UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Peruta v. County of San Diego

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Was concealed carry ruling correct?

NAY

Misguided gun decision missed the bigger issue

By Joseph Greenlee

In *Peruta v. County of San Diego*, 2016 DJDAR 5523 (June 9, 2016), an en banc panel of the 9th U.S. Circuit Court of Appeals upheld a licensing scheme that amounted to a complete ban on the carrying of concealed firearms for ordinary law-abiding citizens. The court determined that "there is no Second Amendment right for members of the general public to carry concealed firearms in public."

The *Peruta* decision is misguided not necessarily because the court upheld a concealed carry ban, but because the court mischaracterized the issue to reach a holding that failed to even address the plaintiffs' true injury. Instead of considering the complete ban on the plaintiffs' right to bear arms — due to the combination of California's open carry prohibition and the concealed carry restrictions in San Diego and Yolo Counties — the court adjudicated the constitutionality of the concealed carry restrictions in a complete vacuum. By mischaracterizing the issue and ignoring the open carry prohibition, the court diminished the burden on the plaintiffs' right to bear arms.

At the district court level, plaintiff Edward Peruta challenged the San Diego County concealed carry restrictions and plaintiff Adam Richards challenged the Yolo County concealed carry restrictions in separate cases. At the time, the open carrying of unloaded handguns was legal, and both district courts relied on the then-availability of open carry to uphold the concealed carry restrictions. Before the cases reached the 9th Circuit, however, California prohibited open carry. Thereafter, both 9th Circuit panels relied on the then-unavailability of open carry to strike down the concealed carry restrictions. All these courts clearly recognized the need to consider whether the concealed carry restrictions left open alternative channels to exercise the right to bear arms, since the plain text of the Second Amendment requires that the right be accommodated.

On rehearing en banc, despite having the benefits of an en banc panel, the court decided the far less important, far less relevant, and far less novel issue of whether a concealed carry ban in and of itself violates the U.S. Constitution. By addressing only this narrow issue and dodging its duty of defining the full-scope of the right to bear arms, the court's holding did little to guide future courts and even less to address the plaintiffs' burden of a complete prohibition on bearing arms.

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As Judge Randy Smith pointed out in dissent, "If the issue before us is truly whether California can, in isolation, prohibit concealed carry, a simple memorandum disposition citing to *Heller* would be sufficient. A formal opinion, much less the gathering of our en banc panel, would not be necessary to answer the issue framed by the majority."

The court's refusal to address the bearing arms prohibition — even at the expense of providing the parties with a resolution — is especially peculiar considering that of all the authorities cited by the court in its impressively extensive historical analysis, precisely none support the outcome of *Peruta*: a complete ban on bearing arms for citizens of San Diego and Yolo Counties.

Every case cited by the court either upheld a concealed carry ban when open carry remained available, struck down a concealed carry ban, assumed the right to bear arms applies outside the home, or relied on an erroneous pre-*Heller* collective right interpretation of the Second Amendment. Every statute and constitutional provision cited by the court either left open carry available or granted the Legislature the ability to prescribe the manner in which arms could be borne. Thus, the substantial historical evidence provided by the court overwhelmingly supported the conclusion reached by Judge Consuelo Maria Callahan in dissent, that "States may choose between different manners of bearing arms for self-defense so long as the right to bear arms for self-defense is accommodated."

The majority was undeterred by the precedent it produced leading directly to the conclusion reached by the dissent. It was apparently displeased by the idea of holding that the Second Amendment protecting "the right of the people to keep and bear arms" actually protects a right to bear arms, and instead redefined the issue and answered a question largely irrelevant to any of the parties. Further, by upholding a concealed carry ban while refusing to consider the unavailability of open carry, based on concealed carry bans that were justified by the availability of open carry, the *Peruta* decision is flat out disingenuous. The court perverted the legal precedent it relied upon to justify what amounts to a complete prohibition on bearing arms that none of the precedent supports.

Certainly the court understood that it was issuing a decision that did not resolve the existing dispute. And certainly the court understood that it inevitably will have to determine the scope of the right to bear arms. So at best the court wasted precious time and judicial resources (both Richards and Peruta filed suit back in 2009), just to kick the can down the road. But it seems more likely that the court was reluctant to strike down a ban on public carrying, as its extensive historical analysis would have undoubtedly compelled it to, and instead chose to embrace the only approach that could possibly lead to a justification on a complete ban to bear arms.

By considering the concealed carry ban in isolation while relying on precedent that permitted legislatures to place restrictions on concealed carry in the context of the right to bear arms as a whole, the court created the opportunity for a future court to use the same approach to uphold an open carry ban while relying on precedent that permitted legislatures to place restrictions on open carry in the context of the right to bear arms as a whole. This piecemeal approach could ultimately eviscerate the right to bear arms in a way that the plain text of the Second Amendment or longstanding precedent would never otherwise allow. Callahan recognized that, stating "Constitutional rights would become meaningless if states could obliterate them by enacting incrementally more burdensome restrictions while arguing that a reviewing court must evaluate each restriction by itself when determining its constitutionality." Based on the majority's handling of *Peruta*, it does not seem unreasonable to suggest that the court intended to open the door for an approach that could make the right to bear arms meaningless.

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YEA

Not just correct on law, it upholds the best policy

By Mike McLively

On June 9, an en banc panel of the 9th U.S. Circuit of Appeals held that the Second Amendment does not protect a right to carry a concealed firearm in public. In *Peruta v. County of San Diego*, 2016 DJDAR 5523, the 9th Circuit aligned with every other federal court of appeals to hear a Second Amendment challenge to discretionary concealed carry permitting systems. Not only was the opinion correct as a matter of law, it also preserved an important policy that keeps Californians safe from a flood of guns in public spaces.

Those who wish to carry concealed firearms in public in California must meet a number of requirements, including a showing of "good cause." State law leaves it up to local sheriffs to establish standards as to what constitutes "good cause."

In some counties — particularly those with dense urban populations — sheriffs require applicants to demonstrate a specific self-defense concern in order to establish good cause. The plaintiffs in *Peruta* tried to argue that San Diego's interpretation of the "good cause" standard violates the Second Amendment.

To understand the stakes of this case, it's helpful to compare California with Florida, the home of the most deadly mass shooting in American history, the massacre at the Pulse nightclub in Orlando. As with its other gun laws, Florida has relatively lax requirements for issuing concealed carry permits. The result is that in a state with less than 20 million people, some 1.5 million Floridians are licensed to carry concealed, loaded guns in public. Florida also has a dangerous "stand your ground" law that tilts self-defense standards heavily in favor of shooters.

Combining more than a million armed citizens in public with a self-defense culture of "shoot first and ask questions later" is a deadly proposition. This helps explain why, in 2014, Florida's firearm homicide rate was 29 percent higher than California's. If it were true that "more guns equals less crime," as the gun lobby claims, then Florida should be one of the safest states in the country. That is not the case.

As the Law Center pointed out in an amicus brief cited by the *Peruta* court, examples abound in Florida of citizens with concealed carry permits murdering others in public places — including in a movie theater after an argument over texting and popcorn and at a gas station parking lot after a dispute over loud music.

Despite its much larger population, California has issued only about 100,000 concealed carry permits thanks to the "good cause" requirement. Having fewer guns in public places is one of California's many policies designed to reduce gun violence. With its comprehensive approach, California has the ninth lowest rate of gun death in the country. Were the good cause requirement to be struck down, the Golden State would go the way of the Sunshine State, with an ensuing deluge of guns in public places.

Of course, none of these policy considerations matter if the law itself is unconstitutional. So, does the good cause requirement, as implemented in San Diego, violate the Second Amendment?

> The Peruta court's thorough historical analysis establishes beyond a doubt that the Second Amendment does not protect concealed carry.

In 2008, in *District of Columbia v. Heller*, the U.S. Supreme Court held for the first time that the Second Amendment protects the individual right of responsible, law-abiding citizens to possess an operable handgun in the home for self-defense. Justice Antonin Scalia's majority opinion, however, did not discuss whether this right extends beyond the home, leaving the issue for the lower courts.

By the time *Peruta* reached the 9th Circuit, the 2nd, 3rd and 4th Circuits had all rejected Second Amendment challenges to concealed carry permitting systems similar to California's, and the 10th Circuit had found that concealed carry is not protected by the Second Amendment.

With a potential circuit split at stake, the en banc *Peruta* court followed the lead of Scalia's opinion in *Heller*, which "treated its historical analysis as determinative." Accordingly, the 9th Circuit undertook an exhaustive analysis of the historical record in order to resolve the issue of "whether the Second Amendment protects the right to carry a concealed weapon in public."

Since the Second Amendment "codified a preexisting right ... inherited from our English ancestors," the court looked to the understanding of the right at several critical time periods. At each, the court found "uncontradicted historical evidence" showing that "the Second Amendment does not protect, in any degree, the right of a member of the general public to carry a concealed weapon in public."

For example, after looking at English statutes dating back to the Statute of Northampton in 1328, the *Peruta* court concluded that, by the end of the 18th century, "English law had for centuries consistently prohibited carrying concealed ... arms in public." Moreover, the court found nothing "suggesting that the law in the American colonies with respect to concealed weapons differed significantly from the law in England."

The evidence from later American legal sources was similarly overwhelming. The court found that, prior to 1849, state courts were nearly unanimous — with just a single outlier — in concluding that individuals could be prohibited from carrying concealed weapons. By 1849, every state court to address the question held that the right to bear arms did not include a right to carry concealed weapons in public.

In 1897, the U.S. Supreme Court itself, in *Robertson v. Baldwin*, held that "the right of the people to keep and bear arms ... is not infringed by laws prohibiting the carrying of concealed weapons."

The *Peruta* court's thorough historical analysis establishes beyond a doubt that the Second Amendment does not protect concealed carry. As a result, San Diego's interpretation of the good cause requirement is constitutional. The court correctly addressed the issue before it, using the exact analysis prescribed by *Heller*.

The 9th Circuit's opinion in *Peruta* gets the law right and allows California to maintain its sane concealed carry policy. Every circuit court to hear this issue has agreed: discretionary concealed carry permitting systems do not violate the Second Amendment. Thankfully, California remains free to implement lifesaving policies that limit the number of loaded, concealed guns carried in our public spaces.

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