APL-2022-00100

To be argued by
Mark W. Zeno
(20 minutes requested)

Court of Appeals

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

PABLO PASTRANA,

Defendant-Appellant.

Defendant-Appellant's Brief

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PRELIMINARY STATEMENT

By permission of the Honorable Jenny Rivera, Associate Judge of this Court, granted July 27, 2022 (A1),[1] appellant, Pablo Pastrana appeals from an order of the Appellate Division, First Department, entered May 5, 2022. That order affirmed a judgment of the Supreme Court, Bronx County, entered April 19, 2018, that convicted him, after a jury trial, of criminal possession of a weapon in the second degree (Penal Law § 265.03(3)), criminal possession of marijuana in the fifth degree, and unlawful possession of marijuana. Mr. Pastrana was sentenced to an indeterminate prison term of 16 years to life imprisonment (Carter, J., at trial and sentence). Mr. Pastrana had no co-defendants. By order dated September 8, 2022, this Court assigned Robert S. Dean, Esq., Center for Appellate Litigation to represent Mr.

[1]Numbers in parenthesis preceded by "A" refer to pages of Defendant-Appellant's Appendix.

Pastrana on this appeal. No application for a stay of execution of sentence has been made. Mr. Pastrana is currently incarcerated pursuant to the judgment.

JURISDICTION

This Court has jurisdiction to review the claims raised on this appeal as they each present a question of law. CPL §§ 470.35(1), 450.90(1). Counsel's written submission to the suppression court, and post-hearing argument preserved the challenges to the evidence recovered at the roadblock and related issues raised in Point I. The issues relating to the applicability of the Marijuana Regulation and Taxation Act raised in Point II present questions of law, despite the lack of objection below, because the Act was passed and became effective after Mr. Pastrana was convicted, but while his case was pending on direct appeal. The challenge to Mr. Pastrana's weapon-possession conviction raised in Point III present questions of law, despite lack of objection below, because they are based on an intervening Supreme Court decision that changed the law after the judgment was entered.

STATUTORY PROVISIONS INVOLVED

Criminal Procedure Law § 1.20

...

16. "Criminal action." A criminal action (a) commences with the filing of an accusatory instrument against a defendant in a criminal court ... and (c) terminates with the imposition of sentence or some other final disposition in a criminal court ....
...

18. "Criminal proceeding" means any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, either of this state or of any other jurisdiction, or involves a criminal investigation.

19. "Criminal court" means any court defined as such by section 10.10.

Criminal Procedure Law § 10.10

1. The "criminal courts" of this state are comprised of the superior courts and the

local criminal courts.

2. "Superior court" means:

(a) The supreme court; or ....

Penal Law § 222.05

Notwithstanding any other provision of law to the contrary:
...

3. Except as provided in subdivision four of this section, in any criminal proceeding including proceedings pursuant to section 710.20 of the criminal procedure law, no finding or determination of reasonable cause to believe a crime has been committed shall be based solely on evidence of the following facts and circumstances, either individually or in combination with each other:

(a) the odor of cannabis;

(b) the odor of burnt cannabis;

(c) the possession of or the suspicion of possession of cannabis or concentrated cannabis in the amounts authorized in this article ...;

Penal Law § 265.03

A person is guilty of criminal possession of a weapon in the second degree when:

...

(3) such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this subdivision if such possession takes place in such person's home or place of business....

QUESTIONS PRESENTED

1. Whether, because the prosecution did not meet its burden of showing that the roadblock was for a constitutionally permitted primary programmatic purpose, was properly authorized at the programmatic level, and was properly administered, the marijuana and handgun recovered during that roadblock should have been suppressed.

2. Whether the warrantless search of Mr. Pastrana's car and its locked glove box was unlawful because Penal Law § 222.05(3) prohibits courts from determining reasonable cause to believe a crime has been committed based solely on the odor of cannabis or presence of cannabis in now-lawful amounts.

3. Whether Penal Law § 265.03(3)—which criminalizes the possession of a firearm in a public place, a right that *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S.-, 142 S.Ct. 2111 (2022) found protected by the Second Amendment—was unconstitutional, and Mr. Pastrana's conviction for that offense violates the Second and Fourteenth Amendments and must be reversed and the indictment dismissed.

SUMMARY OF ARGUMENT

I.

Officers from NYPD's elite Strategic Response Group, whose mission was, among other things, to "suppress" crime and keep order at parades and other crowd-drawing high profile events, set up a roadblock to stop cars traveling from Manhattan to the Bronx immediately following the City's annual 2015 Puerto Rican Day Parade. The defense contended in its omnibus motion that the roadblock had been set up for an unlawful purpose. The prosecution introduced no evidence showing who had authorized the roadblock, why an elite crime-control unit on parade duty had been assigned to conduct the roadblock, or why the location–-a bridge from Manhattan into the Bronx—had been chosen. Instead, the prosecution presented the testimony of a single detective participant in the roadblock, who said no more than that the roadblock was an unusual assignment for his unit, and that it had been set up to "check[] for people's license[s], registered vehicles, improper inspections, equipment, seat belts."

Because the officer could not supply any information about the roadblock's purpose or who had authorized it, other than to claim that it was for "vehicle safety," the prosecution failed in its burden of going forward to establish that the roadblock was for a valid primary programmatic purpose and was conducted in a non-arbitrary and non-discriminatory manner. *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *People v.*

Scott, 63 N.Y.2d 518, 524-25 (1984). The fruits of that roadblock stop—the weapon and marijuana found in Mr. Pastrana's car—must be suppressed and the indictment dismissed.

II.

Signed into law on March 31, 2021 while Mr. Pastrana's appeal was pending before the Appellate Division and effective immediately, the Marijuana Regulation and Taxation Act (MRTA) added Penal Law § 222.05(3). In relevant part, that provision states that, "in any criminal proceeding ... no finding or determination of reasonable cause to believe a crime has been committed shall be based solely on evidence of ... the odor of cannabis" or the possession of cannabis in now-lawful amounts. Here, officers searched the locked glove compartment of Mr. Pastrana's car solely because an officer claimed that he smelled marijuana in its vicinity. As shown in II(A), the plain language of Penal Law § 222.05(3) prohibited the First Department from determining that the officers lawfully searched the locked glovebox based solely on the odor of marijuana. As shown in II(B), below, even if § 222.05(3)'s plain language did not prohibit that finding, that provision should be applied retroactively.

III.

In *New York Rifle & Pistol Association, Inc., v. Bruen*, 597 U.S.-, 142 S.Ct. 2111 (2022), the Supreme Court held that New York's firearm-licensing system unconstitutionally interfered with the fundamental Second Amendment right of a

citizen to "keep and bear arms" in public. The Penal Law's provisions "prevent[ed] law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." Id. at 2156.

The Supreme Court's conclusion that New York's licensing provisions were unconstitutional rendered Penal Law § 265.03(3)—which criminalized the unlicensed possession of a firearm in a public place—unconstitutional. The Constitution bars punishing an individual for exercising a fundamental right in ostensible violation of an unconstitutional licensing scheme.

STATEMENT OF FACTS

The charges

After a gun and marijuana were recovered from the locked glove box of Mr. Pastrana's car following a police-roadblock stop designed to stop Puerto Rican Day Parade celebrants as they returned to the Bronx, he was arrested and indicted for criminal possession of a weapon in the second degree (Penal Law § 265.03(3)), criminal possession of marijuana in the fifth degree (Penal Law § 221.10(1) (possession of marijuana in a public place in open view), and unlawful possession of marijuana (Penal Law § 221.05)(possession of an unspecified quantity of marijuana)(A11).

The suppression proceedings

The omnibus motion

Mr. Pastrana moved to suppress the handgun and marijuana that were recovered after his car was stopped at a police roadblock (A18-19, 36-38). Citing *Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000) and *People v. Scott*, 63 NY2d 518 (1984), he argued that the gun and marijuana were the fruits of a constitutionally invalid checkpoint stop (A37). Even if the initial stop of his car was proper, there was no basis for removing the occupants from the car and the extensive searched that followed (A37-39).

The People opposed (A46-47). The court ordered a *Mapp* hearing to resolve the factual issues (A51).

The suppression hearing

The roadblock

The prosecution's sole witness at the hearing was NYPD Detective Jeremy Veit (A65). At the time of the roadblock stop, Veit had been assigned to the NYPD Strategic Response Group (SRG) "anti-crime team" for about two years (A66). The Strategic Response Group was a plainclothes unit deployed throughout precincts that had had a "spike" in violent crime (A66).

On June 14, 2015, the day of the City's annual Puerto Rican Day Parade, Veit was assigned to a "parade detail." He was to staff a roadblock on the University

Heights Bridge as celebrants returned to the Bronx from Manhattan. He described it as an uncommon assignment for an SRG member (A68). Veit's supervisor at the roadblock was a Sergeant Rosario; other officers, including a Police Officer Banks, also participated in the roadblock (A69).

Although defense counsel had challenged the roadblock's purpose in the omnibus motion, the only evidence introduced by the prosecution about the roadblock's authorization or its purpose came from Veit. In response to the prosecutor's request to address the roadblock's parameters, Veit testified that "it was for any VTL violations, safety roadblock" (A69-70). He later testified on cross-examination that it was a vehicle-safety checkpoint where officers "were doing inspections for VTL violations" (A106). Veit defined "vehicle safety" to mean, "checking for people's license[s], registered vehicles, improper inspections, equipment, seat belts," and "the well being of the car" (A107). In Veit's words, the checkpoint was not "specifically for drunk drivers," but that "[a] drunk driver would be a part of the checkpoint. If somebody pulled up and they were intoxicated," they would "take enforcement for that," but that was not the "specific goal of the checkpoint" (A158-59).

The prosecution introduced no evidence, documentary or otherwise, of who had decided a roadblock was warranted or had authorized it. Veit did not explain why a specialized anti-crime unit was chosen to check Puerto Rican Day Parade celebrants

for vehicle safety as they returned to the Bronx. Veit did not explain how or why that location had been chosen; he did not testify that roadblocks were routinely set up at that location or that VTL violations had been an issue in that area. The prosecution did not introduce any documentation showing that department procedures were followed, and did not identify the commanding officer who had initiated or oversaw the roadblock.

Veit did not testify regarding what role, if any, Sergeant Rosario played at the roadblock. Veit did not testify whether there was any script followed when questioning drivers, or if he was directed to keep any documentation of which cars were stopped and questioned. Veit did not testify whether any notice was given to drivers on the Manhattan side of the bridge that they might be subjected to a mandatory stop at the other end. The prosecution did not offer any documentary evidence regarding the parameters of the roadblock, how many and which cars were stopped, or any other details about the roadblock.

Asked to describe the roadblock's location and set up, Veit believed there were one or two lanes of Bronx-bound traffic on the bridge but wasn't sure (A88). Veit recalled that there was a "metal structure" on the bridge and the roadblock was located "[r]ight past the metal structure towards the Bronx side on the outbound from Manhattan before you would enter the Bronx, right above what would be the Major Deegan" (A89). Two marked vans and cones identified the roadblock. One was

located "directly behind the metal structure of the inbound from Manhattan lane, inbound to the Bronx from Manhattan" (id.). Veit knew that Officer Banks was tasked with directing every third car into the roadblock, but he did not know whether Banks had followed that plan (A91).

Mr. Pastrana's car is stopped and searched

Banks directed Pastrana's car into the roadblock (A90-91). Veit did not notice anything "out of the ordinary" about the car or its driver (A91-92). Mr. Pastrana was driving, a woman Veit later learned was Alexis Cortez was seated in the front passenger seat, and a man Veit later learned was Ehtien Karrell was seated in the rear (A76).

Veit directed Mr. Pastrana to lower the car's windows. Mr. Pastrana complied. He was fully cooperative and showed no signs of intoxication (A84). Veit claimed that, when the windows were opened, he smelled marijuana and alcohol "emanating from the car" (A77). Veit did not indicate whether the marijuana smell was burnt or unburnt. When Veit "look[ed] around the car," he saw the rear-seat passenger attempting to conceal an open bottle of strawberry liqueur underneath his arm (A77). When Veit questioned the rear-seat passenger and asked him for identification, he perceived "defiant body language," and directed him out of the car (A78).

Veit took Mr. Pastrana's license and registration and directed him, as well as the front-seat passenger Ms. Cortez, to get out of the car (A79). Ms. Cortez had a large boa constrictor snake wrapped around her neck and arms (A79).

Veit claimed he then saw the neck of an open bottle of Grey Goose vodka "sticking out" of Ms. Cortez' purse, which was on the floor on the front passenger's side of the car (A80). While Veit also claimed that, at this point, he saw and recovered a "plastic twist" of marijuana from the floor of the front passenger glove box, he did not specify where the twist was found, or where he was standing when he saw the twist (A80, 102).[2]

Veit began a "systematic" search of the car (A81). He began with the rear passenger seat, moved to the front driver side, then the front passenger side, where the twist had been recovered. Veit's search found nothing. He claimed that, as he searched the front passenger seat, "the odor of marijuana was very strong" (A81).

Veit concluded that the "last possible place 'it' could have been" was in the glove box (A81). The glove box was locked. Veit took the key from the car's center console, unlocked the glove box and opened it (A81,105). Veit found two large plastic

[2]The twist contained 5.045 grams—less than one-fifth of an ounce—of marijuana (NYPD Criminalist Stepahnie Polifroni: A736-37).

bags in the glove box. He opened both of them. One contained seven Ziploc bags of marijuana,[3] the other a loaded handgun (A81-84).

The defense case

After attending the Puerto Rican Day Parade celebration, Pablo Pastrana, Alexis Cortez, and Ehtien Karell got into Mr. Pastrana's car and made their way toward Orchard Beach in the Bronx. Karrell described their trip back to the Bronx (A119-125), the roadblock stop (A126-128), and the search of the car (A128-133).

Arguments at the close of the hearing

Defense argument

Defense counsel argued that, because both the stop and search of the car were unlawful, the evidence found in it should be suppressed. The roadblock was unlawful because the prosecution did not meet its burden of proving that it was administered in a non-discriminatory manner (A153-54, A178). While Veit had testified that the roadblock was for vehicle safety, the police were "[o]bviously looking for people who would attend the Puerto Rican Day Parade and [were] looking for alcohol, or ... thing[s] of that nature" (A156). Veit was "looking for guns and drugs" (A159).

The prosecution had not shown adequate "warning to motorists of the existence of the roadblock, the nature of inquiry of motorists stopped and whether the officers [we]re free to ask any questions" and "procedures for site selection [and]

[3]The bag containing the seven Ziplocs of marijuana recovered from the glove box contained a total of less than an ounce of marijuana (A737).

scope of the problem or its frequency" (A154). Nor did the prosecutor offer evidence of any directive from NYPD leadership instructing the officers to set up the roadblock. The defense argued that the People "should have produced either a written plan … [or had] someone…come in and say this is what we decided, this is what we were doing, this is what was valid, and the reason for it. But we don't even know if my client's car was the third car that was pulled over" (A162). No supervising officer had testified.

Counsel argued that the stop of his car was a product of racial profiling (A162). The roadblock was set up to stop cars leaving Manhattan's Puerto Rican Day parade as they returned home to the Bronx. Karell had testified that the car in front of Pastrana driven by an Asian man, was not stopped, but the car in back of them, driven by a Latino man, was. The prosecution offered no rationale as to why the Puerto Rican Day Parade was an appropriate time and place for a safety roadblock (A155-56). Counsel also argued that, even if the stop of the car was legal, the search was not.

People's argument

The roadblock was valid because it complied with *People v. Scott*, 63 NY2d 518 (1984) (A163-65). Although Veit had testified that DWI was not the focus of the roadblock, the roadblock "in and of itself would cause a deterrent to drunk drivers on the day for celebration" (A165).

The court asked the prosecutor to clarify whether it was the prosecution's burden to produce a witness who could testify that proper procedures had been followed, since Veit had testified that he did not know whether every third car was actually stopped. The prosecutor responded that, so long as the procedure was "uniform and not gratuitous," it was not unconstitutional (A167). The prosecutor asked the court to find that a uniform and nondiscriminatory procedure had been set and followed (A166).

The court denies suppression

The court found that the stop was not pretextual or racially motivated. The "only requirement of a checkpoint stop is that the procedure followed by the police be uniform and not gratuitous or subject to individually discriminatory selection" (A186). Veit's testimony had satisfied the "elements of a valid checkpoint stop," because its primary purpose was roadway safety rather than crime control, it was "effective in advancing those interests, and ... the degree of intrusion on a driver's liberty was minimal" (A187). The court did not address counsel's argument that the prosecution had not met its burden because they had not introduced any paperwork associated with the roadblock, or any evidence about who had authorized it.

The trial

The People's case

The People introduced the seized evidence and provided an account of its seizure that was consistent with the evidence introduced at the suppression hearing (Veit: A579-705; Morrell: A515-79.

The jury convicted Mr. Pastrana of criminal possession of a weapon in the second degree, criminal possession of marijuana in the fifth degree, and unlawful possession of marijuana (A952).

Sentencing

The People filed a Persistent Violent Felony Information alleging that Mr. Pastrana had previously been convicted of two predicate violent felonies. It alleged that, on December 19, 2000, Mr. Pastrana had been convicted in New York County of "attempted criminal possession of a weapon 2nd Degree, PL 110/265.03(2)," and, on January 25, 2005, in New York County, he had again been convicted of "attempted criminal possession of a weapon 2nd Degree, PL 110/265.03(2)" (A957).

On April 19, 2018, Mr. Pastrana appeared for sentence. The court found that he had two prior violent felony convictions (A978). The court sentenced him to 16 years to life imprisonment on the weapon-possession conviction, 30 days' imprisonment on the fifth-degree marijuana possession conviction, and 15 days' imprisonment on the unlawful possession of marijuana conviction (A981).

The Marijuana Taxation and Regulation Act (MRTA) becomes law

Signed into law on March 31, 2021, while Mr. Pastrana's appeal was pending before the Appellate Division, the MRTA added Penal Law § 222.05(3), which became effective immediately.

The appeal

Appealing to the Appellate Division, First Department, Mr. Pastrana contended, among other things, that the hearing court erred when it refused to suppress the handgun and marijuana recovered following a roadway-checkpoint stop, because (A) the prosecution did not meet its burden of showing that the roadblock stopping cars leaving the Puerto Rican Day Parade celebration was for a lawful purpose and conducted pursuant to constitutionally mandated guidelines; and (B) even if the stop was legal, the warrantless search of the car and its locked glove box were unlawful as it was based solely on the presence of a personal use quantity of marijuana on the floor of the car and an officer's claim that he smelled more marijuana elsewhere, a finding precluded by the newly enacted MRTA.

The First Department affirmed. Addressing the roadblock stop, the court found the stop lawful:

> The testimony established that the primary purpose of the checkpoint was vehicular safety and enforcement of vehicular laws and regulations rather than general crime control, that the checkpoint was effective in advancing those interests, that the checkpoint and its primary purpose originated at a higher supervisory level than the officers at the scene, and that the degree of intrusion on the drivers liberty and privacy

> interests was minimal (*see Indianapolis v. Edmond*, 531 U.S. 32 (2000); *People v. Scott*, 63 N.Y.2d 518 (1984). The officer's testimony that the checkpoint stopped every third car satisfied the requirement that "the procedure followed be uniform and not gratuitous or subject to individual discriminatory selection" *People v. Serrano*, 233 A.D.2d 170, 171 (1996)

(A6).

The court that Penal Law § 222.05(3) did not apply to this appeal:

> We also conclude that newly-enacted Penal Law § 222.05(3), which affects whether a finding of probable cause may be made on evidence of the odor of cannabis, should not be applied retroactively (*see Davis v. United States*, 564 U.S. 229, 241 (2011); *People v. Martello*, 93 N.Y.2d 645, 648, 695 (1999)). "[N]othing in the plain language of Penal Law § 222.05(3) indicates that the legislature clearly intended that provision to have retroactive effect" (*People v. Vaughn*, 203 A.D.3d 1729, 1730 (4th Dep't 2022)).

(A7).

United States Supreme Court decides *New York Rifle & Pistol Association, Inc., v. Bruen*, 597 U.S.-, 142 S.Ct. 2111 (2022)

On June 23, 2022, while Mr. Pastrana's leave application was pending, the United States Supreme Court found that the "proper-cause" standard in New York's gun licensing provisions violated the Fourteenth Amendment by preventing citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms.

This appeal follows.

ARGUMENT

Point I

Because the prosecution did not meet its burden of showing that the roadblock was for a constitutionally permitted primary programmatic purpose, was properly authorized at the programmatic level, and was properly administered, the marijuana and handgun recovered during that roadblock should have been suppressed.

A. Applicable law

An automobile stop is a seizure under the Fourth Amendment and the New York Constitution. *Michigan Dep't Of State Police v. Sitz*, 496 U.S. 444, 450 (1990), *People v. Spencer*, 84 N.Y.2d 749, 752 (1995). A suspicion of criminality and the objective facts giving rise to it are normally baseline requirements for any constitutionally permissible seizure. *See Terry v. Ohio*, 392 U.S. 1, 21, 27 (1968) (Fourth Amendment analysis rests not on the officer's "inchoate and unparticularized suspicion or 'hunch,' but on the specific reasonable inferences which he is entitled to draw from the facts"); *People v. DeBour*, 40 N.Y.2d 210, 223 (1976)(New York Constitution analysis rests on whether the officer's level of suspicion, based on objective facts, warrants the officer's actions). This constitutional prerequisite—that an officer's actions be justified by objective facts—"safeguard[s] the privacy of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *see People v. Belton*, 55 N.Y.2d 49, 52 (1982)(stating, in the context of an automobile search, that

"the State Constitution protects the privacy interests of the people of our State ... against the unfettered discretion of government officials to search or seize").

Like other seizures, the lawfulness of an automobile stop is normally measured by an officer's fact-based suspicion of wrongdoing. *See Whren v. United States*, 517 U.S. 806, 810 (1996)(car stop is lawful when supported by probable cause to believe that a driver has committed a traffic violation); *People v. Robinson*, 97 N.Y.2d 341, 349–350 (2001)(same); *Spencer*, 84 N.Y.2d at 752-753 (car stop justified where officer has reasonable suspicion to believe that the driver or an occupant has committed, are committing, or are about to commit a crime). Reasonable suspicion and probable cause, in the context of car stops and elsewhere, rest entirely on the particularized and objective facts known to the officer, not the officer's hunches or subjective beliefs. *See Kansas v. Glover*, -U.S.-, -, 140 S.Ct. 1183, 1187 (2020) (finding officer's decision to stop a motor vehicle whose registered owner's license had been suspended rested on particularized objective facts). The officer's subjective motive or reason for a stop is irrelevant. *Whren*, 517 U.S. at 819 (finding pretextual car stop lawful so long as supported by probable cause to believe a traffic violation had been committed).

While suspicion-based car stops are the constitutional norm, both this Court and the United States Supreme Court have sanctioned a limited category of automobile stops where no individualized suspicion exists. *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *People v. Scott*, 63 N.Y.2d 518, 524-25 (1984). The constitutionality of

a suspicionless seizure is measured by a three-factor balancing test, "weighing the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

To limit the officer discretion that the Fourth Amendment and the State Constitution ordinarily would not tolerate, a roadblock stop is constitutional only if a lawful primary purpose is established at the "programmatic level," *Indianapolis v. Edmond*, 496 U.S. at 48, and the roadblock is administered "pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *In re Muhammad F.*, 94 N.Y.2d 136, 142 (1999) (recognizing that suspicionless stops at sobriety roadblocks "under written guidelines are constitutional") (quoting *Brown v. Texas*, 443 U.S. at 50), *cert. denied sub. nom. Corporation Counsel of the City of New York v. Muhammad F.,* 531 U.S. 1044 (2000).

Whereas general crime control is an unlawful programmatic purpose for a roadbock stop, appropriately administered programs that screen for drunk drivers and border integrity are valid. *Compare, Indianapolis v. Edmond*, 531 U.S. at 44 (finding narcotics interdiction to be a prohibited crime control purpose)*, with Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 447, 450 (1990) (finding sobriety roadblock program lawful), *and United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)(finding permanent immigration roadblock lawful). Courts, including the United States Supreme Court,

have also found, or at least suggested, that roadblocks at which officers check drivers licenses, registrations, and vehicle inspection requirements are constitutionally permissible. *Indianapolis v. Edmond*, 531 U.S. at 37-38 (citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)).

Because affording individual officers the discretion to stop motorists without any suspicion of wrongdoing cannot be squared with the Fourth Amendment, a suspicionless roadblock is lawful only if its programmatic purpose was lawful and its use on a particular day and time at a given location was authorized at the supervisory level. *See Jackson*, 99 N.Y.2d at 132 (holding that the roadblock's legality is measured at the programmatic level, and that the subjective intent of the participating officers is irrelevant); *In re Muhammad F.*, 94 N.Y.2d at 144 ("The location of a fixed roadblock is not chosen by officers in the field, but by officials responsible for making overall decisions as to the effective allocation of limited enforcement resources" (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 549 (1976)); *People v. Dacey*, 2003 WL 1389098, at *1–2 (Suffolk Cty. Dist. Ct. 2003)(finding that a location must be chosen by persons with supervisory authority to ensure that the roadblock is for a valid programmatic purpose, is located to address that purpose, is set up safely, and to oversee its implementation to make sure the stops are "uniform" and "systematic"); *People v. Richmond*, 174 Misc. 2d 40, 43–44, 662 N.Y.S.2d

998, 1000–01 (Monroe Cty, Ct. 1997)(finding roadblock unlawful where the record failed to reveal any proof of any plan promulgated by the Chief of Police).[4]

The People bear the burden of establishing a roadblock stop meets these constitutional requirements. *People v. Jackson*, 99 N.Y.2d 125, 131-32 (2002) (holding that the People have the burden of establishing a valid primary programmatic objective). When assessing whether a suspicionless governmental intrusion violates the Fourth Amendment, the Supreme Court has cautioned against "simply accept[ing] the State's invocation" of its purpose. *Ferguson v. City of Charleston*, 532 U.S. 67, 81

[4]Other state high courts uniformly agree that the decision to conduct a roadblock must be made at the supervisory level. *See, e.g.*, *Brown v. State*, 293 Ga. 787, 798-800 (Ga. 2018) (explaining that the purpose of requiring that a particular roadblock be approved by supervisory personnel is to "ensure that the implementation decision is made above and away from field officers ... whose unfettered exercise of discretion is feared"); *Commonwealth v. Buchanon*, 122 S.W.3d 565 (Ky. 2003)(suggesting criteria that trial courts should consider in determining the legality of a roadblock, including whether the decision to conduct the roadblock was made by supervisory personnel, not officers in field); *Campbell v. Florida*, 679 So.2d 1168, 1172 (Fla. 1996)(holding that police did not have the authority to set up "routine" roadblocks at any time or place, that any roadblock required "particularized advance planning and direction and strict compliance thereafter"); *Crandol v. City of Newport News*, 238 Va. 697 (Va. 1989)(acknowledging that key factors in determining the legality of a roadblock include proof of advance decisions by superior officers as to the time and location of the roadblock, adequate training of officers on the scene, and on-site supervision of the officers conducting the roadblock); *Lookingbill v. Oklahoma*, 157 P.3d 130 (Okla. 2007)(holding that, in assessing the legality of a roadblock, courts should consider, among other things, whether the roadblock was approved in advance by "superior officers"); *City of Las Cruces v. Betancourt*, 105 N.M. 655, 658 (N.M. 1987)(holding that the set up of a roadblock and the selection of the site and procedures for conducting it "must be made and established by supervisory law enforcement personnel rather than officers in the field," and "[i]deally ... should be made by the chief of police or other high-ranking supervisory officials"); *Ingersoll v. Palmer*, 43 Cal. 3d 1321, 1343 (Cal. 1987) (holding that the decision to establish a roadblock and the selection of the site should be made by supervisory personnel and not by an officer in the field, "to reduce the potential for arbitrary and capricious enforcement")

(2001). Instead, a reviewing court must look to "all the available evidence." Id. (striking down a hospital's drug-testing program by looking to, among other things, the documents "codifying the policy," and involvement of police and prosecutors, and concluding that the immediate objective and primary purpose of the program was to generate evidence for law enforcement and not the stated purpose of getting patients into substance-abuse treatment).

The People cannot meet their burden of establishing a valid programmatic purpose with the testimony of line officers with no knowledge of why a roadblock had been authorized for a given date, time, and location. *See, State v. Rose*, 170 N.C.App. 284, 289-90 (N.C. 2005) (finding that suppression court failed to adequately explore a roadblock's programmatic purpose where the evidence of programmatic purpose was limited to individual officers acting at the scene, no one explained why there was a particular need for a vehicle safety roadblock in this particular area, and individual officers were narcotics detectives and defendant was arrested for possession of drugs and a weapon and not a faulty license or registration); *Baker v. State*, 252 Ga.App. 695, 698–99 (Court of Appeals of Georgia), *cert. denied*, 2002 Ga. Lexis 423 (Ga. 2002)(finding that State did not meet its burden of showing that a roadblock was a validly authorized sobriety roadblock where the State relied only on the testimony of one of the officers conducting the roadblock, who testified that the "purpose of the roadblock was 'for DUI checks' and that the decision to set up the roadblock was

made by 'my supervisor of the evening,' because *Edmond* had "elevated proof of the supervisor's "primary purpose" to a constitutional prerequisite of a lawful roadblock the State had not met its burden prove the seizure's constitutional validity); *Blackburn v. State*, 256 Ga.App. 800, 800 (Court of Appeals of Georgia 2002)(reversing denial of motion to suppress evidence seized at roadblock where the only evidence regarding roadblock's purpose came from a state trooper who testified that "a supervising corporal had authorized the roadblock to check licenses and sobriety," because hearsay, even if not objected to, could not prove legitimate programmatic purpose).

B. The People did not meet their burden of showing that the roadblock was (1) for a constitutionally permitted primary programmatic purpose, (2) was properly authorized at the programmatic level, and (3) was properly administered.

1. Detective Veit's testimony that the roadblock was to check vehicle safety was insufficient to meet the People's burden of proving that the roadblock had a valid programmatic purpose.

The entirety of the People's evidence on this point was Veit's testimony that the roadblock was "for any VTL violations, safety checkpoint" (H17-18), and the officers "were doing inspections for VTL violations" (H54). Veit understood a "vehicle safety" checkpoint to mean, "checking for people's license[s], registered vehicles, improper inspections, equipment, seat belts" (H55).

While the Supreme Court has suggested that a document-check roadblock at which officers ask drivers to produce and verify licenses, registration, inspection, and insurance documents is a constitutionally valid programmatic purpose, *Delaware v.*

Prouse, 440 U.S. at 654-55, 659, it has not extended the permissible scope of such roadblocks to inspecting cars for equipment violations and other VTL violations. *See, e.g., State v. Ayers*, 257 Ga.App. 117, 118 (Ga. 2002) (finding "license safety checkpoint" was not a valid primary purpose where officer testified that they would "check everything, license, insurance, ... walk around behind and check the tag... enforce the laws").

Nor should it. While the Appellate Divisions have approved roadblocks with a primary purpose of "roadway safety and enforcement of vehicular laws and regulations," *People v. Dugan*, 57 A.D.3d 300, 300-01 (1st Dep't 2008), and checking "registration, inspection, seat belt and other traffic related infractions," *People v. Edwards*, 101 A.D.3d 1643, 1644 (4th Dep't 2012), those broad purposes are incompatible with the tightly focused exceptions permitted by *Indianapolis v. Edmond*, 531 U.S. at 44. *See Jackson*, 99 N.Y.2d at 132 (finding roadblock stop contravened Fourth Amendment where the "suppression hearing testimony of the officers who set up and manned the roadblock where defendant's vehicle was stopped pointed to a series of unprioritized purposes—among others, to reduce crime, educate cab drivers, prevent taxicab robberies and carjackings, and interdict drugs and guns"); *People v. Perez-Correoso*, 48 Misc.3d 839, 847-48, (Bronx Cty. Crim. Ct. 2015) (finding that a roadblock to ensure "vehicle safety," "traffic safety," "public safety" and to "check for traffic violations or intoxicated drivers," did not establish a valid primary

programmatic purpose); *People v. Cabrera,* 13 Misc.3d 1205(A) (Queens Cty. Crim. Ct. 2006) (finding that roadblock where officers stopped every fourth car and asked for driver's license, registration, and checked for inspection, did not have valid primary purpose); *People v. Velit*, 2002 WL 334690 (Queens Cty. Crim. Ct. 2002)(finding that a "vehicle safety check" roadblock allowed officers too much discretion to pass constitutional muster).

Even assuming that some level of properly documented generalized vehicle-safety roadblock might be a constitutionally permissible primary programmatic purpose, there is an inadequate record to reach that conclusion here. There is no factual record upon which to undertake the balancing of "public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty" mandated by the Supreme Court in *Brown v. Texas*, 443 U.S. 47, and this Court in *People v. Scott*, 63 N.Y.2d 518.

Detective Veit's testimony raised precisely the type of concerns that have led to the Supreme Court to tightly constrain the permissible purposes of suspicionless stops. According to Veit, the roadblock had a number of purposes. Not only were they checking for licenses, registrations, and inspections, but they were also checking for equipment, seat belts, and "the well being of the car." Ultimately, he even suggested that they were on the lookout for drunk drivers. Veit's shifting, expanding list of subjects for assessment, was so vague and standardless as to authorize the

general rummaging that the Fourth Amendment and our State Constitution vigilantly guard against. *Cf. People v. Galak*, 80 N.Y.2d 715, 719 (1993) (requiring that, in the absence of a warrant, an inventory search of an automobile must limit the conduct of individual officers to as to prevent them from becoming "little more than an excuse for general rummaging to discover incriminating evidence").

2. Detective Veit's testimony was insufficient to meet the People's burden of proving that the roadblock's primary purpose and location was authorized at the programmatic level.

Contrary to the First Department's finding below, there was no evidence to show that the roadblock or its location was authorized at the programmatic level. The programmatic-purpose requirement could have been satisfied by producing evidence that NYPD leadership had authorized the roadblock for a particular purpose, perhaps even through testimony from a line officer with knowledge about who had authorized the roadblock and why the location had been chosen. *See People v. Dugan*, 57 A.D.3d 300, 301 (1st Dep't 2008)(proof of a written directive authorizing the roadblock and its purpose is not required). But, despite defense counsel's challenge to the validity of the roadblock on this ground, the People offered no such evidence. Veit provided no evidence about who authorized the roadblock, or why its location, date, and time had been chosen. While Veit testified that a sergeant was present at the roadblock, he did not testify as to the sergeant's role in administering the roadblock.[5] See United States

[5]If NYPD rules were followed, this documentation and information should have been available for the asking. The NYPD Patrol Guide requires roadblock locations to be chosen

v. Davis, 270 F.3d 977, 981 (D.C. Cir. 2001)(finding proof of roadblock's primary purpose insufficient, where the evidence that its principal purpose was to check for licenses and registrations came from a single field officer, but officer acknowledged that he was part of a team that's larger purpose purpose was "combating crime").

While this Court has not yet had the opportunity to address the minimum level of evidence the People need to introduce to meet their burden of proving the legality of a roadblock, its decision in *People v. Scott*, 63 N.Y.2d 518 (1984) is demonstrative of what has been found to satisfy that burden. In *Scott*, a sobriety roadblock was conducted pursuant to a detailed plan implemented at the supervisory level, constraining the potential for arbitrary application The roadblock was set up pursuant to a written plan from the Genessee County Sheriff that called attention to the deaths, injuries and losses occasioned by intoxicated drivers and the need to employ every lawful means to deter and apprehend the drunken driver. *Id.* at 522-23. In detailed paragraphs, it established procedures for site selection and directed that roadblock sites be prescreened. *Id.* at 523. Following those written procedures, roadblocks were established once each month between midnight and 3:00 a.m., at locations selected in advance by senior personnel. Defendant was stopped at one such prescreened site

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by a "commanding" officer, the assignment of a supervising officer, and appropriate documentation (NYPD Patrol Guide, Section: Tactical Operations, Procedure Number; 221-16, "Vehicle Checkpoints" (Issued: 6/1/16). Available online at https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-16-vehicle-checkpoints.pdf (last visited 11/3/22).

chosen by supervisory personnel. *Id.* at 524. Citing the fact that the sobriety roadblock plan had been promulgated by the Sheriff, i.e., the head of the department, and that it was conducted in a manner that "afforded little discretion to operating personnel," this Court found the roadblock stop lawful. *Id.* at 526. [6]

The absence of any indication here about why the roadblock was authorized was especially significant, because it had the potential to have been authorized as a pretext for general law enforcement—or even discriminatory—purposes. The police may not use suspicionless programmatic searches as a pretext for criminal investigation. *United States v. Orozco*, 858 F.3d 1204, 1212-13 (9th Cir. 2017)(a programmatic search is invalid if the subjective purpose is to uncover evidence of a crime). Detective Veit belonged to a specialized unit which NYPD described as a critical asset in "crime suppression ... during events like parades."[7] Veit's Strategic

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[6]The showing made by the government proving the validity of the sobriety roadblock in *Michigan Dep't of State Police v. Sitz*, 496 U.S. at 447, 450, was similarly detailed. A statewide advisory committee created guidelines setting forth procedures governing site selection, operations, and publicity. The plan included site-selection provisions requiring consideration of "previous alcohol and drug experience per time of day and day of week as identified by arrests and/or Michigan Accident Location Index data." *Id.* at 465, n. 5 (Brennan, J., dissenting). The sobriety roadblock location was chosen with the assistance of the Saginaw County Sheriff's Department. Finding the programmatic purpose lawful, the Court noted, among other things, that roadblock locations had been "selected pursuant to guidelines" *id.* at 453, and that the effectiveness of the roadblock was supported by "empirical data." *Id.* at 454.

[7]The described purpose of the Strategic Response Group is crime control, as described in NYPD's public website:

> Strategic Response Group responds to citywide mobilizations, civil disorders, and major events with highly trained personnel and specialized equipment. They are also deployed to areas requiring an increased police presence due to

Response Group ordinarily deployed to areas "requiring an increased police presence due to increased crime and other conditions"[8] He testified that a roadblock was an unusual assignment for his team. Veit gave no explanation why a roadblock had been set up to check the vehicle safety of New Yorkers—like Mr. Pastrana—as they returned home to the Bronx following the Puerto Rican Day Parade. Veit provided no reason to believe that Bronx residents visiting the Puerto Rican Day parade were any more likely to be unlicensed, to have improperly registered cars, or to have cars that violated safety laws more than any others. As defense counsel argued below, the roadblock targeted Bronx residents of Puerto Rican and other Latin descent, like Mr. Pastrana and his passengers. *Cf. People v. Penn*, 2012 WL 13220158, at *4 (V.I. Super. Ct. 2012) (finding that a vehicle-safety roadblock was unlawful because, among other reasons, the government had not adequately shown why the roadblock's location and timing— near a planned party at a time when guests would be leaving—was more likely to encounter more unlicensed motorists or unregistered or uninsured vehicles than at any other time or place).

> increased crime or other conditions. With multiple missions that include disorder response, crime suppression, and crowd control, SRG has proven to be a critical asset during events like parades, protests, and the papal visit. SRG also mobilizes for shootings, bank robberies, missing persons, demonstrations, or other significant incidents.

Available online at https://www.nyc.gov/site/nypd/bureaus/patrol/ citywide- operations. page (last visited 11/3/22).

[8]https://www1.nyc.gov/site/nypd/bureaus/patrol/citywide-operations.page (last visited 11/3/22).

3. Detective Veit's testimony was insufficient to meet the People's burden of proving that the roadblock was administered in compliance with standards eliminating officer discretion.

Even if the People met their burden of going forward to show that the roadblock was set up for a valid purpose, they failed to show that it was administered in a neutral non-discriminatory manner pursuant to adequately detailed guidelines that limited the discretion of participating officers. *See Matter of Muhammad F.*, 94 N.Y.2d at 145 (noting that "suspicionless stops of vehicles to conduct sobriety checkpoints under written guidelines are constitutional," and criticizing prosecution's failure to produce evidence of "particularized guidelines"); *People v. Scott*, 63 N.Y.2d at 526 (finding that written sobriety roadblock plan passed constitutional muster because, among other things there were "specific procedures devised and promulgated to law enforcement personnel by the head of their department, ... the way in which the particular roadblock was being operated ... [and] that it was being maintained in accordance with a uniform procedure which afforded little discretion to operating personnel....").

The prosecution failed to prove the existence of guidelines provided by the commanding officer who issued the directive to the officers administering the roadblock to avoid individual exercises of discretion. *See, e.g., People v. Kozuszko*, 2002 WL 31962634, at *1 (Appellate Term, 9th & 10th Districts 2002) (suppressing evidence collected during the operation of roadblock where "there was insufficient

testimony at the suppression hearing to determine whether the plan was being constitutionally implemented").

When it came to what Veit believed he should be doing when a car entered the roadblock, he seemed to have no clear understanding. Instead, Veit testified that he was "doing inspections for VTL violations," (A106), checking for "vehicle safety," "checking for people's license[s], registered vehicles, improper inspections, equipment, seat belts" (A107). This is precisely the kind of standardless investigation that the requirement of detailed instructions are designed to avoid.

When it came to the one detail that Veit was aware of or could remember, Veit recalled that he believed another officer, Banks, was in charge of stopping every third car. But even as to that, Veit did not know if that direction had been followed. Nor could Veit state the basis for his belief that Officer Banks had been so instructed, and the prosecution did not offer any evidence, written or otherwise, of which cars were actually stopped that day. *See, e.g., People v. Holley*, 157 Misc. 2d 402, 406–08 (NY Cty. Crim. Ct. 1993)(suppressing where no evidence to show, among other things, that roadblock had been conducted pursuant to a written plan, or had been reviewed by a supervisor). Unlike cases in which officers either produced documentation of stops they had made or at least testified to the existence of such documentation, *see, e.g., Dugan* 57 A.D.3d at 301), here the prosecution offered no evidence whatsoever about

which cars were stopped and the extent to which the "every third car" guideline was actually followed.[9]

* * *

This argument is preserved. At the close of the suppression hearing, defense counsel argued that the roadblock had not been properly authorized, was discriminatory, and was not properly administered.

Accordingly, because the officer could not supply adequate information about the roadblock's purpose or who had authorized it, the prosecution failed in its burden of going forward to establish that the roadblock was constitutionally sound under the Fourth Amendment and New York Constitution. The fruits of that roadblock

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[9]While NYPD rules cannot resolve constitutional questions, even those rules required the missing documentation (NYPD Patrol Guide, Section: Tactical Operations, Procedure Number; 221-15, "Vehicle Checkpoints" (Issued: Oct. 15, 2016). Checkpoint locations must be chosen by a commanding officer who must direct the manner of the stops on a Vehicle Checkpoint Form (PD371-143). Drivers must be notified of the existence of a checkpoint, and officers cannot stop cars who lawfully evade the checkpoint. A Vehicle Checkpoint Form must be given to and discussed with the "supervisor in charge of the checkpoint." The supervisor must discuss tactics including questioning with all checkpoint personnel and the supervisor must "[r]emain at the checkpoint location for the entire operation." Assigned personnel must be apprised of the primary purpose of the operation. The supervisor must also assign a "'point person'…whose sole responsibility is to maintain the commanding officer's established procedure for stopping vehicles and to advise the vehicle operators that their vehicles are being stopped, and the reason why." The supervisor must also ensure that records are kept of the number of vehicles stopped and other information such as arrests and summonses. These records must be maintained and forwarded to the commanding officer. Available online at https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-16-vehicle-checkpoints.pdf (last visited 11/3/22).

stop—the weapon and marijuana found in Mr. Pastrana's car—must be suppressed and the indictment dismissed.

Point II

The warrantless search of Mr. Pastrana's car and its locked glove box was unlawful because Penal Law § 222.05(3) prohibits courts from determining reasonable cause to believe a crime has been committed based solely on the odor of cannabis or presence of cannabis in now-lawful amounts.

Signed into law on March 31, 2021 while Mr. Pastrana's appeal was pending before the Appellate Division and effective immediately, the Marijuana Regulation and Taxation Act (MRTA) added Penal Law § 222.05(3). In relevant part, that provision states that, "in any criminal proceeding ... no finding or determination of reasonable cause to believe a crime has been committed shall be based solely on evidence of ... the odor of cannabis" or the possession of cannabis in now-lawful amounts. The plain language of that provision, as shown in subpoint A, below, applied to the Appellate Division's determination of Mr. Pastrana's appeal. To the extent that the Appellate Division found this to be a question of retroactivity, that ruling missed the point: the statutory mandate as reflected in the provision's plain language anticipated and encompassed determinations on appellate review. But if the Court finds that plain language inconclusive, as shown in subpoint B, below, the Legislature's decision to make Penal Law § 222.05(3) effective immediately, together with, among other things, its legislative history showing its ameliorative

purpose—including the remedying of past wrongs—demonstrates that its standard was intended to apply to cases still pending on direct review on the date the MRTA became effective..

A. The plain language of Penal Law § 222.05(3) provides that the proscription against determining reasonable cause based solely on the odor of cannabis is the standard that applied on this appeal, because the appeal before the Appellate Division was a criminal proceeding.

The goal of statutory interpretation is to "effectuate the intent of the Legislature." *Patrolmen's Benevolent Ass'n of City of New York v. City of New York*, 41 N.Y.2d 205, 208 (1976). The words of a statute are the "clearest indicator of legislative intent." *Majewski v. Broadalbin-Perth Central School District*, 91 N.Y.2d 577, 583 (1998). Where the statutory language is "clear and unambiguous, courts must give effect to its plain meaning." *Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 91 (2001).

The MRTA's plain statutory language required the Appellate Divisoin to apply its proscription against finding reasonable cause based solely on the odor of cannabis to this appeal. The MRTA's odor-of-cannabis-cannot-supply-reasonable-cause prohibition applies "in any criminal proceeding." Penal Law § 222.05(3). By the express definitional provisions of the Criminal Procedure Law, a criminal appeal in the Appellate Division is a statutorily defined "criminal proceeding." The Criminal Procedure Law defines "criminal proceeding," in relevant part, as "any proceeding which ... (b) occurs in a criminal court and is related to a prospective, pending or

completed criminal action ....” CPL §1.20(18). Because the Appellate Division is a “criminal court” and an appeal from a criminal judgment is a proceeding that is “related” to a completed criminal action, the MRTA’s reasonable-cause limitation applied to Mr. Pastrana’s case on his appeal in the Appellate Division.

The appellate division is a criminal court. Criminal Procedure Law § 1.20(19) defines a criminal court as “any court defined as such in [Criminal Procedure Law] section 10.10.” Criminal Procedure Law § 10.10(1), in turn, defines “the ‘criminal courts’ of this state” as the “superior courts and local criminal courts.” Subdivision (2) of that same section states that the “‘superior court’ means ... “[t]he supreme court.” CPL § 10.10(1) & (2). The New York Constitution provides that the Appellate Divisions are a part of the Supreme Court. NY Const. Art. VI, § 1(a)(“There shall be a unified court system for the state. The statewide courts shall consist of the court of appeals, the supreme court including the appellate divisions thereof, ...”). Because a criminal appeal heard in the Appellate Division thus occurs in a criminal court, it is a “criminal proceeding” if it is “related to a ... completed criminal action.” CPL §1.20(18); cf. Criminal Procedure Law, Part Two–the Principal Proceedings –Title M–Proceedings After Judgment–Article 450–Appeals (Including Appeals within CPL Article 450 as one of the Criminal Procedure Law’s “Principal Proceedings”).[10]

[10]In the context of whether New York’s right to counsel protections under *People v. Rogers*, 48 N.Y.2d 167 (1979), extended to appellate counsel, the Third Department found that the

An appeal from a criminal judgment is related to a completed criminal action. The Criminal Procedure Law defines a "criminal action" differently from a "criminal proceeding." A criminal action begins with the filing of an accusatory instrument and ends with the imposition of sentence or other final disposition. CPL § 1.20(16). A direct appeal from a criminal conviction is "related" to a "criminal action" because its goal is to have the intermediate appellate court reverse, modify, or correct the result of the "criminal action." *See* CPL § 450.10 (providing that an appeal may be taken as of right from a "judgment, sentence and order of a criminal court"); § 470.15(2) ("Upon such an appeal, the intermediate appellate court must either affirm or reverse or modify the criminal court judgment, sentence or order"). Connecting these provisions, an appeal heard from a criminal conviction heard in the Appellate Division is a criminal proceeding because it occurs in a criminal court and is "related to a ... completed criminal action."

Because § 222.05(3) was effective at the time Mr. Pastrana's appeal was heard, and a criminal appeal in the Appellate Division is a criminal proceeding, its plain language prohibited the Appellate Division from making a "finding or determination

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Appellate division is not a criminal court. This Court affirmed on grounds unrelated to the question of whether the Appellate Division is a criminal court. 65 N.Y.2d 883 (1985), (declining to address the question framed by the appellate division, and instead finding that interrogation of defendant after waiver of *Miranda* rights while he was represented by counsel on an unrelated criminal appeal was not prohibited). For the reasons discussed in the text of this point, the Third Department's finding should not be followed, at least not in this context.

of reasonable cause to believe a crime [w]as ...committed ... based solely on evidence of ... the odor of cannabis" or the possession of cannabis in now-lawful amounts. A "determination" is the word the Legislature has denominated for the decision of an appeal from a criminal judgment. *See, e.g.*, Criminal Procedure Law 470.25, entitled "Determination of appeals by intermediate appellate courts; form and content of order"; § 470.35 (giving Court of Appeals power to review "[a]ny question of law which was *determined* by the intermediate court ...." (italics added)).

The Legislature's inclusion of the expansive modifier "any" in the statutory text stating that its limitation applies "in any criminal proceeding" shows that the provision was intended to have broad effect. *Kimmel v. State*, 29 NY3d 386, 393 (2017) (the Legislature's use of the word "any" in a statutory provision "imports no limitation") (emphasis in original), citing *Zion v. Kurtz*, 50 N.Y.2d 92, 104 (1980). Coupling the expansive word "any" with the broad statutorily defined term "criminal proceeding" shows that, if there is any doubt whether something fits the "criminal proceeding" definition, it should be resolved in favor of inclusion.

In examining these definitional provisions in *People v. Fabien*, 206 A.D.3d 436, 437 (1st Dep't 2022),[11] decided after this appeal, the First Department only partially addressed CPL § 1.20(18)'s definition of "criminal proceeding." That provision states,

[11]The Second, *People v. Badadzhanov*, 204 A.D.3d 685 (2d Dep't 2022), and Fourth, *People v. Vaughn*, 203 A.D.3d 1729, 1730 (4th Dep't 2022), Departments have similarly concluded that the MRTA does not apply to cases pending on direct appeal on the date it became effective.

in full, that "'Criminal Proceeding' means any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, either of this state or of any other jurisdiction." The First Department analyzed only subsection (a) limiting criminal procedure to only parts of a criminal action. 206 A.D.3d at 437. It's reading ignored subsection § 1.20(18)(b), which, as we have demonstrated, includes not only "criminal actions," but also "any proceeding" that is "related to a ... completed criminal action." The First Department's omission effectively substituted the constrained statutory phrase "criminal action" for the more expansive phrase "criminal proceeding." In so doing, it altered the Legislature's chosen phrase criminal proceeding, which by its plain terms includes direct appeals of criminal convictions in the Appellate Division. The determination of Mr. Pastrana's appeal was a criminal proceeding to which CPL § 222.05(3) applied.

Detective Veit's sole justification for opening and searching the locked glove box were two reasons prohibited by MRTA: he'd recovered a twist containing five grams[12] of marijuana from the floor in front of the front passenger's seat, and there was a "very strong" odor of marijuana in the passenger's side of the car, and "the last possible place it could have been" coming from was the glove box. Veit gave no other reason for the search of the glove box. The Appellate Division's determination that

[12]Five grams is less than one-fifth of an ounce. MRTA makes the possession of up to three ounces lawful. Penal Law § 222.05(1).

the odor of cannabis and the presence of a personal-use quantity of it on the car's floor gave Detective Veit probable cause to search was contrary to § 222.05(3)'s prohibition.

There is no need to look any further than the MRTA's unambiguous language and the corresponding statutorily defined terms, *People v. Galindo*, 38 N.Y.3d 199, 203 (2022), to conclude that Penal Law § 222.05(3) applied to the Appellate Division's determination. But if this Court finds that the language was not conclusive, rules of statutory construction and the statute's legislative history confirm that the Legislature intended that the reasonable-cause limitation applied to the Appellate Division's review of the suppression issue in this case.

B. To the extent that the statutory language leaves any room for ambiguity, the Legislature's decision to make Penal Law § 222.05(3) effective immediately, together with, among other things, its legislative history showing its ameliorative purpose—including the remedying of past wrongs—demonstrates that it was intended to apply retroactively.

Separate and apart from the question of whether section 222.05(3)'s plain statutory language requires that the standard forbidding a finding of reasonable cause based on the odor of cannabis cannot must be applied to cases pending on direct appeal in the intermediate appellate courts when it became effective, it should be applied retroactively to effectuate the Legislature's intent..

If nothing in a statute's text "expressly or by necessary implication" addresses whether it applies to criminal actions commenced before the date on which it became

law, competing rules of construction apply. On the one hand, "[i]t is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it." *Galindo*, 38 N.Y.3d at 207, *quoting Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1998). On the other, there is an "equally settled maxim ... that 'remedial' legislation or statutes governing procedural matters should be applied retroactively." *Majewski*, 91 N.Y.2d at 584. Ultimately, in a situation like this one, where a new statute is both ameliorative and deals with a procedural matter, these "general principles" are only guides for divining legislative intent, when other indications are not available. *Id.* None of these considerations are determinative. *See, Matter of Duell v. Condon*, 84 N.Y.2d 773, 783 (1995). Absent express language, the question of whether a statute should apply retroactively is a judicial decision, "made upon review of the legislative goal." *OnBank*, 90 N.Y.2d at 730 (quoting *Matter of Duell*, 84 N.Y.2d at 783)).

For at least five reasons, applying Penal Law § 222.05(3) to cases pending on direct review when it became effective, is consistent with the Legislature's intent.

First, the Legislature's decision to make the reasonable-cause-limitation provision take effect immediately shows legislative urgency. *Becker v. Huss, Co., Inc.*, 43 N.Y.2d 527, 541 (1978) (while a statute's language that it take effect immediately is a separate question from whether it applies retroactively, the inclusion of a take-effect

immediately provision "evinces a sense of urgency"). Because there is no statement in the MRTA that suggests the Legislature wished to apply its provisions only prospectively, the general rule in favor of retroactive application of remedial statutes that are to take effect immediately, should apply. *Id.* at 1209 (finding from the direction that a statute take effect immediately, "it must be inferred that the Legislature was interested in affecting as many cases as practicable").

Second, the odor-of-cannabis-cannot-provide-reasonable-cause provision would be superfluous if it applied prospectively—i.e., only to police action that took place after the MRTA's effective date—and there is a strong preference for avoiding constructions that render statutory provisions meaningless. *See Matter of OnBank & Trust Co.*, 90 N.Y.2d 725, 731 (1997) (declining to find an amendment to the Banking Law applied only prospectively, because such a reading would render a provision in the statute meaningless and unnecessary). A reading of section 222.05(3) that limited it to the conduct of police officers following its effective date, would render the provision unnecessary or meaningless. McKinney's Cons Laws of NY, Book 1, Statutes § 98[a] (it is a core principle of statutory construction that "effect and meaning must, if possible, be given to the entire statute and every part and word thereof"). This is so because cannabis in lawful amounts and the odor of it are now lawful. The odor of cannabis or its presence in personal use amounts cannot provide an officer reasonable cause to conduct a search, because reasonable cause to search

requires reliable information that a criminal offense has been committed and that evidence of the offense may be found in the place to be searched. *People v. Bigelow*, 66 N.Y.2d 417, 423 (1985); *People v. Maldonado*, 86 N.Y.2d 631, 635 (1995)("Reasonable cause means probable cause…."). There is no prospective need for a provision stating that a search cannot be based on the smell of cannabis or its presence in lawful amounts because those indicators can no longer provide probable cause for a search. The no-reasonable-cause provision only operates if it applies to conduct that occurred before its effective date. This confirms that the Legislature intended the statute to forbids the finding of reasonable cause in proceedings that occurred after the statute's effective date where the search occurred before the effective date.

Third, the Legislature has shown that it is perfectly capable of specifying when a provision of a criminal statute—including those relating to the admissibility of evidence—is only to begin application at some future date. *See e.g.*, L. 2017, c. 59, pt. VVV, § 13) (amending CPL § 60.45 relating to the admissibility of statements, and § 60.30 relating to the admissibility of photographic identifications, and providing, in part, [t]his act shall take effect immediately; provided, however that sections one and two of this act shall take effect April 1, 2018 and shall apply to confessions, admissions or statements made on or after such effective date"). That the Legislature chose not to include a prospective-application provision for searches based on the odor of cannabis means prospective application was not intended. This conclusion

reinforced here because the Legislature included other prospective-application provisions in the MRTA. *See, e.g.,* 2021 Sess. Law News of NY Ch. 92 (s.854-A)(McKinney's) § 64 (providing that the MRTA take effect immediately, except for specified provisions).

Fourth, the MRTA's legislative history is consistent with the plain language of the statute showing that it was designed to remedy prior harms, i.e, the historically discriminatory police practices involving the investigation of marijuana possession. On the date of the MRTA's enactment, legislators heralded the Act as "continuing [their] work to right the wrongs of [marijuana] prohibition" to "protect communities of color from over-policing." New York Assembly Debate, 2021 Ch. 92, Public Health Law, Marijuana Regulation & Taxation Act 6 (Mar. 30, 2021) (Bill Jacket) (statement of Assembly member and Majority Leader Peoples-Stokes). The MRTA's sponsor, Senator Liz Krueger, explained that the MRTA was specifically intended to remedy New York's "broken, unjust, and outdated" "marihuana policies," with particular emphasis on "discriminatory police practices that have perpetuated systematic racism and discrimination." New York State Senate Introducer's Mem. in Support 3 (Sen. Krueger) (Bill Jacket). Another legislator explained that although "[w]e'll never be able to repair the damage done to families torn apart by over-policing, targeted stops and frivolous arrests," passing the MRTA was "a historic step in the right direction to begin to address and und[o] those critical harms." New

York Assembly Debate, 2021 Ch. 92, Public Health Law, Marijuana Regulation & Taxation Act, 171-73 (Mar. 30, 2021) (Bill Jacket) (statement of Assembly member Anderson); *see also, e.g.*, New York Assembly Debate, 2021 Ch. 92, Public Health Law, Marijuana Regulation & Taxation Act 146-51 (Mar. 30, 2021) (Bill Jacket) (statement of Assembly member Kelles) (explaining that the MRTA was intended to "begin to undo and repair generations of harm caused by marijuana prohibition").

In early debates on the bill, legislators sought a means to "redefin[e] just cause" to stop citizens "[i]n communities of color," where "law enforcement often uses the odor of marijuana as a pretext to stop and search." Joint Legislative Hearing on Executive Budget on Taxes: Proposal for Cannabis Regulation 70:8-14 (Feb. 13, 2019) (Senator Ramos). In support of the Act, lawmakers often cited police practices such as "stop and frisk," borne out of racial profiling, which resulted in "Black [P]eople [being] arrested 15 times more frequently than White people on low-level marihuana charges." New York Assembly Debate, 2021 Ch. 92, Public Health Law, Marijuana Regulation & Taxation Act 206 (Mar. 30, 2021) [Bill Jacket] (statement of Assemblymember Rosenthal); *see also* New York Assembly Debate, 2021 Ch. 92, Public Health Law, Marijuana Regulation & Taxation Act 237 (Mar. 30, 2021) [Bill Jacket] (statement of Assemblymember Rodriguez) ("[T]his [law] takes the next step to really restore and provide opportunity for communities like mine that have been ravaged by the stop and frisk actions . . . .").

The legislators' consistent emphasis on addressing past and existing practices that targeted people of color and those from low income communities and remedying past harms confirms that the plain language interpretation addressing policing that occurred before the statute's effective date was intentional and not inadvertent. This is especially so because, as we have shown, there was no need to include a provision limiting police search authority after the statute's effective date, because the MRTA's decriminalization of cannabis effectively eliminated the smell or possession of cannabis as a basis of probable cause.

The Legislature not only explained it remedial purpose, but employed provisions designed to remedy those previously unfairly punished by marijuana laws. Those serving sentences for now-non-criminal conduct are entitled to automatic vacatur and expungement, in effect, applying the MRTA's Penal Law amendments retroactively. See, CPL § 440.46-a.

Fifth, that the Legislature designed the MRTA to remedy past injustices related to the enforcement of marijuana laws, like here, is confirmed by other provisions of the Act. For example, the MRTA amended New York's rules of criminal procedure such that convictions for a variety of marijuana offenses will be automatically expunged without any filings or fees. CPL § 160.50(5). And the Act created a new provision requiring the Chief Administrative Judge to "automatically" vacate, dismiss, and expunge a conviction for an offense that would no longer be illegal under the new

legislation. CPL § 440.46-a. These other provisions reflect that Legislature wished to offer relief for those who had suffered injury from unjust historic practices. The prohibition on the use of cannabis odor to establish probable cause should be read in harmony with that general purpose.

Thus, the plain language, effective-immediately implementation, and legislative history confirm that Penal Law § 222.05(3) presents the standard by which the legality of the search here should be measured for all cases that were pending on directly appeal on the date the MRTA became effective.

Point III

Under *New York State Rifle & Pistol Assn. v. Bruen*, 597 U.S.-, 142 S.Ct. 2111 (June 23, 2022), Penal Law § 265.03(3) was unconstitutional, and Mr. Pastrana's conviction for that offense violates the Second and Fourteenth Amendments and must be reversed and the indictment dismissed.

A. Relevant Law

The Second Amendment to the United States Constitution provides, in relevant part, "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation." Id. at 592. This right of "the people" to keep and bear arms for self-defense belongs to "all members of the political community, not an unspecified subset." *Id.* at 580; *see also id.* at 581

(announcing a "strong presumption" that the Second Amendment right "belongs to all Americans"). "[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010). Still, "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and exercise of the right can be subject to "lawful regulatory measures." *Heller*, 554 U.S. at 626-27, and fn. 26. Therefore, at the time Mr. Pastrana was arrested and charged, he had a fundamental right, subject to lawful regulation by the government, to possess a gun in public.

When Mr. Pastrana was indicted in 2015, New York's criminal weapon possession laws prohibited "only *unlicensed* possession of handguns." *People v. Hughes*, 22 N.Y.3d 44, 50 (2013) (emphasis in original). To grant a license to an applicant, among other criteria, the licensing officer had to find that "proper cause exist[ed]." former Penal Law § 400.00(2)(f).[13] "Proper cause" did not exist unless the applicant showed "a special need for self-protection distinguishable from that of the general community." *See In re Klenosky*, 75 AD2d 793 (1st Dep't 1980). An individual who possessed an unlicensed firearm outside their home or place of business could be charged with Penal Law § 265.03(3), a class C violent felony. *See*

[13]Penal Law § 400.00 was amended, effective September 4, 2022, in an effort to comply with *Bruen*. Among other things, the new version eliminated the "proper cause" requirement contained in former § 400.00(2)(f) and found unconstitutional by *Bruen*.

CPL § 265.20(3)(a)(exempting licensed possession of a pistol or firearm from prosecution).

In *Bruen*, the Supreme Court held that New York's licensing system unconstitutionally interfered with the fundamental right of a citizen to "keep and bear arms" in public. With respect to New York's licensing regulations, the Court found that the proper-cause requirement violated the Fourteenth Amendment in that it "prevent[ed] law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." Id. at 2156. New York's public-carry proper-cause requirement was contrary to our "Nation's historic tradition of firearm regulation," which drew no distinction between home and public possession and never required an individual to show good cause before exercising the fundamental right to bear arms. Id. at 2126, 2135, 2138 ("Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'").

B. Penal Law § 265.03(3) violated the Second Amendment.

Under the standard set forth by the Supreme Court in *United States v. Salerno*, to succeed on a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 745 (1987); *People v. Stuart*, 100 N.Y.2d 412, 421 (2003). Here, because Mr. Pastrana was convicted of violating a statute that, at the time, incorporated an unconstitutional licensing

regime, there is no set of circumstances under which the Penal Law provision would be valid.

Bruen's holding that New York's licensing regulations were unconstitutional rendered Penal Law § 265.03(3) unconstitutional. Penal Law § 265.03(3) provides, in pertinent part, that "[a] person is guilty of criminal possession of a weapon in the second degree when . . . such person possesses any loaded firearm." Since it was not Mr. Pastrana's possession of a firearm *per se* that was unlawful, but his unlicensed possession of the firearm, *see Hughes, supra*; CPL § 265.20(3)(a), the validity of the statute criminalizing Mr. Pastrana's firearm possession necessarily rose or fell with the constitutionality of the licensing regulations. Only "lawful" regulatory measures can restrict Second Amendment rights. *Heller*, 553 U.S. at 626-27 & n. 26 (Second Amendment right can be restricted through "*lawful* regulatory measures") (emphasis added). Otherwise, the state would be punishing constitutionally protected conduct.

The unconstitutional licensing regulations that New York had in place at the time Mr. Pastrana was charged did just that, rendering the Penal Law statute invalid by unconstitutionally criminalizing his fundamental right to bear arms. The Constitution bars punishing an individual for violating an unconstitutional, and therefore unlawful, licensing scheme. *See People v. Diaz*, Case No. 21FEI19850 (Sacramento Super. Ct, July 27, 2022) (available in separately provided "Compendium) (sustaining demurrer to firearm charges subject to licensing scheme containing

"proper cause" standard: "When the licensing statute and criminal statutes are considered together . . . the defendant cannot be punished for exercising his right to public carry").

Mr. Pastrana was not required to first futilely attempt to obtain a license under the facially unconstitutional licensing scheme in order to assert this challenge. *Smith v. Cahoon*, 283 U.S. 553, 562 (1931); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1939); *Staub v. City of Baxley*, 355 U.S. 313 (1958). Where a state statute requires a license in violation of a constitutional right, a person may not be prosecuted for failing to attempt to obtain that license. In *Staub*, a First Amendment case, the appellant was convicted of violating a city ordinance that prohibited solicitation of membership for an organization without a permit but had not applied for a permit before challenging the ordinance's constitutionality. *Id.* at 314-15, 322. The Court struck down the licensing scheme as invalid on its face. *Id.* at 325.

In reaching its decision to reverse appellant's conviction, the Court explained that "[t]he decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance." *Id.* at 319. "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Id. See also Shuttlesworth v. City of Birmingham*, 394 U.S. 147

(1969) ("a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license").

The failure to attempt to obtain a license to exercise a fundamental right under an unconstitutional licensing scheme is no barrier to challenging that scheme. *Bruen* held that the rights bestowed by the Second Amendment cannot be treated differently from rights protected by any other amendment, including, and especially, the First Amendment. "The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen*, 142 S.Ct. at 2156. The reasoning in *Staub* applies equally here. Just as appellant in *Staub* could not be punished for engaging in the exercise of their right of free expression without having attempted to secure a permit under the facially invalid statute, so too was Mr. Pastrana permitted to freely exercise his right to carry a firearm in the face of an unconstitutional licensing law without first attempting to secure a license.

At least one court has agreed. In *People v. Diaz*, Case No. 21FEI19850 (Sacramento Super. Ct, July 27, 2022), the Sacramento Superior Court, citing, *inter alia, Staub* and *Shuttlesworth,* sustained a demurrer—the equivalent of a dismissal motion—to the criminal weapon possession charges, finding "no reason to believe these holdings do not apply when the Second Amendment is at issue." *See Diaz, supra*, at

8-10. To the extent lower courts in New York have found differently on the issue of standing,[14] these decisions are wrong. *Staub* and *Shuttlesworth* provide unequivocal authority in the First Amendment context that an unconstitutional licensing scheme cannot interfere with one's exercise of a constitutionally protected right, and *Bruen* allows for no distinction between these constitutional rights of equal magnitude, *see Bruen*, 142 S. Ct. at 2156.

In any event, Mr. Pastrana was not required to attempt to obtain a license because it would have been futile for him to try. As the unconstitutional proper-cause requirement rendered Mr. Pastrana's attempt to obtain a New York concealed carry license futile, imposing an application requirement "would serve no purpose." *See Bach v. Pataki*, 408 F.3d 75, 82-83 (2d Cir. 2004)(internal quotation marks omitted)(holding that plaintiff's failure to apply for New York handgun license posed no obstacle to consideration of constitutional claims because, as a non-resident excluded from the license-application process, imposing an application requirement require a "futile gesture"), *cert. denied*, 546 U.S. 1174 (2006).

Nor is it a bar that Mr. Pastrana would have been ineligible to obtain a firearm license because he had two prior New York felony convictions, and former (and

[14] *E.g.*, *People v. Rodriguez*, 76 Misc.3d 494 (Sup. Ct. N.Y. Co. 2022); *People v. Williams*, -Misc.3d-, 2022 WL 3440484 (Sup. Ct. Kings Co. 2022).

current) Penal Law § 400.00(1)(c) rendered anyone previously "convicted anywhere of a felony" ineligible for a license.

Because the Second Amendment's plain text covers Mr. Pastrana's conduct, the Second Amendment "presumptively protects" it. *Bruen*, 142 S. Ct. at 2129–30, 2156 (reiterating that the Second Amendment guarantees to "all Americans" the right to keep and bear arms); *Heller*, 554 U.S. at 581 (noting that the Second Amendment right "belongs to all Americans"). *Bruen's* holding is not limited to the single discretionary licensing provision challenged by the *Bruen* plaintiffs and struck down by the Court. *Bruen* set out the "standard for applying the Second Amendment," and the Court then "appl[ied] that standard to New York's proper-cause requirement." *Bruen*, 142 S. Ct. at 2129, 2134. Its holding governs any attempt to constrain rights guaranteed by the Second Amendment.

To overcome that presumption of entitlement, the People "must affirmatively prove that its firearms regulation"—here, the prohibition covering persons "convicted anywhere of a felony"—is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S.Ct. at 2136.

That would be a difficult showing to make. Now-Justice Amy Coney Barrett and other jurists have concluded that "Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); *abrogated by New York State Rifle*

& Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111; *see, e.g., id.* at 453–64 (surveying history); *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("[S]tates did not start to enact [felony-based prohibitions on possession] until the early 20th century."); *Folajtar v. Att'y Gen. of U.S.*, 980 F.3d 897, 914 (3d Cir. 2020) (Bibas, J., dissenting) ("[T]he issue of disarming felons is open. Precedent does not settle its historical limits. Rather, we must analyze the history ourselves and ask: Were all felons, dangerous and nondangerous alike, equally excluded from the Second Amendment? No, they were not."); *United States v. Booker*, 644 F.3d 12, 23–24 (1st Cir. 2011)(finding that the federal ban on possession of a firearm by persons with prior felony convictions—18 U.S.C. § 922(g)(1)—"bears little resemblance to laws in effect at the time the Second Amendment was ratified"); *United States v. McCane*, 573 F.3d 1037, 1048 (10th Cir. 2009) (Tymkovich, J., concurring) ("more recent authorities have not found evidence of longstanding dispossession laws.").

Showing a historical tradition that Mr. Pastrana's prior convictions would have disentitled him to lawfully possess a weapon would be an especially difficult showing to make because both his prior convictions were for attempted criminal possession of a weapon second degree under former Penal Law § 265.03(2)[15](A957), which is itself "presumptively protect[ed]" by the Second Amendment. *Bruen*, 142 S. Ct. at

[15]Both Mr. Pastrana's prior attempted second-degree weapon possession convictions—in 2000 and 2005— were under former Penal Law 265.03(2), amended in 2006. 2006 Sess. Law News of N.Y. Ch. 742.

2129–30, 2156. While Penal Law former § 265.03(2) had, as an element, the intent to use that weapon unlawfully against another, the simple act of possessing the firearm was "presumptive evidence of intent to use the same unlawfully against another." Penal Law § 265.15(4). Thus, the People would be required to show that merely possessing a loaded firearm in the past, disentitled Mr. Pastrana from possessing a loaded firearm on the day of his arrest. *Bruen* would make this a difficult showing to make.

Accordingly, Mr. Pastrana's conviction for the act of possessing a firearm outside his home violated the Second Amendment. Though *Bruen* was decided after Mr. Pastrana was convicted, its holding applies to this appeal. Although it is all but certain that *Bruen* applies retroactively, it would apply to Mr. Pastrana's case in any event because his conviction is non-final. *See People v. Eastman*, 85 N.Y.2d 265, 275 (1995)("[W]hen a Supreme Court decision applies a well-established constitutional principle to a new circumstance, it is considered to be an application of an old rule, and is always retroactive;" new constitutional rules are applicable to cases which are not yet final before the new rules are announced.); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final," regardless of whether the new rule constitutes a "clear break" with the past).

Accordingly, Mr. Pastrana's conviction must be reversed and the charge dismissed.

* * *

Preservation is no bar to this Court's review. It would have been futile, if not frivolous, for Mr. Pastrana to have raised a Second Amendment challenge to Penal Law § 265.03(3)'s constitutionality, in light of this State's controlling law. In 2013, five years after the Supreme Court decided *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court, in *People v. Hughes*, denied a defendant's Second Amendment challenge to Penal Law § 265.03(3)'s prior-crime exception to the home or place of business exception by applying means-end, intermediate level scrutiny, notwithstanding *Heller*'s rejection of it. 22 N.Y.3d 44, 51-52 (2013); *see Bruen*, 142 S.Ct. at 2129 (noting that *Heller* "specifically ruled out the intermediate-scrutiny test"). At the time of Mr. Pastrana's 2015 arrest and 2018 suppression hearing, binding First Department law, following suit, had unequivocally held that the New York licensing scheme satisfied the Second Amendment. *See Matter of Delgado v. Kelly*, 127 A.D.3d 644 (1st Dep't 2015); *Matter of Esperon v. Kelly*, 125 A.D.3d 460 (1st Dep't 2015); *Matter of Caputo v. Kelly*, 117 A.D.3d 644 (1st Dep't 2014); *Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012). Any Second Amendment challenge would not only have been unsuccessful, but a waste of time and court resources.

As binding precedent within this State had consistently repudiated challenges to either the licensing regulations or the penal law, preservation does not apply. *People v. Patterson*, 39 N.Y.2d 288, 296 (1976) ("[T]here was no doubt in this State that the [court's instruction] was constitutionally valid [at the time of trial]. The defendant's failure to object to a practice deemed valid in this State cannot deprive him of the right to attack that practice when an intervening Supreme Court decision calls that practice into question."); *People v. Baker*, 23 N.Y.2d 307, 317 (1968).

CONCLUSION

For the reasons stated in Points I & II, the evidence obtained at the roadblock stop must be suppressed, and each of the convictions must be reversed, and the indictment dismissed; and, for the reasons stated in Point III, the weapon-possession conviction must be reversed and that count of the indictment dismissed.

Respectfully submitted,

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November 4, 2022

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WORD-COUNT CERTIFICATION

This brief was prepared in Wordperfect®, using a 14-point Garamond font (13-point in footnotes), and totaled 13,395 words, excluding Tables of Contents and Authorities, and this statement.