

STATE OF NEW YORK
ERIE COUNTY COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

NOTICE OF MOTION

YOUR HONOR:

Please take notice that at a term of Erie County Court, [REDACTED] held at 9:30 a.m. on [REDACTED] [REDACTED], 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)(1).

March __, 2023

Respectfully yours,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

TO:

Hon. [REDACTED]

Erie County District Attorney
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 COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

SUPPORTING AFFIRMATION

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
TOWN OF [REDACTED])

[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 to 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 semi-automatic pistol. On the date of the alleged possession, [REDACTED]
2. I make this affirmation in support of my motion 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). 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 an 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. The statute defining the offense is unconstitutional because it prohibits many young adults, including Mr. Colston, from lawfully possessing a firearm.
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]). The States, by way of the Fourteenth Amendment, are bound to respect this right (*McDonald v. City of Chicago, Ill.*, 561 US 742, 750 [2010]).
7. Handguns, including the pistol allegedly possessed by Mr. Colston, are protected by the Second Amendment, as “the American people have considered the handgun to be the quintessential self-defense weapon” (*Heller* at 629).
8. Where the Second Amendment covers an individual’s conduct, a regulation of that conduct is valid only if “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]).

Penal Law § 400.00(1)(a) is unconstitutional on its face.

9. In the early days of Reconstruction, Frederick Douglass said that an individual’s rights “rest in three boxes: the ballot-box, the jury-box, and the cartridge box” (*Fred. Douglass: The Black Radical Oracle Denounces Things Generally*, Nashville Union and American, October 30, 1867, p. 2).
10. In New York, two of these rights – to vote and to serve on juries – vest at age 18 (Election Law § 5-102[1]; Judiciary Law § 510[2]). But not the right to keep and bear arms.
11. The licensing law provides, in relevant part, that “[n]o license shall be issued or renewed except for an applicant ... twenty-one years of age or older,” with an exception for those honorably discharged from the armed services (Penal Law § 400.00[1][a]).
12. A person is criminally responsible for possessing a firearm at age 17 (Penal Law § 30.00[3]). But Penal Law § 400.00(1)(a) prevents them from obtaining a license until they turn 21 – which, for some, means a choice between death and prison.
13. But the age limit is not only unjust; it is unconstitutional.
14. In a recent federal case decided after *Bruen*, the court asked “a simple question: are law-abiding 18-to-20-year-olds properly considered members of the political community and a

part of the national community? The answer is yes” (*Firearms Policy Coalition, Inc. v. McCraw*, 2022 WL 3656996, slip op at 4 [ND Tex. 2022], Pittman, J.). On the basis of that answer, the court concluded, “law-abiding 18-to-20-year-olds are a part of ‘the people’ referenced in the Second Amendment,” and their dispossession is not consistent with the Nation’s historical tradition of firearm regulation (*id.*).

15. This conclusion is supported by a review of the Nation’s historical gun laws, which reveals that as of 1868 – the year the Fourteenth Amendment was ratified – not a single State set the age of legal possession at 21 (Duke Center for Firearms Law, Repository of Historical Gun Laws, https://firearmslaw.duke.edu/repository/search-results/?sft_subjects=possession-by-use-of-and-sales-to-minors-and-others-deemed-irresponsible).

16. Penal Law § 400.00(1)(a) must be struck down.

Penal Law § 265.03(3) is unconstitutional as applied to adults under the age of 21.

17. The logic for striking down Penal Law § 265.03(3) is simple: it embeds an unconstitutional licensing law, and a conviction for violating such a law cannot stand (*Shuttlesworth v. City of Birmingham*, 394 US 147 [1969]).

18. In *Shuttlesworth*, the Supreme Court struck down an ordinance that infringed on the First Amendment rights of civil rights leaders. This case involves a law that infringes on another civil right – the Second Amendment rights of young adults – and it deserves the same treatment.

19. 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). The law currently treats it as such, but this Court has the opportunity to restore it to a first-class right.

20. To bring the licensing law in line with the Constitution, the State must make a license available to any law-abiding citizen who is old enough to be criminally responsible for possessing a firearm – and, in any event, set the age of legal possession no higher than 18. Until it does, Penal Law § 265.03(3) is unconstitutional as applied.

In order to vindicate the right of all young adults to keep and bear arms, the indictment must be dismissed.

[REDACTED]