No. 14-55873 [DC No.: 2:11-cv-09916-SJO-SS]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Charles Nichols,

Plaintiff-Appellant

v.

Edmund Brown, Jr., et al

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANT'S OPPOSITION TO MOTION FOR 90-DAY STAY OF PROCEEDINGS

Charles Nichols
PO Box 1302
Redondo Beach, CA 90278
Tel. No. (424) 634-7381
e-mail: CharlesNichols@Pykrete.info
Plaintiff-Appellant In Pro Per

OPPOSITION TO MOTION TO STAY

TO THE COURT, THE CLERK AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Peruta and *Richards* are MOOT

As a threshold matter, *Peruta* and *Richards* are now MOOT. The California courts have since held in *People v. Pellecer*, 215 Cal. App. 4th 508 - Cal: Court of Appeal, 2nd Appellate Dist., 1st Div. (2013) that the "upon his or her person" language in former section PC 12020 is limited to carrying concealed weapons in one's clothing (including a "trouser or coat pocket" Id at 517) and not in containers such as fanny packs, purses, and back packs.

On February 2, 2014 Assembly Bill 2305 was introduced to amend the language in PC 21510, PC 25400 and PC 25850 to say "on or about the person" "includes upon the body of a person, in the attire or clothing of a person, in a bag or container carried by the person, or in close proximity to, within the immediate reach of, or conveniently accessible to, the person."

(http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201340AB2305 last visited November 29, 2014). The Appropriations Committee Bill Analysis (same link) stated that: "This measure makes clear the legislature's intent regarding prohibitions on the unlawful carrying of concealed firearms and switchblade knives in purses, backpacks, fanny packs, brief cases, suitcases, or any

other container by conforming statute to the recent Court of Appeal ruling." (Pellecer).

After final judgment was entered in Plaintiff-Appellant Nichols' case on May 1, 2014, AB 2305 was held in the Assembly Appropriations Committee on May 23, 2014 wherein it died.

So long as the *Peruta* and *Richards* Plaintiffs do not carry a concealed weapon beneath or within their clothing they are free to carry concealed weapons without a permit so long as they do not do so in sensitive public places such as schools and government buildings without the permission of the school or the proprietor of the government building.

Defendant-Appellee Harris Has Not Met Her Burden To Show That The Four Factors For A Stay Have Been Met

Defendant-Appellee Harris falsely claimed in her motion to stay, on the first page, that there are no other parties to this appeal. Edmund Brown, Jr., in his official capacity as governor of the State of California is the lead Defendant-Appellee in this case. Both Appellees have Jonathan Michael Eisenberg, Deputy Attorney General as their attorney of record. Defendant-Appellee Brown is clearly named in Plaintiff-Appellant Nichols' notice of appeal. Defendant-Appellee Brown has not filed a motion to stay.

Furthermore, Plaintiff-Appellant Nichols' challenge to the state licensing statutes are solely in the alternative should California enact a statewide licensing

scheme for the Open Carry of firearms and the US Supreme Court uphold a permit requirement for an individual to exercise his Second Amendment rights. Neither of these events has occurred.

Defendant-Appellee Harris conveniently fails to mention the related case of James *Rothery, et al. v. County of Sacramento, et al.*, No. 09-16852 which Plaintiff-Appellant Nichols cited in his communications with Defendant-Appellee Harris *before* she filed her motion to stay.

The parties in *Rothery* filed a *joint motion* for a stay "until ninety (90) days following issuance of the Ninth Circuit's mandate in *Peruta v. County of San Diego*, No. 10-56971" *Rothery* Dkt 60.

Instead, the court granted a far more limited stay ending on December 30th of this year. Defendant-Appellee Harris on the other hand wishes perhaps an immediate 90 day stay followed by a subsequent 90 day stay but she certainly seeks an indefinite stay "at least until the U.S. Court of Appeals, Ninth Circuit, decides whether to grant a pending petition for en banc review of *Richards v. Prieto*, Case No. 11-16255." In short, Defendant-Appellee Harris wants an open ended stay granted in an *opposed* motion, something this Court would not do in an *unopposed joint motion* in *Rothery*.

Richards is irrelevant to Plaintiff-Appellant Nichols' appeal. *Richards*, unlike Plaintiff-Appellant Nichols, never argued that he was prevented from

carrying a loaded firearm in his home or that he was prevented from openly carrying modern unloaded firearms in his home.

Richards' was a purely facial challenge to the "good cause" interpretation of the Yolo County Sheriff and "good moral character" requirement of a state statute the latter of which *Richards* subsequently dropped. *Richards* was disposed of in an unpublished memorandum. It has no precedential weight.

Moreover, Defendant-Appellee Harris' motion must be denied on its face. She cites no authority or rule supporting her motion. She fails to cite any of the necessary legal requirements for granting a stay and her motion is devoid of any argument satisfying any of the four elements for a stay.

"A stay is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009). To justify a stay, the party seeking the stay must satisfy a four-factor test. In determining whether the moving party has met that exacting burden, courts consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Id. at 434 (citation and internal quotation marks omitted).

None of the four factors support Defendants' motion for a stay, and accordingly, the Court should deny Defendant-Appellee Harris' motion.

Plaintiff-Appellant Nichols seeks to carry loaded firearms in his home but is prevented from doing so because he lives in an incorporated city and the California Courts have held that the exemption for "having" loaded firearms on one's residential property does not mean that one can "carry" a loaded firearm on one's residential property for the purpose of self-defense. See *People v. Overturf*, 64 Cal. App. 3d 1 - Cal: Court of Appeal (1976). *District of Columbia v. Heller*, 128 S. Ct. 2783 - Supreme Court (2008) struck down not only the ban on handgun possession in the home but the prohibition on *carrying* fully "functional firearms within the home" for the purpose of self-defense Id at 2788.

Under current California law, because Plaintiff-Appellant Nichols resides in an incorporated city, the only firearms he is allowed to carry in his home and in non-sensitive public places are unloaded antique firearms and he may only carry them openly because a state permit is required to carry a handgun concealed regardless of whether or not it is a modern or antique handgun and regardless of whether or not it is loaded or unloaded.

Although the holder of a concealed carry permit is not "licensed" to openly carry firearms as the state does not generally license the Open Carry of firearms, a concealed carry permit holder is exempted from the general prohibition on the carrying of firearms (including long guns) openly and concealed, loaded and unloaded, in most state and local government buildings (Penal Code section 171b).

In schools, on school grounds and within 1,000 feet of a K-12 public or private school (PC 626.9) a concealed carry permit holder can carry loaded long guns because the two recently enacted bans on openly carrying modern, unloaded firearms require separate permission from the school to carry modern, *unloaded* firearms.

It is an uncontroverted fact SUF 132 that even if Plaintiff Nichols lived where he could obtain a permit to carry a handgun concealed, concealed carry substantially burdens his ability to defend himself. Long guns are not concealable weapons under California law and therefore can only be carried openly.

There is no in-home nexus in *Richards*, *Peruta or Baker*. The plaintiffs sought to carry handguns concealed and sought permits which allow them to carry loaded firearms in sensitive public places such as government buildings and schools. Plaintiff-Appellant Nichols case does not seek to carry in any sensitive public place or even within 1,000 feet of a K-12 public or private school.

Baker v. Kealoha, Case No. 12-16258 isn't even a California case and was likewise disposed of in an unpublished memorandum. Defendant-Appellee Harris' citation to *Baker* argues against her motion. The district court judge held in *Baker* that the Second Amendment was limited to the home. In the nearly two and a half years of litigation in the district court Defendant-Appellee Harris never so much as

conceded that Plaintiff-Appellant Nichols has a right to possess a firearm in the home let alone carry a firearm in the home.

None of the Appellees have ever acquiesced to the fact that Plaintiff-Appellant Nichols has a Second Amendment right under *Heller* to carry fully functional loaded firearms in his home for the purpose of self-defense. The district court held that Plaintiff-Appellant Nichols in-home challenge to the state statutes falls outside the scope of the Second Amendment. This can only be resolved on appeal and won't be resolved by any of the "related" cases cited by Defendant-Harris.

Regardless of whatever happens with *Peruta*, *Richards* and *Baker* the fact remains that even under the narrowest interpretation of *Heller* Plaintiff-Appellant Nichols has the Second Amendment right to carry loaded firearms and unloaded, modern firearms in his home for the purpose of self-defense, and no Federal Appellate court has read Heller's Second Amendment right to be limited to the confines of one's home. The district court in Plaintiff-Appellant Nichols' case, relying on a line of orbiter dicta from *Peruta*, not only held that there is no right to carry a loaded firearm in one's home, it held that there is no right to openly carry any firearm, anywhere, not even in places where it isn't prohibited by law or in places where it was historically understood that one has a right to openly carry firearms for the purpose of self-defense which included the home.

The *Peruta* Court in its denial of Defendant-Appellee's motion to intervene (*Peruta* Dkt 156) once again emphasized that "Most importantly, the opinion never "draws into question" the "constitutionality" of any California statute—it only questions San Diego County's exercise of regulatory authority under such state statutes. See Mot. of CA to Intervene at 7 (admitting the Court's opinion does "not directly rul[e] on the constitutionality of state statutes" and only challenges the San Diego County policy regarding "good cause" (internal quotations omitted))." Id at 10.

The district court, contrary to the *Peruta* decision, concluded that the *Peruta* Court upheld California's *entire licensing scheme* and based on a line of orbiter dicta from *Peruta* inferred a pleading barrier requiring that Plaintiff-Appellant Nichols' case be dismissed with prejudice and Appellee's Rule 12 motion be granted.

It is well established that inferior courts may not create pleading barriers not found in the Federal Rules of Civil Procedure. The US Supreme Court recently reminded the Fifth Circuit Court of Appeals in *Johnson v. City of Shelby* 574 U. S. ____ (2014) http://www.supremecourt.gov/opinions/14pdf/13-1318_3f14.pdf (last visited November 29, 2014) saying that "Federal pleading rules call for "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for

imperfect statement of the legal theory supporting the claim asserted." Id at 1. Moreover, this line of dicta from *Peruta* the district court found to be dispositive of Plaintiff-Appellant Nichols Second Amendment claim will not be at issue in the unlikely event of en banc or cert proceedings in any of the "related" cases.

Even if the *Peruta* court, contrary to US Supreme Court and 9th Circuit precedents, were allowed to create a pleading barrier, Plaintiff-Appellant Nichols' case is distinguishable from *Peruta, Richards* and *Baker* and not just because of his in-home challenge. Plaintiff Nichols seeks to carry long guns in the only way that they can be carried, which is openly, and Plaintiff Nichols seeks to carry concealable firearms (e.g., handguns and stun guns) in the only manner which does not *substantially burden* his ability to defend himself, which is openly. Moreover, Plaintiff-Appellant Nichols' challenge is not a "broad challenge to the state-wide ban on open carry" but rather is the narrowest possible challenge to California's Open Carry bans, bans which by the way are not state-wide but apply to incorporated cities and "prohibited places" in unincorporated county territory. Plaintiff-Appellant Nichols as well as every other person who falls within the Scope of the Second Amendment is free to openly carry firearms throughout the state without a permit as Open Carry has always been the right recognized under Article I, Section 1 of the California Constitution. Distinguishable from *Peruta*, *Richards* and *Baker* are Plaintiff Nichols state law claims which were dismissed

with prejudice and are now on appeal. The district court failed to undertake a case-specific analysis required by *Executive Software N. Am., Inc. v. United States Dist. Court*, 24 F.3d 1545, 1557-58 (9th Cir.1994). The district court decision to decline to exercise jurisdiction over the state law claims conflicts with *Bahrampour v. Lampert*, 356 F. 3d 969 - Court of Appeals, 9th Circuit (2004) at 978.

The two recently enacted bans on openly carrying modern, unloaded firearms are in violation of state law given this state's prior state court precedents. In light of *Heller* and its own prior precedents, the California Supreme Court would likely hold that the *Open Carry* of loaded firearms in the home and in non-sensitive public places is also constitutional under its State Constitution.

Unlike concealed carry, which is by default illegal throughout the state of California (even in the home) see Penal Code section 25400 prohibiting concealed carry everywhere and for everyone, including police -- the three bans at issue in this appeal are limited to incorporated cities prohibiting the carrying of loaded firearms, openly or concealed, modern or antique (PC 25850), and the unloaded Open Carry of modern handguns in these same places (PC 26350) but not to long guns outside of incorporated cities (PC 26400).

All of the bans at issue in this appeal prohibit the carrying of loaded firearms and unloaded, modern firearms *for the purpose of self-defense* but not for other

purposes such as for hunting and not for a myriad of similarly situated individuals who fall within one of the special interest groups.

Plaintiff-Appellant Nichols', unlike *Peruta*, *Richards* and *Baker*, district court case raised far more challenges than a Second Amendment challenge to the state laws. He raised challenges, and will raise them again on appeal, independent of the Second Amendment. None of these challenges are present in any other case now on appeal, let alone the three cited by the motion.

Defendant-Appellee Harris has not established the likelihood that she will prevail. She hasn't even established the likelihood that she will have standing in *Richards* (her petition to intervene in *Peruta* has already been denied and she has no standing to intervene in *Baker*). In her latest en banc petition of Nov. 26, 2014 (*Peruta* Dkt 157-1) she argues that en banc in *Peruta* should be granted because "[G]ranting the motion in this case [*Peruta*] would avoid any question that a denial here [*Peruta*] might otherwise raise concerning the State's ability to intervene in *Richards*…" Id at 2-3.

Appellee's standing, let alone the conditions for en banc hearing in *Peruta* or *Richards* is far from clear, from Defendant-Appellee's Harris' own admissions in her own pleadings in *Peruta*.

Defendant-Appellee Harris has not made any showing, let alone a "strong showing" the she is likely to succeed on the merits nor has she shown that she will be irreparably injured absent a stay.

The past, current and on-going deprivation of Plaintiff-Nichols' Constitutional rights as well as the rights of others who fall within the scope of the Second Amendment is an irreparable injury which would only be aggravated by a stay and would substantially injure those members of the public and, most importantly, Plaintiff-Appellant Nichols were the stay to be granted.

Given that the joint motion for a similar stay in *Rothery* was denied, granting Defendant-Harris' opposed motion would show that this Court is prejudiced against Plaintiff-Appellant Nichols' pro se litigation.

There is no public interest in Defendant-Appellee Harris's continued enforcement of unconstitutional laws.

It takes a great deal of time to resolve en banc petitions and for the US Supreme Court to resolve cert petitions. Moreover, the questions raised in *Peruta*, *Richards* and *Baker* are not dispositive of Plaintiff-Appellant Nichols' Constitutional challenges even if all three of the "related" cases were to be granted en banc or cert as these issues were never raised in the trial court or on appeal nor can the *Peruta*, *Richards* or *Baker* plaintiffs be expected to raise them for the first

time in their cert petitions. Indeed, *Baker* has abandoned his pursuit of his Preliminary Injunction.

The National Rifle Association (NRA) which is funding the *Peruta* case and to which one of the plaintiffs (The California Rifle and Pistol Association) is the official state organization of the NRA helped write and supported the passage of "The Mulford Act of 1967" of which PC 25850 is a part. The *Peruta* plaintiffs' argued to uphold the racist Black Panther Gun bans in its *Peruta* appellants' opening brief. Likewise, the Second Amendment Foundation (SAF) which is a plaintiff in *Richards* likewise argued, contrary to three US Supreme Court decisions and nearly two hundred years of state and Federal appellate court decisions, that states can ban Open Carry if they want to. Likewise, Christopher Baker, the sole Plaintiff in *Baker*, is a concealed carry proponent.

CONCLUSION

Plaintiff-Appellant Nichols respectfully asks this Court to DENY Defendants-Appellee Harris's Motion for Stay Pending Appeal.

Dated: November 29, 2014

Respectfully submitted,
Charles Nichols

By: /s/ Charles Nichols
Plaintiff-Appellant
In Pro Per