No. 11-1149

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GRAY PETERSON, APPELLANT,

Plaintiff – Appellant,

v.

ALEX MARTINEZ*, *et al.*,

Defendants – Appellees.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Walker D. Miller, Senior District Judge
District Court No. 1:10-CV-00059-WDM-MEH

APPELLEE ALEX MARTINEZ' OPPOSITION TO THE PETITION FOR REHEARING AND REHEARING *EN BANC*

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Dated: March 22, 2013

*Alex Martinez has been substituted for Charles F. Garcia, who was substituted for Alvin LaCabe; James Davis has been substituted for Peter Weir.

Now comes Appellee, Alex Martinez, by and through his attorney, and for his opposition and response to Appellant's Petition for Rehearing and Rehearing *En Banc*, states as follows:

Appellant has not offered this Court any valid reason for granting his petition. Rule 35(a) of the Federal Rules of Appellate Procedure make it clear that petitions for rehearing or rehearing *en banc* are not favored. In addition, the requirements for rehearing stated in F.R.A.P. have not been met.

First, the Appellant's petition does not state a valid reason for granting the petition under F.R.A.P. 35(a)(1) and (b)(1)(A). The petition does not claim that this Court's decision is in conflict with a decision of the U.S. Supreme Court or any decision issued by this Circuit Court of Appeals.

The petition does claim that this Court's decision conflicts with the decisions of two other Circuit Courts of Appeals, in an attempt to comply with the "example" of a question of exceptional importance provided in F.R.A.P. 35(b)(1)(B), which refers to "an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." The two cases cited by Appellant, *Kachalsky v. County of Westchester,* 701 F.3d 81 (2d Cir. 2012), and *Moore v. Madigan,* 702 F.3d 933,

934 (7th Cir. 2012) do not fit this criterion. Neither case deals, authoritatively or otherwise, with the reciprocity issue, which Appellant has complained has denied him the right to carry a concealed weapon.

In *Kachalsky* the issue presented to the Court was framed by the Court as follows:

> This appeal presents a single issue: Does New York's handgun licensing scheme violate the Second Amendment by requiring an applicant to demonstrate "proper cause" to obtain a license to carry a concealed handgun in public? *Kachalsky*, *supra*, at 83.

This issue was never part of the instant case. This Second Circuit opinion does not conflict with this Court's decision upholding the Colorado law which has prevented Appellant from obtaining a concealed carry permit in Denver.

Similarly the issue decided by the Seventh Circuit in *Moore* involved:

> An Illinois law [which] forbids a person … to carry a gun ready to use (loaded, immediately accessible—that is, easy to reach—and uncased)…. Even carrying an unloaded gun in public, if it's uncased and immediately accessible, is prohibited, other than to police and other excepted persons, unless carried openly outside a vehicle in an unincorporated area and ammunition for the gun is not immediately accessible. *Moore*, supra, at 934.

The Seventh Circuit determined that such restrictive laws violated the Second Amendment. But no such law was at issue in the instant case. This Court's decision is simply not in conflict with *Moore*.

Finally, it is plain that the petition does not raise an issue of exceptional importance because the issue it seems to raise, the alleged total disarming of the Appellant of which he now objects, was an issue he chose not to litigate. As this Court noted, the disarming of Appellant is not simply the result of the lack of reciprocity or the law denying permits to non-residents of Colorado. Rather, it is the result, in part, of a ban on the open carry of weapons, which Appellant has specifically not challenged, even in face of the opportunity and invitation to do so. (See this Court's decision at pages 16, 18, 19, 20.) The argument which Appellant now attempts to revive has been determined by this Court to have been waived (Decision, p.26). This Court should not re-open this matter to determine an issue the Appellant, himself, has repeatedly refused to litigate. See, *Cone v. Bell*, 556 U.S. 449, 482, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) ("Appellate courts generally do not reach out to decide issues not raised by the appellant."), cited in *U.S. v. Games-Perez***,** 695 F.3d 1104,1105 (10th Cir. 2012).

Wherefore, Appellee Alex Martinez respectfully prays that Appellant's petition for rehearing or rehearing en banc be denied.

Respectfully submitted this 22nd day of March, 2013.

CITY AND COUNTY OF DENVER
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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing APPELLEE ALEX MARTINEZ' OPPOSITION TO THE PETITION FOR REHEARING AND REHEARING EN BANC was electronically filed on March 22, 2013, via Electronic Case Filing (ECF), which will effect service on all attorneys of record, including:

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/s/ *Robert R. Wolf*
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CERTIFICATE OF EXACT COPIES, SCANNING FOR VIRUSES, AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing APPELLEE ALEX MARTINEZ' OPPOSITION TO THE PETITION FOR REHEARING AND REHEARING EN BANC has been submitted in digital form via the court's ECF system and:

is an exact copy of the written or hard documents filed with the Clerk;

has been scanned for viruses with the current version of McAfee VirusScan Enterprise and is free of viruses;

all required privacy redactions have been made per 10th Cir. R. 25.5.

/s/ *Robert W. Wolf*
Robert W. Wolf (Digital)