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11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA

13 JONATHAN BIRDT,)	CASE NO. EDCV 13-00673-VAP
)	(JEM)
14 Plaintiff,)	
)	DEFENDANT'S RESPONSE TO THE
15 vs.)	COURT'S ORDER RE STANDARD
)	OF SCRUTINY
16 JOHN MCMAHAN,)	
)	
17 Defendant.)	
)	

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19 TO PLAINTIFF IN PROPRIA PERSONA, JONATHAN BIRDT:

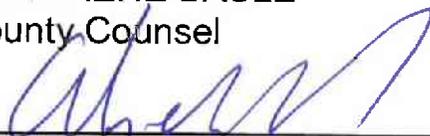
20 **PLEASE TAKE NOTICE** that Defendant, JOHN McMAHON, will

21 and hereby does provide his response to the Court regarding the

22 applicable standard to be applied.

23 DATED: October 31, 2014

24 JEAN-RENE BASLE
 25 County Counsel



26 ALGERIA R. FORD
 27 Deputy County Counsel
 28 Attorneys for Defendant,
 JOHN McMAHON

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I.
INTRODUCTION

This case arises from the Sheriff's denial of plaintiff's application for a Concealed Carry Weapons permit on February 26, 2013, after a finding that he lacked good moral character.

A background investigation conducted during the inquiry into issuance or denial of plaintiff's permit revealed that plaintiff was disciplined by the State Bar of California for admittedly and knowingly lying to a Superior Court under penalty of perjury. Under California law, perjury is a felony crime. Penal Code sections 118 and 126. Plaintiff also unethically communicated with a represented party. According to a stipulation entered into before the State Bar of California, plaintiff admitted that he committed acts involving moral turpitude, dishonesty and/or corruption. Plaintiff was suspended from the practice of law for a year, placed on probation for two years, and ordered to retake the MPRE. When defendant learned this information during the background investigation, plaintiff's permit to carry a deadly weapon outside the home was denied. Plaintiff filed a First Amended Complaint and a Motion for Summary Judgment.

Defendant filed a motion to dismiss plaintiff's First Amended Complaint, an opposition to the Motion for Summary Judgment, and requested that the Court instead issue summary judgment in favor of defendant. Magistrate Judge John E. McDermott issued a Report recommending 1) the denial of the motion to dismiss; and, 2) denial of the summary judgment motions without prejudice pending "an opportunity to exercise his [Sheriff's] discretion whether to deny a license to Plaintiff on grounds other than lack of good moral character." (Report, 22:2-8.)

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1 Defendant objected to the Report and Recommendation on the
2 grounds that it failed to identify or apply a legal test or standard or level of
3 scrutiny for the recommendation that lack of good moral was not an
4 appropriate basis for the Sheriff's denial of the permit, that the Court
5 erroneously substituted its own discretion for that of the Sheriff without
6 identifying or articulating a violation of law and that assuming a Second
7 Amendment standard of "responsible and law abiding," the defendant's
8 reason for denying the permit was clearly lawful based on the pleadings
9 and evidence before the Court.

10 Following the defendant's objections, Magistrate Judge
11 John E. McDermott ordered the parties to submit supplemental briefs on
12 the appropriate level of scrutiny.

13 **II.**
14 **ARGUMENT**

15 Defendant contends that the appropriate standard to be applied in
16 this case is a two-fold test where the inquiry is 1) whether the scope of the
17 right extends to all citizens; and, 2) whether the Sheriff abused his
18 decision in determining that the scope of the right did not extend to
19 plaintiff.

20 **A. THE SCOPE OF THE RIGHT ONLY EXTENDS TO TYPICAL,**
21 **RESPONSIBLE AND LAW ABIDING CITIZENS**

22 The Supreme Court stated in Heller that "[l]ike most rights, the right
23 secured by the Second Amendment is not unlimited." District of Columbia
24 v. Heller, 554 U.S. 570, 626 (2008). It is "not a right to keep and carry any
25 weapon whatsoever in any manner whatsoever and for whatever
26 purpose." Id. at 626. Rather, it is a right subject to "traditional restrictions,"
27 which themselves—and this is a critical point—tend "to show the scope of
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1 the right." McDonald v. City of Chicago, 130 S. Ct. 3020, 3056 (U.S.2010)
2 (Scalia, J., concurring); see also United States v. Skoien, 614 F.3d 638,
3 640 (7th Cir. 2010) (en banc) ("That some categorical limits are proper is
4 part of the original meaning.").

5 In Peruta v. County of San Diego, the Ninth Circuit defined the
6 limitation of the right. Specifically, the Court defined the right as extending
7 only to the "typical responsible, law-abiding citizen to bear arms in public
8 for the lawful purpose of self-defense." Peruta v. County of San Diego, 742
9 F.3d 1144, 1169 (9th Cir. Cal.2014). Applying that definition, in Peruta,
10 the Court found issue with San Diego County's concealed carry policy
11 because the policy excluded the typical responsible, law abiding citizen
12 from bearing arms in public. Although Peruta did not address whether
13 citizens who had committed serious crimes but were not prosecuted fell
14 within the scope of the right, nothing in that case suggested that
15 prosecution was the key in determining whether a citizen was law-abiding
16 or that the Sheriff, the head law enforcement officer of the County, was
17 precluded from determining what a typical responsible, law abiding citizen
18 was.

19 The phrase "typical responsible, law abiding citizen" has not been
20 conclusively defined but, it is undisputable that one who commits a felony
21 crime, whether prosecuted or not, is not a "law abiding citizen." This is
22 because by definition, a citizen who breaks the law by committing a crime
23 is not abiding by the law. Further, given that citizens who break the law do
24 so in contravention of widely accepted societal norms, do so despite the
25 fact that typical citizens do not, and do so with the knowledge that their
26 conduct could result in jail and or prison time, such individuals are also,
27 by definition, atypical and irresponsible. Whether these individuals are
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1 prosecuted or not is irrelevant to the inquiry, as it is their conduct that is
2 evaluated under the scope of the right. It is important to note at this point
3 that under California law, perjury is a felony crime. Penal Code sections
4 118 and 126.

5 **B. THE SHERIFF DID NOT ABUSE HIS DISCRETION IN**
6 **DETERMINING THAT THE SCOPE OF THE RIGHT DID NOT EXTEND**
7 **TO PLAINTIFF BIRDT.**

8 California Penal Code section 26150 grants discretion to a sheriff of
9 a county to issue a concealed carry license to a person who falls within
10 the scope of the right. There is no viable claim in this case that the
11 Sheriff's decision to deny Plaintiff Birdt's permit was arbitrary and
12 capricious or an abuse of discretion because the decision to deny the
13 permit fell squarely within the limitation suggested by this Court and under
14 Peruta.

15 Plaintiff Birdt's application for a Concealed Carry Weapons permit
16 was denied because the Sheriff's Department concluded that he was not
17 the typical responsible and law abiding citizen. Plaintiff lacked good moral
18 character and although he was not prosecuted, he had committed a
19 felony crime and was punished by the State Bar of California. A public
20 record of plaintiff's state bar discipline and stipulation was previously filed
21 with this Court. In that public record, plaintiff signed an admission
22 indicating that he committed acts involving moral turpitude, dishonesty
23 and/or corruption. He lied to a Superior Court under penalty of perjury,
24 communicated with a represented party and entered into a stipulation that
25 he conceded to committing acts involving moral turpitude, dishonesty
26 and/or corruption. The plaintiff's conduct constitutes a felony under
27 California law. Penal Code sections 118, 126. Further, plaintiff's perjury
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1 was not garden variety. It was a deliberate, irresponsible act involving a
2 brazen lie to a Court by an officer of the Court. Notwithstanding that, he
3 was not prosecuted. Still plaintiff was suspended by the California State
4 Bar and placed on probation until 2011. He applied for a permit to carry a
5 concealed weapon relatively soon after his probation ended.

6 In its Report and Recommendations, this Court acknowledged that
7 the defendant relied on plaintiff's suspension from the bar and stipulation
8 to committing acts involving moral turpitude when making the
9 determination to deny the permit. (Report, 18:1-3.) This Court also
10 conceded that moral turpitude is "any crime of misconduct...or any
11 dishonest or immoral act..." or "crimes which necessarily involve an intent
12 to defraud" or "perjury" (Report p. 16:13-25), that lacking good moral
13 character, which includes perjury and dishonesty, is a legitimate and
14 appropriate reason to deny use and possession of a firearm (Report p.
15 17: 10-19), that perjury and dishonesty "fit squarely" within what a
16 community would regard as a lack of "good moral character" (Report,
17 17:12-14), and that the Court would have no difficulty with the above
18 determination were this shortly after the 2005 misconduct occurred or
19 after the 2009 suspension or even in 2011 near the expiration of his
20 probation." (Report, 18:1-3.) In other words, this Court seemed to agree
21 that the Sheriff's decision was not abusive.

22 What troubled the Court, however, was that plaintiff was reinstated
23 by the State Bar and was no longer subject to discipline. Incorporating the
24 Court's concern into the analysis, the defendant would phrase the second
25 prong of the inquiry as whether the Sheriff's decision to deny a non-law
26 abiding, irresponsible, atypical citizen a permit to Carry a Concealed
27 Weapon in public violated the Second Amendment to the United States
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1 Constitution simply because the plaintiff was fortuitously reinstated to the
2 State Bar, fortuitously no longer subject to discipline, and because the
3 plaintiff felt that enough time had elapsed since he committed the crime.
4 The answer is a resounding no. Plaintiff's good fortune does not
5 somehow transform him into a typical responsible law abiding citizen and
6 within the scope of Peruta. In the absence of some other fact that renders
7 the Sheriff's decision abusive, there is no ground upon which plaintiff can
8 assert a Second Amendment violation. Plaintiff's conduct was unlawful
9 and irresponsible and therefore, the scope of the right enunciated in
10 Peruta does not extend to him.

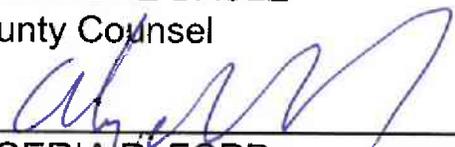
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12 **III.**
13 **CONCLUSION**

14 The scope of the right is that a plaintiff must be a typical responsible
15 and law abiding citizen. The filings and evidence before the Court
16 establish that plaintiff does not fall within the scope of the right and
17 therefore, show that defendant appropriately exercised his discretion
18 when he denied plaintiff's permit.

19 Based on the foregoing, defendant again respectfully requests
20 dismissal of the Second Amended Complaint, with prejudice, or in the
21 alternative a grant of summary judgment for the defendant.

22 DATED: October 31, 2014

23 JEAN-RENE BASLE
24 County Counsel

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26 ALGERIA R. FORD
27 Deputy County Counsel
28 Attorneys for Defendant,
JOHN McMAHON