

SETTLEMENT AND RELEASE AGREEMENT

1. **PARTIES:** The Parties to this Settlement and Release Agreement ("Agreement") are Plaintiff Jose Diaz ("Plaintiff"), City of San Fernando, San Fernando Police Department, and Officer Marshall Mack ("Defendants"). Plaintiff and Defendants are referred to collectively as "the Parties."

2. **RECITALS:** This Agreement is made with reference to the following facts:

2.1 Certain disputes and controversies have arisen between Plaintiff and Defendants concerning Plaintiff's arrest on November 4, 2007 ("incident").

2.2 Such disputes and controversies include, but are not limited to, the claims, demands, and causes of action set forth in *Jose Diaz v. City of San Fernando, et al.*, Los Angeles Superior Court Case No.PC044139.

2.3 It is the intention of the Parties hereto to settle and dispose of, fully and completely, all of the claims, demands and causes of action at issue in the civil action more fully described above at Paragraph 2.2, including Plaintiff's claims for personal injuries, as well as any and all claims, demands or causes of action heretofore or hereafter arising out of or in any way connected with the incident.

3. **SETTLEMENT:**

3.1 **Consideration and Release:**

- a. City of San Fernando shall pay Plaintiff forty-three thousand five-hundred dollars (\$43,500.00). Payment shall be made in two installments. The first installment of twenty-one-thousand-seven-hundred-fifty dollars (\$21,750.00) shall be paid immediately upon execution of this agreement. The second installment of twenty-one-thousand-seven-hundred-fifty dollars (\$21,750.00) shall be paid on or before January 1, 2011. City of San Fernando may, at its option, make said second payment after January 1, 2011, but such payment shall incur interest ten-percent (10%) annual percentage rate interest compounded monthly from the date October 1, 2010. In no event, shall said payment be made after February 1, 2011.
- b. Defendants will provide all support necessary for Plaintiff to obtain his relief pursuant to Penal Code section 851.8. This includes, but is not limited to a form petition; if a form petition is deemed insufficient by the Court, a letter that shall state that they "support a court order granting Mr. Diaz's petition pursuant to Penal Code section 851.8," and that it is their opinion that "Mr. Diaz has satisfied the requirements for relief pursuant to Penal Code section 851.8." Such written support shall not contain any language contradicting said statement nor otherwise undermine or place in jeopardy Plaintiff's petition(s) for a factual finding of innocence.
- c. San Fernando Police Department will distribute to each of its' officers and implement the Training Bulletin attached hereto as **Exhibit A**, as policy, into its annual officer training program.

- d. The Chief of Police will meet with Plaintiff and his counsel to formally discuss the above entitled matter and the Training Bulletin attached hereto as **Exhibit A**.

In exchange for Defendants' performance with items a through d of this subdivision, Plaintiff promises and agrees to hereby release, remise, and forever discharge Defendants, their agents, employees, representatives, officers, directors, divisions, subsidiaries, affiliates, assigns, successors in interest, shareholders, attorneys, insurers, and adjusters from any and all liability for any damages and losses pertaining to the incident, and which form the basis for the action described in Paragraph 2.2 above, including Plaintiff's claims for personal injuries, and any and all claims, demands, or causes of action heretofore or hereafter arising out of, connected with, or in any way incidental to the incident.

3.2 Dismissal: Also in exchange for Defendants' consideration, Plaintiff promises and agrees to dismiss *with prejudice* his Complaint against all Defendants as referenced in Paragraph 2.2 above.

3.3 Legal Fees and Costs: The Parties to this Agreement agree that this payment includes Plaintiff's legal fees and other expenses relating to the litigation of the civil action more fully described at Paragraph 2.2.

4. RELEASE; WAIVER OF CIVIL CODE SECTION 1542: The Parties acknowledge and agree that it is their intention that this Agreement shall be effective as a full and final settlement of, and as a bar to, each and every claim, demand, and cause of action in any way relating to incident. The Parties further acknowledge that they are aware that they may, after the signing of this Agreement, discover facts different from or in addition to the facts that they now know or believe to be true with respect to the incident, the civil action described in Paragraph 2.2, and this Agreement, but that it is nevertheless their intention to fully, finally, absolutely and forever settle any and all claims, disputes and differences between the Parties.

In furtherance of this intention, Plaintiff expressly, knowingly and voluntarily *waives* any and all rights and benefits conferred upon him by the provisions of California Civil Code section 1542, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

5. SATISFACTION OF LIENS; AGREEMENT TO HOLD DEFENDANTS HARMLESS FROM LIABILITY FOR LIENS: Plaintiff agrees to be responsible for satisfying any and all liens, including, but not limited to, attorney liens, hospital liens, medical liens, Medicare liens and State Disability liens arising out of the incident, and the civil action more fully described at Paragraph 2.2. Plaintiff further agrees to indemnify and hold harmless Defendants from any and all liability for losses, damages, attorneys' fees, and other costs and

expense relating to any lien or other such claim arising out of or in any connected with the incident.

6. REPRESENTATIONS AND WARRANTIES: Each of the Parties to this Agreement represents and warrants to, and agrees with, each other Party hereto as follows:

6.1 No Party (nor any officer, agent, employee, representative, insurer, or attorney of or for any Party) has made any statement or representation to any other Party regarding any fact relied upon in entering into this Agreement, and each Party does not rely upon any statement, representation, or promise of any other Party (or of any officer, agent, partner, employee, representative, insurer, or attorney for any other Party) in executing this Agreement, or in making the settlement provided for herein, *except* as expressly stated in this Agreement.

6.2 Each Party to this Agreement has made such investigation of the facts pertaining to this settlement and this Agreement, and of all the matters pertaining thereto, as he/it deems necessary.

6.3 Each Party is aware that he/it may hereafter discover claims or facts in addition to or different from those she/it now knows or believes to be true with respect to any matter. Nevertheless, it is the intention of the Parties to fully, finally and forever settle and release all matters, and all claims relative thereto, which do now exist, may exist, or heretofore have existed in regard to the incident, including Plaintiff's claims for personal injuries arising therefrom. In furtherance of such intention, the release given herein shall be and remain in effect as a full and complete release of all such matters notwithstanding the discovery or existence of any additional or different claims or facts relative thereto.

6.4 Each Party has had the opportunity to seek independent legal advice from his/its attorney(s) with respect to the advisability of making the settlement provided for herein, with respect to the advisability of executing this Agreement, and with respect to the meaning of California Civil Code section 1542.

7. MISCELLANEOUS:

7.1 This Agreement shall be deemed to have been executed and delivered within the State of California, and the rights and obligations of the Parties hereto shall be construed and enforced in accordance with, and governed by, the laws of the State of California, without regard to choice of law rules. In the event of any later claims or litigation relating to the incident, the matter described in Paragraph 2.2, or the interpretation or enforcement of this Agreement, jurisdiction will be exclusively within the State of California.

7.2 This Agreement is the entire Agreement between the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous oral and written agreements and discussions. This Agreement may be amended and/or modified only by a written agreement executed by all Parties to this Agreement.

7.3 In the event of litigation or arbitration relating to this Agreement, the prevailing Party shall be entitled to recover reasonable attorneys' fees and costs.

7.4 In the event that any portion of this Agreement is adjudged to be void or unenforceable by a court of competent jurisdiction, the same shall be severable from the remainder of the Agreement.

7.5 This Agreement is binding upon and shall inure to the benefit of the Parties hereto, their respective agents, employees, representatives, partners, officers, directors, divisions, subsidiaries, affiliates, assigns, heirs, successors in interest, shareholders, attorneys, insurers, and adjusters.

7.6 Each term of this Agreement is contractual and not merely a recital. Each Party has cooperated in the drafting and preparation of this Agreement. Hence, in any construction to be made of this Agreement, the same shall not be construed against any Party.

7.7 This Agreement may be executed in counterparts, and when each Party has signed and delivered at least one such counterpart, each counterpart shall be deemed an original, and, when taken together with other signed counterparts, shall constitute one Agreement, which shall be binding upon and effective as to all Parties.

7.8 A signed copy of this Agreement transmitted by facsimile machine will have the same force and effect as an original signature.

7.9 This Agreement consists of four (4) pages, and is made and entered into on the dates indicated below.

7.10 Each of the undersigned representatives of each party certify under penalty of perjury under the laws of the State of California that they are fully authorized by the party or parties they represent to agree to the above terms and conditions of this Agreement and to legally bind the parties to it.

Dated: 12/20/, 2010



JOSE DIAZ, Plaintiff

Dated: _____, 2010

By: _____
Michael Okafor, City Manager

SAN FERNANDO POLICE DEPARTMENT,

Dated: _____, 2010

By: _____
Anthony Ruelas, Chief of Police

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Dated: _____, 2010

Jose Diaz, Plaintiff

Dated: 1-12, 2010

CITY OF SAN FERNANDO

By: 
Mario Hernandez, Mayor

Dated: 1-12-11, 2010

SAN FERNANDO POLICE DEPARTMENT,

By: T. RUELAS
Marco Antonio Ruelas, Chief of Police

Dated: 1/13, 2010

MARSHALL MACK,

By: M. Mack
San Fernando Police Officer, Marshall Mack,
Defendant

APPROVED AS TO FORM:

Dated: _____, 2010

DAVIS & ASSOCIATES,

By: _____
Jason A. Davis
Attorney for Plaintiff Jose Diaz

Dated: 1/17, 2010

ALDERMAN & HILGERS, LLP

By: Daniel Alderman
Daniel Alderman
Attorneys for Defendants

MARSHALL MACK,

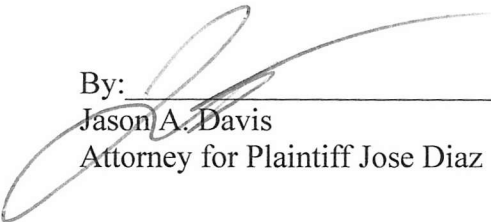
Dated: _____, 2010

By: _____
San Fernando Police Officer, Marshall Mack,
Defendant

APPROVED AS TO FORM:

Dated: 1-12, 2010

DAVIS & ASSOCIATES,

By: 
Jason A. Davis
Attorney for Plaintiff Jose Diaz

Dated: _____, 2011

ALDERMAN & HILGERS, LLP

By: _____
Daniel Alderman
Attorneys for Defendants

EXHIBIT A

SAN FERNANDO POLICE DEPARTMENT TRAINING BULLETIN ON FIREARM RELATED ISSUES

With increasing frequency, officers are encountering individuals carrying holstered pistols in plain view on a gun belt. Individuals participating in these actions have dubbed their actions, the “open carry” movement. Frequently, ammunition is close at hand either in a bandolier fashion or a loaded magazine affixed to the gun belt. While open carrying of firearms in California has not been practiced in recent years, it is entirely legal if done properly. The background and legal issues that the open carry movement presents are discussed in this training bulletin. It is important to note that this bulletin covers the most common issues pertaining to open carrying of firearm and is not designed to be exhaustive in all firearms related crimes.

HISTORY

The history of Penal Code §12031 offers guidance in understanding 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 restricted – subject to a Concealed Carry Weapons permit. However, early in May of 1967, the legislature proposed a bill that would criminalize carrying a loaded firearm within certain locations, such as in incorporated city. Opposing this ban, a group of Black Panthers peacefully marched into the California legislature fully armed. Their protest failed and the legislature enacted Penal Code §12031, effective July 28, 1967, which restricted the carrying of a *loaded* firearm in public, even if not concealed – but preserved the ability to carry an *unloaded* firearm if carried in plain view and/or in a holster.

Carrying firearms in plain view diminished in its popularity shortly thereafter until 2004, when the website, OpenCarry.org, was established. The website not only serves as a legal resource, but also as a social networking portal for thousands of American gun owners. This movement gained momentum in 2008, when the Supreme Court ruled on the Second Amendment. Since then, unloaded open carry groups and events have been occurring with an increased frequency throughout the state and the nation. These events are historically peacefully conducted with the pre-approved permission of local businesses hosting the events.

It is important to note that members of the Open Carry movement appear to be exercising the full scope of the laws available to carry concealable firearms exposed on their persons. Some of these individuals record video and audio of encounters with law enforcement for later broadcast on the internet. Officers need to be fully knowledgeable and tactically prepared to safely and legally address these issues.

SECOND AMENDMENT PROTECTIONS

The Second Amendment to the United States Constitution provides: “A well-regulated Militia, being necessary to the security of a Free State, the right of the people to keep and Bear Arms, shall not be infringed.” This right was found to be a *fundamental* and *individual* right by the Supreme Court in 2008. (*District of Columbia v. Heller*, 554, U.S. ___, 128 S. Ct. 2783 (2008).) In June of 2010, a plurality of the Supreme Court found that the *fundamental* Second Amendment right to Keep and Bear Arms was incorporated and made applicable to the states by the Due Process Clause of the Fourteenth Amendment. (*McDonald v. City of Chicago*, 561 U.S. ___ (2010).) In short, the Second Amendment guarantees individuals protection against federal, state, or local infringement of their fundamental right to bear arms.

The Second Amendment does not preclude otherwise lawful enforcement of statutes making it unlawful to carry concealed or loaded handguns in public, or for specified convicts to possess firearms. (*People v. Flores*, ___ Cal.App. 4th , DJDAR 18615, WL5265343 (2008).) It is, however, a fundamental right that may create federal and state liability if otherwise *unlawful* enforcement of statutes is effectuated. (42 U.S.C. §1983.)

INITIAL CALL

California does not ban firearm possession, but regulates firearm possession ad hoc; as such it is important to document a number of factors. Dispatch will process the calls using current procedures. However upon receiving a phone call regarding people carrying firearms openly, they will obtain as much information as possible about the demeanor, behavior, and activities of the people carrying the firearms to help everyone determine if this is an “open carry” situation, including whether the firearm is in a holster, whether the suspect is in a prohibited area, and whether the suspect is engaged in, or about to be engaged in, any criminal activity. For instance, dispatch will confirm that there is no brandishing, assault, or other unlawful activity in progress. They will confirm whether or not the firearms are concealed and the location of the firearms. Typical information regarding the Reporting Person, descriptions, does the caller have any safety concerns, etc. will be gathered and relayed to the officers.

The intent is not to change the current practices/procedures of how we gather information or what information to gather, rather try to drill in further to determine if this is an “open carry” type call or a “man with a gun” type call. Obviously this information is critical to determine the appropriate tactics. A supervisor shall be assigned to all open carry or man with a gun calls.

Because much of the public is unaware of the legalities of “open carrying,” if the facts present themselves to be of the “open carry” type, dispatch will advise the caller that California does permit the open carrying of unloaded firearms with some exceptions.

INITIAL CONTACT

When making the initial contact with a person carrying a handgun in a holster or otherwise carrying a firearm openly, officers should consider that the individual may be carrying a firearm lawfully, barring any other indicia of reasonable suspicion of a crime being or about to be committed. In assessing the situation, officers must consider the 4th amendment rights of the individuals carrying firearms openly as well as their own safety and the safety of the public.

Handguns v. Long Guns

Handguns Penal Code 12025 applies to firearms capable of being concealed upon the person, which is limited to “handguns” per Penal Code 12001. There is no requirement that all handguns must be registered to the owner in California. California only requires handguns *transferred* from 1991 to the present be registered to their owners, with some exceptions.

Long Guns Nonconcealable firearms (rifles and shotguns) are not covered within the provisions of California Penal Code section 12025 and therefore are *not* required to be transported in a locked container. In general, they may be carried openly or concealed. As with any firearm, nonconcealable firearms must generally be unloaded while they are being transported. However, a rifle or shotgun that is defined as an “assault weapon” (see below) pursuant to Penal Code 12276 or 12276.1 must be transported in accordance with Penal Code section 12026.1. Unless the firearm is an “assault weapon” or “.50 BMG Rifle,” there is no requirement that the firearm be registered or otherwise appear in the AFS.

Search & Seizure Cautions

4th Amendment The Fourth Amendment, applied to the states through the Fourteenth Amendment, provides, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" (U.S. Const. amend. IV.)

Michigan v. Chesternut

A seizure under the Fourth Amendment occurs when "a reasonable person would have believed that he was not free to leave." (*Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States v. Mendenhall* 446 U.S. 544, 554 (1980) (opinion of Stewart, J.).)

Terry v. Ohio

"There are well-defined limits on what police officers may do in discharging their duties, and police may be held liable for acting outside these limits. Perhaps the most fundamental of these is the requirement that the police not interfere with the freedom of private persons unless it be for specific, legitimate reasons. (See *Terry v. Ohio*, 392 U.S. 1, 21 (1968), 20 L. Ed. 2d 889, 88 S. Ct. 1868.)

Duran v. Douglas

"In the absence of a valid warrant, the police may generally not stop and detain an individual for investigation absent a reasonable belief that criminal or otherwise dangerous activity is afoot." (*Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1377 (9th Cir. 1989).)

U.S. v. Ubiles

Plaintiff's lawful possession of an unloaded firearm could *not*, by itself, create a reasonable suspicion sufficient to justify an investigatory detention and seizure – or *arrest*. (See Lawrence Rosenthal, Second Amendment Plumbing after Heller: Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs (2009) 41 Urb. Law. 1, 37 ("When applicable law does not ban carrying a firearm, however, the Fourth Amendment does not permit a stop-and-frisk regardless of any indication that a suspect is armed or potentially dangerous because there is no indication that the suspect is violating the law.")) For example, in *United States v. Ubiles*, 224 F.3d 213 (3rd Cir. 2000), the Third Circuit found that *an individual's lawful possession of a firearm in a crowded place did not justify a search or seizure*. Holding that the search violated Ubiles' Fourth Amendment rights, the court noted that the situation was no different than if the informant had told officers "that Ubiles possessed a wallet . . . and the authorities had stopped him for that reason." (*Id.*) Nor, the court continued, could the officers rely on the fact that Ubiles possessed the weapon while in a crowd. (*Id.* at 219.)

Florida v. J.L.

U.S. Supreme Court held that law enforcement cannot stop and frisk a citizen based solely on an anonymous tip describing only innocent behavior and which does not sufficiently predict the future actions of a suspect. (*Florida v. J.L.*, 529 U.S. 266 (2000).)

U.S. v. King

The Tenth Circuit has also dealt with this question. In *United States v. King* (10th Cir. 1993) 990 F.2d 1552, the Tenth Circuit found that *a firearm alone did not create a reasonable suspicion of criminal activity*—permitting such detentions would render the Fourth Amendment functionally meaningless.

Contact Advisory

Contact

Officers are expected to appropriately assess each situation and respond in a safe manner that respects the citizens' rights. These types of contacts are difficult in the sense that you will be using different contact tactics that you may otherwise use in a situation involving a person with a gun that has other extenuating circumstances. We are required to respect the rights of others and impartially enforce the law. Demonstrate the utmost professionalism in your conduct. Assess the situation and monitor the subjects prior to making contact. Use "contact and cover" while interacting with citizens. Clear verbal commands regarding the weapon inspections should be given *with the Officer retrieving the weapon from the holster*.

Supervisor

If possible, a supervisor should be present when contact is made with the individuals or groups.

Identification of Individual Not Required

PC§148 Unloaded Open Carry enthusiasts most likely will not produce identification, even if requested. It is their stance that they are complying with all laws and are not compelled to identify themselves. In short, there is no authority that requires them to identify themselves. Do not enforce the PC§148 solely under this circumstance. Absent any other reasonable suspicions of articulable facts, we cannot arrest for failure to provide Identification. Other law enforcement agencies improperly cite *Hibel v. Sixth Judicial District*, which allowed for a demand for I.D., this case was in Nevada which has a "Stop and I.D." statute. California has no similar requirement for I.D. Thus, it is not a PC 148 to fail to identify oneself during an investigative stop. (*In re Gregory S.*, 112 Cal.App.3d 764 (1980).)

INSPECTION OF FIREARM

Limited Authority to Inspect

PC§12031(e) In order to determine whether or not a firearm is loaded for the purpose of enforcing PC§12031, 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, or in any prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section is, in itself, probable cause for arrest for violation of 12031.

It is important to note that the authority granted by this provision does not permit any search or seizure beyond mere inspection of the firearm to determine whether the firearm is loaded. It does not, without additional factors, give you the right to prolong the contact beyond inspection to run computer checks or complete an FI. **To do this you must have consent or additional factors that justify a reasonable suspicion detention.** Reasonable suspicion is less than probable cause but more than no evidence at all. Reasonable suspicion is defined as: information sufficient to cause a reasonable law enforcement officer, taking into account his or her training, to reasonably believe that the person to be detained is, was or is about to be, involved in criminal activity. (The Fourth Amendment and Search and Seizure, 9th Edition, Phillips.)

PC§833.5 In addition to any other detention permitted by law, if a peace officer has *reasonable cause to believe that a person has a firearm or other deadly weapon with him or her in violation of any provision of law relating to firearms or deadly weapons* the peace officer may detain that person to determine whether a crime relating to firearms or deadly weapons has been committed. For purposes of this section "reasonable cause to detain" requires that the circumstances known or apparent to the officer must *include specific and articulable facts causing him or her to suspect that some offense relating to firearms or deadly weapons has taken place* or is occurring or is about to occur and that the person he or she intends to detain is involved in that offense. The circumstances must be such as would cause any reasonable peace officer in like position, drawing when appropriate on his or her training and experience, to suspect the same offense and the same involvement by the person in question.

Arizona v. Hicks Only if the serial number of the weapon comes into *plain view* during inspection, may it be noted and run against data bases. (*Arizona v. Hicks*, 480 U.S. 321, 324 (1987).)

People v. DeLong You cannot search for the serial number. (*People v. DeLong*, 11 Cal.App.3d. 786 (1970).)

PC§12090 Makes it unlawful to alter, remove, change, or obliterate a firearms serial number; it does *not*, however, criminalize covering of serial numbers.

PC§8571.5 Officers may not seize or confiscate any firearm or ammunition from an individual who is lawfully carrying or possessing the firearm or ammunition. Officers may temporarily disarm an individual, however, if the officer reasonably believes it is immediately necessary for the protection of the officer or another individual. An officer who disarms an individual is to return the firearm before discharging the individual unless the officer arrests the individual or seizes the firearm as evidence of the commission of a crime.

Loaded v. Unloaded

PC§12031(g) A firearm is loaded “when there is an unexpended shell . . . in, or attached in any manner to, the firearm.”

People v. Clark Interpreting PC§12031, the courts have found that a firearm is loaded when a shell or cartridge has been placed into a position from which it can be fired. A firearm is not loaded if the shell or cartridge is stored elsewhere and not yet placed into a firing position. (*People v. Clark*, 45 Cal.App.4th 1147, 1153 (1996).)

Conversely, a firearm is not loaded if ammunition is not placed into a firing position.

Restricted Locations

PC§171b **Public Buildings:** This section prohibits any person from possessing a firearm within public buildings.

PC§171.5 **Sterile Areas:** This section prohibits any person from possessing a firearm in a “sterile area” of an airport or passenger vessel terminal.

PC§626.9 **School Grounds:** This section prohibits any person from possessing a handgun in a place that the person knows, or reasonably should know, is a school zone, unless it is with the written permission of the school district superintendent, designee, or equivalent school authority.
School Zone: Defined as an area in, or on the grounds of, a public or private school providing instruction in K-12, inclusive, or within a distance of 1,000 feet from the grounds of the public or private school. (PC§626.9(e)(1).)

PC§626.95 **Playground/Youth Center:** Pursuant to this section, violation of PC§12025, 12031, 417(a)(2), or 417(b) while on the grounds of a playground, or youth center during hours when it is open for business, classes, or school-related programs, or at a time when minors are using the facility, when the person knows that he or she is on or within the grounds, are felony wobblers.
Playground: Defined as any park or recreational area specifically designed to be used by children that has play equipment installed, including public grounds designed for athletic activities such as baseball, football, soccer, or basketball, or any similar facility located on public or private school grounds, or on city or county parks. (PC§626.95(c)(1).)
Youth Center: Defined as any public facility that is used to host recreational or social activities for minors while minors are present. (PC§626.95(c)(2).)

UNLOADED FIREARM LAWS

Carrying Concealed Firearms on the Person

- PC§12025(a)** This section prohibits carrying a concealed handgun upon the person without a license to carry such a firearm. It does not apply to rifles or shotguns. (Penal Code §12001)
Knowledge: The person must know that he was carrying a firearm.
Unlocked Suitcase: An otherwise unsecured handgun concealed in an unlocked suitcase carried by a person is sufficiently “upon his person” to constitute a violation. (*People v. Dunn*, 61 Cal.App.3d Supp. 12 (1976).)
Inoperable Firearm: It is not a defense to PC§12025 that the firearm is inoperable. (*People v. Marroquin*, 210 Cal.App.3d 77, 82.)

- PC§12025(f)** **Firearms carried openly in belt holsters are not concealed.**

Firearms Concealed in a Vehicle by Driver

- PC§12025(a)(1)** This section prohibits carrying concealed handguns within a vehicle by the person controlling or directing the vehicle.
Knowledge: The person must know the gun was in the car. (*People v. Jurado*, 25 Cal.App. 3d 1027, 1030-31 (1972); *People v. Rubalcava*, 23 Cal. 4th 322, 331-32 (2000).)
Possession & Control: The statute does not require that the person have exclusive possession and control of the firearm; it is enough that the person owned and controlled the car, and knew the gun was below the seat, even though the gun was placed there by someone else and belonged to someone else. (*People v. Davis*, 157 Cal.App. 2d 33, 36 (1958).)
Unlocked Carrying Case: If a firearm is transported in a vehicle in a manner that it is invisible unless its carrying case is opened, it’s concealed. (*People v. Hodges*, 70 Cal.App.4th 348, 1355 (1999).)
- PC§12026.1(a)(1)** **Trunk:** it is lawful to transport an unloaded firearm in a vehicle’s trunk.
Locked Container: It is lawful to transport an unloaded firearm in a vehicle if it is in a locked container. A “locked container” is a secure container which is fully enclosed and locked by a padlocked, key lock, combination lock, or similar locking device. (PC§12026.1(c).)

Firearm Concealed in Vehicle by Occupant

- PC§12025(a)(3)** This section prohibits any person to cause to be carried concealed a handgun within any vehicle in which he or she is an occupant.
Knowledge: The person must know that he caused the firearm to be concealed in the car (concealing a gun between the seats), even if he did not intentionally bring the gun into the car. (*People v. Padilla*, 98 Cal.App.4th 127, 134 (2002).)

LOADED FIREARM LAWS

Loaded Firearm on Person or in Vehicle

- PC§12031(a)** This section prohibits carrying a loaded firearm in public in a vehicle or on one’s person. This section applies to any public place, on any public street, or in any place where it is unlawful to discharge a firearm.

Knowledge: The person must know that he was carrying a firearm. But knowledge that the firearm is loaded is not an element of the offense of carrying a loaded firearm in a public place. (*People v. Dillard*, 154 Cal.App.3d 261 (1984).)

Inoperable Firearm: A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting. (*People v. Taylor*, 151 Cal.App. 3d 43f2, 437 (1984).)

ON LOCATION RETURN OF A FIREARM

If a firearm is determined to be lawfully carried at the time of a Penal Code 12031(e) inspection, the firearm must be immediately returned to the individual. If the firearm was removed from an individual's holster, the officer shall return the firearm to the holstered position for the individual so as to not place the individual in a position of brandishing a firearm in a public place.

LAW ENFORCEMENT OFFICER SAFETY ACT

On July 22, 2004, the Law Enforcement Officers Safety Act (LEOSA) of 2004, also commonly called "HR 218," became law. (18 U.S.C. §§, 926B, 926C.) This federal law allows "a qualified law enforcement officer" or "a qualified retired law enforcement officer" with identification that meets specified criteria to carry a concealed firearm anywhere in the nation, notwithstanding most other state and local laws which restrict the possession of concealed weapons.

Active Qualified Law Enforcement Officers

In order to be "a qualified law enforcement officer" under the LEOSA, a person must meet the following requirements:

1. Be an employee of a governmental agency who is authorized by law to engage in or supervise the prevention, detection, investigation or prosecution of, or the incarceration of any person for any violation of law;
2. Have the statutory powers of arrest;
3. Be authorized by the agency to carry a firearm;
4. Not be the subject of any disciplinary action by the agency;
5. Meet the standards, if any, established by the agency that require employees to regularly qualify in the use of a firearm;
6. Not be under the influence of alcohol or any intoxicating or hallucinatory drug;
7. Not be prohibited by federal law from possessing firearms;
8. Be carrying photographic identification issued by the governmental agency.

Regarding the requirement that the individual have the statutory power of arrest to be a "qualified law enforcement officer," California law allows "a peace officer" to make an arrest. (Pen. Code, § 834.) Penal Code sections 830.1 through 832.6 specify the persons who are peace officers and when and where they may use their authority. No one else is considered a peace officer under California law. (Pen. Code, § 830.) Certain federal officers, however, have been deemed to have LEOSA application. For example, LEOSA applies to members of the Coast Guard. *See People v. Booth*, 20 Misc. 3d 549, 552-53, 862 N.Y.S.2d 767, 770 (N.Y. Co. Ct. 2008) (member of Coast Guard covered by section 926B held to be exempt from prosecution for Criminal Possession of Weapon in the Second Degree); (See also *LaFontaine v. City of New York* (2009) 2009 U.S. Dist. LEXIS 105838. As such, LEOSA is likely to also apply to Navy Shore Patrol, Air Force Law Enforcement, and Military Police.

There is *no* requirement that the law enforcement officer be on duty in order to carry a firearm under LEOSA. Further, the only documentation that a law enforcement officer must carry for LEOSA to apply is photographic identification issued by the government agency identifying the individual as a law enforcement officer or the proper credential carried by the retired law enforcement officer.

Qualified Law Enforcement Officers

In order to be “a qualified retired law enforcement officer” under the LEOSA, a person must meet the following criteria:

1. Be retired in good standing from service with a public agency as a law enforcement officer for reasons other than mental instability;
2. Prior to retirement, was authorized by law to engage in or supervise the prevention, detection, investigation or prosecution of, or the incarceration of any person for any violation of law;
3. Prior to retirement, had the statutory powers of arrest;
4. Prior to retirement, was either
 - (1) regularly employed as a law enforcement officer for an aggregate of 15 years or more; or
 - (2) retired from service after completing any applicable probationary period of such service, due to a service-connected disability, as determined by the agency;
5. Has a non-forfeitable right to benefits under the retirement plan of the agency;
6. Has met, within the past 12 months, the state’s standards for training and qualification for active law enforcement officers to carry firearms;
7. Not be prohibited by federal law from possessing firearms;
8. Be carrying identification that meets specified criteria (see below).

In order to qualify as “identification” under the LEOSA, a credential that is carried by a retired law enforcement officer must meet one of the following criteria:

1. A photographic identification issued by the agency from which the law enforcement officer retired that indicates the retired law enforcement officer has, not less recently than one year prior, been tested or otherwise found by the agency to meet the standards established by the agency for training and qualification for active law enforcement officers to carry a firearm;

OR

2. A photographic identification issued by the agency from which the law enforcement officer retired;

AND

A “certification issued by the State in which the individual resides that indicates that the individual has, not less than one year [prior] . . . been tested or otherwise found by the State to meet the standards established by the State for training and qualification for active law enforcement officers to carry a firearm of the same type as the concealed firearm.”

Limits of LEOSA

The LEOSA has limits and exceptions. It does not apply to all firearms and weapons. For example, it does not authorize either qualified law enforcement officers, or qualified retired law enforcement officers, to carry any of the following: machineguns, silencers, or destructive devices. Likewise, the LEOSA does not supersede all state laws regarding the possession of concealed firearms. The LEOSA states that it “shall not be construed to supersede or limit the laws of any State that (1) allow *private* persons . . . to prohibit or restrict the possession of concealed firearms on *their property*; or (2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base or park.”

BOTTOM LINE FOR CARRYING ISSUES

Law abiding citizens are carrying firearms in compliance with California laws with increased frequency. Police may stop a person who is openly carrying a firearm in a belt holster and may inspect the firearm to see if it is loaded;

however, the person may not be arrested for violating PC§12031 if ammunition is not in such a position from which it can be fired, even though the person may have immediate access to matching ammunition. Upon a determination that the firearm is unloaded, the firearm should be returned and the person in possession advised that he or she is free to leave. Further questioning may be done on a voluntary basis.

ASSAULT WEAPONS

Assault Weapons The term “assault weapon” means any designated semiautomatic firearms as defined by Penal Code section 12276 *et seq.* “Assault weapons” are divided into three categories. These are:

Category 1 Firearms specifically listed in Penal Code section 12276 subdivision (a), (b), and (c) (Roberti-Roos Assault Weapons Act of 1989). If the specific make and model is not on the list of firearms in Penal Code section 12276, then the firearm is not a Category 1 “assault weapon.” (*Harrott v. County of Kings* (2001) 25 Cal. 4th 1138.)

Category 2 Additional firearms specifically listed by make and model expanding on the AR and AK “series” firearms in Penal Code section 12276 subdivision (e) and (f) (*Kasler v. Locker* (2000) 23 Cal. 4th 472, AK and AR-15 series weapons). If the specific make and model is not on the list of firearms in 11 C.F.R. §5499, then the firearm is not a Category 2 “assault weapon.” (*Harrott v. County of Kings* (2001) 25 Cal. 4th 1138.)

Category 3 Firearms that are defined by the generic characteristic features of the firearm in Penal Code section 12276.1 (Senate Bill 23 or “SB 23 features.”).

Generic Features Under Category 3, PC 12276.1(a), “assault weapon” is defined as the following firearms:

Rifles

- (1) A rifle with the following features: semiautomatic, centerfire, rifle, with the capacity to accept a detachable magazine, *and* any one of the following:
 - (A) A pistol grip that protrudes conspicuously beneath the action of the weapon,
 - (B) A thumbhole stock,
 - (C) A folding or telescoping stock,
 - (D) A grenade launcher or flare launcher
 - (E) A flash suppressor, or
 - (F) A forward pistol grip.
- (2) A semiautomatic, centerfire, rifle, that has a fixed a fixed magazine with the capacity to accept a more than 10 rounds.
- (3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

Pistols

- (4) A semiautomatic, pistol, that has the capacity to accept a detachable magazine and any one of the following:
 - (A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer,
 - (B) A second and grip,
 - (C) A shroud that is not attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning his or her hand, except a slide that encloses the barrel,
 - (D) The capacity to accept a detachable magazine at some location outside of the pistol grip.
- (5) A semiautomatic pistol fixed magazine that has the capacity to accept more than 10 rounds.

Shotguns

- (6) A semiautomatic shotgun that has both of the following:
 - (A) A folding or telescoping stock,
 - (B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.
- (7) A semiautomatic shotgun that has the ability to accept a detachable magazine.
- (8) A shotgun with a revolving cylinder.

Notes

- Bayonets and bayonet lugs are not considered characteristics of “assault weapons” under California law.
- A “detachable magazine” for the purposes of the “assault weapon” laws is defined as “any ammunition feeding device that can be removed readily from the firearm with the neither disassembly of the firearm action nor use of a tool being required. A bullet or ammunition cartridge is considered a tool. (11 C.C.R. §5469(a).)
- There has been an increase of AR-15, AK-47, and other firearms sold and possessed in California that at first glance appear to be “assault weapons,” but these firearms have a device installed called magazine locks. Brands of magazine locks include, but are not limited to: “Bullet-Buttons,” “Prince 50 kits,” Arsenal, & Solar Tactical. These devices prevent the shooter from depressing the magazine release button with a finger. The magazine can quickly be released by using a “tool” to depress the enclosed magazine release button. Once a magazine lock device is installed and there is an attached magazine capable of holding only 10 rounds or less, the firearm no longer has a “detachable magazine” as required for a Category 3 type of “assault weapon.”

- Companies have become creative and have manufactured “10/30 round magazine.” These magazines look just like a 30 round magazine, but have been permanently altered to only hold 10 rounds. If you are basing an “assault weapons” charge on the fact that a rifle has a fixed magazine with the capacity to accept more than 10 rounds, make sure you can in fact load more than 10 rounds into the magazine. Note in your report that you were able to load more than 10 rounds into the magazine.

AW Dispatch

No peace officer or dispatcher shall broadcast over a police radio that an individual has registered, or has obtained a permit to possess, an assault weapon, unless there exists a reason to believe in good faith that one of the following conditions exist:

- (1) The individual has engaged, or may be engaged, in criminal conduct.
- (2) The police are responding to a call in which the person allegedly committing a criminal violation may gain access to the assault weapon or .50 BMG rifle.
- (3) The victim, witness, or person who reported the alleged criminal violation may be using the assault weapon or .50 BMG rifle to hold the person allegedly committing the criminal violation or may be using the weapon in defense of himself, herself, or other persons. (Penal Code 12288.5)

Exception This shall not prohibit a peace officer or dispatcher from broadcasting over a police radio that an individual has not registered, or has not obtained a permit to possess, an assault weapon or .50 BMG rifle pursuant to this chapter. This does not limit the transmission of an assault weapon or a .50 BMG rifle ownership status via law enforcement computers or any other medium that is legally accessible only to peace officers or other authorized personnel.

LEO Exemption

These restriction on “assault weapons” shall not prohibit the delivery, transfer, or sale of an assault weapon to, or the possession of an assault weapon or a .50 BMG rifle by, a sworn peace officer member provided that:

- (1) The peace officer is authorized by his or her employer to possess or receive the assault weapon or the .50 BMG rifle. Required authorization is defined as **verifiable written certification from the head of the agency**, identifying the recipient or possessor of the assault weapon as a peace officer and authorizing him or her to receive or possess the specific assault weapon.
- (2) **The officer shall register the assault weapon pursuant to Section 12285 not later than 90 days after possession or receipt. The officer shall register the .50 BMG rifle not later than one year after possession or receipt.** The peace officer must include with the registration, a copy of the authorization required pursuant to this paragraph. (Penal Code 12280(f)(2).)

RESOURCES

Included are links to resources that should help personnel determine issues not addressed in this memorandum.

- For general information on California firearm laws, see California Firearms Laws 2007 (The latest edition at this time): <http://ag.ca.gov/firearms/forms/pdf/cfl2007.pdf>
- For California Attorney General's "Assault Weapon Identification Guide, 3rd Edition, Nov. 2001 (The latest edition at this time): <http://ag.ca.gov/firearms/forms/pdf/awguide.pdf>
- The "California Centerfire, Semi-Auto Rifle Identification Flowchart" is an easy to follow flowchart listing yes/no questions showing the characteristics and related penal code sections of "assault weapons" and .50 BMG Rifles." The second page of the flowchart lists all of the banned "assault weapons" by make and model (Category 1 and 2) and lists the characteristics (Category 3) of "assault weapons." This is a resource only, much like a "quick code" and not to be used for official citation.
<http://www.calguns.net/caawid/flowchart.pdf>