

CENTER FOR APPELLATE LITIGATION

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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.

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 business¹ 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,

Defendant.

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 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 licensing 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-

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

XXXX XXXX,

Defendant.

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 licensing 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), *see, 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. *See, 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.” See *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 charges, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

THE PEOPLE OF THE STATE OF NEW YORK,

Ind. No. XXXXX

-against-

XXXX XXXX,

Defendant.

NOTICE OF
MOTION
CHALLENGING
CONSTITUTIONALITY
OF “VIOLENT”
CLASSIFICATION AND
SENTENCING RANGE
OF PENAL LAW
§ 265.03 (3)

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.]

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

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 n, 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. ___, slip op. No.20-843 (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*, slip op. at 23 ("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: Bronx, New York
Date

[Attorney, Esq.]

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

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. ____; slip op. No.20-843 (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

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); 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. 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, criminalizing the possession of “any firearm,” is classified as a non-violent E felony and is punishable 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). Penal Law § 70.02(1)(b) classifies the offense as a class C violent felony offense. Penal Law § 70.02(3)(b) makes the offense punishable by determinate sentence ranging from 3 ½ years up to 15 years, and Penal Law § 70.45 (2)(d) 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. ___, slip op. No.20-843 (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 30.

First, the Court held that the Second and Fourteenth Amendment protect an individual’s right to carry a handgun for self-defense outside the home. The foundation for that conclusion was that the Second Amendment did not allow a distinction between inside-the-home possession and public carry. *Id.* at 23 (“Nothing in the Second Amendment’s text draws a home/public distinction with respect to 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 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.*

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 63. 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. *Bruen* at 9, 15, 25 (“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 the 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 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 14-15; 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 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

¹ Although *Hughes* applied intermediate-level scrutiny to analyze whether firearm regulations, 22 N.Y.3d at 51, including punishments, satisfied the Second Amendment, *Bruen* invalidates *Hughes*’ 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* at 13-15.

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. Penal Law § 70.02(3)(b) states that the determinate term of imprisonment for a Class C violent offense “must be at least three and one-half years and must not exceed fifteen years.” Penal Law § 70.45(2)(d) mandates a period of post-release supervision between one and one-half and three years upon conviction of a class C felony offense. 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*, slip op at 4; *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*, slip op. at 3 (Kavanaugh concurrence), 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 as 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 without a “proper-cause” license.

3. This punishment violates the Eighth Amendment.

Finally, the Eighth Amendment compels this conclusion. U.S. Const., amend VIII. 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*].

Accordingly, as Penal Law §§ 70.02(2)(a) and (3)(b) violate the Second Amendment, Due Process, Equal Protection, and the Eighth Amendment with respect to the classification and punishment of Penal Law § 265.03(3), this Court cannot sentence [Client] in accord with those provisions and must instead denominate the offense non-violent and afford the same sentencing options available to individuals convicted of possession of firearms in the home.

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 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).

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 constitutionality 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,

Ind. No. XXXX

v.

XXXXXXX,

Defendant.

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

XXXXXXXXXX

THE PEOPLE OF THE STATE OF NEW YORK,

Ind. No. XXXX

v.

XXXXXXXXXX,

Defendant.

**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