



PERUTA V. SAN DIEGO

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PERUTA V. COUNTY OF SAN DIEGO

In *Peruta*, the Ninth Circuit Court of Appeals answered the narrow question—whether the 2nd Amendment protects a right to carry concealed firearms in public.

“The Second Amendment may or may not protect to some degree a right of a member of the general public to carry a firearm in public. If there is such a right, it is only a right to carry a firearm openly. . . and if that right is violated, the cure is to apply the Second Amendment to protect that right. The cure is not to apply the Second Amendment to protect a right that does not exist under the Amendment” (*id.* at 942).

ISSUE

You asked for a summary of [Peruta v. San Diego \(824 F.3d 919\)](#), in which the Ninth Circuit Court of Appeals considered whether the 2nd Amendment includes the right to carry concealed firearms in public.

SUMMARY

The 2nd Amendment states that “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed” (U.S. Const. Amend. II). By a seven to four margin, the Ninth Circuit Court of Appeals held in [Peruta v. San Diego \(824 F. 3d 919\)](#) that the 2nd Amendment “does not preserve or protect the right of a member of the general public to carry concealed firearms in public” ([Peruta](#) at 924).

In this case, residents of two California counties were denied a license to carry concealed firearms because they did not show good cause under their counties’ policies to carry concealed firearms. They sued, contending that the good cause requirement as defined by the counties’ policies violated their right to bear arms under the 2nd Amendment. The district court granted summary judgment, holding that the counties’ policies do not violate the 2nd Amendment. A divided Ninth Circuit three-member panel initially reversed the decisions but the Ninth Circuit later granted rehearing by the full court (en banc).

On rehearing, the en banc court conducted similar historical analysis as the U.S. Supreme Court conducted in *Heller* ([District of Columbia v. Heller, 554 U.S. 570 \(2008\)](#)) and *McDonald* ([McDonald v. City of Chicago, 561 U.S. 742 \(2010\)](#)). The



court said that “an overwhelming majority of the states to address the question. . . understood the right to bear arms, under both the Second Amendment and their state constitutions, as not including a right to carry concealed weapons in public” ([Peruta](#) at 936). Given the volume and consistency of historical data on the question, the court held that the “Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public” (*id.* at 924).

Like the U.S. Supreme Court did in *Heller*, the court left unanswered the question of whether the 2nd Amendment protects *some* ability to carry firearms in public (*id.* at 927). The court expressly stated that the 2nd Amendment “may or may not protect, to some degree, a right of a member of the general public to carry firearms in public. But the existence . . . and scope of such a right, are separate from and independent of the question presented here.”

According to the principal dissent, members of the general public have a constitutional right to carry firearms outside of the home for self-defense, and California’s restrictions on open and concealed carry, considered together, violate the 2nd Amendment.

BACKGROUND

With some exceptions, California’s current statutory scheme generally prohibits anyone from carrying concealed firearms (loaded or unloaded) in public. One exception allows concealed carry under a license (Cal. Penal Code §§ [25850](#), [26350](#), [25400](#).) To obtain a license, an applicant must (among other things) show “good cause,” as determined by the county sheriff or police department, as applicable (Cal. Penal Code §§ [25655](#) & [26160](#)).

San Diego County defines “good cause” as “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.” Yolo County does not define good cause but the county’s policy requires valid reasons for requesting a license and gives examples of what would be considered good cause and what would not. “Self-protection and protection of family (without credible threats of violence)” are not considered good cause. On the other hand, “victims of violent crime and/or documented threats of violence” would satisfy the good cause requirement.

CASE FACTS AND PROCEDURAL HISTORY

In 2009, plaintiffs Edward Peruta, a resident of San Diego County, and Adam Richards, a resident of Yolo County, were denied licenses to carry concealed firearms because they did not show good cause under their respective county's policy. Along with other plaintiffs, they brought separate suits, challenging the denials on 2nd Amendment grounds.

The district court, in each case, granted summary judgment in favor of the counties, holding that their policies were constitutional (*Peruta v. Cty. of San Diego*, 758 F.Supp.2d 1106 (S.D. Cal. 2010); *Richards v. Cty. of Yolo*, 821 F.Supp.2d 1169 (E.D. Cal. 2011)). In upholding the counties' restrictions, the district court relied on the fact that, at the time the counties denied the concealed weapons permits, it was legal to carry handguns openly in California under the Penal Code § 1203(g).

Plaintiffs appealed, and while the appeal was pending, California repealed its open carry law and enacted broad legislation prohibiting open carry of handguns in public locations. A three-judge panel of the Ninth Circuit, in *Peruta*, found San Diego County's policy unconstitutional, holding that the 2nd Amendment requires that "the states permit some form of carry for self-defense outside the home" (*Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1172 (9th Cir. 2014)). In arriving at its decision, the panel considered the change in California law, which had the effect of generally prohibiting individuals from carrying handguns—whether loaded or unloaded—in public locations. Based on the *Peruta* decision, the *Richards* panel held Yolo County's policy unconstitutional (*Richards v. Prieto*, 560 F App'x 681 (9th Cir. 2014)).

The Ninth Circuit subsequently granted a rehearing by the full court.

MAJORITY OPINION

The question before the en banc court was whether the 2nd Amendment protects someone's ability to carry concealed firearms in public. Plaintiffs contended that (1) the 2nd Amendment guarantees the general public at least some ability to carry firearms in public; (2) California's restrictions on concealed and open carry of firearms, taken together, violate the 2nd Amendment; and (3) there would be sufficient opportunity for public carry of firearms to satisfy the amendment if the good cause requirement for concealed carry, as interpreted by the sheriffs, were eliminated ([Peruta](#) at 927).

Like the Supreme Court in *Heller* and *McDonald*, the en banc court engaged in extensive historical inquiry. It conducted an extensive review of firearm regulations as they existed in England before the 2nd Amendment was ratified. Likewise, it

analyzed concealed carry laws that predated the Constitution and post-Amendment state court decisions.

According to the court, “the history relevant to both the Second Amendment and its incorporation by the Fourteenth Amendment lead to the same conclusion: the right of a member of the general public to carry a concealed firearm is not and never was protected by the Second Amendment” ([Peruta](#) at 929).

The court stated the following:

1. Under English law, the carrying of concealed weapons was consistently prohibited since at least 1541.
2. Concealed carry was consistently forbidden in the American colonies and was consistently forbidden by the states (with the sole and short-lived exception of Kentucky) both before and after the Civil War.
3. In the years after the adoption of the 2nd Amendment but before the adoption of the 14th Amendment, the state courts that considered the question nearly universally concluded that laws forbidding concealed weapons were consistent with both the 2nd Amendment and their state constitutions.
4. “In the decades immediately after the adoption of the Fourteenth Amendment, all of the state courts that addressed the question upheld the ability of their state legislatures to prohibit concealed weapons” ([Peruta](#) at 939).
5. The U.S. Supreme Court (*Robertson v. Baldwin*, 165 U.S. 275 (1897)) unambiguously stated in 1897 that the 2nd Amendment protection does not extend to the carrying of concealed weapons. . . . and “the right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons” ([Peruta](#) at 939, 940).

Given the volume of and consistency of state court rulings, the en banc *Peruta* court held “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 (*id.* at 939).”

The court further stated that:

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. There may or may not be a Second

Amendment right for a member of the general public to carry a firearm openly in public. The Supreme Court has not answered that question, and we do not answer it here (*id.* at 939).

The court also stated that:

even construing the Second Amendment as protecting the right of the general public to carry a firearm in public, and even assuming that California's restrictions on public open carry violate the Second Amendment so construed, it does not follow that California's restrictions on public concealed carry violate the Amendment (*id.* at 941, 942).

In a separate concurring opinion, Judge Graber wrote that even assuming "the Second Amendment applied to concealed carry of firearms in public, the challenged laws and defendants' actions survive heightened scrutiny and did not violate the constitution" (*id.* at 945). Judge Graber was joined in the dissent by Judge McKeown and Judge Thomas.

THE DISSENT

To the seven-member majority, the only legal issue was whether carrying concealed firearms is, in itself, a 2nd Amendment right as the right has been traditionally understood. But the four dissenting judges said the full legal context should have been considered.

According to the main dissent, by Judge Callahan, *Heller* "addressed concealed carry restrictions and instructed that those restrictions be evaluated in context with open-carry laws to ensure that the government does not deprive citizens of a constitutional right by imposing incremental burdens" (*id.* at 946, citing *Heller*, 554 U.S. at 629).

Judge Callahan said members of the general public have a 2nd Amendment right to carry firearms in public for general defense, and (1) "any fair reading of *Heller* and *McDonald* compels the conclusion that the right to keep and bear arms extends beyond one's front door," and (2) the history of the 2nd Amendment indicates that the right to bear arms applies outside the home ([Peruta](#) at 946, 947).

He said that "in the context of California's choice to prohibit open carry, the counties' policies regarding the licensing of concealed carry are tantamount to complete bans on the Second Amendment right to bear arms outside the home for self-defense, and are therefore unconstitutional" (*id.* at 950). But, according to Callahan, "even if the counties' policies in light of the California laws prohibiting

open carry were not tantamount to complete bans, the proper remedy would be to remand to the district courts" (*id.* at 951). Judge Smith concurred in a separate opinion.

In addition to the four-judge dissent, dissenting Judge Silverman wrote a separate dissent, joined by Judge Bea. He argued that the near-total refusal of some counties to issue carry permits could not pass any form of scrutiny. According to this dissent, licensed carry may or may not reduce violent crime in a statistically significant way, but it certainly does not increase crime; licensees are far more law-abiding than the general population.

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