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SD concealed-carry appeal may head to Supreme Court

9th Circuit decision in review for re-hearing

By JAMES PALEN, The Daily Transcript
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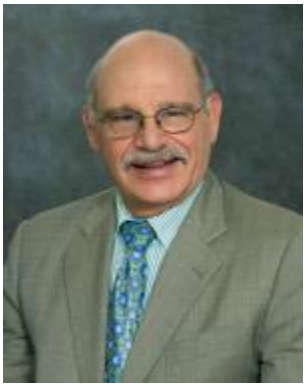

Professor Belknap

The decision by a 9th Circuit Court of Appeals panel to call San Diego County's restrictions on gun-carrying unconstitutional may have ramifications beyond California, a local law professor says.

The Feb. 13 decision was the fifth appellate court decision on the issue, and highlighted a split among the circuits.

Judge Diarmuid O'Scannlain wrote in a 2-1 opinion — similar to a ruling made by the 7th Circuit Court of Appeals — that because of state law on carrying firearms in plain view (open carry), San Diego County could not, in its "good cause" requirement, keep most registered gun owners from obtaining licenses (CCWs) for the concealed carry of their legal firearms.

The 2nd, 3rd and 4th Circuits have arrived at different opinions on restrictions of the carry of firearms.

Michal R. Belknap, an Earl Warren Professor at California Western School of Law, said the latest ruling increases the odds that the matter is on its way to the Supreme Court. The case is now in review for a potential re-hearing *en banc*, meaning that 11 of the 9th Circuit's 29 judges could be called to re-hear it.

"It's the fact that the attorney general of California wants a re-hearing that I would think is probably the biggest thing pushing it in that direction," Belknap said.

If the case is re-heard and then appealed to the Supreme Court, Belknap said he suspects the five more conservative-leaning justices — in today's Supreme Court balance — would be likely to agree with the recent panel opinion.

"I think that's totally unjustifiable, but that's a professor's opinion," Belknap said.

At issue in the case is an individual's right to carry a handgun outside the home or a designated area intended for its use. Edward Peruta, founder of American News and Information Services, initiated the case in 2009. He has concealed-carry permits in three other states and filed suit when San Diego County Sheriff Bill Gore turned down his application because it didn't show "good cause."

The county's concealed-carry application provides a question intended to help applicants know what it defines as "good cause": "For example, has your life or property been threatened or

jeopardized? Explain incidents and include dates, times, locations and names of police agencies to which these incidents were reported."

California generally prohibits the open carry of a handgun in public locations, and many local authorities with such jurisdiction generally prohibit concealed carry as well, except when “good cause” can be shown. As with many of the state's local permit-issuing authorities, San Diego County does not consider a general concern for one's safety to qualify as good cause.

The 9th Circuit panel said that is constitutionally problematic, pointing in large part to the landmark 2008 Supreme Court precedent from *District of Columbia v. Heller* that the Second Amendment is an individual's right, not a collective right, and that it extends beyond the walls of one's home into the public sphere.

It wasn't the restrictions on concealed-carry issuance themselves that the 9th Circuit found to be an issue, but rather that combined with the open-carry ban, few people in the state could exercise their Second Amendment right.

In short, the court found that either open-carry or concealed-carry may permissibly be restricted heavily without infringing Second Amendment rights — but not both — suggesting that in the absence of a statewide open-carry ban, San Diego County's position might be justified.

"The County’s argument has two flaws," the court's opinion stated. "First, it misapprehends Peruta’s challenge. This is not a case where a plaintiff who is permitted to openly carry a loaded weapon attacks the validity of a state’s concealed-carry rule because he would rather carry secretly.

“Rather, Peruta and his fellow plaintiffs argue that the San Diego County policy, in light of the California licensing scheme as a whole, violates the Second Amendment because it precludes a responsible, law-abiding citizen from carrying a weapon in public for the purpose of lawful self-defense in any manner."

The second flaw, the 112-page opinion continued, was that the county’s argument read too much into *Heller*’s blessing of concealed-carry restrictions.

"A flat-out ban on concealed carry in a jurisdiction permitting open carry may or may not infringe the Second Amendment right — the passage from *Heller* clearly bears on that issue, which we need not decide. But whether a state restriction on both concealed and open carry overreaches is a different matter.

“To that question, *Heller* itself furnishes no explicit answer. But the three authorities it cites for its statement on concealed-carry laws do."

The court referenced the three "authorities," the two cases of *State v. Chandler* and *Nunn v. State*, and George Chase's 1894 “American students' Blackstone,” to build the argument that laws inhibiting the Second Amendment could be constitutional as long as they did not render the Second Amendment useless.

California Attorney general Kamala Harris' motion to intervene in the Peruta case did not come until after the 9th Circuit made its ruling, but given the weight of her office, Belknap said he thinks the court is likely to allow her as an intervening party.

"My guess is she probably thought these judges are not terribly representative of the court," Belknap said.

For a long time there was a debate over whether the Second Amendment protected an individual right or a group right. Over time, he said, the Supreme Court has decided that it protects an individual right.

"You can make a very good argument on both sides," Belknap said.

The *Heller* case, he said, held not only that the individual right exists, but it includes a right to have a handgun for self-defense.

Belknap doesn't think the latter finding is covered by the Constitution.

"At the time the Second Amendment was written, there weren't very many handguns," he said. “Muskets or rifles were usually used.”

The 9th Circuit opinion touched on the point, naming the handgun as today's most common firearm for self-defense.

A public information officer with the 9th Circuit said there's no deadline for the court to decide on the motions to intervene, which have been filed not only by the state attorney general, but also the Brady Campaign to End Gun Violence. The California Police Chiefs' Association and California Peace Officers' Association have submitted amicus briefs petitioning for a re-hearing *en banc*.

The last filing in the case was an April 1 letter from San Diego County Counsel Thomas Montgomery to the clerk of court, stating, "My client has directed me not to file anything further in this appeal. As such, I cannot file a response regarding the motions to intervene."

The County Sheriff's Office previously announced that it would not fight the February ruling, but that it would also not abide by it as law or change its concealed-carry policy until the case is further decided.

"Applications that seek a CCW permit under the self-defense standard set forth in *Peruta v. County of San Diego* will be processed in the order they were received, should the decision of the Ninth Circuit become final," a notice reads from the county.

Orange County, which had a policy similar to San Diego County’s, has decided to comply with the ruling.