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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

DEFENDANT'S *PERUTA* BRIEF

[Submitted pursuant to 2/13/14 Order]

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

In accordance with the Court's February 13, 2014 order, website docket entry 36, page three, defendant submits this supplemental brief concerning the recent Ninth Circuit decision in *Peruta v. County of San Diego*.

I.

THE OPINION HAS NO PRECEDENTIAL EFFECT, YET

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

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While the Second Amendment is, as the panel majority says, certainly not a second-class amendment, it is qualitatively different from other amendments, such as the First Amendment. Freedom of speech and religion involve words, which cannot imminently strike someone dead. Further, arms and munitions technology have become exponentially more destructive in the 224 years since the amendment was adopted. A flintlock, whether a pistol or rifle, could fire a single shot and took 20 seconds to reload. By that time, the Aurora, Colorado, mass murderer could have been jumped and disarmed; rapid-fire semi-automatic magazines have changed the map dramatically. Considering Judge Thomas's lengthy and vigorous dissent, it is not at all inconceivable that the en banc Circuit will view the matter differently than did the two-judge panel majority.

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

> Precedential Value, Pending Decision En Banc: If the Court grants a petition for re-hearing en banc, the three judge panel opinion is withdrawn, unless the en banc opinion orders otherwise. [Advisory Committee 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 brief or oral argument to the Ninth Circuit or to 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. INS*, 272 F.3d 1176, 1187, fn. 8 (9th Cir. 2001) [en banc]. (Court's decision to re-hear case en banc effectively means that the original three judge panel never existed, and en banc Court acts as if it were hearing the case on appeal for the first time.)

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A 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 to a petition for rehearing en banc has been 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 7 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.

It is not uncommon for months to elapse during the en banc process. For example, in *Smith v. City of Hemet*, the panel decision was published on January 29, 2004, 356 F.3d 1138. Rehearing en banc, however, was not granted until June 9, 2004, four and a half months later. The en banc opinion didn't issue until January 10, 2005, almost a year following publication of the panel decision. 394 F.3d 689.

Even after the en banc decision, certiorari is a legitimate possibility. Whenever the federal appellate system is done digesting this important, complicated matter, mandate would still need to issue. Mandate must issue seven days after expiration of the time for filing a petition for rehearing en banc, if no petition is filed. Fed. R. App. P. 41(d)(1).

Under these circumstances, there are three options. One would be to stay the action until the *Peruta* decision is finally resolved. Such indefinite postponements of pending litigation are not unheard of. *Adamson v. Lewis*¸ 955 F.2d 614, 618 (9th Cir. 1992); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-814 (1976). Exceptional circumstances justify abstention pending rendition of a judicial decision.

An alternative would be to rule on the motion for judgment on the pleadings or revisit the denial of plaintiff's summary judgment motion. In either case, there would be a final, dispositive determination of this controversy, suitable for appellate review.

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The third option would be to reinitialize the process. Depositions could be completed and cross-motions for summary judgment, in the traditional fashion, would be filed.

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 26150] explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements.

II.

THE PRESENT CASE INVOLVES THE RESIDENCY FACTOR, NOT THE GOOD CAUSE FACTOR

Good cause is a complete bar to concealed carry. On the contrary, residence only governs the locale of issuance. The complaint and all prior briefing and rulings in the current case 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 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).

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III.

THE *PERUTA* PANEL DID NOT REQUIRE THE GOVERNMENT TO ISSUE CONCEALED WEAPONS PERMITS

Even if the panel majority opinion stands and, by some penumbral leap of logic, all of the 26150(a) criteria fell, there is no fact, theory, or extrapolation of fact or theory requiring the government to issue concealed weapons licenses. In that unlikely scenario, while it might not be illegal to carry a concealed weapon, there would be no mandate that the government sanction the carrying of concealed weapons, only refrain from illegalizing such activity. There is a wide gulf between not criminalizing behavior and approving it.

DATED: February 24, 2014

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