

STATE OF NEW YORK
NIAGARA COUNTY COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

NOTICE OF
OMNIBUS MOTION
IND- [REDACTED]

YOUR HONOR:

Please take notice that upon the attached affirmation of [REDACTED],
ESQ., the defendant will move, at a term of Niagara County Court, Part I, at 2:00
p.m. on [REDACTED] 2023, for the following relief.

1. Review of the Grand Jury minutes and dismissal of the indictment.
2. An Order directing the prosecution to disclose all items and information related to the Grand Jury proceeding, including the legal instructions and attendance and voting sheets.
3. An Order directing the prosecution to disclose all body worn camera footage.
4. An Order dismissing the indictment on the ground that Penal Law § 265.03(3), as applied to this case, violates the defendant's 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).

5. An order suppressing the firearm on the ground that it was recovered in violation of the defendant's right to be secure against unreasonable searches and seizures (US Const Amend IV, NY Const Art I § 12).

6. Leave to file further motions if necessary.

7. Any other relief this Court deems proper.

DATED: [REDACTED] 2023
Buffalo, New York

Respectfully yours,

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

TO:

Hon. John Ottaviano
Niagara County Courthouse
175 Hawley Street
Lockport, New York 14094

Maria H. Stoelting, Esq.
Niagara County District Attorney's Office
175 Hawley Street
Lockport, New York 14094

Office of the Attorney General
Buffalo Regional Office
350 Main Street
Buffalo, New York 14202

STATE OF NEW YORK
NIAGARA COUNTY COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

SUPPORTING AFFIRMATION

IND [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, [REDACTED] who is charged in this indictment with one count of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]). The charge arose from [REDACTED] alleged possession of a loaded firearm in a vehicle on [REDACTED], 2023.

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

The Grand Jury minutes were insufficient to establish the element of possession.

3. A court may dismiss an indictment on the ground that "the 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. ██████ moves for review of the Grand Jury minutes to determine whether the evidence was legally sufficient to support the indictment (CPL 210.30[2]). Upon review, it will be clear that the minutes did not establish the element of possession.

5. "Possess means to have physical possession or otherwise to exercise dominion or control over tangible property" (Penal Law § 10.00[8]). The firearm was recovered in a bag that ██████ said was not his. The bag was in a car that did not belong to him. Another person was as close to the bag as he was.

6. The indictment should be dismissed.

The prosecution must disclose all items and information related to the Grand Jury presentation.

7. The prosecution has provided the Grand Jury minutes, but not the legal instructions or the attendance and voting sheets, although these items exist and are in its possession.

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

8. As part of its 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). 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]).

9. “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.).

10. 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.

11. Through this motion, ██████████ is notifying the prosecution that its 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.

12. 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]).

13. 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.

14. [REDACTED] is unable to obtain these items unless they are provided by the prosecution.

The prosecution must disclose all body worn camera footage.

15. As part of its automatic discovery obligation, the prosecution must disclose "[a]ll tapes or other electronic recordings" that relate to the subject matter of the case (CPL 245.20[1][g]). This includes all body worn camera and dash camera footage recorded by the police officers.

16. No such footage has been disclosed, even though there are several news stories that reference the use of body worn cameras by members of the Niagara Falls Police Department (e.g., [REDACTED], "Niagara Falls Police Release Bodycam Footage from Police-Involved Shooting," WGRZ News, [REDACTED] 2023, [https://www.wgrz.com/article/news/crime/\[REDACTED\]-\[REDACTED\]-1-0ca1325c-6d22-4783-adcb-e01f4881df58](https://www.wgrz.com/article/news/crime/[REDACTED]-[REDACTED]-1-0ca1325c-6d22-4783-adcb-e01f4881df58)).

17. By Through this motion, [REDACTED] is notifying the prosecution that its Certificate of Compliance is deficient until these items are provided (CPL 245.50[4][b]).

Penal Law § 265.03(3) is unconstitutional.

18. Upon a defendant's motion, the Court may dismiss an indictment on the ground that "the statute defining the offense is unconstitutional" (CPL 210.20[1][a], 210.25[3]). In this case, the statute is unconstitutional because it disqualifies many young adults, including ██████████ from lawfully possessing a firearm.

19. The Second Amendment confers a personal right to keep and bears arms for lawful purposes, including the "core lawful purpose of self-defense" (*District of Columbia v. Heller*, 554 US 570, 630 [2008]). This right is fully applicable to the States by way of the Fourteenth Amendment (*McDonald v. City of Chicago, Ill.*, 561 US 742, 750 [2010]).

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

21. Where the Second Amendment covers an individual's conduct, a regulation of that conduct is lawful 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]).

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

22. In the early days of Reconstruction, Frederick Douglass said that a person'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).

23. In New York, two of those rights - to vote and to serve on juries - vest at the age of 18 (Election Law § 5-102[1]; Judiciary Law § 510[2]). But not the right to keep and bear arms.

24. The licensing law provides, in relevant part, that "no 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]).

25. A person is criminally responsible for possessing a firearm at the age of 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.

26. But the age limit is not only unjust; it is unconstitutional.

27. In a 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*, 623 F.Supp.3d 740, 7444 [ND Tex. 2022], Pittman, J.). Thus,, 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.*).

28. Admittedly, other courts have disagreed. But the *Pittman* court's 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/?sftsubjects=possession-by-use-of-and-sales-to-minors-and-others-deemed-irresponsible>).

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

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

30. 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]).

31. 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.

32. 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.

33. 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.

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

The firearm should be suppressed.

35. "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).

36. Where tangible property is recovered in violation of a citizen's constitutional rights, it must be suppressed (CPL 710.20[a], [1]).

37. With respect to the stop, ██████████, as an occupant of a vehicle stopped by the police, has standing to contest the legality of the stop.

38. Where the police lack "reasonable suspicion that a crime [has] occurred or probable cause to stop [the] vehicle for a traffic infraction," a traffic stop is unlawful (*People v. Hinshaw*, 35 NY3d 427, 429 [2020]).

39. In his Grand Jury testimony, PO Travis ██████████ claimed that the reason for the stop was the driver's failure to use a turn signal when pulling off the side of the road (Grand Jury minutes, p. 8).

40. ██████████ requests a hearing to assess the credibility of this testimony (CPL 710.60[4]).

41. With respect to the search, is unknown whether the prosecution instructed the Grand Jury on the automobile presumption codified in Penal Law § 265.15(3). If so, ██████ has automatic standing to challenge the legality of the search (*cf. People v. Graham*, 171 AD3d 1559, 1560 [4th Dept. 2019]).

42. The warrantless search of the vehicle was conducted without probable cause, and therefore illegal. PO ██████ did not allege that he saw the firearm in the bag; rather, he had to open the bag in order to find it.

43. The police later obtained consent to search from the owner of the car, but this was after PO ██████ had already searched it and recovered the bag.

44. Mr. ██████ requests a hearing to assess the legality of the search.

Further motions may be necessary.

45. In compliance with the omnibus motion rule, every effort has been made to include all pre-trial motions in the same set of papers (CPL 255.20[2]). However, Mr. ██████ reserves the right to file further motions if they become necessary.

For the reasons stated, the motion should be granted in all respects, along with any other relief the Court deems proper.

██████████ ESQ.