

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

GEORGE K. YOUNG, JR.

Plaintiff-Appellant,

vs.

STATE OF HAWAI‘I and NEIL
ABERCROMBIE in his capacity as
Governor of the State of Hawai‘i;
DAVID M. LOUIE in his capacity as
State Attorney General; COUNTY OF
HAWAI‘I, as a sub-agency of the State
of Hawai‘i and WILLIAM P. KENOI in
his capacity as Mayor of the County of
Hawai‘i; and the Hilo County Police
Department, as a sub-agency of the
County of Hawai‘i and HARRY S.
KUBOJIRI in his capacity as Chief of
Police; JOHN DOES 1-25; JANE DOES
1-25; CORPORATIONS 1-5, AND DOE
ENTITIES 1-5.

Defendants-Appellees.

No. 12-17808

D.C. No. 1:12-cv-00336-HG-BMK

APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
HAWAI‘I

HONORABLE HELEN GILLMOR

**DEFENDANTS-APPELLEES COUNTY OF HAWAI‘I, WILLIAM P.
KENOI AND HARRY S. KUBOJIRI’S ANSWERING BRIEF**

CERTIFICATE OF COMPLIANCE

APPENDIX “A”

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DEFENDANTS-APPELLEES COUNTY OF HAWAI‘I, WILLIAM P. KENOI AND HARRY S. KUBOJIRI’S ANSWERING BRIEF

I. INTRODUCTION

Appellant GEORGE K. YOUNG, JR. (hereinafter “Appellant”), appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment of the United States District Court for the District of Hawai‘i dismissing Appellant’s Complaint on the grounds that he failed to state a claim upon which relief can be granted. *See* Rule 12(b)(6), Federal Rules of Civil Procedure (hereinafter “FRCP”).

Appellant’s Complaint alleges that the provisions of Chapter 134-9 of the Hawai‘i Revised Statutes (hereinafter “HRS”) be enjoined as unconstitutional, that a permit to carry a concealed or unconcealed weapon be issued to him immediately and damages be awarded upon the premise that the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) as well as the Court’s decision in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) applying the holding of *Heller* to the states, granted Appellant the constitutional right to keep and bear arms outside of the home for purpose of self protection without limitation or the need to obtain a license to carry a firearm. Appellant thus concludes that the licensing provisions of Chapter 134, HRS, especially §134-9, HRS, are unconstitutional.

II. STATEMENT OF JURISDICTION

Appellant filed a timely Notice of Appeal (Docket #48) from a final Judgment entered on November 29, 2012 (Docket #43). This appeal is timely pursuant to Rule 4(a)(1), FRCP.

III. STATEMENT OF ISSUES FOR REVIEW

Did the opinion of the United States Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) as applied to the states in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) grant the unrestricted right to keep and bear arms so that the denial of a license to carry a firearm concealed or unconcealed constituted a violation of a protected right?

VI. STANDARD OF REVIEW

The Court of Appeals reviews a dismissal based upon a failure to state a claim pursuant to Rule 12(b)(6), FRCP, *de novo*. *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007); *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). When reviewing a motion to dismiss, we “consider only allegations contained in the pleadings, exhibits attached to the complaint, and

matters properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir.2007) (per curiam).

V. STATEMENT OF THE CASE

Appellant filed his five count Complaint for Deprivation of Civil Rights (hereinafter “Complaint”) (Docket #1) on June 12, 2012 alleging:

- Count 1: Sections 134-6 (Repealed 2006) and 134-9, HRS, constitutes A Bill of Attainder, this is unconstitutional under Article 1 Section 10 of the United States Constitution.
- Count 2: The enactment of Sections 134-6 and 134-9, HRS, impairs the obligation of contract.
- Count 3: The provisions of the Second Amendment to the United States Constitution creates a liberty interest in the right to keep and bear arms which cannot be infringed by any state in the enactment of legislation restricting that right.
- Count 4: The Ninth Amendment to the United States Constitution confirms rights retained by the citizens of the States.
- Count 5: The Fourteenth Amendment provides that no state shall abridge the privileges and immunities of the citizens of the United States. That since Appellant is not restricted from the possession of firearms under the auspices of Section 134-7, HRS, hence a permit to carry a firearm should not have been denied to him.

On August 8, 2012, Defendants Harry Kubojiri and William Kenoi filed their Motion to Dismiss the Complaint (Docket #23). On August 16, 2012, Defendants Neil Abercrombie, David Louie and the State of Hawai‘i filed their Motion to Dismiss (Docket #25). Appellant filed his opposition to the Motions to

Dismiss on September 6, 2012 (Docket #29). On November 29, 2012, the United States District Court entered an Order Granting County of Hawai‘i Official Defendants’ Motion to Dismiss and State of Hawai‘i Defendants’ Motion to Dismiss (Docket #42). Judgment was entered on November 29, 2012 (Docket #43). On December 14, 2012, Appellant filed a timely Notice of Appeal (Docket #48). On December 21, 2012, Notice of Appearance by Counsel Alan A. Beck was entered on behalf of Appellant (Docket #47).

VI. STATEMENT OF FACTS

No facts other than those facts pled in Appellant’s Complaint exist in the record of this case.

A. HELLER RECOGNIZED THE RIGHT TO POSSESS A HANDGUN IN THE HOME FOR THE PURPOSE OF SELF DEFENSE

Justice Alioto writing for the majority in the case of *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020 (2010) clarified the scope of the Second Amendment rights provided for in *Heller* stating:

We held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.
(Emphasis Added)

District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)

Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the federal government and the states. *See Duncan v. State of Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, n. 14, 20 L.Ed.2d. 491 (1968). We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings. *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, 3050 (2010).

The majority opinion of the Supreme Court makes it clear that regardless of the position taken by Appellant to extend the protections of *Heller* and *McDonald* to areas outside of the home, *Heller* was not intended to extend the protections found in the Second Amendment to any area outside the home. The *Heller* reasoning regarding the possession of a handgun as a right has not been extended by the Supreme Court beyond the walls of one's home. The right to possess a handgun for self protection was limited by *Heller* to a person's home and the Supreme Court has not extended the right to any other area including the unrestricted possession of concealed or unconcealed handguns on the person absent a license to carry issued by the proper authority.

The weight of authority in the Ninth Circuit, other circuits and state courts favors the position that the Second Amendment right articulated by the Supreme

Court in *Heller* and *McDonald* establishes only a narrow individual right to keep an operable handgun at home for self-defense. *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir.2010) (en banc), *cert. denied*, — U.S. —, 131 S.Ct. 1674, 179 L.Ed.2d 645 (2011). Courts have found that the right to carry a gun outside the home is not part of the core Second Amendment right. *See United States v. Masciandaro*, 638 F.3d 458 at 470–71 (2011). In *Masciandaro*, the Fourth Circuit Court of Appeals held that the right to carry a firearm in public is more limited than at home because public safety interests outweigh the individual interest in self defense. *Id.* (noting *Heller's* examination of 19th-century decisions which upheld statutes prohibiting carrying concealed weapons).

B. REQUIRING A LICENSE TO CARRY A FIREARM IN PUBLIC ARE NOT VIOLATIVE OF THE SECOND AMENDMENT

In *Kachalsky v. County of Westchester*, 701 F.3d 81(2d.Cir. 2012) (cert denied, *Kachalsky v. Cacace*, 2013 WL 127179 (Apr. 15, 2013), the Second Circuit upheld a New York state law that requires an applicant for a permit to carry a concealed handgun in public to demonstrate “proper cause” to obtain a license. The New York law requires an applicant for a gun permit to demonstrate a need for self-defense greater than that of the general public, such as being the target of personal threats. *Id.* at 92-93.

Moreover, the trial court in *Kachalsky v. Cacace*, 817 F.Supp.2d 235 (2011) upheld New York’s handgun licensing laws which allows for the issuance of a license to carry a handgun in public only after a licensing authority makes a discretionary determination that “proper cause exists for the issuance thereof,” which New York state courts have interpreted to mean “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Kachalsky*, 817 F.Supp.2d at 240 (quoting N.Y.P.L. § 400.00(2)(f)). The court held that the Second Amendment right defined in *Heller* does not extend to invalidate regulations such as N.Y.P.L. Section 400.00(2)(f). *Kachalsky*, 817 F.Supp.2d at 259–61. The court explained that “the language of *Heller* makes clear that the Court recognized ‘not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,’ *Heller*, 554 U.S. at 626, 128 S.Ct. 2783, but rather a much narrower right—namely the ‘right of law-abiding, responsible citizens to use arms in defense of hearth and home,’ *id.* at 635, 128 S.Ct. 2783.” *Kachalsky*, 817 F.Supp.2d at 260.

The District Court further stated that “*Heller*’s limiting language makes clear that the Supreme Court did not disturb its prior ruling in *Robertson v. Baldwin*, 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715 (1897), where it ‘recognized that the Second Amendment right to keep and bear arms is not infringed by laws

prohibiting the carrying of concealed weapons.’ ” *Kachalsky*, 817 F.Supp.2d at 260 (quoting *Dorr v. Weber*, 741 F.Supp.2d 993, 1005 (2010)). Because New York’s law did not interfere with the right of individuals to bear arms in the home for the purpose of self-defense, the court found that the law did not impose a burden on conduct falling within the scope of the Second Amendment and rejected the plaintiffs’ challenge under the first prong of the two-prong Second Amendment analysis. *Kachalsky*, 817 F.Supp.2d at 263–65.

Appellant’s sole allegation that he applied for a license to carry either a concealed or unconcealed firearm on both August 29, 2011 and September 16, 2011 which was denied by Appellee Chief Harry Kubojiri appears at p. 13 of Appellant’s Complaint filed June 12, 2012. *See* Supplemental Excerpt of Record at 13. Appellant offered no evidence of his applications to carry a firearm that were filed. In addition, Appellant provided no evidence of the rules and regulations used by the Hawai‘i Police Department when deciding whether to issue a permit to carry a firearm pursuant to § 134-9, HRS.

Section 134-9, HRS, empowers a county police chief to grant a permit to carry a concealed pistol or revolver and ammunition in “an exceptional case, when an applicant shows reason to fear injury to the applicant’s person or property.” Section 134-9(a), HRS, provides the chief of police may grant a license to carry an unconcealed firearm “[w]here the urgency or the need has been sufficiently

indicated.” *Id.* The Hawai‘i Police Department has adopted rules and regulations for the issuing of permits under § 134-9, HRS. Appellant’s assertions that, “Chief Kubojiri’s failure to adopt policies which comport with constitutional guidelines has resulted in § 134-9, HRS, as applied to Appellant, is an unconstitutional deprivation of his constitutional rights. In the alternative, if no guidelines could make the statute constitutional then it is unconstitutional on its face,” is in fact false. *See* Appellant’s Opening Brief at p.10.

Rules and Regulations Governing the Issuance of Licenses to Carry Concealed and Unconcealed Weapons was adopted in October of 1997, and were in place when Appellant made his applications for a permit to carry either a concealed or unconcealed firearm and remain in effect to this day. A copy of the Rules and Regulations Governing the Issuance of Licenses to Carry Concealed and Unconcealed Weapons is appended hereto as Appendix “A”.

As did the District Court in *Kachalsky*, 817 F.Supp.2d 235 (2011), District Court Judge Helen Gillmor ruled that the County of Hawai‘i Defendants did not violate a constitutional right of Appellant holding that Hawai‘i’s Firearm Carrying Laws do not violate Plaintiff’s Second Amendment rights and dismissed the case.

The District Court reasoned that the carrying laws do not restrict the core protection afforded by the Second Amendment. *See Kachalsky*, 817 F.Supp.2d at

264. They only apply to carrying a weapon in public. They do not operate as a ban on all firearms.

Other federal courts considering this issue have ruled consistently that the licensing statutes are constitutional. In New Jersey, the United States District Court considered a similar constitutional challenge to a New Jersey law governing issuance of permits to carry handguns outside of one's home or place of business. *See Piszczatoski v. Filko*, 840 F.Supp.2d 813, 827, 2012 WL 104917 at 1 (2012), finding that the law was constitutional.

The New Jersey law requires a permit applicant to demonstrate, among other things, a "justifiable need to carry a handgun," first to a police officer and then to a Superior Court judge. *Piszczatoski*, 840 F.Supp.2d at 828–29, 2012 WL 104917, at *3. The plaintiffs argued that the law encroaches upon a fundamental right to carry operable handguns for self-defense under the Second Amendment. *Id.* The District Court upheld the law, finding that "[t]he Handgun Permit Law does not on its face burden protected conduct because the Second Amendment does not include a general right to carry handguns outside the home." *Piszczatoski*, 840 F.Supp.2d at 827, 2012 WL 104917, at *1. The court reasoned that *Heller* "repeatedly and specifically limited itself to the home," and much of its reasoning "refers to the need for self-defense specifically in the home." *Piszczatoski*, 840 F.Supp.2d at 833, 2012 WL 104917, at *7. The court concluded: "If the Supreme Court

majority had intended to create a broader general right to carry for self-defense outside the home, *Heller* would have done so explicitly.” *Id.*

In a recent case, *Wollard v. Gallagher*, --- F.3d ---, 2013 WL 1150575 (2013), the United States Court of Appeals for the Fourth Circuit found that the “good and substantial reason requirement of the Maryland licensing scheme was not un-constitutional, reasoning that even in spite of the argument that “crime is largely random and unpredictable” it is for the legislature to determine the policy direction taken for its citizens stating:

“But we cannot substitute those views for the considered judgment of the General Assembly that the good-and-substantial-reason requirement strikes an appropriate balance between granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets of Maryland. *See Kachalsky*, 701 F.3d at 100 (“New York determined that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation.”).

Woolard v. Gallagher, ---F3d---2013WL 115075 at 11.

The Tenth Circuit Court of Appeals also rules that licensing statutes were constitutional in a case which dealt with a challenge to Colorado’s licensing laws for concealed firearms which require out of state residents to obtain a license. Thus, neither the Privileges and Immunities Clause nor the Second Amendment and the Fourteenth Amendments were violated. *Peterson v. Martinez*, 707 F.3d 1197 (2013) where the Tenth Circuit held that the Second Amendment does not

provide for the right to carry a concealed weapon. *Id.* at 1208. Citing *the Heller opinion*, the court ruled:

“[L]ike most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” 554 U.S. at 626, 128 S.Ct. 2783. As an example of the limited nature of the Second Amendment right to keep and carry arms, the Court observed that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” *Id.* The Court stressed that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions.” *Id. Peterson* at 1210.

The Tenth Circuit went on to reject Robertson’s Privileges and Immunities argument as well, and held:

“For largely the same reasons that we reject Peterson’s Second Amendment claim, we conclude that carrying a concealed weapon is not a privilege or immunity protected under Article IV. As discussed in Section III.A.2, *supra*, our nation has a lengthy history of restricting the *1216 concealed carry of firearms. *See Heller*, 554 U.S. at 626, 128 S.Ct. 2783 (“[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”); *Kachalsky*, 701 F.3d at 95 & n. 21 (noting that “[m]ost states enacted laws banning the carrying of concealed weapons” in the nineteenth century and collecting statutes). And in *Robertson*, the Court included in a list of “well-recognized exceptions” to enumerated rights “laws prohibiting the carrying of concealed weapons.” 165 U.S. at 281–82, 17 S.Ct. 326.”

Peterson at 1215-1216.

C. DENYING A LICENSE TO CARRY FIREARMS IN PUBLIC DOES NOT VIOLATE THE FOURTEENTH AMENDMENT

The Fourteenth Amendment protects against the deprivation of property or liberty without due process. *See Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); *Brady v. Gebbie*, 859 F.2d 1543, 1547 (9th Cir.1988). When considering whether due process rights have been violated by the actions of a government official Court's apply a two step approach. First, a court must determine whether a liberty or property interest exists entitling a plaintiff to due process protections. If a constitutionally protected interest is established, courts employ a three-part balancing test to determine what process is due. *Hewitt v. Grabicki*, 794 F.2d 1373, 1380 (9th Cir.1986). The three-part balancing test set forth in *Mathews v. Eldridge* examines (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

If no liberty or property interest exists then no violation of due process can occur. To show that a due process violation occurred, Appellant must prove that Hawai'i's Firearm Carrying Laws adversely affect a protected interest to carry a

weapon in public under the facts of the case. In *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir.1982), the Ninth Circuit Court of Appeals held that California's comparable licensing scheme did not create a property interest or liberty interest in obtaining a concealed weapon.

Other decisions of federal district courts, post *Heller*, confirm the holding that there is no unlimited right to carry a gun in public. See *Peruta v. County of San Diego*, 758 F.Supp.2d 1106, 1121 (S.D.Cal.2010)(concealed carry); cf. *Fisher v. Kealoha*, No. 11-00589, 2012 WL 2526923, at *11 (D.Haw. June 29, 2012) due process rights attach to requiring a license for carrying a firearm at a person's home, as opposed to carrying a weapon in public. (Both cases were argued orally in December of 2012 and are currently pending decision by the Ninth Circuit Court of Appeals.)

While the Complaint alleges Appellant was twice denied a license to carry a pistol or revolver, Chapter 134, HRS, does not implicate any liberty or property interests of Appellant because there is no right to carry weapons in public. Since Appellant possesses no fundamental right to carry a firearm, Appellant is not entitled to due process, thus Appellant's Complaint failed to state a claim upon which relief could be granted because no due process rights guaranteed by the Fourteenth Amendment to the United States Constitution are implicated.

D. ISSUES NOT RAISED IN THE DISTRICT COURT CANNOT NOT BE CONSIDERED BY THE NINTH CIRCUIT

Appellant's additional issue argued in sections F, G, H, I and J of Appellant's Opening Brief were not raised at the Hawai'i District Court hence these issues constitute new matter i.e., issues that were not raised in the pleadings or raised in any way before the Hawai'i District Court. This court should disregard any argument not raised at the trial court.

The Ninth Circuit generally declines to consider issues raised for the first time on appeal unless they fall into one of three narrow exceptions: (1) there are "exceptional circumstances" why the issue was not raised in the trial court; (2) the new issue arises while the appeal was pending because of a change in the law; (3) the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed, so that the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court. *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir.1990); *United States v. Elias*, 921 F.2d 870, 874 (9th Cir.1990); *In re Professional Investment Properties of America*, 955 F.2d 623, 625 (9th Cir.), *cert. denied* 113 S.Ct. 63 (1992).

None of the exceptions noted above apply to the arguments raised in Sections F, G, H, I and J of Appellant's Opening Brief. The arguments raised by

Appellant were not addressed at the Hawai‘i District Court and are not cognizable matters for this court to consider in rendering an opinion in this case.

VII. CONCLUSION

The decision of the District Court must be affirmed for the reasons stated within.

Dated: Hilo, Hawai‘i, May 24, 2013.

COUNTY OF HAWAI‘I, WILLIAM
P. KENOI AND HARRY S. KUBOJIRI,
Defendants-Appellees

By /s/ Michael J. Udovic
MICHAEL J. UDOVIC
Deputy Corporation Counsel
Their Attorney

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

GEORGE K. YOUNG, JR.

Plaintiff-Appellant,

vs.

STATE OF HAWAI'I and NEIL
ABERCROMBIE in his capacity as
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HAWAI'I, as a sub-agency of the State
of Hawai'i and WILLIAM P. KENOI in
his capacity as Mayor of the County of
Hawai'i; and the Hilo County Police
Department, as a sub-agency of the
County of Hawai'i and HARRY S.
KUBOJIRI in his capacity as Chief of
Police; JOHN DOES 1-25; JANE DOES
1-25; CORPORATIONS 1-5, AND DOE
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Defendants-Appellees.

No. 12-17808

D.C. No. 1:12-cv-00336-HG-BMK

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Federal Rules of Appellate Procedure Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the Answering Brief submitted herewith is proportionately spaced, has a typeface of 14 points or more in Times New Roman and does not exceed the 14,000 word count.

Dated: Hilo, Hawai‘i, May 24, 2013.

COUNTY OF HAWAI‘I, WILLIAM
P. KENOI AND HARRY S. KUBOJIRI,
Defendants-Appellees

By /s/ Michael J. Udovic
MICHAEL J. UDOVIC
Deputy Corporation Counsel
Their Attorney

POLICE DEPARTMENT

COUNTY OF HAWAII

**RULES AND REGULATIONS GOVERNING THE ISSUANCE OF
LICENSES TO CARRY CONCEALED AND UNCONCEALED WEAPONS**

Pursuant to and by virtue of the authority set forth in Chapter 91 and Section 134-9, Hawaii Revised Statutes, as amended, the Chief of Police of the County of Hawaii, subject to the approval of the Mayor of the County of Hawaii, hereby adopts the following new rule:

**RULES AND REGULATIONS GOVERNING THE CARRYING OF
CONCEALED WEAPONS AND THE CARRYING OF WEAPONS BY
PRIVATE DETECTIVES AND SECURITY GUARDS**

- Sec. 1 Authority
- Sec. 2 Definitions
- Sec. 3 Applicability of Rules
- Sec. 4 Rules of Practice
- Sec. 5 Methods Whereby Public May Obtain Information
- Sec. 6 Petition For Adoption, Amendment or Repeal of Rules
- Sec. 7 Declaratory Rulings
- Sec. 8 Severability
- Sec. 9 Effective Date

Rules and Regulations Governing The Carrying Of Concealed Weapons And The Carrying Of Weapons By Private Detectives And Security Guards

Sec. 1 Authority. These rules and regulations are promulgated by the Chief of Police for the granting of authorization for the carrying of weapons as provided by section 134-9, Hawaii Revised Statutes, State of Hawaii.

Sec. 2 Definitions. For the purpose of these rules and regulations, the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number. The word "shall" is always mandatory and not merely a directory.

Whenever used in these rules and regulations, the following terms shall be taken to have the following meanings: -----

- (a) "Applicant" shall mean any person applying to the Chief of Police for authorization to carry weapons.
- (b) "Chief of Police" means the chief of police of the county of Hawaii.

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- (c) "Employer" shall mean any individual, agency, partnership, corporation, or company duly licensed to engage in the private detective or guard business.
- (d) "Firearm" means any weapon, for which the operating force is an explosive, including but not limited to pistols, revolvers, rifles, shotguns, automatic firearms, noxious gas projectors, mortars, bombs, and cannon.
- (e) "Licensed Employees" shall mean any person employed by a private detective or guard agency who has been granted authorization by the Chief of Police to carry a weapon or weapons.
- (f) "Pistol" or "revolver" means any firearm of any shape with a barrel less than sixteen inches in length and capable of discharging loaded ammunition or any noxious gas.
- (g) "Weapon" includes any instrument made and designed for offensive or defensive purposes, or for the destruction of life or the infliction of injury and shall include but

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not be limited to firearms, knives, blackjacks, batons, night sticks, and chemical agents designed to temporarily subdue or incapacitate a person.

Sec. 3 Applicability of Rules. These rules and regulations shall apply to all persons within the County of Hawaii.

Sec. 4 Rules of Practice. Authorization for the carrying of weapons shall be governed by the following:

(a) Carrying Concealed Firearms

(1) The applicant shall apply in person to the Office of the Chief of Police and shall complete the forms required and provided by the Chief of Police. The applicant shall submit two sets of fingerprints and two identification photographs, 1-1/2" X 1-1/2" in size.

(2) The applicant shall show proof:

(A) That there is reason to fear injury to his person or property to the degree which necessitates the carrying of a concealed

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firearm;

(B) That he is a citizen of the
United States or a duly
accredited official
representative of a foreign
nation; and

(C) That he is of the age of
twenty-one years or more.

(3) No license shall be issued to a person:

(A) Who is a fugitive from justice;

(B) Who is under indictment for, or
has waived indictment for, or
has been bound over to circuit
court for, or has been convicted
in this state or elsewhere of
having committed a felony, or
~~any crime of violence, or an~~
illegal sale of any drug;

(C) Who has been adjudged insane or
appears to be mentally deranged;

(D) Who has been restrained pursuant
to an order of any court,

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- including an ex-parte order as provided herein, from physically abusing any person; or
- (E) Who is prohibited under section 134-7, H.R.S., from possession or ownership of a firearm.
- (4) Federal Law, title 18, United States Code, section 922(g)9):
- (A) It is illegal for anyone who has been convicted of a misdemeanor crime of domestic violence to possess any firearm or ammunition.
- (5) No license shall be issued unless the Chief of Police is satisfied that the applicant is a suitable person to be licensed and has demonstrated proficiency with the firearm to be carried.
- (6) A fee of \$10 shall be charged for each license.
- (7) Licenses issued for the carrying of

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concealed firearms shall expire one year from the date of issue and may be renewed only upon reapplication to the Chief of Police.

- (8) A license to carry a firearm may be canceled by the Chief of Police when in his judgment there is sufficient cause to warrant such action.
- (9) Expired or canceled licenses shall be surrendered to the Office of the Chief of Police within 24 hours of termination. Lost or stolen licenses shall be reported to the Office of the Chief of Police.
- (10) The license to carry a concealed firearm authorizes the licensee to carry ~~only~~ the designated concealed firearm. The license shall be carried on the licensee's person at all times.

(b) Carrying Unconcealed Firearms

- (1) Licenses to carry unconcealed firearms may be issued only to persons who:

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- (A) Are of good moral character;
 - (B) Are citizens of the United States;
 - (C) Are twenty-one years of age or more; and
 - (D) Are engaged in the protection of life and property.
- (2) No license shall be issued to a person:
- (A) Who is a fugitive from justice;
 - (B) Who is under indictment for, or has waived indictment for, or has been bound over to circuit court for, or has been convicted in this state or elsewhere of having committed a felony, or ~~any crime of violence, or an~~
~~illegal sale of any drug;~~
 - (C) Who has been adjudged insane or appears to be mentally deranged;
 - (D) Who has been restrained pursuant to an order of any court,

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- including ex-parte order as
provided herein, from physically
abusing any person; or
- (E) who is prohibited under section
134-7, H.R.S., from possession
or ownership of a firearm.
- (3) Federal Law title 18, United States
Code, section 922(g)(9):
- (A) It is illegal for anyone who has
been convicted of a misdemeanor
crime of domestic violence to
possess any firearm or
ammunition.
- (4) No license shall be issued unless the
Chief of Police is satisfied that the
applicant is a suitable person to be
~~licensed and has demonstrated~~
proficiency with the firearm to be
carried.
- (5) The Employer and Applicant shall apply
in person to the Office of the Chief
of Police and shall complete the forms

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required and provided by the Chief of Police. The applicant shall submit two sets of fingerprints and two identification photographs, 1 1/2" X 1 1/2" in size.

- (6) The Employer is expected to show urgency of need in support of each application.
- (7) A fee of \$10 shall be charged for each license.
- (8) Licenses issued for the carrying of unconcealed firearms shall expire one year from the date of issue and may be renewed only upon reapplication to the Chief of Police.
- (9) The license to carry unconcealed
firearm authorizes the licensee to carry the designated unconcealed firearm only in the actual performance of his duties or within the area of his assignment. The license shall be carried during these times.

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- (10) The Employer shall prescribe a comprehensive firearms training program conducted by qualified instructors covering all standard aspects of marksmanship, proper usage of firearms, care and operation, safety, etc.
- (11) The Employer will be required to certify that the Applicant is qualified to use the firearms as a result of qualifying in the firearms training program or through prior experience and training. Licensed employees shall carry the firearm with which they were qualified and certified.
- (12) The Chief of Police reserves the right to examine any Applicant to determine his qualification in the use of firearms.
- (13) The Employer shall be responsible for the safe storage of all firearms under

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his control.

(14) A license to carry an unconcealed firearm may be canceled by the Chief of Police when in his judgment there is sufficient cause to warrant such action, when the holder terminates his employment, or when cancellation is recommended by the Employer.

(15) Notice shall be given to the Chief of Police by the Employer immediately upon termination of a licensee's employment.

(16) Expired or canceled licenses shall be surrendered to the Office of the Chief of Police by the Employer within 24 hours after expiration of the license or termination of the licensee's employment.

(c) Carrying Weapons Other Than Firearms
Authorization for private detectives and security guards to carry weapons other than firearms shall be subjected to all of the

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following:

- (1) The Employer and Applicant shall apply in person to the Office of the Chief of Police and shall complete the forms required and provided by the Chief of Police. The applicant shall submit two sets of fingerprints and two identification photographs, 1 1/2" X 1 1/2" in size.
- (2) The Employer shall furnish a detailed description of the weapon(s) to be carried and is expected to show urgency of need in support of the carrying of such weapon(s).
- (3) Authorization for the carrying of weapons shall expire one year from the date issued and may be renewed only upon reapplication to the Chief of Police.
- (4) Authorization to carry a weapon may be canceled by the Chief of Police when in his judgment there is sufficient

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cause to warrant such action, when the Applicant terminates his employment, or when cancellation is recommended by the Employer.

(5) Notice shall be given to the Office of the Chief of Police by the Employer immediately upon termination of an Applicant's employment.

(6) Expired or canceled licenses shall be surrendered to the Office of the Chief of Police by the Employer within 24 hours after expiration of the license or termination of the licensee's employment.

Sec. 5 Methods Whereby Public May Obtain Information.

The public may obtain information as to matters within the jurisdiction of the Chief of Police by inquiring at:

- (a) The Office of the Lieutenant Governor of the State of Hawaii; or
- (b) The Office of the Clerk of the County of Hawaii; or

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(c) The Office of the Chief of Police. All rules, orders or opinions of the Chief of Police are on file and available for public inspection at said office.

Such inquiry may be made in person at said offices during business hours, or by submitting a request for information in writing to the Chief of Police.

Sec. 6 Petition for Adoption, Amendment or Repeal of Rules.

(a) Any interested person may petition the Chief of Police requesting the adoption, amendment or repeal or any rule of the Chief of Police.

(b) The petition shall include:

- (1) A statement of the nature of the petitioner's interest;
- (2) A draft of the substance of the proposed rule or amendment or a designation of the provision sought to be repealed; and
- (3) An explicit statement of the reasons in support of the proposed rule, amendment or repeal.

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- (c) The Chief of Police shall within thirty days after the submission of the petition either deny the petition in writing, stating his reasons for such denial, or initiate proceedings necessary for the adoption, amendment or repeal of the rule as the case may be.

Sec. 7 Declaratory Rulings.

- (a) Any interested person may petition the Chief of Police for a declaratory order as to the applicability of any statute, ordinance, rule or order of the Chief of Police.
- (b) The petition shall contain:
- (1) The name, address and telephone number of the petitioner;
 - (2) A statement of the nature of the petitioner's interest, including reasons for the submission of the petition;
 - (3) A designation of the specific provision, rule or order in question;
 - (4) A complete statement of facts;

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- (5) A statement of the position or contention of the petitioner; and
 - (6) A memorandum of authorities, containing a full discussion of the reasons, including any legal authorities, in support of such position or contention.
- (c) Any petition which does not conform to the foregoing requirements may be rejected.
- (d) The Chief of Police may for good cause refuse to issue a declaratory ruling. Without limiting the generality of the foregoing, the Chief of Police may so refuse where:
- (1) The question is speculative or purely hypothetical and does not involve existing facts; or
 - (2) The petitioner's interest is not of the type which would give him standing to maintain an action if he were to seek judicial relief; or
 - (3) The issuance of a declaratory ruling may adversely affect the

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interests of the State, the County of
Hawaii, the Hawaii Police Department
or any of their officers or employees
in any litigation which is pending or
may reasonably be expected to arise; or

(4) The matter is not within the
jurisdiction of the Chief of Police.

(e) Where any question of law is involved, the
Chief of Police may refer the matter to the
Corporation Counsel of the County of Hawaii.
He may also obtain the assistance of other
agencies, where necessary or desirable.

(f) Upon the disposition of his petition, the
petitioner shall be informed in writing by
the Chief of Police.

(g) Orders disposing of petitions shall have the
same status as other orders of the Chief of
Police. Orders shall be applicable only to
the fact situation alleged in the petition or
set forth in the order.

Sec. 8 Severability.

If any portion of the foregoing rules or the

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applicability thereof to any person, property or circumstances is held invalid for any reason, such invalidity shall not affect other provisions or application, and to this end these rules are declared to be severable.

Sec. 9 Effective Date.

This rule shall become effective ten days after filing with the County Clerk.

Rules and Regulations Governing The Carrying Of Concealed Weapons And The Carrying Of Weapons By Private Detectives And Security Guards

CERTIFICATION

I, Wayne G. Carvalho, Chief of Police of the Hawaii Police Department of the County of Hawaii, State of Hawaii, do hereby certify:

1. That the foregoing is a full, true and correct copy of Rules and Regulations of the Chief of Police on matters relating to the Carrying of Concealed Weapons and the Carrying of Weapons by Private Detectives and Security Guards, section 134-9, Hawaii Revised Statutes, State of Hawaii.

2. That notice of the public hearing on the foregoing rule, which notice included a statement of the substance of the proposed Rule, was published in the Hawaii Tribune Herald on August 24, 25, and 26, 1997.

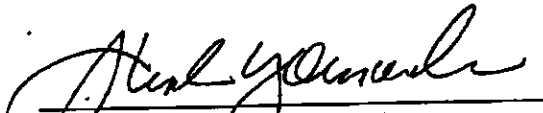
Wayne G. Carvalho

WAYNE G. CARVALHO
POLICE CHIEF

Date 10-16-97

Rules and Regulations Governing The Carrying Of Concealed Weapons And The Carrying Of Weapons By Private Detectives And Security Guards

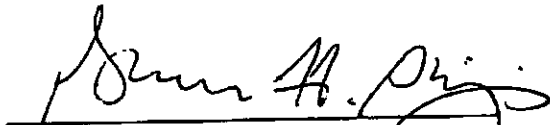
APPROVED:



Mayor, County of Hawaii

Date: 10/21/97

APPROVED AS TO FORM AND LEGALITY:



Deputy Corporation Counsel

Date: 10-20-97

I HEREBY CERTIFY that the foregoing rules were received and filed in the Office of the County Clerk this 22 day of October, 1997.



COUNTY CLERK

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

GEORGE K. YOUNG, JR.

Plaintiff-Appellant,

vs.

STATE OF HAWAI'I and NEIL ABERCROMBIE in his capacity as Governor of the State of Hawai'i; DAVID M. LOUIE in his capacity as State Attorney General; COUNTY OF HAWAI'I, as a sub-agency of the State of Hawai'i and WILLIAM P. KENOI in his capacity as Mayor of the County of Hawai'i; and the Hilo County Police Department, as a sub-agency of the County of Hawai'i and HARRY S. KUBOJIRI in his capacity as Chief of Police; JOHN DOES 1-25; JANE DOES 1-25; CORPORATIONS 1-5, AND DOE ENTITIES 1-5.

Defendants-Appellees.

No. 12-17808

D.C. No. 1:12-cv-00336-HG-BMK

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served upon the following, on the date and by the method of service noted below:

Served electronically through ECF:

ALAN BECK, ESQ. May 24, 2013
ngord2000@yahoo.com
Attorney for Plaintiff
GEORGE K. YOUNG, JR.

JOHN M. CREGOR, JR., ESQ. May 24, 2013
CARON M. INAGAKI, ESQ.
Deputy Attorneys General
Department of the Attorney General
State of Hawai'i
425 Queen Street
Honolulu, Hawaii 96813
Attorneys for Defendants
STATE OF HAWAII'I, NEIL ABERCROMBIE
in his capacity as Governor of the State of Hawai'i
and DAVID M. LOUIE in his capacity as State Attorney
General

Dated: Hilo, Hawai'i, May 24, 2013.

/s/ Michael J. Udovic
MICHAEL J. UDOVIC
Deputy Corporation Counsel