SENIOR COUNSEL:
C. D. MICHEL

SPECIAL COUNSEL:
W. LEE SMITH
JOSHUA R. DALE

ASSOCIATE COUNSEL:
SEAN A. BRADY
SCOTT M. FRANKLIN
HILLARY J. GREEN
THOMAS E. MACIEJEWSKI
CLINT B. MONFORT
JOSEPH A. SILVOSO, III
TAMARA M. RIDER
LOS ANGELES, CA

MICHEL & ASSOCIATES, P.C.
Attorneys at Law
Firearms - Environmental - Land Use - Employment Law

OF COUNSEL:
DON B. KATES
SAN FRANCISCO, CA

RUTH P. HARING
LOS ANGELES, CA

GLENN S. MCROBERTS
SAN DIEGO, CA

AFFILIATE COUNSEL:
JOHN F. MACHTINGER
JEFFREY M. COHON
LOS ANGELES, CA

DAVID T. HARDY
TUCSON, AZ

MEMORANDUM FROM THE DESK OF C. D. MICHEL

Date: April 4, 2011

Subject: Law Enforcement Authority When Encountering "Unloaded Open Carry"

INTRODUCTION

Law Enforcement Officers ("LEOs") have requested a legal opinion to provide guidance on the issue of law enforcement officer contact with persons carrying firearms in a manner consistent with state law, where there is no reasonable suspicion of unlawful activity. Specifically, we were asked the following:

1) Whether disarming the individual carrying the firearm openly in a holster is lawful?
2) Whether a pat down search of the individual during a Penal Code § 12031(e) check is lawful?
3) Whether visible serial numbers on a firearm may be checked against the Automated Firearm System?
4) Whether inconspicuous firearm serial numbers may be searched for and checked against the AFS?
5) Whether someone's identification can be demanded by LEOs to determine firearm eligibility status?

This memorandum will analyze the legal principles implicated when LEOs make contact with a person carrying a firearm openly in public. This memorandum also evaluates the legality of each of the above described activities individually. Because of the complexities of the issues raised in this memorandum, we have prepared a Quick Reference Procedure and Law Summary.[1] In preparing this memorandum, our office analyzed and considered the policies, memoranda, and information bulletins of cities and counties throughout California that address these issues.[2] Some of these authorities have taken

[1] Available upon request.

[2] Available upon request.

the position that each of these are lawful activities for officers to engage in whenever encountering a firearm being carried in public. They are, however, not entirely accurate - and will be addressed below.

Additionally, in preparing the responses, it became apparent that an unasked question must be addressed - whether Penal Code § 12031(e) – which allows officers to inspect any firearm carried in public to determine whether unloaded – is facially unconstitutional in light of recent Second Amendment rulings by the Supreme Court? This too will be addressed below.

BACKGROUND

I. The Unloaded Open Carry Movement

In recent years, members of some pro-gun rights groups have taken to publicly carrying unloaded firearms openly, primarily holstered handguns. The activity known as "unloaded open carry" or "UOC"[3] has evolved into an organized pro-Second Amendment"movement." There are now a significant number of people engaging in UOC throughout California.

Individuals engaging in UOC are typically trained to varying degrees in how to lawfully carry firearms and how to properly exercise their Constitutional rights. Those that engage in organized UOC tend to follow a certain protocol: they will meet in groups of people who also UOC – sometimes at a designated location, wear tight-fitted shirts or have their shirts tucked in well to avoid the potential for their shirt covering or "concealing" (even partially) their gun. When contacted by LEOs, these individuals do not consent to any search of their person or property, but they will not obstruct such a search. They wait for the officer to remove the handgun from their holster, inspect the firearm, await its return to their holster, then inquire as to whether they are free to move on. They remain silent about most everything else. Many of them will also refuse to provide identification if requested, which, as explained below, they are generally *not* required to do under California law.

In order to ensure that law enforcement officers do not exceed their authority, many individuals that engage in UOC activities record video and/or audio of police encounters. These records are often posted on the internet for public viewing. In some instances, individuals arrested for engaging in UOC have subsequently filed lawsuits challenging the acts of the arresting officers and the policies of departments. For example, the City of San Diego issued a finding of factual innocence and settled a lawsuit for $35,000.00 with an individual that was falsely arrested for two hours while openly carrying an unloaded firearm the officer wrongly believed was loaded because a loaded magazine was simultaneously carried by the plaintiff. As such, the issues at stake in any UOC encounter involved both public safety as well as the rights of law abiding citizens engaging in UOC activities.

II. California Law – Carrying Firearms in Public

[3] The term "UOC" will be used throughout this memorandum when referring to the practice of carrying a firearm unloaded an openly, in compliance with California law.

California law generally[4] prohibits the carrying in public of any loaded firearm[5] and any concealed handgun[6] - whether loaded or unloaded.[7] A firearm carried openly in a hip-holster is considered *not* concealed under California law.[8] This means that merely carrying a handgun in public that is neither concealed (e.g., in an exposed hip-holster) *nor* loaded does not in and of itself violate any law.[9]

III. "(e)-Checks" - A Limited Inspection Provision

Penal Code §12031(e) provides a limited inspection provision, which does not grant law enforcement the right to harass and interrogate individuals lawfully carrying firearms. Specifically, it states:

> In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.

These types of inspections have become known in the context of UOC situations as "(e)-checks"[10] (in reference to the PC section, 12031(e) that provides for such inspections). Breaking this down into sub-parts, we note that Penal Code §12031(e) is *very* limited.

A. "(e)-Checks" Only Permit Examination of A Firearm - Not A Person or Property

First, we note that an "(e)-Check" is expressly limited to "examining any firearm." It does not statutorily permit examination of an individual's person, vehicle, home, purse, wallet, identification, or other personal property. Had the legislature intended to permit such inspections, it would have drafted subdivision (e) in a much broader manner. Thus, the inclusion of the term "any firearm" is intended to act as a balance between the public's concern for safety and the law abiding individual's right to be free from reasonable search and seizure. *Because* of their limited application, "(e)-checks" have been held by

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[4] There are certain exceptions, including but not limited to law enforcement and those who possess a valid permit to carry a concealed handgun. (*See* Cal. Pen. § 12050).

[5] Pen. C. § 12031(a).

[6] A rifle, shotgun, or other firearm with a barrel length of greater than 16 inches, that is also not designed to be interchanged with a barrel less than 16 inches in length, is not a firearm capable of being concealed and can thus be generally be carried concealed or open unloaded without violating the Penal Code; PC § 12025 applies solely to handguns. (Pen. C. § 12001 (a).)

[7] Pen. C. § 12025.

[8] Pen. C. § 12025(f).

[9] Exceptions include but *are not limited to* carrying on the grounds of any public or private school providing instruction in kindergarten or grades 1-12, or within 1,000 feet thereof, in which case the gun must be unloaded *and* carried in a locked container (Cal. Pen. § 626.9).

[10] The term "(e)-check" will be used throughout this memorandum when referring to the practice of officers inspecting firearms to determine if loaded pursuant to Pen. C. § 12031(e).

courts to *not* violate the Fourth Amendment. For example, *People v. De Long,* 11 Cal App 3d 786 (1970) held such an examination of a weapon may hardly be deemed a search, and, even assuming it may be called a search, it is not an unreasonable one. However, any further search or seizure beyond the mere determination of whether the firearm is "unloaded" is beyond the authority granted by the statute. (*See People v. Bello*, 45 Cal App 3d 970,(1975).)[11]

B. "(e)-Checks" Are Geographically Limited

Second, the provision is geographically limited to firearms carried "on his or her person" or "in a vehicle" and only "while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory." Firearms located anywhere outside these specified areas are not subject to an "(e)-Check."

C. "(e)-Checks" Are Limited in Purpose To Determining Whether A Firearm Is "Loaded."

Third, the purpose of the inspection is expressly limited "to determine whether or not a firearm is loaded for the purpose of enforcing [Pen. C. § 12031]." *Id.* Nothing within this section expressly permits inspection to determine whether the suspect is or is not the registered owner of the firearm; nor does it permit background checks on law abiding citizens, nor does it permit an inspection to determine whether the firearm is an "assault weapon." In fact, the statute expressly limits an officer to "examining any firearm" for the limited purpose of determining whether it is "loaded."

There are multiple definitions for the term "loaded." For example, the term "loaded" is defined in one way for purposes of Penal Code §12023[12], defined in another way for purposes of Sections 12025(b)(6)(A), 12031, and 12035,[13] and is used without definition in other sections.[14]

Thus, clarification on the meaning of "loaded" is an important difference that can prevent an unlawful arrest as well as subsequent lawsuits. In January, the City of San Fernando settled a lawsuit for $44,000.00 involving an incident in which the arresting officer believed that a firearm being carried in a locked container simultaneously with a magazine was "loaded" and constituted a Penal Code §12031

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[11] In a prosecution for carrying a loaded firearm in a motor vehicle (Pen C. § 12031, subd. (a)), defendant's motion to suppress the evidence against him should have been granted where it appeared that defendant was stopped by a police officer who thought that he was driving erratically and might be under the influence of liquor or drugs, but where, after defendant stopped and got out of his car and walked toward the officer, the officer concluded that defendant was not under the influence of either drugs or alcohol; where defendant produced his driver's license in good order, and where the officer observed the firearm by shining his light into the defendant's car as defendant was securing the vehicle registration from the glove compartment at the officer's request. Under these circumstances, once the officer had seen and talked to defendant, he had no legitimate reason for detaining him further or for pursuing any further investigation of him.

[12] *See* Pen. C. § 12001(j).

[13] *See* Pen. C. §§ 12025(b)(6)(A), 12031(g), and 12035(a)(2).

[14] *See*, e.g., Pen C.§§ 12031.1, 12036(b), and 12040(a)(4).

violation.[15] Also, last year, the City of San Diego settled a lawsuit for $35,000 stemming from an arrest of a UOC activist who was carrying an unloaded firearm along with a loaded magazine attached to his belt.[16]

The definition of "loaded" that is most typically encountered in an UOC scenario, and the only one for which an "(e)-Check" applies, is the definition that is used in both Penal Code §§ 12031(g) and 626.9(j), which defines as 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." The use of the term "attached" caused some confusion early on, but was clarified over a decade ago. A firearm is loaded when a shell or cartridge has been placed into a position from which it can be fired. A firearm is not loaded if the shell or cartridge is stored elsewhere and not yet placed into a firing position. (*People v. Clark*, 45 Cal.App.4th 1147, 1153 (1996).) Conversely, a firearm is not loaded if ammunition is not placed into a firing position.

A broader definition of the term "loaded" is applied to specific factual patterns, such as when persons carry a firearm with the *intent* to commit a *felony* or possession of a firearm on the grounds of the Governor's Mansion, or any other residence of the Governor, the residence of any other constitutional officer, or the residence of any Member of the Legislature, in the State Capitol, any legislative office, any hearing room in which any committee of the Senate or Assembly is conducting a hearing, the Legislative Office Building at 1020 N Street in the City of Sacramento, or upon the grounds of the State Capitol. (Pen. Code §§ 171e and 12001.) Under those limited factual circumstances, a firearm shall be deemed loaded whenever both the firearm and unexpended ammunition capable of being discharged from such firearm are in the immediate possession of the same person.

Also, Fish & Game Code § 2006 defines a rifle or shotgun as loaded for the purposes of that section when there is an unexpended cartridge or shell in the firing chamber but not when the only cartridges or shells are in the magazine.

D. Beyond The Express Provisions of Penal Code § 12031(e) - *Terry v. Ohio* Applies

LEOs are generally concerned with what restraints the law places on them in conducting a routine "(e)-Check." Beyond the *very limited conduct* expressly permitted by Penal Code § 12031(e), the legality of a search and seizure depend on whether the specific activities inquired about (i.e., pat-downs, serial number checks, and identification checks) are valid investigatory acts or officer-safety precautions sanctioned under the doctrine laid out in *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny.

IV. Terry And The Fourth Amendment

[15] *See* http://www.examiner.com/la-in-los-angeles/san-fernando-pays-over-44-000-agrees-to-new-firearm-policies?render=print

[16] *See* http://www.capoliticalnews.com/blog_post/show/6683

In *Terry*, the U.S. Supreme Court explained that though the Fourth Amendment[17] generally requires officers to obtain a warrant or have probable cause to conduct searches and seizures there are valid exceptions. Specifically, the Court explained:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

(*Id.* at 30.)

Though the Supreme Court found that the Fourth Amendment permits officers to contact and pat-down people, their authority to do so is limited to what is "reasonable" under the totality of the circumstances, which means an officer's action must be "'justified at its inception, and ... reasonably related in scope to the circumstances which justified the interference in the first place.'" (*United States v. Sharpe,* 470 U.S. 675, 682 (1985) (quoting *Terry, supra,* at 20, 88 S.Ct. 1868).) "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." (*Terry v. Ohio*, 392 U.S. 1, 19 (1968), quoting *Warden v. Hayden,* 387 U.S. 294, 310 (1967) (Fortas, J., concurring).)

Therefore, stops, pat-downs, and similar investigative and precautionary actions by officers must, absent probable cause, meet that two-part test to be considered "reasonable" under *Terry* and its progeny.[18] Reasonableness also "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." (*United States v. Brignoni-Ponce,* 422 U.S. 873, 881 (1975).)[19]

Despite these general guidelines, there is no bright-line rule for what is and is not "reasonable" under the Fourth Amendment. (*Sibron v. New York*, 392 U.S. 40, 59, 88 S. Ct. 1889, 1901, 20 L. Ed. 2d

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[17] The Fourth Amendment provides, in pertinent part: "The right of the people" to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." (U.S. Const' amend' IV').

[18] The constitutionality of officers stopping people engaged in UOC, a perfectly legal activity, to conduct a routine "(e)-check" is subject to debate and discussed in detail below in Section VI of the Analysis. But, for the purpose of answering the specific questions posed in the introduction, it will be assumed that routine "(e)-checks" – stopping people merely to check whether their firearm is unloaded – are constitutional; meaning the first part of the "reasonable" test – that the officer's action be "justified at its inception" – is satisfied. Thus, only the second part of the "reasonable" test – that they are reasonably related in scope to the circumstances which justified the interference in the first place – is at issue in answering those questions.

[19] *See also Terry,* 392 U.S. at 21(reasonableness determination balances " 'need to ... [seize] against the invasion which the ... [seizure] entails' ") (brackets in original) (quoting *Camara v. Municipal Court,* 387 U.S. 523, 534-35, 87 S.Ct. 1727, 1734, 18 L.Ed.2d 930 (1967).)

917 (1968) (explaining "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case.").)

ANALYSIS

With these legal concepts in mind, we now apply them to the specific questions typically raised by LEOs. It is worth reiterating here that there is no bright-lined rule for determining what is and is not reasonable under the Fourth Amendment, and the facts of each situation need to be evaluated. Thus, this memorandum merely explains the nature of the principles for determining what is valid under the Fourth Amendment, provides examples of the application of those principles in analogous contexts to the question raised here, and our law firm's analysis of the position a court would likely take. But, unless expressly indicated otherwise, all of the legal opinions made herein have an element of uncertainty. There is just no way of knowing with certainty how a court will rule on cases concerning the reasonableness of any given search or seizure.

I. Can an Officer Disarm a Person Engaging in UOC?

As mentioned, Pen. C. § 12031(e) expressly allows officers to "inspect" firearms carried in public places to determine whether they are loaded. So, there do not seem to be any issues with an officer *temporarily* disarming a person engaging in UOC under California law, – since it is reasonable to assume that 12031(e) envisions an officer handling the firearm during the inspection – *as long as* the sole purpose is to determine whether the firearm is loaded.

Assuming routine "(e)-checks" are constitutional, an officer's temporarily disarming a person in order to conduct an inspection is also almost certainly "reasonably related in scope to" determining whether the firearm is loaded in satisfaction of *Terry*. The officer needs visual access to the action of the firearm, which is likely obstructed by the holster. And, people removing firearms from holsters in public could create safety issues for both the officer and the public. That being said, however, once the firearm is determined to be lawfully carried during an "(e)-check," – i.e., unloaded, unconcealed / openly, and in a non-prohibited area – it should be returned to the individual in a reasonable amount of time, generally meaning immediately upon completion of the "(e)-check."

Delay in returning a lawfully carried firearm *could* constitute an "unreasonable seizure" under the Fourth Amendment and be the basis of a civil rights action. In *United States v. Sharpe*, 470 U.S. 675 (1985), the Supreme Court considered whether a 20-minute detention of a driver after the driver evaded police was reasonable. The Supreme Court explained that, though its cases "impose no rigid time limitation on *Terry* stops," it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was *necessary* to detain the defendant." (*Id.* at 686)(emphasis added). This appears to be an affirmation of the plurality in *Florida v. Royer,* 460 U.S. 491, 500, in which the Court held that "an investigative detention must be temporary and last no longer than is *necessary* to effectuate the purpose of the stop."

Pursuant to the Supreme Court's clarification in *Sharpe* that the Fourth Amendment requires diligent investigation which takes no longer than necessary to effectuate the purpose of the stop presumably an officer should, immediately inspect the firearm to determine whether it is loaded – which is the basis for an "(e)-Check" – and, upon learning that it is *not* loaded, return the firearm promptly since, absent some indicator of criminal conduct, further detention of the subject would not be *"necessary*."

Such a policy is further supported by the rule set out in *Terry* that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry* at 19.[20] What rendered the seizure and search of the firearm permissible was Cal. Pen. § 12031(e), or possibly an articulable fact leading to suspicion that it was loaded in violation of Cal. Pen. § 12031(a). Thus, the scope of the search should be "strictly tied to" determining whether the firearm is loaded.

The Supreme Court has cautioned, however, that while it is clear "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," *United States v. Place,* 462 U.S., 696, 709 (1983), there is also a "need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." (*United States v. Hensley,* 469 U.S., 221, 228-229, 234-235 (1985); *Place, supra,* 462 U.S., at 703-704, 709; *Michigan v. Summers,* 452 U.S. 692, 700, and n. 12,(1981) (quoting 3 W. LaFave, Search and Seizure 9.2, pp. 36-37 (1978)).)

The Court has further explained that "[i]f the purpose underlying a *Terry* stop – investigating possible criminal activity – is to be served, the police must, under certain circumstances, be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams* [*v. Williams,* 407 U.S. 143 (1972)]." (*Michigan v. Summers,* 452 U.S. 692, 700, n. 12.)

Whatever length of time is reasonable for an officer to retain possession of a firearm during an "(e)-Check" likely depends on the specific circumstances, and is one of those questions that a court would have to answer definitively. What is certain is there *can be* a legitimate claim under the Fourth Amendment if a firearm is retained too long during an "(e)-check," and there is a strong civil rights argument to be made that the case law supports *immediate* return of the firearm.

Of course, an officer is not precluded from disarming a person who the officer has probable cause[21] to believe is engaging in criminal activity or is a danger to public safety, or who is found to have a weapon hidden on them during the course of a *valid* frisk. (*See Terry,* at 21.) And, it should be noted that though UOC is a lawful practice alone, the Fourth Amendment allows an officer to take the totality of circumstances into account in determining whether a person's actions are suspicious and deserving of further investigative action. (*United States v. Sokolow*, 490 U.S. 1, 9 (1989) (airport stop based on drug courier profile may rely on a combination of factors that individually may be "quite consistent with innocent travel").)

For example, the officer may notice that a person engaged in UOC matches the description of an armed robbery suspect, and upon initial questioning receives odd responses. In such a case, the investigation is no longer solely about whether the firearm is loaded, but about potentially solving a crime and protecting the public from a dangerous felon.

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[20] (*See also U. S. v. Avery*, 137 F.3d 343, 349 (6th Cir. 1997) ("Although an officer may have reasonable suspicion to detain a person or his possessions for investigation, the officer's investigative detention can mature into an arrest or seizure if it occurs over an unreasonable period of time or under unreasonable circumstances. While the Supreme Court has refused to set an outer time limit on detentions, the Court has held that the passage of time can cause an investigative detention to ripen into a defective seizure that must be based upon probable cause").)

[21] **Note:** Refusal to allow an officer to conduct a proper "e-check" constitutes probable cause under the Penal Code to arrest for violating Cal. Pen. § 12031(a). (Cal. Pen. § 12031(e).) The constitutionality of this provision is not evaluated in this memorandum, but is questionable.

II. Can an Officer Conduct a Pat-down Search of an Individual During an "(e)-Check"?

A. "(e)-Check" Pat-Down Issues

The Legislature included a very specific preamble in Cal. Pen. § 12031(e): "In order to determine whether or not a firearm is loaded for the purpose of enforcing this section. . ." As discussed above, that language can only be read as *limiting* the scope of an "(e)-check" to determining whether a firearm being carried in public is loaded. Otherwise, that language is superfluous, which is presumed to not be the case under maxims of statutory construction.[22] Any activity beyond checking a firearm to determine if it is loaded would likely be construed by a court as outside the permissible scope of Penal Code § 12031(e).[23]

And, under *Terry*, a pat-down after confirming a firearm is unloaded seems wholly unrelated to "the circumstances which rendered the stop's initiation permissible" – the officer's desire to confirm the firearm is carried "unloaded" in compliance with the law. Such can be determined without the intrusion of a pat-down. Therefore, without some indicia of the individual being engaged in criminal activity or a potential threat to the officer safety, a pat-down may very well not be reasonably "justified by" the presence of a person engaging in UOC – a perfectly legal activity.

In fact, the Legislature decision to expressly limit the purpose of "(e)-checks" to determining whether a firearm is loaded could be construed as its belief that other activities like a pat-down during a *routine* "(e)-check," are *not* reasonable. Also, note that *Terry* and its progeny upholding the constitutionality of pat-downs generally involve scenarios where there is reasonable belief that *criminal* activity is afoot and indicate that such is generally a prerequisite to conducting a pat-down. (*See, e.g., Royer,* 460 U.S. at 502, (defendant suspected of carrying drugs); *Brignoni-Ponce,* 422 U.S. at 881 (defendants suspected of being illegal aliens); *United States v. Cortez*, 449 U.S. 411 (1981)(defendants suspected of smuggling illegal aliens into country based on evidence gathered over a two-month period); and *Terry,* 392 U.S. at 22-23(defendants suspected of planning robbery).)

In the context of UOC, there generally are no such specific facts indicating criminal activity because UOC is a lawful activity usually performed by people who fit a profile which allows police to readily identify them as *non*-threats. Thus, it comes down to whether a court would find that the mere presence of a firearm, even if lawfully carried in an apparently safe, non-threatening manner, would make it reasonable to expand a routine "(e)-Check" to a more intrusive pat-down.[24]

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[22] "The courts presume that every word, phrase, and provision of a statute was intended to have some meaning and perform some useful function . . . ." 58 Cal. Jur. 3d Statutes § 119. "[A statute] must be so construed as to give meaning and effect to every clause thereof." (*Shelby v. S. Pac. Co.*, 68 Cal. App. 2d 594, 599 (Cal. Ct. App. 1945) (internal citations omitted).)

[23] "[A] familiar rule of construction is that where a statute enumerates things upon which it is to operate it is to be construed as excluding from its effect all those not expressly mentioned." (*Shelby v. S. Pac. Co.*, 68 Cal. App. 2d at 599.) "The expression of certain things in a statute necessarily involves the exclusion of other things not expressed. This court cannot add language to a statute that '... the Legislature must be deemed to have omitted intentionally." (*Cheryl P. v. Superior Court*, 139 Cal. App. 4th 87, 99 (Cal. Ct. App. 2006) (internal citations and quotation marks omitted).)

[24] Though some courts may find the mere presence of a firearm makes a pat-down reasonable, some courts to have considered the issue ruled otherwise. For example, *United States v. King* (10th Cir.

At least one California court seems to have taken the view that pat-downs during "(e)-checks" are not sanctioned by *Terry* – the case of *People v. De Long*, supra at 786 11 Cal.App.3d. 786 (1970). In analyzing the constitutionality of an almost identical predecessor to Pen. C. § 12031(e) – the court in *De Long* held that though an "(e)-check"-type inspection is a reasonable search, if a search at all, it is so because it is "limited to a *single purpose* . . . . The *minimal intrusion* does not begin to approach the *indignity of the frisk*, as graphically described in *Terry* . . . . It is true that the frisk, as sustained in the *Terry* case*, requires as justification something different than mere possession of a firearm in a proscribed place*, but it requires a good deal less than cause for arrest." (*Id*.). The *De Long* court went on to conclude "The *exceedingly limited inspection* permitted by the statutes in question . . . . comes well within the orbit of reasonable inspection or search." (*Id*. at 793). (Emphasis added throughout).

In other words, the *De Long* court was saying that "(e)-checks" are lawful *because* they are limited to the single act of determining whether a firearm is loaded, and are thus *distinguishable* from *Terry* stops that include pat-downs. This suggests that any act beyond checking for whether the firearm is loaded – especially a pat-down – would not be constitutional unless the officer has probable cause or can articulate specific facts of reasonable suspicion the person is engaging in *criminal* activity or a danger to public safety, (*Terry.* at 30.), which is generally not present in most UOC situations.

Thus, both statutory law and constitutional case law seem to indicate that pat-downs during *routine* "(e)-checks" are not generally permissible absent other circumstances indicating actual criminal activity or concern for officer or public safety.

B. Officer Safety Pat Down Issues

Of course, a pat-down is not only permitted as an investigatory tool under the *Terry* doctrine, but also when reasonable to assure the safety of the officer contacting the individual. (*Id.* at 30.) The Supreme Court has explained that "[s]o long as an officer is entitled to make a forcible stop[25] and has reason to believe that the suspect is armed *and dangerous*, the officer may conduct a weapons search *limited in scope to this protective purpose*." (*Adams v. Williams*, 407 U.S. 143, 146 (1972), citing *Terry* 392 U.S. at 30.) (emphasis added.) "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for

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1993) 990 F .2d held firearms alone do not create reasonable suspicion of criminal activity: "In a state such as New Mexico, *which permits persons to lawfully carry firearms,* the government's argument [(that seizure of defendants was justified by safety concerns due to a gun being within their reach)] *would effectively eliminate Fourth Amendment protections for lawfully armed persons.* In short, while the safety of police officers is no doubt an important government interest, it can only justify a Fourth Amendment intrusion into a person's liberty [s]o long as the officer is entitled to make a forcible stop . . ." (emphasis added). (*Id.* at 1552.) Another 10th Circuit court ruled for a plaintiff in a § 1983 civil rights action who sued after being seized and searched while lawfully carrying a firearm, reasoning "[b]ecause New Mexico law allows individuals to openly carry weapons in public-and [plaintiff] had done nothing to arouse suspicion, create tumult or endanger anyone's well-being-there were no articulable facts to indicate either criminal activity or a threat to safety. Accordingly, Defendants' seizure . . . violated his Fourth Amendment rights." St. John v. McColley, 653 F. Supp. 2d 1155, 1162-63 (D.N.M. 2009). And, this very issue is currently being litigated in the Second Circuit. (See *Goldberg v. Glastonbury*, No. 07-1733 (D. Conn. 2010), *appeal docketed*, No. 10-4215 (2nd. Cir. Oct. 20, 2010).)

[25] **Reminder Note:** we are assuming officers are entitled to stop a person engaging in UOC in order to conduct an "(e)-check" – i.e., confirm the firearm is unloaded.

weapons *might be* equally necessary and reasonable, *whether or not carrying a concealed weapon violated any applicable state law*" (*Id*.) (emphasis added).

The emphasized language raises several issues that are relevant in the analysis of the legality of patting-down a person during a routine "(e)-check." First, the phrase "might be . . . reasonable" leaves no doubt there are instances when a pat-down (i.e., frisk) is *not* reasonable (otherwise, the Court would have said "*are* reasonable").

Second, we know a pat-down is reasonable where the officer has reason to believe the individual is "armed and dangerous." An officer knows a person engaged in UOC is armed, so reasonableness seems to come down to whether there is reason to believe the person is also "dangerous." There does not seem to be any guidelines for determining what makes someone "dangerous" in this context, but the Supreme Court has explained "in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria. *Sharpe*, 470 U.S. at 105. In other words, would the common sense of a typical officer – who knows about the popularity of UOC and that those who UOC generally pose no threat – be that such a person is "dangerous?" The answer is most likely no.[26]

Of course, the language "might be . . . reasonable," also indicates that just because an activity is lawful – like UOC is – does not mean an officer would *never* be justified in conducting a pat-down of a person engaging in UOC. The Supreme Court noted in *Illinois v. Gates,* 462 U.S. 213 at 243-244, n. 13 (1983), that "innocent behavior will frequently provide the basis for a showing of probable cause," and that "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." The Court also said in *Reid v. Georgia,* 448 U.S. 438 (1980) (*per curiam*), "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." Thus, just because UOC is legal, does not mean an officer cannot reasonably fear for his safety in *certain* situations, justifying a pat-down of the person.

In sum, unless an officer conducting a routine "(e)-check" can articulate specific facts that led the officer to suspect a person of criminal activity or of being dangerous, and those suspicions are reasonable, it is likely inappropriate for the officer to perform a pat-down of the individual.

III. Can an Officer "Run" the Serial Number of an Individual's Gun During an "(e)-check?"

A. Visible Serial Numbers

It is not an unlawful search if the serial number of an individual's firearm comes into "plain view" of an officer performing a legal act. (*Arizona v. Hicks*, 480 U.S. 321, 324 (1987).)

Under *People v. DeLong* – discussed in the previous section – however, officers are likely still

[26] As the 10th Circuit has explained "if a police officer's safety could justify the detention of an otherwise lawfully armed person, the detention could last indefinitely because a lawfully armed person would perpetually present a threat to the safety of the officer." *U.S. v. King*, 990 F.2d 1552, 1559 (1993). Additionally, it is important to note that the mere fact that a firearm is carried openly and in a holster indicates that the individual is attempting to comply with the law, which is not usually indicative of "dangerous" individuals.

prohibited from running the serial number during an "(e)-check" because it exceeds the very narrow grant of authority in Cal. Pen. § 12031(e) to inspect the firearm *solely* for whether it is loaded or not. Thus, it is arguably improper to run a check of the serial number – even if it comes into plain view – if it is during the course of a *routine* "(e)-check."

Further, under a *Terry* analysis, running the serial number during a routine "(e)-check" seems wholly unrelated to "the circumstances which rendered its initiation permissible" – the officer's desire to confirm the firearm is carried legally and safely. There generally is no suspected crime the commission of which would be either confirmed or dispelled by doing so, and running the serial number really does nothing to protect the officer on the scene or the public from the danger of weapons. Additionally, a check to determine whether the firearm is registered to the owner is wholly without investigatory merit, as most firearms, including handguns, are not required to be registered with the State.[27]

Also, while an officer runs the serial number, the person being inspected must remain present, which may amount to a seizure beyond what is allowed under *Terry*. A seizure under the Fourth Amendment occurs when the surrounding circumstances "would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick,* 501 U.S. 429,436 (1991). Applying that to a routine "(e)-Check," any reasonable person would feel he is not free to leave a situation where a police officer has custody of his firearm and is checking to confirm it is lawfully possessed. And, in order to seize someone lawfully, the officer must at minimum be able to articulate *specific facts* indicating criminal activity or show probable cause. Further, as mentioned above, even a valid investigative stop can mature into an arrest, requiring probable cause. (See footnote 20 above citing *U.S. v. Avery*, 137 F. 3d at 349).

And, as discussed above, neither probable cause nor even reasonable suspicion of criminal activity are generally present during routine "(e)-Checks;" especially no criminal activity relating to the serial number of the firearm. Of course, should the officer become suspicious during an "(e)-check" – and can articulate his suspicions with specific facts – that an individual is or has committed a crime, and running the serial number can confirm or dispel the suspicion, it is lawful under *Terry* - e.g., marks in plain view that indicate an attempt to remove, obliterate, alter, or otherwise change the serial number.

In sum, an officer should not run serial numbers during routine "(e)-Checks" unless the officer can articulate specific facts that would lead a reasonable person to believe the individual subject to the "(e)-Check" is engaged in criminal activity, and running the serial number would be helpful in either confirming or dispelling the officer's suspicion.

B. Inconspicuous Serial Numbers

There may be instances where an individual has *temporarily* covered the serial number of the firearm (e.g., with tape). There is conflict in the law regarding such conduct. Pen. C. § 537e provides:

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[27] Only "assault weapons" and ".50 BMG rifles" are generally required to be "registered" to the owner. (Pen. Code §§ 12275 *et seq*.) Handguns are only required to be registered if and when they were transferred after 1991. (Pen. Code §§ 12070 *et seq*.) With the exception of the aforementioned "assault weapons" and .50 BMG rifles, long guns are only voluntarily included in the Automated Firearms System. Additionally, even if registered in someone else's name, firearms can be lawfully loaned or temporarily transferred to third parties. (*Id*.)

> Any person who knowingly . . . . has in his or her possession any personal property from which the manufacturer's serial number, identification number, electronic serial number, or any other distinguishing number or identification mark has been removed, defaced, *covered*, altered, or destroyed, is guilty of a public offense . . . .

(Emphasis added.)

Though it seems pretty straightforward that covering a firearm's serial number would be illegal under this code, however, Pen C. § 12090, relating to firearms specifically, says it is only unlawful if a person:

> *changes, alters, removes or obliterates* the name of the maker, model, manufacturer's number, or other mark of identification, including any distinguishing number or mark assigned by the Department of Justice *on any pistol, revolver, or any other firearm*, without first having secured written permission from the department to make such change, alteration or removal . . . .

(Emphasis added.)

These two statutes seem to conflict in that Cal. Pen. § 537e more or less covers all the activity proscribed in Pen. C. § 12090, making the latter somewhat superfluous. If inconsistent statutes cannot otherwise be reconciled, "a particular or specific provision will take precedence over a conflicting general provision." (*People v. Vessell,* 36 Cal.App.4th 285, 289 (1995), applying Code Civ. Pro. §1859.)

The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply. (*People v. Jenkins, 28 Cal.3d 494, 505* (1980).) Indeed, in most instances, an overlap of provisions is determinative of the issue of legislative intent and "requires us to give effect to the special provision alone in the face of the dual applicability of the general provision . . . and the special provision. . . ." (*People v. Gilbert, 1 Cal.3d 475, 481* (1969), superceded on other grounds).) This case law strongly suggests that the Legislature intended 12090, the more specific statute, to control with respect to serial numbers on firearms.

Thus, there is a strong possibility that it is not a crime to temporarily cover a serial number in a manner that does not change, alter, remove, or obliterate it. But this remains an unanswered legal question.

IV. Can an Officer Demand An Individual's Identification During an "(e)-Check" to Determine If He/She Can Lawfully Possess?

The Supreme Court has explained that "a police officer is free to ask a person for identification without implicating the Fourth Amendment." (*See INS v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984).) But, just because an officer *may request* that people produce identification, does not mean the officer can *arrest* a person for refusal to do so.

First, as explained, Cal. Pen. § 12031(e) expressly limits the purpose of inspections allowed thereunder to determine whether a firearm is loaded. And, any activity beyond that – such as inspecting the individual's identification and running his/her name in a database – is likely *not* sanctioned by Cal.

Pen. § 12031(e).

One senior Los Angeles County Deputy District Attorney has opined that *Hiibel v. Sixth Judicial District,* 542 U.S. 177 (2004) and *People v. Loudermilk*, 195 Cal.App.3d 996 (1987) stand for the proposition that an officer can arrest an individual for violation of Cal. Pen. § 148(a)(1)[28] should the person refuse to produce identification during a standard "(e)-Check." But, this DDA's reliance on *Hiibel* and *Loudermilk* is misplaced.

In *Hiibel*, the Supreme Court upheld Nevada's "Stop and identify" statute – a law specifically saying people must identify their name when asked by law enforcement.[29] Cal. Pen. § 148(a)(1) does not have the express language of a typical "Stop and identify" statute, and California appears to have no such requirement anywhere else in its Penal Code. *Hiibel* merely holds that an arrest under Cal. Pen. § 148 for refusing to identify oneself *would be* constitutional *if* that statute required people to identify themselves to law enforcement upon request;[30] because California has no such "stop and identify" statute, refusal to provide identification does not necessarily violate Pen C. § 148 (a)(1).[31]

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[28] Cal. Pen. § 148(a)(1) provides: "Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

[29] Hiibel had obstructed the officer in carrying out his duties under § 171.123, a Nevada statute that expressly defines the legal rights and duties of a police officer in the context of an investigative stop. Section 171.123 provides in relevant part:

> "1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime."
>
> . . . . .
>
> "3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. *Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.*"

(*Hiibel*, at 181-82. Emphasis added.)

[30] If the theory is to justify the identity check by suggesting that Cal. Pen. § 148(a)(1) is a "Stop and Identify" statute, this would raise the same problems of vagueness as the statute struck down by the Supreme Court in *Lawson v. Kolender*, 658 F.2d 1362 (1981). The California law in *Kolender* required a suspect to give an officer "'credible and reliable'" identification when asked to identify himself. *Id.*, at 360, 75 L. Ed. 2d 903, 103 S. Ct. 1855. The Court held that the statute was void because it provided no standard for determining what a suspect must do to comply with it, resulting in "'virtually unrestrained power to arrest and charge persons with a violation.'" (*Ibid.* (quoting Lewis v. New Orleans, 415 U.S. 130, 135, 39 L. Ed. 2d 214, 94 S. Ct. 970 (1974) (Powell, J., concurring in result)).)

[31] *See also Ashley v. Sutton,* 492 F. Supp. 2d 1230 (2007) (While attending a school game, the attendee's husband was ejected. The arrestee refused to give information to a police officer and walked away, causing the officer to arrest her. The court concluded that the police officer did not have grounds for a Terry stop or for an arrest, so he was not entitled to summary judgment on the wrongful arrest

As for *Loudermilk*, the plain text of the court's opinion in that case demonstrates rather definitively that one's refusal of an officer's request to identify oneself does not necessarily, or even usually, justify arrest:

> We must emphasize that we do *not* hold that a suspect may be detained and searched merely because he either refused to identify himself or refused to produce proof of identification. Nor do we hold that each time an officer conducts a *Terry* stop he may immediately conduct a search for identification. The rule we announce does not provide officers with unfettered discretion and does not open citizens to harassment. Our decision, . . . is limited to the unique facts of this case, where defendant lied to the officer and himself created the confusion as to his own identity. The seizure of defendant's wallet was minimal and strictly limited to the legitimate inquiry into his identity.

People v. Loudermilk, 195 Cal. App. 3d 996, 1004, 241 Cal. Rptr. 208 (Cal. Ct. App. 1987) (emphasis original).

Loudermilk merely stands for the proposition that an officer *can* request people to identify themselves, and *in certain situations*, arrest a person for refusing to do so. It expressly does not condone allowing officers to arrest a person for refusal to identify alone, explaining the facts in that case warranted it. But a typical UOC situation is nothing like the facts the court reasoned justified arrest in *Loudermilk* (*Id.* at 1000 (where a *murder* suspect was contacted because he matched a description, asked about his identity, then lied to the officer about not having identification, and a lawful *Terry* pat-down revealed a wallet showing he was lying).)

Thus, though it can be in certain circumstances, it is not *necessarily* a violation of Pen. C § 148 nor probable cause for arrest to refuse to identify oneself during an investigative stop. (See *In re Gregory S.*,112 Cal.App.3d 764, 779 (1980) ("We find no authority to support the [lower] court's legal conclusion that a person who merely refuses to identify himself or to answer questions in a context similar to that before us thereby violates Penal Code section 148 or otherwise furnishes ground for arrest.")

Finally, though a specific "Stop and Identify" statute is not in place in California, it is still the case that "questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops . . ." (*Hiibel* 542 U.S. at 186, *citing U.S. v. Hensley*, 469 U.S. 221, 229, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985).) But as for arresting a person who refuses to identify himself during a *Terry* stop, the Court in *Hiibel* explained that under the principles of *Terry* – that an officer's act must be justified at its inception and reasonably related in scope to the circumstances which justified the interference in the first place – "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." *Hiibel*, 542 U.S. at 189.

There is a compelling argument to be made that demanding or searching for an individual's identity during a routine "(e)-Check" is wholly unrelated to "the circumstances which rendered its initiation permissible" – the officer's desire to confirm the firearm is unloaded in compliance with the law. And, the public benefit gained by police demanding people engaged in lawful, generally *nonsuspicious* activity like UOC to identify themselves – if any – likely does not outweigh the interest people have in being free from government intrusion, and is likely unconstitutional.

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claim).

Many who UOC likely will refuse requests by officers to produce identification during a routine "(e)-Check." For the reasons described in the preceding paragraphs, it is *not* advisable to arrest them for violation of Cal. Pen. § 148(a)(1) *solely* for refusing to do so. Of course, where surrounding circumstances make the request for identification reasonable for the purposes of investigating possible criminal conduct – for example, the person engaging in UOC has tattoos consistent with prison gangs or is known by the officer to have been in prison, which would likely make it unlawful for him to possess firearms – and the person refuses to comply, there may be a basis for arrest.

In short, there is generally no authority that requires people engaged in lawful activity – which UOC is – to identify themselves to law enforcement, even when in public, absent any specific, articulable facts of reasonable suspicion the person is involved in criminal activity or is a danger to the officer or the general public. Thus, one likely cannot be arrested for failure to identify himself to an officer during a *routine* "(e)-Check."

VI. Do Limited Inspections Expressly Allowed by 12031(e) – Routine "(e)-checks" – Violate the Fourth Amendment?

Penal Code § 12031(e) is a limited, but mandatory, waiver of one's Fourth Amendment rights if they choose to carry firearms openly and unloaded in compliance with California laws. This raises the question of whether the provision violates the Fourth Amendment?

Of course, it should be reiterated here that a California court in *De Long*, 11 Cal App 3d 786, has already held that "(e)-Check" type searches, if limited to *solely* inspecting the firearm to determine whether it is loaded are reasonable under *Terry*. And, though some California courts have held that police need probable cause before they can inspect a firearm to determine whether it is loaded. *See, e.g.,People v. Green*, 15 Cal. App. 3d 766, 771-72 (Cal. Ct. App. 1971) ("They contend nevertheless that section 12031 authorizes them to search without probable cause to arrest. This contention of statutory justification cannot be upheld short of the circumstances set forth in *De Long*), and *People v. Kern*, 93 Cal. App. 3d 779, 782 (Cal. Ct. App. 1979), they seem to be the minority view. The prevailing view in California seems to be that police may inspect a firearm carried in public regardless of whether they have reason to believe that it is loaded. (*People v. Azevedo,* 161 Cal.App.3d 235, 244, 207 Cal.Rptr. 270, 275-76 (1984) (following *People v. Zonver,* 132 Cal.App.3d Supp. 1, 183 Cal.Rptr. 214 (1982)); *People v. Greer,* 110 Cal.App.3d 235, 238-39, 167 Cal.Rptr. 762, 764 (1980). *United States v. Brady*, 819 F.2d 884, 889 (9th Cir. 1987).)

Subsequent to the California courts validating "(e)-Checks" as constitutional in *De Long*, however, the Second Amendment was found to be a fundamental and individual right by the Supreme Court in 2008. *District of Columbia v. Heller*, 554, U.S. ___, 128 S. Ct. 2783 (2008). In June of 2010, a plurality of the Supreme Court found that the fundamental Second Amendment right to Keep and Bear Arms was incorporated and made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. ___(2010). Further, the court in *Peruta v. San Diego,* 2010 U.S. Dist. LEXIS 130878 (2010) held, albeit indirectly, UOC to be protected activity under the Second Amendment right to bear arms, a fundamental right.

These cases cast new doubt on the constitutionality of "(e)-Checks," since they require the waiving of one fundamental right (the Fourth Amendment) in order to exercise another fundamental right (the Second Amendment); this leads one to ask whether the mere presence of a firearm, even if lawfully carried in an apparently safe, non-threatening manner, make a temporary detainment and search

of the firearm reasonable under the Fourth Amendment, considering "the totality of the circumstances?"[32]

Preliminarily, there currently is no clear answer to this question.

Some legal commentators have expressed the view that such "(e)-Check"-type searches without reason to believe the firearm is being possessed unlawfully are unconstitutional. (See Lawrence Rosenthal, Second Amendment Plumbing after *Heller*: Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs (2009) 4l Urb. Law. l, 37 ("When applicable law does not ban carrying a firearm, however, the Fourth Amendment does not permit a stop-and-frisk regardless of any indication that a suspect is armed or potentially dangerous because there is no indication that the suspect is violating the law.").)

Later Supreme Court cases clarifying the *Terry* doctrine as to *when* an officer is justified in stopping a person for investigatory purposes seem to at least somewhat support that position. These cases generally limit such stops to where an officer can articulate specific facts from which it would be reasonable to deduce that the person stopped *is engaged in criminal activity*. For example, *Reid v. Georgia*, 448 U.S. 438, 440 (1980) held "While the Court has recognized that in some circumstances a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized *is engaged in criminal activity*.") (emphasis added).) Then, in *Cortez*, a unanimous Court reiterated the suspected-criminal-activity precondition for a *Terry* stop in even more certain terms, stating plainly that "An investigatory stop must be justified by some objective manifestation that the person stopped *is, or is about to be, engaged in criminal activity*." (*Ibid.* at 417.)[33]

Additionally, case law from various district courts seems to support that position. For example, in *United States v. Ubiles*, 224 F .3d 213 (3rd Cir. 2000), the Third Circuit found that an individual's lawful possession of a firearm in a crowded place did not justify a search or seizure. Holding that the search violated Ubiles' Fourth Amendment rights, the court noted that the situation was no different than if the informant had told officers "that Ubiles possessed a wallet . . . and the authorities had stopped him for that reason." (*Id.*) Nor, the court continued, could the officers rely on the fact that Ubiles possessed the weapon while in a crowd. (*Id.* at 21e). Even case law from the Ninth Circuit seems to support this position. (See *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1377 (9th Cir. 1989) (stating "In the absence of a valid warrant, the police may generally not stop and detain an individual for investigation

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[32] It should be reiterated here that there tends to be a general profile of those who UOC legally, which allows officers a reasonable opportunity to distinguish between those who are part of the "UOC movement" (and thus likely not a threat) and those who are not – which is one factor in the totality of the circumstances that may the indicate the presence of criminal activity and thus subject the person carrying the firearm in a non-conventional manner to a limited search of the firearm.

[33] (*See also Delaware v. Prouse*, 440 U.S. 648 (1979) (holding that reasonable suspicion of a license or registration violation is necessary to authorize an automobile stop; random stops impermissible).) This provides an appropriate analogy in that though people *can* commit crimes with a car, they may not be stopped by law enforcement without reasonable suspicion of their wrongdoing. Similarly, it could be said that though crimes *can be* committed with firearms, an officer needs reasonable suspicion that the gun is loaded or stolen, etc. in order to stop a person that is carrying a firearm in a manner seemingly consistent with the law.

absent a reasonable belief that criminal or otherwise dangerous activity is afoot.")[34]

Based on the foregoing, it would seem there is at least a valid argument that stopping a person merely engaging in UOC is not justified under *Terry* or its progeny.[35] As such challenge to, a statutory provision requiring a waiver of Fourth Amendment rights in order to exercise their Second Amendment rights would likely succeed. Litigation to answer these questions should be expected in the current atmosphere of defining the scope of the newly recognized Second Amendment rights.

For the purpose of answering the questions posed in the Introduction, it was assumed that routine "(e)-checks" – except for in the specific scenario described in Footnote 35– are valid under the Fourth Amendment. Of course, as explained in this section, it is unclear whether routine "(e)-Checks" would pass constitutional muster if challenged. If a court found routine "(e)-Checks" to violate the Fourth Amendment, that would necessarily mean that all the other acts inquired about by Captain Hink would also be generally unlawful absent their meeting the requirements of *Terry* independently, and there could be civil liability against the police department and its officers for conducting them.

CONCLUSION

Though the nature of Fourth Amendment jurisprudence does not allow us to provide definitive answers about the legality of the actions inquired about, it does allow us to conclude that there are legitimate concerns about the legality of those actions in the context of a routine "(e)-check."

To recap the findings of this memorandum, assuming routine "(e)-checks" are lawful, – which is not a certainty – an officer can likely disarm the individual to inspect the firearm for whether it is loaded. However, anything beyond that, without the officer being able to articulate specific facts of reasonable suspicion of criminal activity, is likely unlawful, and could result in civil liability against the officer and the department.

"There are well-defined limits on what police officers may do in discharging their duties, and police may be held liable for acting outside these limits. Perhaps the most fundamental of these is the requirement that the police not interfere with the freedom of private persons unless it be for specific, legitimate reasons." (See *Terry v. Ohio*,392 *supra* at 21.) There have already been successful civil rights lawsuits against police departments in California that arose from officer contacts of people engaging in UOC or otherwise carrying firearms. (See, e.g., *Diaz, Jose v. City of San Fernando, et al.,* Los Angeles Superior Court Case No. PC044139 and *Wolanyk, Sam v. San Diego,* United States Federal Court, Southern District, Case No. 3:09-cv-02279.)

Because there generally tends to be an easily recognizable profile of those who UOC, it would

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[34] See also the cases cited in Footnote 24 above, examples of some courts taking the position that an apparently lawfully carried firearm cannot be the basis for commencing a *Terry* stop of a person.

[35] Regardless of whether routine "(e)-Checks" are found to be generally constitutional, one specific scenario would make justifying an "(e)-Check" under the Fourth Amendment especially difficult: where the firearm is carried in a manner which allows an officer to see it is obviously unloaded – e.g., a semi-automatic handgun with the action open and the magazine- well empty or a revolver with the internal part of the wheel exposed and visibly empty. In such a case, barring other circumstances indicating criminal activity, there is really no reason to contact the person.

make sense for police departments to take reasonable steps to determine certain facts that may indicate whether the person being contacted is likely engaging in lawful UOC or could be more of a threat, such as whether the individual is carrying a firearm openly in a holster, the age of the individual, the individuals mannerisms and demeanor, and the proximity of the individual to a sensitive place. This may allow the responding officer to approach the situation with a sensitivity for the potential of civil rights issues discussed in this memorandum and avoid possible legal action against the officer and the department.

Some of the issues raised in this memorandum will almost certainly be litigated in future civil rights lawsuits - and we have confirmation that at least one other city and police department has been sued this year regarding the issues discussed in this memorandum.

As much as valid public safety concerns allow, it would behoove law enforcement agencies to instruct their police officers to avoid engaging in investigatory actions that are not expressly permitted by the Penal Code unless they can justify them under *Terry*. In other words, if it is fairly obvious that an individual carrying a firearm is part of the "UOC movement" and no circumstances exist to suggest he/she is engaged in criminal activity, officers should limit their contact with that individual to an inspection of the firearm to determine if it is loaded, if any contact at all. Such restraints will help the officers, agencies, and cities they protect and serve avoid civil liability for Fourth Amendment violations.

Officers should err on the side of respecting the civil rights of an individual in a UOC situation as long as the safety of the officer or the public is not jeopardized in doing so.

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