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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 184

FRANKLIN HUGHES,

Appellant.

-----

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 185

HAROLD JONES,

Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
October 9, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM



1 CHIEF JUDGE LIPPMAN: 184 and 185, Hughes  
2 and Jones.

3 Counselor?

4 MR. FIECHTER: May it please the court,  
5 Michael A. Fiechter for the appellant, Mr. Hughes.  
6 Requesting two minutes of rebuttal time.

7 CHIEF JUDGE LIPPMAN: Two minutes, sure.  
8 Go ahead, counsel.

9 MR. FIECHTER: Your Honor, this case brings  
10 before the court a very important consideration of  
11 changing the way that this state looks at gun laws,  
12 and that includes licensing laws, and more  
13 specifically, the statutes in question here. Too  
14 often what the legislature looks at, what the  
15 governor looks at and what judges look at is the  
16 equivalation (sic) - - - the equivocation of public  
17 safety and possession of firearms. And that is done  
18 without much substant - - -

19 CHIEF JUDGE LIPPMAN: Counselor, do you  
20 think that there's a valid theory behind the  
21 statutory law that we're talking about, that there's  
22 a certain dispensation if the gun is in the home, but  
23 yet if you violated the law previously, it's a  
24 different situation; does that make any sense to you,  
25 from a policy perspective?

1 MR. FIECHTER: Only - - - only to the - - -

2 CHIEF JUDGE LIPPMAN: And how does it

3 affect your client?

4 MR. FIECHTER: Only to the extent that the

5 previous criminal behavior predicts future use.

6 CHIEF JUDGE LIPPMAN: But it could be?

7 MR. FIECHTER: It could.

8 CHIEF JUDGE LIPPMAN: Right. I mean - - -

9 MR. FIECHTER: Of course, it could.

10 CHIEF JUDGE LIPPMAN: - - - that could be a

11 very val - - - valu - - - valid public policy

12 perspective on it?

13 MR. FIECHTER: Correct, but what we're

14 looking at here is since Heller - - - since Heller

15 and McDonald - - -

16 CHIEF JUDGE LIPPMAN: Right. How did that

17 change the equation?

18 MR. FIECHTER: It changed the equation by

19 looking at something from the perspective of,

20 basically, reality. Guns are a reality. Weapons are

21 - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but you can

23 have - - - under Heller and the subsequent case, you

24 can have some limitations, right?

25 MR. FIECHTER: Oh, of course.

1 CHIEF JUDGE LIPPMAN: Reasonable limitation  
2 is okay.

3 MR. FIECHTER: Of course.

4 CHIEF JUDGE LIPPMAN: What's unreasonable  
5 here - - -

6 MR. FIECHTER: Oh, the city - - - there's  
7 the - - -

8 CHIEF JUDGE LIPPMAN: - - - as applies to  
9 your client?

10 MR. FIECHTER: - - - the state of New York  
11 - - - the state of New York, with their licensing  
12 statutes, are basically - - - as Lenny Bruce used to  
13 say, society makes a man a cripple and then arrests  
14 him for limp - - - for limping.

15 JUDGE PIGOTT: Should the Attorney General  
16 be here?

17 MR. FIECHTER: Yes, I assume.

18 JUDGE PIGOTT: You are; good.

19 MR. FIECHTER: What - - - the licensing  
20 statutes, as described by the counsel for - - - for  
21 the District Attorney, under no circumstances would  
22 Mr. Hughes be able to have a gun to defend himself,  
23 despite the fact that he's targeted for death - - -

24 JUDGE SMITH: But am I - - -

25 MR. FIECHTER: - - - by a gang member.

1 JUDGE SMITH: - - - am I missing something?  
2 Why couldn't your guy, if he wanted, have got a  
3 license to have a gun in his home?

4 MR. FIECHTER: First of all, the threat  
5 that arose was only twenty-four to forty-eight hours  
6 prior to the confrontation with the gang member. So  
7 that's number one. Number two, because of his prior  
8 conviction for - - -

9 JUDGE SMITH: Resisting arrest.

10 MR. FIECHTER: - - - resisting arrest,  
11 they're alleging he has a felony conviction. I can't  
12 comment on that; it's not in the record. They're  
13 alleging it's in the probation report. It wasn't  
14 litigated. As far as I'm - - -

15 JUDGE SMITH: But I'm - - -

16 JUDGE GRAFFEO: You mean the alleged drug  
17 crimes, not - - -

18 MR. FIECHTER: I - - - I would submit  
19 that's not part of the record, because he didn't have  
20 a chance to challenge that. And he - - -

21 CHIEF JUDGE LIPPMAN: But - - -

22 MR. FIECHTER: And he wasn't sentenced as a  
23 second felony offender.

24 CHIEF JUDGE LIPPMAN: But maybe he couldn't  
25 get a gun. I mean, that's the answer, right?

1 MR. FIECHTER: Not legally, no.

2 CHIEF JUDGE LIPPMAN: Right.

3 MR. FIECHTER: According to the District  
4 Attorney, no.

5 CHIEF JUDGE LIPPMAN: Because of his prior  
6 - - -

7 MR. FIECHTER: Right. I think - - -

8 JUDGE SMITH: But if - - -

9 MR. FIECHTER: - - - I think in her papers  
10 she says under no - - -

11 JUDGE SMITH: But limiting ourselves to the  
12 record - - -

13 MR. FIECHTER: Yes.

14 JUDGE SMITH: - - - I mean, obviously, if  
15 we presume he has a felony conviction, well, then  
16 you've got other problems.

17 MR. FIECHTER: Correct.

18 JUDGE SMITH: You wouldn't be standing  
19 there.

20 MR. FIECHTER: Correct. Correct.

21 JUDGE SMITH: But if you assume this is  
22 just a guy with only a resisting arrest conviction,  
23 he could get - - - he could get a permit.

24 MR. FIECHTER: Not to - - - well, not to  
25 carry, of course.

1 JUDGE SMITH: No, to have it in his home.

2 MR. FIECHTER: To have it in his home? If  
3 he - - - if he didn't - - - would he get it within  
4 twenty-four hours or forty-eight hours? I don't  
5 think so.

6 JUDGE SMITH: Is - - - are you - - - so is  
7 that the Constitutional problem, that the licensing  
8 isn't fast enough?

9 MR. FIECHTER: It's - - -

10 JUDGE SMITH: And can you really challenge  
11 that here? I mean, there's no record the he ever  
12 applied for a permit.

13 MR. FIECHTER: It's a combination of the  
14 fact that when the - - - when the People argue, as  
15 they did, the Kachalsky case, which upheld the  
16 licensing statute, that proper cause is a viable  
17 ability for someone to get a license, even with a  
18 conviction, even with a felony conviction. What we  
19 find out, based on looking at this case, is that  
20 proper cause is almost never in existence. If a per  
21 - - - if a person can't get a license when they're  
22 targeted for death by a gang member, if that doesn't  
23 show - - -

24 JUDGE SMITH: Well, he didn't - - -

25 MR. FIECHTER: - - - that he - - -

1 JUDGE SMITH: - - - he didn't try.

2 MR. FIECHTER: Within twenty-four to forty-  
3 eight hours, no, he did not try.

4 JUDGE SMITH: I mean, if - - - I mean, I  
5 agree, if you had a case of a guy saying I got a  
6 death threat from somebody named - - - named Maniac  
7 Guns, and runs down to the - - - to the local office  
8 and says, hey, I need a gun to protect myself and my  
9 home, and they say we'll be back to you next month,  
10 that's an interesting case. But you don't have that  
11 case.

12 MR. FIECHTER: Well, if I - - - if I did  
13 have it, then I would have been challenging the  
14 licensing statutes also, or I assume the people who  
15 tried the case would have. I didn't represent the  
16 client on - - - on appeal - - -

17 JUDGE READ: What about - - -

18 MR. FIECHTER: - - - I mean, on the trial -  
19 - -

20 JUDGE READ: What about preservation in  
21 this case? I mean, you didn't raise this issue until  
22 3/3. Did you even raise it then?

23 MR. FIECHTER: The motion was made post - -  
24 - it was made during conferences prior to sentence.  
25 The issue came up, and I think the trial judge said

1 that he wanted it addressed prior to sentence. And  
2 so the motion was made at around that time. I don't  
3 have exactly that time, but - - -

4 JUDGE SMITH: Is there a record that the  
5 deferral until the 330 was at the judge's request?

6 MR. FIECHTER: I cannot state that  
7 unequivocally. I can't state that unequivocally.

8 JUDGE READ: It occurs to me if it had been  
9 raised earlier, then maybe - - - maybe this question  
10 about the felony conviction could have been resolved  
11 earlier.

12 MR. FIECHTER: I - - - I think - - -

13 JUDGE READ: And we wouldn't be here.

14 MR. FIECHTER: I think that that is not the  
15 - - - not the main focus of what - - - of what we're  
16 doing here today. What Heller and McDonald did was  
17 force the judicial branch of government, which is our  
18 only protection against legislatures who rapidly pass  
19 legislation based on headlines and based on poll  
20 numbers and ambitious politicians. The legi - - -  
21 the judicial branch of government has always been  
22 there to protect individual rights. And - - -

23 JUDGE READ: Yeah, but you do have to have  
24 - - - you would agree with me, you do have to have a  
25 preserved issue?

1                   MR. FIECHTER: Of course. My argument is  
2 that it is preserved, but I - - - I did not - - - I  
3 didn't brief that - - - I didn't brief that issue  
4 specifically. It wasn't raised - - - the Appellate  
5 Division had no problem with it, and I didn't - - -  
6 we didn't think it was preserved here.

7                   JUDGE SMITH: So the - - - both - - - as I  
8 remember, both the trial court and the Appellate  
9 Division addressed - - -

10                  MR. FIECHTER: Yes.

11                  JUDGE SMITH: - - - addressed the merits?

12                  MR. FIECHTER: Yes. Yes, they both  
13 addressed the merits.

14                         So when Heller and McDonald raised the  
15 possession of a handgun, both inside the home and  
16 outside the home, as a protected Constitutional  
17 right, based on just the reality of life - - -

18                  JUDGE SMITH: So as I understand, the issue  
19 you're presenting to us is whether it's okay to  
20 enhance the - - - the level of the crime for a mis -  
21 - - because the guy has a prior misdemeanor?

22                  MR. FIECHTER: I'm saying that statutes  
23 that punish innocent behavior are wrong. We have - -  
24 - we have - - -

25                  JUDGE SMITH: Well - - -

1 MR. FIECHTER: - - - a licensing structure  
2 that makes it - - - that makes it extremely impo - -  
3 - almost impossible to carry - - - to carry a weapon.

4 JUDGE SMITH: Okay. But you're not - - -  
5 you're not - - - I don't - - - maybe you are. So are  
6 you saying that since carrying a gun is innocent  
7 behavior, a statute can't even punish - - - can't  
8 even require licensing?

9 MR. FIECHTER: It depends on how much  
10 you're punishing. This is a C felony. It went from  
11 an A misdemeanor - - -

12 JUDGE SMITH: Okay. So you're saying that  
13 the right to - - - the Second Amendment right is  
14 sufficiently powerful that you can't even - - - that  
15 you can't make it a felony to have an unlicensed gun?

16 MR. FIECHTER: I'm saying that fifteen  
17 years in jail, for someone who proactively saved his  
18 own life, in face of an argument from the prosecution  
19 that said, well, you should run away and hope you  
20 don't get shot in the back, which by the way, the  
21 trial court was the prosecutor for the Colin Ferguson  
22 case.

23 JUDGE GRAFFEO: That sounds - - -

24 MR. FIECHTER: Very top prosecutor.

25 JUDGE GRAFFEO: That sounds like the

1 licensing officer has to consider separate facts in  
2 each case.

3 MR. FIECHTER: Well, if it comes to - - -

4 JUDGE GRAFFEO: You're going to have - - -

5 MR. FIECHTER: - - - proper cause, yes.

6 JUDGE GRAFFEO: You're going to have - - -

7 there's going to be - - -

8 MR. FIECHTER: Yes, if it comes to proper  
9 cause. If proper cause was real, if it was a fact  
10 that was an everyday occurrence - - - I mean,  
11 assuming somebody honestly needs it - - - and he went  
12 to the issuing officer within twenty-four hours of  
13 that threat and the issuing officer did a fact check  
14 or did some cursory investigation and said yes, this  
15 man is a gang member, he's known in the community, he  
16 doesn't - - - he's reputed to carry a gun, we called  
17 the third precinct.

18 JUDGE GRAFFEO: The Heller case - - -

19 MR. FIECHTER: I'm going to say proper  
20 cause - - -

21 JUDGE GRAFFEO: The Heller case didn't  
22 address these kinds of facts.

23 MR. FIECHTER: Excuse me?

24 JUDGE GRAFFEO: The Heller case didn't  
25 address this scenario.

1 MR. FIECHTER: The Heller case is - - - is  
2 a sweeping piece of legis - - - a sweeping piece of  
3 law because of what it says about the possession of a  
4 gun. That - - - but that being said, Heller did not  
5 want to wipe out tens of thousands of gun statutes  
6 and proper weapon statutes throughout - - -

7 CHIEF JUDGE LIPPMAN: But, counselor - - -

8 MR. FIECHTER: - - - the country, and I  
9 think that's why they - - - they used some of the  
10 language that they did.

11 CHIEF JUDGE LIPPMAN: Yeah, but what - - -

12 MR. FIECHTER: It wasn't legi - - -

13 CHIEF JUDGE LIPPMAN: - - - what's  
14 unreasonable here with the statutory framework?

15 MR. FIECHTER: The unrea - - - what's  
16 unreasonable here is exposing someone to up to  
17 fifteen years in jail for getting a gun to protect  
18 himself, which many people would have - - -

19 JUDGE SMITH: So you - - - it would be the  
20 same, in your view, if there hadn't actually been an  
21 encounter with a guy who eventually got killed. It  
22 was - - -

23 MR. FIECHTER: Correct.

24 JUDGE SMITH: If he had just had the gun -  
25 - - -

1 MR. FIECHTER: Right.

2 JUDGE SMITH: - - - never - - - as it  
3 turned out, never needed it, but had it for that  
4 reason, you say he's got a Constitutional right to  
5 have it, even though he has no license?

6 MR. FIECHTER: No - - - no, I'm saying that  
7 he could be punished - - -

8 JUDGE SMITH: Or is it the Constitutional  
9 right to be free from felony - - - from a felony - -  
10 -

11 MR. FIECHTER: I would - - -

12 JUDGE SMITH: - - - possession?

13 MR. FIECHTER: I would say from that kind  
14 of punishment. If someone shows up to vote and says  
15 I'm registered, and it turns out they're not, you  
16 don't arrest them for attempted voter fraud and say  
17 you're going to jail for a year. It infringes on the  
18 right to vote.

19 CHIEF JUDGE LIPPMAN: So in that sense it's  
20 unconstitutional, is that what you're saying?

21 MR. FIECHTER: Yes, officially going from  
22 an A misdemeanor - - -

23 CHIEF JUDGE LIPPMAN: And that's a C  
24 felony, as opposed to something else?

25 MR. FIECHTER: Yes, as opposed to something

1 much less. I mean - - -

2 JUDGE SMITH: So you don't - - - I guess  
3 I'm repeating, but you don't question that it would  
4 be Constitutional to punish your guy for a  
5 misdemeanor?

6 MR. FIECHTER: No, I don't question that.  
7 And keep in mind, Your Honors, the legislature  
8 tomorrow, if they raise it from an A misdemeanor  
9 penalty to a C, they can make it a B. Is that going  
10 to make it unconstitutional then?

11 CHIEF JUDGE LIPPMAN: So what's the  
12 Constitutional theory when it's a felony as to why it  
13 makes it unconstitutional, as opposed - - -

14 MR. FIECHTER: It's - - -

15 CHIEF JUDGE LIPPMAN: - - - as opposed to a  
16 misdemeanor?

17 MR. FIECHTER: It's balancing the level of  
18 the wrongness of the behavior. The wrongness of the  
19 behavior, the only thing - - - because he was  
20 justified in defending himself, the wrongness of the  
21 behavior was not having a proper license for the gun.  
22 He could be punished with a misdemeanor, a fine,  
23 something along those lines. I mean, if a person  
24 drives - - - if a person has no license for a car, no  
25 registration on the car, no insurance for the car and

1 drives the car, he pays fines. That's the end of it.  
2 He doesn't go to jail for three years or fifteen  
3 years. And yet you would presume - - -

4 JUDGE SMITH: Would your argument - - -

5 MR. FIECHTER: - - - this man shouldn't be  
6 driving.

7 JUDGE SMITH: Would your argument be the  
8 same if the guy were not in his home?

9 MR. FIECHTER: Well, the cases say we're  
10 getting into strict scrutiny as far as in the home,  
11 out of the home. There's a lot of cases pointing  
12 toward using strict scrutiny for in the home and  
13 intermediate scrutiny outside the home. An argument  
14 could be made there are cases that hold that public  
15 safety is more impacted if he's carrying outside - -  
16 -

17 JUDGE SMITH: But he in fact admitted that  
18 he did possess it outside his home.

19 MR. FIECHTER: True, but the facts of the  
20 case, as the court found it, was out of - - - was in  
21 his home.

22 CHIEF JUDGE LIPPMAN: So you think this is  
23 strict scrutiny?

24 MR. FIECHTER: Oh, for in the home, I think  
25 it must be, Your Honor. I think it absolutely must

1 be. I don't think there's any question. I think the  
2 case law supports it. As far as carrying its - - -  
3 you know, that's - - -

4 CHIEF JUDGE LIPPMAN: If it's not strict  
5 scrutiny, a different result?

6 MR. FIECHTER: Again, Your Honor, we are  
7 talking about the right to life, about defending your  
8 own life, I think, under any result.

9 CHIEF JUDGE LIPPMAN: So under any - - -

10 MR. FIECHTER: Under any - - -

11 CHIEF JUDGE LIPPMAN: - - - intermediate,  
12 middle level - - -

13 MR. FIECHTER: - - - under any analysis,  
14 fifteen years in jail for protecting your own life is  
15 wrong.

16 JUDGE PIGOTT: How much discretion did the  
17 sentencing court have?

18 MR. FIECHTER: I think his sentence was  
19 three and a half; I'm not positive.

20 JUDGE PIGOTT: That was the minimum?

21 MR. FIECHTER: Yeah.

22 JUDGE PIGOTT: And you think it should be  
23 lower?

24 MR. FIECHTER: Yes. And keep in mind, the  
25 legislature can raise it tomorrow, and I don't know

1 if we'll be able to come back and make an argument  
2 then. If it's upheld at fifteen, why wouldn't it be  
3 upheld at twenty-five?

4 JUDGE RIVERA: But - - - so just to - - -

5 MR. FIECHTER: And I think the time to  
6 change it is now.

7 JUDGE RIVERA: Just to clarify, so your  
8 argument is not with regulating - - - not requiring a  
9 license; that's not your argument?

10 MR. FIECHTER: No. It's a combination of  
11 the difficulty in getting a license and the  
12 punishment.

13 JUDGE RIVERA: The difficulty, meaning  
14 what?

15 MR. FIECHTER: In getting the license.

16 JUDGE RIVERA: What's the difficulty?

17 MR. FIECHTER: You can't - - - you're  
18 considered a recidivist, according to my adversaries,  
19 if you've been convicted of jostling, if you've been  
20 - - -

21 JUDGE RIVERA: Yeah, but - - - I'm sorry.

22 MR. FIECHTER: That's a ser - - - if you've  
23 been convicted of jostling, that's a serious offense;  
24 you don't deserve to have a gun in your home to  
25 defend yourself. If you've convic - - - or if you

1           were - - -

2                   CHIEF JUDGE LIPPMAN:  So that, in itself,  
3           is not a proper statute, or that's - - -

4                   MR. FIECHTER:  Correct.  I'm saying it's an  
5           unreasonably onerous, burdensome statute.

6                   CHIEF JUDGE LIPPMAN:  It's not relevant to  
7           what you're - - - to having the gun?

8                   MR. FIECHTER:  In tandem, the weapons laws  
9           and the licensing laws in this state punish the  
10          innocent, leave the innocent open to be - - -

11                   CHIEF JUDGE LIPPMAN:  Are inherently  
12          prejudicial to - - -

13                   MR. FIECHTER:  Innocent conduct.

14                   CHIEF JUDGE LIPPMAN:  - - - people who want  
15          to own - - -

16                   MR. FIECHTER:  To innocent conduct.

17                   CHIEF JUDGE LIPPMAN:  Okay.

18                   MR. FIECHTER:  Which includes the right to  
19          own a gun.

20                   CHIEF JUDGE LIPPMAN:  Let's - - - you'll  
21          get your rebuttal.  Counselor, let's hear from your  
22          adversary.

23                   MS. LEVY:  Good afternoon, Your Honors.  
24          Yael Levy of the Nassau County District Attorney's  
25          Office on behalf of the People of the State of New

1 York.

2 Your Honors, this case presents neither a  
3 question of law nor a Second Amendment issue. And  
4 with your permission, I'd like to address the  
5 question of law issue first. This - - -

6 CHIEF JUDGE LIPPMAN: Sure, go ahead.

7 MS. LEVY: This issue was not raised until  
8 after the verdict, in a 330.30 motion. And under  
9 decades of this court's precedent, as well as binding  
10 statutory authority, a 330.30 motion is not a proper  
11 vehicle for preserving the - - -

12 JUDGE SMITH: So even assuming the statute  
13 is unconstitutional, assuming it's unconstitutional  
14 on its face, he has to do his time because his lawyer  
15 called it a 330 motion instead of something else?

16 MS. LEVY: Your Honor, if you were to rule  
17 otherwise, you would have to overrule decades of your  
18 own precedent - - -

19 JUDGE SMITH: Okay. Apart from the decades  
20 of precedent, does that rule make any sense?

21 MS. LEVY: It makes perfect sense, Your  
22 Honor, because there are policy reasons behind the  
23 preservation doctrine. There is a reason that this  
24 court's jurisdiction is limited - - -

25 JUDGE SMITH: If he had called this a

1 belated motion under 2 whatever it is - - - a belated  
2 motion to dismiss the indictment, the court's allowed  
3 to entertain it, in its discretion, isn't it?

4 MS. LEVY: Only if there is good cause and  
5 in the interest of justice.

6 JUDGE SMITH: Okay. But - - -

7 MS. LEVY: And there was no - - -

8 JUDGE SMITH: But this judge presumably  
9 thought it was in the interest of justice to  
10 entertain it; he did entertain it.

11 MS. LEVY: This judge may or may not have  
12 even been aware of the good cause and interest of  
13 justice requirement because no good cause application  
14 was made to this judge. This judge merely  
15 entertained the motion. There's no record as to - -  
16 -

17 CHIEF JUDGE LIPPMAN: Counselor, take it on  
18 the merits. Assume it's preserved.

19 MS. LEVY: Okay.

20 CHIEF JUDGE LIPPMAN: What's your argument?

21 MS. LEVY: My argument is that what is at  
22 issue here, as my adversary just articulated to this  
23 court, is solely the elevation of the level of the  
24 offense to a felony if the person has - - -

25 CHIEF JUDGE LIPPMAN: He says fifteen

1 years, or whatever it is, is a long time.

2 MS. LEVY: Regardless of whether it's a  
3 long time, the Second Amendment does not speak to the  
4 level of an offense; it speaks only to whether it's  
5 permissible to possess a weapon. And his misdemeanor  
6 offense - - - his misdemeanor conviction for resisting  
7 arrest did not prevent him from obtaining a gun  
8 license. The gun licensing statute actually permits  
9 the vast majority of misdemeanants to obtain a gun  
10 license.

11 CHIEF JUDGE LIPPMAN: But something else  
12 might have prevented him, right, from hav - - - from  
13 getting - - -

14 MS. LEVY: His felony offense certainly  
15 prevented him. He was - - - he was disqualified by  
16 his felony offense from - - -

17 JUDGE SMITH: But you said - - - but that's  
18 outside the record, apparently?

19 MS. LEVY: It's not outside the record. In  
20 fact, it's on page 380 of the record of my - - - of  
21 my appendix. In the pre-sentence report, it actually  
22 says that he had a conviction of attempted criminal  
23 possession of a controlled substance in the fifth  
24 degree. That's in this - - - the record before this  
25 court.

1 CHIEF JUDGE LIPPMAN: So in those  
2 circumstances, you think it's all right that he was  
3 subject to a felony?

4 MS. LEVY: Under - - -

5 CHIEF JUDGE LIPPMAN: A C felony, yeah.

6 MS. LEVY: I think it's permi - - - I think  
7 it has nothing to do with the Second Amendment.

8 JUDGE SMITH: Aren't there - - - I mean, I  
9 see your point, but aren't there - - - to enhance a  
10 sent - - - his sentence wasn't enhanced because of a  
11 felony. The grade of his - - - the grade of his  
12 conviction didn't result from the felony; he relied  
13 on the misdemeanor.

14 MS. LEVY: Correct, that's the predicate  
15 that we used.

16 JUDGE SMITH: And the fact that you might  
17 have got the same thing from a felony, I mean, there  
18 are technical - - - you've got to prove the felony  
19 existed, right?

20 MS. LEVY: Right, but - - -

21 JUDGE SMITH: And in theory, he's got a  
22 right to say oh, no, that was some other - - -  
23 somebody else named Franklin Hughes.

24 MS. LEVY: That's - - - that's for sure.  
25 But regardless of which predicate offense was used,

1 the issue before this court is a Second Amendment  
2 challenge, and none of this implicates the Second  
3 Amendment. We have all sorts of penal laws that - -  
4 - where the level of offense is enhanced based on  
5 convictions of prior crimes.

6 JUDGE SMITH: So you're saying the Second  
7 Amendment either gives you a right to carry a gun or  
8 it doesn't give you a right to carry a gun. It  
9 doesn't give you a right to be free from felony  
10 consequences - - -

11 MS. LEVY: Correct.

12 JUDGE SMITH: - - - if you illegally carry  
13 a gun.

14 MS. LEVY: Correct.

15 JUDGE SMITH: And what do you cite for  
16 that?

17 MS. LEVY: What do I cite for that? I - -  
18 - the Second Amendment itself, the Heller decision.  
19 This - - -

20 JUDGE GRAFFEO: What was - - -

21 MS. LEVY: My - - -

22 JUDGE GRAFFEO: - - - your interpretation  
23 of the Heller decision? What's the breadth of  
24 understanding we should apply?

25 MS. LEVY: The Heller decision stands for

1 the proposition that the core protection of the  
2 Second Amendment is that a person has a right to bear  
3 arms for self-defense in the home, if that person is  
4 a law-abiding responsible citizen. But it speaks to  
5 the right to bear arms; it doesn't speak to the  
6 degree of offense or of punishment - - -

7 CHIEF JUDGE LIPPMAN: What - - -

8 MS. LEVY: - - - in connection - - -

9 CHIEF JUDGE LIPPMAN: What if - - - as your  
10 adversary says, what if you have a jostling offense -  
11 - -

12 MS. LEVY: Um-hum.

13 CHIEF JUDGE LIPPMAN: - - - do you not have  
14 that right or the consequences is greater? What's  
15 the cons - - -

16 MS. LEVY: Okay.

17 CHIEF JUDGE LIPPMAN: What's the - - - the  
18 result if it's really a minor misdemeanor? Does it  
19 mean anything?

20 MS. LEVY: It's insig - - - it's not - - -  
21 it does not implicate the Second Amendment. It  
22 sounds, if anything, as if he is making an Eighth  
23 Amendment challenge, Your Honor, and that is  
24 certainly an unpreserved issue. But the degree of  
25 the offense, the Second Amendment has absolutely

1 nothing to say about that.

2 JUDGE SMITH: You keep saying that, and you  
3 - - - I guess you can - - - you probably have a point  
4 that Heller certainly doesn't create a right relating  
5 to the severity of punishment - - -

6 MS. LEVY: That's right.

7 JUDGE SMITH: - - - as you talk about it,  
8 but doesn't that just mean we're writing on a clean  
9 slate, that we should figure out whether the Second  
10 Amendment should put some limitation on how severely  
11 you punish a possession that is a Constitutional  
12 right, that people are entitled to protect their  
13 lives?

14 MS. LEVY: Well, there - - - that would be  
15 a huge stretch of what the Heller decision says. And  
16 - - -

17 JUDGE SMITH: I'm not suggesting that's  
18 what Heller says; I'm just suggesting maybe it's what  
19 the Second Amendment should be read to say.

20 MS. LEVY: Again, I think that would be a  
21 huge stretch, Your Honor. The Second Amendment  
22 speaks in terms of the right to possess. It does not  
23 speak in terms of what's the penalty if you illegally  
24 possess. And I can't see any possible way to  
25 interpret the Second Amendment that way. If

1 anything, that would be, perhaps, an Eighth Amendment  
2 challenge. And if we want to - - -

3 CHIEF JUDGE LIPPMAN: So you don't think  
4 this is a - - -

5 MS. LEVY: - - - talk about the - - -

6 CHIEF JUDGE LIPPMAN: You don't think this  
7 is a Second Amendment case at all?

8 MS. LEVY: It's not a Second Amendment case  
9 at all. And maybe it's even an equal protection  
10 case, if you want to talk about disparity of  
11 treatment based upon the type of prior offense. But  
12 I don't see the Second Amendment issue here at all,  
13 Your Honor. And to the extent that - - -

14 CHIEF JUDGE LIPPMAN: Are New York's gun  
15 laws at issue here?

16 MS. LEVY: The - - -

17 CHIEF JUDGE LIPPMAN: That's what your  
18 adversary thought - - -

19 MS. LEVY: The licensing law? Absolutely  
20 not. My adversary isn't challenging the gun  
21 licensing law. He said so himself, and nor would he  
22 have sta - - -

23 CHIEF JUDGE LIPPMAN: Well, he spoke to the  
24 possession and licensing laws.

25 MS. LEVY: Well, he certainly - - - he

1 never applied for a license. He was ineligible to  
2 apply for a license. He can't challenge the gun  
3 licensing law. He doesn't have standing to challenge  
4 the gun licensing law. And that's not before this  
5 court. He made that clear himself. What he's  
6 challenging is the enhancement of the degree of  
7 offense based on the prior conviction. That's what  
8 he's unhappy with, and that does not implicate the  
9 Second Amendment in any way whatsoever.

10 That's my argument on the merits, in a  
11 nutshell. But if this court believes that it does  
12 somehow, I have given you ample opportunity - - -  
13 I've giv - - - I've supplied plenty of alternative  
14 arguments as to why this passes Constitutional  
15 muster. It's a presumptively lawful regulation, and  
16 it's a regulation. To the extent that he is  
17 challenging the licensing laws, this is - - - this is  
18 not a ban, like the Heller law in the District - - -  
19 the District of Columbia's law in Heller. This is -  
20 - - this is a very reasonable regulatory law, the gun  
21 licensing statute.

22 But I want to get back to preservation,  
23 because on - - -

24 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

25 MS. LEVY: I think that that's really

1 significant here. This case does not present a  
2 question of law. There are reasons that the  
3 legislature, in the CPL, established a proper  
4 procedure for how to make a motion to dismiss an  
5 indictment on the basis of the lack of  
6 constitutionality of the statute charging the  
7 offense, and it's because we want to preserve scarce  
8 trial resources, we don't want there to be  
9 gamesmanship in the trial process. People should not  
10 be able to go through a trial when they believe that  
11 the offense that they've been charged with is  
12 unconstitutional and await the verdict, and only if  
13 the verdict is unfavorable - - -

14 JUDGE SMITH: And the consequence of making  
15 that mistake is that you are convicted and serve time  
16 under an unconstitutional statute and you have no  
17 remedy.

18 MS. LEVY: Well, I'm obviously arguing that  
19 this statute is not unconstitutional on purpose, but  
20 - - -

21 JUDGE SMITH: I understand, well, no you're  
22 not - - -

23 MS. LEVY: But - - -

24 JUDGE SMITH: - - - because you don't have  
25 to argue it - - -

1 MS. LEVY: But I - - -

2 JUDGE SMITH: - - - because it's not  
3 preserved.

4 MS. LEVY: My argument is that if - - - if  
5 a person - - - if the argument is available to the  
6 person before the verdict - - - and it certainly was  
7 here; there's no possible way that this was not on  
8 the radar screen, or couldn't have been, I should  
9 say, on the radar screen before the verdict. There's  
10 no evidence that there was any good cause for not  
11 having raised this at the proper time. If the  
12 argument was available at the proper time, it has to  
13 be - - -

14 JUDGE SMITH: So I guess my question is,  
15 doesn't - - - granting that it was, no doubt, an  
16 oversight not to make the motion earlier, doesn't the  
17 consequence of a criminal conviction under a  
18 unconstitutional statute seem a little severe for  
19 that - - - that oversight?

20 MS. LEVY: Your Honor, we have made a  
21 determination - - - this court has made a  
22 determination that Constitutional challenges to  
23 statutes have to be preserved.

24 JUDGE PIGOTT: But it struck - - -

25 MS. LEVY: This goes - - -

1                   JUDGE PIGOTT: I'm sorry, but it struck me  
2                   that probably what happened here is - - - I mean,  
3                   this guy's facing a murder charge, right, at some  
4                   point? And miracle of miracles, he got acquitted of  
5                   that, and they found that where he was was his home.  
6                   And the judge - - - I mean, he gets a very stiff  
7                   sentence for what I think your op - - - your opponent  
8                   is arguing really wasn't because he - - - you know,  
9                   he was guilty of resisting arrest one time. And - -  
10                  -

11                  MS. LEVY: That's right.

12                  JUDGE PIGOTT: And all he's trying to do is  
13                  protect himself with a weapon and he's getting - - -  
14                  he's getting sentenced really for what the judge  
15                  thinks should have happened or could have happened  
16                  here, and - - - and it's not fair. I mean, if he'd  
17                  applied for a gun permit, he would have gotten one,  
18                  presumably, based on this record where there's only a  
19                  misdemeanor.

20                  MS. LEVY: Well, as I said, though - - -

21                  JUDGE PIGOTT: Right. But because of that,  
22                  you know, he gets sentenced to fifteen years. It  
23                  just seems kind of odd.

24                  MS. LEVY: Well, he - - - first of all, he  
25                  wasn't sentenced to fifteen years. Yes, I understand



1           whatsoever. Certainly that issue is unpreserved as  
2           to my adversary. If he were to come back and say on  
3           rebuttal, no, there was good cause, there's no  
4           evidence that this argument, this Second Amendment  
5           argument, was unavailable to him.

6                         And the People, had the argument been  
7           raised at the proper time, could have substituted the  
8           felony conviction, and we probably wouldn't be here  
9           today if that had happened. So the preservation  
10          doctrine has a purpose, and the purpose was lost here  
11          because the People had no opportunity to substitute  
12          the conviction that would have obviated the challenge  
13          that's being raised today. I know that's not the  
14          proper word.

15                        But anyway, the bottom line is that this  
16          court really has no jurisdiction to address this case  
17          because - - - this issue, because it was raised after  
18          the verdict. And even if it does address the issue,  
19          it doesn't - - - this issue - - - the issue before  
20          this Court is not a Second Amendment issue. At best  
21          it's an Eighth Amendment issue, which it not  
22          preserved, either.

23                        CHIEF JUDGE LIPPMAN: Okay, counselor.

24                        MS. LEVY: Thank you.

25                        CHIEF JUDGE LIPPMAN: Thank you, counselor.

1 Counselor?

2 MS. KOWALSKI: Good afternoon. I'm Nikki  
3 Kowalski. I'm deputy solicitor general, and I'm here  
4 on behalf of the Attorney General.

5 CHIEF JUDGE LIPPMAN: So what's your  
6 position on this case?

7 MS. KOWALSKI: We agree that this case does  
8 not present a Second Amendment issue, as the Nassau  
9 County DA's office has argued. The defendant really  
10 is only claiming that - - - he is conceding that it  
11 is consistent with the Second Amendment to require a  
12 license before you possess a handgun even in the  
13 home. And all he's complaining about is that the  
14 sentences that he was exposed to for his behavior  
15 were too high. That's just not a Second Amendment  
16 claim at all. This - - -

17 JUDGE SMITH: Has anyone ever actually  
18 decided that, one way or the other, whether the  
19 severity of sentence implicates the Second Amendment?

20 MS. KOWALSKI: Your Honor, all of the cases  
21 that talk about that are really about much different  
22 statutes that - - - this statute - - - than the one  
23 we have at issue here.

24 JUDGE SMITH: That's a no?

25 MS. KOWALSKI: That's a no. The New York

1 statutory framework for criminal weapon possession -  
2 - - the operative crime in New York is possession of  
3 an unlicensed firearm. That's what the crime is.  
4 And the - - - the aspect of the prior - - - any prior  
5 criminal offense really is just an enhancing element  
6 for what degree of seriousness the crime is.  
7 Defendant concedes that possession - - - that the  
8 Second Amendment is consistent with the New York law  
9 that says that you have to have a license before you  
10 can have a gun in your house.

11 JUDGE SMITH: I suppose it's perfectly  
12 Constitutional to make it a misdemeanor to pass out  
13 leaflets in an area where leafleting is forbidden,  
14 right, that - - - for some reasonable time, place and  
15 manner regulation?

16 MS. KOWALSKI: Yes.

17 JUDGE SMITH: Would there be a First  
18 Amendment problem if you made it a C felony?

19 MS. KOWALSKI: Your Honor, I'm not a First  
20 Amendment expert, but I would imagine - - -

21 JUDGE SMITH: Well, you're only one  
22 amendment away.

23 MS. KOWALSKI: - - - the answer to that - -  
24 - yeah, these - - - the first and the Second  
25 Amendments, you know, they're both fundamental

1 rights, but you know, there's a long history of  
2 regulating gun possession in this country, and I  
3 don't understand the - - - the defendant to be - - -  
4 to be challenging that.

5 I think the key to understanding this here  
6 is once you agree that the Second Amendment does not  
7 protect your right to have an unlicensed firearm,  
8 that you have no Second Amendment right to possess an  
9 unlicensed firearm, then it's really clear that the  
10 Second Amendment really is not concerned with how  
11 that unprotected behavior is punished.

12 CHIEF JUDGE LIPPMAN: So Heller is totally  
13 irrelevant to this equation?

14 MS. KOWALSKI: For the claims that the  
15 defendant is raising, yes, it is. So all that is  
16 happening with these other crimes is that the degree  
17 of offense is being raised, and it is not - - - and  
18 that's not a Second Amendment claim. As Ms. Levy  
19 said, it's either an Eighth Amendment claim, arguably  
20 some kind of equal protection claim, in some other  
21 kind of case, but not in this case. The - - -

22 JUDGE GRAFFEO: And what's your - - - and  
23 do you also agree with the County on the issue of  
24 preservation or do you have a different posture on  
25 that?

1 MS. KOWALSKI: Your Honor, I defer to the  
2 parties on the issue of - - - of preservation. We're  
3 here for the constitutionality of the statute.

4 JUDGE READ: So you don't take a position?

5 MS. KOWALSKI: We don't take a position,  
6 although I do not see any flaws in what the Nassau  
7 County DA's Office is saying on the subject of  
8 preservation in light of this court's prior  
9 precedent.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 MS. KOWALSKI: Thank you.

12 CHIEF JUDGE LIPPMAN: Thanks, counselor.

13 Counselor, rebuttal?

14 MR. FIECHTER: Yes, please. To begin with,  
15 the characterization of Heller only granting to a  
16 certain number of individuals or only granting to  
17 those with a license the right to defend yourself  
18 with a firearm is obviously a misreading of the  
19 statute - - - a misreading of the case law. Heller  
20 grants a broad right which of course must or can be  
21 trimmed down, but it doesn't start with a trimming.  
22 They're trimming it first before we even get - - -  
23 get to what the right is. First they've established  
24 what the right is and then they could just say  
25 obviously there's going to be some trimming down.

1 It's not an unbridled right, nor would anybody want  
2 that.

3 I ask the court to accept the merits of  
4 this case based on the review that the judiciary must  
5 do in reviewing the constitutionality of statutes  
6 when it looks at what the legislature did. The  
7 legislature has to draw reasonable inferences based  
8 on substantial evidence. Is - - - does that really  
9 go on in the state when they pass the gun laws? The  
10 SAFE Act that's just been passed that's being  
11 challenged in the federal courts, do they really look  
12 at what's going on and look at the causes of  
13 violence? The shootings we've had recently, all  
14 mentally ill people. You have - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but this isn't  
16 a philosophical discussion - - -

17 MR. FIECHTER: Well - - -

18 CHIEF JUDGE LIPPMAN: - - - of New York's  
19 gun laws. It's do you have a legal argument, in this  
20 case, a Constitutional argument?

21 MR. FIECHTER: I - - - if I have a  
22 protected right, and that is to have a gun inside and  
23 outside the home for my personal protection, then any  
24 law that attacks that right, that makes me afraid to  
25 exercise that right, that could cause me to put my

1 own life in jeopardy or cause me not to exercise that  
2 right, can be challenged.

3 JUDGE RIVERA: But you concede that gun  
4 possession can be regulated?

5 MR. FIECHTER: Of course.

6 JUDGE RIVERA: Your issue, again - - - I  
7 think that's what you said before - - - is how much  
8 of a penalty can be imposed if you possess the gun  
9 without first having gone through this regulatory  
10 process and indeed gotten the license.

11 MR. FIECHTER: Yes, it's so hard to get the  
12 license, I would submit. It's arbitrary to try and -  
13 - -

14 JUDGE PIGOTT: Well, Ms. Levy points out  
15 she'd have loved to have that discussion with you at  
16 the lower court, but you didn't bring it up. And if  
17 you had, she'd have pointed out that because of,  
18 apparently, other criminal activity, you wouldn't be  
19 able to make the argument that you're making now.  
20 And she regrets that you didn't bring it up earlier.

21 MR. FIECHTER: Well, if he had made the  
22 application and been turned down - - - he could have  
23 made an application under proper cause, keep in mind.  
24 I don't - - - I don't know why if someone's life is  
25 threatened the fact that they sold drugs five years

1 ago - - - they could be a model citizen now. But you  
2 know, these gang members that attacked the people in  
3 the SUV, what if they said I'm coming to get you  
4 later?

5 JUDGE PIGOTT: I know, but what - - -

6 MR. FIECHTER: What if they said I'm coming  
7 to get you - - - I'm coming to get you tomorrow - - -

8 JUDGE PIGOTT: But maybe - - -

9 MR. FIECHTER: - - - by the license plate?

10 JUDGE PIGOTT: - - - maybe in your client's  
11 past, and I know this isn't true, but maybe he was  
12 Maniac Rifles, but that's not in the record. And  
13 what they want to be able to argue, when you argue  
14 that you were - - - that you should have been able to  
15 have a gun and that this is a bad penalty, they would  
16 have liked to argue that by saying that the record  
17 really is not what was being argued by the defendant  
18 here. And they can't do that because it's not in the  
19 record.

20 MR. FIECHTER: Well, I submit the record is  
21 that even if he had applied and been turned down  
22 properly, the next question becomes what's the  
23 punishment for lawfully using an unlicensed firearm  
24 to save your own life?

25 CHIEF JUDGE LIPPMAN: Okay, counselor,

1           thanks.

2                   MR. FIECHTER: Thank you.

3                   CHIEF JUDGE LIPPMAN: Thank you.

4                   Next is Jones. Counselor, do you want any  
5 rebuttal time?

6                   MR. KLEM: Two minutes for rebuttal,  
7 please.

8                   CHIEF JUDGE LIPPMAN: Okay, counselor.

9                   MR. KLEM: Good afternoon, Your Honors.

10                  CHIEF JUDGE LIPPMAN: Go ahead. Counselor,  
11 how does your case differ from Hughes?

12                  MR. KLEM: This case before you now is not  
13 a Constitutional challenge; it's a pure statutory  
14 interpretation. The issue before Your Honors is what  
15 is the phrase "except as provided in"? And I think  
16 that phrase has a very clear meaning. What the  
17 statute here was doing was saying, you know, if you  
18 have a gun in your home, you can't be prosecuted  
19 under this statute. But look over there; as provided  
20 in that statute, you can be. And we know that that  
21 interpretation is correct by looking at the history  
22 of the derivation of that language, as well as the  
23 very significant legislative history here. That  
24 language was derived from the old third degree  
25 possession; it was subsection (4) of the original

1 statute. And subsection (4) had that exact same  
2 language in it, and subsection (4) was saying if you  
3 have that gun in your home, you can't be prosecuted  
4 under this subdivision, but look to subdivision (1)  
5 for how you can be prosecuted if you have a prior  
6 conviction. And when the legislature ripped out  
7 subdivision (4) from the old third degree, stuck it  
8 into the new second degree, they kept that language.  
9 Does it make as much sense in the second degree  
10 statute as it did in the third degree statute?  
11 Perhaps not. But the legislative history tells us  
12 that when they were moving that language from the  
13 third degree to the second degree, they didn't intend  
14 - - -

15 JUDGE RIVERA: If we find the statute to be  
16 plain - - - the language of itself to be plain on its  
17 face, clear on its face, do we have to look at any of  
18 the history?

19 MR. KLEM: No, it would not be appropriate  
20 to look at the history then.

21 JUDGE RIVERA: What - - -

22 MR. KLEM: But I don't - - -

23 JUDGE RIVERA: What's the ambiguity on the  
24 face of the statute?

25 MR. KLEM: The ambiguity is the language

1           itself, which says "except as provided in". Does - -  
2           - what did the legislature mean when they write - - -  
3           wrote "except as provided in"?

4                     JUDGE SMITH: You - - -

5                     MR. KLEM: In criminal - - -

6                     JUDGE SMITH: You read it to mean,  
7           essentially, however, he may be prosecuted pursuant  
8           to that other section.

9                     MR. KLEM: Yes.

10                    JUDGE SMITH: Which you would concede that  
11           that was unnecessary. If the language weren't there,  
12           it would mean the same thing?

13                    MR. KLEM: It was necessary when that  
14           language - - -

15                    JUDGE SMITH: And it's in the prev - - -

16                    MR. KLEM: - - - when the statute - - -

17                    JUDGE SMITH: In the predecessor statute it  
18           was necessary; it became unnecessary when they moved  
19           it to the other statute?

20                    MR. KLEM: Yeah, it essentially became  
21           surplusage, but I think the meaning didn't change.  
22           The meaning of that clause, look to the third degree  
23           - - -

24                    JUDGE GRAFFEO: But shouldn't we - - -

25                    MR. KLEM: - - - section.

1                   JUDGE GRAFFEO: Don't we generally try to  
2 interpret a statute to give effect to all portions of  
3 the statute?

4                   MR. KLEM: Of course. I think here, where  
5 the legislature rips out the language verbatim from  
6 one statute and sticks it into another where the  
7 language had meaning, as it was originally written,  
8 the only reason it's become surplusage is because of  
9 where they've placed it.

10                  JUDGE GRAFFEO: Well, maybe - - -

11                  MR. KLEM: I don't think that rule - - -

12                  JUDGE GRAFFEO: Maybe it still has meaning;  
13 it's just a different interpretation than what you're  
14 suggesting.

15                  MR. KLEM: Sure, but if the court's  
16 suggesting that it gained meaning or a different  
17 meaning than it had originally, I would object to  
18 that. I don't think that's - - - that's correct, and  
19 the legislative history certainly wouldn't support  
20 that. The legislative history is consistent in this  
21 case that the purpose of moving subsection (4) from  
22 the third degree into the second degree was to punish  
23 those people carrying weapons on the street. That  
24 was the entire focus. Multiple people, including the  
25 Attorney General's Office, wrote in and emphasized

1           that it was not changing the exception for guns that  
2           are in the home or place of business. There was not  
3           one mention in the legislative history that in fact  
4           the legislature was also increasing punishment for  
5           weapons that were in the home or place of business,  
6           under some circumstances.

7                         JUDGE SMITH: What about - - - there's  
8           something in the legisla - - - in the bill jacket  
9           that says that the legislature's purpose in amending  
10          the statute was to increase the - - - the penalty  
11          when a person possesses a loaded firearm in his home  
12          or place of business and has previously been  
13          convicted of a crime.

14                        MR. KLEM: That is not correct. That is  
15          the legislative history for a subsequently enacted  
16          statute. That one senator writes in and says this is  
17          what I think that prior legislation meant, should be  
18          - - -

19                        JUDGE SMITH: It wasn't all that long prior  
20          at that point.

21                        MR. KLEM: That's correct, but it doesn't  
22          change the fact that it is one legislature saying  
23          this is what that prior legislation meant.

24                        JUDGE SMITH: So you're saying that the  
25          author of that memorandum, which was, I guess, some

1 sort of corrective bill that was passed two weeks  
2 after the statute we're worrying about - - -

3 MR. KLEM: That's correct.

4 JUDGE SMITH: yeah - - - the author of that  
5 essentially was - - - had committed the same error  
6 that the People are now committing?

7 MR. KLEM: I think that's correct. What we  
8 certainly can't say is that the legislatures who were  
9 voting on this statute had that information or that  
10 guidance before them when they were voting on it. In  
11 fact, the legislative history on the statute that  
12 makes the change we're talking about is entirely to  
13 the opposite, with clear statements that the  
14 legislature was not meaning to change the punishment  
15 for the possession of weapons inside the home or  
16 place of business.

17 I suggest that this court cannot actually  
18 reach this issue, though. The People's appeal to the  
19 Appellate Division was untimely. They had thirty  
20 days in which to file a notice of appeal. They did  
21 not, in fact, do so. There are two arguments - - -

22 CHIEF JUDGE LIPPMAN: When were the People  
23 served?

24 MR. KLEM: There is no - - - there's  
25 nothing in the record to indicate that they were

1 served, aside from the court handing them the  
2 decision on March 2nd.

3 JUDGE GRAFFEO: But is that what triggers  
4 the running of the thirty days?

5 MR. KLEM: It does.

6 JUDGE GRAFFEO: I thought it's service of  
7 the order.

8 MR. KLEM: It is service of the order. The  
9 service of the order was accomplished on March 2nd.  
10 That's when the order was issued, that's when the  
11 parties appeared in court, that's when the court  
12 handed down the order. That was the service. The  
13 statute, pointedly, does not require that the service  
14 be made with a notice of entry.

15 JUDGE GRAFFEO: I thought in People v.  
16 Washington our court said the notice has to be served  
17 by the prevailing party.

18 MR. KLEM: That was what this court said in  
19 Washington. I submit that's dicta. In Washington  
20 there was no evidence whatsoever of service of the  
21 order. This court did not have to go beyond deciding  
22 the issue before it, which was whether or not the  
23 respondent in that case had proven that there was  
24 service. There was no evidence of service  
25 whatsoever. The statute doesn't require prevailing

1 party service. The civil statute, in pointed  
2 contrast, does. CPLR 55.13 requires service by a  
3 party - - - by a party, and written notice of entry.  
4 The legislature has not amended CPL 460.10 to require  
5 either of those things. It does not say who has to  
6 provide service, and it does not require a notice of  
7 entry.

8 CHIEF JUDGE LIPPMAN: Okay, counselor,  
9 you'll have your rebuttal time.

10 MR. KLEM: Thank you.

11 MR. STROMES: Good afternoon, Your Honors.  
12 May it please the court. David Stromes for the  
13 People.

14 CHIEF JUDGE LIPPMAN: Counselor, you want  
15 to deal with service first?

16 MR. STROMES: Sure. As Your Honor pointed  
17 out, the statute requires service. Service was not  
18 effectuated here. And service means service.  
19 Service means service by a party. Parties serve;  
20 courts do not serve. That's been the law in the  
21 state when Washington was in the First Department.  
22 Washington noted that's been the law of the state for  
23 over 123 years. The statute was not followed.  
24 Service was never effectuated; that's not disputed.  
25 And because there was never service, the thirty-day

1 period never began to run.

2 In any event, within - - - within thirty  
3 days of - - - of March 2nd, there was a motion to  
4 reargue. The motion to reargue was considered. The  
5 judge adhered to his original decision, and then we  
6 filed a notice of appeal, certainly within thirty  
7 days of that. So no matter which way you look at  
8 that, you're certainly - - -

9 CHIEF JUDGE LIPPMAN: All right. Tell - -  
10 -

11 MR. STROMES: - - - inside the box.

12 CHIEF JUDGE LIPPMAN: - - - us about - - -  
13 tell us about the - - - the whole issue here as to  
14 the statutory language.

15 MR. STROMES: As to the merits issue, Your  
16 Honor, this statute is abundantly clear.

17 CHIEF JUDGE LIPPMAN: Is it plain on its  
18 face?

19 MR. STROMES: It is 100 percent plain on  
20 its face.

21 CHIEF JUDGE LIPPMAN: What about the  
22 juxtaposition between the old statute and the new  
23 statute?

24 MR. STROMES: The old statute and the new  
25 statute not only said the same thing, but penalized

1 the same behavior. Under the old statute, if you  
2 possessed a loaded gun in your home with a prior  
3 conviction, you're guilty under subdivision (4);  
4 that's the violent felony.

5 And in fact, in People v. Lamont, which is  
6 a 2005 case from the Third Department, the Third  
7 Department analyzed this and said the same thing.  
8 The Third Department said in Lamont - - - if I can  
9 pull up that page. The Third Department said "the  
10 court correctly determined that the home or place of  
11 business exception to possession of a loaded weapon  
12 under penal Law 265.02(4)" - - - the old law - - -  
13 "does not apply if the defendant has previously been  
14 convicted of a crime." And in fact, in Lamont, even  
15 under the old scheme, that defendant was convicted  
16 and affirmed by Lamont, and denied by this court, of  
17 the violent felony of sub (4).

18 Now, when sub (4) moved into sub (1), they  
19 changed a word. They said - - - they said now this  
20 subdivision shall not be a violation of this  
21 subdivision, except as provided in those other  
22 crimes. By using those words, the legislature is  
23 giving the - - - is giving the prosecutors and the  
24 courts instructions on how to prosecute the second  
25 degree crime when possession occurs in the home, only

1 if the offender also commits conduct that falls under  
2 subdivisions (1) or (7) of 265.02.

3 JUDGE SMITH: Supposing you're right, are  
4 we barred by LaFontaine from reaching this question?

5 MR. STROMES: I don't see how you could be  
6 barred by LaFontaine from reaching this question.

7 JUDGE SMITH: Wait a minute. The - - - as  
8 I understand it, the defendant prevailed in the - - -  
9 at the nisi prius court on a theory that everyone now  
10 admits is wrong?

11 MR. STROMES: The defendant prevailed in  
12 the trial court on this exact issue. Justice  
13 Carruthers analyzed whether or not a person can be  
14 convicted of the second-degree crime for possessing a  
15 gun in his home, and determined that no, that person  
16 can't. If you have - - - what the trial court said  
17 was if you possess a gun in your home, you cannot be  
18 prosecuted under the second degree crime, fire  
19 conviction or - - -

20 JUDGE SMITH: No, didn't he say that the  
21 indictment tracked the language of - - - of some  
22 other section?

23 MR. STROMES: In passing, the court noted  
24 that the language looked similar to the third degree  
25 statute. That's a little bit curious, in and of

1           itself, because the indictment says possessed a  
2           loaded firearm, and the word "loaded" appears nowhere  
3           in the - - -

4                    JUDGE SMITH:   I mean, I understand, but I  
5           guess I thought - - -

6                    MR. STROMES:   I - - -

7                    JUDGE SMITH:   - - - I thought the trial  
8           court was confused.

9                    MR. STROMES:   The trial court - - -  
10          certainly at the time, I think the People thought the  
11          trial court was confused, because what the trial  
12          court held was despite the plain language of  
13          265.03(3), a defendant who possesses a gun in his  
14          home can never be convicted of a second degree crime.  
15          That's what the People appealed to the Appellate  
16          Division, that's what the Appellate Division  
17          reversed, and that's the issue that's here now.  The  
18          only thing that this court really can't address is  
19          Mr. Klem's point 3 argument dealing with the - - -  
20          dealing with the special information.

21                    JUDGE SMITH:   You say - - -

22                    MR. STROMES:   That was something that was  
23          never - - -

24                    JUDGE SMITH:   You say that's barred by  
25          LaFontaine.

1 MR. STROMES: Well, by People v.  
2 Goodfriend, but under a similar - - - a similar kind  
3 of theory.

4 JUDGE SMITH: But then if that's correct,  
5 then I supp - - - should we give the trial court the  
6 opportunity to address it? I mean, usually, in  
7 Goodfriend/LaFontaine situations we don't - - - you  
8 know, if we can't review it, we ought to let somebody  
9 - - - somebody decide it.

10 MR. STROMES: Well, I think - - - I think  
11 the issue with Goodfriend is that you're essentially  
12 giving the defendant a right to an interlocutory  
13 appeal. This defendant, if he wants to challenge the  
14 sufficiency of the indictments on appeal, he has to  
15 wait until he's actually convicted of any kind of  
16 crime, which he has not been in this case.

17 But regardless of that, what the trial  
18 court clearly decided was the issue that was  
19 presented to the Appellate Division, what is now  
20 presented to this court. And the statute, for the  
21 reasons I stated, is abundantly clear. Judge Smith,  
22 as you noted during Mr. Klem's argument, the  
23 legislature addressed this directly. Fifteen days  
24 after passing this law, the legislature amended it  
25 because what happened was - - -

1                   JUDGE SMITH: He says the legislature  
2 didn't address it; one guy addressed it, and he was  
3 wrong.

4                   MR. STROMES: This piece of paper was the  
5 introducer's memorandum for the bill. This is  
6 something that - - -

7                   JUDGE SMITH: For the - - - for the  
8 corrected bill?

9                   MR. STROMES: For the corrected bill. And  
10 if this had - - - if this had some wild, crazy theory  
11 that no other legislature ever heard of before, you  
12 can bet that fifteen days later there would have been  
13 further action. And the legislature clearly said  
14 that it had intended, in passing 742, to increase the  
15 penalty for possession of a loaded firearm, under  
16 circumstances where a person possesses a loaded  
17 firearm in his home or place of business and has  
18 previously been convicted of a crime. That's what  
19 the legislative history says. That's what the First  
20 and Second Departments have said, every trial court  
21 to consider the issue, the practice commentaries all  
22 across the boards. Unless this court has further  
23 questions.

24                   CHIEF JUDGE LIPPMAN: Okay. Thank you,  
25 counselor.

1 MR. STROMES: Thank you very much.

2 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

3 MR. KLEM: Yes, thank you. The legislative  
4 history of the statute at issue actually says  
5 something quite different. It says the legislation  
6 exempts possession that occurs at the person's home  
7 or place of business from the enhancement. That was  
8 in the legislative history on the actual statute that  
9 we're referring to.

10 So when I say we can't look at the  
11 subsequent statement by one senator to try to divine  
12 what the legislature, in its previous enactment,  
13 meant, I think we need to look, quite clearly, at the  
14 legislative history of what the legislature was  
15 actually voting on. Time and time again, in the  
16 legislative history of this statute, the  
17 legislatures, the Attorney General's Office, DCJS,  
18 all said the same thing. They all said that this  
19 statute, this amendment is not going to enhance  
20 punishment for guns that are possessed in one's home.  
21 We submit the statute doesn't do that, it shouldn't  
22 be interpreted to do that, and Justice Carruthers got  
23 it right below.

24 CHIEF JUDGE LIPPMAN: Okay, counselor.

25 MR. KLEM: Thank you.

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CHIEF JUDGE LIPPMAN: Thank you all.  
Appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Franklin Hughes, No. 184 and The People of the State of New York v. Harold Jones, No. 185, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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