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ISSUES TO DEVELOP AT TRIAL

Bruen Series

July 2022

This month's Issues to Develop is devoted to supporting your post-Bruen litigation. Templates are provided at the end of this issue (in pdf) and on our website (in word) at https://www.appellate-litigation.org/forms-for-trial-practitioners/. *We hope in future Bruen-related ITDs to provide additional guidance as court and DA responses come in and new arguments emerge. For now, two post-Bruen decisions (one from New York Supreme and one from Sacramento Superior Court) are attached at Exhibit F*
Our goal in this issue is to provide you with a basic outline of the motions you can file and objections you can raise as your client's gun possession case moves through the proceedings. Because there are many potential factual and legal permutations, we do not attempt in this opening issue to address in detail every permutation. Instead, we hope to give you the tools to adapt the core guidance we provide, which focuses on a charge under Penal Law § 265.03(3) (loaded gun outside home or place of business). We provide some suggestions for addressing different situations at Exhibit D.

I. Background

In *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the Second and Fourteenth Amendments protect an individual's right to keep and bear arms for self-defense. In so doing, the Court held unconstitutional two laws that prohibited the possession and use of handguns in the home.

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. ___, slip op. No.20-843, 2022 WL 2251305 (June 23, 2022), the Supreme Court considered New York's "may-issue"permit regulations for outside-the-home possession, which required "proper cause"-essentially a special need for self defense. Slip op. at 30. The Court held that the "proper cause" requirement violated the Second and Fourteenth Amendments because the government could not establish that the requirement was supported by our "nation's historic tradition of firearm regulation." Slip op. at 62-63; see generally slip op. At 29-62 (reviewing historical evidence). Concurring, Justice Kavanaugh reiterated that, as stated in *Heller and McDonald,* the Second Amendment allows a "variety" of gun regulations, including prohibitions on the possession of firearms by "felons and the mentally ill," or forbidding the carrying of firearms in "sensitive places." *Kavanaugh concurrence at 3*.
Significantly, the Court expressly placed inside-the-home and public carry on equal

constitutional footing. "Nothing in the Second Amendment's text draws a home/public distinction with respect to bear arms." Slip op. at 23. As the right to bear arms for self-defense is "'*the central component* of the [Second Amendment] right itself,'" confining the right to bear arms to the home would "make little sense." *Id.* at 24, quoting *Heller* at 599 (emphasis and brackets in original). The Court stated that "many Americans hazard greater danger outside the home than in it." *Id.*

II. Applying *Bruen* where your client was charged with violating Penal Law § 265.03 (3) before *Bruen* was decided.

New York punishes the *unlicensed* possession of firearms. In other words, it is not the possession of a gun that is criminalized per se, but the unlicensed possession of a gun. *See People v. Hughes*, 22 N.Y.3d 44, 50 (2013) ("New York's criminal weapon possession laws prohibit only *unlicensed* possession of handguns. A person who has a valid, applicable license for his or her handgun commits no crime.") (emphasis in original); CPL § 265.20(3)(a) (exempting licensed possession of a pistol or firearm from prosecution). Accordingly, *Bruen*'s rejection of New York's licensing scheme allows for a host of challenges directed at charges predicated on your client's possession of an unlicensed firearm outside home or place of business[1] at various points in the proceedings:

- Motion to dismiss the indictment at arraignment or before a guilty plea
- Motion to dismiss the indictment/withdraw the plea before sentencing
- Constitutional challenge to classification and sentencing range
- Predicate challenge

We discuss each potential challenge briefly below, referencing, where applicable, the relevant template.

As noted above, our focus in this issue is on the most common scenario, a charge under Penal Law § 265.03(3). In the chart attached at Exhibit D, we set forth some factual and legal permutations, with recommendations for addressing these situations.

[1] It is possible you could challenge charges predicated on your client's in-home possession of a firearm, even though that possession was not subject to the "proper cause" requirement. *Compare* Penal Law §§ 400.00(1)(a)-(n) (regulations governing in home possession) *with* (former) Penal Law § 400.00(2)(f)(regulations governing public carry). We do not address such potential challenges in this issue.

Practice Note:

CPLR § 1012(b) requires Notice to the Attorney General when you are challenging the constitutionality of a statute. As the challenges to the indictment and to the sentencing classification and range for Penal Law § 265.03(3) suggested below involve constitutional challenges, provide Notice to the AG upon filing. We include a Template notice at Exhibit E.

a. Motion to dismiss the indictment at arraignment or before the guilty plea (see Template at Exhibit A attached, courtesy of Bronx Defenders with a huge thank you for their outstanding work and generosity).

CPL §§ 210.20 (1)(a) and 210.25 (3) provide that an indictment is defective and subject to dismissal on the ground that "[t]he statute defining the offense charged is unconstitutional or otherwise invalid." CPL § 255.20(1) provides for such motion to be made within 45 days of arraignment, with an extension available after that period for "good cause, CPL § 255.20(3).

A motion to dismiss is cognizable after *Bruen* on the grounds that Penal Law 265.03(3) is unconstitutional. Since it was not your client's possession of a firearm that rendered his conduct unlawful, but his *unlicensed* possession of a firearm, *see Hughes, supra*, the penal law statute embedding the unconstitutional regulations necessarily violates your Second and Fourteenth Amendment rights as well.

We recommend limiting this motion to clients who do not have a prior felony conviction. We believe you will face an insurmountable counter-argument to the effect that your client could never have gotten a license due to his predicate felony and thus lacks standing to challenge the statute. However, practitioners may disagree about our position (which we explain more fully at Exhibit D with a brief primer on standing), and ultimately, it is your decision as to what's in your client's best interests. For those who want to pursue a challenge on behalf of a client who has a predicate, we offer a suggestion at Exhibit D.

b. Motion to dismiss indictment/withdraw guilty plea (see Template at Exhibit B, attached. Shout-out again to Bronx Defenders!)

If your client had already pleaded guilty when *Bruen* came down, you can still move to dismiss the indictment before sentencing. *See* CPL § 255.20(3)(providing that "the court must entertain and decide, on its merits," an appropriate pre-trial motion on grounds where "the defendant could not, with due diligence, have been previously aware, or for other good cause, could not reasonably have been raised within the period specified . . . .").

You can also move to withdraw your client's guilty plea as unknowing and involuntary in violation of due process on the theory that "where a defendant is under the mistaken impression that "non-criminal conduct is criminal," the guilty plea is "unintelligent and constitutionally

invalid." *See Magnus v. United States*, 11 A.3d 237, 244 (D.C. 2011) (holding that defendant was entitled to an evidentiary hearing on a claim based on court rulings postdating his guilty plea). This is the case even where that mistaken impression is clarified and corrected only after a guilty plea by a "subsequent court ruling." *See id.*

The voluntariness of a guilty plea, the constitutionality of the statute under which the defendant was convicted, and a jurisdictionally defective indictment are claims that survive a guilty plea, so we appellate practitioners can raise them on appeal even if the court denies your motions. The voluntariness of the plea and jurisdictionally defective indictments are also among the issues that survive an appeal waiver.

c. Constitutional Challenge to § 265.03(3)'s Classification and Sentence Range (see Template at Exhibit C).

If the court rejects your challenges to the indictment and guilty plea, you can attack the constitutionality of Penal Law §§ 70.02 (2)(a) and 70.02(3)(b) which classify Penal Law § 265.03(3) as a class C violent felony and mandate a determinate term of imprisonment from three and one-half up to fifteen years. The theory, which we recommend raising in a motion filed before sentencing, rests on the premise that *Bruen* put in-home and public carry on equal constitutional footing. Therefore, the argument goes, the legislature's classification of § 265.03(3) – essentially, the offense criminalizing unlicensed public carry– as a violent felony, with the attendant severe penalty range, violates the Second, Fourteenth and Eighth Amendments because even if your client stands convicted of unlicensed public possession, the penalties should not exceed those imposed for in-home possession (a misdemeanor or non-violent E felony).

This motion is not available to clients with prior convictions or who are charged with possessing an assault weapon. This is because CPL § 265.03(3) punishes (via cross-reference to CPL § 265.02(1) and (7)) the in-home possession of a loaded firearm as a class C violent felony under those circumstances. Therefore, the sentencing disparity based on a comparison to in-home possession won't work for those clients.

We do, however, propose a different due process sentencing argument to make for clients with prior convictions – that it violates due process to punish the mere possession of a firearm as severely as violent crimes such as robbery, homicide, and assault, and, in the case of mandatory persistent felony offenders, as murder. We hope to provide a template for this argument in a later issue in this *Bruen* series.

Since illegal sentences survive appeal waivers, and since an unconstitutional sentence is illegal, this claim would survive an appeal waiver.

If the court rejects your constitutional challenge, you can still make the commonsense argument that your client should not receive more than the minimum for engaging in conduct — public carry – that, while unlicensed, is not qualitatively different from in-home possession under the

Constitution. Public carry is not a lesser Second Amendment right. Marshal any facts supporting your client's possession for purposes of self-defense.

Excessive sentence claims survive a guilty plea but generally do not survive valid appeal waivers. (We rarely see valid appeal waivers though).

d. Predicate Challenge - to be made when your client has been convicted of any felony, and the prosecution proffers a firearm possession offense as the predicate felony to enhance the sentence.

If the prosecution files a predicate felony statement naming a firearm offense as the predicate, challenge the predicate as unconstitutionally obtained in violation of your client's Second Amendment rights. *See,* e.g., CPL § 400.21(5), (7)(b) (setting forth procedure for challenging constitutionality of prior conviction). The arguments set forth in connection with the motion to dismiss the indictment and plea withdrawal motions will also inform your predicate challenge (in other words, that the statute is unconstitutional and that, if a guilty plea, that the plea violates due process).

Should the prosecution argue that *Bruen* doesn't apply to your predicate challenge because it was decided after the predicate conviction became final, argue that *Bruen* does apply retroactively to the predicate. It is not a new rule (a) given the historical analysis that informs the entire opinion; and (b) because it sets forth a rule of substantive Second Amendment law, not a rule of criminal procedure. *See Bousley v. United States, 523 U.S. 614, 620 (1998) (*holding that *Teague v. Lane's* presumption of non-retroactivity "applies only to procedural rules" and is "inapplicable to the situation where [the Supreme Court] . . . decides the meaning of a criminal statute); *United States v. Sood*, 969 F.2d 774, 774 (9th Cir. 1992); *Ingber v. Enzor*, 841 F.2d 450, n.1 (2d Cir. 1988); *cf. People v. Smith*, 28 N.Y.3d 191, 206-209 (2016)(holding that *People v. Catu's* automatic plea vacatur rule was a new rule of criminal procedure and therefore did not retroactively apply to pre-*Catu* predicate convictions).

Again, as a sentence enhanced by an unconstitutional predicate would be illegal, appellate practitioners could raise this claim notwithstanding any appeal waiver.

III. Suppression arguments

If your client was arrested and charged with firearm possession after a street encounter or traffic stop, consider how law enforcement's observations can be assailed after *Bruen*.

- If the cop claims that your client's so-called furtive conduct in the car or on the street

contributed to a reasonable suspicion that he had a gun,

- ☐ Argue that since your client had a constitutionally protected right to possess a gun, his conduct – even if it could be interpreted as trying to conceal a gun - was innocent. He was only acting furtively, in fact, because New York had unconstitutionally burdened his right to possess a gun in public. The only caveat is arguably if the cop knew that your client would never have qualified for a license (ie, had a prior felony). Under those circumstances, an inference of criminality could perhaps be drawn from his furtive conduct, but that is extremely unlikely to be the case (but see Exhibit D, which provides arguments for countering the prior felony bar).

- ☐ That your client was arrested before *Bruen* doesn't sanction the stop because New York has no good faith exception. *See People v. Bigelow*, 66 N.Y.2d 417, 427 (1985).

- The observation of a bulge in a pocket or waistband does not provide grounds for a stop and frisk, as, again, there is no basis for drawing an inference of criminal possession of a gun from that observation. Your client has a protected Second Amendment right to possess a gun in public.

- Information, whether from an identified citizen or an anonymous tip, should not provide, the police with anything more than a basis to conduct a minimal inquiry (a level one), not to aggressively question or seize your client, since the information does not establish criminal activity.

- If the cop claims that the neighborhood where your client was stopped had a higher incidence of gun possession, and that contributed to reasonable suspicion,

  - ☐ Argue that, even if true, a higher incidence of gun possession only means more people were exercising their constitutionally protected right to publicly carry guns, and do not allow an inference of criminality. *See our June 2022 Issues to Develop for more "high crime" neighborhood challenges.*

See next page for more

Practice Note:

On July 1, 2022, the Governor signed into law revised regulations meant to align with *Bruen*. Clients charged after passage of the new regulations will need to argue that the new provisions are also unconstitutional.

Although we do not undertake a comprehensive discussion of these new provisions in this issue, we offer two immediate points. First, the new regulations cannot be applied retroactively to cure any defect related to your client's *Bruen*-related case, as that would be an *ex post facto* violation. The new regulations are also irrelevant. At the time of your client's possession, he was subject to the unconstitutional law that was on the books, not some new, purportedly more favorable, law.

Second, at least one of the requirements that carried over from the former regulations to the new ones can be challenged on grounds similar to those that doomed "proper cause." Both the old and new regulations require that the applicant have "good moral character." So, should you have a client charged under the new licensing regime OR should the DA in your *Bruen* case respond to your motion to dismiss by saying your client would not have gotten a license anyway because he lacked "good moral character," argue that a good-moral-character standard vests "broad discretion" in state agents to apply a vague standard that ultimately cannot constitutionally justify denying a fundamental right in the first place. *Olivera v. Kelly*, 23 A.D.3d 216 (1st Dept. 2005). New Yorkers retain basic fundamental rights even where the State determines that they lack "good moral character" (whatever that means). We doubt the State will even come close to justifying this provision with any historical tradition. And *Bruen* itself rejects it as *Bruen* repeatedly referred to the right of "law-abiding citizens" to possess firearms, that is, those without criminal records, not those who seem to have "good moral character."

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM -- XXXX

THE PEOPLE OF THE STATE OF NEW YORK

-against-

NOTICE OF MOTION TO DISMISS

XXXX XXXX,

Ind. No. XXXX

Defendant.

PLEASE TAKE NOTICE, that upon the annexed affirmation of XXXX, Esq. and the prior proceedings in this case, the undersigned will move this Supreme Court, Criminal Term, Part XXXX, on the XXXX day of XXXX, 2022, at 9:30, or as soon thereafter as Counsel may be heard for an Order dismissing the [XX count of the] indictment pursuant to the Second Amendment of the United States Constitution.

DATED: Bronx, New York
XXXX

_____
XXXX, Esq.
THE BRONX DEFENDERS
360 East 161st Street
Bronx, NY 10451
ruthh@bronxdefenders.org

TO: DARCEL D. CLARK
District Attorney
Bronx County
Attn: A.D.A. XXXX
Served via email at XXXX

Clerk of the Supreme Court, Criminal Term
Bronx County

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM -- PART XXXX

THE PEOPLE OF THE STATE OF NEW YORK

-against-

AFFIRMATION

XXXX XXXX, Ind. No. XXXX

Defendant.

[Attorney], an attorney duly admitted to practice law in New York State, affirms the following to be true:

1. I am associated with The Bronx Defenders, and am attorney of record for [Client]. I am familiar with the facts of this case and the prior proceedings held in it.

2. This affirmation is made in support of [Client]'s Motion to Dismiss.

3. Unless otherwise indicated, all allegations of fact are based upon inspection of the record in this case, initial investigations of the facts and circumstances surrounding the incident, and discussions with the assigned assistant district attorney, and are made on information and belief.

4. [Client] was arrested on [date] and charged with Criminal Possession of a Weapon in the Second Degree in violation of P.L. § 265.03(3).

5. [Factual allegations against client – note that client did not use gun, no proof of intent to use unlawfully against another/no intent to use other than in self defense, note whether gun was in home or outside home, if client has no criminal record

or no (violent) felony record, if client was over the age of 21 at the time, etc., was indigent and therefore couldn't pay for gun licensing fees]

6. At the time of [Client]'s charged conduct, P.L. § 265.03(3) made it a class C violent felony to possess a loaded firearm outside of a person's home or place of business unless such person had a license to carry a firearm pursuant to P.L. § 400.00. In order to obtain a license to carry a firearm, a licensing officer had to find "proper cause" to issue such license, and even then, the officer had discretion to deny the license. An individual's generalized interest in self-defense could not establish "proper cause."

7. In *New York State Rifle & Pistol Assn v. Bruen*, issued on June 23, 2022, the United States Supreme Court struck down this licensing scheme as violating the Second Amendment of the United States Constitution. Slip Op. No. 20-843 (June 23, 2022).

8. [Client] was charged under P.L. § 265.03(3) for no other reason than [he/she/they] allegedly possessed a firearm without a license to carry such firearm under an unconstitutional licesnsing scheme.

DATED: Bronx, New York
[Date]

_____
[Attorney name], Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM -- PART XXXX

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MEMORANDUM OF LAW

XXXX XXXX, Ind. No. XXXX

Defendant

MEMORANDUM OF LAW

I. The Second Amendment Protects [Client's] Right to Carry a Firearm in Public

[Client] respectfully requests that this Court dismiss with prejudice [all the firearms and ammunition charges, Counts X through X/the indictment] due to a legal impediment, pursuant to C.P.L. §210.20(1)(h) and the incorporated Second Amendment. Criminal Procedure Law § 210.20(1)(h) allows the accused to move for dismissal of an indictment, or counts of an indictment, when there exists a "jurisdictional or legal impediment to conviction." *See also People v. Swamp*, 84 N.Y.2d 725 (1995); *cf. People v. Aviles*, 28 N.Y.3d 497 (2016). The Supreme Court of the United States has held that the incorporated Second Amendment protects the right of individuals to possess and carry firearms and ammunition. As such, these counts must be dismissed as violations of this right.

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, 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."). "[I]t is clear that the 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).

II. The Indictment Should Be Dismissed Because, but for New York State's Unconstitutional Gun-Licensing System, [Client] Would Have Been Able to Legally Possess the Firearm [He/She/They] Is Charged with Possessing

In order to lawfully carry a firearm in public in New York, the government requires citizens to first obtain a license. To grant a license to an applicant, among other criteria, the licensing officer must find that "proper cause exists." P.L. § 400.00(2)(f). "Proper cause" has been defined in case law as "a special need for self-protection distinguishable from that of the general community." *See In re Klenosky,* 75 AD2d 793 (1st Dept. 1980). New York law criminalizes possession of a firearm without first obtaining this license. P.L. § 265.03(3); *see also People v. Hughes*, 22 N.Y.3d 44, 50 (2013) ("New York's criminal weapon possession laws prohibit only *unlicensed* possession of handguns") (emphasis in original). Recently, in *New York State Rifle & Pistol Assn v. Bruen*, the United States Supreme Court struck down New York's public carry licensing system, holding that it unconstitutionally interferes with citizens' Second Amendment rights. Slip Op. No. 20-843 (June 23, 2022). The Court stated that "New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id.* at 63. The Court explicitly took issue with the discretionary nature of New York's licensing scheme, contrasting it to systems in other states that

"contain only 'narrow, objective, and definite standards' guiding licensing officials, rather than requiring the 'appraisal of facts, the exercise of judgment, and the formation of an opinion" as New York's system does. *Id*. at 30, n. 9 (internal citations omitted).

In this case, [Client] is facing criminal charges solely on the basis that [she/he/they] did not obtain a license to carry a firearm. Because the licensing system is unconstitutional, this Court must dismiss the indictment.

The Constitution does not require [Client] to first attempt to obtain a license under the facially unconstitutional licensing scheme, only to be denied. *Smith v. Cahoon*, 283 U.S. 553, 562 (1931); *Lovell v. City of Griffin,* 303 U.S. 444, 452 (1939). The Court addressed this issue in analogous circumstances in *Staub v. City of Baxley*, 355 U.S. 313 (1958). In that case, the appellant was convicted of violating a city ordinance that prohibited solicitation of membership for an organization without a permit. *Id.* at 314. The appellant did not apply for the appropriate license prior to soliciting membership from the employees of another company, in direct contravention of the ordinance. *Id.* at 315. However, the ordinance granted the mayor and council of the city "unfettered discretion" in their decision to grant or refuse the required permit, "without semblance of definitive standards or other controlling guides." *Id.* at 322. The Court struck down the licensing scheme as invalid on its face, as it made enjoyment of First Amendment freedoms "contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgement by the First Amendment[.]" *Id.* At 325. In reaching its decision to reverse the 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.*

The Court in *Bruen* held that the rights bestowed by the Second Amendment should be treated no differently than rights protected by any other amendment, including 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,* No. 20-843 at 62. Therefore the reasoning in *Staub* applies equally in this case. Just as the appellant in *Staub* could engage in the exercise of their right of free expression despite having made no attempt to secure a permit under the facially invalid statute, so too was [Client] permitted to freely exercise [his/her/their] right to carry a firearm in the face of an unconstitutional licensing law without first attempting to secure a license.

The D.C. Court of Appeals has specifically addressed the issue of a defendant's failure to seek a license in the context of firearm possession. In *Heller*, the Supreme Court held that the Second Amendment guarantees "an individual right to possess and carry weapons in case of confrontation," invalidating Washington, D.C.'s near total ban on handgun possession. 554 U.S. at 592. In the wake of *Heller*, the D.C. Court of Appeals held that defendants could move to dismiss indictments charging them with firearms possession under the unconstitutional statute, even where they never applied for licenses for the firearms under the statute. *See Plummer v. United States*, 983 A.2d 323, 341-42 (D.C. 2009) (citing *Chicago v. Atchinson, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 89 (1958)). This was so even where the defendant had pled guilty to unlawful possession prior to the decision in *Heller*. *Magnus v. United States*, 11 A.3d 237 (D.C. 2011).

More specifically, the court in *Magnus* held that, "unless the government proves the defendant was disqualified from exercising his Second Amendment rights," it is "impermissible

under the Second Amendment to convict a defendant" for unlicensed possession of a firearm if an unconstitutional licensing scheme made it "impossible" for the defendant to obtain a license. *Id*. at 242-43. Here, the "proper cause" requirement made it "impossible" for [Client] to obtain a license to carry a firearm because [he/she/they] could not distinguish [his/her/their] interest in self-defense from that of the general community. New York courts have made clear that, to obtain a license to carry a firearm, the applicant must provide evidence "of personal threats, attacks or other extraordinary danger to personal safety." *Bruen*, No. 20-843 at 3 (citing *In re Martinek*, 294 A.D.2d 221, 222 (2002)). The New York licensing law is "almost engineered" to preclude "most citizens" from exercising a fundamental, enumerated constitutional right. *See Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (addressing Washington D.C.'s nearly identical "good cause" requirement for gun licenses).

[IF CLIENT IS CHARGED WITH OTHER FIREARMS OFFENSES THAT ARE LESSER INCLUDED OFFENSES OF 265.03(3) (including 265.01-b (not in home), 265.01 or ammunition charges): [Client] is also charged with XXXX, XXXX, and XXXX. These charges are lesser included offenses of P.L. § 265.03(3) and the only basis for the charges is that [Client] did not have a license to carry a firearm. [Client] is facing these charges only because [he/she/they] did not obtain a license under an unconstitutional licensing scheme. They must therefore be dismissed as well.

Because the Supreme Court has found New York's gun licensing scheme to be unconstitutional, and because the prosecution cannot show that [Client] was "disqualified from exercising [his/her/their] Second Amendment rights," this Court must dismiss [the charge of Criminal Possession of a Weapon/all firearms charges/the indictment]. *See Magnus*, 11 A.3d 237 at 242-43.

No prior application for the relief herein requested has been made.

WHEREFORE, the undersigned requests that the foregoing motions be granted and requests such other and further relief as this Court may deem just and proper.

DATED: Bronx, New York
[Date]

_____
[Attorney], Esq.
Attorney for [Client]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX, CRIMINAL DIVISION PART ____

_____

THE PEOPLE OF THE STATE OF NEW YORK

-against- Affirmation of Service by E-mail

[CLIENT NAME], IND. NO. _____

Defendant

_____

I, [ATTORNEY NAME], an attorney duly admitted to practice law in the State of New York, under penalty of perjury and pursuant to Rule 2106 of the CPLR, hereby affirm that the following statements are true, except those based upon information and belief, which I believe to be true:

1. I am an attorney at The Bronx Defenders. I am over eighteen years of age and am not a party to this action.
2. On [DATE] I served a true copy of [NAME OF MOTION] upon [ADA NAME], the assigned Assistant District Attorney ("ADA") in this action, by transmitting the same via electronic means to the following e-mail address: [email address], which is the email address provided by such ADA for service upon written consent / through which I have exchanged correspondence with the assigned ADA in this action.
3. On [DATE] I served a true copy of the attached [NAME OF MOTION] upon New York Attorney General Letitia James by mailing a true copy of the attached papers, enclosed and properly sealed in a postpaid envelope, which I caused to be deposited in an official depository under the exclusive care and custody of the United States Postal Services within the State of New York addressed to Attorney General Letitia James the Attorney

General of New York at: Office of the Attorney General, 28 Liberty Street, New York, NY 10005, ATTN: Managing Attorney's Office/Personal Service.

DATED: Bronx, NY
[DATE]

_____

[ATTORNEY NAME]
The Bronx Defenders
360 E. 161 St.
Bronx, NY 10451
(718) 838-7878
_____@bronxdefenders.org

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM -- XXXX

THE PEOPLE OF THE STATE OF NEW YORK

-against-

XXXX XXXX,
Defendant.

NOTICE OF MOTION TO WITHDRAW PLEA PURSUANT TO C.P.L. § 220.60(3) AND DISMISS INDICTMENT

Ind. No. XXXX

PLEASE TAKE NOTICE, that upon the annexed affirmation of XXXX, Esq. and the prior proceedings in this case, the undersigned will move this Supreme Court, Criminal Term, Part XXXX, on the XXXX day of XXXX, 2022, at 9:30, or as soon thereafter as Counsel may be heard for an Order granting the following relief:

1. Granting [CLIENT] motion to withdraw his previously entered plea of guilty pursuant to C.P.L. § 220.60(3);
2. Dismissing the [XX count of the] indictment, on the ground that such statute, either in whole or as applied, is in violation of the Second Amendment of the United States Constitution, and in the interests of justice;
3. Granting such additional relief as the Court deems just and proper.

DATED: Bronx, New York
XXXX

XXXX, Esq.
THE BRONX DEFENDERS
360 East 161st Street
Bronx, NY 10451
[EMAIL]@bronxdefenders.org

TO: DARCEL D. CLARK
District Attorney
Bronx County
Attn: A.D.A. XXXX
Served via email at XXXX

Clerk of the Supreme Court, Criminal Term
Bronx County

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM -- PART XXXX

THE PEOPLE OF THE STATE OF NEW YORK

-against-

AFFIRMATION

XXXX XXXX, Ind. No. XXXX

Defendant.

[Attorney], an attorney duly admitted to practice law in New York State, affirms the following to be true:

1. I am associated with The Bronx Defenders, and am attorney of record for [Client]. I am familiar with the facts of this case and the prior proceedings held in it.

2. This affirmation is made in support of [Client]'s Motion to withdraw his plea and dismiss the indictment.

3. Unless otherwise indicated, all allegations of fact are based upon inspection of the record in this case, initial investigations of the facts and circumstances surrounding the incident and discussions with the assigned assistant district attorney, and are made on information and belief.

4. [Client] was arrested on [date] and charged with Criminal Possession of a Weapon in the Second Degree in violation of P.L. § 265.03(3) [ADD other charges as applicable, including 265.01-b and 265.01 to the extent charged in the indictment for unlicensed possession OUTside the home/business].

5. [Factual allegations against client – note that client is not alleged to have used gun, no proof of intent to use unlawfully against another/no intent to use other than in self defense, note whether gun was in home or outside home, if client has no criminal record or no (violent) felony record, if client was over the age of 21 at the time, etc., was indigent and therefore couldn't pay for gun licensing fees]

6. At the time of [Client]'s charged conduct, P.L. § 265.03(3) made it a class C violent felony to possess a loaded firearm outside of a person's home or place of business unless such person had a license to carry a firearm pursuant to P.L. § 400.00. Under that statutory scheme, a licensing officer could only issue a license to carry a firearm upon a finding of "proper cause" to issue such license, and even then, the officer had discretion to deny the license. An individual's generalized interest in self-defense could not establish "proper cause."

7. On June 23, 2022, the United States Supreme Court in *New York State Rifle & Pistol Assn v. Bruen*, struck down this licensing scheme as violating the Second Amendment of the United States Constitution. Slip Op. No. 20-843 (June 23, 2022).

8. [Client] was charged under P.L. § 265.03(3) for no other reason than [he/she/they] allegedly possessed a firearm without a license to carry such firearm under an unconstitutional licesnsing scheme.

9. Prior to the Court's decision in *Bruen*, on [DATE OF PLEA], [Client] accepted the prosecution's offer [describe the terms of the plea offer – dismissed xyz counts/plea to xyz in full satisfaction of the indictment with promised sentence, etc] and entered a plea of guilty to [describe the plea and the promised sentence]. The matter was adjourned to [Sentencing date] for sentencing.

10. [Client]'s plea of guilty was based on mistaken beliefs that his conduct was not constitutionally protected when, in fact, such conduct is -- and always was – protected by the Second Amendment of the United States Constitution. [Client's] plea of guilty was not knowing and intelligently [or voluntarily] entered. He now moves this Court, pursuant to C.P.L. § 220.60(3), to permit [Client] to withdraw his plea of guilty and to dismiss the indictment [THIS WILL DEPEND ON THE COUNTS].

DATED: [Date]

Bronx, New York

_____

[Attorney name], Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM -- PART XXXX

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MEMORANDUM OF LAW

XXXX XXXX, Ind. No. XXXX

Defendant

MOTION TO WITHDRAW PLEA OF GUILTY PURSUANT TO C.P.L. § 220.60(3)

[Client] requests that this court exercise its discretion to permit [him/her/them] to withdraw [his/her/their] plea to [count XX of] the indictment. A court, pursuant to C.P.L. § 220.60(3), may exercise its discretion to permit a defendant who has entered a plea of guilty to any part of an indictment to withdraw such plea. C.P.L. § 220.60(3), s*ee, e.g., People v. McTootle*, 307 N.Y. 889 (1954) (holding that trial court abused its discretion in refusing to grant defendant's motion to withdraw his plea where the circumstances of the plea were coercive). Trial courts are endowed with broad discretion to grant motions under C.P.L. § 220.60, including by conducting fact-finding inquiries. *People v. Mitchell*, 21 N.Y.3d 964, 966 (2013); *cf. People v. Feliciano*, 71 A.D.2d 571, 572 (1st Dept. 1979) (Fein, J. P., and Sandler, J., dissenting) (discussing the "very general" standard governing motions made under C.P.L. § 220.60). Here, the Court should exercise its discretion and permit [Client] to withdraw [his/her/their] plea and dismiss the indictment, as the plea was entered based on a misunderstanding of the charged conduct and the constitutionality of the charges at issue, and therefore was not knowing, intelligent, and voluntary.

"A plea of guilty is constitutionally valid only to the extent that it is voluntary and intelligent." *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)); *see also People v. Peque*, 22 N.Y.3d 168, 184 (2013) ("To ensure that a criminal defendant receives due process before pleading guilty . . . a trial court bears the responsibility to confirm that the defendant's plea is knowing, intelligent and voluntary"). Where a defendant is under the mistaken impression that "non-criminal conduct is criminal," the guilty plea is "unintelligent and constitutionally invalid." *See Magnus v. United States*, 11 A.3d 237, 244 (D.C. 2011) (holding that defendant was entitled to an evidentiary hearing on a claim based on court rulings postdating his guilty plea). This is the case even where that mistaken impression is clarified and corrected only after a guilty plea by a "subsequent court ruling." *See id.* Thus, where such a ruling "makes clear that the defendant's charged conduct was constitutionally protected and could not have been criminalized," a court must entertain a challenge to the validity of that plea. *Id.*

The Supreme Court has, accordingly, permitted individuals to challenge convictions based on subsequent court rulings adopting narrower interpretations of the crimes of conviction. In *Bousley*, the petitioner had pleaded guilty to "using" a firearm in violation of 18 U.S.C. § 924(c)(1), five years before the Supreme Court held in *Bailey v. United States*, 516 U.S. 137, 144 (1995) that "use" in the context of that statute required "active employment of the firearm." *Bousley*, 523 U.S. at 616. In attacking the validity of his plea, the petitioner maintained that his guilty plea was "unintelligent," and therefore invalid, because "neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he had been charged." *Id.* at 618. In remanding the case for the petitioner to make a showing of actual innocence in the lower court, the Supreme Court acknowledged, "Were this contention [that the petitioner, his counsel, and court

misunderstood the elements of the charges] proved, petitioner's plea would be . . . constitutionally invalid." *Id.* at 619.

In *Magnus*, the District of Columbia Court of Appeals reversed a trial court's denial of a motion to withdraw a guilty plea to a statute criminalizing conduct that a subsequent court ruling held was constitutionally protected. There, the defendant entered guilty pleas to firearms related offenses prior to higher courts handing down three decisions interpreting the Second Amendment of the United States Constitution, namely, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Plummer v. United States*, 983 A.2d 323 (D.C. 2009); and *Herrington v. United States*, 6.A.3d 1237 (D.C. 2010). *Magnus*, 11 A.3d at 242-43. Those decisions dramatically expanded the controlling view of Second Amendment protections, extending such protections, respectively, to safeguard an individual's right to keep and bear arms for the purposes of self-defense; to possess an unregistered handgun in the home; and to possess handgun ammunition in the home. *Id.* After his plea and sentencing, Magnus challenged his conviction based on those later decisions. *Id.* The Court of Appeals for the District of Columbia reasoned that, because Magnus "did not know when he pleaded guilty" that the statutes of conviction "constitutionally could not reach" certain conduct protected by the Second Amendment, Magnus was entitled to a hearing based on his challenge to his convictions, at which a court would be required to rule on the Second Amendment challenge to his convictions.[1] *Id.* at 244.

The Supreme Court has offered an additional conception of a defendant's right to attack a plea on the basis of core constitutional rights. In *Menna v. New York*, it permitted a defendant to challenge a plea on double jeopardy grounds, holding that even a plea that is knowing, intelligent,

[1] The Court in *Magnus* ordered a hearing on whether his conduct was constitutionally protected, instead of setting aside the conviction, only because the record left as "an open question" whether Magnus' conduct was, in fact, protected by the Second Amendment, given that his conduct arguably involved the unlawful *use* of a firearm, and not just simple possession. *See id.*at 244-45.

and voluntary does not waive a criminal defendant's claim that "the charge is one which the State may not constitutionally prosecute." 423 U.S. 61, 62 (1975) (citing *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)). Similarly, in *Blackledge*, the court affirmed the granting of a writ on double jeopardy grounds, rejecting the government's claim that the respondent's "guilty plea . . . precluded [him] from raising his constitutional claims." 417 U.S. at 29. In so ruling, the court reasoned that the respondent's claim "went to the very power of the State to bring the defendant into court to answer the charge brought against him." *Id.* at 30. The court powerfully articulated the holdings of these cases in *United States v. Broce:* "[T]he concessions implicit in the defendant's guilty plea [in *Blackledge* and *Menna*] were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all." 488 U.S. 563, 575 (1989).

Here, this court would abuse its discretion if it denied [client]'s request to withdraw [his/her/their] guilty plea. Similar to the defendant's predicament in *Bousley*, [Client] pleaded guilty at a time that "neither he, nor his counsel, nor the court correctly understood" that constitutionally permissible reach of the statute of his conviction. *See* 523 U.S. at 618. Further, as in *Magnus*, [Client] did not know when he pleaded guilty to P.L. § 265.03(3) that the statute criminalized constitutionally protected conduct. As demonstrated below, the Supreme Court has ruled that the statute under which [Client] pleaded guilty in this case is unconstitutional. The Supreme Court's ruling in *Bruen* corrected [Client]'s mistaken and overly restrictive understanding of [his/her/their] Second Amendment rights only after he had already pleaded guilty. Prior to *Bruen*, the controlling precedent was that P.L. § 265.03(3) did not infringe on core constitutional rights. S*ee, e.g., People v. Hughes,* 22 N.Y.3d 44 (2013). The *Bruen* opinion, however, held that conduct criminalized under that statute—namely, possession of a firearm outside of the home for self-defense—is constitutionally protected. [Client's] plea therefore was

not knowing, intelligent, and voluntary. Even if [client] had entered a properly counseled plea, [his/her/their] plea would not have waived [Client's] right to challenge [his/her/their] plea, as [his/her/their] claim goes, as in *Menna* and *Blackledge*, to the "very power of the State to bring [him/her/them] into court to answer the charge." S*ee Blackledge*, 417 U.S. at 30. Because [client]'s plea was thus constitutionally invalid, this court must exercise its discretion to permit him to withdraw the plea.

Moreover, such an exercise of discretion is in the interests of justice. Here, [Client] pleaded guilty in a case where [many/all] charges are constitutionally defective, both facially and as applied to the conduct at issue. [Client] should not be penalized because of a mere accident of timing beyond [his/her/their] control. The *Bruen* decision has rendered the licensing scheme for carrying firearms in New York null and void as an unconstitutional infringement on the exercise of a "core" fundamental right. [Client] could not be charged with such conduct were he to be arrested today. Even if the legislature adopts a new licensing scheme that comports with the Court's analysis in *Bruen* and the dictates of the Second Amendment to the United States Constitution, such a scheme could not criminalize the constitutionally protected conduct at issue in [Client's] case.[2] Allowing [client] to withdraw [his/her/their] plea and move to dismiss the indictment will prevent [Client] from being unfairly penalized merely because [his/her/their] case was prosecuted and heard earlier than others similarly situated.

Permitting [client] to withdraw [his/her/their] guilty plea would also promote judicial economy. If [client] is not permitted to withdraw [his/her/their] guilty plea at this stage of

[2] A new licensing scheme, even if constitutional, would not cure the constitutional injury to [client], namely, that [he/she/they] never had the opportunity to apply for a license under a constitutional licensing scheme prior to [his/her/their] arrest. The future passage of a constitutional licensing scheme would thus be irrelevant to the constitutionality of [client]'s conviction under P.L. § 265.03(3).

proceedings, [he/she/they] will raise the same claims in a motion made pursuant to C.P.L. § 440.10(1)(h), a claim that is likely to succeed because of the constitutional infirmities of [client]'s conviction detailed below. *See* C.P.L. § 440.10(1)(h) (providing for vacatur of judgment where the judgment was obtained "in violation of a right of the defendant under the constitution of . . . the United States"). An exercise of the Court's discretion here therefore promotes fundamental fairness, permitting [Client] to raise in a timely manner the same challenges as others impermissibly prosecuted for similarly constitutional conduct under an unconstitutional legal regime.

MOTION TO DISMISS [COUNT XXX OF] THE INDICTMENT

I. The Second Amendment Protects [Client's] Right to Carry a Firearm in Public

[Client] respectfully requests that this Court dismiss with prejudice [all the firearms and ammunition ch**a**rges, Counts X through X/the indictment] pursuant to C.P.L. §§ 210.20(1)(a), 210.25, and the incorporated Second Amendment. Criminal Procedure Law § 210.20(1)(a) allows the accused to move to dismiss an indictment, or counts of an indictment, when "such indictment or count is defective, within the meaning of section 210.25." "An indictment or a count thereof is defective within the meaning of [C.P.L. § 210.20(1)(a)] when the charged statute is unconstitutional. C.P.L. § 210.25(3). The Supreme Court of the United States has held that the incorporated Second Amendment protects the right of individuals to possess and carry firearms and ammunition. As such, these counts must be dismissed as violations of this right.

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, 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."). "[I]t is clear that the 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).

II. The Indictment Should Be Dismissed Because, but for New York State's Unconstitutional Gun-Licensing System, [Client] Would Have Been Able to Legally Possess the Firearm [He/She/They] Is Charged with Possessing

In order to lawfully carry a firearm in public in New York, the government requires citizens to first obtain a license. To grant a license to an applicant, among other criteria, the licensing officer must find that "proper cause exists." P.L. § 400.00(2)(f). "Proper cause" has been defined in case law as "a special need for self-protection distinguishable from that of the general community." *See In re Klenosky,* 75 AD2d 793 (1st Dept. 1980). New York law criminalizes possession of a firearm without first obtaining this license. P.L. § 265.03(3); *see also People v. Hughes*, 22 N.Y.3d 44, 50 (2013) ("New York's criminal weapon possession laws prohibit only *unlicensed* possession of handguns") (emphasis in original). Recently, in *New York State Rifle & Pistol Assn v. Bruen*, the United States Supreme Court struck down New York's public carry licensing system, holding that it unconstitutionally interferes with citizens' Second Amendment rights. Slip Op. No. 20-843 (June 23, 2022). The Court stated that "New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id.* at 63. The Court explicitly took issue with the discretionary nature of New York's licensing scheme, contrasting it to systems in other states that

"contain only 'narrow, objective, and definite standards' guiding licensing officials, rather than requiring the 'appraisal of facts, the exercise of judgment, and the formation of an opinion" as New York's system does. *Id*. at 30, n. 9 (internal citations omitted).

In this case, [Client] is facing criminal charges solely on the basis that [she/he/they] did not obtain a license to carry a firearm. Because the licensing system is unconstitutional, this Court must dismiss the indictment.

The Constitution does not require [Client] to first attempt to obtain a license under the facially unconstitutional licensing scheme, only to be denied. *Smith v. Cahoon*, 283 U.S. 553, 562 (1931); *Lovell v. City of Griffin,* 303 U.S. 444, 452 (1939). The Court addressed this issue in analogous circumstances in *Staub v. City of Baxley*, 355 U.S. 313 (1958). In that case, the appellant was convicted of violating a city ordinance that prohibited solicitation of membership for an organization without a permit. *Id.* at 314. The appellant did not apply for the appropriate license prior to soliciting membership from the employees of another company, in direct contravention of the ordinance. *Id.* at 315. However, the ordinance granted the mayor and council of the city "unfettered discretion" in their decision to grant or refuse the required permit, "without semblance of definitive standards or other controlling guides." *Id.* at 322. The Court struck down the licensing scheme as invalid on its face, as it made enjoyment of First Amendment freedoms "contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgement by the First Amendment[.]" *Id.* At 325. In reaching its decision to reverse the 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.*

The Court in *Bruen* held that the rights bestowed by the Second Amendment should be treated no differently than rights protected by any other amendment, including 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,* No. 20-843 at 62. Therefore the reasoning in *Staub* applies equally in this case. Just as the appellant in *Staub* could engage in the exercise of their right of free expression despite having made no attempt to secure a permit under the facially invalid statute, so too was [Client] permitted to freely exercise [his/her/their] right to carry a firearm in the face of an unconstitutional licensing law without first attempting to secure a license.

The D.C. Court of Appeals has specifically addressed the issue of a defendant's failure to seek a license in the context of firearm possession. In *Heller*, the Supreme Court held that the Second Amendment guarantees "an individual right to possess and carry weapons in case of confrontation," invalidating Washington, D.C.'s near total ban on handgun possession. 554 U.S. at 592. In the wake of *Heller*, the D.C. Court of Appeals held that defendants could move to dismiss indictments charging them with firearms possession under the unconstitutional statute, even where they never applied for licenses for the firearms under the statute. *See Plummer v. United States*, 983 A.2d 323, 341-42 (D.C. 2009) (citing *Chicago v. Atchinson, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 89 (1958)). This was so even where the defendant had pleaded guilty to unlawful possession prior to the decision in *Heller*. *Magnus v. United States*, 11 A.3d 237 (D.C. 2011).

More specifically, the court in *Magnus* held that, "unless the government proves the defendant was disqualified from exercising his Second Amendment rights," it is "impermissible

under the Second Amendment to convict a defendant" for unlicensed possession of a firearm if an unconstitutional licensing scheme made it "impossible" for the defendant to obtain a license. *Id*. at 242-43. Here, the "proper cause" requirement made it "impossible" for [Client] to obtain a license to carry a firearm because [he/she/they] could not distinguish [his/her/their] interest in self-defense from that of the general community. New York courts have made clear that, to obtain a license to carry a firearm, the applicant must provide evidence "of personal threats, attacks or other extraordinary danger to personal safety." *Bruen*, No. 20-843 at 3 (citing *In re Martinek*, 294 A.D.2d 221, 222 (2002)). The New York licensing law is "almost engineered" to preclude "most citizens" from exercising a fundamental, enumerated constitutional right. *See Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (addressing Washington D.C.'s nearly identical "good cause" requirement for gun licenses).

[IF CLIENT IS CHARGED WITH OTHER FIREARMS OFFENSES THAT ARE LESSER INCLUDED OFFENSES OF 265.03(3) (including 265.01-b (not in home), 265.01 or ammunition charges): [Client] is also charged with XXXX, XXXX, and XXXX. These charges are lesser included offenses of P.L. § 265.03(3) and the only basis for the charges is that [Client] did not have a license to carry a firearm. [Client] is facing these charges only because [he/she/they] did not obtain a license under an unconstitutional licensing scheme. They must therefore be dismissed as well.

Because the Supreme Court has found New York's gun licensing scheme to be unconstitutional, and because the prosecution cannot show that [Client] was "disqualified from exercising [his/her/their] Second Amendment rights," this Court must dismiss [the charge of Criminal Possession of a Weapon/the indictment]. *See Magnus*, 11 A.3d 237 at 242-43.

No prior application for the relief herein requested has been made.

WHEREFORE, the undersigned requests that the foregoing motions be granted and requests such other and further relief as this Court may deem just and proper.

DATED: Bronx, New York
[Date]

_____
[Attorney], Esq.
Attorney for [Client]

EXHIBIT C

EXHIBIT D

Standing

A critical question here is whether a defendant has standing to challenge the unconstitutional proper-cause-license requirement even if he did not seek a license at all.

Under analogous First Amendment speech law, the answer to that question is a definite yes. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) ("[A] person faced with such an unconstitutional licensing law [that gives local officials unbridled discretion] 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 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.") (citing *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958) ("The 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.")). These cases confirm it is unjust for the government to create an unconstitutionally burdensome licensing scheme and then punish people for failing to try to satisfy it. These cases also confirm standing on the theory that the unconstitutional system effectively deterred the license application in the first place.

Our post-*Bruen* challenge to weapon-possession charges on the grounds that the proper-cause requirement is unconstitutional requires courts to transplant this First Amendment standing doctrine into Second Amendment law (assuming the client did not try to obtain a license). We have a good argument for that as *Bruen* held that the Second Amendment should be afforded the same respect as the First and cited *Shuttlesworth* with approval. *Bruen*, slip op. at 15, 20, 30 n.9, 62-63. As *Bruen* confirmed: "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." *Id.* at 62 (quoting *McDonald*, 561 U.S. at 780 (plurality)).

Further, the logic of the First Amendment cases applies to a firearm-licensing challenge because the proper-cause standard was "virtually impossible for most New Yorkers" to satisfy and thus deterred license applications in the first place. *E.g.*, *Bruen* at 6 (Alito, J., concurrence); *accord Bruen* at 3-4 ("This 'special need' standard is demanding. For example, living and working in an area 'noted for criminal activity does not suffice. Rather, New York courts generally require evidence 'of particular threats, attacks or other extraordinary danger to personal safety.'") (citing *In re Kaplan*, 249 App.Div. 2d 199, 201 (1st Dept. 1998) (upholding the New York City requirement of 'extraordinary personal danger, documented by proof of recurrent threats to life or safety.'"). Our clients did not seek a license because the unconstitutional scheme *precluded* them from obtaining one. Therefore, there is a direct connection between the unconstitutional proper-cause requirement and the

unlicensed-possession charge. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (the defendant must show "an injury [here, a criminal indictment] that is fairly traceable to the [government's] allegedly unlawful conduct [here, the unconstitutional licensing scheme") (internal quotation marks/citation omitted).

Dealing With Other Possible Barriers to the Right to Publicly Bear Arms Beyond the Proper-Cause Requirement

In many cases, the major impediment to a license would have been the unconstitutional proper-cause requirement. Penal Law § 400.00(2)(f). We have standing to challenge that requirement for the reasons discussed above. But New York law had, and still retains, a litany of other restrictions on public-carry licenses. *Harrison v. Warhit*, 190 A.D.3d 735 (2d Dept. 2021); Penal Law § 400.00(1). If those restrictions apply to your client, we think you must also show that those restrictions are unconstitutional. If not, your client was not harmed by the unconstitutional proper-cause requirement and likely lacks standing to challenge the statute on the grounds that the proper-cause requirement is unconstitutional.

Below, we briefly summarize challenges to other license bars.[1] Recall that *Bruen* explicitly puts the burden on the State to justify weapon-possession restrictions by isolating a historical tradition justifying them. Slip op. at 24-25, 30. Put that burden to work on behalf of your client.

A. Prior Misdemeanor or Felony Conviction

If the client had a prior conviction for a "felony" or "serious offense," we have a potential standing problem because that predicate conviction bars a license. Penal Law § 400.00(1)(c); *see* Penal Law § 265.00(17) (defining "serious offense").

Thus, where the client has a qualifying predicate, we must challenge the constitutionality of the predicate-crime restriction itself. That may be a tough sell given *Bruen*'s focus on "law-abiding citizens." But there is authority supporting such a challenge. *Kanter v. Barr*, 919 F.3d 437, 451-69 (7th Cir. 2019) (Barrett, Amy C., J., dissenting) (arguing that the Second Amendment prohibits excluding *non-violent* felons from possessing a weapon). Put the government to their *Bruen* burden here, especially if the client is convicted of a non-violent misdemeanor. *See* Penal Law § 265.00(17)(a).

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[1] If the invalidation of the proper-cause requirement renders the *entire* weapon-possession regime unconstitutional because that requirement is not "severable" from the remaining provisions, *Bruen* invalidates the Penal Law's other license restrictions too. We see no evidence, however, that the Legislature intended such "anti-severability" and we do not discuss that argument here. *See generally People v. Viviani*, 36 N.Y.3d 564, 583 (2021).

Driving while intoxicated was not listed as a "serious crime" under the licensing law (it now is under the new law that goes into effect in the fall). But beware that a creative prosecutor could realize that the New York City regulations justified a license denial on the grounds of "a poor driving history." *See Abekassis v. New York City, New York*, 477 F. Supp. 3d 139, 144 (S.D.N.Y. 2020) (upholding constutitionality of Title 38 of the Rules of the City of New York ("RCNY") at § 5-10(h)). If the State relies on such a theory, you will likely have to challenge the constitutionality of that restriction in your reply.

SAMPLE LANGUAGE FOR OPENING MOTION PAPERS: [Client's] prior conviction for a [felony/misdemeanor] does not change the analysis because the government cannot shoulder its burden of demonstrating a historical tradition of categorically barring those with [felony/misdemeanor] records from exercising their right to bear arms. *See Bruen*, slip op. at 15, 24-25 and 62-63 (confirming that the State bears the burden of establishing that the restriction "is consistent with this Nation's historical tradition of firearm regulation"); *id.* at 31 (ambiguity in the historical record is insufficient to justify a regulation limiting the right to bear arms).

B. The government relies on a prior public-possession charge.

If your client's predicate conviction stemmed from public, unlicensed weapon possession, challenge the predicate on *Bruen* grounds. Address any retroactivity issues (*see* Memo), and argue that an unconstitutional prior conviction cannot be used to enhance your client's sentence and/or the severity of the offense. *Burgett v. Texas*, 389 U.S. 109, 115 (1967). This argument applies to predicates used to enhance a sentence and/or "bump up" charges that elevate the severity of the offense.

C. Client Was Under 21

Age New York law bars those under 21 from possessing a weapon. Penal Law § 400.00(1)(a). Again, the government bears the burden of proving a historical justification for this categorical age cap. We are skeptical that this broad age limitation has a historical tradition behind it.

SAMPLE LANGUAGE FOR OPENING MOTION PAPERS: The fact that client was less than 21 at the time he was exercising his fundamental right does not change the result. The government will be unable to shoulder its burden of demonstrating a historical tradition of categorically barring those who have reach the age of majority (18) from records from exercising their right to bear arms.

D. What About "Intent to Use Unlawfully" Charges?

Bruen's dicta arguably supports barring possession of a firearm with "intent to use unlawfully against another." Penal Law § 265.03(1)(a); *see Bruen* at 34-38, 41, 62. On the other hand, *Bruen* indicates that the historical tradition justifies regulating the *manner* of possession, not simply a state of mind. *Id.* at 51. Again, put the government to their *Bruen* burden here.

Common sense also justifies a challenge to the intent-to-use-unlawfully theory. It would be quite odd for a thought—the development of an intent to use unlawfully—to switch a constitutional right on and off. An otherwise valid speech demonstration, for instance, does not lose First Amendment protection because the participants happen to develop "a desire to riot" during the demonstration. Of course, the State can lawfully punish the use or attempted use of the weapon. But we can argue that the State cannot punish mere possession simply because a thought enters the client's mind. Again, put the State to its burden here.

SAMPLE LANGUAGE FOR OPENING MOTION PAPERS: The government cannot isolate a longstanding historical tradition of switching the right to bear arms on and off simply because the individual happens to develop a particular state of mind while exercising the right. Instead, the historical tradition demonstrates that the State can punish the unlawful attempted use of a firearm—not simply an "intent to use" it unlawfully. *See Bruen* at 51.

E. Dealing With the Presumption

If there is no actual evidence of an intent to use unlawfully against another and the government is relying exclusively on the presumption (Penal Law § 265.15(4) ("possession . . . of any . . . weapon . . . is presumptive evidence of intent to use unlawfully against another."), attack this preposterous presumption in a few ways: (1) argue that this presumption would create a massive *Bruen* loophole and thus violates the Second Amendment; and (2) attack the presumption on traditional due process grounds by arguing that it is not "more likely than not" that mere possession of a loaded firearm confirms possession with intent to use unlawfully against another.

You should move for inspection of the grand jury minutes and dismissal of the indictment on the grounds that (1) the government produced no evidence of an intent to use unlawfully against another, (2) the government must therefore rely on the presumption, and (3) the presumption is unconstitutional.

Possible Template:

The presumption violates the Second Amendment because it effectively converts all constitutionally protected activity into unlawful activity. The Second Amendment

bars the government from categorically criminalizing weapon possession, either in the home or in public. *See Bruen* at 24-25. And yet, under this presumption, everyone who exercises their Second Amendment right to carry a firearm in public is presumed to be engaging in criminal activity. Under such a theory, the State could circumvent the Second Amendment by attaching unlawful-use presumptions to all weapon possession, thus converting constitutionally protected activity into unprotected activity. That loophole cannot stand.

In any event, this presumption violates due process because it is not "more likely than not" that mere possession of a weapon (loaded or not) indicates an intent to use unlawfully against another. *See Cty. Ct. of Ulster Cty. v. Allen*, 442 U.S. 140, 166 (1979). There are numerous innocent reasons why an individual may, at any given moment, possess a loaded firearm, including, as *Bruen* held, for self-defense. It defies reality to suggest that, on average, an individual who possesses a loaded firearm in public is, at any given moment, more likely than not plotting to use it unlawfully against another.

EXHIBIT E

COURT

THE PEOPLE OF THE STATE OF NEW YORK, *v.* XXXXXXX, *Defendant.*	Ind. No. XXXX

PLEASE TAKE NOTICE that the proceedings in the above-captioned case implicate the constitutionality of Penal Law § XXXXX. A copy of [your submission], filed on XXXX is attached to this notice. C.P.L.R. § 1012(b); Executive Law § 71.

Dated: XXXXXX, New York
Date, 2022

FROM: Attorney, Esq.
etc.

TO: Office of the Attorney General
Solicitor General
Department of Law
The Capitol
Albany, New York 12224

COURT

XXXXXXXX

THE PEOPLE OF THE STATE OF NEW YORK, *v.* XXXXXXXX, *Defendant.*	Ind. No. XXXX

AFFIDAVIT OF SERVICE OF NOTICE UPON ATTORNEY GENERAL

STATE OF NEW YORK)
) ss.:
COUNTY OF XXXXX)

[Your name], an attorney admitted to practice law in this State, affirms:

1. I am not a party to this action, am over 18 years of age, and I am associated with [your office].

2. On XXXX, the enclosed [submission] for Defendant XXXX and the enclosed Notice of a Constitutional Challenge of a Statute were served upon the Attorney General of New York by mailing these documents to the Attorney General at **Office of the Attorney General, Solicitor General, Department of Law The Capitol Albany, New York 12224**, which has been designated by the Attorney General for that purpose, by depositing these documents in a first class, postpaid, properly addressed wrapper, in a depository under the exclusive care and custody of the United States Postal Service within the State of New York. These documents were also e-mailed to Nikki Kowalski, Deputy Solicitor General for Criminal Matters at nikki.kowalski@ag.ny.gov.

Dated: COUNTY, New York
DATE

_____[sig]_____
YOUR NAME

_____ COURT OF THE STATE OF NEW YORK
COUNTY OF _____

THE PEOPLE OF THE STATE OF NEW YORK,	Ind. No. XXXXX
-against-	NOTICE OF MOTION CHALLENGING CONSTITUTIONALITY OF "VIOLENT" CLASSIFICATION AND SENTENCING RANGE OF PENAL LAW § 265.03 (3)
XXXX XXXX,	
Defendant.	

PLEASE TAKE NOTICE that upon the annexed affirmation of XXXX, Esq. and the prior proceedings in this case, the undersigned will move this Supreme Court, Criminal Term, Part XXXX, on the XXXX day of XXXX, 2022, at 9:30, or as soon thereafter as Counsel may be heard, for an Order striking the classification of Penal Law § 265.03(3) as a "violent" felony offense and the resulting sentencing range as unconstitutional on its face and as applied, pursuant to the Second, Eighth, and Fourteenth Amendments of the United States Constitution.

DATED: _____,
New York XXXX

_____
XXXX, Esq.
[etc.]

TO: _____
[etc.]

_____COURT OF THE STATE OF NEW YORK
COUNTY OF _____

THE PEOPLE OF THE STATE OF NEW YORK, Ind. No. XXXXX

-against- AFFIRMATION

XXXX XXXX,

Defendant.

[Attorney], an attorney duly admitted to practice law in New York State, affirms the following to be true, or if made on information and belief, that he/she/they believes it to be true:

1. I am attorney of record for [Client]. I am familiar with the facts of this case and the prior proceedings held in it.

2. This affirmation is made in support of [Client's] Motion challenging the constitutionality of Penal Law § 70.02 (1)(b)'s classification of Penal Law § 265.03(3) as a "violent" felony offense and the sentencing range set forth in Penal Law § 70.02(3)(b) for that offense.

3. Unless otherwise indicated, all allegations of fact are based upon inspection of the record in this case, initial investigations of the facts and circumstances surrounding the incident, conversations with [Client], and discussions with the assigned assistant district attorney, and are made on information and belief.

4. [Client] was arrested on [date] and charged with Criminal Possession of a Weapon in the Second Degree in violation of Penal Law § 265.03(3). Indictment No. XXXX charged [Client] with violating Penal Law § 265.03(3). [procedural facts e.g., On X date] this

Court denied [Client's] Motion to Dismiss the charge on the ground that the charge violated [Client's] Second Amendment rights. On [date], [Client] pleaded guilty to [ ]. Sentencing is to take place on [date]].

5. At the time of [Client]'s charged conduct, Penal Law § 265.03(3) made it a class C violent felony to possess a loaded firearm outside of a person's home or place of business unless such person had a license to carry a firearm pursuant to Penal Law § 400.00. In order to obtain a license to carry a firearm, a licensing officer had to find "proper cause" to issue such license, and even then, the officer had discretion to deny the license.

6. In *New York State Rifle & Pistol Assn v. Bruen*, 597 U.S. ___, 142 S.Ct. 211 (June 23, 2022), the United States Supreme Court struck down this licensing scheme as violating the Second Amendment of the United States Constitution.

7. In so doing, the Supreme Court rejected any constitutional distinction between possessing a firearm in one's home and in the public. *Bruen*, at 2134 ("Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms.").

8. As set forth below in the accompanying Memorandum, New York's classification and punishment of the "public carry" offense of Penal Law § 265.03(3) as a violent felony offense, while classifying "inside the home" possession as misdemeanor or a low-level non-violent offense, Penal Law §§ 265.01-b, 265.01(1), violates the Second, Eighth, and Fourteenth Amendments (due process and equal protection).

9. Notice of [Client's] constitutional challenge has been served on the Attorney General. CPLR §1012(b), *see* Exhibit A hereto.

DATED: _____

_____

[Attorney, Esq.]

_____ COURT OF THE STATE OF NEW YORK
COUNTY OF _____

THE PEOPLE OF THE STATE OF NEW YORK, Ind. No. XXXXX

-against- MEMORANDUM

XXXX XXXX,

Defendant.

NOTE TO ATTORNEY: This template is good for clients who do not have predicate convictions and are convicted of CPW-2 (loaded firearm outside home).

MEMORANDUM OF LAW

The classification and sentencing range associated with Penal Law § 265.03(3) is unconstitutional, in violation of [Client's] Second, Eighth, and Fourteenth Amendment rights. The distinction the Penal Law draws between inside-the-home firearm possession and public carry is no longer constitutionally tenable after New York State Rifle and Pistol Assn., Inc. v. Bruen, 597 U.S. ___, 142 S.Ct. 2111 (June 23, 2022), which expressly rejected any such distinction. As such, the sentencing disparities created by the Penal Law's distinction are irrational and allow for gross disparities in violation of the Second, Eighth and Fourteenth Amendments. [Client] must be afforded the same sentencing options available to individuals convicted of in-home possession.

A. New York's firearm offenses

"New York's criminal weapon possession laws prohibit only *unlicensed* possession of handguns." People v. Hughes, 22 N.Y.3d 44, 50 (2013)(emphasis in original). However, in "apparent deference to the concept that possession of a loaded firearm to protect the persons or property in one's home or place of business is less reprehensible than possession for other purposes," People v. Powell, 54 N.Y.2d 524, 526

(1981); People v. White, 75 A.D.3d 109, 121 (2d Dept. 2010), the Legislature has classified the unlicensed *in-home* possession of a firearm as a misdemeanor or low- level non-violent felony, and possession *outside* the home as a class C violent felony. Compare Penal Law §§ 265.01(1) and 265.01-b, with Penal Law § 265.03(3); see Penal Law § 265.20(a)(3) (exempting licensed possession from prosecution).

Penal Law § 265.01(1), Criminal Possession of a Weapon in the Fourth Degree, makes it a class A misdemeanor to possess "any firearm." The offense is punishable by a maximum definite jail term of 364 days. See Penal Law § 70.15(1). Lesser sentences, including probation or a conditional or unconditional discharge, are also available. See Penal Law §§ 65.00(3); 65.05(3); 65.20; see also 80.05 (fine); 85.00(3) (intermittent sentence).

Penal Law § 265.01-b, Criminal Possession of a Firearm, criminalizes the possession of "any firearm," as a felony. The offense is classified as a non-violent E felony and is punishable, for first felony offenders, by a maximum indeterminate sentence of 1-1/3 to 4 years. Again, probation, conditional discharge, and a determinate jail sentence are available dispositions.

Penal Law § 265.03(3) criminalizes the unlicensed possession of a loaded firearm outside one's home or place of business, that is, public carry. See also Penal Law § 265.20(a)(3)(exemption for licensed possession). The penal law classifies the offense as a class C violent felony, see Penal Law § 70.02(1)(b), punishable by a determinate sentence ranging, for a first offender, from 3 ½ up to 15 years, see Penal Law § 70.02(3)(b). Penal Law § 70.45 (2)(f) mandates a period of post-release supervision ranging from 2 ½ to 5 years.

B. Bruen expressly rejected any distinction between home and public possession.

In District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. Chicago, 561 U.S. 742 (2010), the Supreme Court held that the Second and Fourteenth Amendments protect an individual's right to keep and bear arms for self-defense. In so doing, the Court held unconstitutional two laws that prohibited the possession and use of handguns in the home.

In New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. ___, 142 S.Ct. 2111 (June 23, 2022), the Supreme Court considered, and struck down, New York's "may-issue" permit regulations for outside-the-home possession, which required "proper cause" -- essentially a special need for self-defense. Id. at 2156. First, the Court held that the Second Amendment protects an individual's right to carry a handgun for self-defense outside the home. The Second Amendment did not allow a distinction between inside-the-home possession and public carry. 142 S.Ct, at 2134 ("Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms."). As the right to bear arms for self-defense is "'the *central component* of the [Second Amendment] right itself,'" confining the right to "'bear'" arms to the home would "make little sense." Bruen at 2135, quoting Heller at 599 (emphasis and brackets in original). The Court stated that "[m]any Americans hazard greater danger outside the home than in it." Id.

New York's proper-cause requirement violated the Second and Fourteenth Amendments because it prevented law-abiding citizens from exercising their Second Amendment right to keep and bear arms in self-defense outside the home. 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 possession in the home or in public. 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.'"). Central to the Supreme Court's holding was its recognition that the Second Amendment tolerated no distinction between firearm possession in the home or in public; the Second Amendment protected both equally.

The New York Legislature's determination that public carry is "more reprehensible" than inside-the home possession, and thus deserving of classification as a violent offense and harsher punishment, cannot be squared with Bruen. New York's decision to punish public carry more harshly is constitutionally untenable because it rests on the false premise that gun possession in public is subject to lesser constitutional protection than inside-the-home possession. Regardless of the constitutionality of Penal Law

§ 265.03(3), the sentencing distinctions the penal law currently draws between home and public carry cannot be sustained.

C. The Legislature's regulation of firearm possession by imposing drastically higher punishments for public-as opposed to in-home-possession, violates the Second, Eighth, and Fourteenth Amendments.

New York's classification of Penal Law § 265.03(3) as a class C violent felony offense, and the harsh sentencing range associated with that classification contravenes the protections afforded by the Second Amendment and the proscriptions of Due Process, Equal Protection, and the Eighth Amendment.

1. This regime violates the Second Amendment under Bruen's historical analysis methodology.

When a specific Amendment provides an "explicit textual source of constitutional protection," a court must analyze the challenge by reference to that Amendment. See Graham v. Connor, 490 U.S. 386, 395 (1989) (analyzing "excessive force claim" under the Fourth Amendment). Here, the sentencing distinctions between unlicensed in-home weapon possession and unlicensed public possession squarely implicate the right to bear arms and thus must be analyzed under the Second Amendment. These sentencing distinctions are drastic: unlicensed possession of a gun in the home is classified as an A misdemeanor or non-violent E felony, punishable by no more than 364 days in jail for the misdemeanor, and at most, an indeterminate term of 1-1/3 to 4 years for the felony. The punishment for public possession, in contrast, is a C-violent-felony determinate sentence ranging from 3-½ to 15 years, followed by a period of mandatory post-release supervision. Under Bruen, this punishment scheme, predicated on a distinction between in-home and public possession, can only be sustained if the government can establish a historical tradition justifying it. Bruen at 2126; cf. People v. Hughes, 22 N.Y.3d 44, 51 (2013) (assuming, without deciding, that the Second Amendment applies to the penalties that may be imposed for unlawful gun possession).[1] Bruen itself confirms the government's inability to do so; as Bruen repudiated any basis in the Second

[1] Although Hughes applied intermediate-level scrutiny to analyze whether firearm regulations, including punishments, satisfied the Second Amendment, Bruen invalidates Hughes's intermediate-scrutiny approach. As Bruen expressly held, intermediate scrutiny does not apply; instead the State bears the burden of justifying a regulatory scheme by pointing to an American tradition justifying that scheme. Bruen, 142 S.Ct. at 2135.

Amendment's text or this nation's history for distinguishing home possession from public carry, there is likewise no basis for exacting exponentially harsher penalties on those guilty of possessing unlicensed firearms in public, versus those who commit a similar infraction related to in-home possession.

Further undercutting any possible argument by the government is the majority's observation in Heller that even those few founding-era laws that punished discharge of a gun within city limits, including a Rhode Island law that fined the discharge of guns in streets and taverns, "punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail, not with significant criminal penalties." 554 U.S. at 632-33. The "significant criminal penalties" New York imposes on individuals exercising their fundamental right of public carry merely for not obtaining a license thus finds no support in the history and traditions of this country. For this reason alone, Penal Law § 70.02's classification and sentencing provisions with respect to Penal Law § 265.03(3) are unconstitutional.

2. These sentencing distinctions violate Due Process and Equal Protection too.

Due Process and Equal Protection further compel this conclusion. As noted above, § 70.02(1)(b) classifies Penal Law § 265.03(3) as a C violent felony offense. Penal Law § 70.02(2)(a) provides that the sentence imposed on a C violent felony offense must be a determinate term of imprisonment, and Penal Law § 70.02(3)(b) states that the determinate term of imprisonment "must be at least three and one-half years and must not exceed fifteen years." Penal Law § 70.45(2)(f) mandates a period of post-release supervision between two and one-half and five years. This stands in sharp contrast to the probationary, conditional and unconditional discharge, jail sentences, and modest indeterminate prison sentences available to first felony offenders who are convicted of unlicensed inside-the-home firearm possession.

Under the Equal Protection and Due Process clauses, when the State draws statutory distinctions within the context of fundamental rights, strict scrutiny applies: the government must show a compelling State interest in the distinction and that the distinction is narrowly tailored to accomplish that interest. E.g., Myers v. Schneiderman, 30 N.Y.3d 1, 21-22 (2017) (if legislation burdens a fundamental right, strict

scrutiny applies); Alevy v. Downstate Med. Ctr., 39 N.Y.2d 326, 332 (1976). The Supreme Court has now confirmed that the right to possess a firearm outside the home is a fundamental right that has been enshrined in our Constitution for centuries. Bruen, 142 S.Ct. at 2134-35, 2153-54 (citing "overwhelming evidence" of an enduring American tradition permitting public carry); McDonald, 561 U.S. at 791.

The Penal Law's statutory distinctions cannot overcome strict scrutiny. As Bruen held, an individual's fundamental right to bear arms for self-defense under the Second Amendment equally protects both in-home and outside-home possession. Although States have available to them constitutionally acceptable ways to regulate the unlicensed possession of firearms, see, e.g., Bruen, 142 S.Ct. at 2162 (Kavanaugh, J., concurring), the State can show no compelling interest in classifying and punishing mere possession outside the home more severely than in-home. The absence of a required license does not change the essential conduct as to provide any reason, let alone a compelling reason, to differentiate between the possessions.

In any event, this regime cannot even satisfy rational basis review. Chapman v. United States, 500 U.S. 453, 464-65 (1991); U.S. const., amend XIV; N.Y. Const. art. I § 6, 11. Rational basis review is not "toothless." Mathews v. Lucas, 427 U.S. 495, 510 (1976). The State cannot rely on a distinction "whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985). Courts of this state, whether expressly relying on Due Process or not, have recognized that the "fairness of the criminal justice system requires some measure of equality in the sentences meted out to defendants who commit the same or similar crimes." See People v. Barone, 101 A.D.3d 585, 587 (1st Dep't 2012); People v. Schonfeld, 68 A.D.3d 449, 450 (1st Dep't 2009).

Here, as noted, in the wake of Bruen, no rational distinction can be drawn between unlicensed in-home firearm possession on the one hand, and unlicensed public carry on the other. In turn, the classification of in-home possession as a misdemeanor or non-violent, low-level felony offense, and the public carry offense as a class C violent offense, is irrational. Bruen's express holding that public carry is no

less protected under the Second Amendment than in-home possession renders arbitrary and irrational the New York Legislature's policy choice to label unlicensed public possession a "reprehensible" violent offense warranting harsh punishment including a prison sentence as long as 15 years. Regardless of whether "unlicensed" possession remains a crime in New York after Bruen, the Constitution forbids a harsher outcome for individuals who possess firearms outside the home.

3. This punishment violates the Eighth Amendment.

Finally, the Eighth Amendment compels this conclusion. U.S. Const., amends. VIII, XIV. Punishments that are "grossly disproportionate to the crime" are prohibited by the Eighth Amendment. See Solem v. Helm, 463 U.S. 277 (1983) (the Eighth Amendment incorporates the "deeply rooted principle" that a punishment should be proportional to the offense); People v. Broadie, 37 N.Y.2d 100 (1975). The 15-year maximum that may be imposed for conviction of Penal Law § 265.03(3) makes the challenged provisions of Penal Law § 70.02 appropriate for Eighth Amendment scrutiny. Solem, at 291. Indeed, even "a single day in prison may be unconstitutional in some circumstances." Id. at 290. The 15-year penalty that can be imposed for public carry is, on its face, "grossly disproportionate" to the far less severe penalties - including minimal jail time, or no jail time at all - for constitutionally indistinguishable conduct.

In conducting this scrutiny, this Court must consider the gravity of the offense and the gravity of the danger the offender poses to society. Solem, at 291. Here, again, the Supreme Court's unequivocal ruling protecting public carry under the Second Amendment is dispositive. Conduct expressly and textually protected by the United States Constitution, and supported by centuries of American history, cannot at the same time be labeled a "grave" offense, nor can such conduct categorically be considered a danger to society. [The client's] character also supports finding the sentence disproportionate. See Broadie, 37 N.Y.2d at 113. [Circumstances of client's case- first offender, any evidence that he had the gun for self-defense as to bring possession squarely within Bruen].

WHEREFORE, [Client] requests that this Court strike the Penal Law classification and sentencing range associated with Penal Law §265.03(3) and sentence [Client] in conformance with the analogous non-violent offense and sentencing range.

Dated: _____

_____

Attorney, Esq.

EXHIBIT F

People v. Rodriguez

Supreme Court, New York County, New York. • July 15, 2022 • --- N.Y.S.3d ---- • 2022 WL 2797784 • 2022 N.Y. Slip Op. 22217 (Approx. 13 pages)

2022 WL 2797784
Supreme Court, New York County, New York.

The PEOPLE of the State of New York
v.
Jonathan RODRIGUEZ, Defendant.

Ind. No. 71550/2022
Decided on July 15, 2022

Synopsis

Background: Defendant, who was indicted for criminal possession of a weapon in the second degree, moved to dismiss the charges as an unconstitutional infringement on his right to bear arms.

Holdings: The Supreme Court, Robert M. Mandelbaum, J., held that:
1 Constitution does not forbid a state from requiring citizens to obtain a license in order to carry concealed firearms;
2 defendant lacked standing to bring challenge to state's firearm licensing regime;
3 rebuttable presumption that a person who possesses an unlicensed handgun intends to use it in an unlawful manner did not apply to defendant's prosecution; and
4 unconstitutionality of New York's licensing scheme in no way undermines rebuttable presumption that a person who possesses an unlicensed handgun intends to use it in an unlawful manner.

Motion denied.

Procedural Posture(s): Pre-Trial Hearing Motion.

West Headnotes (15)

1 **Weapons**

Constitution does not forbid a state from requiring citizens to obtain a license in order to carry concealed firearms outside of their homes or places of business for purposes of ordinary self-defense, so long as the ability to obtain the license is not thwarted by an obligation to demonstrate a unique need to carry such

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k106 Validity
406k106(3) Violation of right to bear arms

weapons beyond the general desire to protect oneself. U.S. Const. Amend. 2.

406 Weapons
406III Registration, Licenses, or Permits of Owners and Purchasers
406k134 Permits to carry guns

2 **Weapons**

Defendant lacked standing to bring challenge to state's firearm licensing regime, in his prosecution for criminal possession of a weapon in the second degree, where defendant failed to seek a license. N.Y. Penal Law § 400.00.

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k106 Validity
406k106(3) Violation of right to bear arms

3 **Weapons**

If a firearm license holder violates the conditions or restrictions of the license, including by carrying into a public place a firearm licensed only for possession in his dwelling by a householder or in his place of business by a merchant or storekeeper the licensee may be subject to an administrative sanction, such as license revocation. N.Y. Penal Law §§ 400.00(2)(a), 400.00(2)(b).

406 Weapons
406III Registration, Licenses, or Permits of Owners and Purchasers
406k133 License to own or possess gun; owner identification cards

406 Weapons
406III Registration, Licenses, or Permits of Owners and Purchasers
406k135 Revocation, non-renewal

4 **Weapons**

New York's criminal weapon possession laws prohibit only unlicensed possession of handguns.

406 Weapons
406IV Offenses
406IV(C) Possession, Use, Carrying, or Personal Transport
406k162 Possession and Carrying in General
406k164 Possessory crimes in general

5 **Weapons**

The Second Amendment protects the right to bear arms, both in one's home and out. U.S. Const. Amend. 2.

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k107 Construction
406k107(2) Right to bear arms in general

Notes
Quick Check

6 **Constitutional Law**

One cannot falsely shout fire in a crowded theatre despite the free speech protections of the First Amendment. U.S. Const. Amend. 1.

92	Constitutional Law
92XVIII	Freedom of Speech, Expression, and Press
92XVIII(D)	False Statements in General
92k1620	In general

7 **Constitutional Law**

The Free Exercise Clause does not bar states from requiring that students in public schools be immunized against various vaccine-preventable illnesses over religious objection or from penalizing the use of hallucinogenic drugs, even though ingested pursuant to religious ceremony. U.S. Const. Amend. 1.

92	Constitutional Law
92XIII	Freedom of Religion and Conscience
92XIII(B)	Particular Issues and Applications
92k1341	Public Education
92k1356	Immunization requirements

92	Constitutional Law
92XIII	Freedom of Religion and Conscience
92XIII(B)	Particular Issues and Applications
92k1419	Controlled substances

8 **Constitutional Law**

Freedom of press does not in all cases forbid prior restraint on publication. U.S. Const. Amend. 1.

92	Constitutional Law
92XVIII	Freedom of Speech, Expression, and Press
92XVIII(U)	Press in General
92k2070	In general

9 **Criminal Law**

The right of an accused to confront witnesses does not categorically prohibit a child witness in a child sexual abuse trial from testifying by one-way closed circuit television. U.S. Const. Amend. 6.

110	Criminal Law
110XX	Trial
110XX(C)	Reception of Evidence
110k662	Right of Accused to Confront Witnesses
110k662.65	Conduct of trial

10 **Searches and Seizures**

Fourth Amendment requirement that warrant be obtained in order to enter private residence to effect search or seizure permits exceptions for exigent circumstances. U.S. Const. Amend. 4.

349	Searches and Seizures
349I	In General
349k42	Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant
349k42.1	In general

11 **Weapons**

406	Weapons

Notes

Quick Check

Like other constitutionally protected rights, right to bear arms is subject to certain reasonable, well-defined restrictions, including properly administered, evenhanded licensing requirements. U.S. Const. Amend. 2.

406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k107 Construction
406k107(2) Right to bear arms in general

12 **Weapons**

Under the Second Amendment, states may constitutionally prohibit the possession of firearms by felons and individuals with mental health diagnoses; the carrying of firearms in sensitive places, such as schools and government buildings; and the carrying of dangerous and unusual weapons. U.S. Const. Amend. 2.

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k107 Construction
406k107(2) Right to bear arms in general

13 **Weapons**

Like most rights, the right to bear arms secured by the Second Amendment is not unlimited. U.S. Const. Amend. 2.

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k107 Construction
406k107(2) Right to bear arms in general

14 **Weapons**

Permissive, rebuttable presumption that a person who possesses an unlicensed handgun intends to use it in an unlawful manner did not apply to defendant's prosecution for criminal possession of a weapon in the second degree, where defendant was not indicted based on this presumption, as to which the grand jury was never instructed, but rather, the count charging him with criminally possessing a loaded firearm with intent to use it unlawfully against another was based on evidence before the grand jury that defendant and another individual acted in concert to fire multiple shots from a moving vehicle being driven recklessly through city streets. N.Y. Penal Law §§ 265.03(1) (b), 265.15(4).

406 Weapons
406V Prosecution
406V(C) Presumptions and Burden of Proof
406k243 Possession, Use, Carrying
406k249 Intent, knowledge, purpose

15 **Weapons**

Rejection in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, of New York's licensing scheme in no way undermines New York's permissive, rebuttable presumption that a person who possesses an unlicensed handgun intends to use it in an unlawful manner. N.Y. Penal Law §§ 265.15(4), 400.00(2) (f).

406 Weapons
406V Prosecution
406V(C) Presumptions and Burden of Proof
406k243 Possession, Use, Carrying
406k249 Intent, knowledge, purpose

Notes
Quick Check

West Codenotes

Prior Version Held Unconstitutional
N.Y. Penal Law § 400.00(2)(f)

Attorneys and Law Firms

For the Defendant: Donald H. Vogelman, Esq.

For the People: Alvin L. Bragg, Jr., District Attorney, New York County (Jillian Shartrand of counsel)

Opinion

Robert M. Mandelbaum, J.

*1 In (*New York State Rifle & Pistol Assn., Inc. v. Bruen,* 597 U.S. ––––, 142 S. Ct. 2111, ––– L.Ed.2d ––––– [2022]), the United States Supreme Court struck down New York's firearm licensing scheme as violative of the Second Amendment. Concluding that the United States Constitution confers upon "law-abiding citizens" a right to carry firearms outside the home for self-defense (597 U.S. at ––––, 142 S. Ct. at 2122), the Court held that the New York statute impermissibly infringed upon that constitutional guarantee because, unlike 43 other states, it required a showing of particularized need in order to obtain such a license, rendering the exercise of the right by ordinary citizens a near-impossibility. Since New York's "proper cause" requirement to obtain a concealed carry permit (Penal Law § 400.00 [2] [f]) compelled an applicant to "demonstrate a special need for self-protection distinguishable from that of the general community" (*Matter of Klenosky v. New York City Police Dept.*, 75 A.D.2d 793, 793, 428 N.Y.S.2d 256 [1st Dept. 1980]), it could not survive constitutional scrutiny.

1 Indicted for, among other things, [1] two counts of criminal possession of a weapon in the second degree, defendant now moves to dismiss these charges as an unconstitutional infringement on his right to bear arms. Defendant, however, misreads both *Bruen* and the Second Amendment as conferring an unqualified entitlement to possess deadly weapons in public places without restriction. The *Bruen* Court held nothing more than that New York's previous permitting regime impermissibly burdened the right of law-abiding citizens to carry concealed firearms outside of their homes or places of business for purposes of "ordinary self-defense" (597 U.S. at ––––, 142 S. Ct. at 2156), because that regime forbade the granting of such licenses absent evidence "of particular threats, attacks or other extraordinary danger to personal safety" (*Matter of Martinek v. Kerik*, 294 A.D.2d 221, 222, 743 N.Y.S.2d 80 [1st Dept. 2002]). What the Court did not hold is that the Constitution forbids a state from requiring citizens to obtain a license in order to engage in such activity, so long as the ability to obtain the license is not thwarted by an obligation to demonstrate a unique need to carry such weapons beyond the general desire to protect oneself.

2 Defendant does not claim to have a license. He does not claim to have sought a license. He does not claim to have been denied a license, either fairly or unfairly, whether because of a failure to establish a special need or for some other reason (*see e.g.* Penal Law § 400.00 [1] [c]-[e] [establishing ineligibility for firearm license if, for example, applicant has been convicted anywhere of a felony or serious offense; is a fugitive from justice; or is an unlawful user of or addicted to any controlled substance]). [2]

3 *2 On that basis alone, defendant's challenge must fail. While it may be, following *Bruen*, that one possessed of a license to keep a firearm in the home or place of business (*see* Penal Law § 400.00 [2] [a], [b]) who, in violation of the license restrictions, carries the gun outside and is sanctioned; [3] or that one who sought but was denied a concealed carry license under the old, unconstitutional regime, and is then prosecuted for possessing a firearm in public, might colorably argue that such conduct is constitutionally protected and that a criminal charge for unlicensed possession of that firearm is thus forbidden, defendant is in no way so situated. Rather, having failed to seek a license, he lacks standing to bring any challenge to the licensing regime (*see United States v. Decastro*, 682 F.3d 160, 164 [2d Cir. 2012] ["(T)o establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy" (internal quotation marks and citations omitted)]). [4]

4 In any event, defendant does not ultimately seek to challenge New York's (former) licensing regime. That regime has already been challenged and found wanting. Instead, defendant's quarrel lies not with the licensing scheme, but with the statutes criminalizing unlicensed possession. [5] In other words, he does not seek to demonstrate either that the licensing law was unconstitutional — we already know it was — or that it was unfairly applied to him — it wasn't applied to him at all — but that the Second Amendment itself, the right to bear arms, confers an absolute entitlement to possess concealed firearms in public, license be damned.

But contrary to defendant's contention, *Bruen*, which sought to vindicate the rights of "law-abiding, responsible citizens" who wish to obtain a license in compliance with a fairly administered law based on "narrow, objective and definite" criteria (597 U.S. at ---- n. 9, 142 S. Ct. at 2138 n. 9 [internal quotation marks and citations omitted]), [6] did not hold that the State is powerless to criminalize the unlicensed possession of firearms on city streets.

5 6 7 8 9 10 *3 To be sure, the Second Amendment protects the right to bear arms, both in one's home (*see District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 [2008]; *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 [2010]; US Const Amend II) and out (*see Bruen*, 597 U.S. ----, 142 S. Ct. 2111). But no constitutional right is absolute. Americans are well acquainted with the truism that one cannot falsely shout fire in a crowded theatre despite the free speech protections of the First Amendment (*see Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 [1919]; US Const Amend I). The Free Exercise Clause does not bar states from requiring that students in public schools be immunized against various vaccine-preventable illnesses over religious objection (*see Prince v. Massachusetts*, 321 U.S. 158, 166-167, 64 S.Ct. 438, 88 L.Ed. 645 [1944]; *Phillips v. City of New York*, 775 F.3d 538 [2d Cir. 2015]; US Const Amend I), or from penalizing the use of hallucinogenic drugs, even though ingested pursuant to religious ceremony (*see Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 [1990]; *see also Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 [1878] [rejecting claim that criminal laws against polygamy could not constitutionally be applied to those whose religion commanded the practice]). Freedom of the press does not in all cases forbid a prior restraint on publication (*see Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 570, 96 S.Ct. 2791, 49 L.Ed.2d 683 [1976] ["This Court has frequently denied that First Amendment rights are absolute"]; US Const Amend I). The right of an accused to confront witnesses does not categorically prohibit a child witness in a child sexual abuse trial from

testifying by one-way closed circuit television (*see Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 [1990]; US Const Amend VI). The Fourth Amendment requirement that a warrant be obtained in order to enter a private residence to effect a search or seizure permits exceptions for exigent circumstances (*see Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 [1980]; US Const Amend IV).

11 12 13 So, too, here. Like other constitutionally protected rights, the right to bear arms, as the *Bruen* Court recognized, is "subject to certain reasonable, well-defined restrictions" (597 U.S. at ––––, 142 S. Ct. at 2156 [citation omitted]), including properly administered, evenhanded licensing requirements (*see id.* at ––––– n. 9, 142 S. Ct. at 2138 n. 9; *see also id.* at ––––, 142 S. Ct. at 2161 [Kavanaugh, J., concurring] ["the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense"]). Thus, states may constitutionally prohibit the possession of firearms by felons and the mentally ill; the carrying of firearms in sensitive places, such as schools and government buildings; and the carrying of "dangerous and unusual weapons" (*Heller*, 554 U.S. at 626-627, 128 S.Ct. 2783). In other words, "[l]ike most rights, the right secured by the Second Amendment is not unlimited" (*id.* at 626, 128 S.Ct. 2783).

Defendant's reading of the Second Amendment, unsupported by *Bruen*, would turn New York into the Wild West, placing its citizens at the mercy of criminals wielding unlicensed firearms, concealed from public view, in heavily populated areas. The last two months alone have seen 10 people shot to death in Buffalo; 21 people, including 19 children under the age of 12, shot to death in Uvalde, Texas; and 7 people shot to death in Highland Park, Illinois. Many more were wounded. And apart from these headline-grabbing tragedies are the hundreds of other daily instances of gun violence that garner little attention. This court has a full inventory of such cases.

14 15 Defendant misreads *Bruen* as eviscerating the police powers of the State to address criminality, or as applying to anyone other than law-abiding citizens. Failing to seek a license before roaming the streets with a loaded firearm is not abiding by the law, and nothing in the Second Amendment requires that it be tolerated. The Constitution is not a suicide pact. The motion to dismiss is denied. [7]

*4 This opinion shall constitute the decision and order of the court.

All Citations

--- N.Y.S.3d ----, 2022 WL 2797784, 2022 N.Y. Slip Op. 22217

Footnotes

1 Defendant also stands charged with attempted assault in the first degree, reckless endangerment in the second degree, and criminal possession of a controlled substance in the fourth degree.

2 Defendant's New York and New Jersey criminal history, including multiple felony drug arrests, might well render him ineligible for a firearm license in any event (*see e.g.* Penal Law § 400.00 [1] [e] [unlawful user of a controlled substance]).

3 Under Penal Law § 265.20 (a) (3), the statutory provisions criminalizing possession of a

firearm in any degree "shall not apply to ... [p]ossession of a pistol or revolver by a person to whom a license therefor has been issued" under article 400 of the Penal Law (*see People v. Parker*, 52 N.Y.2d 935, 437 N.Y.S.2d 669, 419 N.E.2d 347 [1981]), *revg on dissenting op* 70 A.D.2d 387, 391-394, 421 N.Y.S.2d 59 [1st Dept. 1979]. Instead, if a license holder violates the conditions or restrictions of the license, including by carrying into a public place a firearm licensed only for possession "in his dwelling by a householder" (Penal Law § 400.00 [2] [a]) or "in his place of business by a merchant or storekeeper" (Penal Law § 400.00 [2] [b]), the licensee may be subject to an administrative sanction, such as license revocation (*see People v. Thompson*, 92 N.Y.2d 957, 959, 683 N.Y.S.2d 159, 705 N.E.2d 1200 [1998]).

4 Defendant claims standing based on a series of First Amendment cases, but the United States Supreme Court has consistently held that traditional standing principles are different in the First Amendment context (*see e.g. Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 84 L.Ed. 1093 [1940]; *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634, 100 S.Ct. 826, 63 L.Ed.2d 73 [1980]).

5 New York law does not prohibit mere possession of a weapon. "New York's criminal weapon possession laws prohibit only *unlicensed* possession of handguns" (*People v. Hughes*, 22 N.Y.3d 44, 50, 978 N.Y.S.2d 97, 1 N.E.3d 298 [2013] [emphasis in original]).

6 In light of *Bruen*, the Legislature has already enacted a new licensing scheme eliminating the "proper cause" requirement (*see* L 2022, ch 371 [effective Sept. 1, 2022]), thus negating defendant's severability claim that without a "proper cause" requirement for concealed carry permitting, the Legislature would have preferred to repeal all gun licensing requirements — indeed, in defendant's view, all gun laws.

7 Also denied is defendant's challenge to the constitutionality of the permissive presumption contained in Penal Law § 265.15 (4) (*see People v. Galindo*, 23 N.Y.3d 719, 725-726, 993 N.Y.S.2d 525, 17 N.E.3d 1121 [2014]; *see also Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 [1969]). *Bruen*'s rejection of New York's licensing scheme in no way undermines New York's permissive, rebuttable presumption that a person who possesses an *un*licensed handgun intends to use it in an unlawful manner. In any event, defendant was not indicted based on this presumption, as to which the grand jury was never instructed. Rather, the count charging him with criminally possessing a loaded firearm with intent to use it unlawfully against another (*see* Penal Law § 265.03 [1] [b]) was based on evidence before the grand jury that defendant and another individual acted in concert to fire multiple shots from a moving vehicle being driven recklessly through Manhattan streets.

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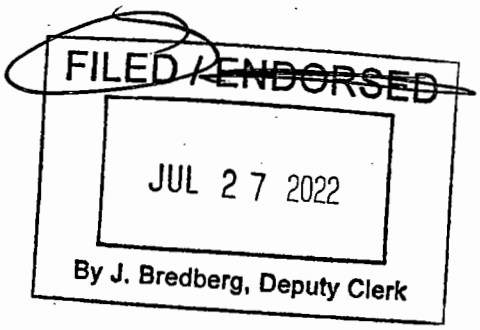

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

The People of the State of California,

Plaintiff,

v.

TONY DIAZ,

Defendant.

Case No. 21FE019850 Dept. 40

ORDER SUSTAINING DEMURRER

The defense demurs to four felony firearm charges, including three alleged violations of Penal Code section 25400, subdivision (a)(3)[1] and one alleged violation of section 25850, subdivision (a). After careful review, the Court concludes the demurrer must be sustained.

I. Introduction

The facts of the case are largely irrelevant to the legal analysis, so the Court will provide only a brief synopsis.

Defendant was one of three individuals in a vehicle smoking marijuana when they were contacted by law enforcement. Defendant was patted down and a loaded unregistered handgun was found in his waistband. Officers also located a key on defendant's person. The key opened a safe that contained two more firearms. Both were unregistered and one was reported stolen.

[1] All future statutory references are to the Penal Code unless otherwise noted.

II. The Demurrer and the People's Response

On July 11, 2022, the defense filed a demurrer challenging the charges. The defense maintains that in light of *New York State Rifle & Pistol Assoc., Inc. v. Bruen* (2022) 142 S.Ct. 2111 (*Bruen*), violations of sections 25400 and 25850 are no longer public offenses. (§ 1004, subd. (4).) The defense maintains *Bruen* invalidated California's concealed carry licensing statutes (§§ 26150, 26155), meaning individuals can no longer be punished for concealed carry of a firearm. Critically, the defense argues an individual need not have attempted to obtain a concealed carry license before invoking *Bruen*. The People disagree.

The People make several arguments that attempt to distinguish *Bruen* and demonstrate the defense's interpretation of *Bruen* is overbroad. The People argue that, under *Bruen*, a state may impose statutory prohibitions so long as those prohibitions do not "altogether prohibit the *public* carry of arms protected by the Second Amendment or state analogues." (Peop. Resp. at p. 5 citing *Bruen*.) The People then point out that sections 25400 and 25850 do not "contain any language regarding a licensing scheme" and that section 25400 prohibits various forms of concealed carry but that *Bruen* was concerned with "licensing scheme that involved public or open carry laws." The People contend section 25850 is still valid because "it does not ban, altogether, public carry." The People go on to cite pre-*Bruen* cases holding sections 25400 and 25850 are constitutional. Finally, the People maintain defendant is not the "law-abiding" citizen that *Bruen* approved for public carry.

III. California's Public Carry Laws

Section 25400, read by itself, completely prohibits carrying a concealed firearm in a vehicle or on one's person. The offense is either a misdemeanor or a felony depending on the circumstances. Section 25850, read by itself, completely prohibits carrying a loaded firearm on one's person or in a vehicle "while in any public place." Like section 25400, the offense is a misdemeanor or a felony depending on the circumstances. Per sections 25655 and 26010, an individual may, however, avoid prosecution for these offenses by obtaining a license under section 26150 or section 26155.

Sections 26150 and 26155 outline the requirements for obtaining a concealed carry

license.[2] The two statutes are essentially identical with one (§ 26150) applying when the sheriff is the licensing authority and the other (§ 26155) applying when the city chief of police is the licensing authority. For the remainder of this order the Court will refer to section 26150 as the relevant statute. To obtain a license an applicant must meet four criteria:

(1) The applicant is of good moral character;

(2) Good cause exists for issuance of the license;

(3) The applicant is a resident of the county, or the applicant's principal place of employment is in the county and the applicant spends a substantial period of time in that place of employment;

(4) The applicant has completed a course of training as described in Section 26165.

Compliance with section 26150 is the only legal means by which the majority of individuals can legally carry a concealed firearm[3].

IV. Bruen and its Effect on California Law

a. Bruen

Bruen holds that the "Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." (*Bruen, supra,* 142 S. Ct. at p. 2122.) The "Second Amendment's plain text [] presumptively guarantees" the right to " 'bear' arms in public for self-defense." (*Id.* at p. 2635.) The decision allows for objective regulations only if they are "consistent with the Nation's historical tradition of firearm regulation." (*Id.*)

Bruen addressed New York's concealed carry licensing law, which required an applicant to convince a licensing officer that he is "of good moral character" and that "proper cause" exists

[2] Sections 26150 and 26155 provide a narrow exception that allows open carry in counties with populations under 200,000 people. Other than this exception, open carry is completely banned in California.

[3] Obtaining a license under section 26150 is not the *only* exemption from prosecution for carrying a concealed firearm. Other exemptions, however, depend on a person's place of employment, or the activity they are engaged in. For the vast majority of individuals, compliance with section 26150 is their only legal path to exercising their right to public carry. (§ 25620 [members of the Armed Forces permitted to public carry when on duty] § 25645 [transportation of unloaded firearms permitted for a person operating a licensed common carrier]; § 25640 [licensed hunters and fisherman permitted to carry concealed weapon while engaged in hunting or fishing]; § 25630 [exemption for any guard or messenger of any common carrier, bank, or other financial institution].)

to issue it. An individual caught with a concealed firearm and without a license, was punishable by four years in prison for a felony or one year in jail for a misdemeanor. Possession of a loaded firearm without a license was punishable by up to 15 years in prison. The two petitioners in *Bruen* each sought a license to carry a concealed weapon and each was denied. The petitioners sued for declaratory and injunctive relief, alleging New York's statute violated the Second Amendment by denying their license applications on the basis that they had failed to show "proper cause." (*Bruen, supra,* at pp. 2122-2126.) The Supreme Court agreed.

The Court began its analysis by rejecting the two-step approach appellate courts had taken to analyze firearm regulations in the wake of *District of Columbia v. Heller* (2008) 554 U.S. 570 (*Heller*) and *McDonald v. City of Chicago* (2010) 561 U.S. 742. The specifics of the two-step approach are not relevant here. Suffice it to say, the Court rejected the two-step analysis and concluded that to justify a regulation of the Second Amendment, the state must demonstrate that the regulation "is consistent with this Nation's historical tradition." Only then, will the individual's conduct fall "outside the Second Amendment's 'unqualified command.' [Citation.]" (*Bruen, supra,* at p. 2126.) The Court then conducted a painstaking review of historical firearm regulations. At the end of their journey, the Court concluded New York did not meet "their burden to identify an American tradition justifying the State's proper-cause requirement." (*Id.* at p. 2156.) The Court stated, "we know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need." (*Id.*) Though it struck down New York's licensing statute, the Court made it clear that regulations consistent with historical precedent are permitted.

b. Effect on California Law

California's concealed carry licensing scheme is the same as New York's. *Bruen* specifically identified California as one of seven states (including New York) that utilize a "proper cause" standard. (*Bruen, supra,* 142 S. Ct. at p. 2124.) In a "Legal Alert," the California Attorney General expressed his view that "that the Court's decision renders California's 'good cause' standard to secure a permit to carry a concealed weapon in most public places

unconstitutional." [4] The Attorney General also states he believes the other requirements of section 26150 remain valid and recommends licensing authorities should "continue to apply and enforce all other aspects of California law with respect to public-carry licenses and carrying of firearms in public." The Legislature is currently considering a bill that would amend California's licensing scheme to comply with *Bruen*. (Sen. Bill 918, 2021-2022 Reg. Sess.)

V. Discussion

a. The People's Arguments

The Court recognizes that *Bruen* addressed a licensing statute, but the demurrer challenges a punishment/criminal statute. But the People's attempt to separate the licensing scheme from the criminal statutes is untenable. The licensing scheme (§ 26150) and criminal statutes (§§ 25400, 25850) are two sides of the same coin. Charging a violation of either section 25400 or 25850 is implicitly and functionally an allegation that the defendant failed to comply with section 26150. When the licensing statute and criminal statutes are considered together, and in light of the caselaw cited by defense, the defendant cannot be punished for exercising his right to public carry.

Bruen unequivocally holds that public carry is *presumptively legal*. States may regulate public carry, but the regulation must be rooted in our Nation's history of gun regulation as interpreted by *Bruen*. If the regulation is not constitutional, then the state returns to the default position – that public carry is legal, at least until the unconstitutional portions of the licensing scheme are excised or amended. The People's arguments do not counter this conclusion.

The Court identified five arguments in the People's response. First, the People contend section 25400 "specifically prohibits various forms of *concealed* carry," but that *Bruen* "was concerned with a licensing scheme that involved public or open carry laws." (Peop. Resp. at p. 5 (Italics in original).) The People are incorrect. The opening paragraphs of *Bruen* cite the New York law prohibiting concealed carry. The Court observed: "If he wants to carry a firearm outside his home or place of business for self-defense, the applicant must obtain an

[4] The Legal Alert can be found at https://oag.ca.gov/system/files/media/legal-alert-oag-2022-02.pdf

unrestricted license to 'have and carry' a *concealed* 'pistol or revolver.' § 400.00(2)(f). To secure that license, the applicant must prove that 'proper cause exists' to issue it." (*Bruen, supra,* 142 S. Ct. at p. 2123 (Italics added).) Clearly, *Bruen* is as applicable to laws related to concealed carry as it is laws concerning open carry.

Related to their first argument, the People's second argument posits that section 25850 "is also appropriate under the *Bruen* analysis as it does not ban, altogether, public carry. Therefore, contrary to Defendant's best efforts to incorrectly expand *Bruen*, Penal Code sections 25400 and 25850 are constitutional statutory prohibitions." (Peop. Resp. at p. 5.) This argument is impossible to square with the statute's plain language. Section 25850 subjects anyone in a public place "carrying a loaded firearm" on the person or in a vehicle to criminal prosecution. This amounts to a total ban on public carry. The validity of the statute depends on individuals having a legal means to exercise their right to public carry. This argument is emblematic of the People's failure to connect the licensing scheme to criminal statutes.

The People's third argument is that *Bruen* only applies to the licensing statutes. To support this argument, the People cite a footnote in a United States District Court case that states "the Supreme Court decision in [*Bruen*], calls into question the constitutionality of California Penal Code § 26150." The Court fails to see the relevance of this case. As noted above and explained more fully below, the invalidation of the only legal means by which an individual can exercise the right to public carry has significant ramifications on the ability to punish an individual for the exercise of this constitutional right. The People's fourth argument is that two pre-*Bruen* California decisions have already found sections 25400 and 25850 are constitutional. *Bruen*, however, renders both of these decisions obsolete.

In *People v. Yarbrough* (2008) 169 Cal.App.4th 303, the defendant was convicted of carrying a concealed and loaded firearm (fmr. §§ 12025 (now § 25400), § 12031 (now § 25850)). The defendant argued these convictions violated the Second Amendment. Relying on *Heller*, the court held the two statutes do "not broadly prohibit or even regulate the possession of a gun in the home for lawful purposes of confrontation or self-defense, as did the law declared constitutionally infirmed in *Heller*." (*Id.* at p. 313.) The court also found that "carrying a firearm concealed on the

person or in a vehicle in violation of section 12025, subdivision (a), is not in the nature of a common use of a gun for lawful purposes which the court declared to be protected by the Second Amendment in *Heller*." (*Id.* at p. 313-314.) The court's conclusions do not survive *Bruen*'s holding that public carry is presumptively legal. Further, the court's reliance on *Heller* (a case that decided whether possession of firearms in the home was protected by the Second Amendment), is superseded by *Bruen*. As it was with *Yarbrough*, the People's faith in *People v. Flores* (2008) 169 Cal.App.4th 568 (*Flores*) is misplaced.

In *Flores*, the defendant was convicted of being a felon in possession of a firearm, carrying a concealed firearm and carrying a loaded firearm in a public place. The defendant argued the convictions violated his Second Amendment rights under *Heller*. The court found that "[g]iven [*Heller's*] implicit approval of concealed firearm prohibitions, we cannot read *Heller* to have altered the courts' longstanding understanding that such prohibitions are constitutional." (*Flores, supra,* at p. 575.)

Flores' conclusion that *Heller* approved concealed firearm prohibitions turned out to be erroneous. *Heller* stated, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." (*Heller, supra,* 554 U.S. at p. 626.) However, *Heller* also made clear they "do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment." (*Ibid.*) The Supreme Court completed its exhaustive analysis in *Bruen*. The *Bruen* court acknowledged *Heller's* dicta on concealed carry laws and stated, "we cautioned that we were not 'undertak[ing] an exhaustive historical analysis today of the full scope of the Second Amendment' and moved on to considering the constitutionality of the District of Columbia's handgun ban." (*Bruen, supra,* 142 S. Ct. at p. 2128.) *Flores* is no longer good law.

The People's fifth, and final argument, is that the facts of the present case distinguish it from *Bruen*. The People argue (1) the charges involve unregistered firearms; (2) "these statutory prohibitions fall short of the blanket bans discussed in *Bruen*; and (3) defendant is not the "law-abiding" citizen using the firearm for self-defense that the Supreme Court approved for concealed carry. The Court fails to see the import of the firearms not being registered, or even stolen. The

defendant is not charged with possession of an unregistered firearm and is not charged with possession of stolen property. The question is whether the charges defendant is facing are still public offenses, and those charges do not depend on whether the gun was registered or stolen. The Court acknowledges sections 25400 and 25850 have provisions that affect the *punishment* for public carry of an unregistered or stolen firearm, but those provisions do not change the fundamental question before the Court. The People's contention that *Bruen* does not apply because defendant is not the type of person entitled to public carry under *Bruen* is similarly unpersuasive.

None of the People's arguments find traction. The People are correct that the Supreme Court repeatedly states the Second Amendment protects the right of "law-abiding" citizens to public carry for "self-defense." However, *Bruen* does not define law-abiding or give any guidance on how lower courts should determine whether a weapon is carried for self-defense or for some other purpose. The People also decline to offer a definition of these ambiguous terms, and the Legislature has not yet addressed these questions. Do the criminal allegations themselves mean someone is not law-abiding? Does carrying a concealed firearm while possibly engaged in uncharged criminal conduct mean someone is no longer law-abiding? Does a prior conviction of any kind mean someone is no longer law-abiding? What if the prior conviction is stale? How does a court determine whether a firearm in a waistband is possessed for self-defense or not? Is a firearm locked in a safe possessed for self-defense or some other purpose? Denying someone's constitutional right by teasing through nebulous questions like these is not the Court's role.

The best argument for sustaining the demurrer is found in caselaw cited by the defense. The People never address these cases in their brief.

b. Defendant May Exercise his Right with Impunity

A critical question in deciding whether to overrule or sustain the demurrer is whether defendant needed to attempt to comply with section 26150 before possessing the firearm in public. The petitioners in *Bruen* chose to challenge the licensing law *after* they applied and were denied, but did they *have to* apply for the license first? The cases cited by the defense are unequivocal – the answer is no.

In *Shuttlesworth v. City of Birmingham, Ala.* (1969) 394 U.S. 147 (*Shuttlesworth*), the petitioner was convicted of violating a city ordinance that prohibited participation in a "parade or procession or any other public demonstration" without first obtaining a permit. The defendant was sentenced to 90 days imprisonment at hard labor and fined. The Alabama Court of Appeals initially reversed the conviction, but it was reinstated by the Alabama Supreme Court. The Supreme Court then reviewed the ordinance and easily determined it was unconstitutional.

Shuttlesworth stated the ordinance was an unlawful prior restraint on the First Amendment because it "conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways." (*Shuttlesworth, supra,* at p. 150.) Critically, the Court then stated:

> *And our decisions have made clear that 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.*

(*Id.* at p. 151.) The Court cited six prior opinions in support of this conclusion, including *Staub v. City of Baxley* (1958) 355 U.S. 313 and *Freedman v. Maryland* (1965) 380 U.S. 51. The defense cites both cases in the demurrer. At least one California appellate court has also held that individuals faced with an unconstitutional license scheme may exercise their right without fear of prosecution.

In *Aaron v. Municipal Court* (1977) 73 Cal.App.3d 596, the petitioners sought a writ of prohibition to prevent their prosecution for violation of a municipal ordinance which outlawed soliciting without a license. The petitioners argued the ordinance violated their First Amendment rights. Application for the writ was necessary because the trial court had overruled the petitioners' demurrers. The appellate court agreed, and reversed the judgment of the trial court and "remanded with directions to issue a peremptory writ of prohibition commanding the respondent municipal court to refrain from further proceedings in the actions specified in the petition, pending against petitioners, *other than to dismiss the same*." (*Id.* at p. 610 (Italics added).)

c. Conclusions

Aaron and *Shuttlesworth* provide a powerful argument for sustaining the demurrer. In *Shuttlesworth*, the defendant's conviction was overturned because the licensing scheme was unconstitutional. In *Aaron*, the court did not even allow the prosecution to proceed because it was based on an invalid restraint on a constitutional right. Read together, the cases hold that an individual cannot be prosecuted for exercising a constitutionally protected right. There is no reason to believe these holdings do not apply when the Second Amendment is at issue. As *Bruen* stated: "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.' [Citation.]" (*Bruen, supra,* 142 S. Ct. at p. 2156.)

At the time of defendant's arrest California provided one legal means by which an individual could exercise their right to public carry – to get a license under section 26150. That path was unconstitutional. According to *Shuttlesworth,* faced with an unconstitutional restriction on his constitutional right, defendant was free to engage "with impunity in the exercise of the right..."

The Court does not relish the conclusion reached here and understands its ramifications. But this result cannot be avoided in light of *Bruen* and *Shuttlesworth* and the arguments presented by the parties.

VI. Disposition

The demurrer is SUSTAINED. The People may attempt to remedy the complaint by filing an amended complaint within ten calendar days of the issuance of this order. (§ 1007.) If an amended complaint is not timely filed, the case will be dismissed. (§ 1008.)

DATED: 7/27/22

HON. STEVE WHITE
JUDGE OF THE SUPERIOR COURT