JURIST

ACADEMIC COMMENTARY

Ninth Circuit Ruling in Gun Permit Case Elevates Form Over Substance

Thursday 18 December 2014 at 12:00 PM ET edited by Jenna Decker

JURIST Guest Columnist Glenn C. Smith of California Western School of Law discusses the Ninth Circuit's denial of intervention in Peruta v. County of San Diego...

"You snooze, you lose."

©

At first blush, this maxim seems to capture the essence of the US District Court for the Ninth Circuit's November 12, 2014 split-panel decision in Peruta v. County of San Diego [PDF]. Peruta held that the California Attorney General and a major gun-control-advocacy organization waited too long to intervene and ask for the *en banc* review the county defendant decided not to seek. Peruta also denied intervention to two associations representing law-enforcement, already in the lawsuit as *amici*.

Far from being merely an arcane fight over federal procedure, Peruta is ultimately about the ability of major stakeholders to get authoritative guidance on important, unresolved constitutional questions flowing from the Supreme Court's recent forays into Second Amendment rights. Depending upon the outcome of post-decision maneuvering—explored at the end of this commentary—the Peruta majority may have insulated the Ninth Circuit from further review of its earlier controversial ruling [PDF] invalidating strict restrictions on concealed-

carry gun permits. Assuming that the US Supreme Court would not likely step into this kind of seemingly discretionary and procedural issue, insulating the latest Peruta decision from *en banc* Ninth Circuit review might equate to immunity from any further review.

The Background and Basic Controversy: The Underlying Dispute Began as a Challenge to San Diego County's Denial of a Concealed-Weapon Permit

California law generally forbids [PDF] most residents from the open or concealed carrying of firearms, but individual gun owners can get concealed-carry permits upon a showing of "good cause." Individual cities and counties have discretion to define the specifics of what such a showing requires in their jurisdictions. Like other California urban areas—but unlike most rural counties—San Diego applied a restrictive standard for good cause. Essentially, permit seekers could not just invoke a generic safety concern. They had to show through restraining orders or law-enforcement letters that they faced security threats "distin[ct] from the mainstream" San Diegan.

Peruta gave Ninth Circuit judges a chance to weigh in on key Second Amendment uncertainties in play since two Supreme Court opinions recognized an individual constitutional right to gun ownership applying to (and potentially invalidating) strict state and local gun-control laws (District of Columbia v. Heller and McDonald v. City of Chicago). In their February 2014 opinion reversing a federal district court opinion in favor of the county, the Peruta judges opined for many pages about the importance of the right to bear arms outside of the home, the strong scrutiny appropriate for laws regulating public engagement with firearms and the unconstitutionality of restrictive concealed-carry laws.

As noted in a previous JURIST report, Peruta's pro-gun rights discussion is "being cited as a precedent in other gun challenges and some California counties have already chosen to follow it." So, when the county defendant announced that it would not appeal its loss up the Ninth Circuit ladder, the State of California, the non-profit Brady Campaign to Prevent Gun Violence and two associations representing California law-enforcement officials sought *en banc* review before an eleven-judge panel.

The Peruta "Intervention Round" and the Basic Majority/Dissent Positions

In order to request *en banc* review, the state, the Brady Campaign and the associations needed to be formally recognized as "intervenors" in the underlying dispute. This implicated the rights of non-parties to intervene in a federal civil lawsuit under Fed. R. Civ. P. 24.

The two-judge Peruta majority (Republican-appointed Judges O'Scannlain and Callahan) saw the intervention requests as unjustifiably "untimely." Applying a standard three-factor test, the majority objected that the would-be intervenors waited "more than four years after the case began" and acted only when it had reached the appellate stage (at which intervention should be "extremely rare.") Finding no good reason for the delay, and seeking to avoid "encourag[ing] interested parties to impede litigation by waiting...until the final stages of a case," the majority turned thumbs down.

In dissent, Chief Judge Thomas (Democratic-appointed) saw the would-be intervenors' initial failure to join the fray as entirely justified, because the controversy had "morphed" from a "narrow but important" challenge to one county's policy into "another challenge entirely"—one that "considered the constitutionality of California's [entire] firearm regulatory framework." The dissenter evoked a "liberal policy in favor of intervention [as of right];" he also argued for two additional alternative bases upon which permissive or equitable intervention should be granted.

Assessing the Positions: Determining Whether the Majority or the Dissent Approach is Better Requires Answering Three Questions

First, what is the correct characterization of the would-be intervenors' motivations and justifications? Long knowing about the implications and significance of the challenge, did they merely seek to "avoid some inconvenience to themselves by waiting," as the majority implied? Did they seek to "impede" the litigation, the policy downside the majority worried about? Or, were their motives more creditable—such as maximizing scarce litigation resources and, in the case of the Attorney General, deferring to the lead of local officials? At least the two law-enforcement associations were already participating as *amici*, so they cannot be said to have "waited out" the controversy. Ultimately, this motive question is tied to a second question of characterization: who's view about the ultimate stakes involved in Peruta is the more persuasive?

The majority seems right as a technical matter that Peruta only formally challenged San Diego's refusal to let a general self-defense assertion be sufficient "good cause" for a concealed-weapon permit. This means that the dissenting judge failed to persuade in arguing that intervention by the state is mandated by 28 U.S.C. § 2403(b), which requires it "wherein the constitutionality of any statute of that State affecting the public interest is drawn in question."

But the dissenting judge is correct that as a practical matter both the Peruta plaintiff and the appellate majority at important times conflated the broader California gun-carrying regulatory scheme with the San Diego policy. For example, the majority referred to both as an intertwined "California scheme" whose constitutionality needed to be analyzed "as a whole."

This leads to the third and ultimate question: which is more important in an intervention case such as Peruta—form or substance? Here, the dissent is ultimately more persuasive.

Although not technically a ruling on broader gun regulations in California or the other states within the reach of the Ninth Circuit, there is no gainsaying that last February's Peruta opinion (by the same three judges, who split 2-1) constitutes a major discussion by a weighty court. The opinion spends 17 pages on an extensive exegesis of how the Second Amendment text, "original public understanding," contemporaneous judicial precedents and post-Amendment legislation and commentary apply to public gun toting. Then, for 11 pages the opinion comprehensively critiques other circuit court analyses regarding what level of scrutiny should attend judicial review of a variety of gun-control laws.

Thus, there is great force to the dissenting judge's assertion that the Peruta majority's gun-rights pronouncements "will greatly impact any future litigation pertaining to [the] constitutionality" of California gun-control laws. Similarly persuasive is that California and its residents have "a significant protectable interest" in at least seeking broader judicial review of the 2-to-1 judge majority's pro-gun rights sentiments. Judicial efficiency and the public interest, supposedly important variables in intervention decisions, would have been served by a less hidebound application of mandatory and permissive intervention rules.

A Last Irony

I can't resist ending by pointing to an ironic comparison between Peruta and the otherwise unrelated case in which the Supreme Court ducked the merits of Proposition 8's ban on same-sex marriage.

There, it was the official California defendants, including then-Attorney General Jerry Brown, who declined to appeal a judicial invalidation of Proposition 8. It then fell to the proponents of the voter initiative, who had been allowed to intervene in the district court proceeding, to press an appeal. The Supreme Court famously held that initiative proponents lacked standing to mount the appeal; the result was that the lower court invalidation of Proposition 8 (with all its interesting arguments that same-sex marriage bans flunked strict and rational-basis scrutiny) was insulated from further appellate review.

In Peruta, by ironic contrast, the shoe is on the other foot. The (county) defendant's refusal to further defend its policy left it to California officials, among others, to mount an appeal. But they have now been denied the right to do so. Apparently, turn about is fair play.

UPDATE: Present Status of the Three-Judge Panel Ruling and the San Diego County Policy

As of this writing, it is unclear whether the Peruta majority's holding against intervention will stick. In the aftermath of the November 12 decision, the San Diego County Sheriff's website declined to implement the panel ruling at present because of the possibility that the Ninth Circuit would order *en banc* review on its own. Then, on November 27, the California Attorney General announced that she would seek *en banc* review of the intervention denial. (*En banc* review of the denial of *en banc* review? Interesting!)

Glenn C. Smith is a professor of Constitutional Law at California Western School of Law. He is the co-author of Constitutional Law for Dummies, a Dummies-brand guide for interested laypersons, law students and legal practitioners. Student Joseph Gonnella contributed original research for this Commentary.

Suggested citation: Glenn C. Smith, *Ninth Circuit Ruling in Gun Permit Case Elevates Form Over Substance*, JURIST - Academic Commentary, Dec. 20, 2014, http://jurist.org/acadmic/2014/12/glenn-smith-peruta-intervention.php

This article was prepared for publication by Jenna Decker, an Assistant Editor for JURIST Commentary service. Please direct any questions or comments to her at commentary@jurist.org

Posted in Academic Commentary

Please note that JURIST cannot and does not provide legal advice.

As such, nothing on this site is intended as legal advice. If you have a legal problem, please consult an attorney.

We wish you the best of luck with your case, but we can't help.