STATE OF NEW YORK
ERIE COUNTY SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK

v.

NOTICE OF MOTION
Indictment No.

[redacted]

YOUR HONOR:

Please take notice that at a term of Erie County Supreme Court, Part __, held at 9:30 a.m. on January __, 2023 or as soon thereafter as counsel can be heard, the defendant will move for the following relief.

1. Dismissal of the indictment on the ground that Penal Law § 265.03(3), as applied to this case, violates her personal right to keep and bear arms (US Const Amends II, XIV). By this motion, the defendant is notifying the New York Attorney General as required by CPLR 1012(b).
2. An Order suppressing the firearm on the ground that it was obtained in violation of the defendant's right to be secure against unreasonable searches and seizures.
3. Inspection of the Grand Jury minutes.
4. An Order directing the prosecution to disclose all items related to the Grand Jury presentation, including the legal instructions and attendance and voting sheets.
5. Any further relief that this Court deems proper.

Respectfully yours,

[redacted]

DATED: January __, 2023
Buffalo, NY

TO:

Hon. _____
Erie County Supreme Court
25 Delaware Ave.
Buffalo, NY 14202

[redacted]
Erie County District Attorney's Office
25 Delaware Ave.
Buffalo, NY 14202

Office of the Attorney General
Litigation Bureau
Justice Building, 2nd Floor
Albany, NY 12224

STATE OF NEW YORK
ERIE COUNTY SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK

v.

SUPPORTING AFFIRMATION
Indictment No.

[redacted]

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

[redacted]., an attorney licensed to practice in the courts of this State, affirms the truth of the following statements under penalties of perjury.

1. I am counsel for the defendant, who is charged in this indictment with criminal possession of a weapon in the second degree (Penal Law § 265.03[3]) for her alleged possession of a loaded 9mm pistol underneath the driver's seat of her vehicle.
2. I make this affirmation in support of my motion for the relief described below. This affirmation is based on information and belief, the source of which is my review of the discovery provided by the prosecution.

Penal Law § 265.03(3) is unconstitutional.

3. Upon a defendant's motion, the Court may dismiss the indictment on the ground that it is defective within the meaning of CPL 210.25 (CPL 210.20[1][a]). An indictment is defective, in relevant part, when "[t]he statute defining the offense is unconstitutional" (CPL 210.25[3]).
4. Here, the statute defining the offense charged, Penal Law § 265.03(3), is unconstitutional as applied to this case for two reasons: (i) it embeds an

unconstitutional **may issue** licensing law and (ii) it dispossesses individuals convicted of misdemeanor drug possession.

5. "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" (US Const Amend II [1791]).

6. The Second Amendment confers a personal right to keep and bear arms for lawful purposes, including the "core lawful purpose of self-defense" (*District of Columbia v. Heller*, 554 US 570, 630 [2008], Scalia, J.).

7. The States, through the Fourteenth Amendment, are bound to respect this right (*McDonald v. City of Chicago, Ill.*, 561 US 742, 750 [2010]). As the licensing law demonstrates, New York has not.

8. Handguns, including the pistol allegedly possessed by the defendant, are protected by the Second Amendment, as "the American people have considered the handgun to be the quintessential self-defense weapon" (*Heller* at 629).

9. Where the Second Amendment covers an individual's conduct, a regulation of that conduct is valid only if it is "consistent with this Nation's historical tradition of firearm regulation" (*New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct 2111, 2126 [2022], Thomas, J.).

10. The regulations at issue are Penal Law §§ 400.00, the exclusive mechanism for the licensing of firearms in New York, and 265.03(3), the criminal prohibition that embeds the licensing law.

<u>New York's may issue licensing law is unconstitutional on its face.</u>

11. There are two types of licensing laws: **shall issue** and **may issue**.

12. A **shall issue** scheme is one in which licensing officials must grant a license to applicants who meet certain objective criteria. A **may issue** scheme is one in which officials have unlimited discretion to grant or deny licenses as they see fit.

13. The licensing law provides, in relevant part, that "[n]o license shall be issued or renewed except for an applicant ... of good moral character," which it defines as having "the essential character, temperament[,] and judgment necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others" (Penal Law § 400.00[1][b]).

14. "Good moral character," even as defined, is a phrase with no objective meaning. The provision gives licensing officials unlimited discretion to grant or deny licenses as they see fit. This is a hallmark of a may issue licensing law.

15. In *Bruen*, the Supreme Court struck down Penal Law § 400.00(2)(f), New York's "proper cause" requirement for obtaining a concealed carry firearms license, because it was a may issue provision. Logic dictates that if the *entire licensing law* is may issue, it is unconstitutional on its face.

16. As a Judge of the United States District Court found in striking the "good moral character" provision, "America lacks a historical tradition of firearm-licensing schemes conferring open-ended discretion on licensing officers" (*Antonyuk v. Hochul*, 2022 WL 16744700 [NDNY 2022], Suddaby, J., slip op at 45). While the decision is not binding on this Court, "the interpretation of a Federal constitutional question by the lower Federal courts may serve as useful and persuasive authority" (*People v. Kin Kan*, 78 NY2d 54, 60 [1991]).

17. The right to keep and bear arms is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees" (*McDonald* at 780).

As such, a licensing law that burdens this right must be analyzed under the same framework as one that burdens the freedom of speech.

18. Imagine a citizen's right to exercise the freedom of speech being vested in the unlimited discretion of licensing officials. Without question, and the Supreme Court has held, such a law is unconstitutional on its face (*Shuttlesworth v. City of Birmingham, Ala.*, 394 US 147, 151 [1969]).
19. As long as different rules apply in the Second Amendment context, the right to keep and bear arms will remain a second-class right.
20. But this Court has the opportunity to restore it to a first-class right. The first step is recognizing that New York has a may issue licensing law – and that the Constitution requires more.

New York's dispossession of individuals convicted of misdemeanor drug possession is unconstitutional as applied to the defendant.

21. Even if the licensing law was constitutional on its face, it is still unconstitutional as applied to the defendant because of its dispossession of individuals convicted of misdemeanor drug possession.
22. The law provides, in relevant part, that "[n]o license shall be issued or renewed except for an applicant ... who has not been convicted anywhere of a felony or serious offense" (Penal Law § 400.00[1][c]).
23. According to the criminal history provided by the prosecution, the defendant's only prior conviction is for criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03), a class A misdemeanor.
24. This is a "serious offense" that permanently disqualifies the defendant from obtaining a firearms license (Penal Law § 265.00[17][a]).

25. “[L]egislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are **dangerous**” (*Kanter v. Barr*, 919 F3d 437, 451 [7th Cir. 2019], Barrett, J., dissenting, *abrogated by Bruen*, n 4). The dispossession of individuals convicted of misdemeanor drug possession does not advance the State's interest in public safety. "Absent evidence that [she] either belongs to a dangerous category or bears individual markers of risk, permanently disqualifying [an individual] from possessing a gun violates the Second Amendment" (*id.*).
26. The historical analysis in Judge Barrett's dissent confirms that dispossession of individuals convicted of non-violent offenses is not consistent with the Nation's historical tradition of firearm regulation.
27. Misdemeanor drug possession -- the possession of a small amount of a controlled substance for personal use -- is a non-violent offense. It does not indicate that a person is too dangerous to be granted a firearms license. It cannot serve as the basis for a lifetime ban on the exercise of a constitutional right.
28. Because of New York's refusal to allow the defendant to exercise her right to keep and bear arms, the licensing law is an unconstitutional infringement on her right to keep and bear arms.

<u>Penal Law § 265.03(3), which embeds the licensing law, is unconstitutional as applied to this case.</u>

29. The logic for striking down Penal Law § 265.03(3) is simple: it embeds an unconstitutional licensing law.
30. In the First Amendment context, a conviction for violating such a law cannot stand. Rather, “a person faced with such an unconstitutional licensing law may ignore it

and engage with impunity in the exercise of the right of free expression for which the law purports to require a license" (*Shuttlesworth* at 151).

31. It is anticipated that the prosecution will argue that the defendant, having not applied for a firearms license, lacks standing to challenge the constitutionality of the statute. For two reasons, this is incorrect.

32. First, CPL 210.20 confers automatic standing by providing for dismissal of an indictment charging an unconstitutional statute. This is consistent with the principle that if an individual "is subject to prosecution under one of the challenged statutes, that [individual has] standing to challenge the constitutionality of that statute" (*Allee v. Medrano*, 416 US 802, 828 [1974], Burger, C.J., concurring).

33. Second, the defendant, due to her prior conviction for misdemeanor drug possession, was ineligible to obtain a license.

34. Third, "the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review ... of a judgment of conviction under such an ordinance" (*Staub v. City of Baxley*, 355 US 313, 319 [1958]). "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" (*Shuttlesworth* at 151).

35. Again, the same rules must apply in the Second Amendment context.

36. Faced with an unconstitutional licensing law, the defendant was free to ignore it and exercise her constitutional right to keep and bear arms. Until the State brings Penal Law § 400.00 into compliance with the Constitution, no indictment charging Penal Law § 265.03(3) can stand.

37. In order to restore the Second Amendment to a first-class right, the indictment must be dismissed.

The seizure of the defendant and search of her vehicle were unlawful.

38. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" (US Const Amend IV; NY Const Art I, § 12).

39. Upon motion of a defendant who is aggrieved by the improper acquisition of evidence, the Court may order such evidence suppressed on the ground that it "[c]onsists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action" (CPL 710.20[1]).

40. The relevant facts can be gathered from the 911 call and body camera footage.

41. The 911 caller reported shots fired at Niagara and Austin Streets in the city of Buffalo. The caller described the shooter as a white male, wearing a black T-shirt with white writing and black shorts, standing in front of a car dealership.

42. The information was sent out over the police radio as the 911 caller described.

43. Minutes later, the police arrived at the scene. They encountered Matthew Baker, a white male wearing a black T-shirt with white writing and dark shorts, standing in front of the car dealership at Niagara and Austin. Baker told them that the shooter was a female driving a Honda with pink flowers on the side.

44. Although Baker was clearly the shooting suspect, the police inexplicably treated him as a witness and acted on his information. They pulled over the defendant's vehicle further up on Niagara Street, took her into custody, and searched her vehicle, recovering a pistol underneath the driver's seat.

45. Occupants of a vehicle, "entitled to use the public highways, have a right to free passage without interruption or search unless there is ... probable cause for believing that their vehicles are carrying contraband" (*Carroll v. United States*, 267 US 132, 154 [1925], Taft, C.J.). A vehicle may also be stopped if the police upon reasonable suspicion that one of the occupants has committed a crime (*People v. Brooks*, 266 AD2d 864 [4th Dept. 1999]).
46. The stop and search were unlawful for the same reason: Baker's information was worthless. He himself was the shooting suspect, so it could not have been the defendant or anyone else, and he had no credibility. The police let Baker slip through their fingers and frame the defendant for the shooting. They had neither reasonable suspicion for the seizure of the defendant nor probable cause for the search of her vehicle.
47. The defendant requests a hearing to determine the merits of this motion (CPL 710.60[4]).

The defendant moves for inspection of the Grand Jury minutes.

48. A court may dismiss the indictment, or any count thereof, upon the ground that "[t]he evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense" (CPL 210.20[1][b]). Legally sufficient evidence is "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" (CPL 70.10[1]).
49. The defendant moves for inspection of the Grand Jury minutes for the purpose of determining whether the evidence before the Grand Jury was legally sufficient to support the sole offense charged in the indictment (CPL 210.30[2]).

50. If the Court finds that the evidence is legally insufficient to establish every element of the offense charged, the indictment should be dismissed.

The defendant is entitled to all items and information related to the Grand Jury presentation.

51. The prosecution has disclosed the Grand Jury minutes. However, it has not provided either the legal instructions or the attendance and voting sheets, although these items exist and are in their possession.

<u>These items are part of the prosecution's automatic discovery obligation.</u>

52. As part of their automatic discovery obligation, the prosecution must disclose to the defendant "all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control, including ***but not limited to***" the categories of discovery that follow (CPL 245.20[1], emphasis added).
53. "This mandate virtually constitutes open file discovery, or at least makes open file discovery the far better course of action to assure compliance" (*People v. Cartagena*, 76 Misc3d 1214[A] [Crim Ct, Bronx County 2022], Licitra, J.).
54. If this opening language leaves any question, the discovery statute includes a presumption of openness, which requires "a presumption in favor of disclosure when interpreting sections 245.10 and 245.25, and subdivision one of section 245.20, of this article" (CPL 245.20[7]).
55. There is no question that all items and information related to the Grand Jury presentation – the source of the indictment – are related to the subject matter of the case and are in the possession of the prosecution.

56. They are subject to automatic disclosure.
57. Through this motion, the defendant is notifying the prosecution that their Certificate of Compliance is deficient until these items are provided (CPL 245.50[4][b]).

In the alternative, the Court should issue a discovery order.

58. If the Court finds that these items are not subject to automatic discovery, it may order their disclosure under its discretionary discovery authority. A discovery order may be issued "upon a showing by the defendant that the request is reasonable and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means" (CPL 245.30[3]).
59. The request is reasonable. The legal instructions are necessary to ensure that the Grand Jury was properly instructed on the law and that the charges voted by the Grand Jury are consistent with the indictment. The voting and attendance sheets are necessary to ensure that the requisite number of grand jurors heard all of the testimony and voted the indictment (CPL 210.35[2], [3]). There are no interests that will be adversely affected by the disclosure of these items.
60. The defendant is unable to obtain these items unless they are provided by the prosecution.

The defendant reserves the right to file further motions.

61. Although the defendant has made every effort to include all motions in the same set of papers, she reserves the right to file further motions if they become necessary.

For these reasons, the defendant requests that the relief described above be granted, along with any other relief the Court deems proper.

_____

[redacted]