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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SIGITAS RAULINAITIS,

Plaintiff,

v.

VENTURA COUNTY SHERIFFS DEPARTMENT,

Defendant.

CASE NO. CV13-02605-MAN

DEFENDANTS' OPPOSITION MEMORANDUM TO PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER

TO THE HONORABLE MARGARET A. NAGLE, ACTING UNITED STATES DISTRICT JUDGE:

Defendants oppose the ex parte application, in accordance with the Court's standing order, Point Number 4, as follows:

I.

EX PARTE APPLICATIONS SOLELY FOR EXTRA-ORDINARY RELIEF ARE RARELY GRANTED

Ex parte applications have reached epidemic proportions in the Central District. *Mission Power v. Continental Casualty*, 883 F.Supp. 488, 489 (C.D. Cal. 1995). The abusive use of ex parte motions has worsened. *Id.* This abuse is

detrimental to the administration of justice and, unless moderated, will increasingly erode the quality of litigation and present ever-increasing problems for the court, the parties, and their lawyers. *Id.*

Properly designed ex parte motion papers contain two distinct motions or parts. The first part should address only why the regular noticed motion procedures must be bypassed. The second part consists of papers identical to those which would be filed to initiate a regular noticed motion, except that they are denominated as a proposed motion and they show no hearing date. *Id.* at 492. These are separate, distinct elements for presenting an ex parte motion and should never be combined. *Id.* The parts should be separated physically and submitted as separate documents. *Id.*

The purpose of the first part of the ex parte motion papers is to establish why the accompanying proposed motion for the ultimate relief requested cannot be calendared in the usual manner. *Id.* The opposing lawyer who has to abandon his other clients to deal urgently with the motion perceives the episode as just another indicator of the maleficence of the adversary. *Id.* at 491.

This procedure by ambush detracts from the fundamental purpose of the adversary system, namely to give the Court the best possible presentation of the merits and demerits of the case on each side. *Id.* The opposing party can rarely make its best presentation on such short notice. *Id.*

The reasons for needing urgent relief must be supported by declarations and deposition transcripts whose contents would be admissible in court. *Id.* at 492. The showing necessary to justify ex parte relief is that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures. *Id.* It must also be established that the moving party is without fault in creating the crisis said to require immediate relief, or that the crisis occurred as a result of excusable neglect. *Id.*

Ex parte motions impose an unnecessary administrative burden on the court and upon opposing counsel, who are required to make a hurried response under

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pressure, usually for no good reason. *Id.* at 491. Ex parte applications are typically reserved for routine exceptions to the local rules or a medical emergency, not sweeping equitable relief to decide the whole case.

The moving papers follow none of these precepts. There is no verified demonstration of why urgent relief is necessary. The papers are not separated into two parts. The standard notice requirements have been bypassed with no explanation, not even a bad explanation. The ex parte relief should be denied on this basis alone.

II.

NONE OF THE LOCAL RULES ESTABLISHING EX PARTE PROCEDURES HAVE BEEN FOLLOWED

Central District Local Rule 7-19 and 7-20 have not been followed in the least. Local Rule 7-19 requires the reasons for seeking of ex parte relief. None is provided. The application merely argues the merits of the plaintiff's position, nothing more.

The same rule also demands that the applicant "shall lodge the proposed ex parte order." This concern is echoed by Rule 7-20: "A separate proposed order shall be lodged with any motion or application.... Unless exempted from electronic filing pursuant to Local Rule 5-4.2, each proposed order shall comply with L.R. 5-4.4." The only website docket entry for this transaction is number 39; it contains no proposed order.

Local Rule 7-19.1 (b) states, "It shall be the duty of the attorney so applying ... to advise the Court in writing and under oath of efforts to contact other counsel and whether any other counsel, after such advice, opposes the application." This too, has not been done.

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III.

ASSUMING THE COURT DISAGREES AND VENTURES INTO THE MERITS OF THE TRO WHICH IS SOUGHT EX PARTE, DEFENDANTS OPPOSE IT

A. The Restraining Order Sought Is a Sweeping Injunction of a State Statute Based Upon A Non-Final Decision of a Two-Judge Panel Opinion Striking Down One of Four Statutory Subdivisions

The panel majority opinion has no precedential effect, yet. A published panel decision has no force of law until it is final, which occurs upon issuance of mandate. Until the decision is final, it is not the law.

The California Practice Guide, *Federal Ninth Circuit Civil Appellate Practice*, Rutter Group, Section 8:179.1, states:

> **Precedential value pending decision en banc:** If the court grants a petition for rehearing en banc, the three-judge panel opinion is withdrawn unless the en banc panel orders otherwise. [Adv. Comm. Note to Circuit Rules 35-1 to 35-3] Thereafter, the three-judge panel opinion shall not be regarded as precedent and cannot be cited in briefs or oral argument to the Ninth Circuit or any district court in the Ninth Circuit except to the extent adopted by the en banc court. [General Order 5.5(d); *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1187, fn. 8 (9th Cir. 2001) (en banc) – court's decision to rehear case en banc effectively means that original three-judge panel never existed, and en banc court acts as if it were hearing case on appeal for first time].

A Ninth Circuit judge may call for an en banc rehearing vote within the later of 14 days after the panel's circulation of the General Order 5.4 (b)(2) notice or 21 days

after circulation of the last filed petition for rehearing en banc, or, if a response is requested, 14 days after circulation of that response. Under General Order 5.4 (c)(1), any active judge may call for a vote to rehear a case en banc, *even if the parties do not petition for rehearing en banc*. This action must occur within seven days after expiration of the time for filing a petition for panel rehearing, under General Order 5.4 (c)(1), or within 21 days after the disposition was filed.

Therefore, the *Peruta* panel majority upon which the ex parte motion for injunctive relief so heavily hinges is now just an inchoate expression of the law, nothing more. Until the *Peruta* decision is finalized, the law continues to be the Ninth Circuit decision in *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982):

> We affirm because Erdelyi did not have a property or liberty interest in obtaining an initial license to carry a concealed weapon. ¶ … Section 12050 [recodified, without substantive change, as Penal Code Section 2615] explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements.

B. <u>The Legislature Has Already Responded to the *Peruta* Decision by Retaining All Statutory Criteria But Providing That a Mere Representation of Personal Protection or Self-Defense Suffices</u>

The present case involves the residency factor, not the good cause factor. A finding of an absence of good cause is a complete bar to concealed carry. On the contrary, residency only governs the locale of issuance. The complaint and all prior briefing in the current action revolve around residency and the meaning and satisfaction of Penal Code Section 26150 (a)(3).

Peruta involved Penal Code Section 26150(a)(2), the good cause requirement. The *Peruta* panel majority did not purport to strike down the entire statute as unconstitutional. It only struck subdivision (a)(2). An appellate decision is not

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controlling precedent for issues and propositions of law which were not actually presented, considered, and decided by the panel. *United States v. Vroman*, 975 F.2d 669, 672 (9th Cir. 1992). There is not some spillover, penumbral invalidation of the other three subparts of the concealed carry statute, as plaintiff seems to believe.

Appended hereto as Exhibit A is the revised statute, enacted on February 22, 2014, in response to the *Peruta* decision. It retains all four concealed weapons permit licensure criteria – good moral character, good cause, county residence, and completion of a firearms training course. The residency requirement is carried over with no change from the preceding version, which this Court's exhaustive ruling addressed and found not to exist in the present case.

The only difference between the three-day-old statute and the predecessor version is that new subpart (a)(2)(B) provides that good cause is now satisfied by a mere representation that there is a need for personal protection or self-defense.

Plaintiff cannot obtain a preliminary injunction, because he is unlikely to succeed in this action. Can plaintiff prevail in this action? The Court's extremely detailed and well-considered opinion denying plaintiff's summary judgment motion says otherwise.

IV.

CONCLUSION

For the foregoing reasons and authorities, it is respectfully requested that this Court deny the ex parte application and relief sought therein, with prejudice.

DATED: February 25, 2014

WISOTSKY, PROCTER & SHYER

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