

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

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|---------------------------------------|---|-----------------------|
| JARREN GENDREAU | : | |
| Petitioner | : | |
| | : | |
| vs. | : | Case No. SU ____ - __ |
| | : | |
| JOSUE D. CANARIO, | : | |
| In his capacity as Chief of Police of | : | |
| the Bristol Police Department | : | |
| Respondent | : | |

Petition for Certiorari from the Denial of a
Concealed Carry Permit by the Bristol Police Chief

PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

A. Introduction.

This case is not difficult. The Second Amendment to the United States Constitution and Article 1, Section 22 of the Rhode Island Constitution secure a right to carry arms for self-defense. Defendants refuse to acknowledge that carrying arms is a right, and instead, contrary to both Rhode Island and Federal law, demand that applicant prove his need to do so. There is no such thing as a “right” that can be denied unless people prove a special need to exercise it. Prior restraints on constitutionally-protected conduct cannot allow regulators unbridled discretion in choosing who may exercise the right, nor can regulators substitute their own judgment for that of the Constitution as to whether the exercise of a particular right is a good idea. Moreover, when a regulator refuses to issue a permit, basic principles of due process and fundamental fairness dictate that the decision must be rational and supported by evidence. Here the challenged provision, or at least its implementation by Bristol officials, violates these basic prior restraint and due process standards. And because the challenged practice arbitrarily classifies individuals in the exercise of a fundamental right, it also violates the Equal Protection Clause of both the Rhode Island and United States Constitutions.

B. The Regulatory Framework.

Rhode Island criminalizes the unlicensed public carry of a pistol or revolver. See R.I. Gen. Laws 1956 § 11-47-8(a) (“ . . . Every person violating the provision of this section shall, upon conviction, be punished by imprisonment for not less than one nor more than ten (10) years, or by a fine up to ten thousand dollars (\$10,000), or both . . .”) There is a two tiered licensing scheme in place to seek the requisite permit. The Attorney General, is empowered, at his discretion, under § 11-47-18 to issue pistol permits “. . . upon a proper showing of need”

In contrast to the permit available through the Attorney General, the General Laws provide in pertinent part that:

The licensing authorities of any city or town shall, upon application of any person twenty-one (21) years of age or over having a bona fide residence or place of business within the city or town, or of any person twenty-one (21) years of age or over having a bona fide residence within the United States and a license or permit to carry a pistol or revolver concealed upon his or her person issued by the authorities of any other state or subdivision of the United States, issue a license or permit to the person to carry concealed upon his or her person a pistol or revolver everywhere within this state for four (4) years from date of issue, if it appears that the applicant has good reason to fear an injury to his or her person or property or has any other proper reason for carrying a pistol or revolver, and that he or she is a suitable person to be so licensed.

§ 11-47-11(a).

In Rhode Island, firearms law is the exclusive providence of the State. The General Assembly has expressly preempted the field. See § 11-47-58 (“The control of firearms, ammunition, or their component parts regarding their ownership, possession, transportation, carrying, transfer, sale, purchase, purchase delay, licensing, registration, and taxation shall rest solely with the state, except as otherwise provided in this chapter.”)

In addition to the state statutory framework, Bristol itself has developed a policy (the “Policy”) to guide the processing of CCW applications. See Town of Bristol Weapons Carry Permit Packet, Ex. 1, Ap. 1-11. After receiving a completed application, along with a “non-refundable” payment of \$100.00¹ the Bristol Police Department conducts a background check that “may include a check of court records and other sources for pending criminal cases, restraining orders and/or discrepancies in the applicant's background, including prior history or mental illness.” *Id.* at 4. According to the Policy “[t]he Town of Bristol will not issue a pistol

¹ It is noteworthy that this fee is ultra vires and not authorized by the firearms act. See R.I. Gen Laws § 11-47-12.

permit to any applicant who is prohibited from possessing or carrying a firearm under any State of Federal Law (e.g (sic) 18 U.S. (sic) 922(g)) or pursuant to any court order.” *Id.* After the background check is done, the Chief proceeds to consider a showing of need. *Id.* “If this initial check does not disqualify the applicant from obtaining a pistol permit, the Town of Bristol shall review the application on an individual basis to determine whether there has been proper showing of need, as required by the statute, and whether the applicant is qualified.” *Id.* The Policy, in a section captioned “Proper Showing of Need” first explains the approach taken to making a determination:

In considering each individual application for a pistol permit, the Town of Bristol must determine whether or not the applicant has demonstrated a proper showing of need to carry a loaded firearm in public, and consider the individual's demonstration of skill and responsibility to safely carry and use a firearm in compliance with all State, Federal and local laws. Because a loaded, concealed firearm in untrained hands presents danger to the public and the applicant, the Town of Bristol must consider countervailing risks to the public in assessing need.

Id.

The policy then goes on to set out the “factors” considered in making the determination:

While there cannot be any set formula or criteria to limit or restrict the Town of Bristol's discretion to issue or deny a concealed weapon license, the Town will afford a hearing to each applicant before ruling on the application. The Town of Bristol considers the following factors in assessing an applicant's proper showing of need.

1. Has the applicant demonstrated a specific articulable risk to life, limb or property? If so, has the applicant demonstrated how a pistol permit will decrease the risk?
2. Can the applicant readily alter his or her conduct, or undertake reasonable measures other than carrying a firearm, to decrease the danger to life, limb or property?

3. Are there means of protection available to the applicant other than the possession of a firearm that will alleviate the risk to his or her person or property?
4. Has the applicant demonstrated the skill, training and ability to properly use a firearm in accordance with Rhode Island laws?
5. Has the applicant presented a plan to properly secure the firearm so that it does not fall into unauthorized hands?
6. How greatly will the possession of a firearm by the applicant increase the risk of harm to the applicant or to the public?
7. Has the applicant demonstrated that he or she will not use the firearm for an unlawful or improper purpose, and that he or she has not used a firearm for n (sic) unlawful or improper purpose in the past?
8. Does past unlawful, dangerous or violent conduct of the applicant justify denial of the license by the Town even if it is not sufficient to disqualify the applicant as a matter of law from possessing a firearm?
9. Has a protective order been issued relative to the applicant pursuant to chapter 15-5, chapter 15-15, or chapter 8-8.1 of the general laws?
10. Are other factors deemed lawful and appropriate by the Town to demonstrate that the applicant is or is not a person suitable to possess a firearm in public.

Id. at 4-5.

According to the policy, “[a]fter assessing the above factors, the Town shall grant or deny the concealed weapon permit, and in the case of a denial, shall state its reasons therefore in writing.”

Id. at 4-5.

C. Defendant's Application of the Challenges Provisions Against the Petitioner

The petitioner followed the process laid out in the Bristol Policy and applied for a Concealed Carry Permit in the spring of 2012. See *Application of Jarren Gendreau for a*

Concealed Carry Permit, Ex. B, Ap. 12-18. In his Application, Gendreau explained that he was seeking a permit for three reasons. First, Gendreau explained that he is a firearms collector with a collection, at the time, worth in excess of \$4,000. See *Id.* at 18. Next Gendreau explained that he was employed as a security guard and was seeking expanded employment opportunities that only a concealed weapons permit (CCW) could provide, including those in Massachusetts which would require a further application and permit as well. *Id.* Finally, Gendreau explained that he often transports large sums of money, and that he needs a CCW for personal protection and self-defense. *Id.*

In early May, the petitioner participated in an “interview”² with a board appointed by the Chief of Police to conduct the hearing called for by the Town's Policy. During the interview Gendreau was asked about his reasons for desiring a permit and reiterated those reasons contained in his letter. *Tr. of Interview*, Ex. C, Ap. 19-27, 19. Of particular focus was Gendreau’s desire to obtain a Massachusetts permit, leading to the following colloquy:

BOARD MEMBER 2: If they were to hire you in Massachusetts, for this position, that requires you to have a firearm and your a Rhode Island resident. Are they going to tell you, we're

2 It is notable as well that the “interview” was not noticed to the Secretary of State or to the applicant as a hearing on his application. The absence of public notice suggests a troubling desire to keep firearms determinations out of public view in violation of the Rhode Island Open Meeting Act (“OMA”) § 42-46-1, et. seq. The OMA defines a “public body” as “. . . any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government. . . .” R.I. Gen. Laws § 42-46-2(c). While determining whether a particular entity is or is not a “public body” is a fact-intensive question not subject to bright line rules, a literal reading of the act demonstrates that all meetings to discuss or act upon matters over which the [public body] has supervision, control, or *advisory power*, are required to be open to the public. *Solas v. Emergency Hiring Council*, 774 A.2d 820, 825 (R.I. 2001) (emphasis added); See *Finnegan v. Scituate Town Council*, OM 97-05 (a citizen advisory committee was subject to the OMA because the committee “performed public business over which the Council had jurisdiction and control.”); *Reilly v. Providence Economic Development Partnership*, OM 12-07 (Providence Economic Development Partnership (“PEDP”) a body exercising delegated authority from the mayor, was subject to the OMA because the PEDP performed “public business” over which the public body, the City through its mayor, had jurisdiction and control.”); *Finlay v. Town of Cumberland*, OM 12-06 (Committee formed by the Mayor of Cumberland to perform a task under the Mayor's jurisdiction subject to the OMA. Though exercising authority delegated by the Chief of Police, the available administrative guidance suggests that the committee formed to hold a “hearing” under Bristol's formal policy, should have publicly noticed its meeting.

not going to hire you because you have to have a firearm, a concealed weapons permit but you first have to go get one from Rhode Island. I . . . does, when he said does it get around the issue?

MR. GENDREAU: No, like I said, I after I apply to this I'm going to apply to the Massachusetts State Police, who issues their out of state, non-resident concealed to carry permits for class A LTCs as they call it there its not truly concealed carry.

BOARD MEMBER 2: Are you saying Massachusetts, Massachusetts will not issue a permit to a non resident . . .

MR. GENDREAU: Unless they have it in their home state.

BOARD MEMBER 2: Even if you get hired?

MR. GENDREAU: Even if you get hired, you must have it in your home state. yep that's necessary, mandatory, no ifs, ands or buts.

BOARD MEMBER 2: (unintelligible) . . . ask the question.

MR. GENDREAU: I'm sorry yeah.

BOARD MEMBER 2: That's interesting because most, I would say this heavily weighs on need and if you have a need in Massachusetts and not a need in Rhode Island how can they make you get one?

MR. GENDREAU: Well it doesn't really weigh on need in Rhode Island for the town anyway, I believe it's 11-47-11 it doesn't say a showing of need, its says has a reason to believe they will, could be under great bodily harm which, for the reasons listed, I think its fair to say I fare reason to believe that during such activities I run the risk great bodily harm and then its a shall issue.

BOARD MEMBER 2: OK and you never read proper showing of need under that?

MR. GENDREAU: That is under the AG which you guys are not, you are the town official which is 11-47-11. I'm pretty sure. I think your. . .

* * *

Id. at 25:19 – 27:4.

After also focusing on the desire for expanded employment opportunities and a Massachusetts permit, another member asked for “an example when you would draw, draw a weapon?” to which Gendreau responded:

Well do you want to give me a scenario or just an example. Well, I'd never draw a weapon unless one, I can't retreat; two I feel my life is threatened and in immediate physical harm and three, the fear I'm going to be killed. There is no other reason to draw a

weapon, no brandishing, its all bad, unless you can't run and you fear for you life and that your going to die. There is no point to even drawing it besides under those situations.

Id. at 23:7-14.

At no other time during the interview did anyone on the Board ever pose a question going to Gendreau's suitability.

After going through the onerous application process, On June 26, 2012, the Chief sent a short two paragraph letter to the Petitioner stating in pertinent part:

After carefully reviewing the application and receiving a recommendation from the panel which interviewed you with regards to your application for a concealed weapon permit, it is with regret that I advise you that I feel that you do not meet the criteria outlined in 11-47-11 of the General Laws of Rhode Island as amended, as well as Bristol Police Department's Guidelines which would justify me issuing you a concealed weapons permit.

Letter from Josue D. Canario, Chief of Police to Jarren R. Gendreau, Ex. D, Ap. 28. The instant petition to this Honorable Court followed.

When individuals enjoy a constitutional right to engage in an activity, a license to engage in that activity cannot be conditioned on the government's determination of their "need" to exercise that right. Despite Rhode Island's clear statutory mandate to the contrary, and the constraints of Both the Rhode Island and United States Constitutions, Defendant imposes this classic form of unconstitutional prior restraint against the fundamental individual right to keep and bear arms. He must be enjoined from doing so. Of course, Defendant has an interest in regulating firearms in the interest of public safety, just as Defendants have an interest in regulating the time, place, or manner of speech or public assemblies. Petitioner does not challenge the idea that the state may license the carrying of firearms, just as the state might license parades or demonstrations. But the regulatory interest here is not absolute. Whatever else

the state may command with respect to the carrying of arms, it cannot reserve for itself the power to arbitrarily decide, in all cases, whether individuals should be able to carry guns for self-defense nor may one of its officers arbitrarily decide that an applicant for a permit who has complied with all requirements of the permitting application process and who has no disqualifying features should be denied simply because the officer does not “feel” the Petitioner is entitled to exercise his constitutional rights. That decision has already been made for the state, in the federal constitution, and for the Chief, in the Rhode Island General Laws.

Accordingly, the Petitioner Hereby requests that this Honorable Court issue its prerogative Writ of Certiorari to review the decision denying the petitioner a permit under R.I. Gen Laws 1956 § 11-47-11(a) and to address the following questions of law:

1. Whether a summary decision, unsupported by findings of fact or conclusions of law may be used by licensing authorities to deny applicants a gun permit under the Rhode Island Firearms Act, R.I. Gen. Laws 1956 §§ 11-47-1 to 11-47-62?
2. Whether a licensing authority can deny a gun permit under R.I. Gen Laws 1956 § 11-47-11(a) when the uncontroverted evidence on the record indicates that an applicant desires a permit for the purposes of gun collecting, personal defense, or employment and there is no evidence that that the applicant is unsuitable?
3. Whether licensing authority abuses his discretion when denying a permit under R.I. Gen Laws 1956 § 11-47-11(a) by the consideration of criteria beyond suitability and a proper reason.

In Support thereof, petitioners rely upon the Memorandum of Law and Appendix of Exhibits appended to this Petition.

II. JURISDICTION

The requested relief is not available in any other court and cannot be had through any other appellate process. A decision denying a permit application under the Firearms Act is not a judicial or quasi-judicial decision from which a right of appeal exists, nor is such a determination subject to judicial review. In *Krivitsky v. Town of Westerly*, 823 A.2d 1144, 1144 (R.I.2003), this Court reiterated and reinforced the common law rule that “unless a right of appeal is specifically provided by statute,” the proper procedure for denial a license application is by writ of certiorari to the Supreme Court. Applying that maxim to the gun permitting context in *Mosby v. Devine*, this Court explained:

Having provided adequate guidance to the licensing bodies, it is within the province of the courts to review the licensing decision here to ensure that the General Assembly's intent is being effectuated. The opportunity for judicial review of a licensing body's decision under the Firearms Act is especially important when considering the nature of the right sought to be vindicated through the application process. As a matter of policy, this Court will not countenance any system of permitting under the Firearms Act that would be committed to the unfettered discretion of an executive agency. Although the court's authority to review the decision is limited, it is not nonexistent. One does not need to be an expert in American history to understand the fault inherent in a gun-permitting system that would allow a licensing body carte blanche authority to decide who is worthy of carrying a concealed weapon. The constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the basis of an unreviewable unrestricted licensing scheme. Such review is available through a common-law writ of certiorari.

851 A. 2d 1031, 1050-51 (R.I. 2004). Accordingly, the only relief available to the Petitioner is by way of this Court's Grant of the instant petition.

III. COPY OF THE ORDER

A copy of the decision denying Petitioner's Application for a gun permit is attached and incorporated herein as Appendix, Ex. D, Ap. 28.

Wherefore, Petitioner hereby prays this Honorable Court grant his Petition and issue a Writ of Certiorari to review the decision denying him a gun permit under 11-47-11(a).

Dated: 2/25/2013

**Petitioner, Jarren Ray Gendreau,
By and through his Attorney,**

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