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ISSUES TO DEVELOP AT TRIAL

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*Does this sound familiar? Your client stands accused of killing or hurting someone (or attempting to do so) with a gun, and your defense is justification. The court charges justification with respect to the homicide or assault charges, but not with respect to the associated weapon possession charges. You have no grounds to object because of *People v. Almodovar*, 62 N.Y.2d 126 (1984), where the Court of Appeals held that justification applies only to the **use** of force - not the **possession** of the gun. The result? Your client faces a felony conviction and a potentially hefty prison sentence, even if the jury finds him justified, because he nonetheless unlawfully possessed the weapon.*

*This month's Issues to Develop proposes a Second Amendment challenge to *Almodovar*. Since, as the Supreme Court held in *Nati'l Rifle Ass'n v. Bruen*, one's right to carry a gun for self-defense is at the core of the Second Amendment right, your client should not be denied a justification defense for possessing a weapon for that reason. His self-defense needs render his possession lawful. The limited common-law defense of temporary and lawful possession that New York provides inadequately protects your client's constitutional right to bear arms in self-defense.¹*

Below, we provide some legal background and a suggested challenge.

Some Background

A common scenario finds your client charged with causing death or injury to another person (or attempting to do so) by shooting a gun he either was carrying, was handed, or wrested from an aggressor. He faces homicide and/or assault charges, as well as weapon possession charges under Penal Law § 265.03(1)(b) – intent to use a loaded firearm unlawfully against another – and Penal Law § 265.03(3) – possession of a loaded firearm outside home or place of business. The court grants justification with respect to the homicide or assault counts. But the jury is not instructed to consider justification with respect to the weapon possession counts.

You have had no basis to object (before now). In *Almodovar*, the Court of Appeals held that justification is not a defense to unlawful weapon possession. The Court reasoned that once unlawful possession of a weapon is established, the possessory crime is complete. A person who

¹ In all gun cases, continue to make motions to dismiss. For some guidance, please check our July and September 2022 ITDS (available on our website at

<https://appellate-litigation.org/Issues-to-Develop-at-Trial>)

possesses a weapon unlawfully – because it is unlicensed – may not avoid the criminal charge by claiming that he possessed the weapon for his protection. Justification may excuse otherwise unlawful use of the weapon but not the unlawful possession of it. 62 N.Y.2d at 130.²

The Court further explained that the common-law defense of “temporary and innocent [or lawful] possession” was available to one who may “possess an unlicensed or proscribed weapon and still not be guilty of a crime because of the innocent nature of the possession.” *Id.* The “innocent nature of the possession negates . . . the criminal act of possession.” *Id.* Court described two circumstances where the defense might apply: where the defendant finds the weapon shortly before his possession of it was discovered and intended to turn it over to the authorities, or he took it from an assailant in the course of a fight. *Id.* Subsequent caselaw has construed the defense very narrowly. It will seemingly rarely apply, even when a person otherwise was justified in their use of force.³

In *People v. Pons*, 68 N.Y.2d 264 (1986), the Court clarified and reiterated that statutory justification does not “excuse a criminal act” or “negate an element of a crime,” but renders the use of force “privileged under certain circumstances,” rendering such conduct “entirely lawful.” *Id.* at 267. However, only the “use of physical force” can be rendered lawful under the statute. Since possession of a weapon does not involve the use of physical force, “there are no circumstances when justification . . . can be a defense to the crime of criminal possession of a weapon.” *Id.*

Before *Bruen*, then, justification did not apply to gun possession, full stop, because the possession was complete and unlawful once the gun was in the person’s hands, and, under the statute, the defense only applies to the use of force.

Bruen changes this. Clients who possess weapons for self-defense should be able to argue that

² Although justification does not apply to either simple possession or intent to use unlawfully, *see People v. Pons*, 68 N.Y.2d 264 (1986), with respect to intent to use unlawfully, the jury may consider whether the defendant’s justifiable **use** of the weapon rendered his **intent** not unlawful. *See* CJI2d [NY] Penal Law Article 265 “Additional Charges: Intent to Use Unlawfully and Justification” (“an intent to use a firearm . . . against another justifiably is not an intent to use it unlawfully”). However, liability will still attach if the jury finds that the firearm was possessed with an unlawful intent prior to the justified shooting. *People v. Bumbury*, 194 A.D.2d 735 (2d Dept. 1993); *see* Commentaries to Penal Law § 265.01 (McKinney’s).

³For example, in *People v. Ruiz*, 39 N.Y.3d 981 (2022), the Court of Appeals held that the defense wasn’t available to the defendant who killed her boyfriend by firing a gun she had grabbed from the kitchen through the door in the mistaken belief it was her abusive estranged husband who had previously broken in and attacked her. The Court found that she wasn’t entitled to the charge because she used the gun in a dangerous manner and acted recklessly. Yet the jury acquitted her of murder, finding she had acted in self-defense. A bewildering outcome.

their self-defense needs rendered lawful their otherwise unlicensed possession of the gun, separate and apart from the use of the gun and regardless of whether their possession was or wasn't "temporary and lawful" and with the intention of surrendering the weapon to the police.

The Challenge

In striking down the "proper cause" requirement of New York's gun licensing regime, *Bruen* held that the Second Amendment protects an individual's right to carry a handgun for self-defense outside the home just as inside it. As the right to bear arms for self-defense is "the *central component* of the [Second Amendment] right itself," confining the right to "bear" arms to the home would "make little sense." *Bruen*, 142 S.Ct. at 2135 (emphasis and brackets in original).

- Given that *Bruen* specifically recognized an individual's Second Amendment right to carry a weapon in public for self-defense, we propose that, in a case where you are asserting justification in connection with the weapon's use, **argue that your client's Second Amendment right to possess a gun in public for self-defense entitles your client to put to the jury whether his possession of the gun was "lawful" even if unlicensed.** You don't need to satisfy the statutory requirements for the defense under Penal Law § 35.15 because your client's right to possess the gun in self-defense stems from the Constitution. With evidence in the record supporting that he used the gun in self-defense, the question of the reasonableness of his belief that he needed to carry the gun for self-defense should be put to the jury as well. To the extent *Almodovar* and *Pons* hold otherwise, it is unconstitutional.
 - If there was a lengthy period of possession before the confrontation, you may need to present or find proof in the record supporting that he was carrying the gun then in anticipation of self-defense needs.
- Although we have focused here on cases where your client has asserted justification (and the court has granted the charge) with respect to the gun's use, it follows that you should be able to request a justification charge even in a case where your client is charged only with weapon possession – not the gun's use. If the Second Amendment protects public possession for self-defense purposes, then that should render your client's possession lawful.
 - However, this will likely require your client to testify. Since the government can regulate gun possession as long as the restrictions are lawful (proper cause was not, but other of New York's licensing restrictions may be lawful), there would need to be some evidence in the record to establish that your client was carrying the weapon for self-defense so as to find that his otherwise unlicensed possession was not unlawful or outside Second Amendment protection.
- We argue above that *Bruen* entitles your client to a justification charge if he possesses, or comes to possess, a weapon for self-defense. If the court disagrees, argue that your client

is still entitled to a temporary and lawful possession charge, but object to its now-unconstitutional limitations:



- object to the CJI charge (attached hereto), which specifically states that taking possession . . . for the general purpose of protection in the future is not excusable....” As *Bruen* affirms a person’s right to bear arms for self-defense, this limitation violates the Second Amendment.

- If the DA or court raise Court of Appeals precedent, such as *Ruiz*, to say that your client’s “dangerous manner” of using the gun disentitles him to the charge, object that, under *Bruen*, the Second Amendment entitled your client to protect himself, and whether he did so in a “dangerous manner” is a question for the jury.

* * *

TEMPORARY AND LAWFUL POSSESSION

Revised May 2021¹

The defendant [as you are aware] has raised the defense of innocent possession of (specify weapon).

Under our law, in certain circumstances, the possession of a weapon may be innocent and not criminal. Innocent possession of a weapon is possession that is temporary and not for an unlawful purpose.²

A person has innocent possession of a weapon when that person comes into possession of the weapon in an excusable manner, and maintains possession, or intends to maintain possession, of the weapon only long enough to dispose of it safely.³

[Note: Add if appropriate:

Taking possession of a weapon for any period of time for the general purpose of protection in the future is not excusable and does not constitute innocent possession.⁴]

The defense contends that the defendant (specify, e.g.: found the weapon; disarmed an assailant [and used it justifiably in self-defense]; intended to turn it over to the police; was about to turn it over to the police when arrested; turned it over the police at the first opportunity).

Note: The court should tailor the following relevant factors to the defendant's contentions⁴ :

There is no single factor that by itself determines whether there was innocent possession.⁵ In making that determination, you may consider:

any evidence which establishes that the defendant had knowing possession of a (specify weapon); the manner in which the (specify weapon) came into the defendant's possession;

Note: Add if appropriate:

if you find that the defendant took the (specify weapon) from an assailant and then used it,⁶ whether that use was justified;⁷

whether the length of time the (specify weapon) remained in the defendant's possession was reasonable under the circumstances;⁸

whether the defendant had intended to safely dispose of (specify weapon);⁹

whether the defendant had a reasonable opportunity to turn the (specify weapon) over to the police or other appropriate authority; and if and when the defendant did have such opportunity, whether the defendant did so;¹⁰

Note: Add if appropriate:

Or, if as the defendant contends, he/she safely disposed of the (specify weapon), or intended to do so, by another means,

whether choosing another means was reasonable and whether the defendant did so, or intended to do so, in a manner that did not, or would not, place or potentially place any person or persons in jeopardy from the discovery of the weapon and thus its potential use by another.¹¹

The defendant is not required to prove that his possession of the weapon was innocent. Rather, the People are required to prove beyond a reasonable doubt both that the defendant knowingly possessed the weapon and that such possession was not innocent.¹²

NOTE: The following should be added to the list of elements of the pertinent offense:

and #. That the defendant's possession was not innocent.

¹ This instruction, as it existed prior to May 2021, was approved in *People v Griggs*, 108 AD3d 1062, 106 [4th Dept 2013] and *People v Davis*, 103 AD3d 810, 812 [2d Dept 2013]. In May 2021, it was amended primarily to include factors consider by the Court of Appeals in *People v Williams*, 36 NY3d 156 [2020]. In particular, paragraph one and five and the “*Note: Add if appropriate*” sentences were added and the factors specified in paragraph six were expanded as indicated in endnote five. The endnotes were also revised to provide further guidance.

² *Williams* summarized the applicable law as follows:

This Court has long held that criminal possession of a weapon, as proscribed by the Penal Law, "should not be construed to mean a possession . . . which might result temporarily and incidentally from the performance of some lawful act" In order to trigger the right to a jury charge concerning the defense of temporary and lawful possession, "there must be proof in the record showing a legal excuse for . . . possession as well as facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner." In accordance with those principles, the pattern jury charge relating to temporary and lawful possession explains that "[a] person has innocent possession of a weapon when [that person] comes into possession of the weapon in an excusable manner and maintains possession, or intends to maintain possession, of the weapon only long enough to dispose of it safely" (CJI2d[NY] Temporary and Lawful Possession).

In that regard, we have explained that "[a] defendant may not be guilty of unlawful possession if the jury finds that [the defendant] found the weapon shortly before [the defendant's] possession of it was discovered and [the defendant] intended to turn it over to the authorities." We have also indicated that temporary and lawful possession may result where a defendant "took [the firearm] from an assailant in the course of a fight" and the circumstances do not otherwise evince an intent to maintain unlawful possession of the weapon. In such scenarios, "[t]he innocent nature of the possession negates . . . the criminal act of possession." Ultimately, whether the weapon is found fortuitously or obtained by disarming an attacker, "the underlying purpose of the charge is to foster a civic duty on the part of citizens to surrender dangerous weapons to the police." *Williams*, 36 NY3d at 160-61 (case citations omitted).

³ *Williams*, 36 NY3d 156.

⁴ See *Williams*, 36 NY3d at 168 (concurring opinion) ["as with all jury instructions, the trial court may need to tailor to the facts of a given case]; *People v Thomas*, 172 AD2d 572, 573 [2d Dept 1991] ["the trial court

improperly ruled that it could not tailor its charge to the facts of the case, as further requested by defense counsel”].

⁵ The 2021 amendments to this instruction added or expanded the existing version of the factors in this paragraph. Prior to the amendment this paragraph read as follows:

“There is no single factor that by itself determines whether there was innocent possession. In making that determination, you may consider any evidence which establishes that the defendant had knowing possession of a weapon, the manner in which the weapon came into the defendant's possession, the length of time the weapon remained in his/her possession, whether the defendant had an intent to use the weapon unlawfully or to safely dispose of it, the defendant's opportunity, if any, to turn the weapon over to the police or other appropriate authority, and whether and how the defendant disposed of the weapon.”

⁶ *People v. Snyder*, 73 NY2d 900, 901-02 [1989] [The defendants wrested a loaded pistol from another person during a fight and made no effort thereafter to safely dispose of the weapon, in particular to take it the State Police barracks that was “around the corner” from where they took possession of the pistol]; *People v. Banks*, 76 N.Y.2d 799 [1990] [while acquiring the weapon by disarming another in a fight “could be deemed justified,” the defendant was not justified in “conceal[ing] the weapon on his person and determine[ing] to transport it through the streets and on the subway into [another borough] where he proposed to ‘throw it down a sewer’ ”].

⁷ *People v Peterson*, 233 AD2d 533, 533-34 [2d Dept 1996] [the defense should have been charged where the “defendant testified that he was confronted by the victim who was holding a gun, and believing that he was about to be robbed he grabbed the gun and fired three times in self-defense. He walked away in a state of shock and was arrested minutes later after a brief chase].

⁸ *See People v Pereira*, 220 AD2d 696, 697 [2d Dept 1995] [“after coming into possession of a loaded pistol by disarming an assailant, the intoxicated defendant wandered through the streets waving it in a threatening manner at passersby until he was apprehended by the police. Such evidence is utterly at odds with a claim of innocent possession”]; *People v Snyder*, 138 AD2d 115, 119 [3d Dept 1988], *affd*, 73 NY2d 900 [1989] [“the unqualified right of possession following the act of disarming another will end when the weapon is secured and the defendant has had an opportunity to turn it over to lawful authorities. Retention beyond that point will be justified only by an affirmative showing of intent to properly dispose of the weapon and circumstances justifying the defendant's failure to do so promptly”].

⁹ *People v Whitehead*, 123 AD2d 895, 896 [2d Dept 1986] [“the court’s charge included the erroneous proposition that such a defense is established only where the defendant had the intent to turn the subject weapon over to the lawful authorities. . . . the defendant’s intent to turn the subject weapon over to the lawful authorities is not a necessary element of the defense of temporary and lawful possession” (emphasis added)].

¹⁰ See *People v Gonzalez*, 262 AD2d 1061, 1061 [4th Dept 1999] [“here the jury could have found that, after defendant disarmed another during the course of a fight, he retained possession of the weapon despite the opportunity to turn it over to lawful authorities”]; *People v Roccaforte*, 141 AD2d 775, 776 [2d Dept 1988] [the “presence and visibility of police precincts along the route traveled by the defendant was proper rebuttal evidence in that it circumstantially controverted the proffered defense”].

¹¹ See *People v Whitehead*, 123 AD2d 895, 896 [2d Dept 1986] [see note 9]; *People v. Banks*, 76 N.Y.2d 799 [1990] [while acquiring the weapon by disarming another in a fight “could be deemed justified,” the defendant was not justified in “conceal[ing] the weapon on his person and determine[ing] to transport it through the streets and on the subway into [another borough] where he proposed to ‘throw it down a sewer’ ”]; *People v Craig*, 117 AD3d 1485, 1486 [4th Dept 2014] [“Defendant found a loaded gun in a park and took the gun with him when his father drove him to his mother’s house. A police officer found the gun concealed in a bag of clothing after initiating a traffic stop of the vehicle operated by defendant’s father. Although defendant claimed that he intended to turn the gun in at a church’s gun buy back program, defendant’s retention of the gun beyond opportunities to hand it over to the police is “ ‘utterly at odds with any claim of innocent possession’ ”]; *People v Rose*, 2021 NY Slip Op 00577 (2d Dept 2021) (the Court held that the proof established that the defendant had only temporary and lawful possession when he recovered a firearm from an assailant; left the scene with the firearm; unloaded and disposed of it in the trash (i.e. according to the dissent: in a “basement incinerator in the hope” it would be taken away) and it was never recovered).

¹² *People v Holes*, 118 AD3d 1466, 1467 [4th Dept 2014] [a “defendant is not required to prove that [his/her] possession of the weapon was innocent. Rather, the People are required to prove beyond a reasonable doubt both that the defendant knowingly possessed the weapon and that such possession was not innocent (CJI2d [NY] Temporary and Lawful Possession)”]; *People v Sterling*, 151 AD2d 522, 522 [2d Dept 1989] “[it would have been preferable for the trial court to have specifically stated that the People were required to disprove this defense beyond a reasonable doubt”].