

Law Offices of Donald Kilmer

A Professional Corporation

1645 Willow Street, Suite 150
San Jose, California 95125-5120
Don@DKLawOffice.com
Phone: 408/264-8489
Fax: 408/264-8487

May 30, 2017

Judge Edward J. Davila
United States District Court
280 S. First Street
Courtroom 4 - 5th Floor
San Jose, California 95113

Re: *Rodriguez, et al., v. City of San Jose, et al.*
Case No.: 5:15-CV-03698
Status: Case Submitted After Cross-Motions for Summary
Judgment Argued on November 10, 2017
Action: Letter Brief on Supplemental Authority

Your Honor:

Pursuant to this Court's Order of May 16, 2017 (Doc. 47), Plaintiffs hereby submit this letter brief re: *Nelson v. Colorado*, 581 U.S. ___, (April 19, 2017). All five of plaintiffs' claims in the operative complaint are strengthened by the Supreme Court's holding in *Nelson*.

Even if it is conceded (and it is not) that the Defendants' initial seizure of all the firearms (both community and separate property) was lawful, the un-controverted facts are that Lori has procured a new combination to the gun safe and provided uncontradicted assurances that she would not allow her husband access to the firearms. Furthermore, Lori has complied with all of California's laws regarding the transfer, ownership, possession and safe-storage of firearms in this jurisdiction.

The Defendants have admitted, in the state court proceedings and during the motion for summary judgment, that Lori Rodriguez is not prohibited from acquiring new and different firearms. This invites the question: What are the Defendants' justifications for wrongfully keeping the firearms Lori already owns, after both the State Appellate Court and the California Department of Justice have cleared her to recover these firearms in a simple administrative process?

Similar to the facts in *Nelson*, there were state court proceedings in this case that "evolved" as time passed. In *Nelson*, the defendants were cleared of their convictions and then they sought to have the restitution orders that arose from those convictions set aside and the monies they paid refunded.

In this case, the Court of Appeal of the State of California, Sixth Appellate District (Case No.: H040317) made a finding that the administrative “procedure provided by section 33850 *et seq.* for return of firearms in the possession of law enforcement remains available to Lori.” [Doc 1, ¶ 34] This necessarily means is that the Findings and Order made by Judge Kirwan in the trial court under Welfare and Institutions Code § 8102 were modified by that subsequent appellate court findings. This mirrors what happened when the Colorado Court of Appeals modified the judgments of conviction that included restitution orders in the *Nelson* fact pattern.

Furthermore, the *Nelson* Court directed all courts to use the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) to determine whether a forfeiture procedure is offensive to fundamental principles of justice. The *Mathews* test evaluates: (A) the private interest effected; (B) the risk of erroneous deprivation of that interest through the procedures used; (C) the governmental interest at stake. In this case:

- A. Lori has a personal, individual, fundamental, right to keep and bear the arms that she already owns. Furthermore she has a private property interest and a financial stake in the guns as valuable personal property. She also has a statutory right under California Penal Code § 33850 *et seq.*, to recover property that the State’s Firearm Bureau has cleared for release to her.
- B. The risk of erroneous deprivation of these interests is emphasized by the Defendants’ admission that Lori can acquire other firearms, even while they continue to deprive her of the ones she already owns. This is not only an erroneous deprivation of her interests, it is an irrational deprivation of her interests.
- C. The government interest at stake? None. Unless the City is making the argument that it wants to enforce a trial court judgment that was necessarily modified by the appellate court. But this is the exact same argument made by the dissenting opinion in *Nelson*; and it is as ineffective in this case as it was in *Nelson*. The government can never have an interest in depriving someone of constitutionally significant property when that person has complied with all the duties the law imposes on them to recover that property.

Taking the claims as plead in the operative complaint:

1. The First Claim under the Second Amendment is based on Lori’s right to keep and bear arms (that already belong to her) for self-defense in her home. The un-controverted facts are that one of the handguns was Lori’s personal firearm and that she was familiar with its operation.

2. The Second Claim under the Fourth Amendment is both a claim of warrantless seizure and a wrongful (i.e., continuing trespass) retention amounting to a seizure of Lori Rodriguez's personal property. There has been no probable cause finding that she is a prohibited person. There has been no finding that her firearms are evidence of a crime, or that they are (in and of themselves) a public nuisance. As noted above, the Defendants have admitted that Lori Rodriguez is not prohibited from acquiring new and different firearms.
3. The Third Claim under the Fifth Amendment (takings) is that Lori is being deprived of valuable property, without compensation, by the Defendants' conduct. Furthermore, were Lori to acquire new and different firearms to replace the ones she already owns, she would be required to own duplicate firearms based on the City's recalcitrant conduct after the Court of Appeals and the California Department of Justice, Bureau of Firearms, has cleared her to recover her own firearms in a simple administrative process.
4. The Fourth Claim under the Fourteenth Amendment's procedural due process clause is the one most directly bolstered by the Supreme Court's holding in *Nelson*. The Sixth District's opinion was crystal clear that the administrative "procedure provided by section 33850 et seq. **for return of firearms in the possession of law enforcement remains available to Lori.**" [emphasis added] That meant that all Lori had to do to recover her constitutionally significant property was to comply with the administrative procedures in the relevant California Penal Code. It is undisputed that she did comply with those procedures. No other procedures are required. The Law Enforcement Gun Release from the Bureau of Firearms directed the Defendants to release the firearms to Lori's custody. By stubbornly refusing to comply with state law, the Defendants have undermined the only due process that the law requires.
5. The Fifth Claim under California Penal Code § 33800 *et seq.*, is the statutory counterpart of Plaintiffs' procedural due process claim.

The petite irony of this case, in light of the Supreme Court's holding in *Nelson*, is that while Lori Rodriguez has all the same constitutional due process arguments made by the Petitioners in that case, she has actually gone above and beyond the mundane and ministerial procedures that even the dissent in *Nelson* wanted to see exhausted.

The Supreme Court's opinion in *Nelson v. Colorado*, 581 U.S. ___, (April 19, 2017) strengthens an already strong case.

This Court should enter judgment for the Plaintiffs on any one of the five claims plead in the operative complaint and order the Defendants to return Lori's property to her and to refrain from unconstitutional practices in their future dealings with the public in matters that are similar to this case.

Respectfully Submitted,

/s/ Donald Kilmer

Donald Kilmer
Attorney for Lori Rodriguez

CERTIFICATE OF SERVICE

On this, May 30, 2017, I served the foregoing LETTER BRIEF by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on May 30, 2017.

/s/ Donald Kilmer
Attorney of Record for Plaintiffs