

Admin.

December 23, 2013

Third Supplement to Memorandum 2013-54

New Topics and Priorities: Further Comments on Penal Code Section 32390

The following material was received by the Commission¹ at the meeting on December 13, 2013, in connection with the discussion of new topics and priorities, and is attached as an Exhibit:

- Exhibit p.*
- Glenn McRoberts, Michel & Associates (12/13/13)1

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

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Re: Request for Reconsideration of Issue at Commission's Annual Meeting: Deadly Weapons– Minor Clean-Up Issues

Dear Honorable Commission Members:

We again write this Commission to address problems we perceive with the rewording of statutes governing “large capacity magazines.” I will not belabor points that were thoroughly analyzed in our previous letter, but instead will address the concerns of the Commission about the contents of that letter laid out in its Staff Memorandum 2013-54.

First, it is apparent from the Commission's Staff Memorandum that there is a misunderstanding about our position. The memorandum states:

As for the proper interpretation of former Section 12029, some evidence supports Mr. Michel's view — i.e., that a large-capacity magazine legally possessed before January 1, 2000, is not subject to seizure as a nuisance.

To be precise (which is paramount in this context), our position is actually:

that a large-capacity magazine legally possessed before January 1, 2000, is not *[necessarily / per se / whenever not being used as indicated in Sections 32415-32425]* subject to seizure as a nuisance.

In other words, we read the former Penal Code as saying a “large capacity magazine” (“LCM”) *can be* a “nuisance” but is not one *simply because it is an LCM*.

With that in mind, we respectfully do not understand why this is a “controversial” interpretation (setting aside the admittedly controversial nature of the underlying subject matter) based on: the original language of the relevant statutes, their original arrangement, and the legislative history, as those are described in our previous letter.

The Commission is concerned about maintaining some ambiguity it apparently perceives in the LCM statutes; specifically, the Commission believes it is unclear that the Legislature did not intend to make all LCMs “nuisances” under former Section 12029. But, that is simply not a reasonable interpretation of the statutes in light of the legislature choosing to: (1) segregate LCMs from Section 12020(a)’s other items in their own subsection; (2) not make “possession” of an LCM a crime while it is for those other items; and (3) create exceptions to the ban on transferring or importing LCMs for lending a “*lawfully possessed* large capacity magazine” in certain situations (Former Section 12021(b)(22)) or for gunsmiths returning such a magazine to its “*owner*” (Former Section 12021(b)(25)) or for a person bringing an LCM into the state “*who lawfully possessed* the large-capacity magazine in the state prior to January 1, 2000, lawfully took it out of the state, and is *returning to the state with the large-capacity magazine previously lawfully possessed in the state*” (Former Section 12021(b)(23)).

What the Commission points to as evidence of a possible alternative interpretation that all LCMs are “nuisances” pales in comparison. First, a mere unanswered question quoted in the legislative record from concerned citizens about the potential impact of the then proposed LCM law cannot trump an affirmative statement *from law-makers* that the bill “would make it a crime to do anything with detachable large-capacity magazines after January 1, 2000 – *except possess and personally use them . . .*” (Sen. Comm. Pub. Safety, SB 23, 1999 Cal. Stat. ch. 129 p. 7). And, the existence of a statute limiting when a specific item in Former 12020(a) would qualify as a nuisance does not mean that there must be such a provision for LCMs for them to avoid being considered a “nuisance.” In any event, such a provision would be superfluous, as it can be gleaned from Former 12020 itself that LCMs lawfully acquired before 2000 are not nuisances per se, while the same is not true where the *manner* (*i.e.*, concealed) an item listed in Section 12020 is carried dictates whether it is a nuisance, which is what the provision the Commission cites to does.

Thus, to the extent there even is an ambiguity – which we dispute because the law is quite clear it only applies to actions with magazines after 2000 and not possession of such magazines acquired prior to 2000 – the potential alternative interpretation that the Commission is concerned about would lead to an absurd result and, as such, should be rejected. It would mean that it is not

illegal to possess LCMs and that there are statutes expressly allowing the transfer or importation of certain LCMs, but those same LCMs can be confiscated as a “nuisance” per se. This is not like seizing a firearm in a domestic violence situation where there is a reason to seize a lawful item, this is seizing a lawful item due to its very nature. There is no other item that is treated that way.

It appears that what the Commission did in reorganizing the LCM statutes was to accidentally conflate subsections (1) and (2) of Former Section 12020(a) with respect to their interplay with Former Section 12029, not accounting for the fact that while LCMs are mentioned in Former Section 12020(a), their *possession* is not made illegal therein, but rather only certain *actions* performed with them. This is why all the exceptions to section 32310 found in sections 32415-32425 reference actions.

This is an understandable oversight (we missed it as well in assisting the Commission in its laudable efforts to reorganize the Penal Code). But it is one that needs to be fixed. As explained in our previous letter, the City of Los Angeles is currently considering adoption of an ordinance that would allow its officers to treat all LCMs as a “nuisance” based on current Section 32390. This is not a minor problem. Thousands and thousands of people who lawfully acquired LCMs will now, based on this misconstruction of the law, be at risk of having the property permanently seized. This includes many retired peace officers whose sidearm of choice is generally a semiautomatic pistol with a LCM, such as a Glock 17.

Therefore, based on the above and on our previous letter, we respectfully urge the Commission to reconsider its recommendation in its Memorandum to refrain from addressing this issue as suggested in our previous letter.

Sincerely,

Michel & Associates, P. C.

A handwritten signature in black ink, appearing to read "Glenn McRoberts", with a long horizontal line extending to the right.

Glenn S. McRoberts

GSM/sab