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120 WALL STREET – 28TH FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535

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ISSUES TO DEVELOP AT TRIAL

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This month's edition provides you with preservation tips in the wake of the Second Amendment challenge to New York's gun licensing laws argued in the Supreme Court earlier this month.

On November 3, 2021, the U.S. Supreme Court heard oral argument in New York State Rifle & Pistol Association v. Bruen, which raised a Second Amendment challenge to New York's gun licensing regime. In New York, as we all know, possession of an unlicensed gun outside home or place of business is a felony. Penal Law § 265.03 (3). Other provisions of the Penal Law criminalize possession of a firearm as well. Penal Law §§ 265.01 (1); 265.02.

The challengers in the case, a gun-rights advocacy group and two men whose applications for unrestricted concealed-carry licenses were denied, made a broad Second Amendment argument that the text of the Second Amendment protects every individual's right to carry gun outside the home for self-defense; a person shouldn't have to satisfy a government official before exercising a constitutional right.

The challengers also argued that, to the extent the State can restrict firearms, the NY restrictions unduly burden the constitutional right to bear arms as they require an applicant to show "proper cause" for the license, and proper cause has been defined by New York courts as a "special need" to defend themselves, rather than simply wanting to protect themselves or their property.

Supreme Court watchers think the Supreme Court ruling (expected this summer) will defer the broader question on the right to carry a gun outside the home and focus more narrowly on the New York law – striking it down in some capacity.

What does this mean for defense attorneys? We won't know for sure until the Court issues its ruling, but pending that, we do know one thing: **Now is the time to start objecting when your client is charged with simple possession.** As we learned the hard way with Carpenter (which held, contrary to New York law, that a warrant was required before the prosecution could acquire cell site location data), when a Supreme Court ruling changes the law in New York after a client has been convicted but before his appeal is perfected, the client will not get the benefit of that ruling unless the issue was preserved by defense counsel below. **In other words, trial lawyers need to object to things that aren't unlawful now in order to get the benefit of a change in the law later!** Crazy, we know, but if there's a way to avoid a reversal, the appellate courts are sure to find it.

So, based on the arguments made to the Court, we're offering here some quick preservation tips if your client is charged with simple possession. Depending on what the Court decides, these basic objections should be enough to preserve the issue for appeal:

- Move to dismiss the indictment/accusatory instrument on the ground that the Penal Law statute criminalizing your client's possession of a weapon violates your client's Second Amendment right to bear arms for self-defense outside the home.
- Move to dismiss on the ground that the licensing requirements rendering your client's gun possession unlawful unduly burdens your client's Second Amendment rights. A "special need" should not be required to exercise a constitutional right. The regulations also give unbridled discretion to non-elected licensing officials and are open to arbitrary and discriminatory enforcement.
- If your client is Black or brown, argue that the gun restrictions discriminatorily deprive your client of his Second Amendment rights. As set forth by the Black Attorneys of Legal Aid, the Bronx Defenders, and Brooklyn Defender Services in the amicus they filed: for Black and brown individuals, "New York's licensing regime renders the Second Amendment a legal fiction." The regulation effectively criminalizes gun ownership for racial and ethnic minorities based on its enforcement by police and prosecutors.
- If your client proceeds to trial and you've presented evidence that your client possessed the gun for his own protection, request an affirmative defense to be charged that your client possessed the gun for self-protection consistent with his Second Amendment rights.

Spoiler alert: Your motion will be denied and the court will decline to charge the affirmative defense. But, if your client is convicted, and depending on the Supreme Court's ruling, these issues will be available to help your client on appeal!