UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARC W. WEINSTEIN,

Plaintiff,

-against-

THOMAS C. KRUMPTER, Acting Police Commissioner, Nassau County, New York

STEVEN E. SKRYNECKI, Chief of Department, Nassau County Police Department,

DANIEL P. FLANAGAN, Commanding Officer, First Precinct, Nassau County Police Department,

JAMES B. MALONE, Police Officer, First Precinct, Nassau County Police Department

JOHN DOES I –IV, Police Officers, First Precinct, Nassau Police Department,

PAUL CAPPY, Police Officer and Investigator, Nassau County Police Department, Pistol License Section,

NASSAU COUNTY POLICE DEPARTMENT,

and

COUNTY OF NASSAU

Defendants

CIVIL ACTION NO.

CV - 14 – 7210 (ADS) (AKT)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Jury Trial Demanded

TABLE OF CONTENTS

Title page

Table of Authorities ……………………………………………………….………ii

I. Facts ……………………… ……………………………………………1

II. Preliminary Statement ……………………………………… ………2

III. Argument ……………………………. ..………………………….………3

A. Right to Private Cause of Action……………………………………3

B. Procedural Due Process ..……………………………………………...4

1. In General ……………………………………………………4

2. Razzano and OPS 10023 …….……………………………5

(a) Razzano ……………………………………………5

(b) OPS 10023 ………… ……………………….……...7

3. Domestic Incident Gun Confiscation Policy as Applied …..9

4. Delays Occasioned by Rules of Pistol Licensing Section…10

C. PL Article 400 Unconstitutional ………………………………..15

1. Possession of Handgun Treated as Privilege ……………...11

2. Possession of a Handgun as a Right ...……………………14

3. Deprivation of Right to Possess and Due Process ..………15

IV. Conclusion ………………………………………………..…………20

.

TABLE OF AUTHORITIES

Authority page

CASES:

Federal:

Armstrong v. Mango, 380 U.S. 43, 48 (1993) ……..…………………………………4

Back v. Hastings on Hudson Union Free Sch. Dist.,
365 F.3d 107, 128 (2d Cir. 2004) ………………………………………………….3

Curcio v. Roosevelt Union Free Sch. Dist.,
No. 10 Civ. 5612, 2012 WL 3646935 (E.D.N.Y. Aug. 22, 2012) …………………..3

Butler v. Castro, 896 F.2d 698 (2nd Cir. 1990………………………………………...10

District of Columbia v. Heller 554 U.S. 570, 128 S. Ct. 2783 (2008) ………15, 18, 19

Fuentes v. Shevin 407 U.S. 67 (1972) ……………………………………..…..…4, 10

Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) …………………………………..4

Kachalsky et al v. County of Westchester, et al*, 701 F.3d. 81 (2nd Cir, 2012)* ….. ….18

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 898 (1976) ……………………………5

McDonald v. City of Chicago 561 U.S. 742, 130 S. Ct. 3020 (2010) ………….…..16

Monell v. Dep't of Social Services, 436 U.S. 658 (1978) ……………………………4

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) ………………4

Nagle v. Marron, 663 F.3d 100, 116 (2d Cir. 2011) …………………………………3

Panzella v. Sposato et al _____ F.3d. _____ (2nd Cir., July 18, 2017) …………2, 3, 6

Razzano v. County of Nassau, 765 F.Supp.2d. 176, E.D.N.Y. (2011) ...2, 3, 5, 7, 8, 9

United States v James Daniel Good Real Prop., 510 US 43, 48 (1993) ..…………..4

Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) …………………………….4

Zahra v. Town of Shouthold, 48 F.3d 674, 685 (2nd Cir. 1995) ……………………..4

State:

Biggerstaff v. Drago, 65 A.D.3d 728, 883 N.Y.S.2d 657 (3d Dep't 2009) …………14

Beach v. Kelly, 52 A.D.3d 436, 860 N.Y.S.2d 112 (1st Dep't 2008) ……………….14
Authority page

Broadus v. City of New York Police Dept. (License Division),
62 A.D.3d 527, 878 N.Y.S.2d 738 (1st Dep't, 2009) ……………………………….14

Cuda v. Dwyer, 967 N.Y.S.2d 302 (App. Div. 4th Dep't 2013) ……………………14

DeAngelo v. Burns 124 A.D.3d 1156, (3rd Dept., 2015) ………..……….....…12, 18

D'Onofrio v. Kelly, 22 A.D.3d 343, 802 N.Y.S.2d 159 (1st Dep't 2005) ...…………14

Nichols v. Richards, 78 A.D.3d 1453, 913 N.Y.S.2d 352 (3d Dep't 2010) ……….14

People v. David W. 95 N.Y.2d 130 (2000) ………………………….……………..7

Saleeby v. Safir, 289 A.D.2d 60, 734 N.Y.S.2d 139 (1st Dep't 2001) ………………14

Seamon v. Coccoma, 281 A.D.2d 824, 721 N.Y.S.2d 884 (3d Dep't 2001) ...………14

Constitution and Statutes:

Constitution of the United States, Amendment 2 …….……………………………15

Constitution of the United States, Amendment 5 …………………………….…20

Constitution of the United States, Amendment 14 …………….……………….…4, 15

Statutes:

42 U.S.C. §1983 ……………………………………………………………..……5

McKenney's New York, Penal Law Article 265 …….……………………….…...18

McKenney's New York, Penal Law Article 400 ……………….…...…3, 9, 11, 18, 20

McKenney's New York CPLR, Article 78 ……………………..……..…………..9

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I.

FACTS

On February 25, 2014, the Plaintiff MARC W. WEINSTEIN, at his home located in Baldwin, New York, got into an argument with his adult son, Abraham Weinstein, regarding the use of a washing machine. There was shouting between them but no violence, no threats of violence and no brandishing of weapons.

Zoila E. Watson-Weinstein, wife of Plaintiff Marc W. Weinstein called the police. Officer James B. Malone**,** of the Nassau County Police Department and another police officer arrived, finding the home at peace, spoke with the wife and son and found that the argument had been peaceably resolved.

Officer James B. Malone asked to see the plaintiff's New York State Pistol License. The license was produced and at that point, Officer Malone requested that the Plaintiff voluntarily turn over his firearms to the police.

Officer James B. Malone and four other armed officers demanded that Plaintiff surrender his pistol license and all his firearms, pistols and long guns. Malone advised that it was department policy to confiscate all guns in the household, both pistol and long guns "regarding domestic incidents." Malone then threatened that if he, Weinstein refused to do so, they would arrest him and file "menacing" and other unspecified criminal charges against him.

Weinstein is a veteran of the New York City Fire Department, seriously injured in the September 11, 2001 attack on the World Trade Center. Faced with the threat of criminal charges and five armed police officers, Plaintiff opened his gun safes at the demand of said police officers and under duress allowed them to search for and confiscate his legally owned firearms.

In the weeks following the confiscation of his firearms, the plaintiff Weinstein co-operated with the Nassau County Police Department, producing all information and documents requested. Plaintiff's wife and son confirmed in writing and under oath that there had been no violence, threats of violence or brandishing of weapons on the occasion in question. Weinstein, both orally and in writing requested that his firearms be returned to him. Finally, ten months after the confiscation and after filing this lawsuit, plaintiff's pistol license and handguns were returned to him. A month later his long guns were returned. (Ex. 13, Deposition of plaintiff, Marc Weinstein; Ex. 15, Deposition of Abraham Weinstein; Ex. 14, Deposition of Zoila E. Watson-Weinstein; Ex. 9, Domestic Incident Report; Ex. 10, NCPD Case Summary).

II

PRELIMINARY STATEMENT

It is Plaintiff's contention in this motion that he was denied due process under the 4th, 5th and 14th Amendments of the United States Constitution in that at the time of confiscation he was not given notice of a procedure to have his property returned, he was not provided a "prompt post deprivation hearing," as is specifically required by *Razzano v. County of Nassau*, 765 F.Supp.2d. 176, E.D.N.Y. (2011) and *Panzella v. Sposato et al* _____ F.3d. _____ (2nd Cir., July 18, 2017). The procedures adopted by and as actually

implemented by the Nassau County Police Department fails to meet the requirements of due process set forth in these decisions.

Plaintiff further contends that his rights under the Second Amendment to keep and bear arms, specifically to possess a handgun in the home, were violated, occasioned by the suspension of and undue delay in the return of his pistol license and retention of his handguns without a "prompt post deprivation hearing". He contends that McKinney's Penal Law Art. 400, § 1. (b), (k), and (n) and § 11 that authorize the Pistol Licensing Officer to deny, suspend, limit, revoke or delay a pistol license for any "good cause" at "any time" is unconstitutional as a denial of Plaintiff's and other similarly situated persons rights to possess a handgun.

There are no genuine issues of material facts regarding the confiscation and the County's policy that fails to provide the required "prompt post deprivation hearing." Plaintiff seeks declaratory relief that, (1) Defendants' policies, practices, and/or customs violate the Fourth, Fifth and Fourteenth Amendments, (2) an injunction mandating significant changes in those policies, practices, and/or customs to bring them in compliance with the requirements of due process as set forth in *Razzano* and *Panzella,* (3) that Penal Law 400 is at odds with *District of Columbia v. Heller* 554 U.S. 570, 128 S. Ct. 2783 (2008) and therefore unconsitutional and (4) that this matter be set for trial for a determination of damages resulting from the violation of Plaintiff's constitutional right.

III

ARGUMENT

A. Right to Private Cause of Action

"Section 1983 provides a private right of action against any person who, acting under color of state law, causes another person to be subjected to the deprivation of rights under the Constitution or federal law." *Curcio v. Roosevelt Union Free Sch. Dist., No. 10* Civ. 5612, 2012 WL 3646935, at *22 (E.D.N.Y. Aug. 22, 2012) (quoting *Blyden v. Mancusi,* 186 F.3d 252, 264 (2d Cir. 1999)). It is well-settled that municipal entities are

"persons" within the meaning of § 1983 and are therefore subject to suit. See *Nagle v. Marron,* 663 F.3d 100, 116 (2d Cir. 2011) (citing Monell v. Dep't of Soc. Svcs. of City of New York, 436 U.S. 658, 663 (1978); *Back v. Hastings on Hudson Union Free Sch.* Dist., 365 F.3d 107, 128 (2d Cir. 2004))., A municipality can be held liable for its action when there is an official policy or custom that causes the plaintiff to be subjected to a denial of a constitutional right. See *Monell v. Department of Social Services*, 436 U.S. 658 (1978); see also *Zahra v. Town of Southold*, 48 F.3d 674, 685 (2d Cir. 1995).

In this case it is undisputed that the officers and officials involved were acting under color of law and it is undisputed that they were acting pursuant to the official policy of the County of Nassau and of the Nassau County Police Department regarding the confiscation of guns in a "domestic dispute" and the policy and procedures regarding the return or retention of those guns. The policy is codified as OPS 10023 (Ex.1).

B. Procedural Due Process

1. **In General.**

The right to property is a fundamental right guaranteed by the Constitution of the United States in that no State shall "deprive any person of life, liberty, or property without due process of law." See U.S. Constitution, 14th Amendment § 1. The "central meaning" of procedural due process is that parties "whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified". *Fuentes v. Shevin* 407 U.S. 67 (1972) (See also *United States v James Daniel Good Real Prop*., 510 US 43, 48 (1993). It is fundamental that the right to notice and an opportunity to be heard must be done at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); see also, *James Daniel Good Real Property*, at 53 ; *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Before taking property, "the State must provide effective procedures that guard against an erroneous deprivation" of the fundamental right to property. *People v. David W*., 95 N.Y.2d 130 (2000).

Due process has two indispensable components, notice and a post-deprivation

opportunity to be heard. See *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). The Police Department's policies fail on both these components.

2. *Razzano* and OPS 10023.

(a). *Razzano*.

This Court has previously addressed this very issue in *Razzano v. County of Nassau*, 765 F.Supp.2d. 176 E.D.N.Y. (2011). In that case the gun owner brought action against county, county police commissioner, and county police officers, alleging under 42 U.S.C. § 1983 that defendants violated his due process rights by failing to provide him with adequate opportunity to recover rifles and shotguns that defendants confiscated from his residence. The Court found that the violation of the plaintiff's rights were a result of municipal policy.

With regard to the question of due process requirements, this Court, after reviewing the law and facts and applying the test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 898 (1976), concluded that the New York State Article 78 proceeding would not fullfill the requirements of due process 188 [11]. The Court stated at 189 [13]:

> To assess whether this is a reasonable additional requirement, the *Mathews* test requires the Court to consider both (1) the probable value of this safeguard and (2) its cost to the government.
>
> With respect to the former factor, the Court believes that a post-deprivation hearing would have significant value in preventing erroneous deprivation. First, to the extent that the police seize longarms that do not belong to the person from whom they are confiscated, a prompt hearing***190** will allow this to be quickly resolved. *See Canavan,* 1 N.Y.3d at 142–43, 770 N.Y.S.2d 277, 802 N.E.2d 616. More importantly, such a hearing would provide the owner of confiscated longarms a timely and inexpensive forum to challenge the government's holding of his property. Police are charged with the critical duty of protecting the public, and it is undeniable that even the best intentioned officers can err in making the on-the-spot judgments required in carrying out this duty. Timely correction of these mistakes is valuable. Likewise, for many gun owners—including,

> apparently, Razzano—longarms may have important sentimental value, and the prompt return of these weapons if wrongly possessed by the state is an important government obligation. Moreover, the right to bear arms is enshrined in the Second Amendment of the United States Constitution, and although this right is by no means unlimited, ownership of guns by individuals legally entitled to those guns is a basic right. A prompt due process hearing is likely to limit the unfair curtailment of this right.
>
> In setting out the parameters of such a proceeding this Court held at 190 [14]:
>
> Thus, having weighed the three *Mathews* factors, the Court finds that persons ***191** whose longarms are seized by Nassau County are entitled to a prompt post-deprivation hearing, to be held as follows:
>
> • First, the post-deprivation hearing must be held before a neutral decision-maker.
>
> • Second, consistent with the Second Circuit's rulings in the *McClendon* trio, the right to a prompt post-deprivation hearing only applies to seized longarms that are not (1) the fruit of a crime, (2) an instrument of crime, (3) evidence of a crime, (4) contraband, or (5) barred by court order from being possessed by the person from whom they were confiscated.
>
> • Third, at the hearing, Nassau County shall have the burden of showing that it is likely to succeed in court on a cause of action—presumably forfeiture or a cause of action seeking an order of protection, although the Court does not limit Nassau County to these theories—to maintain possession of the seized longarms.
>
> • Fourth, if the person deprived of longarms prevails at the hearing, the longarms must be returned, barring an order to the contrary from a court to whom that finding is appealed. If, by contrast, Nassau County prevails at the hearing, Nassau County must timely commence a proceeding by which it seeks to maintain possession of the longarms in question.

Recently in the case of *Panzella v. Sposato et al* _____ F.3d. _____ (2nd Cir., 2017) decided July 18, 2017, the Second Circuit adopted the analysis and law of *Razzano*. In that case the Plaintiff's long guns had been confiscated as a result of an order of protection in a pending divorce. After the order expired the Nassau County's Sheriff's office refused to return her long guns or provide a post deprivation hearing. After discussing the factors analyzed in *Razzano* the Court concluded:

> We therefore hold, consistent with the district court's decision in the instant case, and the decision in *Razzano*, that persons in Panzella's situation are entitled to a prompt post-deprivation hearing under the four conditions set forth by the district court in this case and in *Razzano*. *See Panzella*, 2015 WL 5607750, at *7; *Razzano*, 765 F.Supp.2d at 191.

In discussing the burden on the County in holding such hearings the Court stated:

> Nor has the County provided any evidence that the type of hearing proposed by Panzella—a prompt post-deprivation hearing consistent with the conditions set forth in *Razzano*, *id.* at 191,—would be overly burdensome. Indeed, as the district court noted, and as the County has not disputed, the **County's police department routinely holds this kind of hearing, given that it is required to do so by the order in *Razzano***, and given the County's more general role in granting pistol licenses. There is no clear reason why the police department could not readily perform the same service in cases such as the one at bar.[11]

The Court made the reasonable but mistaken assumption that the Nassau County Police Department routinely holds such hearing in compliance with the decision of the *Razzano* court. It does not do so because it is "not their policy" to do so. [D.I. 51, Pre-Motion Conf. Ltr, Combined 56.1 Statement paragraphs 10 and 11]

(b). OPS 10023.

Instead of implementing the "prompt post deprivation hearing" required by *Razzano*, and providing gun owners with a notice of the process to be used to have guns returned, the NCPD adopted OPS 10023. (Ex 1). While it is possible that under its framework it could be a substitute for due process, as applied it is not. It provides that the Domestic Incident Liaison Officer is to review all incidents involving confiscations of Rifles and Shotguns as soon as possible (Ex. 1 paragarph C. 1.) There is no deadline as to when the investigation is to be completed and a determination made as to the retention or return of the guns. There is no provision for a "hearing" prompt or otherwise.

Furthermore the gun owner is not aware of the procedures in OPS 10023 or even of their existence. All he knows is his guns have been taken with no order of protection, no criminal charges filed and does not know to whom to turn in the police department in an attempt to have his property returned.

In this matter the "domestic incident" and confiscation occurred on February 24, 2014, yet the Domestic Incident Liaison Officer, John Gisondi, charged with making this decision, did not begin his investigation until January 15, 2015, after this suit was filed. (Ex. 2, Deposition of John Gisondi, p. 11 line 6) when he mailed out the Long Gun Review Record (Ex.3). The investigation which was belatedly started on January 15 was completed by February 15. (Ex. 2, p. 28 line 13 to p. 29 line 18). He testified that there was no time frame for the investigation to begin. (Ex. 2, p. 50 line 5-9). The Plaintiff's long guns were returned to him in late February 2015.

In addition, Gisondi did not know what an "impartial decision maker" was nor what a "post deprivation hearing" was, (Ex. 2, p. 37 line 19 to p. 38 line 11, and p. 43 line 3-9) although the County in its Opposition to Plaintiff's Motion for Preliminary Injunction [D.I. 15, page 3] asserted that the Domestic Liaison Officer was the "impartial decision maker" providing the "prompt post deprivation hearing". The Domestic Incident Liaison Officer is in fact a box checker who insures that each box is checked off for all computer investigations and completed forms required by the department policy. If they are not completed the guns are not returned. Further, his superior advises him whether to return the long arms or continue to retain them.

OPS 10023 was adopted as a result of the *Razzano* decision, according to the attorney for Defendants, yet none of the officers deposed including the Chief of Department, Skrynicki, would admit to any knowledge of *Razzano* or indeed of the land mark gun rights cases of *Heller* and *McDonald*. (Ex. P. 8, lines 14-20, Deposition of Cappy; Ex. 2, p. 45 lines 22 -25, Deposition of Gisondi; Ex. 12, p. 12 lines 10-15 and p. 15, lines 6-15; Ex 5, p. 50 lines 7-11). It is difficult to see how any officer of the department could be an "impartial decision maker" if they don't know the rules to be applied in making their decisions.

The problem here is that when the guns are taken, the owner is given a receipt that states if the guns are not legally returned to the owner in one year, they will be destroyed. (Ex. 4, PDCN 41; Ex 5, p. 60 line 7-23, p. 63 line 6- 19, Deposition of Skrynecki, Chief of Department). But the owner is given no notice of any procedure to retrieve his

property except that he will hear from the department. (Ex. 5, p. 65, line 10-20). As time goes on and the year period runs, the owner gets more concerned that his property will be destroyed, especially in the Plaintiff's case where many of the guns were expensive, custom made match rifles with the total value being in excess of $100,000.00. His letters and telephone calls to the Pistol Licensing Division went unanswered and he was not even aware of the existence or duties of the Domestic Incident Liaison Officer. In Weinstein's case, since his communications were apparently ignored, he had no alternative but to file this suit, which finally got the attention of the County and the Police Department as his guns and pistol license were returned shortly thereafter.

Both *Razzano* and *Panzella* held that a proceeding under McKenney's New York CPLR, Article 78 does not does not meet the requirements of due process because of it's expense, length of time and because it requires the gun owner to bear the burden of proof. In regard to pistol it also fails for the same reasons and for the reason that New York Courts continue to treat the possession of a pistol as a privilege under the unconstitutional provisions of Penal Law Article 400.

3. Domestic Incident Gun Confiscation Policy as Applied.

It might be that Weinstein's case is an anomaly where his case just fell through the cracks, so the speak, until after suit got the attention of the County and Police Department. However, data, county wide regarding "domestic incident" gun confiscations over a two-year period, between the *Razzano* decision and the confiscation of Weinstein's guns indicate otherwise. Exhibit 6 contains information on such guns confiscations provided by the County pursuant to the Orders of Magistrate Tomlinson granting Plaintiff's Motion to Compel. [D.I. 15, pages 6-7] and [D.I. 48, page 2]. This court ordered discovery indicates that there were 124 guns confiscations (the number of seizures, not the number of guns taken) involving domestic incidents in Nassau County during this time period. In not one of these was there a "prompt post deprivation hearing". (Ex. 6, E-mail of Reissman), [D.I. 51, Pre-Motion Conf. Ltr, Combined 56.1 Statement paragraphs 10 and 11]. In only 16 cases were the guns returned and those after two to four years, with the exception of Weinstein's, which were returned in one year (following

the filing of this suit). All of the rest, at the time the disclosure was made were marked as "pending". The disclosures do not indicate why the guns had not been returned, although the County was ordered to include that information.

This in not surprising as Skrynecki, Chief of Department testified that there is no time limits as to when the investigation is to start (Ex. 5, p. 83, line 20-22) and there is no time limit as to when it is to be finished (Ex. 5, p. 84, line 15 – p. 85, line 12). He further testified that there is no provision for a "prompt post deprivation hearing". As set forth in the County's Counter Statement of Uncontested Facts no notice is given and no post deprivation hearing was held because it was not their "policy" to do so.

Then there is the question of what is meant by "prompt". As the above discovery shows, under OPS 10023 no hearings are held, prompt or otherwise. When guns are returned, in the few instances where that happened, it was two to four years after the domestic incident confiscation. *Butler v. Castro*, 896 F.2d. 698 (2nd Cir. 1990) required that "within *ten days* of a timely demand, [the party in possession of the property] either return the item or items or instigate proceedings to justify their retention. Footnote 9 in *Panzella* touched on the concern of delay:

> But a lengthy deprivation can be enough to violate the Fourteenth Amendment right to due process. *Cf. Fusari v. Steinberg*, 419 U.S. 379, 389, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975) ("[T]he possible length of wrongful deprivation ... is an important factor in assessing the impact of official action on the private interests. ... the rapidity of ... review is a significant factor in assessing the sufficiency of the entire process."); *Cty. of Nassau v. Canavan*, 1 N.Y.3d 134, 770 N.Y.S.2d 277, 802 N.E.2d 616, 623–24 (2003) (recognizing the potential length of the deprivation in evaluating whether a procedure is adequate).

But of course in order to make the "timely demand" the person's whose property has been taken must be given notice of the procedure to be followed. *Fuentes v. Shevin* 407 U.S. 67 (1972). Here, no such notice is provided.

4. Delays Occasioned by Rules of Pistol License Section

Part of the reasons for delay is because of the relationship of pistol vs. long guns

in the New York statutory scheme and the unconstitutional nature of Penal Law Art. 400. As Chief Skrynecki testified, handguns are treated differently. (Ex. 5, p. 70, line 3-25). Where pistols are involved the pistol license investigator does his investigation first and then the Pistol License Division forwards its recommendations to the Domestic Incident Liaison Officer who then completes his investigation. (Ex. 5, p.79, line 14 – p. 80, line 18). The language in OPS 10023 that says the Domestic Incident Liaison Officer is to start his investigation as soon as possible means as soon as he hears from the Pistol Licensing Section. (Ex. 5, p. 81 line 4-9).

These delays are exacerbated by the rules of the Pistol Licensing Division. In a situation involving a "domestic incident" as defined by the department, the pistol license is suspended for six month before any reinstatement investigation begins. (Ex. 8, Deposition of Cappy, Pistol License Section, p.21 line 19-23). This is done pursuant to the rules promulgated by the Pistol License Section (Ex. 8, p.23, line 2-8) under the authority of the Commissioner of Police (Ex. 8, p. 9, line 1 – p. 11, line 14).

Although it took almost a year to have Plaintiff's pistol license restored, Officer Cappy, the investigator for the Pistol Licensing Section testified that the total time he spent on the Weinstein case was about two hours, including writing up his summary and recommendations. (Ex. 8, p. 42, line 6-10). No explanation is given why it takes a year to do a two-hour investigation.

Within days of the occurrence the police and pistol licensing section had the necessary facts in the Domestic Incident Report and police department case summaries. These documents were provided by the Defendant County in Response to Plaintiff's Request for Production of Documents. (Ex.9, Domestic Incident Report dated 2-24-14; Ex. 10, Case Summary). Once Cappy's recomendations were made, that the pistol license be returned, it was transmitted to his supervisor who forwarded the paper work to the Commander of the Pistol License Section, who transmits it to the Chief of Department and the Commissioner of Police who all must sign off on the recommendations. There is no time limit on this investigation or procedure and it is reported to take over two years or more.

Since the Police had all the facts within a few days including statements of all the parties involved and since the computer background searches took only a few minutes, there was no reason a prompt post deprivation hearing could not have been conducted within 30 days of confiscation regarding both long guns and pistols and pistol license thus minimizing the deprivation of the Plaintiff's constitutional rights.

C. Penal Law Article 400 Unconstitutional

1. Possession of a Handgun is Incorrectly Treated as a Privilege

Both McKinney's Penal Law Article 400 and the rules and regulations of the Nassau County Police Department, Pistol License Section are premised on the proposition that a pistol license is a privilege and not a right and treats it as such. As set out in the Comments PL Section 400, Subdivision 1, Eligibility:

> To begin, the "issuance of a pistol license is not a right, but a privilege subject to reasonable regulation. The [licensing officer] has broad discretion to decide whether to issue a license. Judicial review of a discretionary administrative determination is limited to deciding whether the agency's actions were arbitrary and capricious. The agency's determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result." *Matter of Kaplan v. Bratton*, 249 A.D.2d 199, 201, 673 N.Y.S.2d 66 (1st Dept., 1998).

Nassau County Police Department OPS 10023 (Ex. 1) on page two states:

> A pistol license is a privilege. Any pistol holder who refuses to surrender his pistol license and/or firearm(s) upon lawful request must be reported to the licensing agency.

The Nassau County Police Department Pistol License Department Handbook (Ex. 11) at page 17 states a licensee must report:

> -any domestic dispute/disturbance involving a licensee and also involving police presence

and that the same is grounds for revocation or suspension which results in confiscation.

At page 23 the Handbook states:

> . . . upon notification . . . of the existence of a volatile domestic situation, the Nassau County Police Department will require the surrender of the pistol license and firearm(s) as well as rifles and shotguns of any involved licensee pending an investigation into the facts and circumstances of the domestic incident and ongoing domestic relations of the licensee and other involved party(ies).

These policies and rules are authorized by the language of McKinney's Penal Law Article 400 that gives the licensing officer almost unlimited discretion in granting, denying, suspending or revoking pistol licenses. The relevant portions are as follows:

> 1. Eligibility. No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No license shall be issued or renewed except for an applicant:
>
> (b) of good moral character;
> (k) who has not had a license revoked;
> (n) concerning whom no good cause exists for the denial of the license.
>
> 2. Types of licenses. . . . A license for a pistol or revolver, . . . shall be issued to (a) have and possess in his dwelling by a householder; (b) have and possess in his place of business by a merchant or storekeeper.
>
> 11. License: revocation and suspension. (a) . . . a license may be revoked and cancelled at any time . . . by the licensing officer . . .

The Courts of New York continue to treat the possession of a pistol as a privilege. The most recent pronunciation by a New York Appellate Court is *DeAngelo v. Burns* 124 A.D.3d 1156, (3rd Dept., 2015). In that case a pistol licensee was involved with a dispute with his neighbors during which he displayed his loaded handgun. He was charged with "brandishing" tried and acquitted. The jury believed the "brandishing" was done in self-defense. Even though he had committed no crime and had used his handgun for a constitutionally protected purpose, self-defense, his pistol license was revoked. The licensing officer did not believe he had the maturity, good character, temperament or

judgment to have a pistol permit. In upholding the licensing officer's decision the court held 1156:

> There is no question that "[r]espondent is vested with broad discretion in determining whether to revoke a pistol permit and may do so for any good cause, including a finding that the petitioner lack[s] the essential temperament or character which should be present in one entrusted with a dangerous instrument ..., or that he or she does not possess the maturity, prudence, carefulness, good character, temperament, demeanor and judgment necessary to have a pistol permit". . . .
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> Upon review, "respondent's resolution of factual issues and credibility assessments are accorded deference, and the determination will not be disturbed absent an abuse of discretion or a showing that [such determination] was made in an arbitrary and capricious manner".

Licenses have been revoked for leaving a handgun in the locked trunk of the licensee's car, *D'Onofrio v. Kelly*, 22 A.D.3d 343, 802 N.Y.S.2d 159 (1st Dep't 2005); an allegation (no conviction) that the licensee had hit someone with a hockey stick, *Seamon v. Coccoma*, 281 A.D.2d 824, 721 N.Y.S.2d 884 (3d Dep't 2001); the licensee had a business association with another alleged to be a member of organize crime, *Saleeby v. Safir*, 289 A.D.2d 60, 734 N.Y.S.2d 139 (1st Dep't 2001); licensee failed to notify licensing officer that he had been arrested, although charges were dropped, *Cuda v. Dwyer*, 967 N.Y.S.2d 302 (App. Div. 4th Dep't 2013); licensee got into a fight (not involving guns), *Nichols v. Richards*, 78 A.D.3d 1453, 913 N.Y.S.2d 352 (3d Dep't 2010); for getting drunk, *Biggerstaff v. Drago*, 65 A.D.3d 728, 883 N.Y.S.2d 657 (3d Dep't 2009); failed to "voucher" his second handgun because he never used it and had forgotten about it, *Broadus v. City of New York Police Dept.* (License Division), 62 A.D.3d 527, 878 N.Y.S.2d 738 (1st Dep't 2009); where licensee took his pistol on a trip to Nevada, when he legally possess same and traveled in compliance with federal law, *Beach v. Kelly*, 52 A.D.3d 436, 860 N.Y.S.2d 112 (1st Dep't 2008).

In each of these cases, the entire license was revoked, denying the licensee's enumerated, individual, fundamental right to possess a handgun in his home. In none of these cases was the license holder convicted of any criminal act. What he did do is fail to live up to the licensing officer's subjective *ad hoc* standards for a model citizen.

2. Possession of a Handgun is a Right

The Second Amendment to the United States Constitution, which applies to the States and subdivisions thereof through the Fourteenth Amendment, provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." This was recognized to be an individual right in the case of *District of Columbia v. Heller* 554 U.S. 570, 128 S. Ct. 2783 (2008). The Court in discussing "keep arms" stated at 2792:

> No party has apprised us of an idiomatic meaning of "keep Arms." Thus, the most natural reading of "keep Arms" in the Second Amendment is to "have weapons."

In recognizing that it is an individual right the Court stated at 2797 [8]:

> . . . we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed."

And again at 2799 [10]:

> There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.

In striking down the District of Columbia's ban on handguns and in fact any operable weapon within the home the Court stated at 2817 [17]:

> The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights,[FN27] banning from the home ****2818** "the most preferred firearm in the nation to 'keep' and use for ***629** protection of one's home and family," 478 F.3d, at 400, would fail constitutional muster.

In discussing the scope of the right and level of scrutiny the Court stated at 2821 [18]:

> The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.
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> And:
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> The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. The Second Amendment is no different. . . .And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

In *McDonald v. City of Chicago* 561 U.S. 742, 130 S. Ct. 3020 (2010) the Court found that the right to keep and bear arms is fundamental and incorporated that right under the due process clause of the 14th Amendment, stating at 791:

> **In *Heller,* we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.** Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a

> right that is fundamental from an American perspective applies equally to the Federal Government and the States. See *Duncan,* 391 U.S., at 149, and n. 14, 88 S.Ct. 1444. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.

3. Deprivation of the Right to Possess and Due Process

It is therefore clear that there is an individual, enumerated, fundamental right to possess a handgun. Since the State of New York makes it a felony to possess a pistol without a license, it follows that one has a constitutional right to the license. Thus, whenever a pistol license is denied, limited, suspended, revoked or delayed, that is a deprivation of a fundamental constitutional right. Due process therefore requires that the individual who has been deprived of that right have a "prompt post deprivation hearing" as set forth in *Razzano* and *Panzella*, supra. No such hearing is provided for in the case of a pistol license suspension, revocation or denial.

The only provision for redress is found on page 12 of the Pistol License Handbook (Ex. 11):

> Appeal Of Denial
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> In the event that an applicant is notified by the NCPD Pistol License Section that his or her license application is denied, the applicant shall have the ability to appeal this determination. The Pistol License Section's letter of denial to the applicant shall be accompanied by instructions regarding the appeal process. The applicant must follow these instructions in order to exercise his or her appeal.

This does not meet the requirements of due process as it is not "prompt" and is only effective upon the receipt of a letter of denial. In addition it does not place the burden on the government to up hold the denial, revocation or suspension. In many cases no such letters are sent, the license is simply taken, leaving the licensee in limbo for months if not years while the so called "investigation" takes place. Although not stated,

the appeal process usually consist of a conference with the Commander or Supervisor in the very Pistol License Section that denied the application in the first place, and is therefore not an "impartial decision maker" as required in *Razzano*. In addition, the "appeal" is not based on the proposition that a pistol license is a right. The decision maker must be impartial and trained in the law regarding the constitutional rights of gun owner. Discovery has shown that police officers in Nassau County, including the Chief of Department, Domestic Incident Liaison Officer and the Pistol Licensing Section Investigator who makes the initial recommendations for actions on the license, have no training and no knowledge of the constitutional law with regard to the rights of gun owners. Such knowledge is essential for a correct decision by the "neutral decision maker" at a "prompt post deprivation hearing." The decision must be made on the basis that the licensee has been deprived of a fundamental right, not that he fails to live up to the subjective standards of the licensing officer.

What the New York statutory scheme does is criminalizes the exercise of a fundamental constitutional right. It then requires a pistol license to legally exercise that right while at the same time giving the pistol licensing officer the power to grant or deny the exercise of that right on an *ad hoc* basis through the use of vague and undefined terms.

The suspension of a pistol license is a deprivation of the core of the Second Amendment right to possess a handgun in the home for the purpose of self defense "where the right is at its zenith". (*District of Columbia v. Heller, supra, Kachalsky et al v. County of Westchester, et al, 701 F.3d. 81 (2nd Cir, 2012)*. Without the license plaintiff

could not legally possess a pistol, nor legally purchase replacements for the ones taken by the police.

In *Heller* the Court stated at page 2821 [18] "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." However, this is exactly what Penal Law Articles 265 and 400 do. Penal Law 265 makes it illegal to possess a pistol without a license and then Article 400 allows to Licensing Officer to "decide on a case-by-case basis" whether a person can exercise that right, based on his own subjective standards. See *DeAngelo v. Burns* 124 A.D.3d 1156, (3rd Dept., 2015).

In comparing the Second Amendment to the First Amendment *Heller* states:

> "The Second Amendment is no different. . . .And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home".

A statute that provides for the investigation of an individual to see if he meets objective qualifications, that there are no felony convictions, under no order of protection and has not been adjudicated insane, all long- standing exceptions on the right to keep and bear arms, would meet constitutional standards.

The unlimited discretion of the licensing officer to grant, deny, limit, suspend or revoke a pistol license "at any time" and for "any good reason" that he can articulate renders the entire statute unconstitutional. To paraphrase Justice Scalia in *Heller*, "A constitutional guarantee subject to [the whim of a licensing officer] is no constitutional guarantee at all".

No other constitutional right is limited only to those persons "of good moral character," with a government official unilaterally determining and defining that term on an *ad hoc* basis. No other constitutional right is denied for any "good cause," with a government official determining on an *ad hoc* basis what that "good cause" might be. No

other constitutional right has been held only to apply to model citizens. No other constitutional rights are denied because a government official subjectively finds that a person lacks "maturity, prudence, carefulness, good character, temperament, demeanor or judgment". No other individual fundamental constitutional right can be summarily "revoked at any time" by a government official without notice, without the opportunity to be heard and without due process. In regard to no other constitutional right is a government official given "broad discretion" and his decision given "deference" in denying a person's fundamental constitutional rights.

All of this is because the State of New York, Nassau County and the Statutes, rules and regulations refuse to treat possession of a pistol as a right but as a privilege to be bestowed or denied at the pleasure of the government. Absence a felony conviction, adjudication of insanity or an order of protection, a person is entitled to a pistol license and possession of a handgun. Since Penal Law Article 400 violates these basic precepts with regard to individual, fundamental constitutional rights they are at odds with the holdings of the United States Supreme Court in *Heller* and *McDonald*, *supra*, the statute are of necessity unconstitutional.

IV
CONCLUSION

Nassau County has been directed to provide prompt post deprivation hearings on cases involving domestic incident gun confiscations but has failed and refuses to do so. Defendants' OPS 10023, as actually applied, fails to provide due process as required, in violation of plaintiff's 5th and 14th Amendment Rights. It does not provide for notice to the property owner nor does it provide for a hearing and the domestic incident liaison officer is not an impartial decision maker. Nor does it require to County to bear the burden of proof as to why the confiscated guns should be retained.

Penal Law Article 400 is unconstitutional as it is based on the incorrect proposition that possession of a handgun is a privilege and not a right. Possession of a

handgun is a right as clearly set forth in *Heller*. Article confers on a state official the power to deny, limit or delay this right in an *ad hoc* manner, on a case-by-case basis, to any person, for any reason he can articulate, based on his own subjective criteria and opinions that are given deference and generally not disturbed by the Courts. "A constitutional guarantee subject to [the whim of a licensing officer] is no constitutional guarantee at all".

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/S/

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