



Office of the City Attorney

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

Re: RODRIGUEZ v. CITY OF SAN JOSE
Court Case Number: 5:15-CV-03698-EJD

Dear Judge Davila:

In accordance with the Court's Order of August 1, 2017 (Doc. 52), Defendant City of San Jose submits this letter brief regarding the applicability to the subject case of the Second Circuit's decision in *Panzella v. Sposato*, 863 F.3d 210 (2nd Cir., July 17, 2017.)

In *Panzella*, Plaintiff's firearms were confiscated in connection with a domestic harassment situation. Plaintiff's ex-husband had filed, in Family Court, a petition for protection that resulted in the court issuing a Temporary Order, ex parte and without a hearing, requiring Plaintiff to refrain from harassing him. The Order did not include any requirement that Plaintiff surrender her firearms.

Five days later, sheriffs served the Temporary Order on Plaintiff, and upon learning that she possessed firearms, confiscated her firearms. Months later, after a hearing, the court dismissed the entire family court proceeding. When Plaintiff sought the return of her firearms, the County refused, arguing that Plaintiff must seek a court order, authorizing their return, in a separate action initiated by Plaintiff.

In Plaintiff's ensuing lawsuit, the District Court held that Plaintiff was entitled to a prompt, post-deprivation hearing at which the County bears the burden of showing that it is likely to succeed on a cause of action to maintain possession of the firearms.

On appeal, the Second Circuit agreed that Plaintiff's due process rights were violated since Plaintiff had a property right in the firearms, and the process suggested by the County failed to provide adequate protection given the various interests involved. In particular, the process suggested by the County required Plaintiff to file a new proceeding where Plaintiff would have the burden of proof. The Court noted that the

Re: Rodriguez v. City of San Jose
August 14, 2017
Page 2

“prompt, post-deprivation hearing” required by the District Court would provide a timely and inexpensive forum to challenge the County’s retention, thus affirming the injunction issued by the lower court.

In the current context – determining whether to return firearms to a person who has been taken into custody pursuant to Welfare and Institutions Code Section 5150 – the applicable statutory procedure under Section 8102 of that Code does provide due process to the person seeking return of the property. In this context, the statute requires the government to bear the burden of establishing that it would be dangerous to return the firearm confiscated. *City of San Diego v. Boggess*, 216 Cal.App.4th 1494 (2013); *Rupf v. Yan*, 85 Cal.App.4th 411 (2000); *People v. Keil*, 161 Cal.App.4th 34 (2008). As briefed previously, it has already been determined that Section 8102 satisfies the requirements of due process, since the statutory process requires the confiscating agency to initiate the proceedings and to bear the burden of proof on the danger issue. See *Boggess*, *Rupf*, *Keil*, *supra*. Therefore, *Panzella*, *supra*, actually provides support for the City’s position that Plaintiff was afforded ample due process in the state proceedings initiated by the City.

The differences between the instant case and *Panzella* are stark and illuminating. In *Panzella*, the government confiscated weapons *without any authority* and refused to return them, even though the domestic petition did not even specify the surrender of firearms, and even though there was no adequate mechanism for seeking their return. In the current case, the Welfare and Institutions Code authorizes the confiscation of firearms in this specific context, and provides an easy, inexpensive process, initiated by the City and in which the City bears the burden of establishing a reason for not returning the firearms. Additionally, the process in this case involves an evaluation of the danger of returning weapons when the person from whom they were confiscated (or in this case, the spouse of such person) has already experienced a mental situation requiring the police to take custody of the person for a psychological evaluation.

Defendant City expects that Plaintiff will point to the portion of the *Panzella* decision that emphasizes that Ms. Panzella was not otherwise prohibited from purchasing weapons. That section of the opinion evaluated the various *Matthews* factors, and concluded that the government’s interest in safety was minimal since Ms. Panzella could still purchase weapons.

But the *Matthews* factors are simply a method to determine whether a particular hearing process satisfies due process. The governmental interest involved is one factor in determining whether the process afforded is fair, given the nature of the property interest and the risk of erroneous deprivation. Those factors were already considered in determining that the post deprivation hearing (under the Section 8102 process) is adequate. After all, the state court proceeding is **all about** determining whether it would be dangerous to return the subject weapons. That is the job of the state court judge when presented with a 8102 petition, and that process is exactly what is due to a person

Re: Rodriguez v. City of San Jose
August 14, 2017
Page 3

whose weapons were confiscated in a situation involving the mental condition of a person who seeks return. In this case, the hearing was specifically contoured to the precise circumstances, where Plaintiff herself was not the person taken into custody, but instead is married to and lives with such person. The state court considered all these facts and determined that *it would be dangerous* to return the confiscated weapons.

Plaintiff **received due process** in this case, and nothing in the *Panzella* opinion even suggests that the procedure employed under Section 8102 fails to provide adequate process. Plaintiff seems to argue that since it was her husband, and not her, who had a mental condition, and since no one argues that Plaintiff herself is incapable of safely handling weapons, the firearms should have been returned. But Plaintiff made that argument to the court which is tasked with making a return determination. And the court instead felt that return of the weapons would be dangerous. On appeal, the reviewing court found that there was sufficient evidence to support this determination. While Plaintiff may disagree with such determination, she was still afforded due process and simply cannot sustain a Fourteenth Amendment claim in this case.

Very truly yours,

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cc: Donald E. J. Kilmer, Jr.