Analysis of Unconstitutionality of California Penal Code Section 12050 in the Wake of *District of Columbia v. Heller*

California Penal Code section 12050 as administered is unconstitutional under the Second Amendment to the United States Constitution in the wake of *District of Columbia v. Heller,* 544 U.S._____ (2008) ("*Heller*").

I. Incorporation to the States

Heller is the recent landmark Supreme Court case, which for the first time in our country's history confirmed that the Second Amendment provides the fundamental right under the Constitution for an ordinary individual citizen to possess and carry firearms for self defense. *Heller* is a federal case from the U.S. District Court for the District of Columbia and as yet has not been incorporated to the States. However, incorporation is just a matter of time. Justice Scalia discusses incorporation of the Second Amendment to the States in footnote 23 of *Heller* on page 45 of the majority opinion. There, noting that a previous Second Amendment case *U.S. v. Cruikshank,* 92 U.S. 542 from 1875, refused to incorporate the Second Amendment, Scalia lays out the obvious path for future courts: "With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." (*Heller*, p. 48, fn. 23.)

The Court in *Heller* elevated the Second Amendment to that of a fundamental individual right, and denial of incorporation of such rights would take the undoing of over 100 years of civil rights cases. "...[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" (Heller, p. 19, *emphasis original*). The incorporation of these natural rights, which pre-existed the Constitution, and are guaranteed by the Second Amendment, is just a matter of time. No state may deny its citizens their fundamental rights without due process of law. Thus, unless California is prepared to put forth the ridiculous argument that the First Amendment, Fifth Amendment and Federal Civil Rights laws no longer apply to the State, singling out the newly affirmed individual right to self defense as not applying to California is laughable. Once the Second Amendment is incorporated, the courts of appeal will review state laws regulating those rights using traditional standards of Constitutional scrutiny, and according to the *Heller* Court, specifically, the standards of strict scrutiny and heightened scrutiny traditionally used to review First Amendment regulations. (See *Heller* p. 56 and fn. 27.)

Heller provides that the operative clause of the Second Amendment to the United States Constitution "guarantee[s] the individual right to possess and carry weapons in case of confrontation." (*Heller* at p. 19.) It is important to note that the Court does not limit that right to "at home" or "when not in public" and certainly there is strong support that the right to bear arms for self defense does extend beyond the confines of the home.

II. The Possession and Carrying of Functional Firearms for Self Defense in Public

In *Heller* the Court ruled that a ban on the possession and carrying of a "functional firearm" in the home was unconstitutional. (See *Heller* p. 64.)

A. Functional Firearms

A "functional firearm" is one that is kept in such a manner that it may be used for self defense when the need arises without the incumbrance of a lock. (See *Heller* p. 58. See also *Parker v. District of Columbia*, 437 F.3d 370 (D.C. Circuit 2007 *Affirmed*) On point, the Court quotes *State v. Reid* (1840) 1 Ala. 612, a concealed handgun case from Alabama. "A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." (*State v Reid* (1840) 1 Ala. 612, 616-617.) Thus, it is safe to say *if* the Second Amendment protects a right to armed self defense outside the home, the complete prohibition of carrying a functional weapon for defense, regardless of method of carry, would be unconstitutional.

B. The Extension of the Second Amendment Beyond the Home

The Second Amendment under *Heller* is not without limits. However, nothing in *Heller* indicates it is limited to the confines of the home. The Court states "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." (*Heller* at p. 54.) The language the Court uses here is quite telling. The Court does not say that "laws forbidding the carrying of firearms in *public places* are constitutional." It specifically uses the term "sensitive places" and then describes a subset of public places. By implication, this means the Second Amendment applies to public places that are not "sensitive" (which by common sense includes most public places). The Court is open to the Second Amendment being not just a right at home, but a public right as well. In the most succinct distillation of the right conferred by the Second Amendment, the Court says, "we find that [the Second Amendment] guarantees the individual right to possess and carry weapons in case of confrontation." (*Heller* at p. 19.) The Court does not qualify the right to being limited to confrontations at home.

One can also look to the cases the Court cites to make its ruling that a complete ban on handguns is unconstitutional under the second amendment. In its analysis of the unconstitutionality of the D.C. ban, the Court lists a series of cases which struck down laws prohibiting the *public* carrying of firearms as analogies of over-broad and unconstitutional laws. "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down. In *Nunn v. State* (1 GA., at 251), the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons)" *(Heller* at p. 57). Next the Court cites *Andrews v. State,* 50 Tenn., at 187 where "the Tennessee Supreme Court likewise held that a statute that forbade openly

carrying a pistol 'publically or privately without regard to time or place, or circumstance' violated the State Constitutional provision (which the Court equated with the Second Amendment)." (*Heller* p. 57)

Clearly by the case law it cites as analogous to the unconstitutional D.C. handgun ban, the Court is at ease with the Second Amendment having some relevance to the carrying of functional firearms for the purpose of public self defense.

III. The Application of Heller to California Penal Code Sections 12031, 12026 and 12050

A. Second Amendment Challenges to CPC 12031, 12026 and 12050

The *Heller* Court clearly states that "prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." (*Heller* at p. 54.) At first blush this would tend to support California's "may issue" concealed weapon law. However, when one looks at the scope of California's laws on the subject, they go far beyond what the Court would allow as exceptions to the Second Amendment. California outlaws the carrying of concealed handguns in public in Penal Code section 12025. Under the clear language of *Heller* this *prohibition* is absolutely constitutional. However, we need not challenge the Constitutionality of CPC 12025, to find California's laws in violation of *Heller* and the Second Amendment. Where the Constitutional problems arise is Penal Code section 12031, which requires that all firearms, possessed and carried in public by private citizens (excepting their limited use during hunting, camping and at gun ranges) be carried unloaded, with the ammunition separate and apart from the firearm. Further, Penal Code section 12026 requires that handguns (the firearms the *Heller* Court noted as the most useful for self defense (*Heller* pp. 57-58) be transported in a locked container, which is analogous to the District of Columbia's requirement in *Heller* that they be locked or disassembled at home.

The only exception to CPC 12031 and 12026 for private citizens in California is Penal Code section 12050 which allows for the licensing of carrying loaded firearms, *either openly or concealed* in public.[1] Thus, sections 12031 and 12026 act as a complete ban on the public possession of functional firearms for self defense in California, much like the District of Columbia's complete ban on possession of functional firearms in the home for self defense in *Heller*. The one saving grace to this clearly unconstitutional ban is that Penal Code section 12050 allows for common citizens to get a permit to carry a loaded firearm in public (which presumably would pass muster if issued under the same guidelines that the Court ordered

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[1] Penal Code section12050. (a)(1)(A) The sheriff of a county, upon proof that the person applying is of good moral character, *that good cause exists for the issuance*, and that the person applying satisfies any one of the conditions specified in subparagraph (D) and has completed a course of training as described in subparagraph (E), may issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person in either one of the following formats:

(i) A license to *carry concealed* a pistol, revolver, or other firearm capable of being concealed upon the person.

(ii) Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, a *license to carry loaded and exposed* in that county a pistol, revolver, or other firearm capable of being concealed upon the person. (Emphasis added.)

Heller's permit to possess a firearm in the District be issued, namely that he not be a felon or mentally ill.) (*Heller* pp. 59 and 64.)

The California legislature has banned both the open and concealed bearing of firearms, and then allowed for a licensing system which *mandates* concealed carry in larger urban areas and allows for open carry in smaller rural areas of the state. California Penal Code cannot be characterized as merely an allowable prohibition on the bearing of concealed weapons (CPC 12025). Instead, it is an unconstitutional banning of the carrying of "functional firearms" in any manner (CPC 12031 & 12026), which then offers an alternative licensing system (CPC 12050) which *mandates* concealed carry in the urban areas of the State. The State and Counties cannot argue that the only way it will allow its citizens to carry functional firearms for self defense in urban counties is by license to do so concealed, and then say "since it's a concealed handgun law we can refuse to issue permits under *Heller's* stance that the prohibition of concealed weapons is outside the protections of the Second Amendment." The State will have to pick whether it wants to issue permits for its citizens to carry weapons concealed (which would be fine if administered as discussed below) or to allow its citizens to carry functional firearms "old west style", open and exposed. And it appears that it has, when it gives *preference* to concealed carry in the urban areas of the State.

Where Penal Code section 12050 becomes problematic is in the requirement that the applicant show "Good Cause" to exercise his rights under the Second Amendment. There is nothing in the Second Amendment or in any of the other amendments to the Bill of Rights that an individual need to show some heightened justification to exercise his rights thereunder. Nor does the order in *Heller* instruct the District to issue him a permit to possess a firearm if he is not a felon or mentally ill *and can show good cause why he needs one*. The "good cause" is the fundamental exercise of the right to armed self defense and presumed in the Court's ruling in *Heller*. Further many of the County Sheriffs and Police Chiefs who are empowered to approve carry permits under CPC 12050 routinely use the "discretion" afforded them by the "good cause" language of CPC 12050 to refuse to issue permits. Thus resulting in an absolute ban on the exercise of Second Amendment rights to possess firearms for self defense in public for the vast majority of law abiding Californians.

B. Fourteenth Amendment Challenges to California Penal Code 12050

As Heller elevated the Second Amendment to a Fundamental right
As administered, section 12050 can not pass an equal protection challenge under the Fourteenth Amendment. Section 12050 allows Sheriffs and Police Chiefs to issue the permits for the carrying of loaded firearms by citizens, which would seemingly pass a *Heller* challenge, if their review of the applications was limited to vetting the applicants for a disqualifying background (felons and the mentally ill under *Heller*) and their adequate training. But with the addition of the subjective "good cause" requirement, we have over 58 different standards of issuance. What a Sheriff in one county deems "good cause" another Sheriff somewhere else does not, leaving the standard of issuance arbitrary and capricious. An applicant in one county can apply and be granted a license, and the same applicant meeting all of the same requirements can apply in another county and be denied. Even worse, an applicant can be granted a permit in his home

county, and have a change of the Sheriff administration and find that his “good cause” is no longer “good enough.” This only takes into account the county Sheriff Departments. Add to it the various city police chiefs throughout the State who also have this power, and the system becomes a hodgepodge of over two hundred and fifty different standards rife with abuse.

The solution to this problem is simple. The most logical approach is to retain the dual nature of open and concealed carry licensing under section 12050, and simply remove its single unconstitutional “good cause” provision (which may be accomplished via legislation or the Courts), or alternately simply administering that provision in a Constitutional manner by declaring that “self defense” is prima facie “good cause.” (Which may be accomplished by the issuance of an advisory opinion by the Attorney General of the State of California). If the administration of section 12050 is done in a fair and consistent manner and the Constitutional “good cause” of “personal self defense” is sufficient (as it is in many California counties, including San Bernardino and Kern) to issue a permit (if the applicant also meets reasonable background checks and training requirements), the State would avoid costly litigation challenging the administration of California’s gun laws.