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ISSUES TO DEVELOP AT TRIAL

December 2023 - *Bruen* Series

Welcome to another update in our Bruen series! On November 21, 2023, the Court of Appeals decided six cases raising various Bruen-related issues. Although the Court declined to reach the merits on preservation grounds – the Court refused to adopt the "futility" exception that the appellants were arguing – it is possible to mine the cases for guidance in framing challenges going forward. In this issue, we offer some thoughts for structuring your Second Amendment challenges in light of these recent decisions. Until the Court of Appeals – or the United States Supreme Court – settles some of these issues, you should continue to litigate them, and we, in turn, will continue to press them on appeal.

For some brief background and a general refresher, in June 2022, the U.S. Supreme Court held in New York State Rifle & Pistol Assn., Inc. v.. Bruen, 142 S.Ct. 2111 (2022), that public carry of handguns is presumptively constitutionally protected conduct, and that the government must prove that any regulation comports with historical tradition. The Court unequivocally rejected means-end scrutiny – whether the regulation serves a governmental interest (such as public safety)– as having any place in the analysis. Applying the historical test to the challenged "proper cause" requirement in New York's licensing scheme, the Court found it unconstitutional as not supported by historical tradition.

Now, a year-and-a-half out from the landmark U.S. Supreme Court decision, it is clear that Bruen has upended Second Amendment litigation across the country. Numerous – often successful – challenges have been made to regulations that were formerly upheld under the means-end scrutiny analysis that Bruen repudiated. On November 7, 2023, the Supreme Court heard arguments in United States v. Rahimi, which raised whether 18 U.S.C. § 922(g)(8), prohibiting the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face. The consensus is that the Justices were wary of striking down this regulation, so we could soon get some limiting language regarding the application of the historic test.

Shortly after Bruen, on July 1, 2022, New York doubled down on its commitment to strict regulation, passing an amended statute (eff. September 1, 2022) that eliminated the proper-cause requirement invalidated in Bruen, but retained other Second Amendment-odious provisions, such as "good moral character" and adding a few more (such as requiring four character references and an interview.). Our September 2022 newsletter proposed challenges to the amended statute you could lodge in the course of moving to dismiss an indictment charging your client with a weapon-possession conviction. You will find that newsletter, along with our July 2022 Bruen

series ITD, attached to the back of this issue at Exhibit A. (The voluminous attachments to these issues are not included here, but can be found on our website). We also draw your attention below to an unfavorable and very recent Second Circuit case, Antonyuk v. Chiumento, that, at least preliminarily, rejected facial challenges to certain provisions of the amended statute.

In this issue, we'll begin by unpacking the Court of Appeals Bruen cases, by issue raised. We'll also address Rivera's dissent, as it might provide some useful material in addressing some of the open issues going forward. After we go through the cases, we'll propose some challenges and strategies going forward gleaned from the cases.

What arguments you focus on will depend in part on whether your client was charged before or after New York amended its licensing statute to eliminate proper cause.

Where - as we imagine is now largely the case – your clients have been charged under the amended licensing scheme, proper cause no longer needs to be challenged. However, the Court of Appeals cases still provide some guidance for framing constitutional challenges to other of the licensing provisions or to the statutory framework generally.

If your client was charged under the old scheme, you will want to continue challenging the proper cause requirement, although we offer a suggested framing based on Court of Appeals' signals.

We apologize in advance for the length of this newsletter; there is a lot to digest.

Unpacking the Court of Appeals' "Bruen" cases

Each of the six cases sought to connect *Bruen*'s broad affirmation of the constitutional right to public carry and its invalidation of the proper cause requirement to the penal law statutes criminalizing and punishing weapon possession.

I. Facial challenge to the validity of convictions under Penal Law 265.03(3) based on *Bruen*'s invalidation of the proper cause requirement. (Raised in all the cases, and particularly in *Cabrera*, *Garcia*, and *Pastrana*).

The Court addressed the issue in *Cabrera*, but it applied its conclusion – that the issue wasn't reviewable – in all of the cases. The COA framed the challenge thusly: that "the U.S. Supreme Court's decision in *Bruen* rendered unconstitutional the entirety of New York's licensing regime, and that in turn meant that Penal Law § 265.03(3) was facially unconstitutional."

In fact, the constitutional challenge raised was more nuanced and did not call for finding the entire licensing scheme unconstitutional. Rather, the appellants argued that, since the unconstitutional licensing requirement was the defendant's only path to immunity from criminal prosecution, the conviction was unconstitutional. *See, e.g.*, *Shuttlesworth v. City of Birmingham*,

394 U.S. 147, 151 (1969)(where State only punishes unlicensed activity but creates an unconstitutional licensing requirement, the conviction is invalid).

Ultimately, at least for purposes of the Court's decision, it didn't really matter how the issue was framed, because the Court declined to reach the merits of the claim on preservation grounds, as discussed below. At the end of its lengthy preservation discussion, the Court stated, "For the above reasons, we do not reach the merits of Cabrera's constitutional challenges on an underdeveloped record and without the benefit of the careful consideration by the courts and parties below. We take no position on whether Cabrera would have had standing to bring his *Bruen* claims had he timely raised them, or on the merits of the various *Bruen* claims addressed in the dissent to *People v. Garcia*." With respect to the "underdeveloped record," the Court stated remittal was not available to develop a claim that is otherwise unreviewable on preservation grounds.

Court's preservation analysis

The Court held that, to the extent there may be a futility exception to preservation based on intervening U.S. Supreme Court precedent previously foreclosed by Court of Appeals precedent, it did not apply here.

The Court found that the law at the time did not foreclose raising the issue. The issue of whether New York's proper-cause requirement violated the Second Amendment and what analytical framework applied was in flux, the Court said, so the Court could "not conclude that the potential success of these arguments was so unanticipated as to excuse preservation." The Court was thus not persuaded that it would have been utterly frivolous to have raised the issue in the trial court, even though, as appellants argued, the trial court, based on Appellate Division law, would have been bound to deny any challenge to the proper cause requirement or to intermediate means-end scrutiny. The need to preserve for future litigation and to allow for the "development of a record" took priority.

Although the Court's bad preservation ruling was deeply disappointing to your appellate friends, there is some lemonade to be made from the lemons. For you, our trial colleagues, the Court's insistence in *Cabrera* on preservation even where the Appellate Division has ruled adversely, or where you have no favorable law to cite, provides you with ammunition (so to speak) if you get pushback for raising a novel issue or one already ruled on adversely by the Appellate Division.

II. "As-applied" challenges raised by Cabrera: Cabrera raised two as-applied constitutional challenges to his conviction: (1) that the proper cause requirement alone rendered his unlicensed possession criminal because his possession of a valid Florida concealed carry license established he would otherwise have been able to lawfully possess; and (2) violation of his right to travel under the Privileges and Immunities Clause based on NY's 2d Amendment violative - residency requirement for getting a license.

The Court found these challenges also unreviewable, with a particular emphasis on the undeveloped record. For example, lack of preservation in the trial court deprived the government of opportunity to argue that Mr. Cabrera would otherwise have been ineligible to obtain a license, not just because of the proper cause requirement alone. New York had other requirements, not necessarily unconstitutional, that Florida didn't have. The record was also inadequately developed as to whether Cabrera might have met "any purported residency requirement imposed by the State's licensing scheme." Defendant Garcia raised a similar as-applied challenge based on his possession of a valid Utah license, which the majority similarly rejected as unpreserved.

Defendant Sebastian Telfair, who won a new trial on an unrelated *Molineux* issue, also raised an argument under the Privileges and Immunities Clause, as Telfair contended he was a Florida resident moving to New York when the guns were recovered in his truck. The majority found the claim unreviewable.

Concurring in *Telfair*, Rivera, would have reached and rejected the issue. Citing *Osterweil v. Bartlett*, 21 N.Y.3d 580, 582 (2013), she stated that whether New York prohibits non-residents from obtaining a gun license is an open question. Also, Telfair's out-of-state residency was disputed, and, because he did not apply for a license, Rivera said that we couldn't know whether he would have been denied a license because of a nonresidency prohibition or because he was a New York resident, a matter she found not appropriate for remittal.

III. Sentencing challenge: That the disparities in classification and sentencing between in-home and public possession violate the 2d, 8th, and 14th Amendments.

Cabrera raised this issue in his opening brief but withdrew it after he fully completed his sentence, rendering it moot. The Court still referenced it, stating that preservation applied, and that record development, i.e, an analysis of historical analogues with respect to such classification and disparities would be necessary.

IV. Challenge in *Garcia* to the constitutionality of the statutory presumption in Penal Law § 265.15(4).

The majority did not mention Garcia's separate claim that Penal Law § 265.15(4), which permits a presumption of unlawful intent to be drawn from the fact of possession, is unconstitutional in light of *Bruen*'s protection of public carry. It seemed to dispense with the claim under the broad preservation umbrella. Rivera addressed in dissent, see below.

V. Issues the majority left open

As noted, the majority did not reach the merits of any of the claims, including the facial challenge, the as-applied claims, the Privileges and Immunities claim, the sentencing challenge, or Garcia's challenge to the presumption. The majority took "no position" on standing, nor on the merits of the claims that Rivera addressed in her *Garcia* dissent.

Note that standing is another threshold issue and regularly invoked by trial courts in denying motions to dismiss.

VI. Rivera dissent in Garcia and Pastrana

Rivera would have dismissed in *Cabrera* on the unrelated *Miranda* violation, so she set forth her main dissent in *Garcia*, who was convicted under Penal Law 265.03(3) [outside home or place of business] and 265.03(1)(b) [intent to use unlawfully against another]. Here's a breakdown of Rivera's analysis:

- Garcia had standing to bring his constitutional challenge under *Shuttlesworth*, *Staub*, *et al.* Rivera agreed with defendants that, per consistent S.Ct. law, "when a defendant is being prosecuted based on a licensing scheme challenged as unconstitutional, as is the case here, it is the fact of the prosecution that confers standing."

- Preservation was no bar to review. It's not worth going into her reasoning because it really doesn't matter going forward given majority's complete shut down of the futility argument.

- Rivera rejected what it termed "[d]efendant's facial challenge that the entirety of New York's gun licensing scheme is unconstitutional." Again, that was not the challenge, but that is how both the majority and Rivera chose to frame it. Rivera stated that only the "proper cause" provision was struck down and defendant's "suggestion that the majority's holding nullifies New York's regulation of public gun possession is belied by the *Bruen* majority's reference to certain common regulatory requirements" and Kavanaugh's concurring opinion that states aren't prohibited from imposing licensing requirements.

- Rivera rejected Garcia's (and presumably would have rejected Cabrera's) as-applied challenge based on his possession of a valid Utah license. Here, Rivera distinguished a remittal to develop the record under the historical tradition test from a remittal to address factual deficiencies in as-applied claims, and rejected the latter because Garcia did not apply for a permit to carry a gun in New York. Thus, Rivera would seem to apply a standing requirement to an as-applied challenge. "Returning the case to trial court would devolve the proceeding to a quasi-administrative hearing and circumvent the regulatory structure. . . Permitting this end run incentivizes gun owners to flout the State's licensing laws, increasing the risk to the public and gun-related violence."

- By way of contrast, Rivera, dissenting in *Pastrana*, would have remanded for development of the record on claim that there is no historical tradition to support NY's prohibition on people with felonies obtaining gun licenses. On this question, Rivera stated that the defendant had no reason to develop such record pre-*Bruen* given the use of intermediate scrutiny's means-end test in deciding whether the gun regulation is

substantially related to achieving an important governmental interest. Rivera believed remittal was "especially appropriate" given that defendants after *Bruen* were raising the issue, making it unfair to deny Pastrana the same opportunity to build a record and for the prosecutor to do the same." Quoting *People v. Finch*, 23 N.Y.3d 4018, 416 (2014), Rivera stated that, "Our 'procedural rules should be so designed as to keep unjust results to a minimum.'"

- Rivera found the statutory presumption charged to the jury in *Garcia* unconstitutional on its face "as it requires the jury to assume a defendant intends an unlawful use of the weapon merely because they possess the weapon in public" – constitutionally protected conduct.

VII. Burden of proof claim in *People v. David*: That *Bruen* renders Penal Law § 265.03 (3) (and presumably all of NY's weapon-possession criminal statutes) unconstitutional in violation of due process by shifting the burden of production on licensure to the defendant. Put another way, post-*Bruen*, the Second Amendment makes lack of licensure an essential element of the offense and bars a shift in the burden of production on that point.

Also unreviewable. The majority declined to find this claim within the *Patterson* mode of proceedings preservation exception but did treat it seriously and, in the course of determining that it wasn't a mode of proceedings error, discussed it substantively at some length.

- The Court read the licensure exemption as intended by the Legislature to be a "proviso" that may be raised by the accused as a bar to prosecution, and not an element of the various offenses criminalizing weapon possession.

- While okay pre-*Bruen*, the Court acknowledged that *Bruen* raised "meaningful questions" about New York's statutory scheme, referencing *Commonwealth v. Guardado*, 491 Mass 666, 667 (Mass 2023), which struck down an affirmative licensure defense as violating due process because lack of licensure must be an essential element of the crime under *Bruen*.

- Since NY's scheme did not put the burden of persuasion on the defendant but rather the burden of production, the error did not come within *Patterson*'s MOP exception.

- Nonetheless the Court was clear that it was not deciding "whether shifting the burden of production to the defendant could amount to a due process violation" - simply that since the burden of persuasion was not shifted, there was no MOP error.

- Preservation also doomed the related argument that the accusatory instrument was facially defective in failing to plead all constitutionally required elements, thereby depriving supreme court of jurisdiction. Otherwise, it would permit "'an end run around the parties' obligation to preserve constitutional claims before the trial court.'" (quoting *Baumann &*

Sons Buses, 6 NY3 at 408).

Rivera dissented here as well.

- Rivera rejected *David*'s facial challenge to Penal Law 265.03 (3), which asserted that the statute penalizes constitutionally protected conduct - public carry. To the contrary, Rivera found, under *Hughes*, that lack of licensure was an essential element of the crime, and thus, that New York did not criminalize the mere possession of a handgun in public.

- However, Rivera found the majority's claim that the scheme shifted only the burden of production to be disingenuous, because to meet that burden, the defendant must essentially prove their innocence (ie. that they have a license). "As a consequence, the prosecution is placed in a reflexive posture, needing only to respond to the licensure issue if the defendant raises it. This view of the statutory framework absolves the prosecution of establishing the only crime under New York's law: *unlicensed* firearm possession. It is nothing short of shifting of the burden, in contravention of *Hughes*."

VIII. *Bruen* claim for a minor raised in *People v. Rivera* : The Second Amendment requires that possession of weapon must be treated as a mitigating circumstance for purposes of a youthful offender adjudication.

The majority found Rivera's claims, generally directed to his eligibility for YO status, unpreserved and unreviewable.

Concurring, Rivera found the Second Amendment claims reviewable but that they failed because defendant, being under 18 when he committed the crimes, "had no unrestricted Second Amendment right to possess an unlicensed weapon in public." Rivera did not do a deep dive into the history here, but rather summarily concluded that age restrictions "do not run afoul of the Second Amendment."

Going Forward

Many of you have been making motions to dismiss based on *Bruen*'s invalidation of the proper cause requirement (for those clients charged before the licensing regulations were amended), and to other constitutional provisions for clients charged under the amended scheme. Unless and until the Court of Appeals or USSC shuts us down, you should continue to do so, bearing in mind these specific post- *Cabrera et al*, suggestions and additions to your arguments.

A. Standing: Whether your client was charged under the former or amended licensing scheme, standing will continue to be an issue the prosecution seizes on unless and until a higher court decides against them.

Make the point that the Court of Appeals could have, but did not, adversely decide the standing question in *Cabrera*, even though it, like preservation, is a threshold issue. Continue to cite

Shuttlesworth, Staub, Lovell and the other First Amendment cases that you've been relying on. Cite, too, Rivera's discussion of standing in which she adopts the *Shuttlesworth* analysis.

B. Facial challenges to penal law statutes criminalizing weapon possession:

(i) proper cause challenges: To the extent you have a client charged under the former scheme, you can frame – and probably have been framing — a constitutional challenge to the penal law charge based on the established invalidity of the proper-cause requirement. To the extent you may have been arguing that the invalidity of the proper-cause requirement rendered the entire licensing scheme unconstitutional, thus rendering 265.03(3) unconstitutional, consider refining and reframing, per our suggestion below, so that the argument doesn't require the court to find the entire licensing scheme unconstitutional. Rivera's rejection of the broad argument on the merits does not bode well for such argument.

Consider framing the argument along these lines:

New York law only criminalizes the public possession of a firearm if it is unlicensed. Penal Law § 265.20(a)(3); *People v. Hughes*, 22 N.Y.3d 44, 50 (2013). A license confers immunity, and thus is a complete defense, to a weapon-possession charge. Penal Law § 265.20(a)(3). Indisputably, *Bruen* invalidated New York's statutory requirement that, to obtain the license necessary to gain that immunity, the individual must prove "proper cause" to publicly carry. *New York Rifle and Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (2022). As that unconstitutional licensing requirement was a defendant's only path to immunity from criminal prosecution, the conviction itself was unconstitutional. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (where State only punishes unlicensed activity but creates an unconstitutional licensing requirement, the conviction is invalid).

Even assuming certain of New York's licensing provisions were constitutional, the invalidation of the proper cause argument alone rendered [your client's] conviction unconstitutional. The validity of a constitutional challenge does not turn on the number of constitutional violations in a statutory scheme. Where, as here, the proper-cause requirement conditioned access to a legal defense on an unconstitutional standard, the prosecution must fail. The Supreme Court cases themselves refute such formalism. The Supreme Court in *Shuttlesworth,* for example, did not invalidate Birmingham's requirements that the permit application be submitted "in writing" nor that the applicant describe "the probable number of persons [involved]." 394 U.S. at 150. And yet that defendant prevailed because one provision of the Birmingham licensing law was unconstitutional. 394 U.S. at 150.

(ii) other licensing provisions: if, as is probably the case for many of your clients, your client was charged after the licensing scheme was amended, your facial challenge will require a

constitutional challenge to other constitutionally suspect provisions of the scheme.

Although we believe there are a number of suspect provisions in the amended statute, a recent case from the Second Circuit unhelpfully rejected facial challenges to certain provisions, including the "good moral character" requirement. In *Antonyuk v. Chiumento*, __ F.4th__, 2023 WL 8518003 (2d Cir. Dec. 8, 2023), the Court was tasked with reviewing the district court's grant of a preliminary injunction enjoining enforcement of certain provisions of the amended statute (including good moral character), and rejected facial challenges – albeit addressing only the likelihood of success on the merits (1) to the licensing requirement that the applicant have "good moral character;" (2) that the applicant disclose information concerning their current spouse or domestic partner and any adult cohabitants, and whether minors reside in the applicant's home; (3) to the "catch-all" provision requiring that the applicant provide "such other information required by the licensing officer that is reasonably necessary and related to the review of the licensing application;" and (4) to the ban on public possession in sensitive locations, specifically in this case, parks, zoos, premises licensed for alcohol consumption, theaters, conference centers and banquet halls. The Second Circuit did sustain challenges to the requirement that the applicant submit a list of former and current social media accounts for the past three years, and to the ban on bringing a gun onto private property, open to the public, without the owner's clear consent.

Somewhat more helpfully, the Court made clear that this was "a very early stage of this litigation," and referenced that its decision did not "determine the ultimately constitutionality of the challenged" provisions, "which await further briefing, discovery, and historical analysis, both in these cases as they proceed and perhaps in other cases." *Id.* at n. 116.

While *Antonyuk* needs to be cited, we recommend continuing to press challenges to good moral character, noting the Second Circuit's own statement that this was a preliminary determination and that the issue has not been decided by the Supreme Court. The parties in the case may well press for Supreme Court review.

Thus, for clients charged under the amended statute, we suggest that, as you've probably been doing, you identify the eligibility provision or provisions that would most likely bar your client from getting a license ("good moral character," "prior felony," age-restriction, etc.), and frame your challenge accordingly, adapting the boxed argument above to again more narrowly argue that the prosecution must fail when your client's access to a legal defense is conditioned on satisfying an unconstitutional provision, just as in *Shuttlesworth*. State that the prosecution has the burden to prove the lawfulness of the regulation, and demand a hearing on historical analogues in the alternative.

For legal support:
At Exhibit A, we provide our prior ITD suggesting potential challenges to certain of the provisions in the amended statute.
At Exhibit B, is a list of cases across the country that support Second Amendment challenges,

based on the historic tradition analysis *Bruen* requires, to various provisions that are also in New York's licensing law. In light of *Antonyuk*, *supra*, we suggest that, if your challenge is to "good moral character," you use the reasoning of the pre-*Antonyuk* cases but not rely on the cases themselves, and cite *Antonyuk* as a *but see* .The law is changing rapidly here, so please check the status of any of the cases you use to see if there are further developments.

C. Semi-assault weapons: Although not addressed by the cases, the Court's preservation ruling should encourage you to lodge challenges that might not have seemed available in the past. For example, if your client is charged with an assault weapon under Penal Law § 265.02(7), lodge a specific Second Amendment challenge to that subsection, arguing that New York's outright ban on assault weapons – which definitionally includes semi-assault weapons – is unconstitutional. *See* Penal Law §§ 265.00 (22)(defining assault weapon); 265.20(3)(excluding assault weapon from exemption); 400.00(2) (excluding assault weapon from any of the licenses that might be issued).

Suggested argument:

New York's total ban on semi-automatic AR-15-style firearms is unconstitutional. Nearly 30 years ago, the Supreme Court stated that AR-15 rifles "traditionally have been widely accepted as lawful possessions." *Staples v. U.S.*, 511 U.S. 600, 610, 612 (1994). Since then, *Heller* and *Bruen* have established that the Second Amendment extends presumptively to "all . . . bearable arms," with *Heller* rejecting as "bordering on the frivolous" the notion that only arms in existence in the 18th century are protected by the Second Amendment. *District of Columbia v. Heller*, 554 U.S.570, 582 (2008). Current Supreme Court justices have signaled their favorable opinions on this open question. *See Heller v. District of Columbia*, 670 F.3d 1244, 1285 (D.C. Cir. 2011) (stating that such weapons are "in common use," and describing a "ban on a class of arms" as "equivalent to a ban on a category of speech.") (Kavanaugh, dissenting); *see also Friedman v. City of Highland Park*, 577 U.S. 1039 (2015)(Justice Thomas, dissenting from the denial of certiorari, finds City's ban "highly suspect because it broadly prohibits common semiautomatic firearms used for law purposes," and the Second Amendment grants citizens the right to keep such weapons); *Caetano v. Massachusetts*, 577 U.S. 411, 416 (2016)(Alito, J., concurring) (identifying semi-automatic weapons, along with revolvers, as those "most commonly used today for self-defense" and rejecting "dangerous and unusual" as the metric for identifying arms that fall outside the Second Amendment).

D. As-applied challenge: If your client, like Cabrera or Garcia, had a valid out-of-state concealed carry license, you can preserve an as-applied challenge, arguing that Penal Law 265.03(3) is unconstitutional as applied to your client because his possession of the valid license proves that it was the proper cause requirement that barred his access to the defense.

Take heed of the Court of Appeals' insistence that a record be made below, so allege facts showing that your client would otherwise have been eligible for a license. You can compare the

provisions of the two regulatory schemes, or, alternatively, request a hearing to prove facts showing he would have qualified but for proper cause. To the extent Judge Rivera seemed to think such "quasi-administrative" hearings were inappropriate for trial courts to conduct, remind the court that trial courts are expected to conduct complex hearings, as demonstrated by the Court of Appeals decision in *People v. Williams*, 35 N.Y.3d 24 (2022), which held that the trial court abused its discretion in permitting the admission of low copy number (LCN) DNA evidence without holding a *Frye* hearing.

E. Burden-shifting challenge to the indictment: Move to dismiss the indictment as jurisdictionally defective and violative of due process on the ground that the Second Amendment makes lack of licensure an essential element of the offense and bars shifting the burden of production on licensure to the defendant. Consider these arguments in support:

- An indictment requires a "statement in each count that the grand jury . . . accuses the defendant or defendants of a designated offense." C.P.L. § 200.50(4). That requirement provides the defendant "with fair notice of the accusations made against him, so that he will be able to prepare a defense." *People v. Sanchez*, 84 N.Y.2d 440, 445 (1994).

- An Indictment, however, "is jurisdictionally defective [] if it does not effectively charge the defendant with the commission of a particular crime." *People v. D'Angelo*, 98 N.Y2d 733, 734 (2002).

- Although the "incorporation by specific reference to the statute operates without more to constitute allegations of all the elements of the crime," *D'Angelo*, 98 N.Y2d at 735, the indictment's reference here to [Penal Law .....] could not fulfill this function because [Penal Law ....] does not include lack of licensure as an element of the offense, in violation of due process and the Second Amendment. U.S. Const., amends. II, XIV; *Bruen*, *David*, __ N.Y.3d __, 2023 WL 8039651 at *2 (Nov. 21, 2023) (noting that "essential allegations are generally determined by the statute defining the crime," and that the licensure exemption is not found within the text of Penal Law § 265.03(3)).

- Instead, New York's statutory scheme puts the burden of production on the defendant to present evidence of licensure. *David*, 2023 WL 8039651 at *2. ("Because the licensure exemption is not found within the text of relevant Penal Law provision criminalizing possession of a weapon, it presumptively operates as a 'proviso that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial.'").

- However, as *David* recognized, *Bruen* "effected a substantial change in Second Amendment jurisprudence." While finding the issue unreviewable because not preserved below, the Court acknowledged the "meaningful questions" *Bruen* raised about New York's statutory scheme.

- In light of *Bruen*, and that only unlicensed possession can be punished as a crime in New York, *People v. Hughes*, 22 N.Y.3d 44, 50 (2013), lack of licensure must be considered

an essential element of [Penal Law] that the prosecution must prove beyond a reasonable doubt. Since the statute does not include that element, incorporation by reference to the statute does not "effectively charge the defendant with the commission of" [Penal Law], and does not constitute allegations of all the elements of the crime. *D'Angelo*, 98 N.Y.2d at 734-35; *cf. Commonwealth v. Guardado*, 491 Mass 666, 667 (Mass 2023) (striking down an affirmative licensure defense as violating due process because lack of licensure must be an essential element of the crime under *Bruen*.

- Accordingly, the indictment is jurisdictionally defective and the charges must be dismissed.

F. Privileges and Immunities Clause challenge: If your client is a resident of another state, move to dismiss the indictment on the ground that the charges violate your client's fundamental right to travel under the Privileges and Immunities Clause because New York's licensing scheme doesn't permit a non-resident to get a concealed carry license. This forced your client to choose between two equally protected rights - his right to travel and his right to bear arms. *See, e.g., Commonwealth v. Donnell*, No. 2211CR2835 (Lowell District Ct. Mass Oct. 3, 2023)(granting motion to dismiss gun possession charge against New Hampshire license-holder who traveled to Massachusetts; "This Court can think of no other constitutional right which a person loses simply by traveling beyond his home state's border into another state continuing to exercise that right and instantaneously becomes a felon subject to a mandatory minimum sentence of incarceration")(attached at Exhibit C).

Rivera, concurring in *Telfair*, suggested, relying on *Osterweil v. Bartlett*, that the issue of whether New York bars non-residents is an open question in New York. Given her position (a concurrence, not a dissent), we suggest making these arguments going forward:

- Note that *Osterweil* did not hold that *all* part-time residents could apply, but, narrowly, in answer to a certified question from federal court, that a part-time resident property "*owner*" in New York met residency requirements. *See Osterweil v. Bartlett*, 21 N.Y.3d 580, 587 (2013)(holding that Penal Law § 400.00(3)(a) does not preclude an individual "who owns a part-time resident in New York but makes his permanent domicile in another state" from applying for a handgun license). There is authority that New York *does* impose a residency requirement. *See Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005). New York State's own website states that eligibility for a New York firearms license requires New York State residency. *See* Apply for a Firearms License/Eligibility, New York State, available at https://www.ny.gov/services/how-obtain-firearms-license (last checked December 2, 2023).

- Allege facts establishing that your client is an out-of-state resident.

- Demand that the People show an historical tradition barring non-residents, *see Commonwealth v. Donnell*, *supra*, attached at Exh. C.

- Alternatively, request a hearing on these issues.

H. Trial issues:

- If your client proceeds to trial, move to dismiss at the close of the People's case if they do not present proof of lack of licensure, and request the Court charge lack of licensure as an element of the People's case that must be found by the jury and proven beyond a reasonable doubt. Cite the Second Amendment and due process.

- If your client is charged with second-degree weapon possession under Penal Law § 265.03(1)(a) (intent to use unlawfully), and the People want the court to charge the presumption of intent to use unlawfully contained in Penal Law § 265.15(3), argue that the presumption violates the Second Amendment. Borrow Judge Rivera's reasoning, that the presumption requires the jury to assume a defendant intends an unlawful use of the weapon merely because they possess the weapon in public – constitutionally protected conduct.

- Make a separate due process challenge (not directly related to *Bruen*) to the presumption. We outlined this challenge in our July 2022 *post*-Bruen ITD (attached at Exh. A):

  This presumption violates due process because it is not "more likely than not" that mere possession of a weapon (loaded or not) indicates an intent to use unlawfully against another. *See Cty. Ct. of Ulster Cty. v. Allen*, 442 U.S. 140, 166 (1979). There are numerous innocent reasons why an individual may, at any given moment, possess a loaded firearm, including, as Bruen held, for self-defense. It defies reality to suggest that, on average, an individual who possesses a loaded firearm in public is, at any given moment, more likely than not plotting to use it unlawfully against another.

I. Sentencing: Cabrera challenged the sentencing disparities between the sentencing range individuals face who are convicted for public carry under Penal Law § 265.03(3) and those convicted of in-home possession. The challenge is limited, unfortunately, to first offenders. We suggested this challenge to you in our first *Bruen* issue and consider it an open question worth pressing. The Court of Appeals did not address the merits nor dismiss it as a question only appropriate for the Legislature, and suggested that a hearing would be appropriate to examine historical analogues. *See* Exhibit D for a suggested Second Amendment challenge that you can adapt. Note, however, that your challenge will be made more difficult if your client was accused of carrying publicly in a "sensitive location," particularly if it is a location the Second Circuit found constitutional in *Antonyuk, supra*. Perhaps wait for reply and argue that a hearing is required to fully address the historical analogue question.

For prior Issues to Develop, visit https://appellate-litigation.org/Issues-to-Develop-at-Trial

EXHIBIT A

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ISSUES TO DEVELOP AT TRIAL

Bruen Series

September 2022

In Bruen's wake, the New York State legislature passed, and Governor Hochul signed, new legislation (Penal Law § 400.00 and related provisions) meant to align with Bruen's strike-down of the "proper cause" requirement. The legislation became effective September 1, 2022 and the relevant provisions are attached at Exhibit A. However, several of the new "eligibility" requirements are assailable as, similar to the proper cause requirement, they place seemingly unbridled discretion in the hands of a bureaucrat, are ill-defined, and likely lack an historical basis in our nation.

We thought the best way to determine what restrictions in the new regulations are most assailable is to compare them to the restrictions in the "shall issue" states – states where, if you meet the qualifications, a license will issue – that Bruen cited with general approval. See Bruen, 142 S.Ct. at 2162 ("Going forward, therefore, the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so. Likewise, the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States.")(Kavanaugh, J. concurring).

Using Florida, a shall-issue state, as a model, it appears that a number of the requirements are similar, including that the applicant be over 21, take a gun-training course, not have a prior felony conviction, and not have been committed for mental illness (among others). Florida's licensing requirements are attached at Exhibit B. That doesn't mean these restrictions are not potentially subject to challenge, but it will be a heavier and, in some cases, more nuanced lift. We provide some lines of argument below.

For your clients who are charged with unlicensed gun possession under the new legislation (and recall, in New York, the crime is not possessing the gun per se, but possessing it without a license), we suggest that you continue to move to dismiss the charges at arraignment, as we had recommended post-Bruen. Our prior ITD is attached at Exhibit C.

Practice alert: Lower courts have uniformly denied the motions to dismiss and motions to withdraw guilty pleas that many practitioners have been bringing post-*Bruen*. This is not surprising and should not stop you from bringing these challenges, at least until the New York Court of Appeals decides, and, we would urge, even beyond, as some of these issues may well reach the United States Supreme Court.

In making your challenge under the new licensing scheme, you cannot directly rely on Bruen's strike-down of the licensing regulations to argue that Penal Law § 265.03(3) is unconstitutional as the new legislation is at least presumptively constitutional. Instead, using Bruen's reasoning, you can argue that the current regulations suffer from similar flaws and similarly infect the constitutionality of the Penal Law statute.

Below are the licensing requirements that we propose render the new regime unconstitutional, just as the proper-cause requirement doomed the prior regime. These restrictions are not contained in shall-issue regimes, based on the Florida model. We suggest you set forth these challenges in your motion to dismiss.

- Applicant must be of good moral character. Penal Law § 400.00(1)(b).

  - ☐ argue that, like "proper cause," a finding of good moral character places unbridled discretion in the hands of a government official and unconstitutionally burdens your client's constitutional right to bear arms.

    - ▸ Justice Kavanaugh's concurrence in *Bruen* with respect to the proper cause requirement is equally apt here - just substitute "good moral character" for "proper cause:" "New York's outlier may-issue regime is constitutionally problematic because it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense. Those features of New York's regime—the unchanneled discretion for licensing officials and the special-need requirement—in effect deny the right to carry handguns for self-defense to many "ordinary, law-abiding citizens." *Bruen*, 142 S.Ct. 2111, 2161 (Kavanaugh, J.. concurring)

  - ☐ Argue that the burden is on the government to prove that a regulation requiring "good moral character" has an historic tradition in this country.

    - ▸ From *Bruen*: "To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" 142 S.Ct. at 2126.

- Applicant must (for a concealed carry permit) meet in person with a licensing officer for an interview, provide at least four character references; provide a list of social-media accounts; and any other information the licensing officer requests. Penal Law § 400.00(1)(o).

  - ☐ Argue that requiring an interview places unchanneled discretion in the hands of the government (see above);

☐ Argue that the requirement of "character references" – four! – burdens your client's right to bear arms and is unconstitutional unless the government can prove that requiring character references is supported by historic tradition. Does a loner, or a misanthrope for that matter, forfeit his Second Amendment rights?

We again anticipate that standing (your client's failure to apply for a gun license) will be a central issue. See our prior ITD for guidance on arguing that client needn't first apply for a license under an unconstitutional scheme.

Below are the licensing requirements that appear in some fashion in shall-issue regimes. We do not recommend lodging challenges to these restrictions up front, but if the government responds to your motion to dismiss by invoking one of these restrictions to argue that your client would not have gotten a license based on his specific circumstances, argue that the particular requirement is unconstitutional unless the government can prove that the restriction is consistent with the nation's historic tradition. As noted, as these restrictions are generally included in shall-issue licensing regimes, your arguments are likely to meet with even stronger resistance. Below are the arguments the government may level and possible responses:

- Applicant must be at least twenty-one years old. Penal Law § 400.00(1)(a).

  ☐ argue that this restriction is unconstitutional unless the government can establish an historic tradition limiting gun possession to those over 21.

- Applicant must not be a felon or convicted of any other "serious offense." Penal Law § 400.00(1)(c). "Serious offense" is defined in Penal Law § 400.00 (1-b) by reference to Penal Law § 265.00(17). That definition is very broad and includes non-violent felonies and misdemeanors.[1] Further, (1-b) provides that "Nothing in this subdivision shall preclude the

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[1] Penal Law § 265.00(7) provides:

"Serious offense" means (a) any of the following offenses defined in the current penal law and any offense in any jurisdiction or the former penal law that includes all of the essential elements of any of the following offenses: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; endangering the welfare of a child; obscenity in the third degree; issuing abortional articles; permitting prostitution; promoting prostitution in the third degree; stalking in the fourth degree; stalking in the third degree; sexual misconduct; forcible touching; sexual abuse in the third degree; sexual abuse in the second degree; criminal possession of a controlled substance in the seventh degree; criminally possessing a hypodermic instrument; criminally using drug paraphernalia in the second degree; criminal possession of methamphetamine manufacturing material in the second degree; and a hate crime defined in article four hundred eighty-five of this chapter.
(b) any of the following offenses defined in the current penal law and any offense in any jurisdiction or in the former penal law that includes all of the essential elements of any of the following offenses, where the defendant and the person against whom the offense was committed were members of the same family or household as defined in subdivision one of section 530.11 of the criminal procedure law and as established pursuant to section 370.15 of the criminal procedure law: assault in the third degree; menacing in the third

denial of a license based on the commission of, arrest for or conviction of an offense in any other jurisdiction which does not include all of the essential elements of a serious offense."

- ☐ Argue that these restrictions are unconstitutional unless the government can prove an historic tradition barring people with criminal convictions from possessing guns;

- ☐ If your client's prior record includes a "serious offense" as defined by statute, argue that the legislature's categorization is overbroad and that the government must prove an historic tradition of barring said offense.

- ☐ If the prosecution points to your client's criminal record in another jurisdiction, check whether the offense contains all the elements of a "serious offense" in New York; if not, argue that the restriction places arbitrary discretion in the hands of a licensing official to decide that the offense is disqualifying.

- ☐ If the prior conviction was itself for weapon possession, argue that a conviction secured by the government under the prior unconstitutional licensing scheme cannot now provide a lawful restriction on your client's Second Amendment rights. That would allow the government to bootstrap the prior unconstitutional restrictions into a basis for prosecuting your client for unlicensed possession now.

- Applicant must not have been convicted of any of these offenses in the past 5 years: driving under the influence (DUI), third degree assault, and menacing. Penal Law § 400.00(1)(n).

  - ☐ Argue that the government must prove the historic basis for these specific restrictions.

- Applicant must not have any order of protection in their name. Penal Law § 400.00(1)(k).

  - ☐ Argue government must prove historical basis

- Applicant must not be convicted of any misdemeanor crime that has to do with domestic violence. Penal Law § 400.00(1)(c); (1-b)(incorporating Penal Law § 265.17(b)).

  - ☐ Argue government must prove historical basis

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degree; menacing in the second degree; criminal obstruction of breathing or blood circulation; unlawful imprisonment in the second degree; coercion in the third degree; criminal tampering in the third degree; criminal contempt in the second degree; harassment in the first degree; aggravated harassment in the second degree; criminal trespass in the third degree; criminal trespass in the second degree; arson in the fifth degree; or attempt to commit any of the above-listed offenses.
(c) any misdemeanor offense in any jurisdiction or in the former penal law that includes all of the essential elements of a felony offense as defined in the current penal law.

Mental Illness and Drug Restrictions

The new legislation includes restrictions related to mental illness and substance abuse. Penal Law § 400.00(1)(e), (i), (j), (m), These are restrictions generally included in some fashion in shall-issue legislation such as Florida's.

However, upon comparison, New York's restrictions are far more broad and unacceptably vague. We believe you have a potential challenge on this basis should the government cite your client's mental health or substance-abuse history and depending on the proof presented.

Specifically, under the new legislation, with respect to mental health, an applicant is not eligible if he or she has, inter alia, stated whether they have **"ever suffered from a mental illness."** Penal Law § 400.00(1)(i). Florida limits the restriction to a person who has been declared incapacitated or who has been committed to a mental institution.

Therefore, if the government responds to your motion to dismiss by arguing that your client would not have gotten a license anyway because he once stated he had a mental illness, consider arguing that "mental illness" is too broad, vague, and ill-defined in this context, and leaves too much discretion in the hands of the licensing official (suppose your client once stated he had anxiety. Is anxiety a mental illness?). Consider challenging the proof the government presents – what did you client say, to whom, and when? How long ago did he suffer from this mental illness? In short, that your client "ever" suffered from mental illness is both vague and overbroad and unfairly burdens your client's Second Amendment rights. Whatever the "illness" was, it might have been successfully treated or have otherwise resolved.

Similarly, the New York laws provide very broad restrictions related to drug abuse, rendering an individual ineligible if they are "an unlawful user of or addicted to any controlled substance as defined in section 21 U.S.C. 802." Penal Law § 400.00(1)(e).

By way of contrast, in Florida, a license can be denied only if the individual was found guilty of a crime relating to controlled substances within a 3-year period immediately preceding the date on which the application is submitted; or was "[c]ommitted for the abuse of a controlled substance."

Therefore, if the government responds to your motion to dismiss by arguing that your client would not have gotten a license anyway because he is an addict, you could formulate a challenge arguing that the vagueness and breadth of the "controlled substance" restriction unduly burdens your client's Second Amendment rights. It allows for the denial of a license by a government functionary based on some standardless determination that an individual is "an unlawful user or addicted to any controlled substance."

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ISSUES TO DEVELOP AT TRIAL

Bruen Series

July 2022

This month's Issues to Develop is devoted to supporting your post-Bruen litigation. Templates are provided at the end of this issue (in pdf) and on our website (in word) at https://www.appellate-litigation.org/forms-for-trial-practitioners/. *We hope in future Bruen-related ITDs to provide additional guidance as court and DA responses come in and new arguments emerge. For now, two post-Bruen decisions (one from New York Supreme and one from Sacramento Superior Court) are attached at Exhibit F*
Our goal in this issue is to provide you with a basic outline of the motions you can file and objections you can raise as your client's gun possession case moves through the proceedings. Because there are many potential factual and legal permutations, we do not attempt in this opening issue to address in detail every permutation. Instead, we hope to give you the tools to adapt the core guidance we provide, which focuses on a charge under Penal Law § 265.03(3) (loaded gun outside home or place of business). We provide some suggestions for addressing different situations at Exhibit D.

I. Background

In *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the Second and Fourteenth Amendments protect an individual's right to keep and bear arms for self-defense. In so doing, the Court held unconstitutional two laws that prohibited the possession and use of handguns in the home.

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. ___, slip op. No.20-843, 2022 WL 2251305 (June 23, 2022), the Supreme Court considered New York's "may-issue"permit regulations for outside-the-home possession, which required "proper cause"-essentially a special need for self defense. Slip op. at 30. The Court held that the "proper cause" requirement violated the Second and Fourteenth Amendments because the government could not establish that the requirement was supported by our "nation's historic tradition of firearm regulation." Slip op. at 62-63; see generally slip op. At 29-62 (reviewing historical evidence). Concurring, Justice Kavanaugh reiterated that, as stated in *Heller and McDonald,* the Second Amendment allows a "variety" of gun regulations, including prohibitions on the possession of firearms by "felons and the mentally ill," or forbidding the carrying of firearms in "sensitive places." *Kavanaugh concurrence at 3*.
Significantly, the Court expressly placed inside-the-home and public carry on equal

constitutional footing. "Nothing in the Second Amendment's text draws a home/public distinction with respect to bear arms." Slip op. at 23. 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." *Id.* at 24, quoting *Heller* at 599 (emphasis and brackets in original). The Court stated that "many Americans hazard greater danger outside the home than in it." *Id.*

II. Applying *Bruen* where your client was charged with violating Penal Law § 265.03 (3) before *Bruen* was decided.

New York punishes the *unlicensed* possession of firearms. In other words, it is not the possession of a gun that is criminalized per se, but the unlicensed possession of a gun. *See People v. Hughes*, 22 N.Y.3d 44, 50 (2013) ("New York's criminal weapon possession laws prohibit only *unlicensed* possession of handguns. A person who has a valid, applicable license for his or her handgun commits no crime.") (emphasis in original); CPL § 265.20(3)(a) (exempting licensed possession of a pistol or firearm from prosecution). Accordingly, *Bruen*'s rejection of New York's licensing scheme allows for a host of challenges directed at charges predicated on your client's possession of an unlicensed firearm outside home or place of business[1] at various points in the proceedings:

- Motion to dismiss the indictment at arraignment or before a guilty plea
- Motion to dismiss the indictment/withdraw the plea before sentencing
- Constitutional challenge to classification and sentencing range
- Predicate challenge

We discuss each potential challenge briefly below, referencing, where applicable, the relevant template.

As noted above, our focus in this issue is on the most common scenario, a charge under Penal Law § 265.03(3). In the chart attached at Exhibit D, we set forth some factual and legal permutations, with recommendations for addressing these situations.

[1] It is possible you could challenge charges predicated on your client's in-home possession of a firearm, even though that possession was not subject to the "proper cause" requirement. *Compare* Penal Law §§ 400.00(1)(a)-(n) (regulations governing in home possession) *with* (former) Penal Law § 400.00(2)(f)(regulations governing public carry). We do not address such potential challenges in this issue.

Practice Note:

CPLR § 1012(b) requires Notice to the Attorney General when you are challenging the constitutionality of a statute. As the challenges to the indictment and to the sentencing classification and range for Penal Law § 265.03(3) suggested below involve constitutional challenges, provide Notice to the AG upon filing. We include a Template notice at Exhibit E.

a. Motion to dismiss the indictment at arraignment or before the guilty plea (see Template at Exhibit A attached, courtesy of Bronx Defenders with a huge thank you for their outstanding work and generosity).

CPL §§ 210.20 (1)(a) and 210.25 (3) provide that an indictment is defective and subject to dismissal on the ground that "[t]he statute defining the offense charged is unconstitutional or otherwise invalid." CPL § 255.20(1) provides for such motion to be made within 45 days of arraignment, with an extension available after that period for "good cause, CPL § 255.20(3).

A motion to dismiss is cognizable after *Bruen* on the grounds that Penal Law 265.03(3) is unconstitutional. Since it was not your client's possession of a firearm that rendered his conduct unlawful, but his *unlicensed* possession of a firearm, *see Hughes, supra*, the penal law statute embedding the unconstitutional regulations necessarily violates your Second and Fourteenth Amendment rights as well.

We recommend limiting this motion to clients who do not have a prior felony conviction. We believe you will face an insurmountable counter-argument to the effect that your client could never have gotten a license due to his predicate felony and thus lacks standing to challenge the statute. However, practitioners may disagree about our position (which we explain more fully at Exhibit D with a brief primer on standing), and ultimately, it is your decision as to what's in your client's best interests. For those who want to pursue a challenge on behalf of a client who has a predicate, we offer a suggestion at Exhibit D.

b. Motion to dismiss indictment/withdraw guilty plea (see Template at Exhibit B, attached. Shout-out again to Bronx Defenders!)

If your client had already pleaded guilty when *Bruen* came down, you can still move to dismiss the indictment before sentencing. *See* CPL § 255.20(3)(providing that "the court must entertain and decide, on its merits," an appropriate pre-trial motion on grounds where "the defendant could not, with due diligence, have been previously aware, or for other good cause, could not reasonably have been raised within the period specified . . . .").

You can also move to withdraw your client's guilty plea as unknowing and involuntary in violation of due process on the theory that "where a defendant is under the mistaken impression that "non-criminal conduct is criminal," the guilty plea is "unintelligent and constitutionally

invalid." *See Magnus v. United States*, 11 A.3d 237, 244 (D.C. 2011) (holding that defendant was entitled to an evidentiary hearing on a claim based on court rulings postdating his guilty plea). This is the case even where that mistaken impression is clarified and corrected only after a guilty plea by a "subsequent court ruling." *See id.*

The voluntariness of a guilty plea, the constitutionality of the statute under which the defendant was convicted, and a jurisdictionally defective indictment are claims that survive a guilty plea, so we appellate practitioners can raise them on appeal even if the court denies your motions. The voluntariness of the plea and jurisdictionally defective indictments are also among the issues that survive an appeal waiver.

c. Constitutional Challenge to § 265.03(3)'s Classification and Sentence Range (see Template at Exhibit C).

If the court rejects your challenges to the indictment and guilty plea, you can attack the constitutionality of Penal Law §§ 70.02 (2)(a) and 70.02(3)(b) which classify Penal Law § 265.03(3) as a class C violent felony and mandate a determinate term of imprisonment from three and one-half up to fifteen years. The theory, which we recommend raising in a motion filed before sentencing, rests on the premise that *Bruen* put in-home and public carry on equal constitutional footing. Therefore, the argument goes, the legislature's classification of § 265.03(3) – essentially, the offense criminalizing unlicensed public carry– as a violent felony, with the attendant severe penalty range, violates the Second, Fourteenth and Eighth Amendments because even if your client stands convicted of unlicensed public possession, the penalties should not exceed those imposed for in-home possession (a misdemeanor or non-violent E felony).

This motion is not available to clients with prior convictions or who are charged with possessing an assault weapon. This is because CPL § 265.03(3) punishes (via cross-reference to CPL § 265.02(1) and (7)) the in-home possession of a loaded firearm as a class C violent felony under those circumstances. Therefore, the sentencing disparity based on a comparison to in-home possession won't work for those clients.

We do, however, propose a different due process sentencing argument to make for clients with prior convictions – that it violates due process to punish the mere possession of a firearm as severely as violent crimes such as robbery, homicide, and assault, and, in the case of mandatory persistent felony offenders, as murder. We hope to provide a template for this argument in a later issue in this *Bruen* series.

Since illegal sentences survive appeal waivers, and since an unconstitutional sentence is illegal, this claim would survive an appeal waiver.

If the court rejects your constitutional challenge, you can still make the commonsense argument that your client should not receive more than the minimum for engaging in conduct — public carry – that, while unlicensed, is not qualitatively different from in-home possession under the

Constitution. Public carry is not a lesser Second Amendment right. Marshal any facts supporting your client's possession for purposes of self-defense.

Excessive sentence claims survive a guilty plea but generally do not survive valid appeal waivers. (We rarely see valid appeal waivers though).

d. Predicate Challenge - to be made when your client has been convicted of any felony, and the prosecution proffers a firearm possession offense as the predicate felony to enhance the sentence.

If the prosecution files a predicate felony statement naming a firearm offense as the predicate, challenge the predicate as unconstitutionally obtained in violation of your client's Second Amendment rights. *See,* e.g., CPL § 400.21(5), (7)(b) (setting forth procedure for challenging constitutionality of prior conviction). The arguments set forth in connection with the motion to dismiss the indictment and plea withdrawal motions will also inform your predicate challenge (in other words, that the statute is unconstitutional and that, if a guilty plea, that the plea violates due process).

Should the prosecution argue that *Bruen* doesn't apply to your predicate challenge because it was decided after the predicate conviction became final, argue that *Bruen* does apply retroactively to the predicate. It is not a new rule (a) given the historical analysis that informs the entire opinion; and (b) because it sets forth a rule of substantive Second Amendment law, not a rule of criminal procedure. *See Bousley v. United States, 523 U.S. 614, 620 (1998) (*holding that *Teague v. Lane's* presumption of non-retroactivity "applies only to procedural rules" and is "inapplicable to the situation where [the Supreme Court] . . . decides the meaning of a criminal statute); *United States v. Sood*, 969 F.2d 774, 774 (9th Cir. 1992); *Ingber v. Enzor*, 841 F.2d 450, n.1 (2d Cir. 1988); *cf. People v. Smith*, 28 N.Y.3d 191, 206-209 (2016)(holding that *People v. Catu's* automatic plea vacatur rule was a new rule of criminal procedure and therefore did not retroactively apply to pre-*Catu* predicate convictions).

Again, as a sentence enhanced by an unconstitutional predicate would be illegal, appellate practitioners could raise this claim notwithstanding any appeal waiver.

III. Suppression arguments

If your client was arrested and charged with firearm possession after a street encounter or traffic stop, consider how law enforcement's observations can be assailed after *Bruen*.

- If the cop claims that your client's so-called furtive conduct in the car or on the street

contributed to a reasonable suspicion that he had a gun,

- ☐ Argue that since your client had a constitutionally protected right to possess a gun, his conduct – even if it could be interpreted as trying to conceal a gun - was innocent. He was only acting furtively, in fact, because New York had unconstitutionally burdened his right to possess a gun in public. The only caveat is arguably if the cop knew that your client would never have qualified for a license (ie, had a prior felony). Under those circumstances, an inference of criminality could perhaps be drawn from his furtive conduct, but that is extremely unlikely to be the case (but see Exhibit D, which provides arguments for countering the prior felony bar).

- ☐ That your client was arrested before *Bruen* doesn't sanction the stop because New York has no good faith exception. *See People v. Bigelow*, 66 N.Y.2d 417, 427 (1985).

- The observation of a bulge in a pocket or waistband does not provide grounds for a stop and frisk, as, again, there is no basis for drawing an inference of criminal possession of a gun from that observation. Your client has a protected Second Amendment right to possess a gun in public.

- Information, whether from an identified citizen or an anonymous tip, should not provide, the police with anything more than a basis to conduct a minimal inquiry (a level one), not to aggressively question or seize your client, since the information does not establish criminal activity.

- If the cop claims that the neighborhood where your client was stopped had a higher incidence of gun possession, and that contributed to reasonable suspicion,

  - ☐ Argue that, even if true, a higher incidence of gun possession only means more people were exercising their constitutionally protected right to publicly carry guns, and do not allow an inference of criminality. *See our June 2022 Issues to Develop for more "high crime" neighborhood challenges.*

See next page for more

Practice Note:

On July 1, 2022, the Governor signed into law revised regulations meant to align with *Bruen*. Clients charged after passage of the new regulations will need to argue that the new provisions are also unconstitutional.

Although we do not undertake a comprehensive discussion of these new provisions in this issue, we offer two immediate points. First, the new regulations cannot be applied retroactively to cure any defect related to your client's *Bruen*-related case, as that would be an *ex post facto* violation. The new regulations are also irrelevant. At the time of your client's possession, he was subject to the unconstitutional law that was on the books, not some new, purportedly more favorable, law.

Second, at least one of the requirements that carried over from the former regulations to the new ones can be challenged on grounds similar to those that doomed "proper cause." Both the old and new regulations require that the applicant have "good moral character." So, should you have a client charged under the new licensing regime OR should the DA in your *Bruen* case respond to your motion to dismiss by saying your client would not have gotten a license anyway because he lacked "good moral character," argue that a good-moral-character standard vests "broad discretion" in state agents to apply a vague standard that ultimately cannot constitutionally justify denying a fundamental right in the first place. *Olivera v. Kelly*, 23 A.D.3d 216 (1st Dept. 2005). New Yorkers retain basic fundamental rights even where the State determines that they lack "good moral character" (whatever that means). We doubt the State will even come close to justifying this provision with any historical tradition. And *Bruen* itself rejects it as *Bruen* repeatedly referred to the right of "law-abiding citizens" to possess firearms, that is, those without criminal records, not those who seem to have "good moral character."

EXHIBIT B

United States v. Daniels, 77 F.4th 337 (5th Cir. Aug. 9, 2023)(federal statute prohibiting firearm possession by unlawful users of controlled substance unconstitutional as applied to marijuana user)

Range v. Attorney Gen. United States of Am., 69 F.4th 96 (3d Cir. June 6, 2023)(en banc)(federal felon-in-possession statute unconstitutional as applied to defendant with felony welfare fraud conviction)

United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *cert granted* 143 S.Ct 2688 (June 30, 2023), *argued* November 7, 2023 (federal statute prohibiting firearm possession by persons subject to domestic violence restraining order is not consistent with historical tradition and thus facially unconstitutional)

United States v. Bullock, No. 18-CR-165-CWR-FKB, __ F Supp 3d __, 2023 WL 4232309 (SD Miss June 28, 2023)(federal felon-in-possession law unconstitutional as applied to defendant with prior aggravated assault and manslaughter convictions)

United States v. Price, 635 F. Supp 3d 455 (S.D.W.Va Oct. 12, 2022)(federal statute prohibiting possession of a firearm with removed, obliterated or altered serial number facially unconstitutional)

Srour v. New York City, __F.Supp.3d__, 2023 WL 7005172 (S.D.N.Y. October 24, 2023) (concluding that assessments of "good moral character" or "good cause" in New York City Administrative Code regulations are facially invalid); *but see Antonyuk v. Chiumento*, __ F.4th__, 2023 WL 8518003 (2d Cir. Dec. 8, 2023).

Antonyk v. Hochul, __ F Supp.3d, 2022 WL 16744700 (N.D.N.Y. 2022)(enjoining enforcement of the "good moral character" provision imported into New York's post-*Bruen* revised licensing scheme), *stay granted*, 2022 WL 18228317 (2d Cir. 2022), *motion to vacate stay denied*, 598 U.S. __, 143 S.Ct 481 (2023)(Justices Alito and Thomas noting the "novel and serious questions" at issue and encouraging the applicants to again seek relief);*but see Antonyuk v. Chiumento*, __ F.4th__, 2023 WL 8518003 (2d Cir. Dec. 8, 2023).

Firearms Policy Coalition, Inc. v. McCraw, 623 F.Supp3d 740 (N.S. Tex. Aug. 25, 2022), *app. dismissed sub nom. Andrews v. McCraw*, No. 22-10898, 2022 WL 19730492 (5th Cr. Dec. 21, 2022)(Texas criminal prohibition on handgun carry by individuals aged 18 to 20 years old facially unconstitutional)

Commonwealth v. Gardado, 491 Mass 666, 206 N.E.3d 512 (Mass April 13, 2023)(convictions for unlawful possession of firearm and ammunition violated right under Second Amendment and Due Process Clause where jury was not instructed that lack of licensure was essential element of offense)

Commonwealth v. Donnell, No. 2211CR2835 (Lowell Dist. Ct Mass. October 3, 2023)(granting motion to dismiss weapon possession charge against law-abiding New Hampshire resident who traveled to Massachusetts).

EXHIBIT C

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS **LOWELL DISTRICT COURT**
NO. 2211CR2835

COMMONWEALTH

VS.

DEAN F. DONNELL

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO DISMISS

The defendant Dean Donnell is charged in the Lowell District Court with carrying a firearm without a license under *G.L. 269 §10(a)*[1]. The defendant has filed a motion to dismiss the charge in the complaint claiming that:

1. *G.L. 269 §10(a)* is unconstitutional on its face.
2. *G.L. 269 §10(a)* is unconstitutional as applied to the defendant, and
3. *G.L. 269 §10(a)* violated the defendant's right to be free from cruel and unusual punishment.2

The defendant in his memorandum in support advances arguments that; 1. *G.L. 269 §10(a)* impermissibly infringes on the Second Amendment of the U.S. Constitution; 2.

1 The defendant is also charged in a separate complaint #2111CR4759 with possession of a firearm, possession of ammunition and operating under the influence of alcohol.
2 The Court finds that pursuant to *Commonwealth v. Jackson 369 Mass. 904 (1976) GL 269, sec 10(a)* does not constitute cruel and unusual punishment and nothing in the Bruen decision changes that holding.

G.L. 296 §10(a) impermissibly shifts the burden of proof onto the defendant to prove he was in fact licensed; 3. Requiring non-residents to obtain licenses to carry firearms violates the Second Amendment because there is no historical analogue burdening the right to interstate travel; 4. The holding of *Commonwealth v Harris 481 Mass. 767 (2019)* does not survive Constitutional muster and is inapplicable to the defendant's case; and 5. The defendant's right to equal protection and the right to travel has been violated.

The facts leading up the issuance of the complaint are not in dispute and for the purposes of this motion, the Court accepts them. Those facts are contained in both the Commonwealth's Memorandum in Opposition to the Motion to Dismiss as well as the Defendant's Memorandum in Support of Addendum to the Motion to Dismiss.

There is no question that the holding of the U.S. Supreme Court in *New York State Rifle and Pistol Association, Inc. v. Bruen, 141 S. Ct. 2111 (2022)*, has changed the legal landscape on how the second amendment of the Constitution is interpreted, particularly how it affects existing firearm statutes and challenges to their constitutionality. In fact, the Supreme Judicial Court in *Commonwealth v. Guardada, 491Mass. 666 (2023)* recognized for the first time that the Second Amendment to the U.S. Constitution guarantees an individual's right to possess and carry a firearm outside of his home. *Id. at 690*. Prior to *Guardado*, Massachusetts treated the possession or carrying a firearm outside of one's home as a "privilege" that was conferred on a person by the state. *Harris supra at 767*. It was against the *Bruen* backdrop that the SJC reversed the longstanding law in Massachusetts that licensure to possess a firearm was not an essential element of the felony of unlawful possession of a firearm outside of the home. Massachusetts had previously

required that holding a valid license to carry a firearm was an exception to the otherwise prohibition of carrying a firearm and that requiring a defendant to produce a license at trial did not infringe on Constitutionally protected conduct.

Because the SJC has already addressed the burden shifting claim made by the defendant, the five remaining arguments of the defendant can be summarized as follows;

What affect does the *Bruen* decision have on the status of an ordinary, law-abiding resident of the state of New Hampshire who exercises his Constitutional right under the Second Amendment while traveling in Massachusetts.

Bruen articulated a two-step analysis in determining whether a law or regulation of constitutionally protected conduct is unconstitutional. First, courts must determine whether "the Second Amendment's plain text covers an individual's conduct*[.]" Bruen supra at 2129-30*. If so, then the "Constitution presumptively protects that conduct," and the Government "must justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." Id. at 2130. To carry its burden, the Government must point to "historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation." *Id.* "Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.*

The conduct of the defendant in the instant case clearly is covered by the Second Amendment. Therefore, the burden falls on the Commonwealth to justify the law showing that it is consistent with the Country's tradition of firearm regulation.

As the defendant in the instant case is not a resident of Massachusetts and was in

compliance with his home states laws on the possession of the firearm, the Commonwealth needed to show some historical analogue relating to disparate treatment of nonresidents and must point to some "historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation." *Bruen Id. at 2131-32.*

The Commonwealth argues that under the holding in *Commonwealth v. Harris, supra*, Massachusetts is not obligated to recognize an out of state resident right to carry a firearm under the Full Faith and Credit clause of the Constitution. They claim that the Commonwealth is not required to substitute its statutes for those of New Hampshire. *See Harris supra at 776* and Bruen does not affect the ability of states to require a license as long as the license criteria are objective.

This argument is not persuasive because at the time of the *Harris* decision, carrying a firearm outside of the home was a privilege, and the *Harris* Court held that Massachusetts didn't have to give Full Faith and Credit to New Hampshire laws conferring that same privilege. *Harris, supra*. The Commonwealth is correct that a concurring opinion3 in *Bruen* did state that the ability of States to require a license is not affected, but the holding in *Bruen* basically took away all subjective criteria for the issuance of such a license. The Commonwealth points to no historical precedent limiting the reach of one's exercise to a federal constitutional right to only within that resident's states borders.

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3 Thomas B. Bennett et al., Divide & Concur: Separate Opinions & Legal Change, 103 CORNELL L. REV. 817, 839 (2018) ("[L]ower courts should follow the majority opinion . . . . [They] must follow binding precedent and ignore concurring opinions . . . ."). Justices Alito, Kavanaugh (joined by Chief Justice Roberts), and Barrett filed concurring opinions. Because they all joined the majority opinion, however, these "vanilla concurrences" have "no impact" and "count[] for nothing" legally. Id. at 847.

Moving on to the defendant's claim that *GL 269, sec. 10(a)* violates the defendant's right to travel and equal protection, the Commonwealth also asserts that it does not violate the right to travel and equal protection clause because the Commonwealth's license requirements do not prohibit him from traveling in Massachusetts; they only prohibit him from carrying a firearm while traveling in Massachusetts. The Commonwealth further argues that the licensing requirements don't treat non-residents differently than a residents because they can apply for a temporary nonresident license to carry, or they can travel through the state while complying with statutory exemptions of unloading the firearm and storing it secured in a locked compartment and the travel is for a specific purpose such as training or competition. *See G.L.C. 140 § 131, 131F, 129 and 18 USC § 926A.*

The Commonwealth points to the Massachusetts firearm licensing scheme to argue that a nonresident can travel in Massachusetts with a firearm without a license if they are in compliance with the exceptions as listed. However, the exceptions miss the point of the Second Amendment. The Second Amendment and the right to possess firearms is for personal protection, self-defense. The exceptions strip away the right by disarming the individual while he is traveling within the state. The Commonwealth does not point to any historical precedent for this.

The Commonwealth's argument against the defendant's claim that *GL 269, sec. 10(a)* violates his rights under the equal protection clause because he can obtain a temporary nonresident license to carry is also unpersuasive. As stated above, prior to the *Bruen* decision, Massachusetts treated the carrying of a firearm as a privilege. While it allowed nonresidents to apply to obtain a license for that privilege, nonresidents were not

treated the same as residents. Residents of Massachusetts obtaining a license were granted the license for five years. A temporary non resident license was only valid for one year.

The Commonwealth next argues that the Massachusetts licensing scheme imposes a permissible burden because of the substantial state interest in preventing certain people from possessing firearms. However, under federal law, certain people are prohibited from obtaining/possessing firearms. *18 U.S.C. § 922(g),* makes it unlawful for certain categories of persons to ship, transport, receive, or possess firearms or ammunition, to include any person:

- *convicted in any court of a crime punishable by imprisonment for a term exceeding one year;*
- *who is a fugitive from justice;*
- *who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act, codified at 21 U.S.C. § 802);*
- *who has been adjudicated as a mental defective or has been committed to any mental institution;*
- *who is an illegal alien;*
- *who has been discharged from the Armed Forces under dishonorable conditions;*
- *who has renounced his or her United States citizenship;*
- *who is subject to a court order restraining the person from harassing, stalking, or threatening an intimate partner or child of the intimate partner;*[4] *or*
- *who has been convicted of a misdemeanor crime of domestic violence.*

Nothing in the *Bruen* decision is contrary to the argument raised by the

4 The United States Supreme Court has agreed to hear the government's appeal of a decision from the 5th circuit *United States v. Rahimi*, 59 F.4th 163 (2023) holding that this provision of section 922 (g) does not survive post Bruen.

Commonwealth that there is a substantial interest in making it unlawful for certain individual to possess firearms. In fact, throughout the *Bruen* decision, reference is made to "ordinary, law-abiding" citizens when speaking of the rights under the second amendment. The logical conclusion to the Commonwealth's argument is that an "ordinary law abiding" resident of the state of New Hampshire can become a felon merely by traveling into the state of Massachusetts. Given that there is already a federal law applying to the entire country as to who is prohibited from possessing firearms, the Court is not persuaded by that argument.

CONCLUSION

A law-abiding resident of New Hampshire who is exercising his Constitutional right should not become a felon by exercising that right while he is traveling thorough Massachusetts merely because he has not obtained a Massachusetts license to carry, which now, under the holding of *Bruen*, has to be issued to an applicant unless the applicant is otherwise disqualified. The standard for who is a disqualified individual must be the same. Otherwise, a state may decide to impose different requirements on the exercise of any Constitutional right. For example, some states could impose different age limits on voting in elections. [5]

This Court can think of no other constitutional right which a person loses simply by traveling beyond his home state's border into another state continuing to exercise that

5 While the Twenty Sixth Amendment to the US Constitution directly forbids this, the Court points this out to contrast this amendment with the Second Amendment's prohibition of the right to keep and bear arms **are not to be infringed**.

right and instantaneously becomes a felon subject to mandatory minimum sentence of incarceration. Anecdotally, a law abiding New Hampshire resident exercising his constitutional right to carry while shopping at the Pheasant Tree Mall in Nashua, New Hampshire would become a felon when he shops in a section of a store at that Mall, which happens to be in Tyngsborough, Massachusetts

An individual only loses a constitutional right if he commits an offense or is or has been engaged in certain behavior that is covered by *18 USC section 922.* He doesn't lose that right simply by traveling into an adjoining state whose statute mandate that ***residents of that state*** obtain a license prior to exercising their constitutional right. To hold otherwise would inexplicably treat Second Amendment rights differently than other individually held rights.

Therefore, the Court finds that *GL. 269, sec. 10(a)* in unconstitutional as applied to this particularly situated defendant and **Allows** the motion to dismiss on that ground.

SO ORDERED.

John F. Coffey,
Associate Justice

Dated: 8-3-23

EXHIBIT D

New York's classification and sentencing regime associated with Penal Law § 265.03(3) violates the Second Amendment under *Bruen*'s historical analysis methodology.

The United States Supreme Court in *Bruen* put in-home and public-carry possession on equal constitutional footing, expressly reaffirming that the Second Amendment protects the public possession of a firearm. The Second Amendment did not allow a distinction to be made between inside-the-home possession and public carry. *New York State Rifle and Pistol Ass'n v. Bruen*, 142 S.Ct 2111, 2134 (2022) ("Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms."). 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* at 2135, quoting *District of Columbia v. Heller*, 554 U.S. 570,599 (2008) (emphasis and brackets in original). The Court stated that "[m]any Americans hazard greater danger outside the home than in it." 142 S.Ct at 2134.

In light of *Bruen*'s rejection of any constitutional distinction between in-home and public carry and its unequivocal rejection of means-end scrutiny, no sentencing distinctions between unlicensed in-home weapon possession and unlicensed public possession, let alone the drastic distinctions in Penal Law § 70.02, can survive Second Amendment scrutiny unless the government can establish a historical tradition justifying them. *See Graham v. Connor*, 490 U.S. 386, 395 (1989) (when a specific Amendment provides an "explicit textual source of constitutional protection," a court must analyze the challenge by reference to the Amendment); *cf. People v. Hughes*, 22 NY.3d 44, 51-52 (2013) (applying means-end scrutiny in considering Second Amendment challenge to penalties imposed on a person excluded from the "home or place of business exception" due to a prior crime). As established below, the government cannot

meet this burden, rendering Penal Law § 70.02's classification and sentencing provisions with respect to Penal Law § 265.03(3) unconstitutional. At a minimum, a hearing is required to decide this question. *Cf. People v. Cabrera*, __ N.Y.3d __, 2023 WL 8039656 at *8 (Nov. 21, 2023) (declining to review unpreserved classification and sentencing disparity claim absent judicial analysis of historical analogues by lower court).

New York's Penal Law harshly distinguishes between public and in-home possession, imposing substantially greater punishment for unlicensed pubic carry. Unlicensed possession of a gun in the home is classified as an A misdemeanor or non-violent E felony, punishable by no more than 364 days in jail for the misdemeanor, and at most, an indeterminate term of 1-1/3 to 4 years for the felony. The punishment for public possession, in contrast, is a C-violent-felony determinate sentence allowing up to 15 years in prison, followed by a period of mandatory post-release supervision. Although the government has the burden of proving an historical tradition for this disparity, it is clear the government will be unable to do so. *Bruen* itself repudiated any basis in the Second Amendment's text or this nation's history for distinguishing home possession from public carry. Thus, there is no basis for exacting any greater punishment, let alone exponentially harsher penalties, on those guilty of possessing unlicensed firearms in public, versus those who commit a similar infraction related to in-home possession.

Further undercutting any possible argument by the government is the majority's observation in *Heller* that even those few founding-era laws that punished discharge of a gun within city limits, including a Rhode Island law that fined the discharge of guns in streets and taverns, "punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties." 554 U.S. at 632-33. The "significant criminal penalties" New York imposes on

individuals exercising their fundamental right of public carry merely for not obtaining a license thus finds no support in the history and traditions of this country.

It is equally doubtful that the government could justify the sentencing distinctions between Penal Law § 265.03(3) and New York's other firearm offenses on the basis that Penal Law § 265.03(3) specifically penalizes the possession of "loaded" firearms. Since the core purpose of the right to bear arms is for self defense, it is inconceivable that our Nation's laws would have historically penalized the possession of loaded weapons more harshly than unloaded weapons. An unloaded weapon would hardly serve the overriding purpose of self-defense at the heart of the Second Amendment.

At a minimum, a hearing is required to examine and determine this historical question.