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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 45

BRAZEAL (JARELLE),

Appellant.

20 Eagle Street
Albany, New York
April 15, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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CHIEF JUDGE WILSON: Next case on the calendar is
People v. Brazeal.

MS. LINN: Good afternoon, Your Honors. May it
please the court, Tammy Linn of Appellate Advocates for
Jarelle Brazeal. May I please reserve two minutes for
rebuttal?

CHIEF JUDGE WILSON: Yes.

MS. LINN: Thank you. Because Mr. Brazeal
objected to the search condition of probation here, this is
not a consent to search case. And the sentencing court
violated CPL 410.50 subdivision 3 and Mr. Brazeal's
constitutional rights by giving his probation officers
unfettered discretion to search his home, property, and
person at any time without any suspicion at all. The
People have argued that we should imply consent here, but
in fact, Mr. Brazeal expressly objected to the condition
when it arose at sentencing for the first time. The
probation department was the one that requested the
condition.

JUDGE SINGAS: So it's this specific condition
for this specific case, or are you saying that any time
it's not a per se illegal weapon you can't impose that
condition?

MS. LINN: I'm saying in this specific case where

1 Mr. Brazeal objected, that in and of itself, his objection
2 made the search condition improper because of the statute
3 CPL 410.50 sub 3. I'm also arguing that the search
4 condition was inappropriate under Penal Law 65.10 because -
5 - -

6 JUDGE TROUTMAN: Was he entitled to have a
7 probationary sentence?

8 MS. LINN: No, he was not entitled to have a
9 probationary - - -

10 JUDGE TROUTMAN: So - - - but he didn't have to
11 agree to conditions of probation, correct?

12 MS. LINN: That is true.

13 JUDGE TROUTMAN: And if he didn't agree to
14 conditions of probation, the court could likewise decide
15 not to impose a sentence of probation?

16 MS. LINN: That's true. But I would say in this
17 case, the court had already approved the probationary
18 agreement between the parties, so defense counsel argued -
19 - -

20 JUDGE TROUTMAN: Sentencing always comes after,
21 correct?

22 MS. LINN: Yes.

23 JUDGE TROUTMAN: And the court is supposed to
24 take into consideration facts and circumstances, including
25 the presentence report, et cetera, input from the parties?

1 MS. LINN: Yes.

2 JUDGE TROUTMAN: It - - - did the court at any
3 time prior to the entry of the guilty plea promise that
4 probationary conditions would not be imposed?

5 MS. LINN: No, I think everyone assumed that
6 probationary conditions of some sort would be imposed. I
7 think, you know, that's always what will happen in
8 probation cases. But I think that it's telling - - -

9 JUDGE TROUTMAN: So why do you say here, if a
10 defendant objects, the court can't impose a condition? Is
11 - - - is that exactly what you're saying?

12 MS. LINN: I'm arguing where it is a search
13 condition as opposed to other - - - I mean, there are
14 various conditions that could be imposed. Some are
15 specifically authorized by 60 - - - Penal Law 65.10. Many
16 others may not be knowable until the time of sentencing,
17 like Your Honor is suggesting. But where it is a search
18 condition - - -

19 JUDGE TROUTMAN: So why wouldn't you be putting
20 your client in a position where a court, based on
21 circumstances of the crime, the defendant's history, et
22 cetera, where a court would feel constrained because the
23 defendant says, I'm not going to - - - I object to those
24 conditions. Wouldn't that be creating situations where
25 courts would be disinclined to sentence people to

1 probation?

2 MS. LINN: Realistically, I don't know how much a
3 defendant could object to various conditions of probation.
4 What's - - -

5 JUDGE TROUTMAN: But you just said here - - -

6 MS. LINN: I think what's unique about this
7 situation is there is a statute that the legislature
8 enacted after Penal Law 65.10. It specifically governs
9 probationer searches, and it specifically requires a court
10 order upon a finding of reasonable cause that the - - -

11 JUDGE TROUTMAN: So if it is - - - if we accept-
12 - - if we say for the sake of argument, the condition was
13 imposed with the understanding it's based on reasonable
14 cause, would it still be improper?

15 MS. LINN: Where the defendant objected to it? I
16 would say yes because of the court order requirement of CPL
17 410.50(3).

18 JUDGE GARCIA: Could the court at that point say,
19 well, then I'm not taking this deal so you can have your
20 plea back?

21 MS. LINN: I don't know, maybe. I think that's -
22 - -

23 JUDGE GARCIA: So that's - - -

24 MS. LINN: - - - a possibility.

25 JUDGE GARCIA: Should we say that if we find for

1 you? I mean, should we decide that? Because this may be
2 an important factor if - - - or maybe if we do decide for
3 you, the court will assume they can't do it, so they would
4 factor that into whether or not they should - - - People
5 should offer or whether the court should accept this type
6 of sentence for a violent crime.

7 MS. LINN: So overall, my position is that, well,
8 that the probation condition is appropriate under two
9 circumstances, which would be consistent with Hale, one,
10 that there's actually consent, and two, that it's
11 appropriate on the facts of the case. To answer Your
12 Honor's question, as a practical matter, I think most
13 defendants would agree to a search condition if they were
14 charged with a violent felony, and it was the only way that
15 they would avoid incarceration. So I don't think ruling in
16 my favor is going to limit the use of search conditions
17 going forward. I think maybe the court could say, you know
18 what, I don't feel comfortable signing off on this based on
19 whatever was uncovered during the presentence interview
20 that now makes me think, could likely be - - -

21 JUDGE GARCIA: Could they say, my understanding
22 was you would consent to a search condition and you're not,
23 so here's your plea back, and we'll start again?

24 MS. LINN: Theoretically, I think it's important
25 to note that defense counsel in this case pointed out that

1 it had never come up, that it's usually imposed in a gun
2 case. This wasn't a gun case. The People ultimately took
3 no position on whether the condition should be imposed. So
4 - - -

5 JUDGE RIVERA: So that's a - - - that's a point
6 about whether or not the condition's appropriate?

7 MS. LINN: Yes, it is. And I - - -

8 JUDGE RIVERA: As opposed to the consent?

9 MS. LINN: Yes. So two different things.

10 JUDGE HALLIGAN: Just - - - just to clarify, I
11 thought you said that it's permissible under your view if
12 there's consent or on the facts of the case? Is consent
13 always required under your view?

14 MS. LINN: Yes, both. And I - - -

15 JUDGE HALLIGAN: Okay. And - - -

16 MS. LINN: - - - think that's consistent with - -
17 - I'm sorry.

18 JUDGE HALLIGAN: So absent consent you're saying
19 in this, and I take it this is the upshot of your exchange
20 with Judge Garcia, that it can never be imposed?

21 MS. LINN: Over objection, yes.

22 JUDGE HALLIGAN: Over a defendant's objection.
23 So - - - so with respect to the facts of the case, what is
24 your argument there?

25 MS. LINN: That it wasn't approp - - -

1 JUDGE HALLIGAN: What - - - what - - - what are
2 the - - - what are the relevant benchmarks? What do we
3 look to and why do you think it's not permissible here?

4 MS. LINN: In terms of consent or in - - -

5 JUDGE HALLIGAN: No. I - - -

6 MS. LINN: - - - terms of the - - -

7 JUDGE HALLIGAN: I thought you - - - I thought
8 you said that - - - that there are two conditions that have
9 to be satisfied. One is consent and the second is it has
10 to be appropriate on the facts of the case.

11 MS. LINN: Yes.

12 JUDGE HALLIGAN: So what are the - - - the
13 benchmarks we're looking for in terms of assessing the
14 facts of the case? I take it you think they're not
15 satisfied here?

16 MS. LINN: I do think they're not satisfied here.
17 So I think it was set forth in Hale. And I think the
18 takeaway from Hale and the Appellate Division decisions
19 that have been applying Hale for decades is that the - - -
20 there has to be a reasonable basis to believe - - -

21 JUDGE HALLIGAN: Sure, but given the record here,
22 yes, I - - - I take the standard, but given the record
23 here, why is that not sufficient? There is the use of a
24 knife, right?

25 MS. LINN: Yes.

1 JUDGE HALLIGAN: There is some prior record, so
2 why not - - - not appropriate as a matter? And I - - - I
3 take it that we would have to decide that as a matter of
4 law because we're looking at this on review, right?

5 MS. LINN: I think that's right. It's about
6 whether the sentencing court had the power - - -

7 JUDGE HALLIGAN: Yes.

8 MS. LINN: - - - to impose the condition. And so
9 the facts of this case and why it's not appropriate is
10 because the search condition authorized searches for guns,
11 illegal weapons, and narcotics. And the facts of this case
12 were that it was a household object that was spontaneously
13 - - - spontaneously used to commit an - - -

14 JUDGE HALLIGAN: With a knife.

15 MS. LINN: - - - act of violence. It was a
16 knife.

17 JUDGE HALLIGAN: Which is - - -

18 MS. LINN: It was a kitchen knife.

19 JUDGE HALLIGAN: Okay. But a knife, I would
20 think, could reasonably be deemed a weapon.

21 MS. LINN: It certainly could be deemed a weapon.
22 But realistically, a probation officer searching Mr.
23 Brazeal's home isn't going to confiscate every kitchen
24 knife and every sharp object in his home, so - - -

25 JUDGE CANNATARO: Well, is your argument grounded

1 in that this was a weapon of convenience, as opposed to a
2 weapon that you go out and acquire?

3 MS. LINN: I mean, kind of. Because if the
4 search is for illegal guns and illegal weapons, I don't see
5 what rational basis there is to be - - -

6 JUDGE TROUTMAN: How about the fact that there is
7 assaultive behavior in one's past and then it culminates in
8 them, although it is a kitchen knife, using it in a manner
9 that causes harm? You're saying weapons. If you - - -
10 you're graduating from weapon to weapon, why is it not
11 logical, reasonable that that is a condition that is
12 appropriate if a judge is going to sign off on probation?

13 MS. LINN: I think the totality of the
14 circumstances should matter. And so here, although the
15 People described on appeal and then the court described
16 below, assaultive behavior in the past, the fact is that
17 Mr. Brazeal had one prior misdemeanor conviction for
18 property damage in his early 20s, eight years earlier.

19 JUDGE SINGAS: What about just an intimate
20 partner violence situation? A domestic violence situation?
21 Are you saying a court can't - - -

22 MS. LINN: No.

23 JUDGE SINGAS: - - - can't impose that condition?
24 There's been evidence of escalating threats, they're in the
25 house together. There's violence. You can only impose

1 that condition to look for a gun?

2 MS. LINN: No, actually, I was going to get to
3 that and say that there are certainly cases where,
4 involving intimate partner violence, in particular, if
5 there was a pattern of threats or not even a pattern, if
6 there was a specific threat in the incident to kill
7 someone, I think that's a big red flag. If there was
8 stalking in the past - - -

9 JUDGE TROUTMAN: What about actual usage?

10 JUDGE SINGAS: Right. What about stabbing
11 somebody with a kitchen knife?

12 MS. LINN: I don't think that's a good thing, but
13 I - - - I just - - -

14 JUDGE SINGAS: We can agree on that.

15 MS. LINN: Yeah, but I don't think that it shows
16 he is likely to possess a gun or an illegal weapon in the
17 future. And I would note that there - - -

18 JUDGE CANNATARO: But I don't think that was the
19 hypothetical, at least that I heard from Judge Troutman.
20 It's the fact that defendant is not above - - - you - - -
21 you know, when - - - when he gets to a certain emotional
22 state, he's not above using a weapon, whether it's one that
23 happens to be lying around or one that he acquired at some
24 point.

25 MS. LINN: I don't know that I would frame it as

1 not above as if it is something that has happened even
2 sporadically. This was one time.

3 JUDGE TROUTMAN: How about the court having a
4 concern? If the court's going to sign their name to
5 release that person into the community, having a concern
6 that they have some issues with controlling emotions,
7 temper, and that they may be prone to escalating assaultive
8 behavior with whatever manner of weapon may be available or
9 that which they purposely seek out. Why - - - why is it
10 wrong for a court to have a concern about that when someone
11 has been stabbed?

12 MS. LINN: Can I answer? My red light is on.

13 CHIEF JUDGE WILSON: Yes, please. And I have a
14 question for you after that.

15 MS. LINN: So I don't think it's unreasonable for
16 the court to be concerned in this case or any case where
17 someone is on probation because they have recently
18 committed a crime. But there are provisions in place to
19 address those concerns. One, like I addressed earlier, a
20 search condition is not inappropriate when someone consents
21 to it. And absent that, CPL 410.50(3) authorizes searches
22 based on a standard lower than probable cause. The
23 legislature already envisioned the need to search
24 probationers because of this, and so all they have to have
25 is reasonable cause to believe the probationer has violated

1 a term of their sentence, not probable cause to believe
2 there was a crime. And I'd also add here that Mr. Brazeal
3 had been out for 13 months prior to his sentencing. He had
4 already completed certain programing. He was addressing
5 these anger management issues, and his relationship with
6 the complainant in this case was over, so I don't think
7 it's irrelevant. Obviously, the nature of the crime
8 matters here, but it's very different from Hale, where the
9 search condition authorized searches for drugs for a
10 defendant who had committed a crime while on drugs and had
11 repeatedly violated the drug testing and treatment
12 requirements of his probation.

13 CHIEF JUDGE WILSON: So I'm curious why, if the -
14 - - if a court correctly determines the statutory
15 requirement for a condition is met, consent - - - your view
16 is consent is also required?

17 MS. LINN: That is because of CPL 410.50(3). I
18 don't see how two statutes within the same statutory
19 scheme, you know, Penal - - - Penal Law 65.10 governs
20 probationary sentences, but so does CPL 410.50(3). When
21 the legislature enacted CPL 410.50 sub 3, it was at least
22 five years after Penal Law 65.10 had been in place. So to
23 me, reading 65.10 to allow unilateral search conditions
24 would render CPL 410.50 sub 3 completely meaningless.

25 JUDGE HALLIGAN: I know your light's on. Could I

1 ask one question?

2 CHIEF JUDGE WILSON: Of course.

3 JUDGE HALLIGAN: Can you - - - can you clarify
4 for me the scope of your constitutional challenge? I
5 thought I heard you say in response to an earlier question,
6 maybe from Judge Singas, that you're only raising a
7 challenge that's specific to the facts here.

8 MS. LINN: Yes. So my constitutional argument is
9 that if consent is not required or could somehow be
10 inferred despite Mr. Brazeal's objection here, that the
11 terms of the condition itself are also unconstitutional
12 because they authorize these suspicionless searches. And
13 so that seems inconsistent with - - -

14 JUDGE HALLIGAN: That sounds to me like a facial
15 challenge to the condition. But you're saying it's an as
16 applied challenge because we should measure it as against
17 the circumstances presented in his case?

18 MS. LINN: I'm just saying the language of his
19 actual condition. So I'm not saying all search conditions
20 would have this issue.

21 JUDGE HALLIGAN: Well, are you saying all box 28
22 or - - - or just given the circumstances of - - - of his
23 offenses and history?

24 MS. LINN: I think I would say that any search
25 condition with identical language, especially where the

1 court says, as it did here, that the probation department
2 can search him as they deem appropriate.

3 JUDGE HALLIGAN: And did you - - - did you raise
4 a challenge like that below at all in the Appellate
5 Division? I don't have the briefs in front of me.

6 MS. LINN: No, not in the Appellate Division.

7 JUDGE HALLIGAN: So you're saying to us for the
8 first time that we should take that view?

9 MS. LINN: Yes.

10 JUDGE HALLIGAN: Okay.

11 CHIEF JUDGE WILSON: And I guess your - - - your
12 argument is - - - you would be - - - you'd be making the
13 same argument if he'd actually used a gun and shot his
14 husband, or no?

15 MS. LINN: If he had actually used a gun, I think
16 the search condition would be proper under 65.10, because
17 it would be properly tailored to the crime.

18 CHIEF JUDGE WILSON: Uh-huh.

19 MS. LINN: I still think that there would have to
20 be consent because of CPL 410.50 sub 3 and then - - -

21 CHIEF JUDGE WILSON: Well, I'm asking about the
22 constitutional argument.

23 MS. LINN: The constitutional argument I think
24 would be the same because there's still, you know, this
25 court - - - neither this court nor the Supreme Court have

1 ever endorsed suspicionless searches based on someone's
2 status as a parolee or probationer. And in fact, this
3 court has said that parolees are still entitled to their
4 constitutional rights and should not be searched without
5 suspicion. So that's my argument.

6 JUDGE RIVERA: Can I ask one more thing?

7 MS. LINN: Yes, of course.

8 JUDGE RIVERA: Just to be clear, you're only
9 charging the - - - challenging, excuse me, that part of the
10 condition that allows for these suspicionless searches in a
11 variety of locations for weapons, not - - -

12 MS. LINN: And drugs.

13 JUDGE RIVERA: - - - regarding the drugs?

14 MS. LINN: No. I'm arguing that the condition
15 was improper under 65 - - - Penal Law 65.10 for both
16 because he didn't have a gun, had no prior use of a gun, or
17 no prior - - -

18 JUDGE RIVERA: Has no history on the drugs?

19 MS. LINN: And yes. So his only - - -

20 JUDGE RIVERA: Except the marijuana use?

21 MS. LINN: He had remote marijuana use. It's now
22 legal. And perhaps more importantly, probation determined
23 that he has no substance abuse needs. So it just didn't
24 seem reasonable under the circumstances to be searching him
25 for illegal drugs when he doesn't have any. There's no

1 reason to believe he would have illegal drugs.

2 CHIEF JUDGE WILSON: Thank you.

3 MS. LINN: Thank you.

4 MR. BIERCE: Good afternoon, Your Honors.

5 Michael Bierce of the Kings County District Attorney's
6 Office for the Respondent. The probation condition at
7 issue in this case was properly imposed as a valid exercise

8 - - -

9 JUDGE TROUTMAN: Was it based on suspicionless
10 searches?

11 MR. BIERCE: The condition authorizes
12 suspicionless searches, yes.

13 JUDGE CANNATARO: Was it issued with the consent
14 of the defendant, or does that not even matter?

15 MR. BIERCE: So I would argue on the continuum
16 that the Hale court identified between what it called
17 unilaterally imposing a search condition, which it
18 specifically left open in that case, and a case where the
19 petitioner consents. This is on the consent side of the
20 spectrum. It may not seem that way at first blush, but it
21 - - - it's clear from the court's case law that a defendant
22 has the ability to attempt to withdraw their guilty plea
23 upon being informed of a collateral consequence, if that
24 collateral consequence in - - - in - - - if he can
25 establish that that collateral consequence would have

1 caused him to not plead guilty. That's the holding in
2 Gravino. I don't know that he would have been entitled to
3 it in this case. We don't know. He didn't attempt to make
4 the showing, but since the consent is alleged to be such a
5 significant part of this case, the fact that after his
6 defense attorney doing a reasonable defense attorney thing
7 and said, you know, and - - - all things considered, Your
8 Honor, we would rather not have this onerous condition
9 imposed. And the court says, no, that's not - - that's not
10 going to happen with this probationary sentence. He
11 doesn't even attempt to go the further step of withdrawing
12 his plea. That's more on the consent side of the spectrum.

13 JUDGE TROUTMAN: Has the Supreme Court ever said
14 you can have suspicionless searches of probationers, or
15 this court?

16 MR. BIERCE: I - - - I - - - I don't believe that
17 they have. Well, in Hale, my reading of Hale is that the
18 court there upheld a suspicionless search condition in the
19 absence of - - - well, not in the absence of the consent of
20 a - - - of a petit - - - probationer, but without it being
21 central to the court's analysis. The focus in Hale was on
22 the court's authority and the relationship that
23 probationers have while they're under the supervision of
24 the court, their - - - their reasonable expectations of
25 privacy. So my reading of Hale is that is a case allowing

1 a suspicionless search where the consent, while present, is
2 not central to the analysis. The U.S. Supreme Court, I
3 believe the - - - both parties cited in the briefing the
4 Griffin and Knights decisions. In each of those cases, I
5 think the Supreme Court stopped short of holding
6 specifically that a probation condition as such could
7 authorize a suspicionless search. In one of the cases, it
8 - - - it - - - it escapes me which one, there was - - -
9 under the facts of that case, there was reasonable cause,
10 which emphasizes why, to the extent that this is a Fourth
11 Amendment challenge, it should probably wait until a search
12 has actually been executed here.

13 JUDGE TROUTMAN: And here - - -

14 MR. BIERCE: Yes?

15 JUDGE TROUTMAN: - - - was cons - - - the
16 defendant - - - did the defendant specifically consent to a
17 suspicionless search?

18 MR. BIERCE: My read of the record is that he
19 consented by not attempting to go the further step of
20 withdrawing his guilty plea upon finding out that this
21 condition would be imposed.

22 JUDGE TROUTMAN: Was it clear that the condition
23 was, in fact, a suspicionless?

24 MR. BIERCE: Yes. The Probation Department
25 mentioned it in the presentence investigation report. It's

1 one of the standard conditions on the check box form.

2 JUDGE TROUTMAN: Box 28?

3 JUDGE CANNATARO: Box 28?

4 MR. BIERCE: Box 28.

5 JUDGE CANNATARO: Everyone knows what that means?

6 MR. BIERCE: What's that?

7 JUDGE CANNATARO: Does everyone know what that
8 means? That's a suspicionless search.

9 MR. BIERCE: And this was an experienced defense
10 attorney who was talking about how, in her experience, that
11 these types of conditions tended to be litigated in a
12 certain way or imposed in certain cases. Certainly, this
13 defendant's attorney knew what a box 28 condition was and
14 what it would have entailed. I do want to touch briefly -
15 - -

16 JUDGE HALLIGAN: Let's go back for a second - - -

17 MR. BIERCE: Yes?

18 JUDGE HALLIGAN: - - - to Griffin and Knights.
19 Are there any cases that you're aware of where we look at
20 whether a search is permissible? Just ex ante, you know,
21 before a search has taken place as a - - - as a blanket
22 matter as opposed to determining whether or not it is
23 appropriate in - - - in particular circumstances? You say,
24 you know, that those cases are on - - - on - - - there's a
25 fully developed record and a specific contested search,

1 right?

2 MR. BIERCE: Yes. And in Hale also, there was a
3 follow - - -

4 JUDGE HALLIGAN: Yes, yes.

5 MR. BIERCE: - - - on prosecution.

6 JUDGE HALLIGAN: So - - - so the - - - the
7 challenge here in the absence of a search, right? Seems to
8 me to be ex ante in a way that I don't think I see in other
9 cases, but I wonder if you've seen any?

10 MR. BIERCE: No, I think that's right. And that
11 was one of the objections we raised, particularly to the
12 constitutional component of the claim. Typically, Fourth
13 Amendment searches are litigated - - -

14 JUDGE HALLIGAN: So - - - so - - -

15 MR. BIERCE: - - - once they have a - - -

16 JUDGE HALLIGAN: - - - how do we think about
17 that? Does that mean that, you know, somehow it's - - -
18 it's not ripe? Does it mean that, you know, you'd have to
19 show something particularly problematic to say that they're
20 not permitted as a blanket matter?

21 MR. BIERCE: I think that's right.

22 JUDGE HALLIGAN: How do we think about that
23 problem?

24 MR. BIERCE: I believe in our brief, we cite the
25 case out of the U.S. Supreme Court, City of Los Angeles v.

1 Patel, which talks about essentially conceiving of that, as
 2 Your Honor's question alluded to a few moments ago, as a
 3 facial challenge to a search condition or regulation,
 4 whatever it is that authorizes a particular kind of search
 5 and interpreting that as a facial challenge where there has
 6 not been a search executed pursuant to it, with actual
 7 facts on the ground that have been developed. I - - - I
 8 also, while we're talking about these bars to appellate
 9 review, I just want to return to some of Your Honor's
 10 questions from earlier. The Fourth Amendment claim is also
 11 waived by defendant's valid appeal waiver. And it is
 12 unpreserved. The - - - the - - - the general rule is that
 13 claims are subject to preservation and to valid appeal
 14 waivers. There is an exception for the right to be
 15 sentenced as provided for by law. But it's clear from this
 16 court's previous decisions that that doesn't literally mean
 17 any legal challenge that could be raised to - - -

18 JUDGE HALLIGAN: So what - - - what - - -

19 MR. BIERCE: - - - a particular sentence.

20 JUDGE HALLIGAN: - - - decisions specifically are
 21 you referring to that you think limit that?

22 MR. BIERCE: So I think the best - - - the - - -
 23 the most on point decision to my mind is in the
 24 preservation context, and it's the Pena case where the
 25 court - - -

1 JUDGE HALLIGAN: That's an Eighth Amendment case,
2 right?

3 MR. BIERCE: Yes.

4 JUDGE HALLIGAN: I mean, that to me is almost
5 like a Khinchin sort of - - - of approach, right? Which is
6 to say you need a record to assess the - - - the substance
7 of the facial challenge. Have - - - have we ever decided
8 that outside of the Eighth Amendment context or - - - or
9 Khinchin itself, but instead with regard to a sentence
10 condition?

11 MR. BIERCE: With respect to a probation
12 condition, I'm - - - I'm not particularly aware of any - -
13 - any - - - any case deciding that. This is all by
14 analogy, Your Honor.

15 JUDGE HALLIGAN: Uh-huh.

16 MR. BIERCE: But - - - but again, the general
17 principle is that Fourth Amendment claims themselves are
18 generally subject to waiver, and they're generally subject
19 to preservation when they're litigated after a suppression
20 hearing. This - - - this claim in this case is attendant
21 to a sentencing matter, but it does not concern the court's
22 exercise of its authority under the sentencing rules, which
23 is typically what those exceptions are getting at. The - -
24 - the court's ability to review the lower court's
25 compliance with the statutes or rules that authorize it to

1 act as it does.

2 CHIEF JUDGE WILSON: But if a search were - - -
3 were conducted pursuant to this probation condition, you
4 wouldn't be arguing the appeal waiver barred that or a
5 challenge to that?

6 MR. BIERCE: We wouldn't. I - - - I think on the
7 statutory review, we're not arguing that the appeal waiver
8 bars any component of that.

9 CHIEF JUDGE WILSON: Uh-huh.

10 MR. BIERCE: And on the direct - - - excuse me,
11 on any appeal taken in the subsequent case, we wouldn't be
12 arguing that the appeal waiver barred that. I believe
13 that's correct, Your Honor. I believe that was the
14 circumstance in Hale.

15 CHIEF JUDGE WILSON: You know, I'm not even
16 asking about it. You know, if - - - if six months from now
17 there's a search conducted pursuant to the probation
18 condition and the challenge, the constitutionality, let's
19 say, is brought then, you wouldn't be relying on the appeal
20 waiver.

21 MR. BIERCE: I believe that's right, Your Honor.
22 And I believe that that is roughly what the facts on the
23 ground in Hale were. There was an appeal waiver executed
24 in the original case. And then there is this additional
25 prosecution, this additional suppression proceeding. And

1 then that case goes up and the People don't advance an
2 appeal waiver. And nor could they likely - - -

3 CHIEF JUDGE WILSON: Right.

4 MR. BIERCE: - - - in that case. So it is - - -

5 JUDGE HALLIGAN: Would the - -

6 MR. BIERCE: - - - limited, I think.

7 JUDGE HALLIGAN: Would the considerations you're
8 raising about Pena necessarily apply across the board to a
9 Fourth Amendment question? So for example, let's suppose a
10 locality adopted a law that said that the police department
11 can stop any driver they want, not pursuant to any
12 checkpoint, not pursuant to any reasonable suspicion,
13 anything at all, but just whomever they feel like. Okay.
14 In other words, the sort of provision that we might think
15 raises some significant Fourth Amendment considerations.
16 Would you argue there that that can't be challenged ex ante
17 in the same way, and we would have to await its actual
18 application ala Pena or Khinchin?

19 MR. BIERCE: Well, I think that there would be
20 reviewability bars if it weren't raised below. I'm talking
21 about preservation and appeal waiver - - -

22 JUDGE HALLIGAN: Uh-huh.

23 MR. BIERCE: - - - those sorts of doctrines, even
24 in - -

25 JUDGE HALLIGAN: But why - - - why would there be

1 the same kind of preservation consideration that there
2 would be in - - - in Pena, for example?

3 MR. BIERCE: Well, my recollection is that even
4 in the recent decision in Omar Johnson, which was
5 distinguishing between the appeal waivers and - - - and
6 preservation and talking about the different purposes
7 undergirding both, it was primarily an appeal waiver case,
8 because my recollection was that the claim was preserved.
9 But in that case, in differentiating between those two
10 lines of authority, the court noted that even a facial
11 constitutional challenge must ordinarily be preserved
12 before being brought on appeal. Not - - -

13 JUDGE HALLIGAN: Right, but that's with - - -

14 MR. BIERCE: It's not subject to waiver.

15 JUDGE HALLIGAN: - - - that's without the - - -
16 the - - - the specific case law with regard to illegality
17 of a sentence, right? I mean that - - - that - - - that -
18 - - the - - - I don't think - - - I don't recall, but I
19 don't think it's specifically reckoned with that.

20 MR. BIERCE: No, I - - - I believe that's right,
21 Your Honor. My point about the legality or illegality of
22 the sentence is that that exception should be read fairly
23 narrowly to ensure that the appellate courts have the
24 ability to review, notwithstanding any agreement between
25 the parties or a - - - a litigant's failure to raise the

1 issue below. The court's compliance with the statute that
2 gives it the authority to do what it is supposed to do,
3 that the ordinary considerations that underlie the appeal
4 waiver principles and the preservation principles don't
5 apply with substantial force there. The appellate court
6 should be able to review those types of claims, regardless
7 of whether the parties have decided to agree that they
8 shouldn't be reviewed, and regardless of whether a litigant
9 has failed to notify the court below of his objection.

10 I do see that my white light is on. I do just
11 want to make sure that I emphasize before I sit down, the
12 unique or unusual nature of this case, where the position
13 I'm advancing is good for the prosecution and for courts
14 and the Department of Probation, but it's also good for
15 defendants writ large. It's a phenomenon that this court
16 recognized in the Hakes case about paying for the costs of
17 an alcohol monitoring bracelet, that the, I believe,
18 governor's memorandum in the post-McNair amendments
19 recognize that where there are defendants who are
20 borderline, it - - - it is a good thing for the court to
21 have additional tools to ensure that probationers who are
22 borderline - - -

23 JUDGE RIVERA: Why is the condition related to
24 searching for drugs appropriate here?

25 MR. BIERCE: He does have a - - - a minor history

1 with possessing drug-related contraband at a time when it
2 was still illegal. It is the entirety of his - - - of - -
3 - of his history.

4 JUDGE RIVERA: And is it somehow related to his
5 criminal actions?

6 MR. BIERCE: I don't believe it has to be
7 necessarily related to the criminal actions undertaken in
8 the case. One of the - - - the purposes of the lengthy
9 discussion of the layout and history of the statute and the
10 brief is to emphasize that the legislature contemplated a
11 very robust, and in some ways, intrusive supervision of
12 probationers in - - in arenas that are not necessarily
13 directly related to areas where they currently might be
14 struggling or that undergirded immediately their crimes of
15 conviction.

16 JUDGE RIVERA: Uh-huh.

17 MR. BIERCE: I believe you have my argument.
18 Thank you.

19 CHIEF JUDGE WILSON: Yes. Thank you.

20 MS. LINN: So I just want to start with
21 preservation and emphasize here that the argument, even the
22 constitutional argument, is ultimately an argument that the
23 sentencing court lacked the power to impose the condition
24 because of a statute. So it is a statutorily based
25 argument. And that is different even to the extent that

1 other constitutional arguments may require preservation.
2 Notwithstanding that there's a component of the sentence at
3 issue. And specifically I'm talking about CPL 410.50
4 subdivision 3. In Jackson, this court explained that the
5 provisions in that - - - in that statute are based on
6 constitutional standards. For the same reason - - -

7 JUDGE HALLIGAN: So you're saying that that
8 transforms - - - I - - - I thought you were making a
9 statutory argument about 410.50. Am I misunderstanding
10 that?

11 MS. LINN: I'm making a statutory argument, but -
12 - -

13 JUDGE HALLIGAN: But you're saying it also
14 relieves you from any preservation requirements in the
15 constitutional context?

16 MS. LINN: I'm saying because the statute is
17 based on constitutional standards, that is why preservation
18 wouldn't be required.

19 JUDGE HALLIGAN: So you brought - - -

20 JUDGE CANNATARO: So by arguing the statute, you
21 preserved the constitutional argument because we've said
22 that the statute is based in constitutional principles?

23 MS. LINN: I think they're wrapped up together.
24 I think by arguing that the statute is violated here, it
25 necessarily encompasses the argument that the

1 constitutional standards - - -

2 JUDGE RIVERA: Could the statute be more
3 expansive than what the Constitution might require?

4 MS. LINN: I think the statute is more expansive
5 than what the Constitution requires, because it - - -

6 JUDGE RIVERA: Then how would a court be aware of
7 the constitutional argument?

8 MS. LINN: Well, I will say at the very least, to
9 the extent any constitutional argument has to be preserved
10 in this case, defense counsel objected that there were - -
11 - I guess the statutory argument was preserved because
12 defense counsel objected to the condition and therefore
13 necessarily objected to imposing it with - - - without the
14 client's consent, which implicates CPL 410.50. And then I
15 - - - I also just - - - if I can, I know my light is on,
16 but I wanted to address the fact that Mr. Brazeal didn't
17 move to withdraw his plea. I think this court's precedent
18 in Gravino makes it clear that that would have gone
19 nowhere. He has no basis for a plea withdrawal. This
20 court held in Gravino that plea - - - that probation
21 conditions do not have to be discussed at the time of the
22 plea. As Your Honor noted earlier, they often aren't
23 knowable until the time of sentencing, and they have been
24 deemed collateral consequences that do not provide a basis
25 for plea withdrawal, except in rare circumstances where

1 it's just impossible to believe that such conditions would
2 be considered a rare circumstance, given how commonly they
3 are imposed, and that every probationer has the identical
4 right to privacy.

5 And then as far as, you know, this argument about
6 potential ripeness, I think the harm here really is the
7 intrusion in the first instance. And probationers
8 shouldn't have to be living in, you know, a quasi-police
9 state. I realize they're probation officer searches and
10 not the police, but the harm is still the same, and they
11 are entitled to a degree of privacy as this court has
12 repeatedly recognized. And I also don't think we should
13 only give a remedy to the people who realistically are most
14 likely to appeal from or, you know, seek a remedy for a
15 search that occurs where they have been found to be in
16 violation of their probation or their probation has been
17 revoked.

18 JUDGE RIVERA: Can you briefly comment on his
19 response to me at the very end about the propriety of the -
20 - - the condition related to drugs and drug paraphernalia?

21 MS. LINN: Yes. I mean, I will reiterate, I
22 don't think it's appropriate here. His past use of
23 marijuana, which is now legal, he no longer uses it. There
24 just seems to be no reasonable basis on the record here to
25 believe that he would be in possession of illegal

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narcotics, just like there's no reasonable basis in the record here to believe that he would possess a gun because his criminal history just - - - there's nothing to suggest he ever possessed an illegal weapon at any time.

CHIEF JUDGE WILSON: Thank you.

MS. LINN: Thank you, Your Honors.

(Court is adjourned)

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

I, Leda Yeager, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Brazeal (Jarelle), No. 45 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: April 21, 2026