



**STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC SAFETY
CONNECTICUT STATE POLICE
SPECIAL LICENSING & FIREARMS UNIT**



To: Lt. Mark Cassista #041
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Subject: Observations and Opinions of New York trips

As you are aware, Trooper Hatfield and I recently attended the NRA Civil Rights conference on Long Island and the oral arguments on the Kuck and Goldberg civil suits pending in front of the Second Circuit Court of Appeals in New York City. These events shed some light on current litigation and possible issues that the Unit may face in the future. Some steps have already been taken to address some of the issues that may be of interest to the Unit and we will continue to examine and refine our process.

At the conference, the NRA and the Second Amendment Foundation expounded on the fact that both organizations are currently involved with strategic litigation across the country and are eager to address any firearms issues quickly, before the Obama administration are able to nominate a large contingent of "anti-gun" judges to the various federal benches. In addition, both organizations are making strong efforts to mobilize their member base and are actively seeking out litigants who would be viewed sympathetically by the public, media and courts. It is very possible that the Kuck and/or Goldberg case could receive an infusion of new ideas and funding. At the very least, these two cases have been brought to the attention of both organizations. While not all cases are from the Second Circuit, and therefore not binding in Connecticut there are a few cases of interest, for example:

Palmer v. D.C. looks to establish that carrying outside the home is a fundamental right and fighting the D.C. ban for carrying. This also hits on recognizing other jurisdictions' carry permits thus creating judicial reciprocity;

Nordyke v. King (9th Cir.) addresses the ability of a state or political subdivision of a state to regulate gun possession on public property. This case is arguing the right to bear arms being a fundamental right and extending that to the states. It was decided, however the 9th Circuit decided for a rehearing en banc;

U.S. v. Arzberger (Federal case out of New York so it is in the Second Circuit) said that the Second Amendment established a constitutionally protected liberty interest that was of "paramount" importance with regard to having an opportunity to contest the seizure;

Spinelli v. City of New York is a Second Circuit decision that dealt with a gun dealer being revoked prior to an investigation. The license was reinstated after 58 days. The 58 days was found to be too long and NYC will probably end up in a settlement. The fact that it involved a pre-investigation suspension and involved the livelihood of the business owner, not the possession of a pistol permit. The fact that the determination of bearing arms becoming a fundamental right (Based on Heller and the pending cases which are attempting to incorporate the Second Amendment to the States.) could become an issue. Even barring that, we need to be cognizant of blue/gold card holders and gun dealers. We revoke after an investigation, however if it becomes an issue of a "bad" revocation that length of delay can be a factor. Another point in this case that the court focused on was the fact that a supervisor made the decision to reinstate the license and the investigator did not do the reinstatement for two weeks. The settlement will undoubtedly focus on the time the license should have been returned and the actual date of return when they seek damages. When a person is not disqualified and is not unsuitable the permit should be returned immediately;

NRA v. Chicago is awaiting determination by the U.S. Supreme Court if it will grant cert. The case looks to expand the decision of Heller to apply the Second Amendment against the States. A side note on this is that the Connecticut Constitution Article 1 Section 15 is even clearer that the Second Amendment as to the right to bear arms; and

St. John v. Alamogordo is a brand new case out of New Mexico where the officers involved in a seizure of an individual in an open carry situation that was not illegal we found not to have qualified immunity for seizing and detaining the gun owner where the statute of carrying was not violated. This case was included in a brief filed with the Second Circuit Court of Appeals in the Kuck/Goldberg arguments.

On the legislative front, the bill proposed for nationwide reciprocity fell two votes short last session and will be pushed again.

On September 17, 2009 the Second Circuit Court of Appeals, Judges Parker, Straub and Livingston, heard oral arguments in cases directly involving DPS. *A copy of the transcript of the oral arguments should be requested from the Attorney General's Office.* The arguments in Kuck and Goldberg were combined and focused largely on the length of the backlog with the plaintiffs' emphasis placed on the recent Spinelli decision. Both cases facially involve only BFPE issues. The court quickly distinguished Spinelli, except the argument was made by the plaintiffs that the backlog is purposely created by DPS by revoking without the legal grounds and reinstating prior to a hearing, thus avoiding any oversight. The claim being that by revoking such large numbers of permits without a legitimate reason creates the long delay and creates a suspension period outside review of the civilian review board or court appeals. These allegations in addition to raising substantive and due process claims imply that the revocations are being made maliciously and would possibly open up the individuals acting in that manner to Section 1983 claims. It should be noted that Judge Livingston spent nine years as a Commissioner on New York City's Civilian Complaint Review Board and appeared to take particular interest in this proposition.

In addressing the due process claims, the Court focused on the three pronged Matthews test which balances the weight of the private interest affected, the risk of an erroneous deprivation of that interest under the procedures used, and government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would involve. The government interest in public safety by regulating access to firearms by dangerous individuals is high. The weight of the individual interest may be increasing based on the above referenced cases pending. We need to focus on the procedure used, which involves the appeals process to the BFPE in addition to continuing to ensure the

revocations made are properly grounded in the law. That is where the argument posed that revocations are not being done for cause and are returned prior to hearings to avoid oversight is most compelling.

This was addressed several months ago by implementing the supervisor review of permit revocations and we have been diligently reviewing all pending revocations to ensure that all meet the proper standards. I have established what I believe are clear guidelines for "suitability" revocations. These guidelines are a work in progress, but I believe that by focusing on what a narrowly defined standard of unsuitable is will keep us on solid footings. To ensure that we stay within our bounds we need to remain cognizant of what the governmental interest is and what pistol permits allow, or conversely what a revocation deprives a person of – the ability to carry a handgun outside the home or place of business. Our state court decisions clearly state that the justification for a revocation must be stated in a reasonably precise manner showing that there is a danger to the public if the individual is allowed to carry a weapon outside the home or business. (Vigneri)

Aside from the revocations/denials made as a matter of law based on the prohibiting factors we are left to base our decisions on suitability. Factors need to relate to the purpose of the permit so considerations need to examine if the event involved a handgun and if the event occurred outside the home or place of business. Lacking one of those elements we need to decide whether the conduct was so egregious as to warrant prohibiting the individual from carrying a handgun in public. (Fellows allows us to argue that conduct in the residence may be used to infer similar conduct in public.) Events such as having a handgun stolen from a motor vehicle (which requires the felony of burglary and the felony involving the theft) absent some extenuating circumstance such as leaving the firearm visible do not rise to the level of a finding of unsuitable. It should be kept in mind that the reporting of a lost/stolen firearm, with a statute requiring police notification that specifies that failure to make such mandated notification will not result in the revocation of a pistol permit for a first violation, unless such failure was intentional does not of itself allow for the revocation of a permit. As such, it does not seem reasonable to revoke an individual for complying with the statute where failure to comply results in an infraction and no revocation, not to mention leaving law enforcement unaware of the stolen firearm. Again there needs to be some type of egregious conduct on the part of the permit holder.

In all instances we need any and all documentation available at the time of the revocation. Too many times we have had to scramble to get information as we approach hearings only to find that either there was additional information that had not been provided to SLFU or that we can no longer gain access to the needed documentation due to such variables as the erasure statutes.

On a somewhat unrelated note I revisit my concerns over Protocol compliance and our needed diligence in that area. Ensuring compliance with permit and firearm seizures based on protective/restraining orders with the requisite force component is a vital role for SLFU. Based on the volume of these cases and the workload of the revocations section timely compliance is an issue, with some disqualified persons not being followed up on for several weeks. Historically, Protocol has been assigned to other detectives within SLFU in addition to their regular duties such as professional bondsmen and bail enforcement agents. At this point all detectives in the unit have their respective plates full and I do not want to involve our ever changing cadre of TDY troopers to this task. The alternative I have chosen is to divide the revocations section into two parts, Revocations and Protocol. Protocol will consist of ensuring the timely revocation and seizure of permits/firearms in compliance with our statutory obligations as well as prompt reinstatement upon elimination of the prohibiting factor. Revocations will deal with the denials and revocations based on events which are not automatic disqualifiers. This

division should help reduce the time in which we are able to gain compliance, thus reducing the number of disqualified individuals roaming the state with permits/firearms.

TFC Mattson and TFC Musial will be responsible for Protocol as they have been handling this area and are the most familiar with it. Trooper Hatfield will assume primary duties with respect to Revocations. This makes the most sense given the fact that he will be the person responsible for the preparing and presentment of the denials/revocations to the BFPE.

We can steal a note from our friends at the ATF in looking at our mission, to fight crime and violence and at the same time not to place undue or unnecessary restrictions or burdens on law-abiding citizens with respect to the acquisition, possession or use of firearms ... and not to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes. The proper assumption should be that the citizen and his firearm are lawful unless shown to be otherwise.

Cc: TFC Barbara Mattson
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