CALIFORNIA PEACE OFFICERS' ASSOCIATION
1455 RESPONSE ROAD, SUITE 190,
SACRAMENTO, CA 95815
PHONE- 916.263.0541 FAX- 916.263.6090
E-MAIL- CPOA@CPOA.ORG * WWW.CPOA.ORG

CASE ALERT MEMORANDUM

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Prepared by the firm of

JONES & MAYER

3777 North Harbor Boulevard,Fullerton, CA 92835

(714) 446-1400 F: (714) 446-1448 • Website: www.Jones-Mayer.com

To: All Police Chiefs and Sheriffs

From: Paul R. Coble, Esq., The Law Firm of Jones & Mayer

CITIZEN CARRYING FIREARM IN PLAIN VIEW

It has recently come to our attention from a variety of points around the State that officers are with increasing frequency encountering individuals carrying holstered pistols in plain view on a gun belt, but with ammunition close at hand either in bandolier fashion or a loaded magazine affixed to the gun belt. It is believed that these individuals are attempting to provoke a law enforcement response in order to test whether responding officers will take inappropriate action in the face of ostensibly lawful exercise of the right to bear arms.

The history of Penal Code §12031 is helpful to an understanding of this issue. Prior to 1967, it was lawful in California for an adult, not otherwise prohibited from possessing a firearm, to carry a loaded firearm in plain view in public and in an incorporated city. Only the carrying of a concealed firearm was proscribed. However, early in May of 1967, a group of Black Panthers marched into the California legislature fully armed. Shocked that this conduct was not, at the time, unlawful, the Legislature enacted Penal Code §12031, effective July 28, 1967, thereafter proscribing the carrying of a loaded firearm in public, even if not concealed.

With that background in mind, it is noted that Penal Code §12031 provides in pertinent part that:

(a) (1) A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory. (Emphasis added)

Subdivision (g) of §12031 provides that:

A firearm shall be deemed to be loaded for the purposes of this section when there is an unexpended cartridge or shell, consisting of a case that holds a charge of powder and a bullet or shot, in, or attached in any manner to,

the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm; except that a muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder. (Emphasis added)

While Penal Code §12025 addresses carrying a concealed firearm, subdivision (f) of that statute expressly declares that "Firearms carried openly in belt holsters are not concealed within the meaning of this section."

Here, the situation presented is of an adult person carrying an unloaded firearm in plain view in public. While there is close at hand ammunition for said firearm, the ammunition is we are told not attached to the firearm. Even if the ammunition was, for instance, taped to the firearm, it is questionable whether this would constitute "loading" of the firearm in light of the holding in People v. Clark, (1996) 45 Cal. App. 4th 1147, 1152, where the court of appeal, dealing with the question of whether the defendant had committed the offense of possession of methamphetamine while armed with a loaded, operable firearm, held that:

Under the commonly understood meaning of the term "loaded," a firearm is "loaded" when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not "loaded" if the shell or cartridge is stored elsewhere and not yet placed in a firing position. The shells here were placed in a separate storage compartment of the shotgun and were not yet "loaded" as the term is commonly understood. Even if Pen. Code, § 12031, subd. (g), was applicable, the Legislature's use of the phrase "attached in any manner" to the firearm was intended to encompass a situation where a shell or cartridge might be attached to a firearm or "loaded" for firing by some unconventional method. And, to the extent an ambiguity existed, the construction more favorable to defendant should be adopted.

Anomalous as it may seem in this day and age, it is not, for the reasons aforesaid, unlawful for an adult who is not otherwise legally disabled from possession of a firearm to carry an unloaded firearm in plain view in public in an incorporated city. And the firearm does not become "loaded" for purposes of a violation of §12031 is there is a loaded magazine or other carry of ammunition close at hand.

Furthermore, we doubt that a local ordinance could be enacted to close this gap by, for instance, making it a violation of a city's municipal code to carry an unloaded and unconcealed firearm in public. In this regard, please note Article XI, §7 of the California Constitution, which provides that:

A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

The California Supreme Court has identified three types of conflict that cause preemption of local legislation: A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation is contradictory to general law when it is inimical thereto. A local ordinance is preempted by a state statute only to the extent that the two conflict. Action Apartment Assn., Inc. v. City of Santa Monica, (2007) 41 Cal. 4th 1232. For a local ordinance to proscribe

that which is allowed under State law would perforce be to contradict state law. Furthermore, given the extent of State regulation of dangerous weapons, it would seem apparent that the State has "fully occupied" this area by its general laws.

However, officers may rely upon §12031(e), which provides that:

In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.

The end result of this analysis is to conclude that the conduct at issue is lawful, albeit alarming, and can only be regulates in a manner consistent with existing State law.

HOW DOES THIS AFFECT YOUR AGENCY?

Presentation of an individual walking down the street carrying a pistol in a holster raises obvious tactical issues, as well as safety concerns for both officers and the public. Other than to note these safety and tactical issues, we would urge that officers be alerted of this issue, that there is a possibility that they may encounter this behavior, and that they should be prepared to respond appropriately.

Field personnel should be made aware of the current state of the law as set forth above and cautioned that this is not behavior warranting arrest, but that they are legally entitled under §12031(e) to demand inspection of any such firearms in order to ascertain that the weapon is unloaded. If the firearm is unloaded, it should be returned and the subject released to go about his/her lawful business. Of course, if the firearm is loaded – as defined above – then an arrest is appropriate. Any refusal to allow inspection of the firearm constitutes cause for immediate arrest for a violation of §12031.

You are encouraged to consult with your designated legal counsel for further advice on this or any other matter. And as always, if you wish to discuss this in greater detail, please feel free to contact me at (714) 446-1400 or email me at prc@jones-mayer.com.