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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 EDWARD PERUTA,

12 Plaintiff,

13 v.

14 COUNTY OF SAN DIEGO, WILLIAM D.
15 GORE, INDIVIDUALLY AND IN HIS
16 CAPACITY AS SHERIFF,

17 Defendants.

11 USSD No. **09-CV-2371 IEG (BLM)**

12 **DEFENDANT WILLIAM D. GORE'S**
13 **REPLY POINTS AND AUTHORITIES**
14 **IN SUPPORT OF MOTION TO**
15 **DISMISS COMPLAINT**
16 **[Fed.R.Civ.P., 12(b)(6)]**

17 Date: December 21, 2009
18 Time: 10:30 a.m.
19 Dept: 1 – Courtroom of the
20 Hon. Irma E. Gonzalez

21 **I**

22 **THE SECOND AMENDMENT**

23 Plaintiff's opposition claims that the Second Amendment gives him the
24 constitutional right to "bear arms in order to be armed and ready in case of conflict with
25 another person." That is not the holding of *District of Columbia v. Heller*, 554 U.S. __;
26 128 S. Ct. 2783; 171 L.Ed.2d 637 (2008) (see analysis in motion points and authorities.)
27 There are numerous federal and state statutory proscriptions on the carrying of loaded
28 and concealed firearms. If Plaintiff's position was accurate, gang members and drug
dealers could lawfully carry loaded, concealed weapons without restriction. The *Heller*
court emphasized that the right to keep and bear arms is "not a right to keep and carry
any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at

1 ____; 171 L.Ed.2d at 678. And it endorsed regulatory measures that are presumptively
2 lawful. *Heller* at ____, n. 26; 171 L.Ed.2d at 678, n. 26. Plaintiff cites to no case
3 nationwide which has struck down concealed weapons regulations since *Heller*.
4 California law specifically permits Plaintiff to possess a loaded weapon in his residence,
5 including any temporary residence or campsite, which would include his recreational
6 vehicle. Penal Code § 12031(l).

7 II

8 **THERE IS NO CONSTITUTIONALLY PROTECTED** 9 **INTEREST IN A CONCEALED WEAPONS PERMIT**

10 Penal Code section 12050 gives extremely broad discretion to the sheriff
11 concerning the issuance of such licenses. *Nichols v. County of Santa Clara*, 223 Cal.
12 App. 3d 1236, 1241 (1990); *Salute v. Pitchess*, 61 Cal. App. 3d 557, 560 (1976). In
13 *CBS, Inc. v. Block*, 42 Cal.3d 646, 655 (1986), that discretion was described as
14 “unfettered.” The court noted that in Los Angeles County, with a population of over 7
15 million, the sheriff had issued only 35 licenses, while in Orange County, the sheriff had
16 issued over 400. *Id.* at pp. 649, 655. Licenses to carry a concealed firearm are rarities.
17 The statute leaves their issuance to the unfettered discretion of the sheriff, in the interest
18 of controlling dangerous weapons. *Id.* at p. 655.

19 In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) the court stated: “To have
20 a property interest in a benefit, a person clearly must have more than an abstract need or
21 desire for it. He must have more than a unilateral expectation of it. He must, instead,
22 have a legitimate claim of entitlement to it.”

23 “In light of this statute’s delegation of such broad discretion to the sheriff, it is
24 well established that an *applicant* for a license to carry a concealed firearm has no
25 legitimate claim of entitlement to it under state law, and therefore has no ‘property’
26 interest to be protected by the due process clause of the United States Constitution.”
27 *Nichols v. County of Santa Clara*, 223 Cal. App. 3d at 1241; *Erdelyi v. O’Brien*, 680
28 F.2d 61, 63 (9th Cir. 1982).

1 Plaintiff cannot state a constitutional claim because he has no protected property
2 interest which triggers 42 U.S.C. section 1983. *Erdelyi v. O'Brien*, 680 F.2d 61 (9th
3 Cir. 1982); *Nichols v. County of Santa Clara*, 223 Cal. App. 3d at 1245.

4 **III**

5 **EQUAL PROTECTION**

6 Plaintiff's allegations further fail to state an equal protection claim as set forth in
7 the motion filed herein. He fails to allege intentional discrimination by the Defendant
8 and appears to claim that the sheriff has his own narrow interpretation of the residency
9 requirement. As long as that interpretation is consistent, the sheriff is not treating
10 persons differently. Plaintiff points to a definition of residency from the Elections
11 Code. A more common definition is that used in Revenue and Taxation Code section
12 17014(a) which defines a resident as "[e]very individual who is in this state for other
13 than a temporary or transitory purpose." Plaintiff in his Complaint clearly places
14 himself in San Diego County for a temporary or transient purpose.

15 Further, he fails to allege facts which support his claim that the good cause
16 determination of the sheriff is constitutionally flawed. While Plaintiff makes
17 allegations of his need for a permit, he fails to state what *evidence* he produced to
18 Defendant to meet his burden of proof in the application process.

19 Most significantly, since the statute requires that Plaintiff meet all *three*
20 requirements of Penal Code section 12050 to be eligible for a permit, the failure to meet
21 the residency provision alone ends his constitutional claim. See also, 62 Cal. Ops. Atty.
22 Gen. 708 (1979).

23 **CONCLUSION**

24 The Complaint fails to state a claim upon which relief can be granted. The
25 motion to dismiss should be granted without leave to amend.

26 DATED: December 14, 2009

Respectfully submitted,

27 JOHN J. SANSONE, County Counsel

28 By: s/ JAMES M. CHAPIN, Senior Deputy
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Declaration of Service

I, the undersigned, declare:

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California, where the service occurred; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

On December 14, 2009, I served the following documents: **DEFENDANT WILLIAM D. GORE'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT [Fed.R.Civ.P., 12(b)(6)]** in the following manner:

By placing a copy in a separate envelope, with postage fully prepaid, for each addressee named below and depositing each in the U. S. Mail at San Diego, California.

By electronic filing, I served each of the above referenced documents by E-filing, in accordance with the rules governing the electronic filing of documents in the United States District Court for the Southern District of California, as to the following parties:

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on December 14, 2009, at San Diego, California.

By: s/ JAMES M. CHAPIN
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