IN THE SUPREME COURT OF THE UNITED STATES

Eduardo Salgado,

Petitioner,

v.

State Of California

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 39 of this Court, Petitioner Eduardo Salgado asks leave to file the attached Petition for Writ of Certiorari without prepayment of fees or costs and to proceed *in forma pauperis*. Petitioner is indigent and undersigned counsel was appointed by the California Court of Appeal, Second District, to represent Petitioner on Appeal. A copy of the Court of Appeal's Order appointing counsel to represent Petitioner is appended to this motion.

Dated: August 21, 2018

Respectfully submitted,

Kent D. Young
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(619) 793-4924
Attorney For Petitioner

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 4

The People v. Salgado
Salgado, Eduardo
B282368
LOS ANGELES No. BA450829

THE COURT:

Pursuant to appellant's request for appointment of counsel, and under the authority of Penal Code Section 1240, subdivision (a) (1), the following attorney is appointed counsel for appellant on this appeal:

Kent Young

Appellant's opening brief shall be filed within thirty days from the date of this order.

Appellant is directed to keep the court informed of his/her mailing address at all times. If you move, you MUST notify the clerk of this court immediately; otherwise you may not receive important notices concerning your appeal.

EPSTEIN, P.J.
Presiding Justice

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

EDUARDO SALGADO,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT

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QUESTIONS PRESENTED

Before the California Court of Appeal, Mr. Salgado argued his conviction for carrying a concealed firearm in a vehicle must be reversed because the heightened "good cause" requirement for obtaining a concealed firearm license in Los Angeles City and County violates the Second Amendment. Mr. Salgado further argued that, because California prohibits open carry, the only way a law-abiding Californian can exercise his or her Second Amendment right to carry a firearm outside the home is through concealed carry. Relying on the majority opinion in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), the California Court of Appeal rejected Mr. Salgado's argument. The Court of Appeal acknowledged *Peruta* was not controlling, but nonetheless adopted *Peruta's* holding that the Second Amendment does not protect the right to carry a concealed firearm. Like the *Peruta* majority opinion, the Court of Appeal refused to address whether the Second Amendment protects the right to carry a firearm outside the home, either through open or concealed carry. This case presents the following issues, which have divided the federal courts of appeal:

I. Does the Second Amendment protect the right to carry a firearm outside the home in some fashion, either through concealed or open carry, and, if so, what level of scrutiny applies to laws that burden this right?

II. Does the heightened "good cause" requirement in Los Angeles City and County for obtaining a concealed firearm license violate the Second Amendment?

IN THE SUPREME COURT OF THE UNITED STATES

EDUARDO SALGADO,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT

Petitioner Eduardo Salgado respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Second District.

OPINIONS BELOW

On February 28, 2018, the California Court of Appeal, Second District, issued an unpublished opinion affirming Petitioner's convictions and sentence. On May 23, 2018, the California Supreme Court denied Petitioner's petition for review.[1]

JURISDICTION

The California Supreme Court denied Petitioner's petition for review on May 23, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

[1] A copy of the Court of Appeal's opinion and the California Supreme Court's order denying Petitioner's petition for review are included in the Appendix.

STATUTORY PROVISIONS

The Second Amendment, the Official Los Angeles County Sheriff and Official Los Angeles Police Department Concealed Firearm License Policies, and relevant portions of the California Penal Code, are included in the Appendix.

INTRODUCTION

Although this Court has suggested in dictum that the Second Amendment protects the right to carry a firearm outside the home in some fashion, this Court has yet to squarely hold that the Amendment protects the right to carry a firearm outside the home. *See Peruta v. California*, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari) (noting that, although the Court has not expressly held that the Second Amendment protects the right to carry a firearm outside the home, the Court has "suggested that the Second Amendment protects the right to carry firearms in public in some fashion").

Review is necessary to address two issues that have divided the federal courts of appeal. The federal courts of appeal are divided on whether: (1) the Second Amendment protects the right to carry a firearm outside the home; and, (2) whether a heightened requirement for obtaining a concealed firearm license, beyond the desire for self-defense, violates the Second Amendment.

The District of Columbia and Seventh Circuits have expressly recognized that the Second Amendment protects the right to carry a firearm outside the home and have struck down laws that excessively infringe on this right. *See Wrenn v. District*

of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017) (holding that Washington D.C. law limiting concealed carrying of a "handgun in public to those with a special need for self-defense" violated the Second Amendment, applying strict scrutiny); *Moore v. Madigan* , 702 F.3d 933, 942 (7th Cir. 2012) (holding that an Illinois law that forbade the carrying of a firearm outside the home, with certain limited exceptions, violated the Second Amendment, applying intermediate scrutiny).

Conversely, the Second, Third, and Fourth Circuits have assumed, without deciding, that the Second Amendment protects the right to carry a firearm outside the home, but have upheld laws severely restricting this right. *See Drake v. Filko*, 724 F.3d 426, 431-33 (3d Cir. 2013) (holding that a New Jersey law requiring a "heightened need" for obtaining a license to carry a firearm in public was the type of "longstanding" regulation that does not fall within the scope of the Second Amendment's right to keep and bear arms); *Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012) (holding that a heightened requirement for obtaining a concealed firearm license in New York survived intermediate scrutiny); *United States v. Masciandaro* , 638 F.3d 458, 460 (4th Cir. 2011) (holding that a regulation prohibiting the carrying or possession of a loaded weapon in a motor vehicle within a national park survived intermediate scrutiny).

In *Peruta*, the Ninth Circuit sitting en banc took an alternative approach. There, the plaintiffs argued that the Second Amendment protects the right to carry a firearm outside the home in some fashion, either through open or concealed carry. *See Peruta*, 824 F.3d at 927. The plaintiffs further argued that, because California

law prohibits open carry, the only way for a law-abiding citizen to exercise his or her Second Amendment right to carry a firearm outside the home was through concealed carry. *Id.* The plaintiffs argued that the heightened "good cause" requirement for obtaining a concealed firearm license, beyond the desire for self-defense, in San Diego and Yolo counties, violated the Second Amendment. *Id.*

The majority opinion in *Peruta* declined to address whether the Second Amendment protects the right to carry a firearm outside the home. *Id.* Instead, the majority opinion rejected the plaintiffs' challenge by finding that the Second Amendment does not protect the right to concealed carry. *Id.* This approach was criticized by the four dissenting judges in *Peruta*, as well as Justice Thomas in his dissent from the denial of certiorari, which was joined by Justice Gorsuch, and was also criticized by the D.C. Circuit in a recent opinion. *See Peruta*, 137 S. Ct. at 1997 (Thomas, J., dissenting from the denial of certiorari) ("The en banc court's decision to limit its review to whether the Second Amendment protects the right to concealed carry—as opposed to the more general right to public carry—was untenable."); *Wrenn v. District of Columbia*, 864 F.3d 650, 663 n.5 (D.C. Cir. 2017) (similar); *Peruta*, 824 F.3d at 952, 954 (Callahan, J., dissenting) (similar).

In Mr. Salgado's case, the California Court of Appeal acknowledged that the en banc majority opinion in *Peruta* was not controlling. *See* Op. at 14.[2] Nevertheless, the Court of Appeal rejected Mr. Salgado's argument, adopting the

[2] "CT" refers to the clerk's transcript. "RT" refers to the reporter's transcript. "AOB" refers to Mr. Salgado's opening brief. "Op." refers to the Court of Appeal's opinion.

reasoning of the en banc majority in *Peruta*. *See* Op. at 15. Like the majority opinion in *Peruta*, the Court of Appeal did not address the broader question of whether the Second Amendment protects the right to carry a firearm outside the home for self-defense in some fashion, either through open or concealed carry. *See* Op. at 14-15. Rather, the Court of Appeal, like the majority opinion in *Peruta*, rejected Mr. Salgado's challenge by holding that the Second Amendment does not protect the right to concealed carry. *See* Op. at 15. Quoting *Peruta*, the Court of Appeal held:

> [B]ecause 'the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry—including a requirement of good cause, however defined—is necessarily allowed by the Amendment.'

Op. at 15 (quoting *Peruta*, 824 F.3d at 939).

In sum, as the law stands right now, a heightened requirement for obtaining a concealed firearm license, beyond the desire for self-defense, is valid in New York City, Los Angeles, and San Diego. But in Washington D.C., a similar heightened requirement violates the Second Amendment. Review is necessary by this Court to address this issue of significant importance, which has divided the federal courts of appeal. Mr. Salgado's case presents the perfect vehicle for addressing these difficult questions, because the Court of Appeal rejected his claim on the merits.

STATEMENT OF THE CASE

On April 17, 2017, an amended information was filed in Los Angeles County Superior Court against Mr. Salgado. CT 50. Count 1 alleged criminal threats, in violation of California Penal Code Section 422(a). CT 50. Count 1 further alleged a

firearm enhancement under Penal Code Section 12022.5(a). CT 51. Count 2 alleged a violation of Penal Code Section 25400(a)(1), possession of a concealed firearm in a vehicle. CT 51. Mr. Salgado pled not guilty to both counts and the allegation in the amended information. CT 53-54. A jury found Mr. Salgado guilty of both counts alleged in the information as well as the firearm enhancement. RT 902-03; CT 77-78. The trial court sentenced Mr. Salgado to five years' probation with various terms and conditions. RT 1211-14; CT 96-98.

On appeal, Mr. Salgado argued, *inter alia*, that his conviction for carrying a concealed firearm in a vehicle must be reversed because the statutory and regulatory regime for obtaining a concealed firearm license in Los Angeles City and County violates the Second Amendment. *See* AOB 28-40. The California Court of Appeal rejected Mr. Salgado's argument on the merits, concluding that the statutory and regulatory scheme for obtaining a concealed firearm license did not violate the Second Amendment. Op. at 12-15.[3] The Supreme Court of California denied Mr. Salgado's petition for review.

A. Mr. Salgado's Background

Mr. Salgado is a thirty year-old husband and father of a four-year old. CT 84; RT 1202. The instant case is Mr. Salgado's first criminal conviction. RT 1202; CT 88. Mr. Salgado has been gainfully employed with the same employer for the past

[3] On an unrelated issue, the Court of Appeal ordered that Mr. Salgado's case be remanded to the trial court to afford the trial court the opportunity to strike Mr. Salgado's suspended firearm enhancement in light of a recent amendment to Penal Code Section 12022.5. *See* Op. at 17-19.

five years. RT 1202-03. The firearm at issue in this case was legally purchased and registered to Mr. Salgado. RT 643.

B. Mr. Salgado's Trial

Marvin Martinez testified that he was driving his new Dodge Durango on the evening of October 6, 2016. RT 325. Inside the Durango were Martinez's mother-in-law and his seven-year-old son. RT 325-26.

At approximately 9:00 p.m., Martinez was stopped at a red light at the intersection of La Brea and Venice Boulevards. RT 325-27. Martinez felt a slight tap towards the rear of the Durango. RT 328. Although Martinez's mother-in-law did not believe a collision occurred, Martinez believed he was rear-ended. RT 328-29, 339. Martinez was upset because he "just purchased [the Durango] new." RT 329.

Martinez exited the Durango and observed the Durango's rear, which appeared undamaged. RT 330. Martinez then went to the vehicle behind him, a Chevy Impala, driven by Mr. Salgado. RT 330-31, 358-59. Martinez approached Mr. Salgado but did not attempt to exchange insurance information. Instead, Martinez screamed at Mr. Salgado, "'WHAT THE FUCK MAN? YOU JUST HIT MY CAR?'" RT 341.[4]

Mr. Salgado remained inside his car. RT 331. Mr. Salgado cocked his handgun, which was never pointed at Martinez, and asked, "'is there any damages?'" RT 342, 344. Martinez replied "'no,'" and walked back to the

[4] Martinez also testified that he may have screamed "'What the hell? You just hit my car.'" RT 330.

Durango. RT 331. Martinez then drove towards an unmarked police car, honked at the officers and stated "'someone just pulled out a gun on me.'" RT 336. Martinez testified that when he saw the gun he thought that Mr. Salgado "was in a threatening manner threatening me to go back to my vehicle." RT 331. Martinez testified that he was concerned for his safety and that, if something happened to him, "my son would have seen the whole thing and he would have been traumatized." RT 333.

Detective Joseph Vasquez of the Los Angeles Police Department testified that he was parked at the intersection of La Brea and Venice Boulevard at approximately 9:00 p.m. on October 6, 2016, with his partner, Alex Jacinto. RT 354-55. Martinez pulled up next to the two officers, pointed at Mr. Salgado's Impala and yelled, "'[o]fficers, he pointed a weapon at me. He's got a gun.'" RT 356. Vasquez and Jacinto initiated a traffic stop of the Impala. RT 357. Mr. Salgado immediately pulled over and complied with all of Vasquez's and Jacinto's requests. RT 359-60, 368. Vasquez noticed several rounds of ammunition on the floor of the Impala. RT 361-62. Vasquez recovered a Glock 10 millimeter handgun from under the front passenger seat. RT 365.

Officer Kenya Fregoso of the Los Angeles Police Department testified that she booked the Glock 10 millimeter and bullets found in the Impala into evidence. RT 637-38. Fregoso further testified that a records check indicated the Glock 10 millimeter handgun was legally purchased and registered to Mr. Salgado. RT 643.

C. The Court Of Appeal's Opinion

Mr. Salgado argued on appeal that his conviction for unlawfully carrying a concealed firearm in a vehicle must be reversed because the statutory and regulatory scheme in Los Angeles City and County amounts to a de facto ban on carrying a firearm outside the home, in violation of the Second Amendment. *See* AOB 28-40. In particular, Mr. Salgado argued that the Second Amendment's text, history, as well as caselaw interpreting the Second Amendment, establish that the Second Amendment protects the right to possess a firearm outside the home for self-defense. *See* AOB 28-40. Because California law prohibits open carry, the only way for an ordinary law-abiding citizen to carry a firearm outside the home for self-defense is concealed carry. But the statutory and regulatory scheme in Los Angeles City and County makes it virtually impossible for an ordinary law-abiding citizen to carry a concealed firearm. Mr. Salgado argued that the excessive burdens of this statutory and regulatory regime violate the Second Amendment. Because the only way Mr. Salgado could lawfully carry a firearm outside his home is under a statutory and regulatory regime that is facially unconstitutional, Mr. Salgado argued that his conviction for carrying a concealed firearm in a vehicle must be set aside. *See Peruta*, 824 F.3d at 950 (Callahan, J., dissenting) (describing a similar policy in San Diego and Yolo counties as "tantamount to complete bans on the Second Amendment right to bear arms outside the home for self-defense, and [] therefore unconstitutional."); *id.* at 958 (Silverman, J., dissenting) (describing a

similar policy in San Diego and Yolo counties as "unconstitutional under the Second Amendment").

The Court of Appeal rejected Mr. Salgado's argument in an unpublished opinion. The Court of Appeal acknowledged that the en banc majority opinion in *Peruta* was not controlling. *See* Op. at 14. Nevertheless, the Court of Appeal adopted the reasoning of the en banc majority in *Peruta*. *See* Op. at 15. Quoting *Peruta*, the Court of Appeal held:

> [B]ecause 'the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry—including a requirement of good cause, however defined—is necessarily allowed by the Amendment.'

Op. at 15 (quoting *Peruta*, 824 F.3d at 939).

ARGUMENT

I. The Statutory And Regulatory Scheme At Issue

A jury found Mr. Salgado guilty of violating California Penal Code Section 25400(a)(1), which criminalizes unlawfully carrying a concealed firearm in a vehicle. The California Penal Code, however, expressly exempts from prosecution an individual who has a license to carry a concealed firearm. *See* Cal. Penal Code § 25655; CALCRIM 2521. Yet this exemption is largely illusory in Los Angeles City and County because the statutory and regulatory scheme in Los Angeles City and County makes it virtually impossible for a law-abiding citizen to obtain a license to carry a concealed firearm.

California law prohibits an individual from openly carrying a firearm outside the home. *See* Cal. Penal Code §§ 25850 (prohibiting carry of loaded firearms in public), 26530 (prohibiting open carry of unloaded handguns in public). Accordingly, the only way for a law-abiding Californian to exercise his or her Second Amendment right to carry a firearm outside the home for self-defense is concealed carry.

The California Penal Code authorizes the county sheriff or chief of police to issue a license to carry a concealed firearm if the applicant establishes all of the following:

> (1) The applicant is of good moral character.
>
> (2) *Good cause exists for issuance of the license*.
>
> (3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business.
>
> (4) The applicant has completed a course of training as described in Section 26165.

Cal. Penal Code §§ 26150(a), 26155(a) (emphasis added).

In Los Angeles City and County, however, the agencies responsible for issuing concealed firearms licenses have interpreted "good cause" to only exist if the applicant meets stringent requirements, beyond the desire for self-defense. Specifically, the agencies responsible for issuing concealed firearms licenses have interpreted "good cause" to exist only if,

> there is convincing evidence of a clear and present danger to life, or of great bodily harm to the applicant, his spouse, or dependent child, which cannot

> be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm.

Los Angeles County Sheriff's Department, "Concealed Weapon Licensing Policy," at 2, *available at* http://shq.lasdnews.net/content/uoa/SHQ/ConcealedWeaponLicensePolicy.pdf.[5]

Accordingly, an applicant for a concealed firearms license in Los Angeles City and County may only be granted the license if he or she establishes an unavoidable "clear and present danger" to the applicant, the applicant's spouse, or dependent child, and the danger cannot be dealt with by law enforcement resources and alternative measures. In contrast to Los Angeles City and County, other municipalities in California do not apply this heightened requirement for "good cause." In Sacramento, Fresno, Stanislaus, and Ventura Counties, the "good cause" requirement "is satisfied by the applicant simply stating that he wishes to carry a firearm in public for self-defense purposes." *Peruta*, 824 F.3d at 957 (Silverman, J., dissenting).

II. Review Is Necessary To Address Whether The Second Amendment Protects The Right To Carry A Firearm Outside The Home For Self-Defense, And What Level Of Scrutiny Applies To Laws That Burden This Right

Mr. Salgado argued below that the Court of Appeal should address whether the Second Amendment protects the right to carry a firearm outside the home. *See*

[5] The Official Los Angeles Police Department Policy on issuing a concealed firearm license contains identical language. *See* Los Angeles Police Department, "Carry Concealed Weapon License Policy," at 1, *available at* http://assets.lapdonline.org/assets/pdf/Carry%20Concealed%20Weapon%20Application%202013.pdf. The Los Angeles County Sheriff's Policy and Los Angeles Police Department Policy are included in the Appendix.

AOB 28-40. Mr. Salgado noted that, because California prohibits open carry, the only way a law-abiding Californian can exercise any right to carry a firearm outside the home for self-defense is through concealed carry. *See* AOB 28-40. Mr. Salgado further argued that the statutory and regulatory regime for obtaining a concealed firearm license in Los Angeles City and County violated the Second Amendment. *See* AOB 28-40. Accordingly, a prerequisite to addressing Mr. Salgado's challenge was the broader question of whether the Second Amendment protects the right to carry a firearm outside the home in some fashion, either through open or concealed carry.

Like the en banc majority opinion in *Peruta*, however, the Court of Appeal in Mr. Salgado's case declined to address the broader question of whether the Second Amendment protects the right to carry a firearm outside the home in some fashion, either through open or concealed carry. *See* Op. at 14-15. Instead, the Court of Appeal, like the en banc majority opinion in *Peruta*, held that Mr. Salgado's challenge failed because the Second Amendment does not protect the right to carry concealed firearms. *See* Op. at 14-15.

The Court of Appeal's refusal to address the broader question of whether the Second Amendment protects the right to carry a firearm outside the home was wrong. As the four dissenting judges in *Peruta* noted, as well as Justice Thomas in his dissent from denial of certiorari, as well as the D.C. Circuit, the constitutional validity of a virtual ban on concealed carry cannot be assessed in isolation, without also considering that the jurisdiction has a complete bar on open carry. *See Wrenn*,

864 F.3d at 663 n.5 ("We do not agree with the Ninth Circuit that a ban on concealed carry can be assessed in isolation from the rest of a jurisdiction's gun regulations . . . . [A] regulation's validity may turn partly on whether surrounding laws leave ample options for keeping and carrying."); *Peruta*, 137 S. Ct. at 1997 (Thomas, J., dissenting from the denial of certiorari) (similar); *Peruta*, 824 F.3d at 952, 954 (Callahan, J., dissenting) (similar).

As discussed below, had the Court of Appeal addressed the broader question of whether the Second Amendment protects the right to carry a firearm outside the home, the Court of Appeal would have likely recognized that the Second Amendment protects the right to carry a firearm outside the home. The Second Amendment's text, history, and caselaw support Mr. Salgado's argument that the Amendment protects the right to carry a firearm outside the home.

A. Although This Court Has Suggested In Dictum That The Second Amendment Protects The Right To Carry A Firearm Outside The Home, This Court Has Not Squarely Addressed This Issue

The text of the Second Amendment guarantees the right to both "keep" and "bear" arms. *See* U.S. Const. Amend. II ("[T]he right of the people to keep and bear Arms, shall not be infringed.").

This Court has stated in dictum that the word "bear" in the Second Amendment means "to carry." *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008). More specifically, this Court stated in *Heller* that, "the natural meaning of 'bear arms'" is to "'wear, bear, or carry . . . upon the person or in clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive

action in a case of conflict with another person.'" *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States* (1998) 524 U.S. 125, 143 (Ginsberg, J., dissenting). This Court has noted that the Second Amendment was intended to secure "the right to 'protect[] [oneself] against both *public* and private violence,' thus extending the right in some form to wherever a person could become exposed to public or private violence." *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (Niemyer, J., specially concurring) (quoting *Heller*, 554 U.S. at 594) (emphasis added); *see also Wrenn*, 864 F.3d at 657-58 (same).

This Court, however, has not squarely addressed whether the Second Amendment protects the right of law-abiding citizens to carry a firearm outside the home for the purposes of self-defense. *See Peruta*, 137 S. Ct. at 1998 (Thomas, J., dissenting from denial of certiorari) (noting that, although the Court has not expressly held that the Second Amendment protects the right to carry a firearm outside the home, the Court has "suggested that the Second Amendment protects the right to carry firearms in public in some fashion.").

B. The Second Amendment's History As Well As Caselaw Interpreting The Amendment Support Mr. Salgado's Position That The Second Amendment Protects The Right To Carry A Friearm Outside The Home For Self-Defense

Nineteenth century caselaw supports the view that the Second Amendment was understood to protect the right to carry a firearm outside the home. In *Bliss v. Commonwealth*, 12 Ky. 90 (1822), the Kentucky Supreme Court interpreted the state's Second Amendment analogue as invalidating a ban on "wearing concealed arms." Similarly, in *Simpson v. State*, 13 Tenn. 356 (1833), the Tennessee Supreme

Court invalidated a conviction for being armed in public on the grounds that the conviction violated the state's Second Amendment analogue. In *State v. Reid*, 1 Ala. 612 (1840), the Alabama Supreme Court likewise held that the state constitution's analogue to the Second Amendment required that a citizen be allowed to carry a firearm in public.[6]

More recently, in *Wrenn* and *Moore*, the District of Columbia and Seventh Circuits expressly held that the Second Amendment protects the right to carry a firearm outside the home for self-defense. In *Moore*, Judge Posner, writing for the court, expressed the view that the Second Amendment protects the right of law-abiding citizens to carry a firearm outside the home for self-defense. At issue in *Moore* was an Illinois law which "forbids a person, with exceptions mainly for police and other security personnel, hunters, and members of target shooting clubs, to carry a gun ready to use (loaded, immediately accessible—that is, easy to reach—and uncased)." *Moore*, 702 F.3d at 934 (internal citation omitted). The plaintiffs argued that the law violated the Second Amendment, which protects the right of law-abiding citizens to carry a firearm outside the home for self-defense. *Id.* at 935. After reviewing this Court's opinions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the *Moore* Court found that, "[t]he Supreme Court has decided

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[6] Caselaw from the early twentieth century supports this interpretation of the Second Amendment. In *State v. Rosenthal*, 75 Vt. 295 (1903), the Vermont Supreme Court held that an ordinance prohibiting the carrying of concealed weapons without a permit violated the state analogue to the Second Amendment. The Idaho Supreme Court similarly held in 1902 that a law prohibiting the carrying of handguns in cities, towns, or villages violated the Idaho analogue to the Second Amendment as well as the Second Amendment to the federal constitution. *See In re Brickey*, 8 Idaho 597, 599 (1902).

that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore*, 702 F.3d at 942. In ruling for the plaintiffs, the Court explained that, "Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden." *Id.*

Similarly, last year in *Wrenn*, the D.C. Circuit held that the Second Amendment protects the right to carry a firearm outside the home for self-defense. *Wrenn*, 864 F.3d at 662-64. There, the Court considered the constitutionality of a Washington D.C. law "which confines carrying a handgun in public to those with a special need for self-defense." *Id.* at 655. After considering this Court's opinion in *Heller*, as well as the Amendment's text and nineteenth century caselaw interpreting the Amendment, the D.C. Circuit held that "the Amendment's core generally covers carrying in public for self-defense." *Wrenn*, 864 F.3d at 659; *see also id.* at 661 ("Reading the Amendment, applying *Heller I's* reasoning, and crediting key early sources, we conclude: the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections."). Applying strict scrutiny, the D.C. Circuit struck down the Washington D.C. law, which required an applicant for a license to carry a firearm in public to show "a special need for self-defense." *Id.* at 655, 667.

In sum, the Second Amendment's text, as well as caselaw interpreting the Amendment, establish that the Second Amendment protects the right to carry a firearm outside the home in some fashion.

C. The Federal Courts Of Appeal Are Divided On What Level Of Scrutiny Applies To A Law Or Regulation That Burdens The Right To Carry A Firearm Outside The Home For Self-Defense

The federal courts of appeal are divided on what level of scrutiny to apply to laws or regulations that burden the right to carry a firearm outside the home for self-defense. Review is necessary by this Court to address an issue that has divided the federal courts of appeal.

The Second and Fourth Circuits have upheld laws that infringe on the right to carry a firearm outside the home by applying intermediate scrutiny. These courts have reasoned that, because the state has traditionally had a "substantial role" in regulating firearms outside the home, intermediate scrutiny is appropriate. *See Kachalsky*, 701 F.3d at 96 ("Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case."); *Masciandaro*, 638 F.3d at 460 (applying intermediate scrutiny to a regulation prohibiting the carrying or possession of a loaded weapon in a motor vehicle within a national park).

Conversely, the D.C. Circuit in *Wrenn* chose to apply strict scrutiny to the challenged law at issue. The D.C. Circuit reasoned that strict scrutiny was

appropriate because the Washington D.C. law was effectively a "total ban" on carrying a firearm outside the home. *See Wrenn*, 864 F.3d at 664-67.[7]

In sum, as courts are divided on the level of scrutiny to apply to laws and regulations that regulate the carrying of firearms outside the home – particularly regulations like the one at issue here – review is necessary by this Court to address this issue.

III. Review Is Necessary To Address Whether A Heightened Requirement For Obtaining A Concealed Firearm License, Beyond The Desire For Self-Defense, Is Constitutional, A Question That Has Divided The Federal Courts Of Appeal

In addition to divisions amongst the federal courts of appeal over what level of scrutiny to apply, courts are also divided on the ultimate question of whether a heightened requirement for obtaining a concealed firearm license, beyond the desire for self-defense, is constitutional. Review is necessary to address whether a heightened requirement for obtaining a concealed firearm license, beyond the desire for self-defense, violates the Second Amendment. Mr. Salgado maintains that, regardless of which standard of scrutiny is applied, the regime at issue here does not pass constitutional muster.

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[7] In *Drake*, the Third Circuit declined to apply any level of scrutiny to a New Jersey law requiring a "heightened need" for obtaining a license to carry a firearm in public. *Drake*, 724 F.3d at 431-33. Instead, the Third Circuit held that the New Jersey law was the type of "longstanding" regulation that does not fall within the scope of the Second Amendment's right to keep and bear arms. *Id.* Similarly, in *Peruta*, the Ninth Circuit declined to apply any level of scrutiny, holding that the plaintiffs' challenge failed because the Second Amendment did not protect the right to carry a concealed firearm. *See Peruta*, 824 F.3d at 939.

A. The Federal Courts Of Appeal Are Divided On Whether A Heightened Requirement For Obtaining A Concealed Firearm License, Beyond The Desire For Self-Defense, Is Constitutional

The federal courts of appeal are deeply divided on whether a heightened requirement for obtaining a license to carry a firearm in public, beyond the desire for self-defense, violates the Second Amendment. The District of Columbia and Seventh Circuits have struck down laws that excessively infringe on the right to carry firearms outside the home. *See Wrenn*, 864 F.3d at 655 (holding that Washington D.C. law limiting concealed carrying of a "handgun in public to those with a special need for self-defense" violated the Second Amendment, applying strict scrutiny); *Moore*, 702 F.3d at 942 (holding that an Illinois law that forbade the carrying of a firearm outside the home, with certain limited exceptions, violated the Second Amendment, applying intermediate scrutiny).

Conversely, the Second, Third, and Fourth Circuits have upheld laws severely restricting the right to carry firearms outside the home. *See Drake*, 724 F.3d at 431-33 (holding that a New Jersey law requiring a "heightened need" for obtaining a license to carry a firearm in public was the type of "longstanding" regulation that does not fall within the scope of the Second Amendment's right to keep and bear arms); *Kachalsky*, 701 F.3d at 101 (holding that a heightened requirement for obtaining a concealed firearm license in New York survived intermediate scrutiny); *Masciandaro*, 638 F.3d at 460 (holding that a regulation prohibiting the carrying or possession of a loaded weapon in a motor vehicle within a national park survived intermediate scrutiny.)

The Ninth Circuit has taken yet another approach. As previously discussed, in *Peruta* the Ninth Circuit upheld a similar heightened "good cause" requirement in San Diego and Yolo counties, by reaching only the narrow question of whether the Second Amendment protects the right to concealed carry. *See Peruta*, 824 F.3d at 939. Concluding that the Second Amendment does not protect the right to concealed carry, the Ninth Circuit upheld the challenged scheme without applying any level of scrutiny. *Id.* The Court of Appeal in Mr. Salgado's case adopted this approach. *See* Op. at 14-15.

The approach taken by the Ninth Circuit and the Court of Appeal in Mr. Salgado's case is at odds with the approach taken by all of the courts to have addressed this issue. Review is necessary by this Court to resolve the conflict.

B. Mr. Salgado Maintains That The Heightened "Good Cause" Requirement In Los Angeles City And County Is Unconstitutional, Regardless Of Whether Strict Or Intermediate Scrutiny Is Applied

Regardless of whether strict or intermediate scrutiny is applied, the heightened "good cause" requirement in Los Angeles City and County does not pass constitutional muster. Indeed, even under intermediate scrutiny, the heightened "good cause" requirement is unconstitutional.

To survive intermediate scrutiny "(1) the government's stated objective [must be] significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013) (citing *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)). It is the government's burden to establish that a law or regulation

survives intermediate scrutiny. *See Chovan*, 735 F.3d at 1140 ("We hold that the government has met its burden to show that reducing domestic gun violence is an important government objective."); *Chester*, 628 F.3d at 683 ("Significantly, intermediate scrutiny places the burden of establishing the required fit squarely upon the government."); *Moore*, 702 F.3d at 942 ("Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden.").

Here, the state cannot establish that the heightened "good cause" requirement in Los Angeles City and County survives intermediate scrutiny. Indeed, in Sacramento County, home to the governor, both houses of the state's legislature, all statewide offices, *and a population of over 1.5 million*, the "good cause" requirement "is satisfied by the applicant simply stating that he wishes to carry a firearm in public for self-defense purposes." *Peruta*, 824 F.3d at 957 (Silverman, J., dissenting). It makes little sense that a county the size of Sacramento County, with many government officials vulnerable to firearm violence, does not have a need for a heightened "good cause" requirement, while Los Angeles County does.[8] The discrepancy is an arbitrary application of the "good cause" requirement that cannot withstand intermediate scrutiny. *See Peruta*, 824 F.3d at 958 (Silverman, J., dissenting) ("There cannot be a reasonable fit if the same

[8] Indeed, the D.C. Circuit has held that a similar regulation is unconstitutional in Washington D.C., where thousands of federal officials are vulnerable to firearm violence. *See Wrenn*, 864 F.3d at 655 (holding that Washington D.C. law limiting concealed carrying of a "handgun in public to those with a special need for self-defense" violated the Second Amendment, applying strict scrutiny).

standard – here, § 26150(a)'s 'good cause' requirement – is arbitrarily applied in different ways from county to county without any explanation for the differences.").

In sum, in light of the arbitrary applications between counties in California, the heightened "good cause" requirement in Los Angeles City and County does not survive intermediate scrutiny.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Salgado's petition. Review is particularly warranted here because the Court of Appeal rejected Mr. Salgado's claim on the merits, and thus, Mr. Salgado's case presents the perfect vehicle for addressing these difficult questions, which have divided the federal courts of appeal.

DATED: August 21, 2018

Respectfully submitted,

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APPENDIX A--ORDER AND OPINION

Court of Appeal, Second Appellate District, Division Four - No. B282368

S247955

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

EDUARDO SALGADO, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Filed 2/28/18

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO SALGADO, Defendant and Appellant.	B282368 (Los Angeles County Super. Ct. No. BA450829)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed in part and remanded.

Kent D. Young, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

After defendant Eduardo Salgado lightly hit the back of another car at a stoplight, he was confronted by the other driver. Remaining seated in his car, defendant picked up and cocked or racked his handgun and asked the other driver, "Is there any damage?" The jury convicted defendant of one count of making criminal threats and one count of possession of a concealed firearm. On appeal, defendant contends his criminal threats conviction was based on his nonverbal conduct and therefore cannot stand pursuant to *People v. Gonzalez* (2017) 2 Cal.5th 1138 (*Gonzalez*). He also argues that the trial court erred in failing to give a self-defense instruction. In addition, he raises a constitutional challenge to his conviction on the concealed firearm count. We affirm the convictions on both counts. We also conclude that defendant has forfeited his right to challenge the conditions of his probation.

Finally, defendant argues that we must remand to allow the trial court to exercise its discretion under the recent amendment to the firearm enhancement statute (Pen. Code, § 12022.5[1]). We agree and remand the case for that purpose.

FACTUAL AND PROCEDURAL HISTORY

I. *Procedural Background*

The Los Angeles County District Attorney (the People) filed an amended information on April 17, 2017 charging defendant with one count of criminal threats, a felony (§ 422, subd. (a); count one), and one count of carrying a concealed firearm in a vehicle, a misdemeanor (§ 25400, subd. (a)(1); count two). As to

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

count one, the information also alleged that defendant personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)).

Defendant pled not guilty and denied the special allegation. At the conclusion of trial, the jury found defendant guilty on both counts and found true the firearm allegation. The court sentenced defendant to a total term of six years in state prison. The court suspended the execution of defendant's sentence and placed him on formal probation for five years pursuant to specified terms and conditions. Defendant timely appealed.

II. *Evidence at Trial*

The prosecution presented evidence that on October 6, 2016 around 9:00 p.m., Marvin[2] was stopped at a red light at an intersection. He was driving his Dodge Durango; his seven-year-old son was sitting in the back seat and his mother-in-law was in the passenger seat. While they were waiting at the light, he felt a "minor tap" on the rear end of his car. Marvin testified that he was concerned about his car because he had "just purchased it new," so he "hopped out" of the vehicle. He saw a black sedan directly behind his car. Marvin glanced at the rear of his car, but could not tell whether there was any damage because it was dark.

Marvin testified that he was "a little upset." He walked toward the driver's window of the car behind him and said, "What the hell? You just hit my car."[3] Defendant was seated in the driver's seat of the black sedan. Marvin saw defendant lean

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[2] Pursuant to California Rules of Court, rule 8.90 (b)(4), we refer to the victim in this case by his first name to protect his personal privacy interests. No disrespect is intended.

[3] During cross-examination, Marvin admitted that he was angry when he got out of his car, and that he might have said "What the fuck, man?" instead of "What the hell?"

forward and lean back; he then saw defendant was holding a gun. Marvin heard defendant make a racking sound with the gun; immediately afterward, defendant looked at Marvin and said, "Is there any damage?" Marvin testified that when he saw the gun, he thought defendant "was in a threatening manner threatening me to go back to my vehicle." Marvin responded, "no," and walked back toward his car. At the time, he was thinking defendant could have killed him, and he was worried that his son "would have seen the whole thing and he would have been traumatized."

After Marvin got back into his car, the traffic light turned green and he drove through the intersection. Prior to the incident, he had seen a police car a short distance in front of him, so he sped up and honked at the officers. When one of the officers rolled down the window, Marvin told them that "someone just pulled out a gun on me." Marvin then identified defendant's car.

The two police detectives turned on their lights and siren and initiated a traffic stop of defendant's vehicle. Defendant immediately pulled over and complied with their instructions. Defendant was the only person in the car.

Police officers recovered several hollow-point bullets from inside defendant's vehicle and a 10 millimeter Glock handgun from under the front passenger seat. The gun was not loaded. The gun had been legally purchased by and was registered to defendant.

Defendant did not testify or present other evidence at trial.

DISCUSSION

I. *Criminal Threats*

Defendant contends there is insufficient evidence that he made a verbal "statement" to support his conviction for criminal threats. We disagree.

In reviewing the sufficiency of the evidence, we determine whether after viewing "'the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Holt* (1997) 15 Cal.4th 619, 667.) We do not weigh the evidence or decide the credibility of the witnesses. We draw all reasonable inferences in favor of the judgment. "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Under section 422, subdivision (a), it is a crime to "willfully threaten" infliction of "death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, . . . which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety. . . ."

Based on this statutory language, courts have required a threat charged under section 422 to include some words or sound

to qualify as a "statement, made verbally." Most recently, in *Gonzalez, supra*, 2 Cal.5th 1138, the Supreme Court reversed a threat conviction where the defendant communicated the threat by making a gang hand sign and "manually simulated a pistol pointed upward." (*Id.* at p. 1140.)

To determine whether nonverbal conduct fell within the scope of section 422, the *Gonzalez* court first reviewed the legislative history of the statute. (*Gonzalez, supra*, 2 Cal.5th at pp. 1142-1146.) The prior version of section 422 applied to a threat made "with the specific intent that the statement is to be taken as a threat. . . ." (Stats. 1988, ch. 1256, § 4, pp. 4184-4185.) The statute did not otherwise define "statement." However, the Court in *Gonzalez* noted that Evidence Code section 225 defines "statement" to include both verbal and nonverbal conduct.[4] (*Gonzalez, supra*, 2 Cal.5th at p. 1143.)

The current language of section 422, requiring a threatening statement to be "made verbally, in writing, or by means of an electronic communication device" was inserted in 1998 as "part of a bill intended to combat 'cyberstalking.'" (*Gonzalez, supra*, 2 Cal.5th at p. 1143.) As such, the Court reasoned that while "the Legislature's 1998 amendment was primarily focused on expanding the reach of [ ] section 422 to include electronic communications . . . the Legislature's choice to explicitly describe a threat 'made verbally' must be given significance." (*Id.* at p. 1144.) Indeed, in 2002, four years after amending section 422, the Legislature amended another criminal

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[4] Specifically, Evidence Code section 225 defines "statement" as "(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression."

threat statute to expressly include a reference to Evidence Code section 225. (See *id.* at pp. 1144-1145, citing section 11418.5.)[5] Conversely, the Court also noted that in 2000, the Legislature had considered but failed to pass an amendment of section 422 to add a reference to Evidence Code section 225. (*Id.* at p. 1145.)

In light of this legislative history, the *Gonzalez* court concluded that the Legislature "(a) was aware that the 'made verbally' language excluded nonverbal conduct, and (b) intended that nonverbal conduct may qualify as a statement under section 11418.5 but not section 422." (*Gonzalez, supra*, 2 Cal.5th at pp. 1145-1146.) Accordingly, "a threat made through nonverbal conduct falls outside the scope of section 422." (*Id.* at p. 1147.)[6]

Here, defendant contends that the evidence at trial established only that he made a threat through nonverbal conduct—displaying and manipulating his gun. This conduct communicated to the victim that he might be harmed if he did not retreat from defendant's car. Defendant argues that without the use of the gun, his query to Marvin, "Is there any damage?" did not convey a threat.

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[5] Section 11418.5, subdivision (a) previously contained identical language to section 422, requiring "the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat. . . ." (Stats. 1999, ch. 563, § 1, pp. 3938-3939.) As amended, section 11418.5, subdivision (a) states: "Any person who knowingly threatens to use a weapon of mass destruction, with the specific intent that the statement as defined in Section 225 of the Evidence Code or a statement made by means of an electronic communication device, is to be taken as a threat. . . ."

[6] We note that the trial court here did not have the benefit of *Gonzalez, supra*, 2 Cal.5th 1138, as it was decided after the proceedings in this case.

We reject defendant's suggestion that the nonverbal conduct must be "excised from the incident" in order to determine the nature of the threat. This approach is not supported by *Gonzalez, supra*, 2 Cal.5th at p. 1147, which did not involve *any* verbal conduct. Nor is it consistent with the numerous cases holding that the determination of a threat "can be based on all the surrounding circumstances and not just on the words alone." (*People v. Mendoza, supra*, 59 Cal.App.4th at p. 1340; see also *Franz, supra*, 88 Cal.App.4th at p. 1446; *People v. Butler* (2000) 85 Cal.App.4th 745, 753 (*Butler*).)

Indeed, courts have repeatedly upheld convictions for threats under section 422 based on a defendant's verbal and nonverbal conduct taken together. (See, e.g., *People v. Wilson* (2010) 186 Cal.App.4th 789, 814 [finding a threat where defendant said he had killed officers in the past, said he would "blast" the victim officer, and simulated pulling a trigger with his fingers]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218, 1220 [defendant's statements to victim, including "I'm going to get you," and "I'll get you," were sufficient to convey a threat where defendant also approached the victim "quickly, he yelled and cursed at him, he got within very close proximity to his face, and he displayed very angry behavior"].) In *People v. Franz* (2001) 88 Cal.App.4th 1426, 1436 (*Franz*), cited by the Attorney General, Franz stood behind a police officer as the officer interviewed an eyewitness. Franz looked at the witness, held an index finger in front of his lips with a shushing noise, then ran his thumb across his throat. (*Ibid.*) The court agreed with Franz that "section 422 required in this case proof that defendant's threat to be quiet was 'made verbally,' i.e., that defendant orally made some noise or sound that was capable of conveying

meaning." (*Id.* at p. 1442.) The court affirmed the conviction, concluding that the testimony "that at least one victim heard defendant make a 'shushing' noise constitutes substantial evidence of a verbal 'statement,' the import of which was amplified by the throat-slashing gesture to constitute a threat to kill if the victim talked to the police." (*Id.* at p. 1446.)[7]

As such, "the meaning of the threat by defendant must be gleaned from the words and all of the surrounding circumstances. . . . Thus, it is the circumstances under which the threat is made that give meaning to the actual words used." (*Butler, supra*, 85 Cal.App.4th at p. 749, 753 [finding a threat based on defendant's statement to the victim that she needed to mind her own business or she "was going to get hurt," coupled with his conduct]; see also, e.g., *Franz, supra*, 88 Cal.App.4th at p. 1446; *People v. Martinez, supra,* 53 Cal.App.4th at pp. 1218, 1220.) Accordingly, in this case, we view defendant's verbal statement-"Is there any damage?"- together with his nearly-simultaneous nonverbal conduct with the gun. Together, those actions communicated to Marvin that if he did not stop asking about his car and withdraw, defendant would shoot him. As such, there was sufficient evidence to allow the jury to find a threat under section 422 based on the entirety of defendant's conduct, both verbal and nonverbal.

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[7] We note that the court in *Gonzalez*, discussing the holding in *Franz*, expressly declined to decide "whether 'made verbally' requires the making of a sound or use of words," as the defendant's conduct in *Gonzalez* involved neither. (*Gonzalez, supra*, 2 Cal.5th at p. 1147, fn. 8.)

II. *Self-Defense Instruction*

Defendant contends his criminal threats conviction also should be reversed due to the trial court's failure to instruct the jury on self-defense. We find no error.

"A trial court has a sua sponte duty to instruct regarding a defense if there is substantial evidence to support the defense and it is not inconsistent with the defendant's theory of the case. [Citation.]" (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 567 (*Saavedra*).) In determining whether there is substantial evidence, "the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt. . . .'" (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

There is no dispute that a self-defense theory was consistent with defendant's theory of the case at trial. Defendant further argues that there was substantial evidence to support the defense. The elements of self-defense, as set forth in CALCRIM No. 3470, the self-defense jury instruction, are: "1. The defendant reasonably believed that [he] was in imminent danger of suffering bodily injury; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger.'" (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49–50.)

The evidence at trial did not support a self-defense instruction. After a minor collision, Marvin exited his vehicle and walked toward defendant's car, yelling, "What the fuck, man? You just hit my car!" or something to that effect. There is no evidence that Marvin was holding a weapon, or anything that could be mistaken for one, or that he made any overt threats or

threatening gestures. Defendant remained in his car and had pulled out his gun while Marvin was still some distance away. After Marvin saw the gun, he retreated. Under these circumstances, there was no evidence from which a jury could find that defendant reasonably believed he was in imminent danger of bodily injury such that the immediate use of force was necessary to defend himself.

Tellingly, the cases cited by defendant demonstrate the difference between this case and one in which a self-defense instruction was supported by the evidence. In *Saavedra*, for example, a prison inmate was searched after he had been severely beaten by two other inmates in a fight. Authorities found a knife inside his shoe and charged him with possession of a weapon. The defendant testified that he had picked up the weapon from one of his assailants during the fight, intending to use it to defend himself. (*Saavedra, supra*, 156 Cal.App.4th at pp. 565-566.) The defendant was therefore entitled to an instruction on self-defense because there was substantial evidence that he "temporarily seized the weapon because of a fear of immediate harm." (*Id.* at p. 569.) Similarly, in *People v. Lemus* (1988) 203 Cal.App.3d 470, the defendant testified that while he was in a bar, the victim threatened him, saying "I'm going to fuck you up," and started hitting the defendant's face and body. The victim also threatened to kill the defendant and tried to stab him. The defendant then pulled out his own knife and stabbed the victim. (*Id.* at p. 477.) The trial court refused to give a self-defense instruction based on its determination that the defendant was not credible and therefore the evidence was not "'substantial.'" (*Ibid.*) This was error, as "assessing the credibility of a witness is an exclusive function of the jury and is not to be usurped by the

court." (*Ibid.*; see also *People v. White* (1980) 101 Cal.App.3d 161, 167-168 [self-defense instruction warranted where defendant testified police officer tried to subdue her using a "sleeper hold," causing her to panic and bite the officer when she could not breathe].) Here, by contrast, there was no evidence of an actual or imminent physical attack against defendant, nor did the court make any credibility determinations in error. As such, the trial court was not required to instruct on self-defense.

III. *Possession of Concealed Handgun*

Defendant also contends that his conviction on count two for possession of a concealed firearm in a vehicle violates the Second Amendment. We are not persuaded.

Section 25400(a)(1) makes it a crime for one to carry "concealed within any vehicle that is under the person's control or direction any pistol, revolver, or other firearm capable of being concealed upon the person." California law also generally prohibits open carry of firearms outside the home. (§§ 25850, 26350.) However, there are numerous exceptions to these general prohibitions. For example, the prohibitions of sections 25400 and 25850 do not apply to active and retired "peace officers." (§§ 25450, 25900.) The prohibition of section 25400 also does not apply to carrying a gun within a locked container (§ 25610), to and from a licensed target range (§ 25540), or by an individual engaged in licensed hunting or fishing (§ 25640), among other exceptions. (See *Peruta v. County of San Diego* (9th Cir. 2016) 824 F.3d 919, 925 (*Peruta*) [listing exceptions].) In addition, individuals with a license to carry a concealed firearm are expressly exempt. (§ 25655.)

The Penal Code authorizes the county sheriff or chief of a municipal police department to issue a concealed carry license to

a person upon proof of certain requirements, including that "Good cause exists for issuance of the license." (§§ 26150(a), 26155(a).) Pursuant to the policy published by the Los Angeles County Sheriff's Department, a finding of good cause requires a showing of "convincing evidence of a clear and present danger to life, or of great bodily harm to the applicant, his spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm." The policy published by the Los Angeles Police Department contains a similar requirement.

Defendant asserts that the exemption under section 25655 is "largely illusory" because the "heightened requirement for good cause" under these policies "makes it virtually impossible for a law-abiding citizen to obtain a license to carry a concealed firearm." He therefore challenges the policies governing concealed carry, asserting that absent these unconstitutional restrictions, he would have been able to lawfully carry his concealed handgun in his vehicle. We review questions of constitutional law de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 893-894.)

Defendant acknowledges that the Ninth Circuit considered and rejected the same arguments challenging similar policies in two other California counties in *Peruta, supra,* 824 F.3d 919, 925 (*Peruta*). He notes, however, that the majority opinion in *Peruta* was criticized by the four dissenting judges, as well as by Justice Thomas in his dissent from the denial of certiorari. (See *Peruta v. California* (2017) 137 S.Ct. 1995, 1996 (Thomas, J., dissenting from denial of certiorari); *Peruta, supra,* 824 F.3d at p. 954

(Callahan, J., dissenting).) He concludes that the dissenting judges "had the better argument." We disagree.

In *Peruta*, an en banc panel considered whether the protection of the Second Amendment extends to carrying "concealed firearms in public by members of the general public." (*Peruta, supra*, 824 F.3d at p. 927.) The court declined to reach the broader question of "whether the Second Amendment protects some ability to carry firearms in public, such as open carry," as the plaintiffs challenged only the "good cause" requirements for concealed carry permits. (*Ibid.*) After an analysis of historical sources and prior case law, the majority of the court concluded "that the 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." (*Id.* at p. 939.) The *Peruta* court also noted decisions by several other circuits "that have upheld the authority of states to prohibit entirely or to limit substantially the carrying of concealed or concealable firearms." (*Ibid.*, citing *Peterson v. Martinez* (10th Cir. 2013) 707 F.3d 1197 [no Second Amendment right to carry concealed weapons]; *Woollard v. Gallagher* (4th Cir. 2013) 712 F.3d 865 [Maryland requirement that handgun permits be issued only to individuals with "good and substantial reason" to wear, carry, or transport a handgun does not violate Second Amendment]; *Drake v. Filko* (3d Cir. 2013) 724 F.3d 426, 429–30 [New Jersey "justifiable need" restriction on carrying handguns in public "does not burden conduct within the scope of the Second Amendment's guarantee"]; *Kachalsky v. Cty. of Westchester* (2d Cir. 2012) 701 F.3d 81 [New York "proper cause" restriction on concealed carry does not violate Second Amendment].)

We agree with the analysis and conclusions reached by the court in *Peruta, supra*, 824 F.3d at p. 939. Here, as in that case, defendant challenges the "heightened" good cause requirements to obtain a license to carry a concealed firearm. But because "the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry—including a requirement of 'good cause,' however defined—is necessarily allowed by the Amendment." (*Ibid.*; see also *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 313-314 ["[C]arrying a firearm concealed on the person or in a vehicle . . . is not in the nature of a common use of a gun for lawful purposes which the court declared to be protected by the Second Amendment in [*District of Columbia v.*] *Heller* [(2008) 554 U.S. 570]."].)

Defendant's argument that the licensing requirements fail to meet intermediate constitutional scrutiny is therefore moot, as he has not established that the "challenged law burdens conduct protected by the Second Amendment." (*United States v. Chovan* (9th Cir. 2013) 735 F.3d 1127, 1136.)

IV. *Probation Condition*

Next, we turn to defendant's challenge to his probation condition requiring him to "maintain a residence as approved by the probation officer." He contends this condition is unconstitutionally overbroad, in violation of his rights to travel and to freedom of association.

We conclude that defendant has forfeited his constitutional challenge by failing to object below. In general, a defendant's failure to object to probation conditions at the sentencing hearing waives the claim on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235.) "A timely objection allows the court to modify or

delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis. [Citations.]" (*Ibid.*)

However, there is an exception to this forfeiture rule where a defendant raises a facial constitutional challenge to a probation condition that presents "'pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court.' [Citation]." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*); see also *People v. Stapleton* (2017) 9 Cal.App.5th 989, 994 (*Stapleton*) ["[W]here a claim that a probation condition is facially overbroad and violates fundamental constitutional rights is based on undisputed facts, it may be treated as a pure question of law, which is not forfeited by failure to raise it in the trial court. [Citations.]"].) In *Sheena K., supra*, 40 Cal.4th at p. 878, the Supreme Court applied this exception to a condition that the defendant "not associate with anyone disapproved of by probation." The Court concluded that defendant's challenge to this condition as facially vague and overbroad presented an error that was "easily remediable on appeal by modification of the condition," adding a knowledge element, and without reference to the underlying record. (*Id.* at p. 888.) The Court cautioned, however, that this exception would "not apply in every case in which a probation condition is challenged on a constitutional ground." (*Id.* at p. 889.)

We find the forfeiture exception inapplicable here. To determine whether an otherwise valid condition is

unconstitutionally overbroad, we consider whether "it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153; see also *Stapleton, supra*, 9 Cal.App.5th at p. 993.)

Unlike in *Sheena K.*, the error defendant asserts here is not capable of correction without reference to the underlying sentencing record. (*Sheena K., supra*, 40 Cal.4th at p. 887.) Whether this particular case warranted a need for broad restrictions on defendant's place of residence cannot be analyzed without reference to the facts. (See, e.g., *People v. Arevalo* (Cal. Ct. App., Jan. 17, 2018, G054483) ___ Cal.Rptr.3d___ [2018 WL 456917, at *3] [affirming probation condition "because the nature of her crime suggests a need for oversight"]; *People v. Bauer* (1989) 211 Cal.App.3d 937, 944 [striking residence approval condition after review of sentencing record and defendant's history].) As such, by failing to object to this condition in the trial court, defendant has forfeited his right to raise it on appeal.

V. *Recent Amendment to Section 12022.5*

Defendant's suspended sentence included the midterm of two years on the criminal threat count, plus the midterm of four years for the personal use of a firearm enhancement under section 12022.5, subdivision (a). At the time of sentencing, that section provided no discretion to the trial court to strike a firearm

use enhancement. Effective January 1, 2018, section 12022.5 was amended by the passage of Senate Bill No. 620; the statute now allows the trial court, in its discretion, to strike a firearm use enhancement. (§ 12022.5, subd. (c).)

Defendant requests remand so that the trial court may consider whether to strike the firearm enhancement under the amended section 12022.5. The Attorney General concedes that the amendment applies retroactively to defendant, as the judgment in this case was not final as of January 1, 2018. (See *People v. Brown* (2012) 54 Cal.4th 314, 323-324.) However, the Attorney General suggests that remand is unwarranted, because the trial court's imposition of midterm sentences indicates that it would not have exercised its discretion to strike the enhancement and thereby decrease defendant's sentence. (See, e.g., *People v. Gamble* (2008) 164 Cal.App.4th 891, 901 ["'[i]f the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required'"]; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand is required "unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike"].)

Criminal defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) Here, remand is necessary to allow the court to exercise its discretion under the amended version of the statute. Moreover, it is not for this court to speculate how the trial court would exercise its discretion following the opportunity to hear defendant's arguments in favor of striking the firearm enhancement. It is more prudent to remand unless no reasonable

court could exercise discretion in the defendant's favor. We cannot say that remand would be futile in this case.

DISPOSITION

The case is remanded for the trial court to exercise its discretion under section 12022.5. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.

APPENDIX B--CONCEALED FIREARM LICENSE POLICIES

Los Angeles County Sheriff's Department

Concealed Weapon Licensing Policy

The issuance of licenses enabling a private citizen to carry a concealed weapon (CCW) is of great concern to the Los Angeles County Sheriff's Department. The Department's overriding policy is that no concealed weapon license should be granted merely for the personal convenience of the applicant. No position or job classification in itself shall constitute good cause for the issuance, or for the denial, of a CCW license. Each application shall be individually reviewed for cause, and the applicant will be notified by writing within 90 days of the application, or within 30 days after receipt of the applicant's criminal background check from the Department of Justice, that the CCW license was either approved or denied.

In accordance with California Penal Code § 26150 *et. seq.*, and subject to Department policy and procedures, any Los Angeles County resident may obtain a CCW application for authorization to carry a concealed weapon. Applications may be obtained from any sheriff's patrol station, LASD.org website, or the Hall of Justice 2nd Floor Security Desk. Completed applications may be submitted to any of these units for processing.

Types of Licensing and Expiration Periods for CCWs

There are four distinct categories of CCW licenses: Employment, Standard, Judges, and Reserve Police Officers. The Employment CCW license is issued only by the sheriff of a county to a person who spends a substantial period of time in his or her principal place of employment or business in the county of issuance. The license is valid only in the county issued and for any period not to exceed 90 days. The Standard CCW license is issued to residents of the county or a particular city within the county. The license is valid for any period not to exceed 2 years. The Judge CCW license may be issued to California judges, full-time commissioners, and to federal judges and magistrates of the federal courts. The license is valid for any period not to exceed 3 years. The Reserve Police Officer CCW license may be issued to reserve police officers appointed pursuant to California Penal Code § 830.6. The license is valid for any period not to exceed 4 years, except that it becomes invalid upon the conclusion of the person's appointment as a reserve police officer.

Training Requirements for a CCW License

Regardless of the category, all new license applicants for CCW's must now pass a specified course of training which is acceptable to the licensing authority, the Los Angeles County Sheriff's Department (See attached sheet, "Suggested Training Vendors"). New CCW license applicants must pass a specified course of training acceptable to the licensing authority. The course shall not exceed 16 hours, and the course shall include instruction on firearm safety, the law regarding the permissible use

of a firearm and weapon proficiency. The licensing authority may also require the applicant to attend a community college course certified by the Commission on Peace Officer Standards and Training (POST), up to a maximum of 24 hours, but only if required uniformly of all applicants without exception. For CCW license renewal applicants, the course of training may be any course acceptable to the licensing authority, shall be no less than 4 hours, and shall include instruction on firearms safety, the law regarding the permissible use of a firearm and weapon proficiency.

Qualifications for a CCW License

To qualify for a CCW, each applicant must demonstrate (1) proof of good moral character, (2) that good cause exists, and (3) that the applicant is a resident of the county or a city within the county, or, that the applicant spends a substantial period of time in the applicant's place of employment or business in the county or a city within the county. In addition, the applicant must complete the training requirements as listed above.

According to Los Angeles County Sheriff's Department policy (5-09/380.10) and the California Supreme Court (CBS, Inc. v. Block, (1986) 42 Cal.3d 646), good cause shall exist only if there is convincing evidence of a clear and present danger to life, or of great bodily harm to the applicant, his spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm.

The character requirement will be fulfilled by, but not limited to, a criminal history check through the Bureau of Criminal Identification and Investigation. The good cause requirement will only be fulfilled by thoroughly justifying the applicant's need to the Sheriff or his designee on the application form. The residency requirement will be fulfilled upon presentation of an approved, recognized identification card and at least one recently canceled item of United States mail.

Carry a Concealed Weapon (CCW) Application Guidelines

Applicant: Upon completion of your CCW application, it will be necessary for you to appear in person to have your application reviewed by a member of the Los Angeles Police Department, Gun Unit.

Please contact the Gang and Narcotics Division, Gun Unit at (213) 486-5360 for your appointment.

You will be required to show proof of residency in the city of Los Angeles by bringing in a California Driver's License or Identification Card and a recent utility bill or rent receipt that shows your name and address.

Training Requirements, Penal Code Section 26165 (d):

The applicant shall not be required to pay for any training courses prior to the determination of good cause being made pursuant to Section 26202. Upon making the determination of good cause pursuant to Section 26150 or 26155, the licensing authority shall give written notice to the applicant of the licensing authority's determination. If the licensing authority determines that good cause exists, the notice shall inform the applicants to proceed with the training requirements specified in Section 26165. For new license applicants, the course of training may be any course acceptable to the licensing authority, it shall not exceed 16 hours, and shall include instruction on at least firearms safety and the law regarding the permissible use of a firearm.

LAPD CARRY CONCEALED WEAPON LICENSE POLICY

Pursuant to California Penal Code section 26170, in the City of Los Angeles, the Chief of Police of the Los Angeles Police Department ("LAPD" or "Department") may issue a license to a person to carry a pistol, revolver, or other firearm capable of being concealed upon the person upon proof that the person applying for the license is of good moral character, that good cause exists for the issuance of the license, that the person is a resident of the City of Los Angeles, and that the person has completed a required course of training.

Pursuant to California Penal Code section 26205, the Department shall give written notice to the applicant if the license is denied within 90 days of the initial application for a new license or a license renewal or 30 days after receipt of the applicant's criminal background check from the Department of Justice, whichever is later.

GOOD CAUSE: The policy LAPD has adopted is that good cause exists if there is convincing evidence of a clear and present danger to life or of great bodily injury to the applicant, his (or her) spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm.

TRAINING REQUIREMENT: A new license applicant must furnish proof to the Department that he or she has successfully completed a course of training in the carrying and use of firearms established pursuant to Section 7585 of the California Business and Professions Code or some other course acceptable to the Department which includes the following subjects of training: knowledge of California laws regarding weapons and deadly force use; safe handling, carriage, use and storage of concealable firearms; and competency with the types of firearms to be listed on the license. Such course shall be no less than 16 hours. For license renewal applicants, the course of training may be any course acceptable to the Department, shall be no less than four hours, and shall include instruction on at least firearm safety and the law regarding the permissible use of a firearm.

RESIDENCY REQUIREMENT: Proof that the applicant is a resident of the City of Los Angeles will be fulfilled upon presentation of a copy of the following two items: a recognized California identification card and at least one recent utility or rent receipt showing the applicant's name and residence address.

LICENSE CONDITIONS: The Department may attach to the license such conditions as it deems appropriate in the reasonable exercise of its discretion. These conditions will be noted on the face of the license.

Pursuant to the Judgment of Declaratory Relief in *Anthony Assenza, et al. v. City of Los Angeles, et al.*, the following further rules and guidelines are provided for the interpretation and implementation of the Department's good cause policy:

Good Cause. Good cause shall be deemed to exist, and a license will issue in the absence of strong countervailing factors, upon a showing of any of the following circumstances: a) The applicant is able to establish that there is an immediate or continuing threat, express or implied, to the applicant's safety, or the applicant's family's safety, and that no other reasonable means exist which would suffice to neutralize that threat; b) The applicant is employed in the field of security, has all requisite licenses, is employed by a security firm having all requisite licenses, and provides satisfactory proof that his or her work is of such a nature that it requires the carrying of a concealed weapon; c) The applicant has obtained, or is a person included within the protections of a court order which establishes that the applicant is the on-going victim of a threat or physical violence or otherwise meets the criteria set forth in Penal Code Section 26175; d) The applicant establishes that circumstances exist requiring him or her to transport in public significant amounts of valuable property which it is impractical or impracticable to entrust to the protection of armored car services or equivalent services for safe transportation of valuables; e) The applicant establishes that he or she is subject to a particular and unusual danger of physical attack and that no reasonable means are available to abate that threat.

Favorable Factors. Among facts upon which the Department will, in the exercise of its discretion, look favorably in considering applications are whether: a) the applicant has a demonstrated record of responsible handling of firearms; b) the applicant has a commitment to safe and responsible handling of firearms as shown by having voluntarily taken firearms training; c) the applicant has a record of good citizenship in general as evidenced, for instance, by service to the community through such activities as creditable service in the armed forces, including the National Guard and state militia or in the police reserves, or of active participation in charitable or public service organizations or activities or in political affairs; d) the applicant is trustworthy and responsible as evidenced, for instance, by employment history, positions held in civic, political, religious or secular achievements or record of personal accomplishment in other areas of endeavor; e) that the applicant suffers under a disability or physical handicap, including age or obesity, which hinders the applicant's ability to retreat from an attacker.

Unfavorable Factors. Factors which will bear negatively on issuance (unless they appear to be in the remote past) are: a) the applicant has a long-term history of mental or emotional instability, alcoholism, drug use or addiction to controlled substances; b) the applicant has a history of fault in serious accidents with firearms, automobiles or other dangerous instrumentalities; c) the applicant has had a permit to own or carry a concealed weapon denied, suspended or revoked for good cause by any issuing authority; d) the applicant has had a driver's license denied, suspended or revoked for good cause by any issuing authority; e) the applicant has a long-term record of irresponsible and dangerous behavior with automobiles as indicated by numerous convictions of serious driving offenses; f) the applicant has a long-term history of conduct from which it appears that he or she is not now of good moral character, trustworthy or responsible. While none of the foregoing disqualify an applicant per se, a license will be denied if it appears, in the discretion of the Department, that the applicant does not now have good character or that issuance of a license to him/her is not consistent with public safety.

APPENDIX C--CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. II

A well regulated Milita, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Cal. Penal Code Section 25400

(a) A person is guilty of carrying a concealed firearm when the person does any of the following:
(1) Carries concealed within any vehicle that is under the person's control or direction any pistol, revolver, or other firearm capable of being concealed upon the person.
(2) Carries concealed upon the person any pistol, revolver, or other firearm capable of being concealed upon the person.
(3) Causes to be carried concealed within any vehicle in which the person is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person.
(b) A firearm carried openly in a belt holster is not concealed within the meaning of this section.
(c) Carrying a concealed firearm in violation of this section is punishable as follows:
(1) If the person previously has been convicted of any felony, or any crime made punishable by a provision listed in Section 16580, as a felony.
(2) If the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.
(3) If the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony.
(4) If the person is not in lawful possession of the firearm or the person is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.
(5) If the person has been convicted of a crime against a person or property, or of a narcotics or dangers drug violation, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.
(6) If both of the following conditions are met, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment:
(A) The pistol, revolver, or other firearm capable of being concealed upon the person is loaded, or both it and the unexpended ammunition capable of being discharged from it are in the immediate possession of the person or readily accessible to that person.
(B) The person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106 as the registered owner of that pistol, revolver, or other firearm capable of being concealed upon the person.

(7) In all cases other than those specified in paragraphs (1) to (6), inclusive, by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.
(d)
(1) Every person convicted under this section who previously has been convicted of a misdemeanor offense enumerated in Section 23515 shall be punished by imprisonment in a county jail for at least three months and not exceeding six months, or, if granted probation, or if the execution or imposition of sentence is suspended, it shall be a condition thereof that the person be imprisoned in a county jail for at least three months.
(2) Every person convicted under this section who has previously been convicted of any felony, or of any crime made punishable by a provision listed in Section 16580, if probation is granted, or if the execution or imposition of sentence is suspended, it shall be a condition thereof that the person be imprisoned in a county jail for not less than three months.
(e) The court shall apply the three-month minimum sentence as specified in subdivision (d), except in unusual cases where the interests of justice would best be served by granting probation or suspending the imposition or execution of sentence without the minimum imprisonment required in subdivision (d) or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in subdivision (d), in which case, the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by that disposition.
(f) A peace officer may arrest a person for a violation of paragraph (6) of subdivision (c) if the peace officer has probable cause to believe that the person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106 as the registered owner of the pistol, revolver, or other firearm capable of being concealed upon the person, and one or more of the conditions in subparagraph (A) of paragraph (6) of subdivision (c) is met.

Cal. Penal Code Section 25655

Section 25400 does not apply to, or affect, the carrying of a pistol, revolver, or other firearm capable of being concealed upon the person by a person who is authorized to carry that weapon in a concealed manner pursuant to Chapter 4 (commencing with Section 26150).

Cal. Penal Code Section 26150

(a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following:
(1) The applicant is of good moral character.
(2) Good cause exists for issuance of the license.
(3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business.
(4) The applicant has completed a course of training as described in Section 26165.
(b) The sheriff may issue a license under subdivision (a) in either of the following formats:
(1) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.
(2) 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 only that county a pistol, revolver, or other firearm capable of being concealed upon the person.
(c)
(1) Nothing in this chapter shall preclude the sheriff of the county from entering into an agreement with the chief or other head of a municipal police department of a city to process all applications for licenses, renewals of licenses, or amendments to licenses pursuant to this chapter, in lieu of the sheriff.
(2) This subdivision shall only apply to applicants who reside within the city in which the chief or other head of the municipal police department has agreed to process applications for licenses, renewals of licenses, and amendments to licenses, pursuant to this chapter.

Cal. Penal Code Section 26155

(a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the chief or other head of a municipal police department of any city or city and county may issue a license to that person upon proof of all of the following:
(1) The applicant is of good moral character.
(2) Good cause exists for issuance of the license.
(3) The applicant is a resident of that city.
(4) The applicant has completed a course of training as described in Section 26165.
(b) The chief or other head of a municipal police department may issue a license under subdivision (a) in either of the following formats:
(1) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.
(2) Where the population of the county in which the city is located is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.
(c) Nothing in this chapter shall preclude the chief or other head of a municipal police department of any city from entering an agreement with the sheriff of the county in which the city is located for the sheriff to process all applications for licenses, renewals of licenses, and amendments to licenses, pursuant to this chapter.

IN THE SUPREME COURT OF THE UNITED STATES

EDUARDO SALGADO,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PROOF OF SERVICE

I, Kent D. Young, declare under penalty of perjury that, pursuant to Rule 29 of this Court, I served the within petition for writ of certiorari on counsel for Respondent, by enclosing a copy thereof in an envelope, First Class Postage Prepaid, addressed to Gary A. Lieberman, Deputy Attorney General, Office of The Attorney General, 300 South Spring Street, Suite 1702, Los Angeles, CA 90013; and included an original and ten (10) copies to Hon. Scott S. Harris, Clerk United States Supreme Court, One First Street, N.E., Washington, D.C. 20543-0001 by U.S. mail, First Class Postage Prepaid, at San Diego, California on August 21, 2018.

Kent D. Young, Declarant