STEUBEN COUNTY
NEW YORK

IN RE: MONTGOMERY BLAIR SIBLEY'S STATE OF NEW YORK PISTOL/REVOLVER LICENSE APPLICATION.
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SIBLEY'S HEARING MEMORANDUM OF LAW

Applicant Montgomery Blair Sibley ("Sibley"), files this, his Hearing Memorandum of Law.

LEGAL ISSUES

I. SUMMARY OF ARGUMENT

By his Application, Sibley sought a license to carry his handguns outside the home for purposes of: (i) self-defense and/or (ii) as part of his job-related duties as a New York licensed Nuisance Wildlife Control Operation to humanely "take", i.e. kill, certain wild animals in certain situations for public health and/or safety reasons.

As detailed below, New York's procedure for adjudicating applications to possess a handgun outside of the home violates federal procedural due process constraints on New York. Likewise, N.Y. Penal Law, §400.00.1 is void-for-vagueness, facially overbroad, violates the Equal Protection and Privileges and Immunities guarantees and encourages and permits, as here, prohibited arbitrary and discriminatory licensing.

As such, the Licensing Officer must so find and immediately grant Sibley's Application.

II. NEW YORK'S PISTOL PERMIT ADJUDICATION PROCEDURE DENIES PROCEDURAL DUE PROCESS

In *Bell v. Burson*, 402 U.S. 535 (1971), the United States Supreme Court held that a person could not be deprived of his driver's license without procedural due process. Accordingly, the Licensing Officer may not proceed to adjudicate Sibley's Pistol Permit Application ("Application") as New York's process for such a hearing fails to meet minimum procedural safeguards required by due process. It is "well established that many state-created privileges, such as a license to drive, are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Gudema v. Nassau Cty*., 163 F.3d 717, 724 (2nd Cir. 1998).

The only "procedure" the State of New York has statutorily created is found at N.Y. Penal Law §400.00(4-b) which states in pertinent part: "In acting upon an application, the licensing officer shall either deny the application for reasons specifically and concisely stated in writing or grant the application and issue the license applied for." Notably, no hearing is provided for nor procedure set for a hearing by §400.00(4-b). The courts of New York have failed to flesh out the requisite procedure in any but the most rudimentary fashion. *See, e.g.*: *DiMonda v Bristol,* 219 A.D.2d 830 4th Dept. 1995)("Applicant for pistol permit was afforded due process where he was given specific reason for denial of his application and opportunity to respond.").

For six (6) reasons, the "process" the Licensing Officer is employing to adjudicate Sibley's Application pursuant to §400.00(4-b) singularly and collectively denies to Sibley "due process".

A. THE LICENSING OFFICER RECEIVED *EX PARTE* COMMUNICATIONS FROM THE STEUBEN COUNTY SHERIFF'S OFFICE

The Licensing Officer is prohibited from relying upon *ex parte* information in determining Sibley's Application as he has done here. In the instant matter, the Sheriff has provided information about Sibley upon which the Licensing Officer has relied and which he refuses to reveal to Sibley. (Appendix, pages 245-246). *Accord*: *Stone v. FDIC*, 179 F.3d 1368, 1376 (Fed. Cir. 1999)("The introduction of new and material information by means of *ex parte* communications to the deciding official undermines the public employee's constitutional due process guarantee of notice (both of the charges and of the employer's evidence) and the opportunity to respond. . . . It is **constitutionally impermissible** to allow a deciding official to receive additional material information that may undermine the objectivity required to protect the fairness of the process. Our system is premised on the procedural fairness at each stage of the removal proceedings")(Emphasis added).

Moreover, as noted in *Greene v. McElroy,* 360 U.S. 474, 496-497 (1959): ". . . the evidence used to prove the Government's case **must be disclosed** to the individual so that he has an opportunity to show that it is untrue.)(Emphasis added)[1]. *Accord: Kaur v. Holder*, 561 F.3d

[1] "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, **the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue**. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. . . . This Court has been zealous to protect these rights from erosion. **It has spoken out**

957, 962 (9th Cir. 2009)("Therefore, use of the secret evidence without giving Kaur a proper summary of that evidence was fundamentally unfair and violated her due process rights.")

Here, Sibley is being denied access to the evidence upon which the Licensing Officer relied upon to deny Sibley's Application.

B. THE LICENSING OFFICER ENGAGED IN *EX PARTE* COMMUNICATIONS WITH SIBLEY'S EMPLOYER

The Licensing Officer has engaged in *ex parte* communications with Sibley's employer and refused to reveal the sum and substance of that communication. As such, Sibley has noted his intention to call the Licensing Officer as a witness at the hearing on his Application. (Appendix, page 249). Incontrovertibly: "That a judge before whom the cause is tried cannot likewise be a witness is equally well established (2 Taylor on Evidence [12th ed.] § 1379, pp. 870, 871; 6 Wigmore on Evidence [3d ed.] § 1909, p. 588; 70 C. J., Witnesses, § 237)." *People v. McDermott*, 180 Misc. 247, 248 (Supreme Court of New York, Rockland County, 1943).

C. THE LICENSING OFFICER DETERMINED SIBLEY'S APPLICATION BEFORE RECEIVING SIBLEY'S FACTUAL AND LEGAL CONTENTIONS IN OPPOSITION AND FAILED TO ARTICULATE THE REASONS FOR THE DENIAL OF SIBLEY'S APPLICATION

By his letter of **May 29, 2019**, the Licensing Officer denied Sibley's application before receiving any evidence or legal argument from Sibley and failed to state a *ratio decidendi* for his denial. "Due Process" is denied by an administrative official who decides upon non-record evidence and before he receives facts and hear argument. In *Morgan v. United State*s, 298 U.S. 468, 480-481 (1936), the Court stated:

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not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny." *Id*. (Emphasis added).

> That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. . . it is frequently described as a proceeding of a quasi judicial character. . . The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

Here, the procedure employed by the Licensing Officer fails to meet the *Morgan* "due process" standard.

D. SIBLEY HAS NOT BEEN GIVEN ADEQUATE "NOTICE"

Sibley has been denied adequate "notice" of the nature of the reason for denying his application and the procedure to be employed at the "hearing". (Appendix, pages 244-254). The only belated "notice" of the factual issues of the hearing − to which Sibley objected −was so unspecified as to not satisfy "due process" obligations. (Appendix, pages 247-248). *Accord*: *Escalera v. New York City Hous. Auth*., 425 F.2d 853, (2nd Cir. 1970)("The purpose of requiring that notice be given to the tenant before the hearing is to insure that the tenant is adequately informed of the nature of the evidence against him so that he can effectively rebut that evidence. **The instant one-sentence summary notices are inadequate for this purpose**.")(Emphasis added).

E. THE 10 ½ MONTH WAIT TO HAVE SIBLEY'S APPLICATION PROCESSED DENIES DUE PROCESS

The 10 ½ month wait to determine whether to disqualify Sibley's "fundamental right" to possess a pistol outside his home violates due process. While no court has apparently squarely addressed this issue in the context of a pistol permit application, the authority found in *United States v. $8,850*, 461 U.S. 555 (1983) is analogously applicable. The Supreme Court in *$8,850* provided for a balancing test consisting of four factors. The factors include: (i) "the length of the delay", (ii) "the reason the Government assigns to justify the delay", (iii) "the claimant's assertion of the right to a judicial hearing", and (iv) "whether the claimant has been prejudiced by the delay." *$8,850* at 568-69. In this instance, balancing these factors, there simply is no justification for a 10 ½ month delay. The response to a NCIS or New York's own fingerprint background check is instantaneous.[2] Sibley both claims a right to a hearing and has been prejudiced by the delay as he is without his fundamental right to a handgun outside the home for self defense and business purposes.

In sum, "[T]he Constitution requires some kind of a hearing before the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). "[F]airness can

[2] Indeed, N.Y. Penal Law §400.00(4-a) states in pertinent part: "Except upon written notice to the applicant specifically stating the reasons for any delay, in each case the Licensing Officer shall act upon any application for a license pursuant to this section within six months of the date of presentment of such an application to the appropriate authority." Sibley challenges this six month time frame as violating due process.

rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 170 (1951)(Frankfurter, J., concurring). Indeed, procedural due process rights encompass a pre-deprivation hearing "except in emergency situations". *Bell v. Burson*, 402 U.S. 535, 542 (1971). In *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) the Supreme Court explained that state actors may constitutionally skip a pre-deprivation hearing in favor of a post-deprivation hearing only in "extraordinary situations". As there is no "extraordinary situations" here, the denial of Sibley's Application after a 10 ½ Month wait violates Sibley's procedural due process rights.

F. THE LICENSING OFFICER HAS REPEATEDLY VIOLATED NEW YORK'S ADMINISTRATIVE PROCEDURE ACT

New York's Administrative Procedures Act is applicable to Sibley's Application adjudication. N.Y. Administrative Procedure Act, §401.1 "Licenses", states: "When licensing is required by law to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning adjudicatory proceedings apply."

N.Y. Administrative Procedure Act, §307(2) forbids direct or indirect *ex parte* communications with "any person or party" regarding issues of fact in an adjudicatory hearing.[3] Here, the Licensing Officer has engaged in such forbidden communication with Sibley's employer. Moreover, Admin. P. Act, Section 301.2 "Hearings" states: "All parties shall be given

[3] In *toto*, 9 CRR-NY §4.131.II.B.1 states: "Unless otherwise authorized by law and except as provided in paragraph two of this subdivision, a hearing officer **shall not communicate, directly or indirectly, in connection with any issue that relates in any way to the merits of an adjudicatory proceeding pending before the hearing officer with any person except upon notice and opportunity for all parties to participate**. (Emphasis added). Likewise, Executive Order No. 131 forbids direct or indirect *ex parte* communications about the merits of an adjudicatory proceeding with any person.

reasonable notice of such hearing, which notice shall include: . . . (b) a statement of the legal authority and jurisdiction under which the hearing is to be held; (c) a reference to the particular sections of the statutes and rules involved, where possible; (d) a short and plain statement of matters asserted . . ." Here, though requested by Sibley, the Licensing Officer has refused to Sibley his §301.2 requests. (Appendix, pages 248-249).

Likewise, N.Y. Administrative Procedure Act, §304.2 states: "[P]residing officers are authorized to: Sign and issue subpoenas in the name of the agency, at the request of any party, requiring attendance and giving of testimony by witnesses and the production of books, papers, documents and other evidence and said subpoenas shall be regulated by the civil practice law and rules." Though requested by Sibley, the Licensing Officer refused to issue subpoenas to allow Sibley to marshall evidence in support of his application and to attempt to rebut the (presently unknown) evidence received *ex parte* by the Licencing Officer. (Appendix, page 246).

In sum, the Licensing Officer has violated New York's own due process administrative regulations and thereby denied to Sibley the process to which he is "due".

III. NEW YORK'S PISTOL PERMIT ADJUDICATION PROCEDURE DENIES SIBLEY'S SUBSTANTIVE CONSTITUTIONAL RIGHTS

On its face and as applied, New York's pistol permit application law violates substantive Constitutional rights as it: (i) violates Sibley's fundamental rights and (ii) is void-for-vagueness, (iii) facially overbroad, (iv)violates the Equal Protection and Privileges and Immunities guarantees and (v) encourages and permits, as here, prohibited arbitrary and discriminatory enforcement.

A. SIBLEY'S ENJOYS THE "FUNDAMENTAL FIGHT" TO POSSESS A HANDGUN OUTSIDE THE HOME FOR SELF−DEFENSE

Sibley's "fundamental right" to possess a handgun outside the home for self−defense is well established. Under its original meaning, the Second Amendment protects a right to carry arms for self-defense in public. *See*: *Palmer v. District of Columbia,* No. 14-7180, 2015 U.S. App. LEXIS 6414 (D.C. Cir. Apr. 2, 2015)("This Court agrees with the Ninth Circuit's statement in *Peruta* that '[t]hese passages alone, though short of dispositive, strongly suggest that the Second Amendment secures a right to carry a firearm in some fashion outside the home.'") The Court of Appeals panels that have directly addressed the issue have also reached the same conclusion. *See Moore v. Madigan,* 702 F.3d 933, 936 (7th Cir. 2012)("A right to bear arms thus implies a right to carry a loaded gun outside the home."); quoting *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1166 (9th Cir. 2014)("T]he carrying of an operable handgun outside the home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes bear[ing] Arms within the meaning of the Second Amendment."); *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017)("At the Second Amendment's core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home.") *Accord*: *Bonidy v. U.S. Postal Serv*., 790 F.3d 1121, 1125 (10th Cir. 2015): *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2014); *Drake v. Filko,* 724 F.3d 426, 431 (3d Cir. 2013)*; Kachalsky v. County of Westchester,* 701 F.3d 81, 89 (2d Cir. 2012).

New York's procedure for granting a licence to carry a pistol outside the home reduces

that "fundamental" right to a privilege − one New York grants only to the rare citizen who can demonstrate to a bureaucrat's unreviewable satisfaction that he or she is in dire-enough straits to warrant carrying a handgun outside of the home. This procedure violates Sibley's substantive due process rights. The right to self-defense necessarily extends beyond the four walls of Sibley's home. This conclusion is compelled by the text and structure of the Second Amendment, by the history of the right it protects, and by any fair reading of *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008)("[T]he enshrinement of constitutional rights necessarily **takes certain policy choices off the table**.")(Emphasis added).

Consistent with that understanding, the vast majority of states protect the right of their citizens to carry handguns outside the home for self-defense[4]. But New York persists in denying that right to typical, law-abiding citizens, instead reserving it to only a small subset of individuals who can demonstrate that they have a particularized need to exercise the right that the Second Amendment guarantees to all people. Stated plainly, a citizen's ability to exercise that right should not turn on whether she can persuade a bureaucrat that the right is really worth having as New York now requires.

Although increasing safety and reducing crime are compelling government interests, the Supreme Court has made clear that "the very enumeration of the [Second Amendment] right takes out of the hands of government ... the power to decide on a case-by-case basis whether the

[4] As one scholar put it, "the bottom line is pretty clear: Since permit holders commit virtually no crimes, right-to-carry laws can't increase violent crime rates." John R. Lott, Jr., *Concealed Carry Permit Holders Across the United States: 2017*, Crime Prevention Research Ctr., Jul. 2017, at 23.

right is really worth insisting upon." *Heller*, 554 U.S. at 634. Yet this is precisely what New York's "good cause" regime seeks to do. That regime leaves it up to a "licensing officer" to determine on a case-by-case basis whether a citizen's reasons for carrying a handgun are good enough (in the licensing officer's view) for a citizen to do so, and they deny the vast majority of citizens the right to bear arms outside the home. Such regimes "seem almost uniquely designed to defy" any plausible reading of the Second Amendment, which at a minimum guarantees the right of "the typical citizen to carry a gun." *Wrenn*, 864 F.3d at 668. And it is telling that most States − who share New York's interests in public safety − have not found the elimination of the Second Amendment right to bear arms necessary to ensure public safety.

B. N.Y. Penal Law, §400.00.1 is Void-for-Vagueness, Facially Overbroad, Violate the Equal Protection and Privileges and Immunities Guarantees and Encourages and Permits, as Here, Prohibited Arbitrary and Discriminatory Enforcement

The administrative scheme to issue pistol permits in New York is found at N.Y. Penal Law, Part 4, "Administrative Provisions", §400.00 *et seq*. First, §400.00.1 sets the eligibility requirements for licenses to carry and possess firearms[5]. Of the fourteen (14) mandatory criteria of eligibility, twelve (12) are not disputed by Sibley.[6]

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[5] N.Y. Penal Law §260.00(3). "Firearm" means (a) any pistol or revolver . . ."

[6] N.Y. Penal Law §400.00(1): Is twenty-one years of age or older (N.Y. Penal Law §400.00(1)(a)); Has not been convicted anywhere of a felony or a serious offense or is not the subject of an outstanding warrant of arrest issued upon the alleged commission of a felony or serious offense (N.Y. Penal Law §400.00(1)(c)); Is not a fugitive from justice (N.Y. Penal Law §400.00(1)(d)); Is not an unlawful user of or addicted to any controlled substance as defined in section 21 U.S.C. §802 (N.Y. Penal Law §400.00(1)(e)); Is a U.S. Citizen who has not renounced his citizenship nor served in the Armed Forces (N.Y. Penal Law §400.00(1)(f),(g) & (h)); Has never suffered any mental illness (N.Y. Penal Law §400.00(1)(i)); Has not been involuntarily committed to a facility under the jurisdiction of an office of the department of

However, Sibley does challenge two provisions both facially − and as applied to him − as being void-for-vagueness, facially overbroad, violative of the Equal Protection and Privileges and Immunities guarantees and encourages and permits, as here, prohibited arbitrary and discriminatory enforcement. N.Y. Penal Law §400.00(1) states that "No [firearm] license shall be issued or renewed except for an applicant": (i) "of good moral character" (§400.00(1)(b)) and (ii) "concerning whom no good cause exists for the denial of the license." (§400.00(1)(c)).

In *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983), the Court stated:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. . . Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine − the requirement that a legislature establish minimal guidelines to govern law enforcement. . . **Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections**." (Citations omitted, emphasis added).

First, both terms are so vague and standardless that they "leaves the public uncertain as to the conduct it prohibits . . . ." and as such fail to meet the requirements of the Due Process

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mental hygiene nor has been civilly confined in a secure treatment facility (N.Y. Penal Law §400.00(1)(j)); Has not had a license revoked or who is not under a suspension or ineligibility order issued pursuant to the provisions of section 530.14 of the Criminal Procedure Law or section eight hundred forty-two-a of the Family Court Act (N.Y. Penal Law §400.00(1)(k)); Has not had a guardian appointed for him pursuant to any provision of state law, based on a determination that as a result of marked subnormal intelligence, mental illness, incapacity, condition or disease, he or she lacks the mental capacity to contract or manage his or her own affairs (N.Y. Penal Law 400.00(1)(m)).

Clause. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966)[7]. Patently, New York does not define "good moral character", nor could it. Once the definition leaves the defined areas of "immoral behavior" codified in the criminal law, the term "good moral character" becomes impossible to define because the definition is "viewpoint-based". Indeed, the Supreme Court recognized this very problem in a Lanham Act case:

> So the key question becomes: Is the "immoral or scandalous" criterion in the Lanham Act viewpoint-neutral or viewpoint-based? **It is viewpoint-based**. The meanings of "immoral" and "scandalous" are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material "immoral"? According to a standard definition, when it is "inconsistent with rectitude, purity, or good morals"; "wicked"; or "vicious." *Webster's New International Dictionary* 1246 (2d ed. 1949). Or again, when it is "opposed to or violating morality"; or "morally evil." *Shorter Oxford English Dictionary* 961 (3d ed. 1947). So the Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. . . . There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all. **It therefore violates the First Amendment**. (Emphasis added).

Iancu v. Brunetti, 139 S. Ct. 2294, 2019 U.S. LEXIS 4201(June 24, 2019, Decided). Likewise, requiring a citizen to exhibit "good moral character" in order to be eligible for a pistol permit allows the Defendant Licensing Officer to engage in "viewpoint-based" definition of "good moral character" which violates the First Amendment. What a Licensing Officer may consider "immoral" about Sibley may well be considered "moral" to Sibley and others of his ilk.

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[7] "The State contends that even if the Act would have been void for vagueness as it was originally written, subsequent state court interpretations have provided standards and guides that cure the former constitutional deficiencies. **We do not agree**. All of the so-called court-created conditions and standards still leave to the jury such broad and unlimited power in imposing costs on acquitted defendants that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is." *Giaccio* at 403. (Emphasis added).

Second, the phrase "concerning whom no good cause exists for the denial of the license" is similarly vague on its face and as applied as "no good cause" is equally as impossible to define without reverting to viewpoint-based decision making prohibited by the First Amendment.

As such, N.Y. Penal Law, §400.00.1 is void-for-vagueness, facially overbroad, violates the Equal Protection and Privileges or Immunities guarantees and encourages and permits, as here, prohibited arbitrary and discriminatory enforcement.

IV. CONCLUSION

For the reasons aforesaid, New York's procedure for adjudicating applications to possess a handgun outside of the home violates procedural and substantive Constitutional constraints on New York. As such, the Licensing Officer must so find and immediately grant Sibley's Application.

By: _____

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