Case Number: A 136092

COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 2

CALGUNS FOUNDATION INC., et al
v.
COUNTY OF SAN MATEO

CALGUNS FOUNDATION, INC., et al,
Plaintiffs and Appellants

v.
COUNTY OF SAN MATEO,
Defendant and Respondent.

APPEAL FROM THE
SUPERIOR COURT OF SAN MATEO COUNTY
HONORABLE V. RAYMOND SWOPE, III, PRESIDING JUDGE
Case No.: CIV 509185

APPELLANTS' REPLY BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, First **APPELLATE DISTRICT, DIVISION** 2	Court of Appeal Case Number: A136092
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Donald Kilmer (Bar # 179986) Law Offices of Donald Kilmer, APC 1645 Willow Street, Suite 150 San Jose, CA 95125 TELEPHONE NO.: (408) 264-8489 FAX NO. *(Optional):* (408) 264-8487 E-MAIL ADDRESS *(Optional):* Don@DKLawOffice.com ATTORNEY FOR *(Name):* Calguns Foundation, Inc., and Gene Hoffman, Plaintiffs	Superior Court Case Number: CIV 509185 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Calguns Foundation, Inc., et al. RESPONDENT/REAL PARTY IN INTEREST: County of San Mateo	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Calguns Foundation, Inc., and Gene Hoffman

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 18, 2013

Donald Kilmer
(TYPE OR PRINT NAME)

▶
(SIGNATURE OF PARTY OR ATTORNEY)

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Introduction

Respondent's Brief (RB) fails to make any valid arguments that either:

1. Refute the plain language of express preemption in Government Code § 53071. – or –
2. Refute the reasoning set forth in this Court's opinion in *Fiscal v. City and County of San Francisco*, (2008) 158 Cal. App. 4th 895.

This is reason enough for this Court to reverse the trial court and vacate the order sustaining the demurrer.

In those parts of the RB that actually make arguments, the County sometimes overstates the factual premise of the case. (i.e., the missing exception that invalidates the ordinance is for persons licensed to carry a firearm pursuant to a state-issued license, not the general public.) And in at least one instance at pages 16-17, the RB makes an error of omission that amounts to a mis-statement of the law.

The Gun-Free School Zones Act[1], has several exceptions for possession of a firearm in a school zone. The point made in the Appellants' Opening Brief (AOB)(pg. 15) was that San Mateo's Ordinance § 3.68.080(o), by failing to include any such exceptions, fails a rational basis test. It was not an attempt to exhaustively analyze the exceptions to that Act.

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[1] The Gun-Free School Zones Act of 1995 [Penal Code § 626.9] is set forth in the Appendix to this Reply Brief.

Penal Code 626.9(c)(4), cited in the the AOB, merely covers possession for persons exempt from the general prohibition of carrying a firearm in public under Penal Code §§ 25615, 25625, 25630 and 25645.

The County's analysis of sub-section (c)(4) in the RB (pg. 16-17), while correct on its face is misleading by omission. E.g., Penal Code § 626.9(c)(3) provides an exemption for victims of domestic violence not found in the ordinance:

> When the person possessing the firearm reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety. This subdivision may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety. Upon a trial for violating subdivision (b), the trier of a fact shall determine whether the defendant was acting out of a reasonable belief that he or she was in grave danger.

Penal Code § 626.9(l), which is directly on point for this case, contains the exception for persons with a license to carry a firearm. The same exception that the County's ordinance needs to save it from this preemption challenge:

> This section does not apply to a duly appointed peace officer as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part

> 2, a full-time paid peace officer of another state or the federal government who is carrying out official duties while in California, any person summoned by any of these officers to assist in making arrests or preserving the peace while he or she is actually engaged in assisting the officer, a member of the military forces of this state or of the United States who is engaged in the performance of his or her duties, **a person holding a valid license to carry the firearm pursuant to Chapter 4 (commencing with Section 26150) of Division 5 of Title 4 of Part 6,** or an armored vehicle guard, engaged in the performance of his or her duties, as defined in subdivision (e) of Section 7521 of the Business and Professions Code. [**emphasis** added]

Additional exceptions to the Gun-Free School Zones Act not found in the challenged San Mateo Ordinance are:

> (m) This section does not apply to a security guard authorized to carry a loaded firearm pursuant to Article 4 (commencing with Section 26000) of Chapter 3 of Division 5 of Title 4 of Part 6.
> (n) This section does not apply to an existing shooting range at a public or private school or university or college campus.
> (o) This section does not apply to an honorably retired peace officer authorized to carry a concealed or loaded firearm pursuant to any of the following:
>
> (1) Article 2 (commencing with Section 25450) of Chapter 2 of Division 5 of Title 4 of Part 6.[2]
> (2) Section 25650.

---

[2] Which includes Penal Code §§ 25450, 25455, 25460, 25465, 25470 and 25475.

(3) Sections 25900 to 25910, inclusive.
(4) Section 26020.

In other words, San Mateo County claims to have the almost breath-taking power to ban, without relevant exception, the carrying of firearms in its parks and wilderness areas – even in those circumstances where the State of California licenses (or permits) the carrying of firearms in school zones. (e.g., persons with a license to carry, retired peace officers, self-defense for victims of domestic violence, etc...)

This absurdity invites the converse question. Could San Mateo, if it wanted to, override the Gun-Free School Zone Act for schools located in that county? Could the county just as easily nullify either the general rule (i.e., permit guns on campus) or expand the exceptions of that Act?

The plaintiff/appellants' position is not so radical. They seek only the same exceptions for state licenses that are already found in the County's other ordinance found at 3.53.030 (see AOB appendix pg. 44) regulating firearm possession on county property, which itself mirrors the exceptions found in the State's Gun-Free School Zones Act.

San Mateo County Ordinance § 3.68.080(o) is overbroad and thus preempted by State law. Under an alternative theory, § 3.68.080(o) was repealed by implication when San Mateo adopted the more reasonable Ordinance found at §

3.53 *et seq*., which, by the way, still remains operative if § 3.68.080(o) is found invalid, so that the County retains control of firearms on its property with the appropriate exceptions required by State law.

One additional reason, in the nature of a public policy argument for a finding that § 3.68.080(o) is a dumb idea, is that it puts license holders and other persons permitted to carry firearms for self-defense in a worse position when entering San Mateo's parks and wilderness areas, than they would be on a public street.

DeShaney v. Winnebago, 489 U.S. 189 (1989), stands for the general proposition that the state does not owe any individual a duty to protect them from harm. However, one of the exceptions to that rule is the "state-created danger" doctrine. This exception is well recognized in the law. See: *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) and *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992).

So, hypothetically, if Mr. Hoffman enters a San Mateo County park or wilderness area, without the sidearm he is otherwise licensed to carry in downtown Redwood City, and he is attacked by wild animals or criminals; would the County be liable for his injuries/damages because it deprived him of the means of self-defense? Should the tax-payers of San Mateo County have to bear the risk of finding out if this theory of liability would withstand a legal challenge?

Reply

The County takes issue with how this case was plead and/or briefed in the trial court. But this Court's review of the proceedings below are *de novo* given that judgment was entered after the trial court sustained a demurrer without leave amend. *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 5, 40 Cal.Rptr.3d 205, 208; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, 6 Cal.Rptr.3d 457, 460; *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 633, 79 Cal.Rptr.3d 383, 387, fn. 3 (citing text).

Therefore only the facts plead, reasonable inferences therefrom, and judicially noticeable facts, are the grist for this Court's mill on appeal. Nor does it matter if the complaint was in-artfully drafted in the trial court. What matters is whether the operative facts give an appellate court enough information to examine the complaint to determine whether it states a cause of action on any available legal theory. *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908, 274 Cal.Rptr. 186, 188; see also *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal. App. 4th 72, 85, 14 Cal.Rptr.3d 893, 902.

A. The County Mis-Applies the Rule of Plead Facts.

At page 4 of RB, the County states: "*[appellants] do not allege that they or any person has ever been charged with a*

violation of [the ordinance]." This violates the rule of indulging reasonable inferences in favor of the plaintiff in a demurrer. *Curcini v. County of Alameda*, supra (citing text); *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403, 44 Cal.Rptr.2d 339, 343.

The actual facts plead were that San Mateo presumably enforces the ordinance. If the County wanted the factual record to read that they never enforce the ordinance, then they should have answered the complaint and moved for summary judgment after discovery. But then the County would be faced with the paradox of justifying a superfluous ordinance that they never enforce.

Again, at pg. 16 of the RB, the County contends that it might have "*rationally concluded that concealed firearms are more dangerous in County parks then [sic] in County buildings.*" But the County did not answer the complaint. They demurred. These "facts" are outside of the appellate record and may not be considered by the Court. *Kendall v. Allied Investigations, Inc.* (1988) 197 Cal.App.3d 619, 625, 243 Cal.Rptr. 42, 45.

The County makes the same mistake later in the same paragraph on pg. 16 of the RB, by asserting that someone "*who has an irrational fear of mountain lions and a concealed handgun might shoot at the sign of rustling leaves (caused either by the wind or by children playing or by hikers*

concealed from view) in a park and hit an innocent bystander." The rest of the paragraph engages in similarly wild speculations about the risks of someone carrying a firearm in a public park.

The facts plead are that mountain lions inhabit the parks and wilderness areas of San Mateo and that mountain lions are known to attack people and cause death and great bodily injury. Again, if the County wanted to assert that mountain lions are not dangerous or that they do not inhabit the County's wilderness areas, they should have answered the complaint and propounded appropriate discovery.

Also of note in this section of the RB is that the County keeps glossing over the fact that the challenge to the ordinance is based solely on fact that it does not exempt persons <u>licensed</u> to carry firearms. Penal Code §§ 26150 - 26225. A license that can only be obtained after that person convinces a sheriff or chief of police that:

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

Again, indulging all reasonable inferences in favor of the

plaintiff, a Court would have to assume that the course of instruction required by Penal Code § 26165 would have to include rudimentary safety training. Such training would include: (1) identifying the threat before shooting, (2) how it is grossly negligent to discharge a weapon at rustling bushes, and (3) the potential criminal liability for the use of deadly force in situations that do not warrant such action.

Under the pleading rules for demurrers, this Court must indulge the reasonable inference that the kind of person who obtains a license to carry a firearm from their sheriff would **not** be the kind of person who would randomly fire their gun into rustling bushes.

Furthermore, there is at least the same risk of hitting innocent bystanders in a park or wilderness area as there is while walking in downtown Redwood City. In fact under the reasonable inference rule, hitting an innocent bystander in a crowded urban area is actually **more** likely than it is in a wilderness area.

The County must not be permitted to boot-strap facts into this appellate record when they have not filed an answer in the suit below.

B. The County Mis-Characterizes Appellants' Case.

The County spends a considerable amount of space in the RB analyzing various forms of preemption. This is

unnecessary. If plaintiff/appellants can not prevail on a theory of express statutory preemption via Government Code § 53071, and its most recent interpretation under *Fiscal v. City and County of San Francisco*, (2008) 158 Cal. App. 4th 895, then they would concede that they have no chance of prevailing under a theory of implied preemption.

California Government Code § 53071 states:

> It is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to registration or licensing of commercially manufactured firearms, by any political subdivision as defined in Section 1721 of the Labor Code.

The facts of this case are that Mr. Hoffman carries a state issued <u>license to carry commercially manufactured firearms which are listed upon his license by make, model and serial number</u>. He is authorized to carry a firearms to protect himself and his family after demonstrating good cause (for self-defense) to the sheriff of the county where he lives, by being a man of good moral character, and by taking a course of instruction. Penal Code §§ 26150 - 26225. It is patently unreasonable to indulge a scenario that this good cause (a particularized need of self-defense) is diminished when he enters a county park or wilderness area.

It is also completely beside the point that Government Code § 53071 is silent with respect to the carrying of concealed firearms, as long as Penal Code § 26150 - 26225 is itself a licensing scheme for carrying firearms. This was a more than implied point made by *Fiscal v. City and County of San Francisco*, (2008) 158 Cal. App. 4th 895. After all, its analysis of Government Code § 53071 was in reference to mere possession of handguns in San Francisco County which does not require a license or a permit. (Though law-abiding citizens are required to obtain a hand-gun safety certificate to purchase a handgun in California. California Penal Code § 31610 *et seq.*)

It is also completely beside the point that a sheriff or chief of police can impose conditions on the licenses he/she issues pursuant to Penal Code § 26150 - 26225. The relevant point is that this power (both to issue the license and impose conditions) is not delegated to a County Board of Supervisors. The plain language of this licensing scheme is that sheriffs and chiefs of police are the **only** personnel in this state authorized to issue such a license or impose restrictions. California Penal Code § 26200.

The County also misquotes the California Supreme Court in the *Nordyke* case. The language of the actual holding is: "*In sum, whether or not the Ordinance is partially preempted, Alameda County has the authority to prohibit the*

operation of gun shows held on its property, and, at least to that extent, may ban possession of guns on its property." *Nordyke v. King*, 27 Cal.4th 875, 885 (2002).

The *obiter dictum* cited by the County is an out of context quotation in a footnote addressing a point raised by the Dissent. In fact, the Alameda ordinance at issue in *Nordyke* has exactly the language that plaintiff/appellants contend would allow San Mateo's § 3.68.080(o) to survive a preemption challenge. Indeed, San Mateo's § 3.53 *et seq.,* (regulating county property with appropriate exceptions) is virtually identical to the Alameda ordinance at issue in *Nordyke*.

Additionally, just because the County points out that many counties make the same mistake they do (as was pointed out in the AOB), does not make a valid argument for the proposition that their ordinance is not preempted by Government Code § 53071. The Calguns Foundation, Inc., exists to bring these kinds of public interest lawsuits. The fact that San Mateo is first on their list for challenging these kinds of ordinance has to do with *Fiscal v. City and County of San Francisco*, (2008) 158 Cal. App. 4th 895 arising out of this district. Furthermore it is that organization's hope that this Court will issue an opinion that will obviate the need for additional litigation in this appellate district and be persuasive in the other five appellate districts.

The County makes another rather pedestrian error in statutory interpretation regarding the Deadly Weapons Recodification Act of 2010. Which says: "*This act recodifies the provisions of former Title 2 (commencing with Section 12000) of Part 4, which was entitled "Control of Deadly Weapons." The act shall be known and may be cited as the "Deadly Weapons Recodification Act of 2010.*" Cal. Penal Code § 16000.

And more significantly: "*Nothing in the Deadly Weapons Recodification Act of 2010 is intended to substantively change the law relating to deadly weapons.* ***The act is intended to be entirely nonsubstantive in effect****. Every provision of this part, of Title 2 (commencing with Section 12001) of Part 4, and every other provision of this act, including, without limitation, every cross-reference in every provision of the act, shall be interpreted consistent with the nonsubstantive intent of the act.*" Cal. Penal Code § 16005 [emphasis added]

There is nothing here to suggest, as the RB does on page 14, that the California legislature incorporated any judicial findings or holdings from any cases in its non-substantive reorganization of these statutes in 2010.

Furthermore it is completely erroneous to suggest that the State Legislature has not occupied the field of carving out exceptions for carrying firearm in sensitive areas, for

those with licenses issued under state law. The Gun-Free School Zones Act is not an anomaly with its exceptions. California state law specifically addresses the licensed carrying of weapons in state and local public buildings, including the State Capitol and the Governor's Mansion. See California Penal Code §§ 171b, 171c, 171d.

San Mateo has overstepped its authority. Its Ordinance § 3.68.080(o) is expressly preempted by state law.

Conclusion

Not only did the trial court err in sustaining the demurrer without leave to amend, the County and the trial court are wrong on the law. San Mateo Ordinance § 3.68.080(o) is preempted because it bans weapons in county parks and wilderness areas without exempting California's licensing scheme for the carrying of firearms pursuant to licenses issued by county sheriffs and chiefs of police. These licenses to carry a firearm in public are issued to people of good moral character, who have demonstrated good cause (i.e., a particularized need for self-defense) and have taken a course of instruction.

These licenses are most often issued to retired police, retried federal law-enforcement, district attorneys and judges. In this case Mr. Hoffman, a local businessman who has demonstrated a heightened need for self-defense to his

local sheriff, has also qualified for a license to exercise this fundamental right of self-defense outside of his home. But, San Mateo County claims to have the power to nullify that good cause and nullify the judgment of all county sheriffs and municipal chiefs of police when these license holders enter its parks and wilderness areas. They are wrong and this Court must so hold.

Finally, a holding that San Mateo Ordinance § 3.68.080(o) is preempted, still leaves the appropriately narrow § 3.53 *et seq.,* in place for regulating firearms on county property.

Respectfully Submitted on March 18, 2013.

_____

Donald Kilmer, Attorney for Appellants

Certificate of Word Count

The text of this brief consists of 3,309 words as counted by the Corel WordPerfect X-5 word-processing program used to generate the brief. Dated: March 18, 2013

_____

Donald Kilmer, for Appellant

Certificate of Service on California Supreme Court

I declare that I am employed in the County of Santa Clara, California. I am over the age of eighteen years and not a party to this action. My business address is 1645 Willow Street, Suite 150; San Jose, CA 95125.

On March 18, 2013, I served an electronic copy of the APPELLANTS' REPLY BRIEF on the California Supreme Court pursuant to Appellate Rule of Court 8.212(c)(2)(A).

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct and that this declaration was executed in San Jose, CA on March 18, 2013.

_____

Donald Kilmer

Appellants' Reply – Appendix

*** This document is current through the 2013 Supplement ***
(All 2012 legislation, 2012 Governor's Reorg. Plan No. 2 and all
propositions approved by the electorate at the June and November 2012 elections)

PENAL CODE
Part 1. Of Crimes and Punishments
Title 15. Miscellaneous Crimes
Chapter 1. Schools

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Pen Code § 626.9 (2013)

§ 626.9. Possession of firearm in school zone or on grounds of public or private university or college; Exceptions

(a) This section shall be known, and may be cited, as the Gun-Free School Zone Act of 1995.

(b) Any person who possesses a firearm in a place that the person knows, or reasonably should know, is a school zone, as defined in paragraph (1) of subdivision (e), unless it is with the written permission of the school district superintendent, his or her designee, or equivalent school authority, shall be punished as specified in subdivision (f).

(c) Subdivision (b) does not apply to the possession of a firearm under any of the following circumstances:

(1) Within a place of residence or place of business or on private property, if the place of residence, place of business, or private property is not part of the school grounds and the possession of the firearm is otherwise lawful.

(2) When the firearm is an unloaded pistol, revolver, or other firearm capable of being concealed on the person and is in a locked container or within the locked trunk of a motor vehicle.

This section does not prohibit or limit the otherwise lawful transportation of any other firearm, other than a pistol, revolver, or other firearm capable of being concealed on the person, in accordance with state law.

(3) When the person possessing the firearm reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety. This subdivision may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with *Section 6200) of the Family Code* absent a factual finding of a specific threat to the person's life or safety. Upon a trial for violating subdivision (b), the trier of a fact shall determine whether the defendant was acting out of a reasonable belief that he or she was in grave danger.

(4) When the person is exempt from the prohibition against carrying a concealed firearm pursuant to Section 25615, 25625, 25630, or 25645.

(d) Except as provided in subdivision (b), it shall be unlawful for any person, with reckless disregard for the safety of another, to discharge, or attempt to discharge, a firearm in a school zone, as defined in paragraph (1) of subdivision (e).

The prohibition contained in this subdivision does not apply to the discharge of a firearm to the extent that the conditions of paragraph (1) of subdivision (c) are satisfied.

(e) As used in this section, the following definitions shall apply:

(1) "School zone" means an area in, or on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, or within a distance of 1,000 feet from the grounds of the public or private school.

(2) "Firearm" has the same meaning as that term is given in subdivisions (a) to (d), inclusive, of Section 16520.

(3) "Locked container" has the same meaning as that term is given in Section 16850.

(4) "Concealed firearm" has the same meaning as that term is given in Sections 25400 and 25610.

(f)

(1) Any person who violates subdivision (b) by possessing a firearm in, or on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or five years.

(2) Any person who violates subdivision (b) by possessing a firearm within a distance of 1,000 feet from the grounds of a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, shall be punished as follows:

(A) By imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or five years, if any of the following circumstances apply:

(i) If the person previously has been convicted of any felony, or of any crime made punishable by any provision listed in Section 16580.

(ii) If the person is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of Title 4 of Part 6 of this code or *Section 8100 or 8103 of the Welfare and Institutions Code*.

(iii) If the firearm is any pistol, revolver, or other firearm capable of being concealed upon the person and the offense is punished as a felony pursuant to Section 25400.

(B) By imprisonment in a county jail for not more than one year or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or five years, in all cases other than those specified in subparagraph (A).

(3) Any person who violates subdivision (d) shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for three, five, or seven years.

(g)

(1) Every person convicted under this section for a misdemeanor violation of subdivision (b) who has been convicted previously of a misdemeanor offense enumerated in Section 23515 shall be punished by imprisonment in a county jail for not less than three months, or if probation is granted or if the execution or imposition of sentence is suspended, it shall be a condition thereof that he or she be imprisoned in a county jail for not less than three months.

(2) Every person convicted under this section of a felony violation of subdivision (b) or (d) who has been convicted previously of a misdemeanor offense enumerated in Section 23515, if probation is granted or if the execution of sentence is suspended, it shall be a condition thereof that he or she be imprisoned in a county jail for not less than three months.

(3) Every person convicted under this section for a felony violation of subdivision (b) or (d) who has been convicted previously of any felony, or of any crime made punishable by any provision listed in Section 16580, if probation is granted or if the execution or imposition of sentence is suspended, it shall be a condition thereof that he or she be imprisoned in a county jail for not less than three months.

(4) The court shall apply the three-month minimum sentence specified in this subdivision, except in unusual cases where the interests of justice would best be served by granting probation or suspending the execution or imposition of sentence without the minimum imprisonment required in this subdivision or by granting probation or suspending the

execution or imposition of sentence with conditions other than those set forth in this subdivision, in which case the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by this disposition.

(h) Notwithstanding Section 25605, any person who brings or possesses a loaded firearm upon the grounds of a campus of, or buildings owned or operated for student housing, teaching, research, or administration by, a public or private university or college, that are contiguous or are clearly marked university property, unless it is with the written permission of the university or college president, his or her designee, or equivalent university or college authority, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years. Notwithstanding subdivision (k), a university or college shall post a prominent notice at primary entrances on noncontiguous property stating that firearms are prohibited on that property pursuant to this subdivision.

(i) Notwithstanding Section 25605, any person who brings or possesses a firearm upon the grounds of a campus of, or buildings owned or operated for student housing, teaching, research, or administration by, a public or private university or college, that are contiguous or are clearly marked university property, unless it is with the written permission of the university or college president, his or her designee, or equivalent university or college authority, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for one, two, or three years. Notwithstanding subdivision (k), a university or college shall post a prominent notice at primary entrances on noncontiguous property stating that firearms are prohibited on that property pursuant to this subdivision.

(j) For purposes of this section, a firearm shall be deemed to be loaded 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. 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.

(k) This section does not require that notice be posted regarding the proscribed conduct.

(l) This section does not apply to a duly appointed peace officer as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, a full-time paid peace officer of another state or the federal government who is carrying out official duties while in California, any person summoned by any of these officers to assist in making arrests or preserving the peace while he or she is actually engaged in assisting the officer, a member of the military forces of this state or of the United States who is engaged in the performance of his or her duties, a person holding a valid license to carry the firearm pursuant to Chapter 4 (commencing with Section 26150) of Division 5 of Title 4 of Part 6, or an armored vehicle guard, engaged in the performance of his or her duties, as defined in subdivision (e) of *Section 7521 of the Business and Professions Code*.

(m) This section does not apply to a security guard authorized to carry a loaded firearm pursuant to Article 4 (commencing with Section 26000) of Chapter 3 of Division 5 of Title 4 of Part 6.

(n) This section does not apply to an existing shooting range at a public or private school or university or college campus.

(o) This section does not apply to an honorably retired peace officer authorized to carry a concealed or loaded firearm pursuant to any of the following:

(1) Article 2 (commencing with Section 25450) of Chapter 2 of Division 5 of Title 4 of Part 6.

(2) Section 25650.

(3) Sections 25900 to 25910, inclusive.

(4) Section 26020.

HISTORY:

Added Stats 1970 ch 259 § 2. Amended Stats 1974 ch 546 § 17; Stats 1976 ch 1139 § 256, operative July 1, 1977; Stats 1983 ch 143 § 207, ch 1292 § 5; Stats 1985 ch 295 § 7; Stats 1988 ch 854 § 1; Stats 1991 ch 1202 § 4 (SB 377); Stats 1994 ch 1015 § 1 (AB 645); Stats 1995 ch 659 § 1 (AB 624); Stats 1998 ch 115 § 1 (AB 2609); Stats 1999 ch 83 § 146 (SB 966); Stats 2010 ch 178 § 59 (SB 1115), effective January 1, 2011, operative January 1, 2012; Stats 2011 ch 15 § 422 (AB 109), effective April 4, 2011, operative January 1, 2012.

NOTES:

Amendments:

1974 Amendment:

Added "university and" before "colleges or".

1976 Amendment:

Deleted "for a period of not more than five years" after "state prison" at the end of the section.

1983 Amendment:

In addition to making technical changes, **(1)** substituted "of these officers" for "such officer" after "summoned by any"; **(2)** added "or an armored vehicle guard, who is engaged in the performance of his or her duties, as defined in *Section 7521 of the Business and Professions Code*,"; **(3)** deleted "and colleges" after "state university" the first time it appears; **(4)** substituted "university" for "colleges" after "and the state"; and **(5)** substituted "district superintendent or his or her designee, or equivalent school authority" for "authorities". (As amended Stats 1983 ch 1292, compared to the section as it read prior to 1983. This section was also amended by an earlier chapter, ch 143. See *Gov C § 9605*.)

1985 Amendment:

(1) Substituted ", the California State University, and the California Community Colleges" for "and the state university" wherever it appears; and **(2)** deleted "or" before "his or her designee".

1988 Amendment:

Substituted "state prison for one, two, or three years" for "county jail for a period of not more than one thousand dollars ($1,000), or both such imprisonment and fine, or by imprisonment in the state prison" at the end.

1991 Amendment:

Substituted the section for the former section which read: "Any person, except a duly appointed peace officer as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, a full-time paid peace officer of another state or the federal government who is carrying out official duties while in California, any person summoned by any of these officers to assist in making arrests or preserving the peace while he or she is actually engaged in assisting the officer, a member of the military forces of this state or the United States who is engaged in the performance of his or her duties, a person holding a valid license to carry the firearm pursuant to Article 3 (commencing with Section 12050) of Chapter 1 of Title 2 of Part 4, or an armored vehicle guard, who is engaged in the performance of his or her duties, as defined in *Section 7521 of the Business and Professions Code*, who brings or possesses a firearm upon the grounds of any public school, including the University of California, the California State University, and the California Community Colleges, or within any public school, including the University of California, the California State University, and the California Community Colleges, unless it is with the written permission of the school district superintendent, his or her designee, or equivalent school authority, shall be punished by imprisonment in the state prison for one, two, or three years."

1994 Amendment:

(1) Added subds (a)--(g); **(2)** redesignated former subds (a) and (b) to be subds (h) and (i) and former subd (d) to be subd (j); **(3)** substituted "any university or college" for ", or within, any public school" wherever it appears in subds (h) and (i); **(4)** deleted "or any private school providing instruction in kindergarten or grades 1 to 12, inclusive," after California Community Colleges," in subd (h); **(5)** substituted "university or college president, his or her designee, or equivalent university or college" for "school district superintendent, his or her designee, or equivalent school" wherever it appears in subds (h) and (i); **(6)** deleted "any private school providing instruction in kindergarten or grades 1 to 12, inclusive," after "California Community Colleges," in subd (i); **(7)** redesignated former subd (c) to be subd (*l*); and **(8)** added subds (m) and (n).

1995 Amendment:

(1) Deleted "a motor vehicle in" before "accordance with" in the second paragraph of subd (c)(2); **(2)** added subd (c)(4); **(2)** substituted subd (f)(1) and (f)(2) for former subd (f) which read: "(f) Any person who violates subdivision (b) shall be punished by imprisonment in the state prison for two, three, or five years."; **(3)** redesignated former subd (g) to be subd (f)(3); **(4)** added subd (g); **(5)** deleted "retired peace officer or" before "security guard" in subd (m); and **(6)** added subd (o).

1998 Amendment:

(1) Amended the first subd (h) by **(a)** adding "Notwithstanding Section 12026," at the beginning; **(b)** substituting "a campus of, or buildings owned or operated for student housing, teaching, research, or administration by, a public or" for "any university or college campus, including the University of California, the California State University, the California Community Colleges, or any"; **(c)** adding "that are contiguous or are clearly marked university property,"; and **(d)** adding the second sentence; **(2)** redesignated former subd (i) to be the second subd (h); and **(3)** amended the second subd (h) by **(a)** adding "Notwithstanding Section 12026" at the beginning; **(b)** substituting "a campus of, or buildings owned or operated for student housing, teaching, research, or administration by, a public or" for "any university or college campus, including the University of California, the California State University, the California Community Colleges, or any"; **(c)** adding "that are contiguous or are clearly marked university property,"; and **(d)** adding the second sentence.

1999 Amendment:

(1) Substituted "does" for "shall" before "not apply to" wherever it appears; (2) substituted "When" for "The" at the beginning of subds (c)(2) and (c)(4); (3) substituted "does" for "shall" before "not prohibit or" in the second paragraph of subd (c)(2); (4) amended subd (d) by substituting (a) the comma after "for any person" in the first paragraph; and (b) "contained in" for "of" in the second paragraph; (5) substituted "or" for "and" after "1 to 12, inclusive," in subd (e)(2); (6) redesignated the former second subdivision designated (h) to be subd (i); (7) substituted "that" for "which" after "consisting of a case" in the first sentence of subd (j); and (8) substituted "does" for "shall" before "not require that" in subd (k).

2010 Amendment:

(1) Substituted "Section 25615, 25625, 25630, or 25645" for "subdivision (b), (d), (e), or (h) of Section 12027" in subd (c)(4); (2) substituted "subdivisions (a) to (d), inclusive, of Section 16520" for "Section 12001" in subd (e)(2); (3) substituted "Section 16850" for "subdivision (c) of Section 12026.1" in subd (e)(3); (4) substituted "Sections 25400 and

25610" for "Sections 12025 and 12026.1" in subd (e)(4); (5) substituted "any provision listed in Section 16580" for "Chapter 1 (commencing with Section 12000 of Title 2 of Part 4" in subds (f)(2)(A)(i) and (g)(3); (6) substituted "Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of Title 4 of Part 6" for "Section 12021 or 12021.1" in subd (f)(2)(A)(ii); (7) substituted "Section 25400" for "Section 12025" in subd (f)(2)(A)(iii); (8) substituted "Section 23515" for "Section 12001.6" in subds (g)(1) and (g)(2); (9) substituted "Section 25605" for "Section 12026" in subds (h) and (i); (10) substituted "Chapter 4 (commencing with Section 26150) of Division 5 of Title 4 of Part 6" for "Article 3 (commencing with Section 12050) of Chapter 1 of Title 2 of Part 4" in subd (*l*); (11) substituted "Article 4 (commencing with Section 26000) of Chapter 3 of Division 5 of Title 4 of Part 6" for "Section 12031" in subd (m); (12) substituted "any of the following:" for "subdivision (a) or (i) of Section 12027 or paragraph (1) or (8) of subdivision (b) of Section 12031." in the introductory clause of subd (o); and (13) added subds (o)(1)-(o)(4).

2011 Amendment:

Substituted "pursuant to subdivision (h) of Section 1170" for "in the state prison" in subd (f)(1), in the introductory clause of subd (f)(2)(A), and in subds (f)(2)(B), (f)(3), (h), and (i).

Note

Stats 1991 ch 1202 provides:

SEC. 22. The Legislature declares and finds each of the following:

(a) A business establishment which sells or transfers firearms shall comply with *Section 51 of the Civil Code* that prohibits all arbitrary discrimination.

(b) However, no law in this state requires a business establishment to sell or transfer a firearm to a person who intends to use the firearm for an unlawful purpose or who is a danger to himself or herself or others or if the refusal to sell or transfer the firearm is based on any other good cause.

Stats 2010 ch 178 provides:

SEC. 107. This act shall only become operative if Senate Bill 1080 is enacted and becomes operative on January 1, 2012, and that bill would reorganize and make other nonsubstantive changes to the deadly weapons provisions in the Penal Code, in which case this act shall also become operative on January 1, 2012.

Stats 2011 ch 15 provides:

SECTION 1. This act is titled and may be cited as the 2011 Realignment Legislation addressing public safety.

Stats 2011 ch 15 § 636, as amended by Stats 2011 ch 39 § 68, provides:

SEC. 636. This act will become operative no earlier than October 1, 2011, and only upon creation of a community corrections grant program to assist in implementing this act and upon an appropriation to fund the grant program.

Editor's Notes

Senate Bill 1080 was enacted as Stats 2010 ch 711 and becomes operative on January 1, 2012.

The Community Corrections Grant Program referred to in Stats 2011 ch 15 § 636, as amended by Stats 2011 ch 39 § 68, was created by Stats 2011 ch 40 § 3, operative October 1, 2011.

Law Revision Commission Comments:

2010

Section 626.9 is amended to reflect nonsubstantive reorganization of the statutes governing control of deadly weapons.

Cross References:

Application of Section 629.9, Pen C § 626.92.

Firearm defined: *Pen C § 12001*.

Mandatory referral of child violator to prosecuting attorney: CRC Rule 1404.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 329 "Juvenile Courts: Delinquency Proceedings".

Witkin & Epstein, Criminal Law (3d ed), Crimes Against Public Peace and Welfare §§ 190, 246.

10 Witkin Summary (10th ed) Parent and Child § 768.

Cal Jur 3d (Rev) Criminal Law § 2046.

Cal Criminal Defense Prac., ch 144, "Crimes Against Order".

Cal. Juv. Cts Pr. & Pr. § 3.35 [3] [d].

Attorney General's Opinions:

A person may not, without permission, possess in a school zone two separate parts of a firearm that lock together by pushing a button and moving a pin. *82 Ops. Cal. Atty. Gen. 16.*

Hierarchy Notes:

Pt. 1, Tit. 15, Ch. 1 Note

NOTES OF DECISIONS 1. Generally 1.5. Constitutionality 2. Illustrative cases

1. Generally

Pen C § 626.9, proscribing the bringing or possessing of a firearm on the grounds of any public school including universities and colleges without permission of the school authorities, is not subject to a claim of substantial uncertainty as to what is prohibited. Though a predecessor statute referred only to a "loaded firearm," the current enactment clearly gives notice that the possession of unloaded firearms in the places specified is proscribed; additionally, defendant could not successfully contend that the statute is unconstitutionally vague since it cannot be ascertained therefrom which persons are "the school authorities" and the discretion given to them is unfettered. Since defendant pleaded guilty, there were no facts to indicate that the "school authorities" exception operated in any way with respect to his conduct. At least in cases not involving First or Fourth Amendment rights, one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and a court will not consider every conceivable situation which might arise under the language of the statute or the question of constitutionality with reference to hypothetical situations. *People v. Singer (1976, Cal App Dep't Super Ct) 56 Cal App 3d Supp 1, 128 Cal Rptr 920, 1976 Cal App LEXIS 1423.*

1.5. Constitutionality

Under any applicable level of scrutiny, California's Gun-Free School Zone Act of 1995, *Pen C § 626.9*, constituted a constitutionally permissible regulation of firearms in or near schools. Restricting possession of firearms in school zones did not burden the core right of law-abiding, responsible citizens to use arms in defense of hearth and home, the government's stated interest of preventing harm to children was a well-established governmental objective, a school superintendent's denial of an exemption to allow plaintiff to carry openly a handgun in the school zone bore a relationship to the important interest, and the denial of plaintiff's request did not violate plaintiff's *Second Amendment right. Hall v. Garcia (2011, ND Cal) 2011 US Dist LEXIS 34081.*

2. Illustrative cases

Defendant was properly convicted of possession of a firearm within a school zone where at least part of the parked car in which defendant, armed with a handgun, was sitting was located within 1,000 feet of a school. *People v. Mejia (1999, Cal App 4th Dist) 72 Cal App 4th 1269, 85 Cal Rptr 2d 690, 1999 Cal App LEXIS 577,* review denied (1999, Cal) *1999 Cal LEXIS 6403.*

Even though defendant resided in his camper, the camper was not a residence within the meaning of *Pen C § 626.9(c)(1)*; the gun was found behind the sofa in the living area of the camper and therefore, the exception of *Pen C § 626.9(c)(2)* did not apply either. *People v. Anson (2002, Cal App 4th Dist) 105 Cal App 4th 22, 129 Cal Rptr 2d 124, 2002 Cal App LEXIS 5282,* review denied (2003, Cal) *2003 Cal LEXIS 2052.*

Where defendant possessed a firearm on a sidewalk that was within 1,000 feet of a high school, it was irrelevant whether an easement for a public way existed because the sidewalk was not private property within the meaning of the *Pen C § 626.9(c)(1)* exception to the possession offense. *People v. Tapia (2005, Cal App 2d Dist) 129 Cal App 4th 1153, 29 Cal Rptr 3d 158, 2005 Cal App LEXIS 873,* review denied (2005, Cal) *2005 Cal LEXIS 9991.*

Where defendant possessed a firearm on a sidewalk that was within 1,000 feet of a high school, the application of *Pen C § 626.9* was not unconstitutionally vague because any property interest owned by defendant's father in the sidewalk was not of a sort that a reasonable citizen would understand to be private; hence, a defense that the sidewalk was private property was not viable, and the trial court did not infringe defendant's right to present a defense under § 626.9(c)(1) by excluding evidence of a claimed easement. *People v. Tapia (2005, Cal App 2d Dist) 129 Cal App 4th 1153, 29 Cal Rptr 3d 158, 2005 Cal App LEXIS 873,* review denied (2005, Cal) *2005 Cal LEXIS 9991.*

Where defendant possessed a firearm on a sidewalk that was within 1,000 feet of a high school, in violation of *Pen C § 626.9*, an instructional error was harmless because the sidewalk was not private property within the meaning of § 626.9 as a matter of law and because defendant, having violated *Pen C § 12031(a)(1)* by carrying a firearm in a public place, was not entitled to claim the exception of *Pen C § 626.9(c)(1)* for lawful possession on private property. *People v. Tapia (2005, Cal App 2d Dist) 129 Cal App 4th 1153, 29 Cal Rptr 3d 158, 2005 Cal App LEXIS 873,* review denied (2005, Cal) *2005 Cal LEXIS 9991.*

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Christina Kilmer
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