

No. 12-55115

**IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT**

**JONATHAN BIRDT,
Plaintiff and Appellant,**

vs.

**CHARLIE BECK, et al.,
Defendants and Appellees.**

*On Appeal from the United States District Court
For the Central District of California
Honorable JOHN A. KRONSTADT, Judge Presiding
District Court Case No. CV-10- 08377 JAK (JEMx)*

APPELLEES' SUPPLEMENTAL BRIEF

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PROCEDURAL BACKGROUND RELATING TO STAY

In an Order filed February 18, 2014, this Court stayed proceedings in the present appeal “pending this court’s mandate in *Peruta v. County of San Diego*, 10-56971, or further order of the court.” In an Order filed August 23, 2016, the Court lifted the stay and ordered the parties to provide supplemental briefs “in light of the en banc decision in *Peruta v. County of San Diego*, No. 10-56971 and *Richards v. Prieto*, No. 11-16255.” Defendants-Appellees, the City of Los Angeles Police Chief Charlie Beck and the Los Angeles Police Department (collectively “LAPD”), hereby submit this Supplemental Brief as ordered.

ISSUES ON APPEAL

AND SUMMARY OF ARGUMENT

The following issues are presented by Mr. Birdt’s appeal:

1. Does the *Second Amendment* provide individuals with the right to carry concealed firearms in public?
2. Does the “good cause” requirement under California Penal Code § 26155(a)(2), used by LAPD to deny Birdt’s application for a license to carry concealed weapon, withstand Birdt’s constitutional challenge under the *Second Amendment*?

In *Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016), plaintiffs were denied licenses, by San Diego and Yolo Counties, to carry concealed weapons based upon a failure to demonstrate “good cause” as required pursuant to California Penal Code §§ 26150 (a)(2) and 26155(a)(2). They brought suit under the *Second Amendment* challenging the counties’ interpretation and application of the “good cause” requirement. *Peruta*, 824 F.3d at 924. Summary judgment was granted in district court dismissing the plaintiffs’ civil actions in *Peruta v. County of San Diego*, No. 10-56971 and *Richards v. Prieto*, No. 11-16255. *Id.* This Court affirmed the district court judgment and in so doing, held “the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public.” *Id.*

The holding in *Peruta* resolves the first issue on appeal adversely against Birdt. The *Peruta* decision also found that since there is no *Second Amendment* right to concealed carry, any restriction - such as “good cause” set forth in Penal Code §§ 26150 (a)(2) and 26155(a)(2) - is permitted under the Second Amendment (*Id.* at 939), which resolves the second issue on appeal adversely against Birdt.

ARGUMENT

1. The Issues Raised in Birdt's Appeal Are Resolved Adversely Against Him in the Recent Decision of *Peruta v. County of San Diego*.

A. The Issues Raised by Birdt Are the Same Issues Raised by the Plaintiffs and Appellants in *Peruta*.

Central to the present appeal, and to the appeal in *Peruta* is the issue of what constitutes “good cause” justification for the issuance of a concealed carry permit under California law.

Under California law¹, the Sheriff of Los Angeles County may issue a license for an applicant to carry a concealed weapon provided the applicant presents proof of all the following conditions: (1) good moral character; (2) good cause for the issuance of a concealed carry license; and, (3) the applicant is a resident within Los Angeles County or is employed within the county and spends a substantial amount of time at his or her place of employment. *Cal. Penal Code* § 26150(a). The chief of police of a municipal police department, such as Chief

¹ California Penal Code sections 26150-26190 set forth the general requirements that applicants must meet in California to obtain a license to carry a concealed weapon. These licensing statutes were previously codified in Penal Code sections 12050, et. seq. As of January 1, 2012, the sections were re-numbered although the language of the relevant sections remain unchanged.

Beck of the Los Angeles Police Department, may issue a license to carry a concealed weapon under the same conditions provided the applicant is a resident of the city to which the application is made. *Cal. Penal Code* §§ 26155(a), 26155(a)(3). Police chiefs of California municipalities, as well as county sheriffs, are requires to “publish and make available a written policy summarizing the provisions” of §§ 26150(a), 26155(a). *Cal. Penal Code* § 26160.

In *Peruta*, the Court noted that “[t]he sheriffs of San Diego and Yolo Counties published policies defining good cause as requiring a particularized reason why an applicant needs a concealed firearm.” *Id.* With regard to San Diego, the San Diego Sheriff’s Department License Division described its applicable definition of good cause as follows:

Good Cause . . . is defined by this County to be a set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way. Simply fearing for one's personal safety alone is not considered good cause. This criterion can be applied to situations related to personal protection as well as those related to individual businesses or occupations.

Good cause is also evaluated on an individual basis. Reasons applicants request a license will fall into one of . . . four general categories[.]

Peruta, 824 F.3d at 926.

The two relevant general categories used by San Diego are:

Category 2 = Personal Protection Only includes: documented threats, restraining orders and other related situations where an applicant can demonstrate they are a specific target at risk.

Category 4 = Business owners/employees includes a diversity of businesses & occupations, such as doctors, attorneys, CEO's, managers, employees and volunteers whose occupation or business places them at high risk of harm.

Id.

Yolo County does not define “good cause” but instead provides examples of what circumstances do and do not constitute good cause: victims of violent crime and/or documented threats of violence; business owners who carry large sums of cash or valuable items; and, business owners who work all hours in remote areas and are likely to encounter dangerous people and situations. *Id.* Examples of invalid reasons to request a concealed carry license include: recreation in remote areas; hunting or fishing; self-protection and protection of family (without credible threats of violence); employment in the security field, i.e., security guard, body guard, VIP protection; and, personal safety due to job conditions or duties placed on the applicant by their employer. *Id.*

In an attempt to state good cause in their applications, the plaintiffs and Appellants in *Peruta* said they wished to carry concealed firearms in public for self-defense. *Id.* This did not meet the applicable “good cause” requirements of

San Diego and Yolo Counties and their applications for concealed carry licenses were denied. *Id.*

The Court summarized the facts and procedural history leading up to plaintiffs' constitutional challenge as follows:

Plaintiff Edward Peruta lives in San Diego County. He applied for a license to carry a concealed firearm in February 2009, but his application was denied because he had not shown good cause under the policy published in his county. Plaintiff Adam Richards lives in Yolo County. He sought a license to carry a concealed firearm in May 2009, but was told he could not establish good cause under his county's policy. Peruta, Richards, and the other plaintiffs — five residents of San Diego and Yolo Counties, as well as several gun-rights organizations — brought two separate suits challenging under the *Second Amendment* the two counties' interpretation and application of the statutory good cause requirement under California law.

Id. at 924.

The Court went on to state the limited scope of its review:

We do not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry. That question was left open by the Supreme Court in *Heller*, and we have no need to answer it here. Because Plaintiffs challenge only policies governing concealed carry, we reach only the question whether the Second Amendment protects, in any degree, the ability to carry concealed firearms in public.

Id. at 927.

With regard to Birdt, he applied to LAPD and the Los Angeles Sheriff's Department (LASD) for a license to carry a concealed weapon. (Appellant's

Excerpts of Record Volume I, pages 84, 92; Volume II, pages 76, 84.) Each department denied his application. (AER I, 84; Vol II 76, 103.) As with San Diego and Yolo Counties, LASD and LAPD issue concealed carry licenses on the basis of “good cause” as required by California Penal Code §§ 26150 and 26155. (AER I, 81-82; Vol. II, 68-69.)

Under LAPD’s policies, concerns regarding self-defense or fear for one’s personal safety do not constitute sufficient justification to establish good cause for the purpose of securing a concealed carry license. (AER II, 69, 76.) Instead, an applicant must show “convincing evidence of a clear and present danger to life or of great bodily harm to the applicant, his spouse or dependent child, which cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant’s carrying of a concealed firearm.” (AER II, 68.) LASD maintains a similar good cause policy. (AER I, 82.)

In his application submitted to LAPD, Birdt stated his reasons why he sought a concealed carry license:

Volunteer Judge, Los Angeles Superior Court. Juvenile dependency court tort referral panel. Representation of high profile civil plaintiffs where plaintiff or counsel have been threatened. Actual threat against employees justifying LASD CCW permit. No office security or parking. Frequent travel throughout state and Nevada weekly. Carry large amounts of cash and danger just transferring firearm at state line and/or entering + exiting office which is in a remote area with a ten

minute LAPD response time. Multiple disturbance within office, by visitors and disgruntled clients.

(AER II, 94.)

LAPD individually reviewed Birdt's application and determined that he failed to show good cause as required by California law and LAPD policy. (AER II, 76.) Specifically, LAPD denied Birdt's application because:

Convincing evidence was not established of a clear and present danger to life or of great bodily injury to yourself, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures. You did not provide satisfactory proof that your work is such a nature that it requires the carrying of a concealed weapon.

(AER II, 103; *see also* AER II 76-77.)

After his applications for a concealed carry licenses were denied, Birdt filed the present lawsuit pursuant to 42 U.S.C. §1983 against LAPD, Los Angeles Chief of Police Charlie Beck, LASD, and Los Angeles County Sheriff Lee Baca. (AER I, 12.) He claimed LAPD and LASD policies requiring applicants to provide evidence of good cause for a concealed carry license violated his rights under the *Second Amendment* to the United States Constitution. (AER I, 15-16.) Birdt also alleged a second cause of action for violation of the Equal Protection Clause (AER I, 16), but he did not pursue that claim on appeal. (*See* Appellant's Opening and Supplemental Briefs.)

Thus the allegations giving rise to the plaintiffs' claims in *Peruta* are, with regard to all relevant considerations, identical to the allegations in Birdt's complaint.

B. *Peruta* Held There is No Right Under the *Second Amendment* to Carry Concealed Weapons In Public.

After extensive discussion, analysis, and review of relevant history, the *Peruta* decision held there was no *Second Amendment* Right to carry a concealed weapon:

We therefore conclude that the *Second Amendment* right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public. In so holding, we join several of our sister circuits that have upheld the authority of states to prohibit entirely or to limit substantially the carrying of concealed or concealable firearms. [Citations.]

Peruta, 824 F.3d at 939.

Consequently, under the precedent set by *Peruta*, Birdt has no *Second Amendment* right to carry a concealed weapon and the denial of his application by LAPD does not give rise to a cause of action under 42 U.S.C. §1983.

**C. California’s Requirement of “Good Cause” for Issuance of
a Concealed Carry License Does Not Violate the *Second*
Amendment.**

The Court in *Peruta* went on to find:

Our holding that the *Second Amendment* does not protect the right of a member of the general public to carry concealed firearms in public fully answers the question before us. Because the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry - including a requirement of “good cause,” however defined - is necessarily allowed by the Amendment.

Id. at 924.

Thus, the “good cause” requirement under California Penal Code § 26155(a)(2), used by LAPD to deny Birdt’s application for a license to carry concealed weapon, withstands Birdt’s constitutional challenge under the *Second Amendment*.

CONCLUSION

Birdt has failed to establish that LAPD violated his rights granted under the *Second Amendment*. Therefore, Appellees respectfully request this Court affirm the district court judgment dismissing Birdt's 42 U.S.C. § 1983 action.

DATED: September 13, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 and Ninth Circuit Rule 32-1, the attached Appellees' Supplemental Brief is: Proportionately spaced, has a typeface of 14 points or more and contains 2,127 words.

Dated: September 13, 2016

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9th Circuit Case Number(s)

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