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, THE CITY OF CRANSTON, COL. MICHAEL J. WINQUIST, in his individual and in his official capacity as Chief of the CRANSTON POLICE DEPARTMENT, CAPT. RUSSELL HENRY, JR., in his individual and in his official capacity as an officer of the CRANSTON POLICE DEPARTMENT; MAJOR ROBERT QUIRK, in his individual capacity and in his official capacity as an officer of the CRANSTON POLICE DEPARTMENT, SGT. BRANDON BARTH, in his individual capacity and in his official capacity as an officer of the CRANSTON POLICE DEPARTMEN, OFFICER JOHN MASTRATI, in his individual capacity and in his official capacity as an officer of the CRANSTON POLICE DEPARTMENT, OFFICER WAYNE RUSSELL, in his individual capacity and in his official capacity as an officer of the CRANSTON POLICE DEPARTMENT, OFFICER AUSTIN SMITH, in his individual capacity and in his official capacity as an officer of the CRANSTON POLICE DEPARTMENT, and JOHN And JANE DOES NOS 1-10, in their individual capacities and their official capacities as officers of the CRANSTON POLICE DEPARTMENT,
Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENT TO HIS MOTION FOR SUMMARY JUDGMENT RESPECTING POST-SEIZURE DUE PROCESS

Pursuant to the Court's text order on January 29, 2019, and Plaintiff's supplemental memorandum in support of his argument concerning post-seizure due process, Defendants hereby submit their response to Plaintiff's memorandum.[1]

I. Summary of Pertinent Facts

On August 20, 2015, Plaintiff and his wife, Kim Caniglia ("Mrs. Caniglia"), had an argument over a coffee mug at their residence in Cranston, Rhode Island. Defendants' Statement of Undisputed Facts ("SUF") at 1. During the argument, Mrs. Caniglia asked Plaintiff "what's wrong? Why aren't you happy? I can't make you happy, you have to do that yourself. And that's when [Plaintiff] walked into the bedroom . . . [and] came out with a gun, threw it on the table, and said why don't you just shoot me and put me out of my misery." Id. at 3 (emphasis added).

Mrs. Caniglia thought Plaintiff's behavior was "shocking." Id. at 6. Shortly after she informed Plaintiff that she was going to contact 911, Plaintiff left the residence. Id. at 7. Mrs. Caniglia, however, did not contact 911. Id. After Plaintiff left the residence, Mrs. Caniglia put the gun "between the mattress and the box spring" in their bedroom. Id. at 8. At her deposition, Mrs. Caniglia testified that it was at this point she discovered that the magazine was not in the gun. Id. at 9. She testified that she took the magazine "out from underneath the bed and . . . hid it in a drawer" in the bedroom. Id. at 9. In an affidavit executed before her deposition, however, Mrs. Caniglia averred that, during the argument, Plaintiff brought an unloaded gun *and a magazine* to her and implored her to "shoot me now and get it over with." Id. at 10.

[1] As a result of the confusion concerning the motion for summary judgment on the due process claim, Defendants now also cross move for summary judgment on the claim.

Mrs. Caniglia hid the gun and the magazine because she was worried about Plaintiff's "state of mind." Id. at 11. Plaintiff was "depressed," and Mrs. Caniglia was afraid that Plaintiff "was going to do something with the gun and the magazine" and "hurt himself" or "take[] his own life." Id. at 12. When Plaintiff returned to the residence, he informed Mrs. Caniglia that the argument was "all [her] fault . . . ." Id. at 14. After that comment, Mrs. Caniglia left the residence and went to the Econo Lodge on Reservoir Avenue in Cranston. Id.

At some point the following morning, Mrs. Caniglia contacted the Cranston Police Department ("CPD") and "requested an officer to do a well call." Id. at 16. Mrs. Caniglia was "incredibly worried" that Plaintiff was going to harm himself or commit suicide. Id. at 17. During the telephone call to the CPD, Mrs. Caniglia requested an escort to her residence because she was a "little afraid" of Plaintiff. Id. at 18. Mrs. Caniglia also informed the CPD that (1) she and Plaintiff had "gotten into a verbal fight;" (2) Plaintiff took a gun and said "shoot me;" (3) Plaintiff took the gun *and magazine* and threw it on the table; (4) she spent the night in a hotel and was now in the parking lot of Scramblers Restaurant, and (5) she "hid the gun" and put the magazine in a drawer. Id.

As a result of Mrs. Caniglia's telephone call to the CPD, Cranston Police Officers John Mastrati ("Mastrati"), Austin Smith ("Smith") and Sgt. Brandon Barth ("Sgt. Barth") were dispatched to Scrambler's Restaurant. Id. at 19. At Scramblers, Mrs. Caniglia informed a CPD officer "about the gun, about the words [Plaintiff] said and what [she] did with the gun" and magazine. Id. at 20. Mrs. Caniglia informed Officer Mastrati that she had an argument with Plaintiff and that during the argument Plaintiff took out an unloaded firearm and a magazine and asked Mrs. Caniglia to use it on him. Id. at 21. Mrs. Caniglia stated that she was concerned

about Plaintiff's safety and what she would find when she returned home and told Officer Mastrati that she was worried about Plaintiff committing suicide. Id. at 22.

Officer Mastrati contacted Plaintiff by telephone from Scramblers. Plaintiff agreed to speak to Mastrati at Plaintiff's residence. Id. at 23. Upon arrival at the residence, Officer Mastrati spoke to Plaintiff outside of the house, near or about the deck/porch area of the property. Id. at 24. Plaintiff told Mastrati that he brought the gun out during the argument with Mrs. Caniglia. Id. at 26. Plaintiff "pretty much told [Mastrati] the same story that [Mrs. Caniglia] told" him. Id. at 27. Plaintiff corroborated what Mrs. Caniglia had informed Mastrati about the argument, the gun, and that Mrs. Caniglia should shoot him. Id. at 28. Plaintiff admitted to Mastrati that he and Mrs. Caniglia had had an argument over a coffee mug and he was "sick of the arguments" and he took out his unloaded handgun and told his wife to "just shoot me" because he "couldn't take it anymore." Id. at 29.

Although Plaintiff informed Mastrati that he was not suicidal, Mastrati was not convinced because a "normal person would [not] take out a gun and ask his wife to end his life . . . ." Id. at 36. Mastrati believed that Plaintiff was a danger to himself. Id. at 37. Sgt. Barth considered Plaintiff's statement to his wife to shoot him to be a suicidal statement. Id. at 38.

The CPD seized two guns and ammunition from the Caniglia residence for safekeeping. Id. at 39. In or about late August 2015, Mrs. Caniglia went to the CPD and requested the return of the guns. Docket #59, Defendants' Statement of Disputed Facts at 122-124. The CPD informed the Caniglias that the guns would not be returned unless they obtained a court order. Id. at 123. In mid-September 2015, Mr. Caniglia went to the CPD and requested the return of his guns, however he was informed that the CPD was not going to release the guns. Id. at 125. On

or about October 1, 2015, Plaintiff's attorney sent Colonel Winquist a letter requesting the return of his guns. Id. at 126. Plaintiff's guns were returned to him in late December 2015. Id. at 134.

II. Analysis

A. Plaintiff Had Adequate State Law Remedies Available to Him Thus His Post-Deprivation Due Process Claim Fails

Plaintiff alleges that Defendants violated the due process clause of the United States and Rhode Island Constitutions.[2] Generally, the right to procedural due process guarantees fair procedure. Ford v. Bender, 768 F.3d 15, 24 (1st Cir. 2014).[3] "This right assures individuals who are threatened with the deprivation of a significant liberty or property interest by the state notice and an opportunity to be heard at a meaningful time and in a meaningful manner." Id. at 24 (internal quotation marks omitted). In order to establish a procedural due process violation, Plaintiff must show that (1) he was deprived of a protected property interest, and (2) the procedures attendant to that deprivation were constitutionally inadequate. Garcia-Gonzalez v. Puig-Morales, 761 F.3d 81 (1st Cir. 2014). Plaintiff alleges that Defendants violated his procedural due process rights when Defendants refused to return the firearms to Plaintiff without a court order.

[2] Defendants acknowledge that the Court has already addressed an almost identical argument in Richer v. Parmelee ,189 F. Supp. 3d 334, 342 (D.R.I. 2016). Defendants make a similar, but not identical argument, that the defendants made in Richer. In this matter Defendants also make a timeliness (see Section II B) and a qualified immunity argument (see Section II C.).

[3] Defendants' federal due process argument would be equally dispositive of Plaintiff's claim pursuant to Article 1, Section 2 of the Rhode Island Constitution. See generally Pelland v. Rhode Island, 317 F. Supp. 2d 86 (D.R.I. 2004); Jones v. Rhode Island, 724 F. Supp. 25 (D.R.I. 1989) (since the due process clause of the Rhode Island Constitution was intended by the drafters to parallel the language of the Fourteenth Amendment, a determination of a litigant's federal due process claim is equally dispositive of his state due process claim).

In a procedural due process claim, the "unavailability of constitutionally-adequate remedies" under state law is "critically important." Rumford Pharmacy, Inc. v. City of East Providence, 970 F.2d 996, 999 (1st Cir. 1992). The constitutional deprivation under § 1983 is not complete "unless and until the State fails to provide due process." Id. Plaintiff had access to adequate state court remedies: a miscellaneous petition in Rhode Island District Court for the return of his firearm[4] or an action pursuant to R.I. Gen. Laws § 12-5-7. Since Plaintiff had adequate state law remedies available to him, his due process rights have not been violated. Rumford Pharmacy, 970 F.2d 996.

"[E]ven when the defendants are acting pursuant to established procedures, if a pre deprivation due process hearing is impossible or impractical, or the necessity of quick action exists, a post deprivation remedy may be adequate." Harris v. City of Akron, 20 F.3d 1396, 1401 (6th Cir. 1994) (emphasis added); see also Furrow v. Magnusson, No. 91-1585, 1992 U.S. App. LEXIS 15180 (1st Cir. 1992) (where deprivation was pursuant to established state procedure, post deprivation remedy could only satisfy due process if the necessity of quick action justified bypassing any pre deprivation process). Where a deprivation is caused by conduct pursuant to a government policy, and the State must act quickly, an adequate post deprivation hearing satisfies the requirements of procedural due process. Razzano v. County of Nassau, 765 F. Supp. 2d 176 (E.D.N.Y. 2011).

In Razzano, Nassau County police seized (and retained) weapons from a threatening and mentally unstable individual. Razzano, 765 F. Supp. 2d at 179-181. The plaintiff in Razzano, however, was not arrested or charged with a crime. Id. at 181. The plaintiff filed a federal court complaint challenging the seizure and retention of his weapons. Id. The thrust of the plaintiff's

[4] See Docket #60, Plaintiff's Supplemental Memorandum at 8 n.1.

complaint was that the Due Process Clause of the Fourteenth Amendment required Nassau County to provide him with a meaningful and timely post deprivation hearing for the return of his weapons. Id. at 181-82.

The Razzano court analyzed the post deprivation state law remedies available to the plaintiff for the return of his weapons pursuant to Mathews v. Eldridge, 424 U.S. 319 (1976). Generally, according to Mathews, determining what process is due requires courts to consider (1) the private interest affected by the state action; (2) the risk of erroneous deprivation through the procedures used and the value of additional safeguards, and (3) the government's interest in taking the challenged action. Razzano, 765 F. Supp at 186.

The Razzano court ultimately concluded that an individual whose weapons were seized was entitled to a prompt post deprivation hearing. Id. The Razzano court determined that a prompt due process hearing would have "significant value in preventing erroneous deprivation" by providing the owner of confiscated weapons a timely and inexpensive forum to challenge the government's retention of the weapons. Id. at 189-190. Furthermore, the court concluded that the burden of proving the state's right to hold an individual's property must be "appropriately placed on the government." Id. The court then summarized the particular requirements of the due process hearing. Id. at 190-91.

Courts do not "approach the Mathews factors in a vacuum" as due process is "malleable" and only calls for procedural protections as the particular situation demands. In re Nineteen Appeals, 982 F.2d 603 (1st Cir. 1992). Because due process is flexible, an adequate post-deprivation remedy in this matter need not meet the particular requirements of the "prompt due process" hearing outlined in Razzano, the post deprivation remedy need only be consistent with constitutionally adequate process. See generally id. Defendants submit that Plaintiff had

prompt post deprivation remedies available to him that were consistent with the requirements of constitutionally adequate process – a miscellaneous petition in state district court and/or a motion to restore pursuant to R.I. Gen. Laws § 12-5-7. See R.I. Gen. Laws § 12-5-7.

R.I. Gen. Laws § 12-5-7, titled "Disposition of seized property," provides for the return of seized property. Section 12-5-7 provides

> Disposition of seized property.
>
> (a) The property seized shall be safely kept by the officer seizing it, under the direction of the court, so long as may be necessary for the purpose of being used as evidence in any case.
>
> (b) As soon as may be thereafter, if the property is subject to forfeiture, further proceedings shall be had on the property for forfeiture as is prescribed by law in chapter 21 of this title.
>
> (c) If the property seized was stolen or otherwise unlawfully taken from the owner, or is not found to have been unlawfully used or intended for unlawful use, or is found to have been unlawfully used without the knowledge of the owner, it shall be returned to the person legally entitled to its possession.

R.I. Gen. Laws § 12-5-7 (emphasis added). Section § 12-5-7 provides that if "the property seized . . . is not found to have been unlawfully used or intended for unlawful use. . . it shall be returned to the person legally entitled to its possession." Id.; see generally Shine v. Moreau, 119 A.3d 1 (R.I. 2015) (when the language of a statute is clear and unambiguous, a court must give the words their plain and ordinary meaning).

Although Chapter 5 of Title 12 of the Rhode Island General Laws is titled "Search Warrants," Rhode Island courts have liberally applied § 12-5-7. Section 12-5-7 "relates to property which was properly seized by the police." State ex rel. Ricci v. Gottschalk, 341 A.2d 45, 46 n.1 (R.I. 1975). Rhode Island courts have applied § 12-5-7 in situations of seizures pursuant to (1) a search warrant, State v. Shore, 522 A.2d 1215 (R.I. 1987); State v. DeMasi, 447

A.2d 1139 (R.I. 1982); (2) an arrest, State v. Rushlow, 72 A.3d 868 (R.I. 2013); Gottschalk, 341 A.2d 45; State v. Evans, C.A. No. P2/91-3205A, 1995 R.I. Super. LEXIS 139 (R.I. Super. Ct. December 20, 1995); and, (3) an impoundment, Santiano v. Auto Placement Center Inc., 379 A.2d 368 (R.I. 1977). Noting the liberal application of § 12-5-7, it is clear that the procedures governing the disposition of seized property pursuant to § 12-5-7 would be available to Plaintiff. See generally Mora v. City of Gaithersburg, 462 F. Supp. 2d 675 (D. Md. 2006), modified on other grounds, 519 F.3d 216 (4th Cir. 2008) (warrantless searches validly conducted pursuant to a recognized exception to the warrant requirement essentially equate to searches conducted pursuant to a warrant).

In order to request the return of property seized by a police department in Rhode Island, an individual need only file a motion to restore property pursuant to § 12-5-7. Rushlow, 72 A.3d 868. The Rhode Island District Court has the jurisdiction to hear a motion to restore property pursuant to § 12-5-7. Shore, 522 A.2d 1215. Under § 12-5-7, the "seizure of property from an individual is prima facie evidence of that individual's entitlement to the property." Rushlow, 72 A.3d at 869 (internal quotation marks omitted) (emphasis added).

> [C]ompetent legal evidence must be presented at a hearing so that the [court] . . . may determine whether the government has any right to retain the seized property. It is the state's burden to show that the property is necessary to the success of an active criminal investigation, is going to be used as evidence in a pending criminal trial, or is subject to forfeiture. As such, it follows that the burden also falls on the state to show that the property [has been unlawfully used or intended for unlawful use] to prevent such property from being returned.

Id. at 869 (emphasis added) (internal quotation marks omitted). "[I]f the state does not present serious reasons to doubt the individual's entitlement . . . and does not produce evidence to substantiate its claim, the individual need not come forward with additional evidence of ownership." Id. (internal quotation marks omitted); see also Shore, 522 A.2d 1215 (in order for

the government to maintain possession of an individual's personal property it must show a connection between the property and criminal activity and that the property is necessary to the success of an active criminal investigation, is going to be used as evidence in a pending criminal trial, or is subject to forfeiture). If the state does not meet its burden, the property must be returned. Rushlow, 72 A.3d 868. A hearing on a motion to restore property is prompt. See Rushlow, 72 A.3d at 868 (noting that the motion to restore was filed in December 2010 and the hearing was held in January 2011).

A motion to restore seized property filed pursuant to § 12-5-7 does not present a risk of erroneous deprivation for several reasons. See generally Mathews, 424 U.S. 319. First, an individual does not need to engage an attorney to file a motion pursuant § 12-5-7; filing a motion is relatively straightforward. Second, the government has the burden of overcoming the prima facie evidence that the individual is entitled to the property. Rushlow, 72 A.3d 868. If the government does not present evidence to substantiate its claim, the property must be returned. Id.; § 12-5-7. Consequently, unless the government presents evidence to substantiate its claim; the motion is in essence a pro forma exercise by the individual for the return of the property. Third, a hearing pursuant to § 12-5-7 is timely. See Rushlow, 72 A.3d 868. The state has provided Plaintiff with a timely forum to challenge the retention of his weapons. Since there is little, if any, risk of erroneous deprivation additional safeguards are not necessary. See generally Matthews, 424 U.S. 319.

The government has a substantial public safety interest in keeping guns from individuals in a highly emotional and suicidal state of mind. See generally Mathews, 424 U.S. 319. Razzano found that the government's interest in keeping guns out of the hands of threatening or mentally unstable individuals was both critical and substantial. Razzano, 765 F. Supp. 2d at 189.

In sum, there is a private property interest involved in this matter; the risk of erroneous deprivation is insubstantial, and the government's interest is significant. In order to claim his property, Plaintiff could have filed a motion to restore property pursuant to § 12-5-7. By filing a motion, Plaintiff is presumed to be the owner of the weapons. Rushlow, 72 A.3d 868. If the state did not prove otherwise, the property would have been returned to Plaintiff. Id. Thus, this remedy may have returned the property to Plaintiff promptly. Id. A motion to restore property pursuant to Section 12-5-7 meets the constitutional requirements of an adequate post deprivation remedy in light of the timely opportunity to be heard, the state's burden, and the exigent circumstances involved in this matter.

Similar post deprivation hearings to restore seized property have been held to be consistent with the requirements of procedural due process. Pennsylvania Rule of Criminal Procedure 588 provides:

> (A) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of property on the ground that he or she is entitled to lawful possession thereof. Such motion shall be filed in the court of common pleas for the judicial district in which the property was seized.
>
> (B) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.

Pennsylvania Rule of Criminal Procedure Rule 588. Rule 588 applies in instances where property has been seized yet no criminal charges are filed. Commonwealth v. Fontanez, 739 A.2d 152 (Pa. 1999). "Courts have consistently held that Pennsylvania Rule of Criminal Procedure 588 provides an adequate post-deprivation remedy to cure an improper seizure of property." Lewis v. Heckler, Civil Action No. 11-6492, 2012 U.S. Dist. LEXIS 65673, *9 (E.D. Pa. May 10, 2012) (internal quotation marks and citation omitted); see also McKenna v.

Portman, 538 F. App'x 221, 225 (3d Cir. 2013) (unpublished) ("Pennsylvania Rule of Criminal Procedure 588 provides an adequate post-deprivation remedy when police seize property pursuant to an investigation")[5]; Ochner v. Stedman, 572 F. App'x 143 (3d Cir. 2014) (unpublished) (summarizing a state court action where a seizure pursuant to a policy was subject to a Rule 588).

> Under Pennsylvania Rule of Criminal Procedure 588(A), [a] person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of [his or her] property on the ground that he or she is entitled to lawful possession thereof. The existence of this remedy provides an aggrieved individual with the 'due process' to which he or she is constitutionally entitled. Because Rule 588(A) is generally available and may be accessed by anyone, the [d]efendants were not constitutionally required to inform [plaintiff] of its existence.

Ickes v. Grassmeyer, 30 F. Supp. 3d 375, 393 (W.D. Pa. 2014) (internal quotation marks and citation omitted) (emphasis added).

A procedural due process claim is not "actionable unless . . . no adequate post deprivation remedy is available under state law." Perez-Ruiz v. Crespo-Gullen, 25 F.3d 40, 42 (1st Cir. 1994) (internal quotation marks omitted); see also Reid v. New Hampshire, 56 F.3d 332, 341 (1st Cir. 1995) (a "procedural due process claim may not be redressed under section 1983 where an adequate state remedy exists"); see generally Rumford Pharmacy v. East Providence, 970 F.2d 996 (1st Cir. 1992). Before Plaintiff may assert an actionable due process claim he must take "advantage of the processes that are available to him . . . unless those processes are unavailable or patently inadequate." Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000). If "there is a process on the books that appears to provide due process, the plaintiff cannot skip that process

[5] The McKenna court specifically noted that the plaintiffs "received a hearing [pursuant to Penn. Rule of Criminal Procedure 588] within two months" and obtained an order directing return of the property. McKenna, 538 F. App'x at 225.

and use the federal courts as a means to get back what he wants." Id. (emphasis added); see also Acevedo-Concepcion v. Irizarry-Mendez, Civil No. 09-2133 (JAG), 2013 U.S. Dist. LEXIS 90742, *19 n.5 (D.P.R. June 25, 2013) ("plaintiff should not be able to bring a procedural due process claim without exhausting all available and adequate state remedies for that violation"). Since Plaintiff had adequate post deprivation state court remedies available to him that he did not pursue, his due process claim fails. Rumford Pharmacy, 970 F.2d 996.

B. A Four Month Post-Deprivation Delay In Returning Plaintiff's Guns Does Not Violate Due Process

Defendants submit that returning Plaintiff's guns to him with a four-month period did not violate post-deprivation due process. "The "possible length of the wrongful deprivation . . . is an important factor in assessing the impact of official action on the private interest[.] [T]he rapidity of . . . review is a significant factor in assessing the sufficiency of the entire process." Fusari v. Steniberg, 419 U.S. 379, 389 (1975). Courts have recognized that the potential length of the deprivation is significant in evaluating whether a procedure is adequate. See Panzella v. Sposato, 863 F.3d 210, 218 n.9 (2d Cir. 2017). Although there is a point at which a delay in completing a post-deprivation proceeding becomes a constitutional violation, "the significance of such a delay cannot be evaluated in a vacuum." Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 242 (1988). In determining how long a delay is justified in affording post-deprivation process (and decision) courts examine the importance of the private interest and the harm to the interest occasioned by the delay; the Government justification for the delay; and the likelihood that an interim decision may have been mistaken. Id. Although Plaintiff has a property interest in his firearm, Plaintiff acknowledges that that interest is not unbridled. While Plaintiff's interest in continued access to a *particular* firearm may be an important interest – that right may be interrupted for a variety of safety reasons. The Government has a substantial public safety

interest in keeping guns from individuals in a highly emotional and suicidal state of mind. The United States Supreme Court has held that depriving an individual of his/her interest in *continued employment,* (his/her livelihood) for 90 days did not exceed "permissible limits" and did not violate due process. Id.[6] Moreover, the public has a competing interest in ensuring that its Government does not make "hasty" decisions in returning firearms to individuals who may possess weapons contrary to law and/or pose safety risks to themselves and/or others. See generally id. at 244. Plaintiff's guns were returned to him with four months of the seizure. It is submitted in this instance that a four month delay in returning Plaintiff's firearms to him did not violate due process. See generally Mallen, 486 U.S. at 242.

C. Defendants Are Entitled To Qualified Immunity

The individual officers are entitled to qualified immunity. It is submitted that the four month delay in returning Plaintiff's firearms did not violate clearly established law. See Rhein v. Coffman, 118 F. Supp. 3d 1093 (N.D. Ill. 2015), aff'd on other grounds, 825 F.3d 823 (7th Cir. 2016). In Rhein, the plaintiff alleged that an officer of the Illinois State Police violated his rights to due process by failing to provide him with adequate process after revoking his State Firearm Owner's Identification Card. Rhein, 118 F. Supp. 3d at 1096.[7] In analyzing the qualified immunity argument based on the post-deprivation process argument, the court concentrated on the "clearly established prong" and noted that the issue turned on "whether a reasonable officer . . . would have known that his role in delaying [plaintff's] post-deprivation hearing [six months] violated due process." Id. at 1103 (emphasis added). The Court noted that the Mallen multi-

[6] A near two month "delay in providing a hearing after the revocation of a gun dealer license necessary to the individual's livelihood would violation due process, [however] the same could not be said of a six-month or ten-month delay in processing an application to restore" an individual's state firearm owner's identification card. Rhein v. Coffman, 118 F. Supp. 3d, 1093, 1105-06 (N.D. Ill. 2015), aff'd on other grounds, 825 F.3d 823 (7th Cir. 2016).

[7] Illinois state law permitted revocation of the card of an individual "whose mental condition is of such a nature that it poses a clear and present danger to [the individual], [or] any other person or persons in the community." Rhein, 118 F. Supp. 3d at 1098 (internal quotation marks omitted).

factor standard "which necessarily involves the balancing of various considerations" did not clearly establish that a six month delay fell below the "constitutional line." Id. at 1104. Qualified "immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required." Id. (internal quotation marks omitted). It is submitted that the "determination of the constitutionality of a delay is a fact-intensive analysis based on the [Mallen] factors and that [t]here is not precedent sufficiently on point with this case that could have put Defendants on notice that the delay was unconstitutional." Id. (internal quotation marks omitted). While the Seventh Circuit did not specifically address whether it was clearly established that the six month delay violated due process, the Court noted that the United States Supreme Court has observed that many details about how to implement the Second Amendment "need to be worked out" and among those details are the "timing of hearings on requests for the restoration of firearms." Rhein, 825 F.3d at 826.

III. Conclusion

Defendants did not violate Plaintiff's rights to post-seizure due process.

Defendants,
By their attorneys,

/s/ Marc DeSisto

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CERTIFICATION OF SERVICE

I hereby certify that the within document has been electronically filed with the Court on this 6th day of February, 2019, and is available for viewing and downloading from the ECF system.

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