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To be submitted

Supreme Court of the State of New York
Appellant Division – Third Department

IN THE MATTER OF THE APPLICATION OF

CHERYL A. DIPERNA-GILLEN,

Petitioner,

-AGAINST-

THE HONORABLE CHRISTINA L. RYBA,

Respondent.

BRIEF FOR RESPONDENT

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PRELIMINARY STATEMENT

In February 2021, petitioner Cheryl A. DiPerna-Gillen commenced this C.P.L.R. article 78 proceeding seeking judicial review of a determination by respondent, the Honorable Christina L. Ryba, Supreme Court, Albany County, in her capacity as a firearms licensing officer, denying petitioner's application to remove hunting and target shooting restrictions from petitioner's license to carry a concealed firearm. Based on the record before her, respondent rationally concluded that petitioner failed to demonstrate either a change in circumstances since the issuance of petitioner's restricted carry license or proper cause for the issuance of an unrestricted carry license.

On June 23, 2022, and thus after petitioner perfected her proceeding by filing a brief in this Court, the United States Supreme Court issued its decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), holding that New York State's proper-cause requirement for obtaining unrestricted carry permits is unconstitutional. And in provisions that take effect on September 1, 2022, the Legislature has since amended the State's licensing requirements to remove the proper-cause requirement and add other requirements. *See* L. 2022, ch.

371 (codified at N.Y. Penal Law § 400.00). We leave to the Court to decide the extent to which, if any, these developments affect the disposition of this proceeding.

QUESTION PRESENTED

Did respondent rationally deny petitioner's application for an unrestricted carry license?

STATEMENT OF THE CASE

A. Petitioner's Prior License Applications

In November 2016, petitioner filed an application for a restricted license to carry a concealed firearm. (Record on Appeal ("R.") 52.) Her application stated that the license was sought solely for the purpose of "Hunting/Target Shooting." (R. 52.) On July 31, 2017, respondent, in her capacity as firearm licensing officer, granted the application. (R. 57, 59.) The license issued was expressly restricted to "[h]unting and target shooting only," as requested. (R. 57; *see also* R. 55, 59.)

In July 2019, petitioner filed an application to amend her license to remove the hunting and target shooting restrictions. (R. 63-64.) In

support of her application, she submitted a letter explaining that, since the issuance of her restricted license, she had (1) completed four courses in firearm safety, maintenance and shooting instruction, and (2) regularly practiced shooting on an almost weekly basis. (R. 66.) Petitioner additionally submitted supporting documentation of her completed coursework and trips to the gun range (R. 68-82), as well as a letter in support from Craig D. Apple, the Albany County Sheriff (R. 97).

Respondent convened a conference on petitioner's application in September 2019 at which petitioner testified. (R. 85.) When asked to explain how she met the criteria for a concealed carry permit, petitioner responded that "I would like nothing more to be able to protect myself if I ever need to or a family member or even a third person." (R. 85.) Respondent advised that an unrestricted concealed carry license requires the applicant "to articulate a need that is separate and distinguishable from others that are similarly situated" and that "most people come in here and want to be able to protect their families and others." (R. 86.) And when respondent asked whether there was "something else that I should consider in your request to have the restrictions removed?" (R.

86), petitioner responded that there was not, and instead emphasized the courses and training she had undertaken (R. 86-87).

By letter dated September 30, 2019, respondent denied petitioner's application. (R. 89.) Based on petitioner's application and testimony, respondent determined that petitioner "has failed to demonstrate a change in circumstances since the issuance of the restricted permit in 2017, and has also failed to demonstrate proper cause for the issuance of a carry concealed permit." (R. 89.)

B. The Underlying Application and Resulting Determination

In July 2020, petitioner filed another application to amend her license to remove the hunting and target shooting restrictions. (R. 91-92.) She supported her application with letters from her husband (R. 99) and George D. McHugh, a retired US Army Officer and former judge and police officer. (R. 95-96.)

Respondent convened a conference on petitioner's application in November 2020 at which petitioner testified. (R. 105-106.) Petitioner stated that she had taken classes on using firearms and regularly practiced shooting. (R. 107.) Additionally, petitioner stated that she was

seeking an unrestricted carry license to use for safety purposes when assisting her husband in his hobby of refurbishing woodworking equipment, explaining that picking up products to refurbish and delivering finished products involved traveling “usually out in no-man’s land”¹ and she and her husband “may have several thousand dollars on us as we’re delivering what he has refurbished.” (R. 107-108.) When respondent asked why petitioner would have so much money when delivering refurbished products, petitioner changed her statement, explaining that she and her husband also pick up products they are purchasing to refurbish. (R. 108-109.) And petitioner further disclosed, but only when asked by respondent, that petitioner’s husband had recently been issued an unrestricted carry license that he could use for these activities. (R. 109.)

By letter dated November 5, 2020, respondent denied petitioner’s second application to remove the restrictions on her concealed carry license. (R. 112.) Based on petitioner’s application and testimony at the

¹ At this point in petitioner’s testimony, respondent admonished petitioner’s husband to “stop talking” while petitioner was answering questions. (R. 108.) Respondent then warned petitioner that “I need the answers to come from you.” (R. 108.)

conference, respondent determined that petitioner once again “has failed to demonstrate a chance in circumstances since the issuance of the restricted permit in 2017, and has also failed to demonstrate proper cause for the issuance of a carry concealed permit.” (R. 112.)

ARGUMENT

RESPONDENT’S DETERMINATION TO DENY PETITIONER’S APPLICATION WAS RATIONALLY BASED ON THE RECORD BEFORE HER

Respondent rationally determined on the record before her that petitioner failed to demonstrate the proper cause required to remove the hunting and target shooting restrictions on her concealed carry license.

“The possession of a handgun license is a privilege rather than a right.” *Sewell v. City of New York*, 182 A.D.2d 469, 472 (1st Dep’t), *lv. denied*, 80 N.Y.2d 756 (1992). “The State has a substantial and legitimate interest and indeed, a grave responsibility, in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument.” *Matter of Finley v. Nicandri*, 272 A.D.2d 831, 832 (3d Dep’t 2000) (internal quotation marks omitted). Licensing officers therefore “may deny, revoke

or limit a pistol license for any ‘good cause,’ a determination that will not be disturbed unless it is arbitrary and capricious.” *Matter of Bando v. Sullivan*, 290 A.D.2d 691, 692 (3rd Dep’t 2002) (internal citations omitted).

Further, under Penal Law § 400.00(2)(f) as it existed at the time of petitioner’s application, “an applicant for a carry concealed license must yield ‘proper cause’ to the licensing officer’s satisfaction for the license to issue.” *Matter of O’Brien v. Keegan*, 87 N.Y.2d 436, 439 (1996). The burden was on the applicant to establish such “proper cause.” *Matter of Bando*, 290 A.D.2d at 692. And “proper cause” was interpreted to mean “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Matter of Kaplan v. Bratton*, 249 A.D.2d 199, 201 (1st Dep’t 1998).

In addition, an applicant for a carry concealed pistol permit was required to establish “proper cause” for each particular use or uses. *See Matter of O’Connor v. Scarpino*, 83 N.Y.2d 919 (1994). Where the licensing officer found that an applicant had established “proper cause” with respect to some uses but not others, the licensing officer had the discretion to limit a “carry concealed” permit to a particular use. This was

so because the “licensing officers’ power to determine the existence of ‘proper cause’ for the issuance of license necessarily and inherently includes the power to restrict the use to the purposes that justified the issuance.” *Matter of O’Connor*, 83 N.Y.2d at 921.

Here, it is undisputed that when petitioner applied in 2016 for a restricted concealed carry license, she made a sufficient showing of proper cause for that license, and her application was granted. Her application stated that she would use the restricted license solely for hunting and target shooting. (R. 52.) Accordingly, she was issued a license restricted to those two uses. (R. 55, 57.)

To have those restrictions removed, petitioner was required to show proper cause for the significant expansion she sought for the use of her license. Yet the only evidence she submitted to make that showing was her testimony that she sought to use a firearm for safety purposes while assisting her husband with a hobby that often involved driving to unfamiliar locations with large sums of cash. (R. 107-108.) Until specifically asked, she did not disclose that her husband had recently acquired a concealed carry license with no restrictions. (R. 109.) And although she initially stated that the license was needed because of the

cash the couple carried when delivering refurbished products, on further questioning, she changed her statement to explain that the couple also took trips to purchase products to refurbish. (R. 108-109.)

As an initial matter, petitioner's stated need for an unrestricted concealed carry license was predicated on a claimed general fear for her personal safety. At the time of respondent's decision, such fears, by themselves, were not sufficient to show the proper cause required to obtain an unrestricted concealed carry license. *See Matter of Williams v. Bratton*, 238 A.D.2d 269 (1st Dep't 1997) (sustaining licensing officer's license decision to deny license to attorney with real estate and estates practice who claimed to handle large sums of cash and checks but failed to prove that claim); *Matter of Milo v. Kelly*, 211 A.D.2d 488 (1st Dep't 1995) (sustaining licensing officer's decision to deny license to owner of elevator repair service who relied on allegations that he worked in areas noted for criminal activity and sometimes answered night calls to show requisite proper cause).

Moreover, petitioner failed to explain why her stated self-defense needs were not already adequately and independently addressed by her husband's recent acquisition of an unrestricted concealed carry license.

(See R. 109.) As respondent's questions to petitioner suggested, petitioner's husband would now be able to bring his firearm when he and petitioner engaged in his hobby together. (See R. 109.) This fact alone refuted petitioner's claim that her participation in her husband's hobby presented "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Matter of Kaplan*, 249 A.D.2d at 201.

Accordingly, respondent rationally denied petitioner's application to remove the restrictions from her concealed carry license based on the record before her.

As the Court is likely aware, on June 23, 2022—and thus long after respondent rendered her determination and, indeed, after petitioner filed her opening brief in this matter—the United States Supreme Court handed down its decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). *Bruen* held that New York's proper-cause requirement, as interpreted by the New York courts to require a special need distinguishable from that of the general community, is unconstitutional. *Id.* at 2156. Further, in response to *Bruen*, the Legislature on July 1, 2022, amended Penal Law § 400.00 by striking the

proper-cause requirement from the statute and adding new requirements for obtaining licenses, including concealed carry licenses. *See* L. 2022, ch. 371, § 1. The amendments take effect on September 1, 2022. *Id.* at § 26. We leave to the Court to decide the effect these developments have, if any, on the disposition of this proceeding.

CONCLUSION

For the reasons stated, respondent's determination denying petitioner's application was rationally based on the record.

Dated: Albany, New York
August 24, 2022

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

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NEW YORK SUPREME COURT
APPELLATE DIVISION: THIRD DEPARTMENT

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Respondent.

AD #532863

STATE OF NEW YORK
COUNTY OF ALBANY ss:
CITY OF ALBANY

KENNETH KRUEGER being duly sworn says:

I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the Respondent, herein.

On the 24th day of August, 2022 I served the annexed Brief for Respondent on the attorney named below, by depositing 1 copy thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Postal Service, directed to the said attorney at the address within the State respectively theretofore designated by him for that purpose as follows:

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Sworn to before me this
24th day of August, 2022


NOTARY PUBLIC

CRISTAL R. GAZELONE
Notary Public, State of New York
Reg. No. 01GA6259001
Qualified in Rensselaer County
Commission Expires April 2, 2024

