

**United States Court of Appeals
For the First Circuit**

No. 19-1764

EDWARD A. CANIGLIA
Plaintiff – Appellant

v.

ROBERT F. STROM, as the Finance Director of the City of Cranston; **CITY OF CRANSTON**; **COLONEL MICHAEL J. WINQUIST**, in his official capacity as Chief of the Cranston Police Department; **RUSSELL C. HENRY, JR.**, individually and in his official capacity as an Officer of the Cranston Police Department; **ROBERT QUIRK**, individually and in his official capacity as an officer of the Cranston Police Department; **BRANDON BARTH**, individually and in his official capacity as an officer of the Cranston Police Department; **JOHN MASTRATI**, individually and in his official capacity as an officer of the Cranston Police Department; **WAYNE RUSSELL**, individually and in his official capacity as an officer of the Cranston Police Department; **AUSTIN SMITH**, individually and in his official capacity as an officer of the Cranston Police Department

Defendants – Appellees

REPLY BRIEF OF APPELLANT EDWARD CANIGLIA
ON APPEAL FROM THE DECISION AND FINAL JUDGMENT
OF THE DISTRICT OF RHODE ISLAND

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ARGUMENT

I. DEFENDANTS' ARGUMENTS RELY ON CLEARLY DISPUTED FACTS

Defendants' Brief relies on numerous disputed facts, especially concerning any alleged consent to the seizures and the reasonableness of their actions:

- Defendants argue that Caniglia “implored” his wife to shoot him. (Pages 2, 31). Clearly, he did not actually implore her to shoot him because he knew the gun was empty. (A257). Moreover, she learned within minutes that the gun was empty and she told the police that. (Id., A76). Accordingly, no one could reasonably have thought Caniglia actually wanted his wife to shoot him with an unloaded gun. Rather, he was just making a dramatic point during a domestic argument. It was as if he had pointed his finger at his head and said “shoot me now,” a gesture commonly made by people to express frustration.
- Defendants argue that Mrs. Caniglia “requested an escort” to her house because she was a “little afraid” of her husband. (Page 3). However, Mrs. Caniglia told the officers who responded that she was not concerned about her own well-being and Defendant Mastrati put that in the incident report. (A77). Rather, she wanted an officer to accompany her to the house because her husband had not answered her phone call and she was concerned about his well-being. (A267-68).

- Defendants state that “Mrs. Caniglia showed the CPD the location of the guns and ammunition.” (Page 6). While technically correct, she did so because they told her that Plaintiff had agreed they could seize the firearms, which was a lie. (A264).
- Defendants argue that “[a]ppellant agreed to be transported to Kent County Hospital for a medical evaluation.” (Page 6). Caniglia only agreed because Defendants said they would otherwise seize his firearms. Defendants cannot dispute this. (A259, A955).
- Defendants argue that Caniglia “admitted to asking Mrs. Caniglia to ‘shoot [him] now and get it over with.’” (Page 6). He admitted to making that dramatic statement during an argument. For the reasons set forth above, he did not actually ask his wife to shoot him and everyone knew that.
- Defendants state: “Appellant’s guns were returned to him in late December 2015.” (Page 7). However, Defendants initially told Mrs. Caniglia she could come to the Cranston Police Station to get the guns after her husband was “checked out” at the hospital (A264) and then they told the Caniglias and their lawyer that Ed Caniglia would have to get a court order to get back his guns. (A8). Defendants returned the guns only after this lawsuit was filed. (A12).

- Defendants state that Mr. Caniglia was “a depressed man who had asked his wife to end his life.” (Page 31). However, no medical professional has said Mr. Caniglia was depressed and he denied it. (A655). Defendants are not qualified to diagnose mental illness. (A322, A372, A418). They did not apply their own policies and training on mental illness. (A799-802). For the reasons set forth above, Plaintiff did not genuinely ask his wife to end his life with an unloaded handgun.
- Defendants state they “removed weapons from a suicidal individual’s home and ensured he received the proper medical attention.” (Page 35). However, no doctor has said Caniglia was suicidal. To the contrary, Kent Hospital discharged him after he was seen (A963) and Dr. Berman has opined that Caniglia was not suicidal. (A795-96). Indeed, Defendants acknowledge that Plaintiff never threatened to shoot himself. (A339, A545, A590, A731). Defendants’ own General Order states they are not qualified to diagnose mental illness. (A418). They have not offered the opinion of any medical professional that Caniglia was suicidal. Accordingly, Caniglia did not need “proper medical attention” but the ride in the Cranston Rescue and the visit to Kent Hospital still cost him about \$1000. (A269).
- Defendants argue throughout their Brief that their seizures of Caniglia and his firearms were reasonable in the circumstances. However, Plaintiff’s

expert, Dr. Lanny Berman, has opined that Defendants' actions were inappropriate. (A790-802).

Defendants address Dr. Berman's expert opinions only in a footnote. (Page 29, n. 4). Dr. Berman is a highly-qualified specialist in suicidology. (A790-91). His report states that Caniglia was neither at acute nor imminent risk of suicide on August 20 and 21, 2015. (A795-96). Caniglia's actions and statements on the evening of August 20, 2015 did not constitute suicidal communication, nor did they communicate any suicidal intent. (A798). Caniglia did not express or communicate in words or actions anything that could be construed as indicating he was at imminent risk of suicide. (A798-99). The Defendants made no independent evaluation of Caniglia's risk for suicide based on both his current mental status and associated risk factors as they were trained to observe. (A799-802). Defendants' sole reliance on Caniglia's statement and action on the night before to document any level of concern for imminent risk was inappropriate and a breach of the standards to which these officers were trained. (Id.). The CPD officers did not apply or rely upon appropriate criteria or reasonable and standard police procedures in determining Caniglia was in imminent risk of suicide or in determining that his firearms needed to be confiscated on August 21, 2015. (Id.).

Defendants offer only two, insubstantial responses to Dr. Berman's opinions. First, Defendants argue that Dr. Berman's opinions are inadmissible

hearsay because they are not embodied in an affidavit. However, Rule 56 does not require that expert opinions offered in summary judgment papers be contained in an affidavit. Rather, under the 2010 amendments, the moving party can cite to “particular parts of materials in the record, including...documents...or other materials.” F.R.Civ.P. 56(c)(1)(A). The opposing party’s objection to the material must be that it “cannot be presented in a form that would be admissible in evidence.” F.R.Civ.P. 56(c)(2).

Several courts have expressly rejected Defendants’ argument that the expert’s opinions in a report cannot be considered unless set forth in an affidavit. See Jones v. Coty, Inc., 362 F.Supp.3d 1182, 1194-95 (S.D.Ala. 2018), citing Brannon v. Finkelstein, 754 F.3d 1269, 1277 n.2 (11th Cir. 2014) (“All indications are that the opinions of experts Tackett and Charlesworth set forth in their unsworn reports can be reduced to admissible form at trial; indeed, defendants do not suggest otherwise.”); SE Property Holdings, LLC v. Center, 2016 WL 7493623, *14, n.28 (S.D.Ala. Dec. 30, 2016); Kearney Construction Co. LLC v. Travelers Casualty & Surety Co. of America, 2017 WL 2172200, 2 (M.D.Fla. Apr. 19, 2017). One treatise has said:

Materials offered to support or oppose a fact during summary judgment briefing must be capable of being offered at trial in an admissible form. (Generally, this does not mean that the materials themselves must be presented in an admissible form during the summary judgment briefing, only that an admissible form exists by which those facts may be later introduced at trial). (emphasis added).

Baicker-McKee, Janssen, Corr, Federal Civil Rules Handbook, p. 1119 (Thomson Reuters 2018), citing Celotrex v. Catrett, 477 U.S. 317, 324 (1986); Lee v. Offshore Logistical & Transp., L.L.C., 859 F.3d 353, 355 (5th Cir. 2017); and CMFG Life Ins. Co. v. RBS Sec., Inc., 799 F.3d 729, 734 n. 3 (7th Cir. 2015). The same authority notes: “[i]ndeed, the most frequently submitted support on a summary judgment motion—affidavits—will rarely (if ever) be admissible at trial in the absence of the affiant.” Id., n. 150. Generally speaking, the cases which Defendants cite apparently rely on the pre-2010 version of Rule 26 or indicate that there is an underlying reason to believe that the expert opinions may not be admissible.

Here, Caniglia produced Dr. Berman’s report to Defendants as an expert disclosure pursuant to Rule 26(a)(2). Defendants had the opportunity to depose Dr. Berman but did not do so. Caniglia intends to present Dr. Berman’s opinions at trial through live testimony. That is certainly a form that would be admissible. Defendants do not argue otherwise.

Second, Defendants argue that Dr. Berman’s opinions are irrelevant to whether they had “probable cause to seize Appellant for a mental health exam.” Defendants seem to think that probable cause is a purely subjective assessment that they can make without reference to objective criteria. That is false. State v. Beauregard, 198 A.3d 1, 16 (R.I. 2018), citing United States v. Ross, 456 U.S. 798,

808 (1982) (“[T]he probable cause determination must be based on objective facts that could authorize the issuance of a warrant and not merely the subjective good faith of the police officers.”).

That is precisely the point of Dr. Berman’s opinions, i.e., Defendants did not have probable cause because Caniglia was not suicidal and his statements and actions could not reasonably be construed as suicidal. (A795-99). Further, Dr. Berman states Defendants’ seizure of Caniglia was contrary to their own training and policies. (A799-802). Defendants agree they are not qualified to diagnose mental illness. (A322, A372, A418). Defendants offer no contrary expert opinion.¹ Moreover, it is undisputed that Caniglia did not threaten to shoot himself with the gun. (A339, A545, A590, A731). He knew the gun was unloaded. (A76, A646). His wife had no intention of shooting him and she learned the gun was unloaded. (A76). She hid the gun’s magazine. (*Id.*). Caniglia told the Defendants he was not suicidal. (A258-259). Defendants admit he was calm and cooperative when he spoke with them. (*Id.*). Defendants acted on their individual “instinct” and “experience,” (A252, A262, A277-78, A1054), not their training or written policies. In short, Defendants seized Caniglia and his guns based only on their “subjective good faith,” at most. That is not probable cause. See, Alfano v. Richer,

¹ The Rhode Island Supreme Court has said expert testimony is necessary to assess suicide. See, Almonte v. Kurl, 46 A.3d 1, 18-19 (R.I. 2012).

847 F.3d 71, 77 (1st Cir. 2018), citing Ahern v. O'Donnell, 109 F.3d 809, 817 (1st Cir. 1997).

II. DEFENDANTS IDENTIFY NO RHODE ISLAND OR FIRST CIRCUIT LAW THAT AUTHORIZES THEIR SEIZURES OF PLAINTIFF AND HIS FIREARMS FROM HIS HOME

Notably, Defendants do not cite a single Rhode Island case or a decision by this Court that authorizes their seizures of Plaintiff and his handguns from his home without a court order, without exigent circumstances, without a doctor's certifications, and without consent. Instead, Defendants seem to argue that the Fourth Amendment does not apply so strongly when seizures are not part of a criminal investigation. (Defendants' Brief, pp. 26). However, that argument is contrary to Supreme Court, First Circuit, and Rhode Island precedent. (Plaintiff's Brief, pp. 10-11).

The First Circuit and District of Rhode Island decisions that Defendants cite are easily distinguishable or support Plaintiff's claims. In Matalon v. Hynnes, 806 F.3d 627 (1st Cir. 2015), this Court rejected the application of the community caretaking function ("CCF") to a police officer's warrantless entry of plaintiff's home and rejected his qualified immunity defense. "It is common ground that a man's home is his castle and, as such, the home is shielded by the highest level of Fourth Amendment protection." Id. at 633. This decision supports Plaintiff's claims.

In McDonald v. Town of Eastham, 745 F.3d 8 (1st Cir. 2014), a neighbor saw plaintiff's door standing wide open and called the police. The police responded, announced themselves without receiving a response, and went inside to be sure nothing was wrong. They found a marijuana-growing operation and plaintiff was charged with crimes. A state court judge suppressed the evidence and the charges were dropped. Plaintiff sued, alleging violations of the Fourth Amendment. This Court held that it legally unclear whether the police officers' entry into the home was permitted under the CCF and it specifically declined to decide the issue. Id. at 15. It held the officers were entitled to qualified immunity. Id.

Here, Plaintiff was standing on his deck when Defendants arrived. (A551-52, A651). He was "calm" and "cooperative." (A553-56, A589-91). He expressly objected to the seizure of his firearms. (A259). He only agreed to go for a psychological evaluation because Defendants told them they would not seize his firearms if he did so. (Id.). His wife showed Defendants where his firearms were located (after they told her he had agreed to the seizure). (A264).

Even putting the facts in the best perspective to Defendants, there was, at most, a disagreement between Plaintiff and his wife as to his psychological condition and the presence of the firearms in the house. However, as the Supreme Court has held, one co-tenant cannot consent to a search and seizure over the

objection of another co-tenant. Georgia v. Randolph, 547 U.S. 103, 113-14 (2006) (“In sum, there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.”). Nothing in McDonald authorizes Defendants to seize Plaintiff and his firearms from his home without a court order, without his consent, without a doctor’s certification, and without any exigent circumstances. Accordingly, McDonald provides no support to Defendants.

In U.S. v. Rodriguez-Morales, 929 F.2d 780 (1st Cir. 1991), the Rhode Island State Police stopped, towed, and searched two cars involved in a dispute on Interstate 95. This decision is right in the “wheelhouse” of Cady v. Dombrowski, 413 U.S. 433 (1973) (“Cady”). Nothing in this decision supports Defendants’ actions.

In Mucci v. Town of North Providence, 815 F.Supp.2d 541 (D.R.I. 2011), the plaintiff called a community service director of counseling and said he planned to kill himself. He then cut one of his wrists. The director called the local police who went to plaintiff’s apartment. Plaintiff answered the door with a knife at his throat. The parties dispute what happened next but the police interpreted his actions as aggressive and Tasered him. They charged plaintiff with resisting arrest and assault. A Superior Court jury acquitted him. He sued for violation of his Fourth Amendment rights but the district court held that the police had probable

cause to arrest him and they had not used excessive force because they used non-deadly force. Id. at 547-48. Here, Plaintiff did not call in a suicide threat, he did not harm himself, he did not hold a weapon against himself, and he was calm and cooperative with Defendants. This case is completely different than Mucci.

In Ferreira v. City of East Providence, 568 F.Supp.2d 197 (D.R.I. 2008), a woman, well-known to police, had barricaded herself in her car with a gun, threatened to kill herself, and put the barrel of the gun into her mouth. When police rushed the car, she committed suicide. Her estate sued the police alleging inadequate training and supervision, an unlawful attempt to seize the decedent, and a wrongful failure to have seized her gun prior to these events. The district court held that defendants' actions in rushing the car were reasonable because the decedent was "armed, suicidal, mentally unstable, and potentially dangerous to everyone present, including herself, the officers and the gathering bystanders." Id. at 208. The court held that defendants were not liable for failing to seize the guns sooner because they had not taken affirmative action to increase the threat of harm. Id. at 211.

Here, Plaintiff did not threaten to kill himself and did not put a loaded handgun in his mouth. Rather, the previous night, he made a dramatic gesture with an unloaded handgun during an argument with his wife by suggesting she shoot him. The police spoke with him the next morning on his deck. Plaintiff was calm

and cooperative. He denied being suicidal. Plaintiff had no history of disturbing behavior. No medical professional has said he was suicidal or dangerous to others. This case is significantly different from Ferreira.

At oral argument below, Defendants conceded there were no exigent circumstances (A1137) and they did not assert an “emergency care” argument. (A1138). Further, Defendants cannot dispute that they coerced Plaintiff into having a psychological evaluation by threatening to seize his firearms because they say they do not remember the conversation. (A955). See Hemphill v. State Farm Mut. Auto. Ins. Co., 805 F.3d 535, 541 (5th Cir. 2015). They would have compelled him to have an evaluation regardless of whether he objected. (A958). Similarly, they tricked Mrs. Caniglia into showing them where Plaintiff’s handguns were located by telling her that Plaintiff had agreed to their seizure. (A264). Consents obtained through coercion and misrepresentation are not effective. (Plaintiff’s Brief, pp. 29-31).²

Accordingly, Defendants’ entire defense to Plaintiff’s claims under the Fourth Amendment and Art. 1, Sec. 6 of the Rhode Island Constitution rests on the CCF.

² Defendants claim that Mrs. Caniglia “consented” to the seizure of the firearms (A961-62); however, she cannot consent to the seizure of Plaintiff’s firearms over his objection. (Plaintiff’s Brief, pp. 31-34; *infra*, pp. 9-10).

III. DEFENDANTS FAIL TO SHOW HOW STATE LAW AND SOUND POLICE PROCEDURES SUPPORT THE APPLICATION OF THE COMMUNITY CARETAKING FUNCTION IN THIS CASE

Defendants ignore that the Supreme Court has said that the CCF is based on “state law and sound police procedures.” Cady, 413 U.S. at 447. Defendants make no effort to show that Rhode Island courts would permit the application of the CCF in this context other than a passing reference to dictum in State v. Cook, 440 A.2d 137 (R.I. 1982). In that case, the Rhode Island Supreme Court mentioned that police sometimes are called upon to intervene in domestic disputes as a “domestic relations counselor.” Id. at 139. However, the case actually involved an automobile, not a domestic dispute. Also, the Court never even hinted that it would condone the seizure of a person and his property from his home without a court order, without any exigency, without a doctor’s certification, and without any consent.

To the contrary, as Caniglia pointed out his Brief, the Rhode Island Supreme Court has been especially protective of a person’s right of privacy in his home, as has the General Assembly. (Plaintiff’s Brief, pp. 11-15). Defendants make little effort to distinguish that case law and those statutes. Thus, there is no basis under Rhode Island state law for the application of the CCF in these circumstances.

Moreover, Defendants make no effort to show that their seizures are justified by any objective police procedures. Here, Defendants have a manual of General

Orders (“GO”) that constitute their “complete policies and procedures.” (A391). That manual is their “bible.” (A367). Nothing in that manual authorizes Defendants’ seizures of Caniglia and his firearms from his home without a court order, without any emergency, without a doctor’s certification, or without consent. To the contrary, the GOs state that in these situations police will terminate their actions if there is resistance. (A400).

Further, Defendants’ own training indicates that Plaintiff was not suicidal and the Rhode Island Mental Health Law (“RIMHL”) applies. (A799-802, A427). Instead, Defendants acted on their individual “instinct” and “experience” (A252, A262, A277-78, A1054) and ignored the RIMHL. Dr. Berman opines that Defendants’ actions contradicted their own policies and training. (A799-802). Defendants offer no contrary expert opinion nor do they point to any objective policing standards to justify their action. Accordingly, there are no sound police procedures to justify the application of the CCF in these circumstances.

Defendants rely on apposite case law from other jurisdictions to support their argument. First, they recognize that this Court has never held that the CCF applies to seizures of a person and property from his home. (Defendants’ Brief 12). Then, they cite to cases from other parts of the country, especially Illinois and Wisconsin, to support their argument. (Defendants’ Brief, pp. 18-20). They make no effort to show that the case law or relevant statutes of those jurisdictions are

similar to Rhode Island's. For that matter, they make little effort to show that the facts of those cases are similar to this one. In short, Defendants point to no persuasive authority where any court has held the CCF justified the seizure of person and his firearms from his home in similar circumstances.

Defendants rely upon and discuss Sutterfield v. City of Milwaukee, 751 F.3d 542 (7th Cir. 2014) at length, but that decision undercuts Defendants' arguments. First, in Sutterfield, the Seventh Circuit held that its own precedent barred the application of the CCF "beyond the automobile context." Id. at 548, 561, citing United States v. Pichany, 687 F.2d 2014, 208-09 (7th Cir. 1982). Instead, the Circuit Court applied the emergency aid doctrine, which Defendants expressly did not invoke in this case. (A1138).³ Further, Defendants conceded at oral argument below that there were no exigent circumstances here. (A1137).

Moreover, the facts of Sutterfield were quite different. There, plaintiff's psychologist called the police and reported that plaintiff had just left her office after expressing suicidal thoughts. Specifically, plaintiff had said "I guess I'll go home and blow my brains out." Also, plaintiff had worn an empty gun holster to the appointment. Although the psychologist subsequently spoke with plaintiff

³ In any event, there was no basis to invoke the emergency aid doctrine in this situation. See U.S. v. Timman, 741 F.3d 1170 (11th Cir. 2013); U.S. v. Calhoun, 2017 WL 1078634 (D.Conn. Mar. 21, 2017).

again and communicated with police again, the psychologist never told police that plaintiff was not suicidal.

The police prepared a Statement of Emergency Detention by Law Enforcement Officer pursuant to a Wisconsin statute. This statute permits a police officer to take a person into custody when the officer has cause to believe the person is mentally ill and evidences a “substantial probability of physical harm to himself or herself as manifested by recent threats of at attempts at suicide or serious bodily harm.” Wisconsin Statutes §51.15(1)(a)(1). The statute requires the officer to follow a specific set of procedures including signing a statement of detention that “provide[s] detailed specific information” respecting recent events that support the officer’s belief. It is a felony if the officer signs the statement knowing it contains false information. Wisconsin Statutes, §51.15(12). The police then seized plaintiff from her home and seized a handgun from a closed CD case.

None of these facts or procedures are present here. No psychologist or other medical professional informed the police that Caniglia was suicidal. Caniglia never threatened to “blow [his] brains out.” To the contrary, it is undisputed that Caniglia was not suicidal. (A795-96). Defendants never attempted to comply with the RIMHL. To the contrary, they expressly disclaim any attempt to do so. (Defendants’ Brief p. 47). Accordingly, Sutterfield undercuts Defendants’ argument that their seizure of Caniglia was lawful.

Further, Sutterfield also refutes Defendants’ argument that their seizure of Caniglia’s handguns was lawful. The Seventh Circuit found that Wisconsin law would not support “a top-to-bottom search of the home” in these circumstances and it assumed the seizure of the handgun was otherwise unlawful. Id. at 568. Nonetheless, the Seventh Circuit upheld the seizure of the gun where a psychologist might have determined plaintiff was suicidal and police knew plaintiff had a son but did not know where he was. Id. at 570.

Here, there is no evidence that any psychologist might have found Plaintiff suicidal. There were no children in the home and Mrs. Caniglia had hidden the magazine. While Mrs. Caniglia showed Defendants where Ed’s handguns were located, she did so only after Defendants falsely represented that Ed had agreed to the seizure of his guns. (A264). Otherwise, Defendants would have had to conduct a “a top-to-bottom search” of the Caniglias’ home to locate them. Moreover, the Rhode Island Supreme Court has expressly rejected these kinds of arguments to justify the seizure of firearms without a court order. (Plaintiff’s Brief, pp. 13-14). Defendants make no effort to distinguish these controlling decisions.

The D.C. Circuit has rejected the application of the CCF in similar circumstances. Corrigan v. District of Columbia, 841 F.3d 1022, 1034-35 (D.C. Cir. 2016). In that case, plaintiff was a veteran who was being treated for post-traumatic stress disorder (“PTSD”). He accidentally dialed the National Suicide

Hotline when he meant to dial a Veterans Crisis Hotline. He had a conversation with a suicide hotline volunteer during which he said he was a veteran with PTSD and, in response to the volunteer's questions, he said he owned guns. He denied wanting to hurt himself or others. He hung up the phone and went to sleep. The suicide hotline volunteer called the D.C. Metropolitan Police Department who sent their Emergency Response Team ("ERT") to plaintiff's home.

After a telephone conversation with a police negotiator, plaintiff left his home and locked his door. The police took him to a Veterans Hospital where he admitted himself for PTSD symptoms triggered by the night's events. However, he refused to give the police consent to search his house.

Nonetheless, the police did an initial search of the house because they were unsure if plaintiff's girlfriend was present and a gas leak had been reported. They said that their standard protocol was that when the ERT was called to a scene "it goes in 99.9 percent of the time" because they assume there may be additional persons in the home. The ERT found no other persons in the home and saw no dangerous or illegal items in plain view.

Later, defendants did a second "top-to-bottom" warrantless search during which they found an assault rifle, two handguns, ammunition, and other items. Plaintiff was charged with possession of an unregistered firearm and unlawful possession of ammunition. A D.C. Superior Court judge granted plaintiff's motion

to suppress evidence of the firearms and ammunition. The District government dismissed the charges.

Plaintiff sued alleging the seizures of his firearms and ammunition violated his Fourth Amendment rights. The district court granted defendants' motion for summary judgment based on the CCF and qualified immunity. The D.C. Circuit assumed, without deciding, that the CCF applied to the home. Id. at 1034. It said that while the CCF may have justified the first search of plaintiff's home to determine whether anyone else was in the house and to see if there was a gas leak, it did not justify the second search that resulted in seizure of plaintiff's firearms. It commented that in the cases where the CCF justified a warrantless search of a home, the police officers were presented with circumstances requiring immediate action and the ensuing searches were "characterized by brevity and circumspection." Id. at 1034. The Circuit Court noted that plaintiff was in police custody and they had secured his home. They had ample opportunity to get a court order to search the home but did not. The Court held the second search violated plaintiff's Fourth Amendment rights. Id. at 1035.

Similarly, here, Defendants acknowledge they took Plaintiff into custody for an involuntary psychiatric evaluation. (A1054). They then tricked his wife into showing them where his guns were hidden by telling her he had agreed to the seizure. (A264). Without this deception, Defendants would have had to conduct a

“top-to-bottom” search to find the guns. They had ample opportunity to apply for a court order but did not attempt to do so. Corrigan demonstrates that Defendants violated Plaintiff’s rights under the Fourth Amendment and Art. 1, Sec. 6 of the Rhode Island Constitution.

IV. DEFENDANTS VIOLATED THE RHODE ISLAND MENTAL HEALTH LAW

Defendants admit they made no effort to comply with the RIMHL. Defendants initially argue that there were grounds to seek Plaintiff’s psychological evaluation. (Defendants’ Brief, p. 46). That is, at most, a disputed fact, based on Dr. Berman’s report. (A790-802).

Then, they essentially argue that that the RIMHL does not apply because they made no effort to comply with it. (Defendants’ Brief, p. 47). However, that argument flies in the face of the clear intent of the statute to prevent people from being hospitalized without their consent and without due process. Section 40.1-5-5; In re Doe, 440 A.2d 712, 714 (R.I. 1982). In Doe, Justice Weisberger wrote: “The Rhode Island Mental Health Law was carefully crafted in order to guarantee that the liberty of an individual patient would be scrupulously protected and that this liberty would be impaired only in the event of findings of stringent necessity...” Id. at 714. Here, Plaintiff was not actually suicidal. (A790-802). Defendants’ actions violated their own policies and training. (Id.). Defendants did everything they possibly could to violate the RIMHL. The fact that Caniglia was

not admitted to Kent Hospital does not make their actions less of a violation.
(Plaintiff's Brief, pp. 36-38).

Defendants then argue they could certify Plaintiff for a psychological evaluation because "a physician was not available on scene." (emphasis added). (Defendants' Brief, p. 48). Clearly, that is not what the General Assembly meant by "available" as it knew full well that police officers do not routinely travel with physicians to certify psychological evaluations. Defendants' interpretation of "available" defies a reasonable understanding of the word. For example, Webster's says the second definition of "available" is "that can be got, had, or reached; handy, accessible." Webster's New Twentieth Century Dictionary of the English Language, 2nd Edition, p. 12, (World Pub. Co. 1968). Plainly, Defendants could have reached a physician on a Friday morning at 11 a.m. (A74).

In any event, the RIMHL requires the police to make their certification in writing, R.I.Gen.L. §40.1-5-7(a), and it is undisputed that Defendants did not do so. The evident purpose of requiring a written certification is to ensure the police reasonably believe that the person is "in need of immediate care and treatment" and that his "continued unsupervised presence in the community would create an imminent likelihood of serious harm by reason of mental disability." R.I.Gen.L. §40.1-5-7(a). Defendants cannot evade their liability under the RIMHL by completely ignoring its requirements.

This case stands in stark contrast to Sutterfield upon which Defendants purport to rely. There, pursuant to a similar Wisconsin statute, the police executed a written “Statement of Emergency Detention by Law Enforcement Officer” before seizing the plaintiff. The Seventh Circuit said the defendants’ compliance with the statute was a factor in finding they had qualified immunity. 751 F.3d at 576.

Here, Defendants made no attempt to comply with any of the provisions of the RIMHL. They required Plaintiff to have a psychological evaluation without a written certification. It cost Plaintiff about \$1000. They violated the RIMHL and Plaintiff suffered damages. Because violations of the RIMHL are criminal acts, R.I.Gen.L. §40.1-5-38, and Rhode Island provides for civil recoveries for criminal acts, R.I.Gen.L. §9-1-2, Plaintiff has a cause of action for violation of the RIMHL. In re Doe, 440 A.2d at 716. (Plaintiff’s Brief, pp. 44-46).

V. DEFENDANTS VIOLATED CANIGLIA’S RIGHT TO KEEP FIREARMS UNDER THE RHODE ISLAND CONSTITUTION, THE SECOND AMENDMENT, AND THE RHODE ISLAND FIREARMS ACT

Defendants argue, based on the district court’s holding, that they did not violate Plaintiff’s rights to keep arms because, variously, the Second Amendment and Art. 1, Sec. 22 of the Rhode Island Constitution do not provide a right to possess a specific firearm, and they did not violate the Rhode Island Firearms Act (“RIFA”) because they returned Plaintiff’s firearms after he filed suit to get them

back. (Defendants' Brief, pp. 38). Plaintiff has already argued that the first part of the holding is constitutionally wrong. (Plaintiff's Brief, pp. 43-44).

Plaintiff submits the second part is legally unsupportable. The district court essentially held that there is no damages remedy for a violation of the RIFA, only an equitable one. Caniglia v. Strom, 2019 WL 2358965 at *9 (D.R.I. June 4, 2019). The district court cited only its decision in a companion case for this holding, Richer v. Parmelee, 189 F. Supp. 3d 334, 343 (D.R.I. 2016). To the contrary, Rhode Island clearly provides a damages remedy for violation of criminal statutes even if the perpetrator is not charged. R.I. Const., Art. 1, Secs. 5, 23; R.I.Gen.L. §9-1-2. Violation of the RIFA is a crime. R.I.Gen.L §11-47-26. Defendants violated Plaintiff's right to possess firearms in his home by seizing them without just cause. (Plaintiff's Brief, pp. 39-44). Nothing in the RIFA excludes a damages remedy.

Rhode Island courts have affirmed awards of compensatory damages under §9-1-2. See Cady v. IMC Mortgage Co., 862 A.2d 202 (R.I. 2004); Ludwig v. Kowal, 419 A.2d 297 (R.I. 1980); Baris v. Steinlage, C.A. 99-1302, 2003 WL 23195568 (R.I.Super. Dec. 12, 2003). There is no reason to believe that Rhode Island courts would create a judicial exception for the RIFA. Kenyon v. United Electric Rys. Co., 51 R.I. 90, 94, 151 A. 5, 8 (1930) ("As a general rule, courts are without power to read into statutes exceptions that have not been named therein,

however reasonable they may seem.”). Defendants provide no reason to believe that Rhode Island courts would create an exception to §9-1-2 here.

VI. THE CITY OF CRANSTON IS LIABLE UNDER SECTION 1983 AND RHODE ISLAND STATUTES

Because the CCF does not apply and the City of Cranston cannot get qualified immunity, Owen v. City of Independence, Missouri, 455 U.S. 622, 657 (1980), it is liable under Section 1983 for violation of Caniglia’s rights under the Fourth Amendment and Art. 1, Sec. 6 of the Rhode Island Constitution. Rhode Island law provides for civil liability of persons who violate criminal statutes. R.I.Gen.L. § 9-1-2.

With respect to violations of the RIFA and the RIMHL, the City of Cranston argues that it cannot be a criminal offender, as a matter of law. 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) (“Green”). 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 argues that City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 261 (1981), holds that “[m]unicipal corporations can not...do a criminal act or a willful and malicious wrong.” 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 Green, supra. Further, 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).

Moreover, 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, Cranston can be an offender.

VII. QUALIFIED IMMUNITY DOES NOT APPLY BECAUSE THE COMMUNITY CARETAKING FUNCTION DOES NOT APPLY

Defendants are not entitled to qualified immunity where they violated Rhode Island statutes, Rhode Island Supreme Court decisions, and their own policies and training, which also constitute clearly established law. (Plaintiff’s Brief, p. 47). Qualified immunity is an affirmative defense on which Defendants have the burden of proof. (Plaintiff’s Brief, p. 19, n.5). Defendants point to no significant ambiguities in the applicable law that might excuse their seizures of Plaintiff and his firearms from his home without a court order, without exigent circumstances, without an appropriate written certification, and without consent.

Defendants’ reliance on Sutterfield to support their qualified immunity argument is misplaced. As an initial matter, Sutterfield recognizes the importance of local state law in determining whether a police officer could have considered his actions lawful. Id. at 573. The Seventh Circuit noted that Wisconsin state courts have expressly relied on the community caretaking doctrine to justify warrantless

entries into homes when the police have reason to believe the occupant may be injured or in danger. Id. at 573-74. Here, Defendants studiously avoid Rhode Island law and instead, rely on Wisconsin decisions. (Even so, Caniglia was neither injured nor in danger). However, this Court has previously indicated that not all precedent is considered equal in a qualified immunity analysis. El Dia, Inc. v. Governor Rossello, 165 F.3d 106, 110 n.3 (1st Cir. 1999). Defendants make no attempt to explain why their far-flung authority should be more persuasive than decisions by the Rhode Island Supreme Court or this Court.

In any event, the Sutterfield court said that the defendants could have reasonably believed, based on the Wisconsin state court decisions, that their seizure of the plaintiff was justified by the CCF. Further, they had prepared a Statement of Emergency Detention pursuant to the Wisconsin statute. Here, Defendants do not and cannot cite to any Rhode Island decision that supports their actions. To the contrary, Rhode Island Supreme Court decisions and Rhode Island statutes show Defendants' actions were not authorized. Defendants expressly disclaim any attempt to comply with the RIMHL. Their own policies and training indicated their actions were unjustified. (A799-802). Instead, Defendants resort to distant state court decisions to justify their actions. That is not the kind of ambiguity that would support qualified immunity under the law of this circuit.

Moreover, it is unlikely that the Rhode Island Supreme Court would hold that the CCF or even qualified immunity applies in these circumstances to the state law claims. (Plaintiff's Brief, pp. 23-24, 50-54). It has never so held or even hinted. Here, without the CCF, there can be no qualified immunity.

CONCLUSION

For these reasons, the Court should reverse the denial of Plaintiff's summary judgment motion and should also reverse the grant of summary judgment for Defendants, vacate the final judgment, except with respect to due process, and remand the case for further proceedings.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed.R.App. P. 32(f), this brief contains 6,485 words.
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/s/ Thomas W. Lyons

Attorney for Appellant Edward Caniglia
Dated: November 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2019, I filed and served this pleading electronically via Pacer in the Court's docket.

/s/ Thomas W. Lyons