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August 15, 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 August 1, 2017 (Doc. 52), Plaintiffs hereby submit this letter brief re: *Panzella v. Sposato, et al.*, United States Court of Appeals for the Second Circuit, Case No.: 15–2825-cv. Decided July 17, 2017.

Plaintiffs' claims regarding the Defendants' initial seizure of the Rodriguez firearms (both community and separate property) may have to be resolved by a trier of fact. A determination still has to be made as to whether Officer Valentine's misstatement of the law was the cause-in-fact of vitiating Lori Rodriguez's "consent." This is a live controversy even if Valentine thought his statement was true because he was enforcing a policy of the City of San Jose.

But the controversy over the return of those firearms, at this time, can and should be resolved as a matter of law. The operative facts are similar to the *Panzella* case. It might even be argued that Lori has a better case than Christine Panzella, because Lori never was – even temporarily – prohibited from possessing firearms.

The essential facts of *Panzella*: Firearms belonging to Panzella were confiscated and held by law enforcement. Panzella, who was not prohibited from possessing firearms when she sought their recovery, wanted them back. The Nassau County Sheriff's Office refused to return them. Panzella sued and prevailed.

The *Panzella* Court even employed the test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), which was recently employed by the Supreme Court in *Nelson v. Colorado*, 581 U.S. ___, (April 19, 2017). [See Plaintiffs' Letter Brief (Doc. 49)]

It may be anticipated that the Defendants will be heard to cry: “There already was a state court hearing!”

But this gambit requires ignoring the findings by the California Court of Appeal (Case No.: H040317), which held 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]

Apparently it was not enough for that Court that Lori had already offered to administratively transfer title of all the firearms to her name after the Court said she could have them back, but before actual receipt. For some unknown reason the Court of Appeal insisted that Lori jump through the administrative hoops first. She has done that. The City subsequently rejected the releases from the California Department of Justice that were tendered by Lori. The City still refuses to release her firearms to her. That makes this an entirely new case.

The Defendants herein have even admitted, in the state court proceedings and during the motion for summary judgment in this Court, that Lori Rodriguez is not prohibited from acquiring new and different firearms. This uncanny set of facts also arose in *Panzella*: “*The County cannot, therefore, rely on any safety interest, given that Panzella can buy another longarm, or any other legal firearm for that matter.*” [See opinion attached to Doc. 50, Page 13, lines 14-16. (Page 15 of 17 of the filed document.)]

The un-controverted facts are that Lori had already procured a new combination to the gun safe and provided uncontradicted assurances that she would not allow her husband access to the firearms in that safe. Thus, Lori has complied with all of California’s laws regarding the transfer, ownership, possession and safe-storage of firearms in this jurisdiction. Federal law is in accord. Several ATF advisory opinions state that spouses and children who live with prohibited persons can comply with federal law by denying access to firearms through the simple expedient of locking them in enclosures to which the prohibited person has no access.^{1 2 3}

¹ Acting Assistant Director (Criminal Enforcement, CC-32, 505, FE:LLN (Mar. 30, 1983), in response to Freedom of Information Act Request, CM:D:EAO, 920582 (Oct. 30, 1992).

² Phillip C. McGuire, Associate Director (Law Enforcement), CC-35, 867, FE:JBP (Mar. 4, 1987), in response to Freedom of Information Act Request, CM:D:EAO, 920582 (Oct. 30, 1992).

³ Richard Cook, Chief, Firearms Division, CC-39, 140, FE:FAB (Oct. 23, 1990), in response to Freedom of Information Act Request, CM:D:EAO, 920582 (Oct. 30, 1992).

Lori Rodriguez 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.

Furthermore, the Defendants' admission that Lori can acquire other firearms, even while they continue to deprive her of the ones she already owns, is an irrational violation of her Constitutional rights.

The Supreme Court's holding in *Nelson* [See Plaintiffs' letter brief: Doc. 49] and the Second Circuit's persuasive opinion in *Panzella* [See attachment to Doc 50], should persuade this Court to enter summary judgment, or partial summary judgment, for the Plaintiffs and order the Defendants to return Lori's property to her, forthwith.

Respectfully Submitted,

/s/ Donald Kilmer

Donald Kilmer
Attorney for Lori Rodriguez

CERTIFICATE OF SERVICE

On this, August 15, 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 August 15, 2017.

/s/ Donald Kilmer
Attorney of Record for Plaintiffs