UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

EDWARD A. CANIGLIA, Plaintiff	:	
v.	:	C.A. No. 15-525
ROBERT F. STROM as the Finance Director of THE CITY OF CRANSTON, et al. Defendants	:	

PLAINTIFF'S OBJECTION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment depends on both issues of disputed fact and misunderstandings of the applicable law.

ISSUES OF DISPUTED FACT[1]

Plaintiff incorporates by reference the summary of the facts set forth in his motion for summary judgment as well as his Statement of Undisputed Facts filed in support of that motion and the Statement of Additional Undisputed Facts filed in opposition to Defendants' motion for summary judgment. Plaintiff will refer to those specific facts here and throughout this Objection as SUF ___. Plaintiff has also served his responses to Defendants' Statement of Undisputed Facts and he disputes in whole or part the following of Defendants' facts: nos. 3, 4, 8, 10, 12, 18, 21, 24, 27, 28, 34, 35, 36, 37, 38, 40, and 42.

[1] The parties have filed cross motions for summary judgment supported by statements of undisputed fact. They have agreed that for purposes of responding to each other's motions, and to reduce confusion, they may use the statements of fact they filed in support of their motions in opposition to the other side's motion. Moreover, to the extent the parties designate additional facts in opposition to the other sides motion, they will number those additional facts beginning with the last fact set forth in their own statement of facts. Accordingly, there will be one set of facts by Plaintiff and one set of facts by Defendants.

ADDITIONAL UNDISPUTED FACTS AND SUMMARY OF FACTS

Defendants have General Orders ("GO") that constitute the Cranston Police Department's ("CPD") "complete manual" of policies and procedures. (SUF 13). The manual is based on the "best practices" established by a national law enforcement accreditation organization. (SUF 12). It is the CPD's "bible." (SUF 14).

No specific GO authorizes the Defendants to seize firearms or to require a person to have a psychological evaluation in these circumstances. (SUF 10). There are GOs that generally address this situation. (SUF 17, 25). Defendants did not follow those GOs. (SUF 18). Defendants also had training on dealing with people with possible mental health issues. (SUF 34-38, 52, 79). They did not follow that training. (SUF 134). That training included warning signs of potential suicide. (SUF 79). They did not apply those signs. (SUF 79). The State of Rhode Island has a protocol setting forth signs of potential suicide. (SUF 102). Defendants did not apply that protocol. (SUF 103).

Instead, Defendants based their decisions to seize Plaintiff, to require him to have a psychological evaluation, and to seize his firearms on their individual, idiosyncratic "experiences" and "intuition." (SUF 30, 32, 33, 43, 99). Defendants admit that Plaintiff seemed "calm," "normal," and not suicidal when they spoke with him on August 21, 2015. (SUF 70-72, 81). They made their decision because of Mr. Caniglia's dramatic gesture during an argument with his wife the prior evening when he placed his unloaded handgun on the table and said "shoot me now." (SUF 58-59, 75, 96, 106). Mr. Caniglia never threatened to shoot himself. (SUF 78, 109, 119). His wife said she did not feel she was in personal danger. (SUF 65, 118). When she called the CPD it was because she just wanted an CPD officer to accompany her to the house to check on her husband. (SUF 142). Moreover, it is undisputed, based on the unopposed

report of Plaintiff's expert, Dr. Lanny Berman, that Plaintiff was not suicidal and there was no actual medical basis to seize Plaintiff, to require him to have a psychological evaluation, and to seize his firearms, all without a court order. (SUF 134). Rather, Defendants failed to apply their training and procedures, (SUF 134), not to mention controlling law.

Sgt. Brendan Barth was the senior CPD officer on scene at the Caniglia home on August 21, 2015. (SUF 68). He has attended training on dealing with people with mental health issues. (SUF 163). He does not remember any of that training. (Id.). Sgt. Barth made the decision to send Mr. Caniglia for a psychological evaluation at Kent Hospital. (SUF 68, 158-59, 161-62). He decided that Mr. Caniglia was imminently dangerous to himself or others. (SUF 162). Sgt. Barth understands "imminent" to mean "immediately." (SUF 162). Sgt. Barth said Mr. Caniglia was transported for an "involuntary emergency psychiatric evaluation." (SUF 161).

Sgt. Barth did not consult any specific psychological or psychiatric criteria before deciding to send Mr. Caniglia for a psychological evaluation, nor did he consult with any medical professionals. (SUF 158). He does not know whether the CPD has any written policies or procedures on determining when to seek a psychological evaluation. (SUF 155). Sgt. Barth "probably" based his decision on his "experience up to that point." (SUF 156). Of the numerous suicide risk factors in his training, the only ones that Sgt. Barth considered were that Mr. Caniglia had a gun and he had supposedly said "he wanted harm done to himself." (SUF 164).

Sgt. Barth bases his authority to send a person for a psychological evaluation on the "community care doctrine." (SUF 160). He heard about the "community care doctrine" when he prepared for his deposition in this case. (SUF 148). Sgt. Barth read about the "community care doctrine" on Wikipedia in preparation for his deposition. (SUF 149). He does not know whether he heard about the "community care doctrine" before 2015. (SUF 150). He has not received any

training or written materials on the "community care doctrine." (SUF 151-53). Sgt. Barth is not aware of any Rhode Island decision that authorizes the seizure of a person for a psychological evaluation without a court order. (SUF 164). He has required people to go for mental evaluations "[m]ore times than he can count." (SUF 157).

Capt. Henry made the decision to seize Mr. Caniglia's firearms based on the recommendation of the officers at the scene. (SUF 87). He does not remember any basis for the recommendation other than what is set forth in the in the Incident Report. (Id.). Capt. Henry understands that nothing Mr. Caniglia said to the CPD officers indicated he was suicidal. (SUF 96). Officer Mastrati said the only risk factor for suicide present on August 21, 2015 was Mr. Caniglia's action the prior night in bringing out the (unloaded) handgun and saying "just shoot me now" to Kim Caniglia. (SUF 75-79).

Defendants did not seek or obtain a court order to seize Mr. Caniglia or his firearms. Instead, Defendants told Mr. Caniglia that they would not seize his firearms if he went to Kent Hospital for the psychological evaluation. (SUF 85). They told his wife, after the Cranston Rescue had left for the hospital, that Mr. Caniglia had consented to the seizure of his firearms, but that she could get them back if he passed the evaluation. (SUF 113). Then, they refused to return the firearms without a court order. (SUF 122-34).

ISSUES OF LAW

Defendants' motion fails to recognize what may be significant differences between federal and state law. To the contrary, Defendants mistakenly assume Plaintiff's rights under the Second and Fourth Amendments are the same as Plaintiff's rights under Art. 1, Sections 2 and 6 of the Rhode Island Constitution. (Defendants' Memorandum, p. 13, nn. 6 and 7). However,

based on Rhode Island Supreme Court decisions, this assumption is incorrect. These are the applicable issues of law:

1. Plaintiff has a claim for damages under the Rhode Island Firearms Act and under the Rhode Island Mental Health Law;
2. Under Rhode Island constitutional law, Plaintiff has an "absolute right" to keep arms in his house;
3. The Second Amendment protects Plaintiff's right to keep specific firearms in his home;
4. The Rhode Island Supreme Court has said that Art. 1, Sec. 6 of the Rhode Island Constitution can provide broader protections than the Fourth Amendment;
5. Defendants violated Plaintiff's constitutional protections against unreasonable searches and seizures;
6. The Community Caretaking Function does not pertain here where neither state law nor "sound police procedures" provide for its application;
7. Defendants are not entitled to qualified immunity where Plaintiff's rights were well-established under state and federal law;
8. Defendants converted Plaintiff's firearms;
9. Defendants are not entitled to state law immunity;
10. Plaintiff's claim for injunctive relief is not speculative.

ARGUMENT

I. RHODE ISLAND LAW PROVIDES A DAMAGES REMEDY TO VICTIMS OF CRIMES INCLUDING THE FIREARMS ACT AND THE MENTAL HEALTH LAW

Rhode Island constitutional provisions and statutes provide a damages remedy to persons injured by violations of criminal statutes, including the Rhode Island Firearms Act, R.I.Gen.L. §

11-47-1, et seq., ("RIFA"), and the Mental Health Law. R.I.Gen.L. § 40.1-5-1, et seq. ("RIMHL") (collectively, "the Acts"). The constitutional provisions include Art. 1, Sec. 5 which reads, in part: "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property or character." R.I.Const., Art. 1, Sec. 5. Similarly, Article 1, Sec. 23 states in relevant part: "A victim of a crime…shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetration of the crime…" (emphasis added). R.I.Const., Art. 1, Sec. 23.

The General Assembly has effectuated these provisions through R.I.Gen.L. § 9-1-2, which provides, *inter alia*:

> Whenever any person shall suffer any injury to his person, reputation or estate by reason of the commission of any crime or offense, he or she may recover his or her damages for the injury in a civil action against the offender and it shall not be any defense to such action that no criminal complaint for the crim or offense has been made…

R.I.Gen.L. § 9-1-2. Notably, the statute contains no exceptions.

Rhode Island courts have held or noted that this statute provides a civil claim for damages in a variety of circumstances in which the defendant's conduct constituted a crime, regardless of whether defendant was charged or convicted, including: forgery, Western Reserve Life Assur. Co. of Ohio v. Caramadre, 847 F.Supp.2d 329 (D.R.I. 2012); involuntary manslaughter, Gray v. Dederian, 400 F.Supp.2d 415 (D.R.I. 2005); assault and battery, Iacampo v. Hasbro, 929 F.Supp. 562 (D.R.I. 1996); illegal drug testing, Goddard v. APG Security-RI, LLC, 134 A.3d 173, 174 (R.I. 2016); damage to a historic stone wall, Morabit v. Hoag, 80 A.3d 1 (R.I. 2013); wrongful death, Tyre v. Swain, 946 A.2d 1189 (R.I. 2008); invasion of privacy and wiretapping, Cady v. IMC Mortgage Co., 862 A.2d 202 (R.I. 2004); extortion, Mello v.

DaLomba, 798 A.2d 405 (R.I. 2002); conversion, Ludwig v. Kowal, 419 A.2d 297, 303 (R.I. 1980) (Weisberger, J.); embezzlement, DaCosta v. Rose, 70 R.I. 163, 37 A.2d 794 (1944); larceny of corporate opportunity and by false pretenses, Baris v. Steinlage, C.A. 99-1302, 2003 WL 23195568 at *28 (R.I.Super. Dec. 12, 2003) (Savage, J.); larceny by false pretenses, Rhode Island Hospital Trust National Bank v. Ellman, P.C. 87-0501, 1988 WL 1017221 at *2 (R.I.Super. Apr. 5, 1988); perjury, Chernov v. Schein, No. 85-2577, 1986 WL 716027 at *1 (R.I.Super. Apr. 24, 1986).

Here, both the RIFA and the RIMHL contain provisions making violations of the Acts criminal. R.I.Gen.L. § 11-47-26, and § 40.1-5-38, respectively. Nothing in those Acts exempts them from the civil damages remedy provided by § 9-1-2. Indeed, Justice Weisberg has said of the RIMHL: "The failure of public officials to apply promptly for required judicial authorization to commit or retain involuntary patients may give rise to civil liability in the event that such a patient should be wrongfully deprived of his liberty." In re Doe, 440 A.2d 712, 716 (R.I. 1982). Accordingly, Plaintiff has a damages remedy for the violation of those two Acts.

In its 2016 decision in Richer v. Parmelee, 189 F.Supp. 334 (D.R.I. 2016) (the "2016 Richer Decision"), the Court cited a single Superior Court decision, decided in 1981, for the proposition that the Rhode Island Firearms Act, does not provide a damages remedy for its violation, Gallipeau v. State, No. 77-574, 1981 WL 390927 (R.I.Super. Mar. 12, 1981) ("Gallipeau"). With due respect to the author of the Gallipeau decision, it is not applicable here for a variety of reasons. First, the Gallipeau Court did not decide that there was no damages remedy available under RIFA. The Court did not even address that issue, nor did it even mention § 9-1-2. (Indeed, § 9-1-2 was not enacted until 1984, three years after the Galipeau decision). Instead, the Court dismissed plaintiff's federal civil rights claim finding that

defendants had acted in good faith. Id. at *2. It then held that plaintiff was entitled to return of the firearm under RIFA. Id. at *3. Second, even if the Galipeau Court had held was no damages remedy for a criminal violation of the RIFA, that decision was overturned by the enactment of § 9-1-2 in 1984 and Art. 1, Sec. 23 of the Rhode Island Constitution in 1986: "A victim of a crime…shall be entitled to receive, from the perpetrator of the crime, financial compensation…" R.I.Const., Art. 1, Sec. 23.

Defendants make a meritless arguement claim that they did not violate the Rhode Island Mental Health Law because they only attempted to get Plaintiff committed for mental health reasons, but did not succeed. (Defendants' Memorandum, pp. 32-35). As an initial matter, the RIMHL states:

> Any person who knowingly and willfully conspires with any other person unlawfully to improperly cause to be admitted or certified to any facility, any person not covered by the provisions of this chapter, shall on conviction therefor, be fined not exceeding five thousand dollars ($5,000) or imprisoned not exceeding five (5) years at the discretion of the court. (emphasis added).

R.I.Gen.L § 40.1-5-38. Under Rhode Island law, a criminal conspiracy is complete once the conspirators agree to commit the crime. State v. Romano, 456 A.2d 746, 757 (R.I. 193). In Romano, the Court said:

> [O]nce two or more individuals have agreed to commit an unlawful act, the crime of conspiracy is complete. No further action in furtherance of the conspiracy need occur. This is of no consequence whether the agreement is successfully or substantially effectuated.

Id. citing State v. Ahmadjian, 438 A.2d 1070, 1084-85 (R.I. 1981). It is not necessary that the conspirators actually commit the crime they are conspiring to commit. Romano, 456 A.2d at 757. Thus, it is sufficient here that Defendants agreed to do acts that violate RIMHL. It is not disputed that Defendants agreed to send Plaintiff to the hospital for a psychological evaluation. (SUF 73, 74, 155-57, 161-62). It is legally irrelevant whether Plaintiff was actually admitted.

Further, Defendants cite dictum in the footnote of a Superior Court decision as the only authority for their argument that it is not a crime to attempt unsuccessfully to violate the Mental Health Law. State v. Lopez, P1/2014-0822 AG, at p. 6, n.6 (R.I.Super. Sept. 15, 2015). As an initial matter, Plaintiff notes that case did not address the RIMHLA or a plaintiff's civil claims for violation of it.

Nonetheless, the Rhode Island Supreme Court has held that a criminal statute prohibits an attempt to violate it even if the statute does not expressly refer to an attempt. See, State v. Gonsalves, 476 A.2d 108, 111 (R.I. 1984); State v. Latraverse, 443 A.2d 890, 895-96 (R.I. 1982). In Gonsalves, defendant argued he could not be convicted of unlawful use of a credit card where the language of the statute did not refer to an unsuccessful attempt. The Supreme Court said:

> Although legislative intent is primarily sought from the language used in the statute, we must look to the statutory purpose. This court should not adopt a construction that would defeat the evident purpose of the statute. [citation omitted]. Although penal statutes are to be strictly construed, they should not be interpreted in a manner that would thwart a clear legislative intent. [citation omitted]. Moreover, we will not attribute to the Legislature a meaningless or absurd result. [citation omitted]. It is clear from a reading of the statute that the Legislature intended to prohibit the unlawful use of a credit card with intent to defraud even where that intent is unsuccessful.

476 A.2d at 111.

Here, it is clear that the General Assembly intended to criminalize an effort to commit a person for mental health reasons without an appropriate court order even if the attempt was unsuccessful. It does not matter that the hospital personnel who examined Plaintiff concluded, correctly, that he was not suicidal. Defendants' interpretation of the statute is non-sensical. It would make them criminal liable only if the hospital personnel had agreed with them (without an appropriate court order). Defendants did everything they could to violate the statute. The fact

that the hospital personnel properly determined that Plaintiff was not a threat to his own well-being does not, and should not, excuse Defendants' attempt to violate the statute.

Plaintiff notes the Defendant City of Cranston's argument that it cannot be a criminal offender, as a matter of law. (Defendant's Memorandum, pp. 8-10). However, it is well-settled that local governments can be prosecuted for the violation of criminal statutes in Rhode Island and elsewhere. See, State v. Town of Cumberland, 6 R.I. 496 (1860); see also, Stuart P. Green, "The Criminal Prosecution of Local Governments," 72 North Carolina L. Rev. 1197 (1994) (and cases cited therein). In State v. Town of Cumberland, the State of Rhode Island prosecuted the Town for failing to maintain a highway in the Town and a jury returned a guilty verdict. The trial court denied a motion for a new trial and the Supreme Court affirmed. 6 R.I. at 498-99. Moreover, there are federal cases in which it is clear that municipality can be a "person" and can be convicted of violating federal criminal statutes. See, e.g., United States v. Little Rock Sewer Comm., 460 F.Supp. 6 (E.D.Ark. 1978) (criminal prosecution for violation of federal environmental statute). Accordingly, the City of Cranston can be deemed an offender of the RIFA and the RIMHL.

Defendant cites a quote to City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 261 (1981), that "[m]unipal corporations can not…do a criminal act or a willful and malicious wrong." (Defendants' Memorandum, p. 8). The quote, however, is actually from an 1877 Missouri case, Hunt v. City of Boorville, 65 Mo. 620 (1877). That may be the law in Missouri but it is not the law here, nor is it the law in many other jurisdictions. See Stuart P. Green, "The Criminal Prosecution of Local Governments," 72 North Carolina L. Rev. 1197 (1994) (and cases cited therein). Moreover, federal law often considers municipalities as a "person." Id. at pp. 1215-1221. Similarly, the Supreme Court has made clear that municipalities are persons subject

to civil liability under civil rights laws (which is the point of Plaintiff's lawsuit). Monell v. Department of Social Services, 436 U.S. 65 (1978).

Finally, Defendant's argument that the Town cannot violate § 9-1-2 because that argument only applies to individuals is meritless. The statute provides for a cause of action against "the offender." R.I.Gen.L. § 9-1-2. Black's Law Dictionary says the word "offender" is "[c]ommonly used in statutes to indicate [a] person implicated in the commission of a crime…" (emphasis added). Black's Law Dictionary, 4th Ed., p. 1232 (West Publishing 1951). At common law, a "person" includes artificial persons such as municipalities. Id., p. 1300, citing Lancaster Co. v. Trimble, 34 Neb. 752, 52 N.W. 711 (1892); see also, Roma Construction Co., Inc. v. aRusso, 906 F.Supp. 78, 83 (D.R.I. 1995), rev'd on other grds, 96 F.3d 566 (1st Cir. 1996) (municipalities may be considered "persons" under federal civil rights statute). Similarly, under Rhode Island's laws of statutory construction, a "person" includes "bodies politic." R.I.Gen.L. § 43-3-6. Since a municipality is a person and it can violate a criminal statute, it can be an offender.

II. PLAINTIFF HAS AN ABSOLUTE RIGHT TO KEEP FIREARMS IN HIS HOME

Under Rhode Island constitutional law, at least, Plaintiff has an "absolute right" to keep arms in his house. Mosby v. Devine, 851 A.2d. 1031, 1043 n. 7 (R.I. 2004) ("[O]ne has an absolute right to keep firearms in one's home or place of business."). To Plaintiff's knowledge, the Rhode Island Supreme Court has not defined an absolute right but legal commentators and other courts have done so. Black's Law Dictionary says a property right that is absolute "gives to the person in whom it inheres the uncontrolled dominion over the object at all times and for all purposes." Black's Law Dictionary (4th ed.), p. 1487 (West Publ. 1951). Blackstone says that there are "absolute" and "relative" individual rights: "[A]bsolute, which are such as appertain

and belong to particular men, merely as individuals or single persons; relative, which are incident to them as members of society, and standing in various relations to each other." 1 Blackstone's Commentaries on the Laws of England, 123 (1765).

Thus, an absolute right is one that applies specifically to Plaintiff and that the State cannot limit so long as holder of the right is competent to exercise his right and does not expressly waive it. The Arkansas Supreme Court has said: "An absolute right has been defined as one that 'give to the person in whom it inheres the uncontrolled dominion over the object at all times and for all purposes.' The absolute right to nonsuit may not be denied by the trial court." White v. Perry, 348 Ark. 675, 681, 74 S.W.3d 628, 631 (2002), quoting, Black's Law Dictionary 1324 (6th ed. 1990); Marin v. State, 851 S.W.2d 275, 278-80 (Tex.Crim.App. 1993), overruled on other grds, Cain v. State, 947 S.W.2d 262 (Tex.Crim.App. 1997) (holding that absolute rights are rights that can be lost, if at all, only through express waiver); see also, Salinas v. Texas, 570 U.S. 178, 184 (2013)("[A] criminal defendant has an 'absolute right not to testify.'"); Perry v. Leeke, 488 U.S. 272, 281 (1989) (a criminal defendant who becomes a witness "has an absolute right [to consult with his lawyer] before he begins to testify."); State v. Sampson, 24 A.2d 1131, 1140 (R.I. 2011), quoting State v. Moran, 605 A.2d 494 (R.I.1992) (a defendant in a criminal trial has an "absolute right to waive trial by jury which right" which "is subject only to the procedural requirement that a trial justice determine that the defendant understands and accepts the consequences of executing a waiver.").

By comparison, a fundamental right that is not absolute is one upon which the State can impose reasonable restrictions. See, Buck v. Davis, 137 S.Ct. 759, 773 (2017) ("A state prisoner whose petition for a writ of habeas corpus denied by a federal district court does not enjoy an absolute right to appeal."); Commodity Futures Trading Commission v. Shor, 478 U.S. 833, 848

(1986) ("Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court."); Cool Moose Party v. State of Rhode Island, 6 F.Supp.2d 116, 119-20 (D.R.I. 1998) (the right to vote and the right to associate for political purposes are not absolute but are subject to time, place and manner restrictions).

The Rhode Island Supreme Court has interpreted the Rhode Island Constitution to provide a individual right to keep arms. Mosby v. Devine, 851 A.2d at 1043. Article 1, Section 22 of the Rhode Island Constitution states: "The right of the people to keep and bear arms shall not be infringed." This is an individual right, unrelated to military service: "Thus, like the right to be free from unreasonable searches and seizures and other rights provided to 'the people,' we believe that the right provided in art. 1, sec. 22 flows to the people individually." Id. at 1040-1041. Admittedly, the Rhode Island Supreme Court found that the use of "bear arms" had a military purpose, however: "This implied relationship between the bearing or arms and military service, however, does not undermine the individual right to 'keep' arms in one's home or in his or her place of business. It is the keeping of arms that is the *sine qua non* of the individual right under art. 1, sec. 22." Id. at 1042. [2]

Rhode Island's history supports this interpretation of the individual right:

> History reveals that the policy of Rhode Island called for individuals to keep arms to defend the state "when the alarm sounds." [citation omitted]. Indeed, the Militia Act of 1798 provided that a member of the militia must "provide himself with a good musket or firelock," powder and ammunition…To deny people their individual right to keep arms could transform the militia into a toothless tiger. In the absence of an individual right to keep arms, the government could, by legislative act, deprive the people of their right to defend the state.

[2]This case involves weapons that Plaintiff had in his home and which the Defendants removed from his home. Accordingly, it involves only the right to "keep arms" and not the right to "bear arms." Mosby v. Devine, 851 A.2d at 1042.

Id. Plaintiff was denied his absolute constitutional right to keep arms for the purpose of self-defense as required by and Mosby as his weapons were taken from his home were not returned, despite several requests, until he filed this suit.

The United State Supreme Court has not addressed whether the Second Amendment provides an absolute right to keep firearms in the home, though the First Circuit has recently confirmed that the possession of firearms in the home is a "core Second Amendment right." Gould v. Morgan, 907 F.3d 659, 671-72 (1st Cir. 2018). The Court said:

> The home is where families reside, where people keep their most valuable possessions, and where they are the most vulnerable (especially while asleep at night). Police may not be able to respond to calls for help quickly, so an individual within the four walls of his own house may need to provide for the protection of himself and his family in case of emergency. Lastly—but surely not least—the availability of firearms inside the home implicates the safety only of those who live or visit there, not the general public.

Id.

Even if Plaintiff's rights under the Second Amendment are not as strong as his rights under Article 1, Sec. 2 of the Rhode Island Constitution, then this Court should recognize the difference. Here, Plaintiff never waived his absolute right to keep firearms in his house. Accordingly, Defendants could not seize his firearms in these circumstances.

III. DEFENDANTS' VIOLATED PLAINTIFF'S SECOND AMENDMENT RIGHTS

Defendants argue that they did not violate the Second Amendment because it does not protect a right to specific firearms, only a right to have firearms, generally, and they did not bar Plaintiff from acquiring other firearms. (Defendants' Memorandum, pp. 11-13). This Court made the same point in its 2016 Richer Decision. 189 F.Supp.3d at 342-43.

However, "the Second Amendment conferred an individual right to keep and bear arms." District of Columbia v. Heller, 554 U.S. 570, 595 (2008). In Heller, the Court said the language

of the Amendment supports this interpretation. The Court relied in part on Samuel Johnson's dictionary: "Johnson defined 'keep' as, most relevantly, '[t]o retain, not to lose,' and '[t]o have in custody.'" Id. at 582, quoting 1 Dictionary of the English Language 1095 (4th ed. 1773). Similarly, "Webster defined it as '[t]o hold, to retain in one's power or possession.'" Id., quoting N. Webster, American Dictionary of the English Language (1828).

English and American history also support the argument that the right to keep arms was an individual right. The Court said at the time of the founding the right to "keep arms" was considered an individual right unconnected with military service. Id. "William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to 'keep arms in their houses.'" Id., quoting, Blackstone, 4 Commentaries on the Laws of England 55 (1769). Moreover,

> Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents in party by disarming their opponents. [citations omitted]. Under the auspices of the 1671 Game Act, for example, the Catholic James II had ordered general disarmaments of regions home to his Protestant enemies. [citation omitted]. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Rights (which was codified as the English Bill of Rights), that Protestants would never be disarmed: "That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law." [citation omitted]. This right has long been understood to be the predecessor to our Second Amendment.

Id. at 592-93.

The right of self-defense is an inherent right and is central to the Second Amendment. Id. at 628. "St. George Tucker's version of the Blackstone's Commentaries…conceived of the

Blackstonian arms right as necessary for self-defense. He equated that right, absent the religious and class-based restrictions, with the Second Amendment." Id. at 606.

Admittedly, the Supreme Court has said:

> [T]he right secured by the Second Amendment is not unlimited…nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sales of arms…We also recognize another important limitation on the right to keep and carry arms. Miller[3] said, as we have explained, that the sorts of weapons protected were those "in common use at the time." [citation omitted]. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

Heller, 554 U.S. at 627.

Here, Plaintiff is neither a felon nor mentally ill. The Supreme Court did not explain what it meant by "mentally ill" nor did cite to any legal authority defining its use of that term. However, the Rhode Island General Assembly has set forth in the Firearms Act what mental conditions disqualify a person from possessing a firearm. "No person who is under guardianship or treatment or confinement by virtue of being a mental incompetent, or who has been adjudicated or is under treatment or confinement as a drug addict, shall purchase, own, carry, transport, or have in his or her possession or under his or her control any firearm." R.I.Gen.L. § 11-47-6. This restriction does not apply to Plaintiff. [4]

Further, Plaintiff was not trying to carry his firearms in schools or government buildings nor was he involved in the commercial sales of arms (except when he acquired the guns decades

[3] United States v. Miller, 307 U.S.174, 179 (1939).

[4] See also, Tyler v. Hillsdale County Sheriff's Dept., 775 F.3d 308 (6th Cir. 2014), considering when a mental illness justifies deprivation of Second Amendment rights and reversing the dismissal of a constitutional challenge to a federal statute, 18 U.S.C. § 922(g)(4), which prohibits possession of firearms to a person "who has been committed to a mental institution."

ago). Moreover, these guns are certainly similar to those "in common use at the time." They are clearly not "dangerous and unusual weapons."

In McDonald v. Chicago, 561 U.S. 742, 130 S.Ct. 3020, 3037 (2010), the Court considered whether the Second Amendment was binding on the States. "The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights." Id. at 768. The Framers of our Constitution and those who ratified it regarded the right to keep and bear arms as fundamental to our system of ordered liberty. Id. at 3042. Therefore, the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to keep and bear arms for self-defense to the States. Id. at 3050. In Heller, the Court held that the District of Columbia's prohibition on possession of handguns in the home unless they were rendered inoperable at all times violated the Second Amendment. Id. at 636.

In addition, other federal courts have recognized that the Second Amendment protects person not only against a complete bar of access to firearms but also against unreasonable time, place, and manner restrictions on firearms possession. Heller v. District of Columbia, 801 f.3d 264, 280-81 (D.C.Cir. 2015) (striking down certain firearms regulations including a requirement that they be inspected and a limitation on the number of purchases within a 30-day period); Jackson v. City and County of San Francisco, 746 F.3d 953, 961 (9th Cir. 2013) (analogizing Second Amendment rights to First Amendment rights). Defendants' argument that they can seize specific firearms so long as they do not bar Plaintiff from obtaining other firearms is an unreasonable time, place, or manner restriction. For example, Plaintiff may not be barred from possessing firearms, even for a short period, because Defendants have an unfounded concern that he has psychological issues. See Tyler v. Hillsdale County Sheriffs Department, 837 F.3d 678, 699 (6th Cir. 2015) (holding that a federal statute prohibiting possession of firearms by a person who had ever been

committed to a mental institution must be analyzed under intermediate scrutiny); Keyes v. Sessions, 282 F.Supp.3d 858, 878 (M.D.Penn. 2017) (striking down as unconstitutionally applied to plaintiff the same federal statute addressed in Tyler).[5]

Plaintiff also notes Judge Elrod's dissenting opinion rejecting the argument that the Second Amendment does not apply to specific firearms. Houston v. City of New Orleans, 675 F.3d 441 (5th Cir. 2012), opinion withdrawn and superceded on rehearing, 682 F.3d 361 (5th Cir. 2012). Judge Elrod relies in part on the dissent of former Judge, now Supreme Court Justice, Kavanaugh, in Heller v. Dist. of Columbia, 670 F.3d 1244, 1271 (D.C.Cir. 2011). Judge Elrod highlights both that the Supreme Court has made clear that the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," 675 F.3d at 450, citing McDonald v. City of Chicago, 130 S.Ct. 3020 (2010), and that interpreting the Second Amendment requires "an exhaustive historical analysis." 675 F.3d at 449, quoting, Heller v. District of Columbia, 554 U.S. 570, 626 (2008). None of the cases holding that the Second Amendment only protects a general right to keep firearms--instead of a right to specific, traditional firearms--recognize the Supreme Court's directives in this area. 675 F.3d at 405-51 and n. 4. None of those cases provide any historical analysis supporting those holdings.

Judge Elrod particularly criticizes the argument that the Second Amendment should be applied differently than other personal rights protected in the Bill of Rights:

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[5] Plaintiff notes that on January 22, 2019, the Supreme Court granted certiorari on a petition presenting the question: "Whether New York City's ban on transporting a licensed, locked and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause and the constitutional right to travel." Opinion below, New York State Rifle & Pistol Association Inc. v. City of New York, New York, 883 F.3d 45 (2nd Cir. 2018).

> [A]n equivalent *per se* exception for particular exercises of the right at stake (so long as other exercises of that right are permitted) would be intolerable. Consider, for example, a court holding that the Free Speech Clause affords no protection against the government preventing the publication of a particular editorial in the *New York Times* because there are plenty of other newspapers that might publish the piece. Or consider a court holding that the Fourth Amendment is inapplicable to the seizure of a specific automobile so long as the government does not prevent the owner from borrowing, renting or purchasing a replacement vehicle.

Id. at 450. As Judge Elrod notes:

> [T]he Supreme Court has expressly rejected this sort of reasoning in the First Amendment context: "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" Southeastern Promotion, Ltd. v. Conrad, 420 U.S. 546, 556, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (quoting Schneider v. State of New Jersy, Town of Irvington, 308 U.S. 147, 163, 60 S.Ct. 146, 84 L.Ed. 155 (1939)). Heller itself rejected a strikingly similar argument: "It is no answer to say…that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." 554 US. At 629, 128 S.Ct 2783, see also, Heller, at 1289, [citation omitted] ("[T]hat's a bit like saying books can be banned because people can always read newspapers.").

Id. at 450 n. 2. Similarly, as Judge Elrod commented, the Eighth Circuit has said: "We do not foreclose the possibility that some plaintiff could show that a state actor violated the Second Amendment by depriving an individual of a specific firearm." Walters v. Wolf, 660 F.3d 307, 318 (8th Cir. 2011).

This is just such a case. Defendants specifically seized firearms, not to prevent Plaintiff from committing some harm generally, but to protect themselves from perceived liability and public criticism. If Plaintiff's possession of guns generally was a threat to public safety, then it was incumbent on Defendants to take such steps as the law permitted to prevent him from having any guns. Defendants did not do that. Instead, they merely seized Plaintiff's firearms and did nothing more. This is a specific effort to deprive Plaintiff from keeping those specific guns in his home without a legitimate basis. There can be no clearer situation appropriate for the application of the Second Amendment.

Another decision further supports Plaintiff's claims, Taylor v. City of Baton Rouge, 39 F.Supp.3d 807 (M.D.La. 2014). In Taylor, plaintiff alleged that he was pulled over in his car after exiting the parking lot of a liquor store, allegedly because his headlights were not on. Taylor informed the police officer he had two rifles inside his car and the documents establishing that he possessed the guns legally were in the glove compartment of his car. The police officer arrested Taylor and seized the guns because he was allegedly in violation of a city ordinance that barred any person from having possession of a firearm in any premises that where alcoholic beverages were sold or consumed even though Taylor had not brought the guns inside the liquor store.

Taylor filed a Section 1983 action alleging the ordinance was unconstitutional as applied to his circumstances. The district court said:

> Taylor's pleadings seek a viable claim for relief under the Second Amendment. As written, the clear language of [the ordinance] prohibits the possession of firearms in any parking lot of an establishment that sells alcohol. Thus, any law-abiding citizen who exercises his or her right to keep and bear arms within the confines of his or her personal vehicle will violate [the ordinance] anytime he or she, for example, stops to refuel a vehicle at a service station that sells alcohol, or stops to purchase groceries at a grocery store that sells alcohol.

39 F.Supp.3d at 817. The court entered declaratory judgment that the ordinance "unlawfully infringes upon the right of Plaintiff and other citizens to keep and bear firearms, in violation of the Second Amendment." Id. at 819. Similarly, here, Defendants' unwritten town policy of seizing guns for "safekeeping" and refusing to return them without a court order violates Plaintiff's right to keep arms in his home.

Here, again, Defendants' initial seizure was not reasonably related to any genuine public safety concern. The police knew Plaintiff has made a dramatic gesture with an unloaded handgun during an argument with his wife the prior evening. Defendants acknowledge that

Plaintiff was "normal" and not suicidal when they spoke with him the next morning. (SUF 70-72, 80-81). He did not meet the risk criteria for suicide to which they had been trained. (SUF 79). They did not consult with any medical professional. (SUF 158-159). Instead, they seized his two handguns and required him to have a psychological evaluation. (SUF 87, 96, 108, 115). Moreover, they did nothing to prevent him from obtaining other guns.

Further, Defendants' unwritten town policy of requiring Plaintiff to obtain a court order for the return of his guns has no reasonable public policy basis. Essentially, Defendants seek to shirk their responsibilities to enforce the laws in a legitimate, reasoned manner by hiding behind the proverbial skirts of the courts. This is not an appropriate justification for the violation of Plaintiff's constitutional rights.

The cases upon which Defendants rely are not based upon Supreme Court precedent or a historical analysis. For example, in Walters v. Wolf, 660 F.3d 307, 311 (8th Cir. 2011), the Eighth Circuit held that there had been no violation of plaintiff's Second Amendment rights because "defendants' policy and action affected *one* of Walter's firearms, which was lawfully seized. The defendants did not prohibit Walters from retaining or acquiring other firearms." (emphasis original). Id. at 318, citing, Bane v. City of Philadelphia, C.A. No. 09-2798, 2009 WL 6614992 at *10 (E.D.Pa. June 18, 2010); see also, Rodgers v. Knight, 781 F.3d 932 (8th Cir. 2015), citing, Walters, supra. The Eighth Circuit did not cite any historical analysis.

As an initial matter, Bane would seem to be a pretty weak reed upon which to base the apparent and extraordinary holding that the government does not violate the Second Amendment unless it completely deprives a person of all access to all firearms. It is an unpublished, pre-Heller and pre-McDonald decision. In Bane, plaintiff had an altercation with his neighbors during which he pointed a handgun at them. They called the police who came to Bane's home.

After questioning him, they seized his handgun. While in custody, Bane signed a consent form allowing the police to search his home and seize other weapons. After dismissal of the charges, the police declined to return his weapons. Pennsylvania had a rule of criminal procedure that a person aggrieved by the seizure of property may move for the return of the property. Pa.Ru.Crim.P. 588. Plaintiff did not attempt to use this remedy. Instead, he filed a *pro se* complaint raising a variety of claims, including violation of his Second Amendment rights.

First, the Bane court said that the defendants' seizure of Bane's first weapon was as an instrumentality of a crime and that he gave defendants permission to seize the second weapon. 2009 WL 66614992 at *10. Moreover, state law permitted Bane to apply for the return of the seized items. The Bane court said Rule 588 was an "adequate post-deprivation remed[y]." Id. at *8, citing, Welsch v. Twp. Of Upper Darby, 2008 WL 3919354, *5 (E.D.Pa. Aug. 26, 2008). (Notably, this was a holding that the Eighth Circuit implicitly rejects in Walters). The Bane court then held:

> No government official is barring Plaintiff from obtaining a firearm and none is preventing Plaintiff from availing himself of the procedure for the return of the firearms. Moreover, no law has been cited that infringes upon Plaintiff's right to obtain a firearm. The Second Amendment does not bar police from seizing the items taken in this case.

Id. Thus, the Bane court did not hold that there was no Second Amendment violation unless defendants prohibited the plaintiff from retaining or acquiring other firearms. The Eighth Circuit's purported reliance on Bane for its extraordinary holding that there is no Second Amendment violation unless the government completely prohibits a person from all access to all guns is seriously misplaced, at best.

Moreover, the Walters and Bane holdings would appear to be at least implicitly abrogated by Heller in which the Supreme Court said a major purpose of the Second Amendment was to

prevent the government from disarming citizens without constitutionally permissible reasons. Heller, passim. Plainly, when the government seizes all a person's firearms it disarms him regardless of whether he can obtain new weapons.[6] Nothing in Heller or McDonald remotely suggests that government violates the Second Amendment only when it completely prevents a person from gaining access to all weapons all the time. The Eighth Circuit made no attempt to consider whether Bane was still "good" law in the aftermath of Heller and McDonald.

Finally, the Walters holding is simply illogical. Essentially, it stands for the proposition that even if the government seizes and holds a person's gun for no good reason, there is no Second Amendment violation if he can obtain another one. Conceivably, the government could seize that one, too, without committing a constitutional wrong if the person could obtain a third gun, etc. In other words, the Walters holding would seem to be that the government could seize a hundred guns from a person, one at a time, and, so long as he can get one hundred and one, the person's Second Amendment rights are preserved.

IV. RHODE ISLAND'S CONSTITUTION PROVIDES EVEN STRONGER PROTECTIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES THAN THE FOURTH AMENDMENT

The Rhode Island provision provides Rhode Island citizens a "double barreled source of protection which safeguards their privacy from unauthorized and unwarranted intrusions…" State v. von Bulow, 475 A.2d 995, 1019 (R.I. 1984), quoting State v. Sitko, 460 A.2d 1, 2 (R.I. 1983). "This dual safeguard flows directly from the United States Supreme Court's explicit acknowledgement of the 'right of state courts, as final interpreters of state law, 'to impose higher standards on searches and seizures than [those] required by the Federal Constitution,' even if the

[6] Webster's defines "disarm" as "1. to take away weapons from." Webster's New World Dictionary, College Ed., 415 (World Pub. Co. 1968).

state constitution provision is similar to the Fourth Amendment." Id., quoting State v. Benoit, 417 A.2d 895, 899 (1980) (quoting Cooper v. California, 386 U.S. 58, 62 (1967)).

The Rhode Island Supreme Court has specifically held on several occasions that Art. 1, Sec. 6 provides stronger protections against searches and seizures than the Fourth Amendment. Pimental v. Department of Transportation, 561 A.2d 1348, 1352-53 (R.I. 1989) (finding that drunk driving roadblocks violate the right of privacy under the R.I. Constitution); State v. von Bulow, 475 A2d 995, 1019-20 (R.I. 1984) (holding that a warrantless search of defendant's private bag in his home violated the Rhode Island Constitution); State v. Maloof, 114 R.I. 380, 333 A.2d 676, 681 (1975) (affirming the suppression of evidence obtained through wiretaps authorized with improper orders).

Moreover, the Rhode Island Supreme Court has repeatedly distinguished between searches and seizures in the home as compared to in an automobile or elsewhere because people have strong rights of privacy in their homes:

- "The warrant requirement serves to guard the privacy and sanctity of the home from "zealous" police officers "thrust[ing] themselves into a home" while ardently "engaged in the often competitive enterprise of ferreting out crime." State v. Terzian, 162 A.3d 1230, 1239 (R.I. 2017), quoting Johnson v. United States, 333 U.S. 10, 13 (1948).
- "An individual's right to privacy in his home is rooted in the clear language of the Fourth Amendment: "The right of the people to be secure in their * * * houses * * * shall not be violated * * *." State v. Gonzalez, 136 A.3d 1131, 1146 (R.I. 2016).
- "Casas had a reasonable expectation of privacy with respect to both 224 Amherst Street and his home. The evidence disclosed that defendant's wife was an owner of the Amherst

Street building, and defendant collected rents and made repairs." State v. Casas, 900 A.2d 1120, 1130 (R.I. 2006).[7]

Moreover, the Rhode Island Supreme Court has repeatedly relied on the United States Supreme Court's precedent that are most protective of a person's right of privacy in his or her home. See, e.g. State v. Terzian, supra, citing Johnson v. United States, supra; State v. Gonzalez, supra, citing Payton v. New York, 445 U.S. 573 (1980).

Indeed, in 1980, the General Assembly recognized the right of privacy by creating a cause of action for violation of that right, which includes "[t]he right to be secure from unreasonable intrusion upon one's physical solitude or seclusion." R.I.Gen.L. § 9-1-38.1(a)(1); DaPonte v. Ocean State Job Lot, Inc., 21 A.3d 248, 252 (R.I. 2011), citing Swerdlick v. Koch, 721 A.2d 849, 857 (R.I. 1998) ("Swerdlick stands unequivocally for the proposition that a person's private residence is of the species of 'something that is entitled to be private or would be expected to be private.'").

In Gonzalez, the defendant moved to suppress evidence respecting his statement about the location of a gun the police were questioning him about and certain evidence derived from a search of his residence including a handgun case, a magazine, and a receipt for a gun purchase. The police were investigating a shooting of another person. The police did not obtain a warrant to arrest Gonzalez nor a warrant to search his apartment. They argued that they had the consent of the defendant's mother, who also lived in the apartment, to search it and that there were exigent circumstances. The trial court denied the motion on the grounds that there were exigent

[7] By contrast, the Court has found there is not a reasonable expectation of privacy in other circumstances. See, e.g., State v. Patino, 93 A.3d 40 (R.I. 2014) (no reasonable expectation of privacy in text messages); State v. Bertram, 591 A.2d 14, 20-21 (R.I. 1991) (defendant had no reasonable expectation of privacy in automobile his wife leased).

circumstances justifying the failure to obtain warrants because the police were attempting to apprehend an armed suspect within hours of him allegedly shooting a person.

The Supreme Court again quoted Johnson v. United States: "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman ***." Id. at 1146, quoting, Johnson, 333 U.S. at 14. The Court further quoted the United States Supreme Court:

> "In terms that apply equally to seizures of *** persons, the Fourth Amendment has drawn a firm line at the entrance of the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton [v. New York], 445 U.S. [573], 590 (1980). Therefore "searches and seizures inside a home without a warrant are presumptively unreasonable." Id. at 586. Moreover, this Court has recognized that fundamental principle, stating that "[t]he Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects." [State v.] Linde, 876 A.2d [1115], 1124 [(R.I. 20050], (quoting Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)).

136 A.3d at 1146-47).[8] The Court said, with respect to the exigency of the circumstances, "[w]hen an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." Id. at 1151, quoting Welsh v. Wisconsin, 446 U.S. 740, 751 (1984). Further, exigent circumstances require that there be a compelling need for immediate action and "no time to secure a warrant." Id. at 1152, quoting United States v. Adams, 621 F.2d 41, 45 (1st Cir. 1980). The Court found there was no exigent circumstance. Id. at 1154.

Here, four police officers responded to Plaintiff's house. They were in control of the situation. Plaintiff was not holding his firearms, nor was he even near them. Even assuming the circumstances justified a seizure of Plaintiff's firearms and of Plaintiff himself, for a

[8] The Court first found that the mother's consent to a search of the apartment was not voluntary. 136 A.3d at 1150.

psychological evaluation, there was no reason why one or more officers could not have retained control of the situation while the others obtained warrants or court orders authorizing the seizures. In short, there were no exigent circumstances that justified these seizures without appropriate court orders.

Defendants rely on non-Rhode Island case law to support their argument that the mere possibility that a person may be suicidal justifies police who seize that person, require him to have a psychological evaluation, and seize his firearms for safekeeping, all without a court order. However, Rhode Island statutes, including the RIMHL, the RIFA, and the Warrant Statute, R.I.Gen.L. § 12-5-1, et seq., reinforced by the Rhode Island Supreme Court's decisions, refute that argument. Even if state or local governments elsewhere authorize these kind of police actions, Rhode Island does not.

V. DEFENDANTS VIOLATED PLAINTIFF'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES

Plaintiff moved for summary judgment on his claims under the Fourth Amendment and Art. 1, Sec. 6 of the Rhode Island Constitution that Defendants violated his rights against unreasonable searches and seizures. Plaintiff incorporates those arguments here by reference. (ECF Doc. No. 43 ("Plaintiff's MSJ Memorandum"), pp. 9-27). In short, the Fourth Amendment requires that Defendants obtain a court order before they can seize Plaintiff or his property from his home, absent a showing of exigent circumstances. There were no exigent circumstances here (SUF 65, 67-72, 78, 79-81, 162-64) and Defendants did not obtain a court order.

It appears that Defendants may argue that they are not required to obtain a court order before certifying a person for a psychological evaluation. (Defendants' Memorandum, pp. 32-35). However, the statute provides for such action only if "no physician is available to certify that person's "continued unsupervised presence in the community would create an imminent

likelihood of harm by reason of mental disability." R.I.Gen.L. § 40.1-5-7(a). Defendants made no effort to consult with any medical professionals before requiring Plaintiff to have a psychological evaluation. (SUF 158-59). Further, Defendants are not qualified to diagnose mental illness. (SUF 28, 31). Accordingly, the statute requires police to obtain a court order. R.I.Gen.L. §§ 40.1-5-7(e), 40.1-5-8.

In any event, it is clear that the Fourth Amendment applies to such certifications and, accordingly, a court order is required. (Plaintiff's MSJ Memorandum, pp. 10, 19-22). The Court should interpret the RIMHL to avoid a constitutional issue. I.N.S. v. St. Cyr, 533 U.S. 289, 299-300 (2001); Hometown Properties, Inc. v. Fleming, 680 A.2d 56, 60 (R.I. 1996). Accordingly, it should interpret the Act to require the police who wish to require a psychological evaluation to obtain a court order.

VI. THE COMMUNITY CARETAKING FUNCTION DOES NOT APPLY HERE WHERE NEITHER RHODE ISLAND LAW NOR SOUND POLICE PROCEDURE SUPPORT ITS APPLICATION

Plaintiff has moved for summary judgment with respect to Defendants' assertion of the community caretaking function. (Plaintiff's MSJ Memorandum, pp. 33-44). Plaintiff incorporates those arguments by reference here.

Defendants argue that their actions in seizing Plaintiff and his firearms are a reasonable exercise of their community caretaking function. For example, Defendants' argue that they did not violate Plaintiff's Second Amendment rights because they "only" seized specific firearms in his possession; they did not prevent him from obtaining other firearms. However, this simply proves that Defendants' seizure of Plaintiff's "traditional" firearms was irrational and cannot be justified under either a Fourth Amendment or Fourteenth Amendment analysis. Defendants' argument acknowledges that Plaintiff, who was supposedly an imminent threat to himself and

perhaps others, could have purchased or obtained other firearms immediately after the seizure and used them on himself or others, and Defendants did nothing to stop that. Defendants' argument simply proves the obvious: the seizure of Plaintiff's firearms was not a legitimate law enforcement or community safety action; it was undertaken only to insulate themselves from legal liability and public criticism. This justification is entitled to no constitutional respect.

More importantly, the Supreme Court has made clear that the application of the community caretaking function depends on "state law and sound police procedures." Cady v. Dombrowski, 413 U.S. 447, 433 (1973). As set forth here and in Plaintiff's summary judgment motion, Rhode Island law strictly limits the use of the community caretaking function. The RIMHL requires police to obtain a court order before requiring a person to have a psychological evaluation. R.I.Gen.L. §§ 40.1-5-7(a), (e), (f), 40.1-5-8. In particular, the police must show that the person presents a "imminent" threat of harm to himself or others. R.I.Gen.L. § 40.1-5-7(a). The Rhode Island has carefully limited the meaning of "imminent threat." State v. Urena, 899 A.2d 1281, 1290 (R.I. 2006) (affirming rejection of "battered woman" defense where there was no evidence the victim "was about to inflict death or serious bodily injury upon" defendant). The RIFA specifically defines the circumstances under which the police can deny a person possession of a firearm. R.I.Gen.L. § 11-47-5, 11-47-6. The Rhode Island Supreme Court has strictly enforced these statutes.

Further, Defendants' own General Orders and training demonstrate that no sound police procedure supported their seizure of Plaintiff and his firearms. Those GOs set forth Defendants' police procedures. (SUF 13-14). There is no GO authorizing the seizure of persons and firearms in these circumstances. (SUF 16, 17, 57). To the contrary, Defendants' GOs state they are not qualified to diagnose mental illness and that in such circumstances they should follow RIMHL.

(SUF 25, 28, Exhibit H). That Act requires them to obtain a court order to compel a psychological evaluation. R.I.Gen.L. §§ 40.1-5-7(e), 40.1-5-8. The GOs set forth when exigent circumstances exist that permit police to seize people and property without court orders in a criminal context. (SUF 15, Exhibit E, Part VIII(j)(iv)(4)). Defendants testimony demonstrates that exigent circumstances did not exist here. (SUF 68-81, 162-64). In essence, Defendants argue that Plaintiff has fewer constitutional and legal protections than he would have had in a criminal investigation. That argument is logically absurd and legally unfounded.

Defendants cite non-Rhode Island cases for a "expansive" interpretation of the community caretaking function. However, those cases overlook that the Fourth Amendment and Art. 1, Sec. 6 apply to non-criminal circumstances, as well. (Plaintiff's MSJ Memorandum, pp. 10, 27). Otherwise, the community caretaking function would become the exception that overwhelms the rule. See Matthew C. Shapiro, "The Road to Fourth Amendment Erosion is Paved With Good Intentions: Examining Why Florida Should Limit the Community Caretaker Exception," 6 FIU L. Rev. 351 (2010-2011); Michael R. Dimino, Sr., "Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness," 66 Wash. & Lee L. Rev. 1485 (2009). Moreover, a person's right of privacy in his home is just as strong in the non-criminal circumstance as it is in the criminal context. (Plaintiff's MSJ Memorandum, pp. 9-10, 12-13, 19-23, 25-26). The federal and Rhode Island Constitutions do not give police carte blanche to barge into any domestic situation to rectify any perceived threat of harm no matter how unlikely. (Id.). Yet, that is precisely the authority Defendants claim, here. That purported authority violates the federal and state Constitutions.

VII. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY WHERE PLAINTIFF'S RIGHTS WERE CLEARLY ESTABLISHED UNDER FEDERAL AND STATE LAW

Plaintiff moved for summary judgment on Defendants' affirmative defense of qualified immunity. (Plaintiff's MSJ Memorandum, pp. 45-48). Plaintiff incorporates those arguments here by reference. In short, Rhode Island's statutes and Supreme Court case law, as well as Defendants' own GOs, clearly establish Plaintiff's rights.[9]

The "clearly established" step addresses "whether the state of the law at the time of the putative violation afforded the defendant fair warning that his or her conduct was unconstitutional." Limone v. Condon, 372 F.3d 39, 45 (1st Cir. 2004), citing Hope v. Pelzer, 536 U.S. 730, 741(2002). The Supreme Court has said: "[A] constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." Hope v. Pelzer, 536 U.S. at 740, quoting, Anderson v. Creighton, 483 U.S. 635, 640 (1987); Young v. City of Providence, 396 F.Supp.2d 125, 134 (D.R.I. 2005) (Smith, J.). Here, the case law clearly established that Defendants could not seize Plaintiff or his property from his home without a court order, in the absence of exigent circumstances. (Plaintiff's MSJ Memorandum, pp. 9-27). There were no exigent circumstances and Defendants did not obtain a court order.

[9] In a footnote, Defendants claim Defendants Winquist and Quirk are entitled to summary judgment on certain counts simply because they "were not at the scene nor were they consulted by officers at the scene." (Defendants' Memorandum, p. 6 n. 1). However, it is well-established that police supervisors can be liable under § 1983 for a failure to train and to supervise adequately. See, City of Canton v. Harris, 489 U.S. 378, 380 (1989); Seekamp v. Michaud, 109 F.3d 802, 808 (1st Cir. 1997); Camilo-Robles v. Hoyos, 151 F.3d 1, 6 (1st Cir. 1988); Young v. City of Providence, 396 F.Supp.2d 125, 135 (D.R.I. 2005) (Smith, J.). Col. Winquist is the chief of the CPD. (SUF 11). Here, the police officers on the scene claim they were acting pursuant to an unwritten CPD policy, in violation of state and federal laws and their own GOs. That is clearly a failure to supervise and to train.

Moreover, a state statute or regulation may provide evidence of the state of the law even if it is ignored by state officials. Hope v. Pelzer, 536 U.S. at 744. Here, the RIMHL and the RIFA clearly constrain Defendants' authority to seize persons or firearms. The RIMHL sets forth specific requirements as to when and how a person can compelled to submit to a psychological evaluation. R.I.Gen.L. §§ 40.-5-7, 40.1-5-8. The RIFA sets forth specific reasons why and when a person can be deprived of the possession of his firearm. R.I.Gen.L. §§ 11-47-5, 11-47-6, 11-47-7, 11-47-33, etc. None of those circumstances existed here.

Similarly, Plaintiff submits that Defendants' GOs and training also provide evidence of clearly established law. See Healy v. James, 408 U.S. 169, 189 (1972) (citing to the College's "Student Bill of Rights" as providing substantive rights consistent with constitutional requirements); Andrews v. City of West Branch, Iowa, 454 F.3d 914, 919 (8th Cir. 2006) (state statute and local regulation respecting animal control are clearly established law respecting police officer's claim of qualified immunity for shooting plaintiff's dog); Suarez Cestero v. Pagan Rosa, 198 F.Supp.2d 73, 95 (D.P.R. 2002) (police regulations in police manual constitute clearly established law respecting qualified immunity); Pew v. Scopino, 904 F.Supp. 18, 27 (D.Me. 1995) (National Guard orders respecting minimum flying altitudes constitute clearly established law regarding Guard helicopter flyovers of private residences). Defendants violated their own GOs, as well as their training. (SUF 17, 28, 34-38, 44, 74-76, 79, 99, 136, 153-59, 164).

It was well-established in 2015 that, absent genuinely exigent circumstances, police could not seize a person in his home without a court order or exigent circumstances. (Plaintiff's MSJ Memorandum, pp. 10-23, 27). Similarly, it was well-established that police could not seize a

person's property from his home without a court order, absent genuinely exigent circumstances. (Id.). There were no genuinely exigent circumstances here.

Here, Plaintiff and his wife had an argument the prior night. (SUF 58). During the argument, Plaintiff made a dramatic gesture by placing an unloaded handgun on the table and saying to his wife "shoot me now." (SUF 58-59). His wife put the gun back where Mr. Caniglia got it and left the house. (SUF 60-61). The next morning, she could not reach him (because he was in the bathroom) and she became concerned (SUF 60-62). She called the CPD because she wanted an officer to accompany her to the house to check on Plaintiff. (SUF 63). She was not concerned for her own safety nor was she concerned that Plaintiff would use the gun on himself. (SUF 63).

Instead of one officer, the CPD send four officers in four squad cars. (SUF 64). Defendants knew Mrs. Caniglia was not concerned for her own safety. (SUF 65). The four CPD officers went to the Caniglia's house and spoke to Plaintiff on his back porch. (SUF 66-69). Plaintiff was calm, cooperative, and "normal." (SUF 70, 80). He as not abrasive, aggressive, or suicidal. (SUF 70-72, 81). Plaintiff did not meet the risk criteria for suicide. (SUF 79).

Nonetheless, Defendants insisted on seizing Plaintiff's firearms. (SUF 83). Mr. Caniglia objected to the seizure. (SUF 84). Defendants told Mr. Caniglia that if he agreed to a psychiatric evaluation his handguns would not be seized. (SUF 85). That was the only reason he agreed to the evaluation. (SUF 85). After Mr. Caniglia left in the Cranston Rescue, Defendants told Mrs. Caniglia that he had agreed to the seizure of the firearms. (SUF 113).

Here, the relevant law is settled. Defendants cannot seize a person or his property from the person's home without a court order, unless there are exigent circumstances. There were no exigent circumstances. Mr. Caniglia was not at acute or imminent risk of suicide. Defendants

did not consult with a medical professional nor did they get a court order. Defendants' assertion of qualified immunity is not based on any genuine, reasonable confusion as to the applicable law. Rather, it is an attempt to use qualified immunity to shield themselves from liability for their abuses of their power. The Court should not countenance this.

Further, Defendants are also not entitled to qualified immunity if they have insurance coverage for Plaintiff's claims against them. Richardson v. McKnight, 521 U.S. 399 (1997). In Richardson, the Supreme Court said that employees of a private prison which had a contract to house state prisoners did not have qualified immunity. The defendants argued they were entitled to qualified immunity because they were performing a state function, i.e. operating a prison for prisoners convicted of violating state criminal statutes. Among various reasons the Court provided for denying qualified immunity to those defendants was they had insurance to cover their individual liability. "The insurance increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face." Id. at 411. Here, if Defendants are insured, they have no need for qualified immunity.

Moreover, the doctrine itself has come under increasing criticism in recent years. See, e.g., Ziglar v. Abbasi, 137 S.Ct. 1843, 1869 (2017) (Thomas, J., concurring, but urging the Supreme Court to reconsider its qualified immunity jurisprudence in the appropriate case); Joanna Schwartz, "The Case Against Qualified Immunity," 93 Notre Dame L. Rev. 1797 (2018); William Baude, "Is Qualified Immunity Unlawful?," 106 Cal. L. Rev. 45 (2018). As argued by Defendants, and others, qualified immunity is essentially the same as the "one-bite" rule for dog owners,[10] i.e., so long as the owner is not specifically aware of his dog's dangerous propensities,

[10] See, DuBois v. Quilitzch, 21 A.3d 375, 381 (R.I. 2011).

he is not liable for its first bite. Defendants argue that until there is a case on point stating that what they did was illegal, they can do it. However, we should expect a higher standard of behavior for our government officials than we expect of pit bulls. There is abundant law, both statutory and judicial, indicating that Defendants' actions were unlawful. Plaintiff submits that the Rhode Island Supreme Court would not apply qualified immunity in these circumstances.

VIII. DEFENDANTS CONVERTED PLAINTIFF'S FIREARMS

Plaintiff argued in his motion for partial summary judgment that Defendants had converted his firearms. (Plaintiff's MSJ Memorandum, pp. 32-33). Plaintiff incorporates those arguments here by reference.

Defendants cite Terrien v. Joseph, 73 R.I. 112, 53 A.2d 923 (1947), but that case actually supports Plaintiff's claim because the defendant was found liable for conversion. The decision does distinguish between when a person rightfully acquires possession of another person's property and when his initial possession is not rightful. In the former circumstance, the owner must make a demand for the return of the property as a prerequisite for a conversion action; in the latter, he does not. Here, for reasons previously argued, Defendants' seizure of Plaintiff's firearms was not rightful. Accordingly, no demand was necessary. Nonetheless, Plaintiff made multiple demands for the return of his firearms. (SUF 122-123, 125-126).

The individual Defendants also claim that they are not liable for conversion where their seizure of the firearms was not for their personal benefit. However, Rhode Island law does not require that seizure be for the defendant's personal benefit. Rather, Defendants are liable if they exercised dominion over the property inconsistent with Plaintiff's rights. Narragansett Electric Co. v. Carbone, 898 A.2d 87, 97 (R.I. 2006); Case v. Bogosian, KC-1992-0763, 1996 WL

936944 at *7 (R.I.Super. June 14, 1996) (Gibney, J.) (holding that the Town of West Greenwich could be liable for conversion of plaintiff's automobile). They certainly did that.

Plaintiff cites a federal case based on Tennessee law for the proposition that an individual police officer is not liable for conversion if he does not personally benefit from the seizure. Holzemer v. City of Memphis, No. 06-2436, 2008 WL 8954888 (Dec. 31, 2008). However, Plaintiff relies on Rhode Island law as well as the cases cited in his summary judgment motion applying Massachusetts law and finding police officers liable for conversion in analogous circumstances. (Plaintiff's Memorandum, p. 32).

IX. DEFENDANTS ARE NOT ENTITLED TO STATE LAW IMMUNITY

Plaintiff argued in his motions for partial summary judgment that Defendants were not entitled to other "statutory and common law immunity" under state law. (Plaintiff's MSJ Memorandum, pp. 45-49). Plaintiff incorporates those arguments here by reference.

In addition, Plaintiff also notes that the Rhode Island Supreme Court has never expressly adopted and applied the doctrine of qualified immunity. Rather, it has discussed the doctrine, but it has never held that a defendant who had violated a person's constitutional rights was entitled to qualified immunity because the rights were not clearly established. See, e.g. Fabrizio v. City of Providence, 104 A.3d 1289, 1293 (R.I. 2014) (stating there was no need to consider qualified immunity where there was no constitutional violation); Monahan v. Girouard, 911 A.3d 666, 673-74 (R.I. 2006) (same); Ensey v. Culhane, 727 A.3d 687, 690-91 (R.I. 1999) (Weisberger, J.) ("In light of the pleadings in this case, however, we need not reach the issue of qualified immunity."); Pontbriand v. Sundlun, 699 A.2d 856, 867 (R.I. 1997) ("However, as the issue [of qualified immunity] was neither extensively briefed nor reached by the trial justice below, we are of the opinion that the determination regarding whether qualified immunity exists should be left

for determination upon remand."); Salisbury v. Stone, 518 A.2d 1355, 1361, n.6 (R.I. 1986) ("Our finding that Salisbury failed to state a claim for relief under the Civil Rights Act disposes of any need to consider whether Stone, as a state official with discretionary authority, possesses, under the circumstances, qualified immunity from a civil rights suit.").

Defendants defend their actions based on the community caretaking function ("CCF") but acknowledge that none of their GOs authorize their actions under the CCF. (SUF 10, 17-19). The only court decisions respecting the CCF of which they are aware involve motor vehicles. (SUF 39-40). Defendants violated their own GOs (SUF 17), and training. (SUF 36-38, 79, 136). Indeed, Defendants have vague, inconsistent ideas of what the CCF is. (SUF 3-6, 50-51). Sgt. Barth, who made the decision to send Mr. Caniglia for the psychiatric evaluation, (SUF 147, 158), learned about the CCF from Wikipedia in preparation for his deposition. (SUF 148-49). Accordingly, any application of the CCF to Defendants' actions would be outside their own training. It would constitute an *ex post facto* justification.

Moreover, the Rhode Island Supreme Court would not adopt qualified immunity to apply to Defendants' violations of the RIFA and the RIMHL. Those Acts have specific immunities already. See, R.I.Gen.L. §§ 11-47-9, 11-47-9.1 and §§ 40.1-5-40.2, 40.1-5-41, respectively. The Rhode Island Supreme Court would not expand by judicial fiat the limited immunities the General Assembly has already provided. See, In re Proposed Town of New Shoreham Project, 25 A3d 482, 511 (R.I. 2011) ("'It is not the function of this [C]ourt to rewrite or to amend statutes enacted by the General Assembly.'") Thus, the Rhode Island Supreme Court would not apply the doctrine of qualified immunity in this case.

Plaintiff previously argued in his summary judgment motion that the public duty doctrine does not apply here because Plaintiff alleges intentional torts. (Plaintiff's Memorandum, pp. 48-

49). Plaintiff incorporates those arguments by reference. In addition, the Defendants alleged in their pleadings that the individual Defendants were not acting pursuant to CPD custom and practice. (See, Plainitff's Second Amended Complaint, ¶¶ 45 and 55, and Defendants' denials in their answers). If true, then the individual Defendants cannot claim any sovereign immunity protection. Feeney v. Napolitano, 825 A.2d 1, 4-5 (R.I. 2003).

X. PLAINTIFF'S CLAIM FOR INJUNCTIVE RELIEF IS NOT SPECULATIVE

Plaintiff may seek injunctive relief where he is subject to a credible threat of enforcement by Defendants. Susan B. Anthony List v. Driehus, 134 S.Ct. 2334, 2395 (2014); Virginia v. American Booksellers Ass'n, 484 U.S. 383, 392 (1988); Jamal v. Kane, 96 F.Suup.2d 447, 454-57 (M.D.Penn. 2015), citing Antonin Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers," 17 Suffolk U.L.Rev. 881, 984 (1983) ("Thus, when an individual who is the very subject of a law's requirement or prohibition seeks to challenge it, he always has standing."); New Progressive Party (Partido Neuvo Progressista) v. Hernandez Colon, 779 F.Supp. 646, 651-52 (D.P.R. 1991).

Here, Defendants have already seized Plaintiff, required him to have a psychological evaluation, and seized his firearms, all without court orders. (SUF 85-87, 111-116). Defendants continue to seize other people's firearms and to require other people to have psychological evaluations. (SUF 3, 95, 144-146). Defendants have not promised that they will cease these practices. Obviously, Plaintiff remains at risk that Defendants will again seize him and his firearms without court orders and other constitutional protections. Accordingly, he has standing and his claim for injunctive relief is not speculative.

Moreover, the deprivation of constitutional rights, even for a short time, is an irreparable injury. Providence Firefighters Local 799 v. City of Providence, 26 F.Supp.2d 350, 355 (D.R.I.

1998) (Lagueux, J.) (holding that firefighters had standing to challenge City order that barred firefighters from commenting on fire department "matters" because "the deprivation of constitutionally-protected rights for even minimal amounts of time constitutes not only injury, but irreparable injury.").

CONCLUSION

For the reasons set forth here, or incorporated herein by reference, the Court should deny Defendants' motion for summary judgment.

EDWARD CANIGLIA
By his attorneys,

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CERTIFICATION

I hereby certify that on January 30, 2019, a copy of the foregoing was filed and served electronically on all registered CM/ECF users through the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/ Thomas W. Lyons