

No. _____

**In The
Supreme Court of the United States**

—————◆—————
BARRY ALAN LAYTON,

Petitioner,

v.

STEVEN K. BORDIN,
Chief Probation Officer, Butte County, California,

Respondent.

—————◆—————
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—————◆—————
PETITION FOR WRIT OF CERTIORARI

—————◆—————
CHARLES M. BONNEAU, JR.
Counsel of Record
331 J Street Suite 200
Sacramento, CA 95814
(916) 444-8828
cbonneau@gmail.com

QUESTION PRESENTED FOR REVIEW

Whether the Second Amendment right to keep and bear arms is impinged by a standardless state law requirement of a permit to carry a concealed weapon.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are Petitioner himself and the State, represented by the California Attorney General.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED	2
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	4
Prosecution Case	4
Defense Case.....	11
SUMMARY	11
ARGUMENT.....	14
CALIFORNIA LAW FORBIDDING CONCEALED CARRY OF A FIREARM EXCEPT WITH A CON- CEALED WEAPON PERMIT VIOLATES THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS	14
A. The Constitutionality of California’s Con- cealed Weapon Law Is a Necessary Precondi- tion to Conviction of Carrying a Concealed Weapon in Violation of Former Cal. Penal Code § 12025(a)(2)	15
B. Burdening the Second Amendment Right versus Destruction of the Right	17

TABLE OF CONTENTS – Continued

	Page
C. For Purposes of Federal Habeas Review, Petitioner’s Conviction Violates the Second Amendment Under Clearly Established Federal Law, as Determined by Prior Opinions of This Court	19
D. The Butte County CCW Ordinance Prohibits Ordinary People from Bearing Arms	22
CONCLUSION	24

APPENDIX

Memorandum Opinion of the Circuit Court of Appeals, March 14, 2017	App. 1
Order of the District Court, Eastern District of California, adopting the Findings and Recommendations and denying the habeas corpus petition on February 12, 2015	App. 3
Findings and Recommendations filed in the District Court on February 2, 2015.....	App. 5
Ruling of the Appellate Department of the Butte County Superior Court, December 2, 2013.....	App. 22
Order granting petitioner’s motion to withdraw the petition for rehearing and rehearing <i>en banc</i> on October 2, 2017.....	App. 23

TABLE OF AUTHORITIES

	Page
CASES	
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	17
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	<i>passim</i>
<i>Edelman v. California</i> , 344 U.S. 357 (1952).....	3
<i>Ex parte Bell</i> , 19 Cal.2d 488 (1942).....	3
<i>Ezell v. City of Chicago</i> , 651 F.3d 684 (7th Cir. 2011).....	18, 22
<i>Friedman v. City of Highland Park</i> , 136 S.Ct. 447 (2015).....	13
<i>Fullilove v. Klutznick</i> , 448 U.S. 448 (1980)	17
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011).....	18
<i>Jackson v. City and County of San Francisco</i> , 135 S.Ct. 2799 (2015).....	13
<i>Kachalsky v. County of Westchester</i> , 701 F.3d 81 (2d Cir. 2012).....	18
<i>Larche v. Simons</i> , 53 F.3d 1068 (9th Cir. 1995)	3
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	12, 14, 20, 21
<i>McMonagle v. Meyer</i> , 802 F.3d 1093 (9th Cir. <i>en banc</i> 2015).....	3
<i>Moore v. Madigan</i> , 702 F.3d 933 (7th Cir. Ill. 2012).....	19
<i>New Orleans v. Dukes</i> , 427 U.S. 297 (1976)	17

TABLE OF AUTHORITIES – Continued

	Page
<i>Nordyke v. King</i> , 681 F.3d 1041 (9th <i>en banc</i> Cir. 2012)	18
<i>People v. Mower</i> , 28 Cal.4th 457 (2002).....	23
<i>Peruta v. California</i> , No. 16-894, 137 S.Ct. 1195, June 26, 2017	1, 13, 14
<i>Peruta v. County of San Diego</i> , 824 F.3d 919 (9th Cir. <i>en banc</i> 2016) (cert. den. June 26, 2017)	12, 15, 16, 17
<i>United States v. Chester</i> , 628 F.3d 673 (4th Cir. 2010)	18
<i>United States v. Decastro</i> , 682 F.3d 160 (2d Cir. 2012)	18
<i>United States v. Emerson</i> , 270 F.3d 203 (5th Cir. 2001)	17
<i>United States v. Marzzarella</i> , 614 F.3d 85 (3d Cir. 2010)	18
<i>United States v. Masciandaro</i> , 638 F.3d 458 (4th Cir. 2011)	18
<i>Voisine v. United States</i> , 136 S.Ct. 2272 (2017)	13
<i>Welton v. City of Los Angeles</i> , 18 Cal.3d 497 (1976).....	3
<i>White v. Woodall</i> , 134 S.Ct. 1697 (2014).....	20, 21
<i>Woollard v. Gallagher</i> , 712 F.3d 865 (4th Cir. 2013)	19

TABLE OF AUTHORITIES – Continued

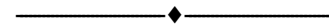
	Page
CONSTITUTIONAL PROVISIONS	
California Constitution Art. VI, § 10 (adopted 1966)	3
U.S. Const., amend. II	<i>passim</i>
STATUTES	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2253	2
28 U.S.C. § 2254	2
28 U.S.C. § 2254(b)(1)(A)	3
28 U.S.C. § 2254(d)(1)	8, 12, 19
Cal. Penal Code § 148	8
Cal. Penal Code § 148(a)	17
Cal. Penal Code § 148(a)(1)	2, 9
Cal. Penal Code § 12025	23
Cal. Penal Code § 12025(a)(2)	3
Cal. Penal Code § 25400	3
Cal. Penal Code § 25850	22
Cal. Penal Code §§ 26150 et seq.	22
Cal. Penal Code § 26150(a)(2)	23
Cal. Penal Code § 26155	22
Cal. Penal Code § 26160	22
Cal. Penal Code § 26170(a)	23

TABLE OF AUTHORITIES – Continued

	Page
Cal. Penal Code § 26190(f)	23
Cal. Penal Code § 26350	22

Petitioner, BARRY LAYTON, respectfully prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, No. 15-15319, March 14, 2017, affirming the denial of his habeas corpus petition.

On March 14, 2017, in the Court of Appeals, petitioner filed a petition for rehearing and rehearing *en banc*, based on the then-pending Certiorari Petition in *Peruta v. California*, No. 16-894, which was filed in this Court on January 12, 2017. On September 26, 2017, petitioner moved to withdraw the petition for rehearing and rehearing *en banc*, based on the denial of certiorari review in the *Peruta* matter on June 26, 2017. See 137 S.Ct. 1995. On October 2, 2017, petitioner's motion to withdraw the petition for rehearing and rehearing *en banc* was granted by the Court of Appeals.



OPINIONS BELOW

Attached to this Petition are: the Memorandum Opinion of the Circuit Court of Appeals, March 14, 2017 (No. 15-15139; App. 1); the Order of the District Court, Eastern District of California, adopting the Findings and Recommendations and denying the habeas corpus petition on February 12, 2015 (2:14-cv-1153; App. 3); the Findings and Recommendations filed in the District Court on February 2, 2015 (2:14-cv-1153; App. 5); the Ruling of the Appellate Department of the Butte County Superior Court, December 2, 2013 (No. APP3932; App. 22); the Order granting

petitioner's motion to withdraw the petition for rehearing and rehearing *en banc* on October 2, 2017 (No. 15-15139; App. 23).

◆

STATEMENT OF JURISDICTION

This Court has jurisdiction on certiorari pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction in habeas corpus under 28 U.S.C. § 2254. The Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 2253.

◆

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition concerns the constitutional right to keep and bear arms in a public place. This issue is governed by the Second Amendment to the United States Constitution: “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.”

◆

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial in the California Superior Court, County of Butte. (No. SCR 86646.) He represented himself at trial. Petitioner was convicted of two misdemeanor counts: resisting a peace officer in violation of Cal. Penal Code § 148(a)(1), and

carrying a concealed weapon in violation of Cal. Penal Code § 12025(a)(2).¹

The conviction was affirmed by the Appellate Department of the Butte County Superior Court. (No. APP 3932.) Transfer of the appeal was denied by the California Court of Appeal. (No. C075616.) Relief was sought in the California Supreme Court through a petition for habeas corpus (S217355), which was denied on April 23, 2014.²

Petitioner sought federal habeas corpus relief by a timely petition in the United States District Court for the Eastern District of California. (2:14-cv-01153.) Relief was denied in the district court, but an appeal was certified to the Circuit Court of Appeals for the Ninth Circuit, “on the question of whether petitioner has made a substantial showing of the denial of his rights under the Second Amendment.” The Court of Appeals

¹ See now, Cal. Penal Code § 25400.

² There is no procedure for the direct state appeal of a misdemeanor conviction to progress to the California Supreme Court. However, a habeas corpus petition to the California Supreme Court is permitted under state law following denial of relief in the California Court of Appeal. See California Constitution Art. VI, § 10 (adopted 1966), *Welton v. City of Los Angeles*, 18 Cal.3d 497, 507 (1976); *Ex parte Bell*, 19 Cal.2d 488, 493-494 (1942); and *Edelman v. California*, 344 U.S. 357 (1952).

At the time of petitioner’s state court appeal, a petition for habeas corpus relief in the California Supreme Court was deemed a requirement for federal exhaustion purposes in the Ninth Circuit. See 28 U.S.C. § 2254(b)(1)(A), and see *Larche v. Simons*, 53 F.3d 1068 (9th Cir. 1995). That requirement has since been removed. See *McMonagle v. Meyer*, 802 F.3d 1093 (9th Cir. *en banc* 2015).

affirmed the denial of relief, and proceedings in the Court of Appeals became final on October 2, 2017. (No. 15-15139.)

At all stages of the proceedings petitioner argued that his right to keep and bear arms was infringed by state law. State law criminalizes the concealed carry of any firearm in a public place in the absence of a permit to carry a concealed weapon (CCW permit). CCW permits are issued on a county-by-county basis, valid only in the issuing county, in the discretion of the local sheriff. The criminalization of concealed carry in the absence of a CCW permit violates the Second Amendment.

◆

STATEMENT OF FACTS

Prosecution Case

Robert and Corrine Crotwell were leaving the Pelicans Roost Restaurant in Paradise on an evening in 2012, when they encountered an elderly man with an elderly woman who had fallen to the ground and was being assisted by petitioner. R.T. 62, 73.³ The woman had been using a walker. R.T. 64, 74, 100.

³ “R.T.” citations are to the Reporter’s Transcript in the state appeal. The Reporter’s Transcript is Exhibit 2 to the Answer, filed by respondent in the district court on September 4, 2014. Dkt. # 12-1.

The Crotwells asked if they could be of assistance. According to Mr. Crotwell, petitioner said, “no, we have it.” R.T. 74.

According to Mrs. Crotwell, petitioner “snapped back,” with a raised voice, “no, we don’t need any help. This is no concern of yours,” or “no, she needs to do it.” R.T. 63-64. Mrs. Crotwell had the impression that petitioner was trying to promote the woman to be independent; as a nurse, she felt this was appropriate. R.T. 64.

Nevertheless, the Crotwells were concerned and decided to stay nearby, to determine if there was anything they could do to help. R.T. 64, 75.

Mrs. Crotwell observed that petitioner was trying to assist the woman by pulling on one arm. R.T. 65. Mr. Crotwell, who was employed as a hospital administrator, felt that this was the wrong way to lift someone. R.T. 76. Mrs. Crotwell suggested that her husband assist by grabbing the other arm. At that point petitioner became “confrontational.” R.T. 65.

Mrs. Crotwell conceded that there was no indication the woman was being abused, but felt that petitioner was “a little harsh” with his words. R.T. 71.

Petitioner turned to Mr. Crotwell, pointed a finger at him, and said “this does not concern you. Stay back. This is no concern of yours.” R.T. 66 [Mrs. Crotwell]. Or, “you need to get away. You need to get away now.” R.T. 76 [Mr. Crotwell]. At that point Mrs. Crotwell ran into the restaurant and told the staff that they should call

the police. R.T. 66, 77. Petitioner asked Mr. Crotwell to have his wife come back outside. R.T. 81.

From inside the restaurant, Mrs. Crotwell suggested that one of the waiters go outside and check on the situation. When the waiter returned, his eyes were wide and he said, “he just hit me.” R.T. 67.⁴

Eric Steen was a busboy at the restaurant that night. He went out to the parking lot in response to Mrs. Crotwell’s complaint. He saw the woman on the ground. He knew that it was better to not help an older person up because the person may have broken something. R.T. 91. He tried to help nevertheless, but was stopped by petitioner. R.T. 89. The defendant yelled or cursed at Mr. Steen “a little bit.” Steen turned and went back into the restaurant. R.T. 92. He was not assaulted by petitioner, and he did not describe a physical assault as claimed by Mrs. Crotwell.

This misunderstanding over an alleged physical assault led to the police response and the arrest of petitioner.

Mr. Crotwell did not see anyone leave the restaurant or get into a physical confrontation with petitioner. R.T. 79. No assault was charged against petitioner.

Mrs. Crotwell ran back out to the parking lot, where her husband had also just called the police. R.T.

⁴ As set forth below, this version was based on a misunderstanding.

68, 77. Waiting for police, they offered to help but petitioner apparently did not want any help. R.T. 80.

Paradise Police Officer Robert Wright was on duty on December 9, 2011, at about 6:30 p.m. when he responded to a call at the Pelican Roost Restaurant. Initially the call reported an elderly person in need of assistance. Then it was modified to a person who was being “combative” and “assaulting the public.” R.T. 95, 114.⁵ Police Sergeant Craig Gallagher responded about the same time. R.T. 113, 116.

Arriving at the restaurant, Gallagher observed three people walking in the parking lot: petitioner and two elderly people, his parents. R.T. 96.

Someone else on the scene identified petitioner as the person who was the source of the call. R.T. 108. Wright approached and spoke to petitioner in a tone which Wright described as “cordial.” R.T. 98. Petitioner responded by saying “no thank you. We’re busy. No crime here.” R.T. 117.

Wright supposed that petitioner “was maybe trying to hide something that had happened.” R.T. 99. Sergeant Gallagher suspected that petitioner was trying to use his parents as an “excuse” to impede the officers’ investigation. R.T. 118.

Wright asked petitioner’s mother if she needed assistance, and she responded, “No I don’t.” Despite this, Wright then intervened to physically escort her to the

⁵ The recorded 911 calls were not offered into evidence by either side.

car. Petitioner protested: "I don't need your help." Wright ignored him, and reached out toward petitioner's mother. R.T. 100. As he did so, petitioner grabbed Wright's arm. R.T. 101.

At that point Sergeant Gallagher intervened and informed petitioner that the officers were going to escort his mother to the car, then interrogate petitioner about the supposed "incident that had occurred." R.T. 101.

According to Gallagher, at this point he had "seen enough." He anticipated a fight. R.T. 142.

Gallagher determined to separate petitioner from his parents so that they would not be hurt in the upcoming violence which was anticipated by Sergeant Gallagher. He told petitioner, "you need to step over here or you're going to end up in handcuffs." Gallagher couldn't put enough distance between petitioner and his elderly parents, so he grabbed petitioner's arm to put him in a wrist lock, then took him to the ground and handcuffed and arrested him. R.T. 119-121.

Wright testified that he was turning to escort petitioner's mother to the car, over her protests, when Sergeant Gallagher tackled petitioner. R.T. 102. Wright heard petitioner say, "Easy, easy." Four officers engaged petitioner in taking him to the ground and placing him in handcuffs. R.T. 103. Officers O'Hearn and Smith were also on the scene. R.T. 108, 115.

According to Sergeant Gallagher, petitioner was arrested for violation of Cal. Penal Code § 148, "delaying

our investigation in the rear parking lot of Pelicans Roost.” Specifically, petitioner “failed to listen to a uniformed officer,” then went “hands on” with Officer Wright. R.T. 137.⁶

Gallagher felt that there had been an obstruction of the assault investigation because petitioner was “manipulating” the officers’ “time and focus.” R.T. 140. Gallagher felt that he had the authority to detain petitioner because he was a potential suspect. R.T. 142.

Officer Wright was equipped with a shoulder video camera, and a three-minute recording was taken of the altercation. That video recording was marked as Exhibit 5 and played to the jury, and a transcript (Exhibit 5-A) was provided. R.T. 106.⁷

The video recordings portray the conversation between Officer Wright and petitioner, Mrs. Layton’s protests that she did not need help, the disagreement

⁶ In Count 1 petitioner was convicted of resisting, delaying, or obstructing a peace officer in violation of Cal. Penal Code § 148(a)(1).

⁷ The video exhibits have been included on a single media disc. This disc was lodged with the Answer, filed by respondent in the district court on September 10, 2014. Dkt. # 14.

The media disc includes the audio recorded 911 calls, which were not entered in evidence.

The media disc includes four shoulder camera video recordings from three officers, all of whom responded to the restaurant at about the same time. Two recordings were entered as part of the prosecution case, and the defense offered the entirety of all four video recordings. The encounter is recorded from three angles. Another shoulder recording shows the arrest process after petitioner was placed in a patrol car.

between Wright and petitioner over who would escort Mrs. Layton to her car [“Step over there . . . “No, I’m helping her . . . ”], Wright’s professed need to question petitioner about an assault report, and a sudden takedown by Sergeant Gallagher, while Mrs. Layton protests in horror and petitioner shouts, “Easy, easy.”

Officers O’Hearn and Smith also carried video recorders. A portion of O’Hearn’s video was marked as Exhibit 3. R.T. 122. That video was played to the jury, and a transcript (Exhibit 3-A) was provided. R.T. 123.

According to Officer Wright, it took the officers three to five minutes to determine that no assault had taken place, and several minutes to determine that there was no need for medical assistance. R.T. 110.

Sergeant Gallagher escorted petitioner to the patrol car, where petitioner was searched. In the left outer pocket of petitioner’s jacket Gallagher found a loaded .25 caliber semi-automatic handgun. R.T. 125; Exhibit 1. Gallagher asked petitioner if he had a concealed weapon permit, or CCW. Petitioner responded that he did not. R.T. 127.⁸

In the continuing search Officer Smith located a folding knife in a sheath on petitioner’s hip. Gallagher described the knife as a “switchblade slash gravity knife.” R.T. 131, Exhibit 2-C.⁹

⁸ Count 2 charged possession of a concealed firearm. Petitioner was convicted of that offense.

⁹ Count 3 charged possession of a switchblade knife. During jury deliberations on October 16, 2012, an investigator with the

Defense Case

Petitioner presented the testimony of his mother, Lynn Layton.

Mrs. Layton testified that she was entering the restaurant with her husband and her son, petitioner, when she fell. She lost her breath but was not injured. Two people approached and offered to help. She told them that she was not hurt but wanted to catch her breath then get herself up and continue into the restaurant. R.T. 189.

When the police arrived she told them that she didn't need any assistance. R.T. 190. She repeatedly told people who approached that she did not need assistance. R.T. 191.

The defense also presented the entirety of the complete videos taken from the cameras of Officers Smith and O'Hearn. These videos were included in a single disc, which was marked Defense Exhibit A and played to the jury. R.T. 200.¹⁰

◆

SUMMARY

Certiorari review is necessary to resolve a profound question of the scope of the Second Amendment right to bear arms. The Ninth Circuit in this case relied

District Attorney's Office examined the knife and determined that it was not a switchblade knife. Count 3 was dismissed. C.T. 127; R.T. 247.

¹⁰ See footnote 7 above.

on its own opinion in *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. *en banc* 2016) (cert. den. June 26, 2017): “[T]he 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 order to gain relief in federal habeas corpus, a petitioner must demonstrate that the state court’s rejection of his claim was contrary to, or was based on an unreasonable application of, clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1).

In *District of Columbia v. Heller*, 554 U.S. 570 (2008) (hereafter “*Heller*”) this Court invalidated a requirement of a federal jurisdiction for licensing of firearms kept in the home. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (hereafter “*McDonald*”) this Court applied the Second Amendment to the states, and invalidated a local ordinance effectively banning handgun possession by almost all residents.

The state court’s rejection of petitioner’s Second Amendment claim was contrary to clearly established Supreme Court law as expressed in *Heller* and *McDonald*.

Since the *McDonald* decision applied the Second Amendment to the states, several opportunities have come and gone for this Court to determine the reach and application of the Second Amendment in a state law context.

Notably, in *Peruta v. California*, No. 16-894, the Court was presented with a challenge to the same state law challenged here, California's CCW permit regimen. The Ninth Circuit rejected the challenge in an *en banc* opinion discussed in the Argument below. Justice Thomas, joined by Justice Gorsuch, dissented from the denial of certiorari. 137 S.Ct. 1195, June 26, 2017.¹¹

The *Peruta* dissenters took note that the issue was of national importance, with extensive weighing-in by the courts of appeals. 137 S.Ct. at 1196. In the view of the dissenters, the Ninth Circuit had improperly treated the issue as limited to the right to concealed carry rather than the more general right to public carry. 137 S.Ct. at 1197. Historical precedent supports

¹¹ In addition, in *Jackson v. City and County of San Francisco*, No. 14-704, petitioners challenged a city ordinance which required that guns kept at home must be disassembled and kept in a locked box. Justice Thomas, joined by Justice Scalia, dissented from the denial of certiorari. 135 S.Ct. 2799, June 8, 2015.

In *Friedman v. City of Highland Park*, No. 15-133, this Court denied certiorari in a challenge to a city ban on common semiautomatic firearms and magazines with a capacity in excess of ten rounds. Again Justices Thomas and Scalia dissented. 136 S.Ct. 447, December 7, 2015.

In *Voisine v. United States*, 136 S.Ct. 2272 (June 27, 2017), this Court granted certiorari and upheld a firearms restriction in federal law based on a state court conviction for a misdemeanor crime of domestic violence. The majority upheld the federal conviction, seeing no impingement on the right to bear arms. In dissent Justices Thomas and Sotomayor would have found a violation of the principles announced in *Heller*.

the fundamental right to some form of carry of firearms outside the home. 137 S.Ct. 1198-1199.

The state's decision to forbid open carry entirely effectively makes this issue identical to the issue confronted in *Heller* and *McDonald*: a *de facto* ban on any act which amounts to publicly "keeping" or "bearing" firearms. The circuit courts' refusal to enforce the Second Amendment in these circumstances calls for certiorari review.

◆

ARGUMENT

CALIFORNIA LAW FORBIDDING CONCEALED CARRY OF A FIREARM EXCEPT WITH A CONCEALED WEAPON PERMIT VIOLATES THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS.

The only means by which a California resident may publicly keep or bear a firearm, not within the home, is by submitting to the concealed weapon permit process.¹² That process is ill-defined and arbitrary and discriminatory, yet failure to abide by its restrictions is a crime. Petitioner seeks relief from his state court conviction based on the Second Amendment.

¹² "Public" carry in this context may be open or concealed. Open carry is forbidden on a statewide basis, and a California citizen or legal resident is therefore relegated to the CCW permit process.

A. The Constitutionality of California’s Concealed Weapon Law Is a Necessary Precondition to Conviction of Carrying a Concealed Weapon in Violation of Former Cal. Penal Code § 12025(a)(2).

The District Court concluded that any unconstitutionality of California’s concealed weapon permit laws does not undermine the validity of a conviction for carrying a concealed weapon. App. 15.

To the contrary, the state in the *Peruta* litigation recognized the potential for a ruling on the constitutionality of the permit law to affect the entire law on carrying a firearm without a permit. Appellee’s Brief in *Peruta* was filed by the San Diego County Sheriff on August 27, 2011. See Dkt. # 49, Ninth Circuit case No. 10-56971. It warned that the case threatened the constitutionality of the entire statutory CCW scheme. “This case is an indirect effort to change California’s statutory limitations on the public carry of loaded firearms by attacking the concealed carry licensing policy of a single county sheriff. Appellants’ argument is, at its core, a challenge to Penal Code section 12031^[13] rather than this Sheriff’s administration of concealed carry licensing.” (p. 1.)

This concern was carried forward by the State of California as *Peruta* continued to be litigated.

¹³ Section 12031 was a companion section to section 12025, the section under which petitioner was convicted. Section 12031 prohibited carrying a concealed loaded firearm. See now sections 25850 et seq.

The California Solicitor General’s Motion to Intervene in *Peruta* was filed on February 27, 2014. Dkt. # 122, Ninth Circuit case No. 10-56971. It expressed the same concern, that the Ninth Circuit panel opinion had the effect of rendering unconstitutional all convictions obtained under the state’s concealed weapon law. “. . . [T]his case draws into question the constitutionality of the State’s statutory scheme regulating the public carrying of firearms, as it has been commonly understood and applied. . . .” (p. 1.) Moreover, “[t]he panel’s opinion would set precedent that draws into question the constitutionality of California’s entire statutory scheme governing the public carrying of firearms.” (p. 3.)

This outcome – the undermining of California’s statutory scheme for concealed weapon permits – was anticipated by the dissent to the *Peruta* panel opinion, as noted in the motion to intervene.

. . . Plaintiffs’ real quarrel is with the statute. Their theory is that the statutory discretion afforded Sheriffs should be uniformly exercised. Thus by arguing that the Second Amendment compels the County to interpret “good cause” to include a general desire to carry a concealed gun, the Plaintiffs in reality are challenging the constitutionality of the [Cal. Penal Code] § 26150 good cause provision. Their proposed remedy of preventing California Counties from exercising discretion eliminates the statutory “good cause” requirement and transforms it into a “no cause” limitation for the general public. *Thus, Plaintiffs’*

complaint and theory necessarily specifically calls into question the constitutionality of state concealed carry law. . . .

Dissenting opinion of Thomas, J., to panel opinion in *Peruta v. County of San Diego*, 742 F.3d 1144, 1196 (9th Cir. 2014) (rehearing *en banc* granted); emphasis added.

Since the constitutional attack on the CCW permit process necessarily calls into question the constitutionality of the state law, it calls into question any conviction for concealed carry. For the reasons stated in the *Peruta* litigation, the unconstitutionality of California's concealed weapon permit law undermines the constitutional validity of all convictions entered under Cal. Penal Code § 148(a).

B. Burdening the Second Amendment Right versus Destruction of the Right.

In general, review of the constitutionality of a state statute requires determination of the standard of review to be applied. Depending on the nature of the right infringed, the applicable standard may be the rational basis test, *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); the intermediate scrutiny test, *Craig v. Boren*, 429 U.S. 190, 197 (1976); or the strict scrutiny test, see *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980).

Prior to *Heller* at least one federal circuit applied the strict scrutiny test to an infringement of the right to bear arms. See *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001).

More recently, federal circuits have agreed that as a general matter “the level of scrutiny applied to gun control regulations depends on the regulation’s burden on the Second Amendment right to keep and bear arms.” *Nordyke v. King*, 681 F.3d 1041, 1045-1046 (9th *en banc* Cir. 2012) (O’Scannlain, J., concurring) (collecting cases); see *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (hereafter “*Heller II*”) (requiring a “strong justification” for regulations imposing a “substantial burden upon the core right of self-defense”). Similarly see *Ezell v. City of Chicago*, 651 F.3d 684, 706, 708 (7th Cir. 2011) (applying more demanding scrutiny to “severe burden[s] on the core Second Amendment right”); *United States v. Masciandaro*, 638 F.3d 458, 469-470 (4th Cir. 2011) (requiring “strong justification[s]” for “severe burden[s] on the core Second Amendment right” (quoting *United States v. Chester*, 628 F.3d 673, 682-683 (4th Cir. 2010))); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (calibrating the level of scrutiny to the “severity” of the burden imposed). Under this general approach, severe restrictions on the “core” right have been thought to trigger a kind of strict scrutiny, while less severe burdens have been reviewed under some lesser form of heightened scrutiny. See, e.g., *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012); *Heller II*, *supra*, 670 F.3d at 1257; *Masciandaro*, *supra*, 638 F.3d at 470; *Chester*, *supra*, 628 F.3d at 682. Confronting challenges to curtailments of the right to carry, one court has applied “some form of heightened scrutiny . . . less than strict scrutiny.” *Kachalsky v. County of Westchester*, 701 F.3d 81, 93-94 (2d Cir. 2012). Another simply

required the state to “justif[y]” the burden. *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. Ill. 2012) (“Our analysis is not based on degrees of scrutiny, but on Illinois’s failure to justify the most restrictive gun law of any of the 50 states.”). Still another has applied intermediate scrutiny. See *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

In *Heller* itself, the Court held that an outright ban would violate the Second Amendment no matter what standard of review is applied. 554 U.S. 570 at 628-629.

Open (unconcealed) public firearm carry is entirely banned in California. Concealed firearm carry is the only permitted form of public carry. The concealed weapon permit law in issue here operates to restrict the right to bear arms. Under *Heller*, the ordinance based on state law cannot withstand scrutiny under any standard of review.

C. For Purposes of Federal Habeas Review, Petitioner’s Conviction Violates the Second Amendment Under Clearly Established Federal Law, as Determined by Prior Opinions of This Court.

Under 28 U.S.C. § 2254(d)(1) a habeas petitioner must demonstrate that the state court decision on his or her constitutional claim was contrary to, or involved an unreasonable application of, “clearly established

Federal law, as determined by the Supreme Court of the United States.”

The district court in its Findings and Recommendations, App. 15, found that citation to *Heller* and *McDonald* failed to trigger clearly established federal law. The district court relied on *White v. Woodall*, 134 S.Ct. 1697 (2014) for the proposition that state courts must reasonably apply the rules squarely established by the Supreme Court’s holdings to the facts of each case.

In *White v. Woodall*, *supra*, the petitioner was sentenced to death after a penalty phase trial in which the trial court failed to give a jury instruction that no adverse inference was to be drawn from the defendant’s failure to testify. The federal circuit court granted relief based on United States Supreme Court precedent that a no-adverse-consequence instruction must be given in the *guilt phase* of a criminal trial. However, since the defendant’s situation is entirely different in the *penalty phase* of the trial, the Court held that the circuit had unreasonably extended prior Supreme Court authority.

Nevertheless,

This is not to say that § 2254(d)(1) requires an “‘identical factual pattern before a legal rule must be applied.’” *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007). To the contrary, state courts must reasonably apply the rules “squarely established” by this Court’s holdings to the

facts of each case. *Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S.Ct. 1411, 173 L. Ed.2d 251 (2009). “[T]he difference between applying a rule and extending it is not always clear,” but “[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.” [*Yarborough v. Alvarado*, 541 U.S. 652 (2004)] at 666, 124 S.Ct. 2140, 158 L.Ed.2d 938. The critical point is that relief is available under § 2254(d)(1)’s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no “fair-minded disagreement” on the question, [*Harrington v. Richter*, 562 U.S. 86, 102 (2011)] 131 S. Ct. 770, 178 L.Ed.2d 624, 641.

White v. Woodall, *supra*, 134 S.Ct. at 1706-1707.

The question of “clearly established federal law” may turn on the specificity of the rule invoked. “[E]valuating whether a rule application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Harrington v. Richter*, *supra*, 562 U.S. at 101, quoting *Yarborough v. Alvarado*, *supra*, 541 U.S. 652 (2004).

Heller and *McDonald* are holdings of general scope and significance. The lower courts can and must apply Second Amendment principles to the right to carry both within and outside the home. The opinions in *Heller* and *McDonald* are not silent on these matters, for, at the very least, “the Supreme Court’s

approach . . . points in a general direction”; indeed, *Heller* does not leave us “without a framework for how to proceed.” *Ezell v. City of Chicago*, 651 F.3d 684, 700 (7th Cir. 2011).

D. The Butte County CCW Ordinance Prohibits Ordinary People from Bearing Arms.

For purposes of regulation, carrying a firearm in public involves two types of conduct: open or visible carrying, and carrying a concealed weapon (CCW). Unless for specified purposes such as hunting, openly carrying a loaded firearm is prohibited in incorporated areas of California (including the City of Paradise and Butte County). Cal. Penal Code §§ 25850, 26155, 26350. Thus the only means of carrying a handgun outside the home is through the California procedure for a concealed weapon permit.

Since the CCW procedure is so restrictive, the California statutory scheme does not allow the typical responsible law-abiding citizen to bear arms in public for the purpose of self-defense. This amounts to a complete ban because of the requirement of a showing of “good cause” for issuance of a CCW permit.¹⁴

¹⁴ California law allows each city and county the power to issue a written policy setting forth the procedures for obtaining a concealed-carry license. Cal. Penal Code §§ 26150 et seq. (enacted 2012; see former §§ 12050 et seq.) set forth the general criteria that applicants for concealed weapons licenses must meet in California. See § 26160. Concealed weapon permits are authorized only for those applicants who demonstrate “good moral character”

Since open carry is prohibited altogether, the “good cause” restriction on a CCW permit amounts to a restrictive ban in violation of the Second Amendment. Concealed carry per se does not fall outside the scope of the right to bear arms, but insistence upon a particular mode of carry does. Carrying weapons in public for the lawful purpose of self-defense is a central component of the right to bear arms.

Since a core aspect of the Second Amendment is implicated, heightened scrutiny is called for. The district court improperly ruled against petitioner because Butte County’s “good cause” permitting requirement impermissibly infringes on the Second Amendment right to bear arms in lawful self-defense.

A CCW permit automatically provides a complete defense to carrying a concealed weapon in violation of former Cal. Penal Code § 12025. See, in general, *People v. Mower*, 28 Cal.4th 457, 478-481 (2002). But a permit

and show that “good cause exists for issuance of the license.” § 26170(a).

The Butte County CCW permit process includes a “good cause” provision. The CCW application, posted on the County website, is the standard California application supplied by the California Department of Justice. It includes questions on “good cause” for the requested permit. (Attachment A to Petition in District Court, Dkt. # 1, p. 10 of 13.) A showing of “good cause” as part of the application is required under Cal. Penal Code § 26150(a)(2).

In addition, the sheriff or other local jurisdiction may require the applicant to undergo psychological testing. Cal. Penal Code § 26190(f).

The City of Paradise does not appear to have a CCW permit process or policy apart from Butte County.

is not reasonably available to a law-abiding citizen solely for purposes of self-defense; simple desire to carry a firearm for self-defense is not “good cause.” The concealed firearm ban in Butte County is therefore unconstitutional in violation of the Second Amendment.

Accordingly, petitioner’s conviction under Count One is invalid and unconstitutional. Certiorari review must be granted, and the conviction must be reversed.



CONCLUSION

For the reasons stated, certiorari review must be granted and Petitioner must be granted relief in habeas corpus.

Date: December 19, 2017

Respectfully submitted,
CHARLES M. BONNEAU, JR.
Counsel of Record
331 J Street Suite 200
Sacramento, CA 95814
(916) 444-8828
cmbonneau@gmail.com