IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RICK CHARLES DELACY,** Defendant and Appellant.	Case No. A125803

Napa County Superior Court, Case No. CR142103, CR142660
The Honorable Diane M. Price, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Rick Charles Delacy (Delacy) appeals five felony convictions. A jury convicted him of one count of possession of shotgun shells by a firearms-restricted person, a statute that sometimes is called the ammunition law in this brief. (Pen. Code, § 12316, subd. (b)(1); further statutory citations are to this code unless otherwise specified.) At a later trial, the court convicted Delacy of possession of four rifles within 10 years of an enumerated misdemeanor for weapons, threats, assault, or battery, which sometimes is called the gun law herein. (§ 12021, subd. (c)(1).)

On appeal, Delacy attacks the constitutionality of the gun law, but not the ammunition law. Specifically, he claims section 12021, subdivision (c)(1) facially conflicts with the Second Amendment to the United States Constitution in light of *District of Columbia v. Heller* (2008) 554 U.S. __ [128 S. Ct. 2783, 171 L.Ed.2d 2783] (*Heller*). He also asserts the gun law violates the Second and Fourteenth Amendments, as applied, by penalizing his possession of firearms based on the "nonviolent" misdemeanor of battery and by "irrationally" and "arbitrarily" affording him a privilege of self-defense but not of keeping arms for self-defense in the home. He further argues the gun law's noninclusion of persons with misdemeanor convictions from outside California denies his federal and state constitutional rights to the equal protection of the laws.

As to his jury trial under the ammunition law, Delacy asserts the denial of his due process right to a fair trial. Specifically, he claims that the court erroneously refused to instruct on a defense of mistake of fact and improperly failed to tell the jury in response to an inquiry during deliberations that lack of knowledge of the contraband nature of the ammunition was a defense to the charge.

terms and conditions in CR142660 included a $20 court security fee, a $200 restitution fine, and a $200 suspended probation revocation fine. (CR142103 CT 57-59.)

At a single sentencing hearing, the court granted formal probation for three years "under the terms and conditions in the pre-sentencing report," with nonrelevant modifications made to certain probation conditions. (CR142103 RT 824, lines 8-9 and 825, lines 5-6.) The probation orders include the fees and fines in the amounts listed in the presentence report. (CR142103 CT 42-45, 57-59; CR142660 CT 93-95.) The court terminated probation as unsuccessful in three trailing cases and imposed a time-served jail term in a fourth. (CR142103 CT 42; CR142660 CT 93; CR142103 RT 821-827; see CR142103 CT 52 [listing the trailing cases].)

STATEMENT OF FACTS

A. CR142660 Jury Trial in the Ammunition Case

On October 2, 2008, Napa County Sheriff's deputies searched Delacy's home. (CR142660 RT 500-501, 509.) A camouflage bag in his bedroom closet and two storage tubs in his garage contained numerous shotgun shells. (CR142660 RT 505-506, 509-511, 518-519.) Delacy said the tubs were his hunting gear. (CR142660 RT 505-506, 511, 513.) Gear for duck and turkey hunting was found throughout the house. (CR142660 RT 520.) Delacy was on his own recognizance (O.R.) in case number CR142103 at the time. (Ex. 2, admitted CR142660 RT 523, described CR142660 RT 595.) The parties stipulated that Delacy had been convicted of misdemeanor battery in violation of section 242 on December 8, 2006. (CR142660 CT 34 and RT 523, 584, 587.)

Delacy testified he was a hunter. At any given time, his home contained 1000 shotgun rounds for wild turkey hunting in which he had a season permit and for trap shooting in which he competed at clubs. While

his home months earlier in 2008 before the search in this case. The prosecutor opposed the instruction, arguing that the crime required knowledge of the ammunition, not the law. (CR142660 RT 483-494.) The court denied the instruction, ruling general intent required knowledge of the possession of ammunition, not of the ammunition law prohibition. (CR142660 RT 498.) Consistent with its pretrial ruling, the court sustained relevancy objections to defense counsel's examination of Delacy during trial about the probation department and the probation order in his battery case not giving notice of the prohibition. (CR142660 RT 554.)

The court instructed the jury that a person acts with wrongful intent when he or she intentionally does a prohibited act on purpose and that the ammunition law requires the defendant to know he possessed ammunition. (CR142660 RT 580, 583.) Defense counsel told the jury Delacy lacked "wrongful intent" in that he registered his firearms and was unaware anything had changed after the battery case. (CR142660 RT 599-600.) The prosecutor responded that no evidence showed Delacy had any misimpression after the battery case. (CR142660 RT 601.)

During deliberations, the jury asked, "Is it a requirement for a conviction in Count One that Mr. Delacy knew that it was a violation of his probation to possess ammunition?" (CR142660 CT 85 and RT 609.) Defense counsel suggested the court answer that possession of ammunition was not a violation of probation. (CR142660 RT 609.) The court instructed: "Knowledge that it is unlawful to possess ammunition is not an element of the crime charged in Count 1." (CR142660 CT 85 and RT 609.)

B. CR142103 Court Trial in the Gun Case

At his subsequent court trial, Delacy moved to dismiss the information in the gun case. He asserted the gun law violates his Second Amendment right to keep and bear arms as construed by *District of Columbia v. Heller* (2008) 554 U.S. __ [128 S. Ct. 2783, 171 L.Ed.2d

"stipulation," he would have refused the "deal" and gone to trial rather than give up his right to bear arms. He said the court (Commissioner Williams) had released him in the battery case with a limitation on his possession of long guns to hunting season, to and from hunting areas only. The documents in his battery case did not "say anything about ammunition or firearms," and nobody told him he could not have long guns during hunting season. (CR142103 RT 572-575, 578.) His probation order in the battery case contained no firearm restriction. (No transcripts of any hearings in the battery case were introduced.) (See CR142103 RT 215-216, 583-585.)

Delacy testified that he retrieved his guns and ammunition from storage after he was placed on probation. (CR142103 RT 575, 579.) When he subsequently informed the probation officer of his "contact" with Fish and Game officers about a trespassing matter, nothing was said about his having long guns during hunting season. (CR142103 RT 575.) Delacy denied having any idea he was not to possess ammunition until his actual arrest on that charge, despite his pending gun case. (CR142103 RT 575-580.)

Defense counsel argued to the court that Delacy believed Commissioner Williams relieved him of gun law liability during hunting season to induce his plea to simple battery (in lieu of the original felony charge), because no arms restrictions appeared in the probation order. (CR142103 RT 582, 584-585.) Counsel urged this as a valid mistake of law defense or at least a sentencing consideration. (CR142103 RT 583, 585.) After reviewing the gun law, the court concluded that mistake of law was no defense and found Delacy guilty. (CR142103 RT 585-587.)[4]

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[4] A hunting-season restriction would have been an idle judicial act even if the probation order had included a restriction under section 12021, subdivision (d)(1). The battery conviction nevertheless would bring Delacy (continued...)

B. Incorporation

Delacy argues the Second Amendment applies to the states. (AOB 8-9.) The Supreme Court has under submission the issue of the extent to which, if at all, the Second Amendment is incorporated as against the states by the Fourteenth Amendment's privileges and immunities or due process clauses. (*National Rifle Ass'n v. Chicago* (7th Cir. 2009) 567 F.3d 856, cert. granted *sub. nom.*, *McDonald v. Chicago* (2009) __U.S. __ [130 S.Ct. 48, 174 L.Ed.2d 632] (argued March 2, 2010).) Pending *McDonald*'s outcome, we assume the Second Amendment as interpreted in *Heller* is incorporated into the Fourteenth Amendment. (See *Heller, supra*, 128 S.Ct. at p. 2813 fn. 23 [recognizing that incorporation under the Fourteenth Amendment was not an issue in that case].)

C. *Heller* Does Not Require Strict Scrutiny Review

Delacy asserts that section 12021, subdivision (c)(1) is subject to strict scrutiny review because *Heller* finds fundamental a personal constitutional right to possess firearms in the home. (AOB 9-10.) To the contrary, this court has found that *Heller* "left standing the venerable holding in *United States v. Cruikshank* (1875) 92 U.S. 542, 553, 23 L.Ed. 588, that the private right to bear arms is not a 'fundamental' right under the Second Amendment to the United States Constitution." (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 312, fn. 4.)

Delacy has misread a footnote in *Heller* stating that rational basis review is not the proper standard under the Second Amendment. (AOB 9, citing *Heller*, 128 S.Ct. at p. 2817, fn. 27.) The footnote assumes the challenged law would "overcome the right to keep and bear arms." (*Ibid.*) The high court addressed the laws struck down there. Those laws banned anyone from possessing a handgun or any other gun in the home unless dissembled or rendered inoperable, even when necessary for self-defense.

outright ban are subject to heightened scrutiny, the high court consciously left the scope of the amendment and the level of scrutiny for gun laws to another day, but it did decide the "longstanding prohibitions" illustrated by its list are outside the amendment altogether. (*Ibid.*)

Consistent with *Heller*, this court decides a facial challenge to a gun law by deciding if it falls into one of the "presumptively lawful regulatory measures," and if the law does, the challenge fails regardless of the elevated scrutiny that might apply to other gun laws. (See *Yarbrough*, *supra*, 169 Cal.App.4th at p. 314 ["Treating as criminal defendant's concealment of a firearm under his clothing on a residential driveway that was not closed off from the public and was populated with temporary occupants falls within the 'historical tradition' of prohibiting the carrying of dangerous weapons in publicly sensitive places."].)

D. The Facial Challenge Fails

Under *Yarbrough*'s approach to *Heller*'s regulatory exceptions, section 12021, subdivision (c)(1) falls squarely within "historical traditions." Delacy's facial challenge can be quickly rejected because it is not true that the gun law is "completely invalid and unenforceable in all circumstances." (AOB 26.)

The gun law can be triggered by misdemeanors involving arms that are outside the Second Amendment's scope as reflected in *Heller* (e.g., armor piercing rounds and machine guns). Other triggering offenses include alternatively-punishable misdemeanor/felonies (i.e., "wobblers" like assault with a deadly weapon, witness intimidation, and criminal threats). Felonies having been included previously (§ 12021, subd. (a)(1)), the actual punishment imposed is not significant. Additional dispossession exceptions in *Heller*—possession in sensitive places and by mental incompetents—are brought into play by still other enumerated misdemeanors (e.g., possession of firearms in public buildings and

undisturbed by the Supreme Court's opinion." (*Id.* at p. 576, see also *Yarbrough*, *supra*, 169 Cal.App.4th at p. 313 [observing "[s]ection 12025, subdivision (a), does not broadly prohibit or even regulate the possession of a gun in the home for lawful purposes of confrontation or self-defense, as did the law" in *Heller*].)

Flores likewise recognizes that no reason exists to distinguish between section 12021, subdivision (c)(1) and the felon-dispossession laws approved in *Heller*. "The public interest in a prohibition on firearms possession is at its apex in circumstances, as here, where a statute disarms persons who have proven unable to control violent criminal impulses." (*Id.* at p. 575; see also *People v. Villa* (2009) 178 Cal.App.4th 443, 448-450 [applying *Flores*'s rationale to reject *Heller* challenge to section 12021, subdivision (e), which prohibits a ward who commits a serious or violent offense from possessing a firearm until the age of 30].)

Section 12021, subdivision (c)(1)'s 10-year suspension on gun possession by misdemeanants is triggered by offenses reflecting a potential for unlawful force and violence, or involving arms of a type outside the amendment, or restricting incompetents disqualified to handle arms. In light of the presumptively valid regulatory measures listed in *Heller,* and the holding in *Flores*, the statute is facially within the "historic tradition" of permissible firearm regulations under *Heller*.

E. The As-Applied Challenges Fail

Delacy makes two as-applied attacks on section 12021, subdivision (c). Neither finds its target.

1. Battery as a "nonviolent" misdemeanor

Delacy asserts that prohibiting gun possession due to a misdemeanor battery conviction infringes Second Amendment rights. He observes

can dispossess misdemeanants who actually use force. Nothing in *Heller* suggests otherwise. The high court said there: "*Assuming that Heller is not disqualified from the exercise of Second Amendment rights*, the District must permit him to register his handgun and must issue him a license to carry it in the home." (*Id.* at p. 2822, italics added.)[6] Rejecting the problem of handgun violence as justification for a total ban on possessing an operable gun in the home, the court concluded, "The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, *see supra, at 2816-2817, and n. 26.* But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include *the absolute prohibition* of handguns held and used for self-defense in the home." (*Id*, at p. 2822, italics added.) Justice Breyer in dissent responded to the court's rejection of plaintiff Dick Heller's argument that every gun law should be strictly scrutinized by observing that "the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws–prohibitions on concealed weapons, *forfeiture by criminals of the Second Amendment right,* prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales–whose constitutionality under a strict scrutiny standard would be far from clear. See *ante,* at 2816." (*Id.* at p. 2851 (dis. opn. of Breyer, J., italics added.)

Heller's discussion emphasizes the amendment's core protection against government completely banning firearms from law-abiding citizens. It cites the portion of the opinion that makes clear the holding leaves unaffected longstanding prohibitions on firearm possession in numerous

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[6] Dick Heller, the civil plaintiff in *Heller*, abandoned his earlier challenge to a District licensing requirement in the Supreme Court, thereby acceding to the District's apparent restrictions against licensing felons and the insane. (See 128 S.Ct. at p. 2819.)

to be necessary." (*Id.* at p. 26.) Thus, "brief use of a concealable firearm, without predesign or prior possession of the weapon, in the exercise of the right to self-defense, defense of others, or defense of habitation would not constitute the possession, custody, or control of the firearm which the Legislature has prohibited in section 12021 . . . ." (*Id.* at pp. 26-27.)

Despite Delacy's eccentric argument that *King*'s limited exemption under section 12021 for temporary possession of a firearm for defense by a person within the restricted class "violates the Second Amendment on its face" (AOB 13), the actual claim is that *Heller*'s recognition of a personal right to keep and bear a firearm in the home is incompatible with the limited self-defense privilege recognized in *King*. Delacy, who never made that argument in the trial court, lacks standing to attack the gun law on this ground. One will not be heard to attack a statute on grounds not shown to be applicable to himself; a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations. (*In re Cregler* (1961) 56 Cal.2d 308, 313, accord, *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 610.)

Delacy kept his guns in his home, but he never claimed it was for the purpose of arming the home or for any kind of defense. To the contrary, he testified his firearms were for his recreation outside the home. (CR142103 RT 574, 576.) Evidently anticipating the standing objection, Delacy claims the *King* doctrine left him "unable to assert that he kept the gun for the purpose of self-defense." (AOB 16.) He cites nothing. Recreation, silent probation conditions, and lack of notice of the gun law prohibition are not defenses to a charge under the gun law any more than is arming of the home. Despite the fruitlessness of introducing the evidence to support his mistake of law claim, Delacy did so and argued such a defense at his court trial. (CR142103 RT 583-585.) Nothing prohibited him from instead

the methods chosen to achieve those objectives. A line of substantive due process cases generally holds that the guaranty of due process in the Fifth and Fourteenth Amendments includes a 'substantive' component that restricts infringement upon certain fundamental 'liberty interests.' [Citation.] The substantive due process doctrine thus acts as a limitation on unreasonable and arbitrary legislation. [Citations.] The scope of the 'substantive due process' concept is indefinite. '. . . the notions of fairness and reasonableness which make up the content of substantive due process . . . are too general to offer any definite test. . . .' [Citation.] Since there is no definite test to determine whether a statute complies with the 'notions of fairness' which make up the concept of 'substantive due process,' and since there is no definite test to determine whether a statute is 'unreasonable' or 'arbitrary,' courts must be cautious not to interfere with proper legislative judgment when considering claims of violation of substantive due process. Thus '"[s]substantive due process" analysis must begin with a careful description of the asserted right [allegedly infringed upon], for "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field."' [Citation.] '". . . a Legislature does not violate due process so long as an enactment is . . . reasonably related to a proper legislative goal. The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute."' [Citation.]" (*California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1330; see *People v. Santos* (2007) 147 Cal.App.4th 965, 979.)

Delacy's substantive due process claim rests again upon his assertion of a fundamental Second Amendment right to keep a firearm in his home for self-defense. (AOB 10.) Delacy has not and cannot establish a historic

to keep firearms out of the hands of criminals of the designated class. "[L]egislation does not violate substantive due process so long as it reasonably relates "'to a proper legislative goal.'" (*People v. Tr*avis (2006) 139 Cal.App.4th 1271, 1293.) "'As long as the statute rationally serves its purpose, it is not made arbitrary or capricious because it might have been drawn more narrowly or widely.'" (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1356, quoting *People v. Mitchell* (1994) 30 Cal.App.4th 783, 798.)

Heller does not support the implication of Delacy's argument that the government must either allow the possession of a firearm in the home by restricted persons or else disallow such persons from using a firearm in self-defense. That argument merely would put the government, in theory at least, to a choice of alternatives, without logically compelling the selection of either one. Such a choice is not involved here. *Heller* expressly rejects the proposition that it precludes governmental regulation of gun possession based on individuals' criminal history or dangerousness. Accordingly, Delacy's argument is groundless that section 12021, subdivision (c)(1) violates a personal right of restricted persons to arm the home for defense and violates substantive due process by the narrowness of its self-defense exception.

Finally, even if this court accepted Delacy's argument, and assuming he possessed at least one lawfully registered rifle commonly held by law-abiding citizens for home defense, Delacy would have proven, at most, a constitutional entitlement to an operable firearm for defense of his home under *Heller*. He still would not have an as-applied constitutional right to four firearms in his bedroom. His current probation order would be sustainable on the basis of three valid convictions of felony gun possession, even if his constitutional protection precluded conviction on all four counts. (See *Heller*, *supra*, 128 S.Ct. at p. 2822 ["Assuming that Heller is not

that laws or other governmental regulations be justified by sufficient reasons. The necessary quantum of such reasons varies, depending on the nature of the classification. [¶] Legislation which discriminates on the basis of a 'suspect class' or touches on a fundamental right is subject to judicial examination under the 'strict scrutiny' test. [Citations.] However, most legislation challenged under the equal protection clause is evaluated merely for the existence of a 'rational basis' supporting its enactment. [Citations.]" (*In re Evans* (1996) 49 Cal.App.4th 1263, 1270 (*Evans*).) The strict scrutiny test requires the state to establish that the interest intended to be served by the challenged classification is necessary to achieve a compelling state interest. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.) By contrast, the question under the rational relationship test is "whether the classification bears a fair relationship to a legitimate public purpose. [Citation.]" (*Evans*, *supra*, 49 Cal.App.4th at p. 1270.)

B. Persons Convicted Of Equivalent Misdemeanors In Other States Are Not Similarly Situated to Delacy

The first prerequisite to a successful equal protection claim "'is a showing that the "state has adopted a classification that affects two or more similarly situated groups in an unequal manner."'" (*People v. Massie* (1998) 19 Cal.4th 550, 570-571.)

Delacy is not similarly situated to persons who possess firearms despite equivalent misdemeanor convictions from other jurisdictions. He pleaded no contest to misdemeanor battery when he had the right to an attorney with the duty of advising him of the direct consequence of the plea that dispossessed him of firearms in California for 10 years. By contrast, a person who has sustained an equivalent conviction in another state would not be told the consequence of leaving that jurisdiction and possessing a gun in California. That is true whether a plea or a trial resulted in the extrastate conviction. Accordingly, Delacy is not similarly situated as

To begin with, the inclusion of extrastate offenses among the triggering convictions in subdivision (a)(1), but not in subdivision (c)(1) of section 12021, could reflect the greater legislative prevalence and public awareness of felon-with-gun prohibitions, as well as the enhanced prosecutorial attention given to keeping guns out of the hands of felons, both inside and outside this state. An otherwise uninformed convicted person coming to this state more likely can anticipate, and hence be in a position to comply with, felony dispossession laws than with misdemeanor dispossession laws, or so, at least, the Legislature might conclude.

The Legislature also might perceive extrastate misdemeanor convictions records to be incomplete, unreliable, expunged, sealed or otherwise unavailable in ways and to degrees extrastate felony records are not. It could conclude that law enforcement would be so hampered in acquiring adequate records of lesser grade convictions from other jurisdictions that proof of the prior would be unacceptably burdensome and perhaps entail unacceptably disparate results in prosecutions. The Legislature also might conclude finite resources are better directed at law enforcement obtaining extrastate felony conviction records in more serious cases like those brought under section 12021, subdivision (a)(1).

Alternatively, the Legislature might have contemplated that a charge under one of the enumerated misdemeanor statutes would trigger the defendant's right to counsel in California, but the same crime might be punished only by a fine, and, therefore, resolved without recourse to counsel in other jurisdictions. (See *Lewis v. United States* (1980) 445 U.S. 55, 67 [upholding under equal protection challenge "Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness"].) Furthermore, California law restricts firearms possession by a defendant convicted of a

E. If The Statute Violates Equal Protection, The Proper Remedy Is To Expand The Class Rather than Strike the Law

If this court concludes section 12021, subdivision (c) (1) violates equal protection, the proper remedy is to interpret the statute as including extrastate convictions, rather than strike the law. (See *People v. Hofsheier*, *supra*, 37 Cal.4th at pp. 1207–1208; *Evans*, *supra*, 49 Cal.App.4th at pp. 1273–1274; see also *Flood v. Riggs* (1978) 80 Cal.App.3d 138, 156 ["wherever possible courts should presume that the Legislature intended to enact a valid statute and to interpret its provisions so as to preserve their constitutional validity."].)

"Where a statute is defective because of underinclusion, there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the Legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." (*Califano v. Westcott* (1979) 443 U.S. 76, 89; see *also Kopp v. Fair Political Practices Commission* (1995) 11 Cal.4th 607.) In selecting between nullification and extension of a statute, a court considers the presumed desires of a legislature if faced with the same decision. (*Heckler v. Matthews* (1984) 465 U.S. 728, 739, fn. 5; *Kopp*, *supra*, 11 Cal.4th at p. 635.)

In rejecting an equal protection attack on another ground to the gun law, Division Two of the First District remarked, "[T]he *Evans* court correctly used the remedy of expanding the inclusionary provision of the statute permitting petition for restoration of the right to possess firearms rather than nullifying the entire statute." (*People v. Mesce* (1997) 52 Cal.App.4th 618, 627; see *Evans*, *supra*, 49 Cal.App.4th at pp. 1274-1275.) The same remedy of inclusion should apply here. Section 12021's history is replete with instances of legislative expansion of its scope such as

evidence at his jury trial on the ammunition charges, but on his defense counsel's argument at the later court trial on the gun charges. (AOB 28, citing "X RT 583") At the jury trial, no evidence showed what, if anything, anybody told Delacy anything concerning a prohibition of guns or ammunition in 2006. As the prosecutor pointed out to the jury, defense counsel's argument about impressions Delacy had as a result of the battery case relative to his possession of arms was not supported by an evidence in the case. (CR142660 RT 599-601.)

Delacy testified to his jury that he was an avid hunter, kept about 1000 rounds of ammunition for hunting and trap shooting, and during the previous two years had owned four or five shotguns registered after a background check for restricted offenses in 2006, the year he had pleaded no contest to battery and signed the probation order. (CR142660 RT 552-554.) That evidence shows no mistake of fact or law about Delacy's possessing ammunition. Registering one's firearms or engaging in recreational shooting is not a defense to unlawful possession of ammunition. As to the 15-day background check for restricted offenses the same year he was placed on probation for the battery conviction, Delacy never said the 15-day check was *after* he pleaded guilty to battery or that the battery conviction (and indeed any of his convictions) was disclosed when he registered his guns, bought ammunition, or secured hunting permits. (CR142660 RT 552-554.) The evidence simply does not show any mistake of fact by Delacy.

B. The Court Properly Denied the Mistake of Fact Instruction

Delacy argues he was entitled to a mistake of fact instruction anyway. He observes there "is no evidence that [he] received any notice of the time of his plea in that [2006 battery] case that his right to own a firearm or ammunition would be revoked for [10] years." (AOB 33.) While section

called maxim that everyone is presumed to know the law, and the rule that ignorance of the law is not an excuse for crime, are based upon the practical consideration of public necessity. If the act itself is punishable when knowingly done, it is immaterial that the defendant thought it was lawful. Criminal intent is merely the intent to commit the prohibited act, not the intent to violate the law." (1 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Defenses, § 36, p. 367; *People v. Cole* (2007) 156 Cal.App.4th 452, 483.)

As the trial court instructed, the crime required general intent. (CR142660 RT 580, 583.) A mistake of law is no defense to a general intent crime. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137.) As explained in *People v. Snyder* (1982) 32 Cal.3d 590, 592-593, (*Snyder*) "'It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. . . . If a person accused of a crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result.' [Citations.] Accordingly, lack of actual knowledge of the provisions of section 12021 is irrelevant; the crucial question is whether the defendant was aware that he was engaging in the conduct proscribed by [the] section. [Citations.]" The court found it was not a defense to a charge of a violation of section 12021 (based upon a defendant's prior conviction of a felony) that the defendant did not know of his legal status as a convicted felon, and that lack of such knowledge was no defense to that crime. "Thus, regardless of what she reasonably believed, or what her attorney may have told her, defendant was deemed to know under the law that she was a convicted felon forbidden to possess concealable firearms. Her asserted mistake regarding her correct legal status was a mistake of law, not fact. It does not constitute a defense to section 12021." (*Snyder*, *supra*, at p. 593, italics omitted.) Under this authority, it is not a defense that Delacy was

"only in very unusual circumstances such as these that the giving of these instructions is necessary." (*Id.* at p. 499.) *Snyder* later rejected the defendant's reliance upon *Bray*, noting that she "made no attempt to inform government officials of the circumstances of her conviction or to seek their advice regarding her correct legal status." (*Snyder*, *supra*, at p. 595.)

Whether or not *Bray* is correctly decided, it is distinguishable. Delacy testified he had his shotgun shells as a recreational shooter with registered guns and a hunting permit. He never said he acquired those arms after making a full disclosure of his battery conviction and received governmental assurances in response to his disclosure that the conviction had no affect on his possession of ammunition. "A mere belief, unsupported by a showing of due care and bona fide, reasonable effort to ascertain the facts, is insufficient to constitute a mistake of fact defense." (*People v. Dillard* (1984) 154 Cal.App.3d 261, 267.)

Finally, mistakes of fact disprove a criminal charge if the mistaken belief is honestly entertained based upon reasonable grounds, and of such a nature that the conduct would have been lawful and proper had the facts been as they were reasonably supposed to be. (*People v. Scott* (2000) 83 Cal.App.4th 784, 801.) Here, it is irrelevant what, if anything, Delacy believed about probation conditions or court orders in his battery case in relation to his ammunition. It is Delacy's conviction of the battery, not his probation conditions or any court order, that brought him within section 12021 and thereby made him subject to the ammunition restriction in section 12316, subdivision (b)(1). Any mistaken belief on his part that keeping his guns and ammunition would not violate his probation terms would not render his conduct lawful under the ammunition statute even if the facts had been as he believed. Accordingly, the instruction was properly refused. (See *People v. Howard* (1976) 63 Cal.App.3d 249, 257 [claimed mistake as to felony status under *Bray* rejected in section 12021

instructed the jury." (AOB 39-40.) To that point, we respond that the court did not have to instruct the jury on testimony Delacy had yet to give.[9]

Penal Code section 1138 imposes on the trial court a mandatory "duty to clear up any instructional confusion expressed by the jury. [Citations.]" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) "This does not mean the court must always elaborate on the standard instructions. When the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 (*Beardslee*).) Violation of the statute implicates a defendant's right to a fair trial conducted substantially in accordance with the law. (*People v. Frye* (1998) 18 Cal.4th 894, 1007-1008, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Delacy argues that "a lack of knowledge of the contraband nature of the ammunition should be a defense." (AOB 39.) He states that the court had to "cite the jury to what the prosecutor had to prove and whether appellant's lack of intent to commit a crime undermined the charge." (AOB 41.) Delacy forfeited this claim as he did not request such an instruction; his counsel instead said that Delacy had not violated probation. (CR142660 RT 609.) "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general

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[9]Actually, he never did give such testimony. In the later court trial, Delacy simply said he discussed his guns with the judge and a "stipulation" (missing from the record) restricted his possession of weapons to hunting season, not that someone in authority actually told him the gun law was suspended or overridden by his plea deal or by his probation order. (CR142103 RT 572-575, 578.)

controlling where CALJIC No. 3.30 given].) Nor was evidence introduced showing an unintentional or temporary possession of the shotgun shells.

In any event, a conviction will not be reversed for a violation of section 1138 unless prejudice is shown. (*People v. Frye*, *supra*, 18 Cal.4th at p. 1007.) There was no prejudice here. Delacy's complaint is that the court's response was incomplete. However, the jury did not ask for further assistance. It is clear, from the record, that the jury understood how to ask for additional help on the law if necessary. It later asked for more information on the law but not on this subject. It sought and received an appropriate response to its further inquiry whether it could make a statement that Delacy lied in his testimony or could find him "guilty of perjury or some other charge?" (CR142660 CT 84 and RT 610.) Any error was harmless and there was no miscarriage of justice. (*Id.* at pp. 1007-1008.)

V. THE COURT ORALLY IMPOSED THE COURT SECURITY FEE, RESTITUTION FINE AND PROBATION REVOCATION FINE AT SENTENCING BY GRANTING PROBATION ON THE TERMS AND CONDITIONS IN THE PRESENTENCE REPORT; DELACY FORFEITED ANY OBJECTION TO THE PROCEDURE

Delacy argues the court did not orally impose a court security fee, the restitution fine, or suspended probation revocation fine. (AOB 43-44.) He appears to argue this claim only as to case number CR142103, though it would seem to apply equally to case number CR142660. Regardless, the argument is mistaken. The record shows no "conflicting sentence entered in the clerk's minutes" respecting fees and fines. (AOB 43.) He is also mistaken that "nothing more was ordered by the judge," than a presentence report fee and an annual probation supervision fee. (AOB 44.)

As reflected in the statement of the case, the court orally granted probation on the terms and conditions in the presentence report, modified as to matters not relevant to this issue. (CR142103 RT 824, lines 8-9 and 825,

(1989) 213 Cal.App.3d 992, 998 [defendant forfeited challenge to direct restitution order for lack of specificity by not contesting it at sentencing].)

Even if Delacy had preserved such an argument, it would fail. No authority requires that after a court grants probation by adopting terms and conditions in a presentence report, it must read them aloud into the record. Instead, Penal Code section 1213, subdivision (b) makes it the trial court's duty to "furnish the executive officer a commitment document (probation minute order) bearing the 'form and content' required for an abstract," meaning an "order specifying the statutory bases of all fees, fines, and penalties imposed upon defendant." (*People v. Eddards* (2008) 162 Cal.App.4th 712, 718, quoting *People v. High* (2004) 119 Cal.App.4th 1192, 1200 [requiring "[a]ll fines and fees [to] be set forth in the abstract of judgment," with the statutory basis, since without the specification Department of Corrections and Rehabilitation cannot fulfill statutory duty to collect and forward deductions from prisoner wages to the appropriate agency].) Delacy has not complained the probation minute order fails to meet that standard. Therefore, he fails to show sentencing error.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 12,189 words.

Dated: April 22, 2010

EDMUND G. BROWN JR.
Attorney General of California

Martin S. Kaye for Laurence K. Sullivan

LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Rick Chalres Delacy***
No.: **A125803**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 22, 2010, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

James M. Crawford, Esq.
528 North Glassell Street
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(2 copies)

County of Napa
Criminal Courthouse
Superior Court of California
1111 Third Street
Napa, CA 94559

The Honorable Gary Lieberstein
District Attorney
Napa County District Attorney's Office
931 Parkway Mall
Napa, CA 94559

Attention: Executive Director
First District Appellate Project
730 Harrison St., Room 201
San Francisco, CA 94107

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 22, 2010, at San Francisco, California.

Tan Nguyen
Declarant

Tan Nguyen
Signature

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