STATE OF NEW YORK
ERIE COUNTY COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

NOTICE OF OMNIBUS MOTION
IND[redacted]

[redacted]

YOUR HONOR:

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

1. Inspection of the Grand Jury minutes.
2. An Order suppressing the physical evidence on the following grounds.
    a. CPLR article 63-A, the Extreme Risk Protection Act, is unconstitutional. By this motion, the defendant is notifying the Attorney General as required by CPLR 1012(b)(1).
    b. The temporary Extreme Risk Protection Order was not supported by probable cause.
3. An Order dismissing Count Two of the indictment on the ground that Penal Law § 265.03(3), as applied, violates his personal right to keep and bear arms (US Const Amends II, XIV). By this motion, the defendant is notifying the Attorney General as required by CPLR 1012(b)(1).
4. An Order directing the prosecution to disclose all items and information related to the Grand Jury presentation, including the legal instructions and attendance and voting sheets.
5. An Order precluding the statements referenced in the CPL 710.30 notice.
6. Any further relief this Court deems proper.

_____, 2023

Respectfully yours,

[redacted]
Attorney at Law
_____
_____
_____

TO:

Hon. Susan M. Eagan
Erie County Court, Part 18
25 Delaware Ave.
Buffalo, New York 14202

ADA Andrew Criado
Erie County District Attorney's Office
25 Delaware Ave.
Buffalo, New York 14202

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

STATE OF NEW YORK
ERIE COUNTY COURT

_____

THE PEOPLE OF THE STATE OF
NEW YORK

v. **SUPPORTING AFFIRMATION**

[redacted]

STATE OF NEW YORK)
COUNTY OF ERIE) ss.

[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 Mr. [redacted] who is charged in this indictment with two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]) for his alleged possession of a loaded semi-automatic pistol and a loaded AR-15 style rifle. The firearms were recovered at his residence pursuant to a temporary Extreme Risk Protection Order (ERPO) on [redacted].

2. I make this affirmation in support of the relief described below. Unless otherwise stated, this affirmation is made upon information and belief, the source of which is my review of the discovery provided by the prosecution.

The defendant moves for inspection of the Grand Jury minutes.

3. 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]).

4. 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 all of the offenses charged in the indictment (CPL 210.30[2]).
5. If the Court finds that either count of the indictment was not supported by legally sufficient evidence, that count should be dismissed.

The firearms were unlawfully recovered.

6. Upon motion of a defendant aggrieved by the acquisition of tangible evidence, the Court may order that such evidence be suppressed on the ground that it was "obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof" (CPL 710.20[a], [1]).
7. For two reasons, the firearms were recovered in violation of Mr. [redacted] constitutional rights, requiring their suppression.

<u>The Extreme Risk Protection Act is unconstitutional.</u>

8. "[N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (US Const Amend IV, NY Const Art I § 12).
9. "Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonable trustworthy information, are sufficient unto themselves to warrant a [person] of reasonable caution to believe that an offense has been or is being committed" (*Berger v. State of NY*, 388 US 41, 55 [1967]).
10. An ERPO is a substitute for a search warrant, so the statute is constitutional only if it meets the probable cause requirement.

11. The standard for issuing a temporary ERPO is "probable cause to believe the respondent is likely to engage in conduct that would result in serious harm to himself, herself or others, as defined in paragraph one or two of subdivision (a) of section 9.39 of the mental hygiene law" (CPLR 6342[1]).
12. In order words, the statute requires probable cause not of evidence of a crime, but evidence of potential future harm.
13. The Constitution requires more.
14. In *Berger*, the Supreme Court struck down New York's eavesdropping statute as unconstitutional, in part, because it authorized eavesdropping "without requiring belief that any particular offense has been or is being committed" (*id.*, at 58). The Extreme Risk Protection Act must fall for the same reason.
15. Because the search provision of the statute is unconstitutional, all evidence recovered pursuant to the order must be suppressed.
16. Additionally, two courts have found the statute unconstitutional on a separate ground.
17. In *G.W. v. C.N.*, a justice of the Monroe County Supreme Court found CPLR article 63-A, the Extreme Risk Protection Act, to be unconstitutional on its face because it "does not sufficiently protect a citizen's rights" (78 Misc3d 289, 291 [Supreme Ct, Monroe County 2022], Moran, J.).
18. The court held that "in order to pass constitutional muster, the legislature must provide that a citizen be afforded procedural guarantees, such as a *physician's* determination that a respondent presents a condition likely to result in serious harm, before a petitioner files for a TERPO or ERPO. Since this standard is required to prevent a respondent from being deprived of fundamental rights under the Mental Hygiene Law, then anything less (as contained in article 63-A) deprives a citizen of a fundamental right without due process of law" (*id.*, at 295).

19. In *R.M. v. C.M.*, a justice of the Orange County Supreme Court reached the same conclusion (2023 NY Slip Op 23088 [Sup Ct, Orange County 2023], Brown, J.).

20. These decisions should be followed.

The temporary Extreme Risk Protection Order was not supported by probable cause.

21. Even if the Extreme Risk Protection Act is constitutional, this particular order was not supported by probable cause that Mr. [redacted] was likely to engage in conduct that would result in serious harm to himself or others.

22. The alleged probable cause was the following information. _____

_____

_____.

23. "Probable cause may be supplied, in whole or in part, by hearsay information, provided that it satisfies the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted" (*People v. Pitcher*, 199 AD3d 1493 [4th Dept. 2021]).

24. For the following reasons, the police acted on the hearsay information without verifying the reliability of the informant. _____

_____

_____.

25. Therefore, the ERPO was not supported by probable cause, and the firearms must be suppressed. If the Court does not summarily grant the motion, Mr. [redacted] is entitled to a hearing (CPL 710.60[4]).

New York's near-total ban on "assault weapons" is unconstitutional.

26. 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]).

27. The statute defining the offense charged, Penal Law § 265.03(3), is unconstitutional as applied to this case because it prohibits a class of arms that are commonly possessed for lawful purposes.

28. In relevant part, a firearm is an "assault weapon," and an assault weapon is "a semiautomatic rifle that has an ability to accept a detachable magazine" and at least one banned feature (Penal Law §§ 265.00[3][e], 265.00[22][a]).

29. As alleged, Mr. [redacted] rifle qualifies as an assault weapon.

30. Penal Law § 400.00 is the exclusive mechanism for the licensing of firearms in New York, and the only provision for the lawful possession of "assault weapons" by civilians is for those possessed prior to January 15, 2013 and registered within one year of that date (Penal Law §§ 400.00[16-a], 265.00[22][g][v]).

31. In other words, New York maintains a near-total ban on AR-15 style rifles with at least one banned feature. The ban extends to possession in the home, "where the need for defense of self, family, and property is most acute" (*District of Columbia v. Heller*, 554 US 570, 628 [2008]).

32. "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).

33. The Second Amendment confers "a personal right to keep and bear arms for lawful purposes," a right that is fully applicable to the States by way of the Fourteenth Amendment (*McDonald v. City of Chicago, Ill.*, 561 US 742, 780 [2010]).

34. The Second Amendment applies to "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding" (*Heller*, 554 US at 582). A class of arms is protected by the Second

Amendment if the arms are "typically" or "commonly possessed by law-abiding citizens for lawful purposes" (*id.*, at 625; *Caetano v. Massachusetts*, 577 US 411, 420 [2016], Alito, J., concurring).

35. In *Heller*, the U.S. Supreme Court held handguns to be a class of arms protected by the Second Amendment (554 US at 628).

36. In evaluating the constitutionality of a firearm regulation, courts are not free to engage in interest-balancing analysis. Rather, "when the Second Amendment's plain text covers an individual's conduct, the government must demonstrate that the regulation 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]).

37. Mr. [redacted] rifle is in a class of arms protected by the Second Amendment, and New York's near-total ban on these arms is unconstitutional.

AR-15 style rifles are commonly possessed for lawful purposes, and therefore in a class of arms protected by the Second Amendment.

38. AR-15 style rifles are commonly possessed.

39. In 2021, according to the sales data they submitted to the U.S. House of Representatives, three of the Nation's largest firearms manufacturers combined to sell over 500,000 AR-15 style rifles (Rep. Carolyn Maloney, Memorandum to Members of the Committee on Oversight and Reform, July 27, 2022, pp. 7-8).

40. The estimated number of AR-15 style rifles owned by Americans – as calculated by "rifle production plus imports less exports" from 1990 through 2020 – is over 24 million (National Shooting Sports Foundation, "Commonly Owned," July 20, 2022, https://www.nssf.org/articles/commonly-owned-nssf-announces-over-24-million-msrs-in-circulation).

41. AR-15 style rifles are overwhelmingly possessed for lawful purposes.

42. According to FBI statistics, rifles – including those built on the AR-15 platform – were confirmed to be responsible for 1,573 homicides between 2015 and 2019, while handguns were confirmed to be responsible for 33,075 homicides (Federal Bureau of Investigation, Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015-2019, https://ucr.fbi.gov/crime-inthe-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8xls). Even the U.S. Court of Appeals for the Seventh Circuit, in upholding a similar ban, conceded that "handguns ... are responsible for the vast majority of gun violence un the United States" (*Friedman v. City of Highland Park, Ill.*, 784 F3d 406, 409 [7th Cir. 2015]).

43. If handguns are protected by the Second Amendment, and they are, then AR-15 style rifles – commonly owned and less commonly used in crime – must be as well.

44. Because the plain text of the Second Amendment covers the defendant's conduct, the burden shifts to the prosecution to prove that New York's near-total ban is consistent with the Nation's historical tradition of firearm regulation.

A near-total ban on a class of arms protected by the Constitution is not consistent with the Nation's historical tradition of firearm regulation.

45. New York's near-total ban on AR-15 style rifles is comparable to the total ban on handguns that the Supreme Court struck down in Heller. In fact, it is a total ban on all such rifles manufactured since January 15, 2013, as well as those not registered within one year of that date. It leaves 5 law-abiding citizens – including the defendant, who has no criminal record – virtually no ability to lawfully possess these weapons.

46. There is no historical analogue to a near-total ban on a constitutionally protected class of weapons (Duke Center for Firearms Law, Repository of

Historical Gun Laws, https://firearmslaw.duke.edu/repository/search-the-repository/).

47. There is no question that AR-15 style rifles are dangerous. "But their ability to project large amounts of force accurately is exactly why they are an attractive means of self-defense. While most persons do not require extraordinary means to defend their homes, the fact remains that some do. Ultimately, it is up to the lawful gun owner and not the government to decide these matters" (*Friedman*, 784 F3d at 413, Manion, J., dissenting).

48. Possession and ownership of AR-15 style rifles, like handguns, may be regulated. The State may amend Penal Law §§ 400.00 to subject them to the same licensing requirements as pistols and revolvers. But a near-total ban does not withstand constitutional muster.

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

49. 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.

These items are part of the prosecution's automatic discovery obligation.

50. 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).

51. The discovery statute includes a presumption of openness under which "[t]here shall be 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]).

52. 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.

53. 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.

54. 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]).

55. 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.

56. The defendant is unable to obtain these items unless they are provided by the prosecution.

The statements referenced in the CPL 710.30 notice should be precluded.

57. In the CPL 710.30 notice, the prosecution referenced Mr. [redacted] "statements to Buffalo Police officers, which were captured on body camera," made on [redacted].

58. Whenever the prosecution intends to offer evidence a statement made by a defendant to a public servant, they must serve upon the defendant a notice of such intention, "specifying the evidence intended to be offered" (CPL 710.30[1][a]).

59. Complying with this statute requires the prosecution "to inform defendant of the time and place the oral or written statements were made and of the sum and substance of those statements" (*People v. Lopez*, 84 NY2d 425, 428 [1994]).

60. The CPL 710.30 notice is inadequate. It turns the statute on its head by requiring the defense to dig through voluminous body camera footage in order to gather all of Mr. [redacted] statements. It also fails to specify the time and place of the statements, which can be hard to ascertain in body camera footage.

61. Because a proper notice was not served within fifteen days of Mr. [redacted] arraignment, any statements attributed to Mr. [redacted] are inadmissible at trial (CPL 710.30[2], [3]).

62. Although Mr. [redacted] has made every effort to include all pre-trial motions in the same set of papers, he reserves the right to file further motions if they become necessary.

For the reasons stated, the requested relief should be granted, along with any further relief this Court deems proper.