

STATE OF NEW YORK  
ERIE COUNTY (SUPREME) COURT

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THE PEOPLE OF THE STATE OF  
NEW YORK

v.

DEFENDANT

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**NOTICE OF MOTION**

Indictment No.

YOUR HONOR:

Please take notice that at a term of Erie County (Supreme) Court, Part \_\_, at 9:30 a.m. on \_\_\_\_\_, 2023 or as soon thereafter as counsel can be heard, the defendant will move to dismiss the indictment on the ground that Penal Law § 265.03(3), as applied to this case, violates his 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).

DATED: \_\_\_\_\_, 2023  
Buffalo, NY

Respectfully yours,

ATTORNEY, ESQ.  
Attorney at Law

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TO:

Hon. \_\_\_\_\_

Erie County District Attorney  
25 Delaware Ave.  
Buffalo, NY 14202

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

STATE OF NEW YORK  
ERIE COUNTY (SUPREME) COURT

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THE PEOPLE OF THE STATE OF  
NEW YORK

v.

DEFENDANT

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**SUPPORTING AFFIRMATION**

Indictment No.

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

ATTORNEY, ESQ., an attorney admitted 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 his alleged possession of a loaded firearm on \_\_\_\_\_.
2. I make this affirmation in support of my motion to dismiss the indictment. This affirmation is made upon information and belief, the source of which is my review of the indictment and the discovery provided by the prosecution.
3. Upon a defendant's motion, the Court may dismiss the indictment on the ground that it is defective within the meaning of section 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. The statute defining the offense charged, Penal Law § 265.03(3), is unconstitutional as applied to this case because it embeds an unconstitutional may issue licensing law.
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]).

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]).
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.

**New York’s may issue licensing law is unconstitutional on its face.**

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” (Penal Law § 400.00[1][b]). “Good moral character” is defined as “having the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others” (*id.*).
14. “Good moral character,” even as defined, is a phrase with no objective meaning. It gives licensing officials unlimited discretion to grant or deny licenses as they see fit. It is the 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. “The Second Amendment elevates above all other interests the right of law-abiding, responsible citizens to use arms for self-defense. The Supreme Court has thus admonished the lower courts that this right demands our unqualified deference. But ‘may-issue’ permitting schemes violate this Second Amendment right” (*Young v. Hawaii*, 45 F4th 1087, 1093 [9th Cir. 2022], O’Scannlain, J., dissenting). This is so because “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).
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.

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

21. The logic for striking down Penal Law § 265.03(3) is simple: it embeds an unconstitutional licensing law.
22. 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).
23. 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.
24. 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).
25. Second, “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).
26. Again, the same rules must apply in the Second Amendment context.
27. Faced with an unconstitutional licensing law, the defendant was free to ignore it and exercise his 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.

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

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ATTORNEY, ESQ.