

1st CRIMINAL NO.
A125803

**IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA**

FIRST APPELLATE DISTRICT

DIVISION 1

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent

vs.

RICK CHARLES DELACY

Defendant and Appellant

**Appeal from the Superior Court of Napa County
Honorable Diane M. Price, Judge Presiding
Case No.'s CRC142103/CRC142660**

APPELLANT'S REPLY BRIEF

James M. Crawford (CSB #171713)
Attorney at Law
528 North Glassell
Orange, California 92867
(714) 288-0180
Fax: (714) 288-0998
Attorney for Appellant

By Appointment of the Court of Appeal
(Independent Case System)

 **COPY**

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INTRODUCTION

Appellant RICK CHARLES DELACY replies to Respondent's Brief with the attached Memorandum of Points and Authorities.¹ Appellant would also incorporate his Opening Brief into this Reply and is respectfully providing the court with responses to the more salient points of Respondent's Brief. Any failure by appellant to respond to or address any point raised in Respondent's Brief is not to be deemed a concession to these issues.

¹ All further references to "R.B." shall be to Respondent's Brief.

I.

IT WOULD BE IMPROPER JUDICIAL LEGISLATION FOR THIS COURT TO EXPAND THE SCOPE OF PENAL CODE SECTION 12021, SUBDIVISION (c) (1) TO INCLUDE A CLASS OF PERSONS NOT EXPRESSLY INCLUDED IN THE STATUTE TO REMEDY THE EQUAL PROTECTION VIOLATION

Within his Opening Brief, appellant argued his convictions must be reversed because Penal Code section 12021, subdivision (c) is unconstitutional under the Second and Fourteenth Amendments to the United States Constitution. Further, appellant argued section 12021 violated Equal Protection under the state and federal constitutions because it punishes persons who have suffered certain California convictions and exempts those with equivalent convictions from other states or countries.

Respondent argues there are no constitution violations. Further, respondent argues that if section 12021, subdivision (c) does violate the Equal Protection Clause, then the appropriate remedy is for this Court to expand the class of persons precluded from possessing firearms to include those who have suffered extrastate convictions. (RB 27-28.) There is no merit to respondent's suggested remedy for this constitutional violation. Rather, this Court should declare section 12021 unconstitutional as violative of the Equal Protection Clauses of the state and federal constitutions.

Respondent cites *People v. Hofsheier* (2006) 37 Cal. 4th 1185, 1207-1208 as support for the proposition that if an equal protection violation is found, "the proper remedy is to interpret the statute as including extrastate convictions, rather than strike the law." (RB p. 27.) *Hofsheier* does not support this. In *Hofsheier*, a 22- year-old man pled guilty to oral copulation with a 16-year-old girl under section 228a, subdivision (b)(1) and was ordered

to register as a sex offender under the mandatory registration provision of section 290. Defendant argued he was denied equal protection because mandatory registration was not required, under the same circumstances, of a person convicted of unlawful sexual intercourse with a minor pursuant section 261.5. The California Supreme Court could perceive no reason why the legislature would find that persons convicted of voluntary oral copulation with adolescents 16 to 17 years old constituted a class of particularly incorrigible offenders who required lifetime surveillance as sex offenders. The court therefore held that the statutory distinction in section 290 requiring mandatory lifetime registration of all persons who, like defendant, were convicted of voluntary oral copulation with a minor of the age of 16 or 17, but not of someone convicted of voluntary sexual intercourse with a minor of the same age violated equal protection. The court concluded that the legislature would probably find elimination of section 290's mandatory lifetime registration requirement for persons convicted of oral copulation under section 288a, subdivision (b)(1), for engaging in voluntary oral copulation with 16- or 17-year old minors to be the preferable remedy.

In this case, section 12021 subdivision (c) (1) makes a distinction between individuals convicted of the same misdemeanor based on whether the misdemeanor was committed in California or out of state. The similarities between the act of California misdemeanor battery and the act of a misdemeanor battery in another state are even greater than the similarities of the physically different acts of voluntary oral copulation and voluntary intercourse. Therefore, disparate treatment under the law of California misdemeanants and extrastate misdemeanants is even less justified.

Respondent also cites *In re Evans* (1996) 49 Cal.App.4th 1263 to support the proposition that if an equal protection violation is found, “the

proper remedy is to interpret the statute as including extrastate convictions, rather than strike the law.” (RB p. 27.) *Evans* does not support this. Rather, *Evans* would support striking 12021 subdivision (c)(1). In *Evans*, the Court extended the class in section 12021 subdivision (c)(3) eligible for relief from section 12021's prohibition on firearms. The *Evans* court noted that “the Legislature has evidenced a consistent concern for those... ‘surprised’ by the addition of misdemeanor offenses to section 12021.” (*Id.* at p. 1273.) The *Evans* Court’s chosen remedy expanded the class eligible for the relief from, not the class subject to, the firearms prohibition. Similarly, individuals convicted of misdemeanors outside of California would likely be “surprised” by being made subject to the firearms prohibition of section 12021 because they “would not be told the consequence of leaving that jurisdiction and possessing a gun in California.” (RB 23.)

Respondent asserts the Legislature rationally chose to address only California convictions in section 12021 subdivision (c)(1). (RB pp. 24-26.) The reasons respondent gives in its argument supporting a rational basis for the Legislature’s differing treatment of California and extrastate misdemeanors all suggest the legislative preference is NOT to expand the class of persons covered.

Without conceding heightened scrutiny does not apply, appellant asserts all respondent’s arguments of a rational basis served by intentionally treating persons like appellant with qualifying California convictions differently from those with equivalent out of state convictions actually show the legislative preference is not to expand the class covered by section 12021. As respondent notes, “In selecting between nullification and extension of a statute, a court considers the presumed desires of a legislature if faced with the same decision. [citation]” (RB p. 27.) Here, when the statute is read as a whole, it is clear that

the legislature was in fact “faced with the same decision” and chose to not extend the class of covered persons. “[T]he inclusion of extrastate offenses among the triggering conviction in subdivision (a)(1), but not in subdivision (c)(1) of section 12021” clearly shows the Legislature contemplated the implications of including extrastate misdemeanor convictions and chose against it. (RB p. 25.)

Section 12021, subdivision (c) is unconstitutional under the Second and Fourteenth Amendments to the United States Constitution. Further, section 12021 violates the Equal Protection clauses under the state and federal constitutions because it punishes persons who have suffered certain California convictions and exempts those with equivalent convictions from other states or countries. Therefore, appellant’s conviction should be reversed.

II.

THE TRIAL COURT ERRED IN DENYING A MISTAKE OF FACT INSTRUCTION

Within his Opening Brief, appellant argued the trial court erred in denying his requested mistake of fact instruction since he had been advised by a trial court at his earlier sentencing that he could lawfully possess firearms during hunting season. Respondent argues the trial court properly denied the instruction because the mistake was one of law and not of fact. (RB 30-34.)

Respondent is mistaken as the evidence showed appellant was led to believe that under certain factual situations he was lawfully entitled to be in possession of firearms. This was a mistake of fact and not one of law.

Evidence showed that appellant was told by the trial court he could lawfully possess firearms and logically ammunition, during hunting season regardless of his misdemeanor battery conviction. Appellant was under the mistaken assumption that he could lawfully possess firearms and ammunition during hunting season. The items were discovered during wild turkey season. Because appellant was so advised by the first trial judge, appellant believed he could lawfully possess firearms and ammunition and as such, lacked capacity to form the requisite criminal intent to be in violation of section 12316. This was not an instance where appellant was simply ignorant of the law. Instead, appellant was misled as to his classification under the law. Basing his beliefs upon the words of the first trial judge, appellant mistakenly believed his factual circumstances to be such that he could lawfully possess firearms and ammunition.

Respondent attempts to distinguish this case from *People v. Bray* (1975) 52 Cal.App.3d 494 by arguing appellant failed to exercise due care and make reasonable efforts to ascertain his legal status. (RB 33.) Respondent is

mistaken. At trial, evidence was presented that appellant made the effort to register his weapons. Further, the evidence at trial established that when appellant was previously convicted of misdemeanor battery, he was told by the judge that he could lawfully possess his guns during hunting season.

People v. Snyder (1982) 32 Cal.3d 590, affirmed *Bray*'s holding that a mistake of fact as to one's status based on mis-advice or unusual circumstances is a defense to unlawful possession of a firearm. (*People v. Snyder, supra*, 32 Cal.3d 590, 595 citing *People v. Bray, supra*, 52 Cal.App.3d 494.) The advise appellant was given by the trial judge creates the unusual circumstances to which *Snyder* and *Bray* apply because appellant registered his guns and discussed his ability to keep his guns with the trial judge, therefore making an "attempt to inform government officials of the circumstances of [his] conviction or to seek their advice regarding [his] correct legal status." (*Snyder, supra*, at p. 595.)

As such, there was substantial evidence to support a mistake of fact instruction. The trial court erred in denying the requested instruction and this Court should reverse appellant's conviction.

III.

THE TRIAL COURT GAVE AN INADEQUATE RESPONSE TO THE JURY REGARDING THE KNOWLEDGE REQUIRED FOR THERE TO BE A VIOLATION OF THE AMMUNITION POSSESSION COUNT

Within appellant's Opening Brief, he argued the trial court gave an inadequate response to the jury question that he had to have knowledge it was a violation of the law to possess ammunition for there to be a violation of section 12316, subdivision (b) (1). Respondent argues that the trial court's response, "knowledge that it is unlawful to possess ammunition is not an element of the crime charged in Count 1," was an adequate response. (RB 34-37.) Respondent is mistaken.

Section 12316 is limited to persons who have suffered convictions under section 12021. The knowledge requirement in section 12021 should equally apply to a violation of section 12316 or 12316 becomes a strict liability crime. Here, the trial judge advised appellant he could possess firearms and ammunition. The trial judge's response to the jury inquiry removed from the prosecution the burden of proving appellant's knowledge of the unlawful nature of possessing ammunition. As such, appellant was not properly advised of the contraband nature of the firearms or ammunition.

Further, respondent argues appellant's claim "a lack of knowledge of the contraband nature of the ammunition should be a defense" and that the trial 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" was forfeited since trial counsel never requested such an instruction. (RB 35.) As the trial court has a sua sponte duty to assure that a jury is adequately instructed on the elements of the crime, respondent is mistaken.

For the prosecution to prove all elements of the offense beyond a reasonable doubt, it must also prove that defendant had the requisite knowledge his possession of the ammunition was unlawful. Failure to adequately instruct on knowledge raises the same constitutional concerns as the failure to instruct on an element of a crime. Reasonable doubt that defendant acted unlawfully must result in acquittal.

With an adequate instruction to what the prosecution needed to prove, and applying the knowledge requirement of 12021 to 12316, there could have been reasonable doubt in the jury's mind whether appellant's conduct was unlawful. The instruction was therefore both inadequate and prejudicial. During deliberations, the jury had a question about appellant's knowledge that it was unlawful for him to possess ammunition. Because appellant reasonably relied on the first judge's assurance that he could lawfully possess firearms and ammunition and not be in violation of the law, appellant's knowledge would have been a significant issue for the jury. The trial court's response to the jury inquiry was both an inadequate and inaccurate statement of the law. This was not harmless error. Therefore, the trial court's inadequate response to the jury inquiry denied appellant due process (U.S. Const. 14th Amend.), was prejudicial, and requires reversal.

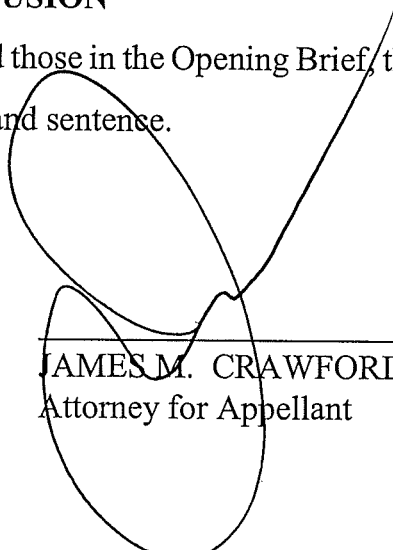
IV.

CONCLUSION

For the reasons stated herein and those in the Opening Brief, this Court should reverse appellant's conviction and sentence.

Dated: June 1, 2010

By:



JAMES M. CRAWFORD
Attorney for Appellant

CERTIFICATE OF LENGTH

I, James M. Crawford, counsel for appellant certify pursuant to the California Rules of Court, that the word count for this document is 2,036 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204, subdivision (c) (1). This document was prepared in WordPerfect, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Orange, California, on June 1, 2010.

Dated: June 1, 2010

By: _____

JAMES M. CRAWFORD
Attorney for Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to the within action; my business address is 528 North Glassell, Orange, California 92867.

On June 3, 2010, I served the foregoing documents described as **APPELLANT'S REPLY BRIEF** on the interested parties in this action by placing a true copy thereof in sealed envelopes addressed as follows:

by transmitting via facsimile the document (s) listed above to the fax numbers(s) set forth below, or as stated on the attached service list, on this date before 5:00 p.m.:

by placing the document(s) listed above in sealed envelope (s) with postage thereon fully prepaid, in the United States mail at Orange, California, addressed a set forth below, or as stated on the attached service list.

Office of the Attorney General
455 Golden Gate Avenue
San Francisco, CA 94102

Napa County District Attorney
931 Parkway Mall
Napa, CA 94559

Napa County Superior Court
Attn: Clerk of the Court
Honorable: Diane M. Price, Presiding
825 Brown Street
Napa, CA 94559

Carl D. Spieckerman, Esq
Attorney at Law
P.O. Box 5074
Vallejo, CA 94591

First District Appellate Project
Attn. Paula Rudman, Esq.
730 Harrison Street, Suite 201
San Francisco, CA 94107

Rick C. Delacy, 199102513
Napa County Jail
1125 Third Street
Napa, CA 94559-2903

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY PERSONAL SERVICE I delivered such envelope by hand to the offices of the addressee.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 3, 2010 at Orange, California.

A handwritten signature in black ink, appearing to read 'Sheila Pastrana', written over a horizontal line.

Sheila Pastrana