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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10
11 EDWARD PERUTA,
12 Plaintiff,
13 vs.
14 COUNTY OF SAN DIEGO,
15 WILLIAM D. GORE,
16 INDIVIDUALLY AND IN HIS
17 CAPACITY AS SHERIFF
Defendants.

) Case No.: 09-CV-2371-IEG (BLM)

) **PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT
WILLIAM GORE'S MOTION TO
DISMISS**

) **Date: December 21, 2009
Time: 10:30a.m.
Dept.: 1- Courtroom of the Hon.
Irma E. Gonzalez**

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1 PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN
2 OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

3 COME NOW Plaintiff Edward Peruta, by and through counsel, and submit his
4 Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss.

5
6 **INTRODUCTION**

7 Plaintiff, Edward Peruta, alleges he was denied a permit to carry a concealed weapon
8 because Defendant Gore found that Mr. Peruta did not have good cause and that he was not a
9 resident of San Diego. Plaintiff opposes Defendant Gore's motion to dismiss because the
10 complaint does state claims based on constitutional grounds.

11 California Penal Code section 12050 is challenged on the grounds that the good cause
12 requirement, on its face and/or the application of, violates the Second Amendment to bear arms.
13 In California only persons that obtain the license to carry a concealed weapon may lawfully
14 possess a loaded firearm for the lawful purpose of being armed and ready in case of conflict with
15 another person. California Penal Code section 12050 grants county sheriffs the authority to issue
16 permits to carry concealed weapons. That authority provides county sheriffs with the unbridled
17 discretion to decide whether an applicant has good cause for a permit to carry a concealed
18 weapon. Defendant Gore has taken that authority and arbitrarily denied plaintiff a permit to
19 carry a concealed weapon. By arbitrarily denying Plaintiff a permit to carry a concealed weapon,
20 Defendant Gore violated Plaintiff's Second Amendment right to bears arms so that he may be
21 armed and ready in case of conflict with another person.

22 Plaintiff showed good cause for the issuance of a concealed carrying permit. Plaintiff's
23 good cause is based in part on the facts that he is at risk for violent attacks because he lives
24 fulltime in his motor home in which he carries large amounts of cash and valuables; his business
25 as a news media member places him in dangerous high crime areas, and; he often stays in remote
26 areas removed from immediate assistance from law enforcement. (Complaint ¶ 19 – 22.)

27 Defendant Gore's application of the residency and good cause requirements of California
28 Penal Code section 12050 are challenged on the grounds that his actions violate the Equal

1 Protection Clause of the Fourteenth Amendment. Defendant Gore's actions have violated the
2 Equal Protection Clause because he is not treating Plaintiff like other residents of San Diego.
3 Plaintiff became a resident in San Diego when he established a habitation in San Diego for a
4 fixed period of time. Defendant Gore has arbitrarily refused to recognize Plaintiff as a resident
5 and in doing so he violated the Equal Protection Clause. Further, Defendant Gore's refusal to
6 find good cause for a permit to carry a concealed weapon is irrational and in violation of the
7 Equal Protection Clause.

8 Plaintiff showed he was a resident of San Diego. Plaintiff's San Diego residency is based
9 in part on the facts that he has maintained a single room residence in San Diego, and was
10 residing in his motor home at Campland on the Bay for a fixed period of time when he applied
11 for the concealed carrying weapons permit. (Complaint ¶ 17-18.)

12 Defendant Gore's application of the residency requirement is also challenged on the
13 grounds that his actions violate the constitutional right to travel. Plaintiff's right to travel has
14 been infringed because Defendant Gore is requiring that Plaintiff live fulltime in San Diego in
15 order to be considered a resident so that he may grant a permit to carry a concealed weapon. By
16 requiring Plaintiff live fulltime in San Diego, Defendant Gore has infringed upon Plaintiff's right
17 to travel.

18 Penal Code sections 12025, 12031, and 12050 are filed herewith as "Exhibit A." *West*
19 *Virginia Firearm Laws*, 2009 handbook, is filed herewith as "Exhibit B." California Election
20 Codes 349 and 2032 are filed herewith as "Exhibit C." Plaintiff Edward Peruta's California
21 identification is filed herewith as "Exhibit D."

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ARGUMENT

I.

**THERE IS A CONSTITUTIONAL
RIGHT TO KEEP AND BEAR ARMS**

A.

**THE GOOD CAUSE REQUIREMENT OF
CALIFORNIA PENAL CODE § 12050
VIOLATES THE SECOND AMENDMENT**

Plaintiff's first cause of action alleges in part that the statutory "good cause" requirement violates his right to keep and bear arms under the Second Amendment of the United States Constitution.

As agreed with by Defendant Gore, the United States Supreme Court, in *District of Columbia v. Heller*, 128 S. Ct. 2783; 171 L.Ed.2d 637 (2008), made clear that the Second Amendment guarantees the individual right to possess and carry weapons in case of confrontation, self-defense, or other traditionally lawful purposes, unconnected with service in a militia. However, as Defendant Gore correctly stated, this right is not unlimited. The Court identified some presumptively lawful regulatory purposes, which included "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, at 2817; 171 L.Ed.2d at 678-679. By no means did the Court intend for this to be an exhaustive list of presumptively lawful regulatory purposes of the right to bear arms. *Heller*, at 2817; 171 L.Ed.2d at 679, (fn. 26).

Contrary to Defendant Gore's assertions, Plaintiff does not argue that all regulatory measures limiting his Second Amendment right to keep and bear arms are unlawful. In fact, Plaintiff does not argue that a complete prohibition on carrying concealed weapons necessarily violates the Second Amendment. In *Heller*, the Court noted that the majority of 19th - Century courts held prohibitions on carrying concealed weapons lawful. *Heller*, at 2817; 171 L.Ed.2d at 678-679. However, the Court did not clearly affirm those 19th-Century court decisions. Defendant Gore cites *United States v. Hall* (S.D.W.Va., Aug. 4, 2008, No. 2:08-00006) 2008

1 U.S. Dist., Lexis 59641), in support of the position that state laws which prohibit the carrying of
2 concealed weapons do not violate the Second Amendment. It appears, though, in states that
3 prohibit the carrying of concealed weapons residents are allowed to openly carry weapons for
4 self-defense purposes, unlike in California. In West Virginia, the state in which *Hall* was
5 decided, "no license is necessary to visibly carry a handgun if the person may lawfully possess a
6 firearm." *West Virginia Firearm Laws*, 2009 handbook, pg. 1. Additionally, in *State v.*
7 *Chandler*, 5 La. Ann. 489 – 90 (1850), the court held that a state law making it unlawful to carry
8 a concealed weapon was not a violation of the citizens right to bear arms guaranteed by the
9 United States Constitution, because "[i]t interfered with no man's right to carry arms... 'in full
10 open view...'" *Chandler*, at 5 La. Ann., 489 – 90. Further, in *Numm v. State*, 1 Ga. 243, (1846),
11 the court declared a state law that sought to suppress the secretly carrying of certain weapons
12 was valid because there was no prohibition against openly bearing arms. *Numm v. State*, at 251.
13 These cases indicate that prohibitions on carrying concealed weapons do not violate the Second
14 Amendment if individuals still have the opportunity to bear arms lawfully, such as openly
15 carrying arms. Thus, Defendant Gore's proposition that prohibitions on carrying concealed
16 weapons are lawful is only sometimes true, because the lawfulness of the prohibition is
17 dependent on the other state law weapons regulations, such as open carrying laws.

18 The purpose of the Second Amendment is to ensure the individual right to self-defense in
19 case of conflict with another person. In *Heller*, the Court affirmed Justice Ginsburg's definition
20 of the meaning of "bear arms." Justice Ginsburg defined "bear arms" to mean "wear, bear, or
21 carry...upon the person or in the clothing or in a pocket, for the purpose...of being armed and
22 ready for offensive or defensive action in a case of conflict with another person." *Heller*, at 2794;
23 171 L.Ed.2d at 652 - 653. From this definition, it is clear that the intent of the Second
24 Amendment is to ensure the individual right of being armed and ready in case of conflict with
25 another person. Being armed and ready clearly means carrying a weapon that is immediately
26 capable of being used for its intended purpose. This means an individual must be able to
27 lawfully carry a loaded firearm. Just the carrying of arms does not make an individual ready in
28 case of conflict with another person. Thus, an individual cannot lawfully be armed and ready if

1 the law prohibits the wearing, bearing or carrying of a loaded firearm without a permit and the
2 permit is impossible to obtain.

3 Currently, California's gun carrying laws do not allow for an individual to be armed and
4 ready for conflict with another person unless that person holds a license or permit to carry a
5 concealed weapon. The opposite is true. Notwithstanding any other gun regulation laws, it is
6 unlawful for an individual to carry a loaded firearm without a concealed carrying weapons
7 permit. *California Penal Code* section 12031(a)(1). Additionally, it is unlawful to carry a
8 weapon without a concealed carrying weapons permit if the weapon is capable of being
9 concealed, whether it is loaded or unloaded. *California Penal Code* section 12025. Although,
10 under *California Penal Code* section 12025(d), an individual may carry a firearm without a
11 permit if it is carried in a belt holster, an individual is completely prohibited from carrying
12 loaded firearm without a concealed carrying weapons permit. Therefore, without a permit to
13 carry a concealed weapon it is impossible for California residents, such as Mr. Peruta, to invoke
14 their Second Amendment right to bear arms in order to be armed and ready in case of conflict
15 another person.

16 Apparently, California lawmakers believed that by enacting Penal Code 12050, lawful
17 citizens such as Plaintiff could invoke their Second Amendment right to keep and bear arms by
18 obtaining a permit to carry a concealed weapon. The problem with Penal Code section 12050 is
19 the good cause requirement. County sheriffs have the unbridled discretion of determining
20 whether to grant or not grant such permits after making a determination of whether the applicant
21 has good cause. Additionally, good cause is not defined, leaving the meaning vague and
22 ambiguous without providing any guidelines for determining whether an applicant has good
23 cause. What this all means, is that lawful citizens solely desiring to invoke their constitutional
24 right to be armed and ready for self-defense purposes may be denied a permit to carry a
25 concealed weapon if the county sheriff determines they have no good cause. Thus, for lawful
26 citizens residing in California, a person's Second Amendment right is dependent upon county
27 sheriffs' policies and practices for determining whether an applicant has good cause for a
28 carrying concealed weapons permit. Clearly, the intent of the Second Amendment was not to

1 make an individual's right to keep and bear arms dependent upon a third person, such as a county
2 sheriff's unguided opinion of whether an individual has good cause or not.

3 Defendant Gore appears to take the position that *Heller* only established the right to
4 possess a gun in the home in case of conflict with another person. *Heller* stands for much more
5 than just the right to possess a gun in the home, as the Second Amendment does not only protect
6 to the right to keep and bear arms in the home. Assumingly, if the Court in *Heller* intended to
7 limit the right to keep and bear arms to one's home then it would have made that limitation clear.
8 However, nowhere in *Heller* does the Court state that right to keep and bear arms is limited to
9 the home. What *Heller* does make clear, is that the "inherent right of self-defense has been
10 central to the Second Amendment." *Heller*, at 2817. This is a right that has never been limited
11 to self-defense in one's home and cannot be limited to one's home because many law abiding
12 citizens do not have homes. The United States Constitution provided rights to all citizens of this
13 country and did not discriminate between persons with and without homes.

14 Defendant Gore also incorrectly takes the position that *Heller* is about protecting the
15 manner how weapons are used. Defendant Gore stated that carrying a concealed firearm on the
16 person or in a vehicle is not in the nature of a common use of a gun, which according to
17 Defendant Gore was declared protected by *Heller*. (Motion to Dismiss, pg. 3 lines 15-17.)
18 However, it is not the nature of a common use of a gun that *Heller* protects. Instead, it is the type
19 of weapon that is protected, and those protected weapons are weapons of common use. The
20 *Heller* Court, in affirming *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206,
21 1939-1 C.B. 373 (1939), declared, "the sorts of weapons protected were those 'in common use at
22 the time.'" *Heller*, at 2817. "[T]he Second Amendment does not protect those weapons not
23 typically possessed by law-abiding citizens for lawful purposes, such as short-barreled rifles."
24 *Heller*, at 2815. Thus, according to *Heller*, it is not the manner in which the weapon is used that
25 is protected, but the types of weapons commonly used that are protected.

26 The inherent right to self-defense has been central to the Second Amendment right. The
27 Second Amendment is clearly all about an individual's right to self-defense. California has
28 attempted to make that inherent right dependent upon the opinion of a third person, such as the

1 county sheriff, who determines whether a person has good cause or not. The Second
2 Amendment does not state that an individual has the right to bear arms if good cause can be
3 shown. The right to bear arms is given so that an individual can be armed and ready to defend
4 against conflict with another person. California has violated that enumerated constitutional right
5 by completely prohibiting the carrying of loaded firearms, either openly or concealed, without a
6 permit that is not obtainable until a county sheriff with unbridled discretion determines an
7 individual has good cause.

8 Although it should not be necessary, Plaintiff provided good cause for the issuance of a
9 concealed carrying weapons permit. Plaintiff has good cause for a permit because he is at risk of
10 violent attacks due to the fact that Plaintiff lives fulltime in his motor home, carrying large
11 amounts of cash and valuables. Also, Plaintiff, who is sixty years of age with health issues,
12 frequently stays in his motor home with his wife in remote places away from the immediate
13 assistance of law enforcement. By staying in these remote areas, Plaintiff is vulnerable to violent
14 predators who take advantage of the remote locations removed from any immediate law
15 enforcement assistance. Plaintiff also faces risks of violent attacks because of his business as a
16 breaking news media member. In doing this business, he is often in high crime areas. These are
17 the type of situations for which the Second Amendment is intended to provide protection for.
18 The Second Amendment makes it lawful for people to bear arms in order to be armed and ready
19 in case of conflict with another person. Plaintiff is attempting to invoke that right because he
20 faces real threats of violence. Defendant Gore is denying Plaintiff his right to bear arms by
21 refusing to recognize that Plaintiff has good cause for a license to carry a concealed weapon.
22 Thus, Defendant Gore's application of California Penal Code section 12050 violates the Second
23 Amendment.

24 Because a showing of good cause, decided by a county sheriff, is required in order for a
25 law abiding citizen to obtain a license to carry a concealed weapon and thereby lawfully bear
26 arms, California Penal Code 12050 violates the Second Amendment of the United States
27 Constitution. Additionally, Defendant Gore's application of California Penal Code section
28 12050 violates the Second Amendment.

B.
**DEFENDANT GORE'S POLICY OF
REQUIRING FULL TIME RESIDENCY
VIOLATES PLAINTIFF'S SECOND
AMENDMENT RIGHT TO KEEP
AND BEAR ARMS**

Plaintiff's first cause of action also alleges that Defendant Gore's policy of requiring full time residency violates his right to keep and bear arms under the Second Amendment of the United States Constitution. Plaintiff does not contend that a residency requirement violates the Second Amendment, and contends only that the policy of requiring fulltime residency is a violation.

California Penal Code section 12050 is silent as to the definition of a resident. But, California Election Code section 349(c) states, "[t]he residence of a person is that place in which the person's habitation is fixed for some period of time, but wherein he or she does not have the intention of remaining. At a given time, a person may have more than one residence." See, also, California Election section 2032. These code sections leave no doubt that a person is a resident of the place where that person has established a habitation for some fixed period of time, although not indefinitely, and that a person can also have more than one residence. Also, it should be noted that there is no set number of days that it takes to become a resident, but only the act of having a habitation for *some* fixed period of time.

Defendant Gore asserts that Plaintiff admitted to not being a resident of San Diego. (Motion to Dismiss, pg. 1, line 25.) This false assertion of Defendant Gore appears to be based off the fact that Plaintiff lives in a motor home and rents space at Campland on the Bay, in San Diego, rather than living fulltime in a fixed residence. By making the false assertion that Plaintiff admitted to not being a resident, Defendant Gore has clearly made it known that he has established his own definition of a resident, which, apparently means living fulltime in San Diego and possibly even living in a fixed residence. However, requiring a person to be a fulltime resident is contrary to the fact that a residence is temporary in nature and a person may even have more than one residence.

1 Plaintiff did not admit that he was not a resident of San Diego. Mr. Peruta is a resident
2 of San Diego. Defendant Gore is using Plaintiff's retirement lifestyle against him to find cause
3 not to issue Plaintiff a license to carry a concealed weapon. Plaintiff resides annually in San
4 Diego, usually during the fall and winter months, which is actually common for retired persons
5 such as Plaintiff. At the very least, during the times in which Plaintiff has established his
6 habitation in San Diego, he is a resident.

7 At the time Plaintiff applied for a permit to carry a concealed weapon, he was staying
8 in his motor home at Campland on the Bay, in San Diego. He had rented space there for five
9 continuous months, not merely a few days or weeks. Plaintiff did not even apply for the
10 concealed carrying weapons permit until he had resided in San Diego for 80 days. This
11 obviously shows that Plaintiff had established his habitation in San Diego for a fixed period of
12 time when he applied for the license, and as such he is and was a resident of San Diego. It
13 should be known that in no way is Plaintiff asserting that he terminated his residency in San
14 Diego after the five months at Campland on the Bay, but provides this information to show that
15 he undoubtedly was a resident when he applied for the concealed carrying weapons permit.

16 Plaintiff's residency actually dates back fifteen years, although, his stays in San Diego
17 have become more consistent and longer over the most recent years. Between February 2007
18 and April 2009, Plaintiff spent nearly one-third of this time in San Diego. However, Plaintiff's
19 residency in San Diego goes back fifteen years, because for fifteen years he and his wife have
20 had the exclusive use of a single room residence at 3151 Driscoll Drive, San Diego, CA, in
21 which they have always maintained a wardrobe. Only for a short period of time while Plaintiff's
22 mother was under hospice care was this room used by another person. This fact is completely
23 ignored by Defendant Gore, and shows he has narrowly defined who may qualify as a resident
24 with no regard to the fact that a person is a resident wherever they have established a habitation
25 for some fixed period of time. Clearly, Plaintiff established a habitation for the past fifteen years
26 in San Diego, by not only using, but also keeping a wardrobe at his single room residence
27 located at 3151 Driscoll Drive, San Diego.

1 By refusing to recognize Plaintiff as a resident of San Diego, Defendant Gore has
2 shown that it is policy and practice to require fulltime residency in San Diego in order to be
3 granted a license to carry a concealed weapon. However, nowhere in California Penal Code
4 section 12050 does it require fulltime residency. Defendant Gore's policy of requiring fulltime
5 residency in order to qualify as a resident violates the Second Amendment. Requiring fulltime
6 residency violates the Second Amendment because it disqualifies every individual that has more
7 than one residence from ever being granted a license to carry a concealed weapon, and as
8 discussed above, possession of the license is the only way a resident of California may lawfully
9 be *armed and ready* in case of conflict against another person.

10 **II.**
11 **DEFENDANT GORE'S UNEQUAL TREATMENT**
12 **OF PLAINTIFF IS A VIOLATION OF THE**
13 **EQUAL PROTECTION CLAUSE OF THE**
14 **FOURTEENTH AMENDMENT OF THE**
15 **UNITED STATES CONSTITUTION**

16 Defendant Gore's application of the good cause and residency requirement of California
17 Penal Code section 12050 violate Plaintiff's right to equal protection of the laws. Plaintiff's
18 right to equal protection of the laws is guaranteed under the Equal Protection Clause of the 14th
19 Amendment of the United States Constitution. "The Equal Protection Clause of the Fourteenth
20 Amendment commands that no State shall 'deny to any person within its jurisdiction the equal
21 protection of the laws.' which is essentially a direction that all persons similarly situated should
22 be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).
23 There are varying standards of review when a law is challenged for violating the Equal
24 Protection Clause. "Unless a classification trammels fundamental personal rights or is drawn
25 upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the
26 constitutionality of the statutory discriminations and require only that the classification
27 challenged be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S.
28 297, 303-04 (1976). Thus, when a classification does trammel fundamental personal rights,
rational basis scrutiny is not the correct standard of review.