RESOLUTION LF-01-2018

DIGEST
Firearms: Possession by a Minor
Amends Penal Code section 29610 to prohibit a minor from possessing all firearms, including rifles and shotguns.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code section 29610 to prohibit a minor from possessing all firearms, including rifles and shotguns. This resolution should be approved in principle because minors should not be allowed to possess any firearm without parental knowledge or consent.

Under current law, a minor cannot possess a firearm that is capable of being concealed on their person unless they are accompanied by a parent, legal guardian, responsible adult with the written consent of the parent or 16 years of age with the written consent of the parent and are actively engaged in a recreational sport which involves the use of a firearm. This restriction is reasonable because a minor should not be able to carry a weapon they can conceal upon their person for obvious reasons. However, in California, if a minor were to possess a shotgun, rifle or even a semi-automatic weapon, the minor would not be in violation of any law.

Twenty-one states and the District of Columbia have set minimum age laws for a minor to possess a long gun, i.e., shotgun or rifle, ranging from 14 to 21 years of age. Because minors have used shotguns, rifles or semi-automatic weapons in school shootings to inflict mass casualties, minors should not be allowed to possess a firearm, much less a shotgun or rifle without parental knowledge or consent. Further, age limits are set so that minors cannot purchase alcohol or tobacco, which can cause serious damage to the body, because minors do not have the maturity to make sound informed decisions. Therefore, it is reasonable to prohibit a minor from possessing any firearm, including a shotgun, rifle or semi-automatic weapon, something that can cause more damage to a person's body than alcohol or tobacco.

The proposed resolution is reasonable and would be a minimal restriction on the ability of minors to use guns. It would also provide a first line of defense towards minors' use of guns for unlawful purposes as well as close a loophole in the law. Because minors do not have the same Second Amendment rights to bear arms that adults do, there would not be a potential challenge to the Second Amendment right to bear arms.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 29610 to read as follows:

§ 29610

A minor shall not possess a pistol, revolver, or other firearm ~~capable of being concealed upon the person~~.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Michael Fern, Nick Stewart-Oaten, Darin Wessel, Frank Leidman, Shaun Jacobs, Ujvala Singh, Mark Harvis, Ben Rudin, Kim Tran, Pamela Villanueva

STATEMENT OF REASONS

The Problem: Under existing law, a minor is generally prohibited from possessing a firearm capable of being concealed upon the person, defined as a gun with "a barrel less than 16 inches in length." (Cal. Pen. Code, §§ 16530, 29610.) Exceptions include when a minor is engaged in a recreational activity while accompanied by a parent or guardian, or with their prior written consent if the minor is at least 16 years old. (See Cal. Pen. Code, § 29615.) However, no laws prohibit a minor's possession of a non-registrable long gun, such as a shotgun or a 'featureless' semi-automatic rifle. (See, e.g., Sterling and Martin, *Enterprising Gun Makers Create Workarounds To California's New Assault Weapon Ban* (Jun. 20, 2017) CBS SF Bay Area, http://sanfrancisco.cbslocal.com/2017/06/20/enterprising-gun-makers-workarounds-california-assault-weapon-ban.)

Since Columbine, minors have used shotguns and semi-automatic rifles in school shootings to inflict mass casualties. The February 14 incident in Parkland, Florida, followed by dozens of threats by minors to carry out similar attacks in Southern California, demonstrate the need and urgency to regulate the possession of long guns. (See Ratzlaff, *Here's a timeline of Southern California school threats that have been reported after the Florida shootin*g (Mar. 4, 2018) Los Angeles Daily News, https://www.dailynews.com/2018/02/23/heres-a-timeline-of-southern-california-school-threats-that-have-been-reported-after-the-florida-shooting.) In particular, there appears to be no legitimate reason to permit a minor to possess a shotgun or semi-automatic rifle in any circumstance where they cannot have a handgun. Minors do not have the same Second Amendment right to bear arms as adults, because of "their inability to make critical decisions in an informed, mature manner." (*United States v. Rene E.* (1st Cir. 2009) 583 F.3d 8, 16 fn.8.)

The Solution: This resolution improves public safety by closing a significant loophole in California's gun laws and gives law enforcement and courts the ability to intervene when a minor possesses a shotgun or a semi-automatic rifle, outside of specified activities and without parental consent. (See Cal. Pen. Code, § 29615.) A violation of Penal Code section 29610 is a misdemeanor, unless the minor has a prior conviction, in which case the offense is a wobbler. (See Cal. Pen. Code, § 29700.) In any case, the offense would be processed through a juvenile delinquency court, where all records are automatically sealed and ordered destroyed upon satisfactory completion of probation. (See Welf. & Inst. Code, § 786.)

IMPACT STATEMENT:
The resolution does not affect any other law, statute or rule other than those expressly identified.

AUTHOR AND/OR PERMANENT CONTACT: Michael Fern, Los Angeles County District Attorney's Office, 211 W. Temple St., Ste. 1000, Los Angeles, CA 90012, (213) 537-4529, sclawyer@gmail.com.

RESPONSIBLE FLOOR DELEGATE: Michael Fern

RESOLUTION ELF-01-2018

DIGEST
Law Enforcement: Standards for Use of Deadly Force
Amends Penal Code sections 196 and 835a by limiting a peace officer's lawful use of deadly force to "necessary" situations.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Penal Code sections 196 and 835a by limiting a peace officer's lawful use of deadly force to "necessary" situations. This resolution should be disapproved because current state and federal law provide adequate standards for when a peace officer may use force against a suspect, the new standard proposed by the resolution is vague, and the resolution conflicts with the language of Assembly Bill No. 931 (AB 931), upon which it is based.

Penal Code section 196 currently provides that it is justifiable homicide for a police officer to kill a suspect pursuant to a court judgment, and when necessary to overcome actual resistance during the execution of a legal process or the discharge of another legal duty. (Pen. Code, § 196, subds. (1) and (2).) In addition to the foregoing requirements, the jury instruction related to Penal Code section 196 further requires that for the killing to be justifiable homicide, the peace officer must have probable cause to believe that the suspect posed a threat of death or great bodily injury to the officer or others or that the suspect committed a crime that threatened the officer or others with great bodily injury or death. (CALCRIM No. 507.)

This resolution seeks to amend the statute to eliminate the lawfulness of the killing where "necessarily committed in overcoming actual resistance" and change the standard so that the killing is "necessary given the totality of the circumstances… unless committed by a public officer whose gross negligence substantially contributed to making [the deadly force] necessary."

It is unclear why this change is necessary, particularly in light of the jury instruction's requirement that the officer must have probable cause to believe the suspect either posed a threat of death or great bodily injury to someone or committed a crime that threatened someone with death or great bodily injury. Also, by changing the language to allow justifiable homicide if it is "necessary given the totality of the circumstances," seems to allow an officer to kill someone in broader situations then the law currently permits. The amendment to Penal Code section 196, to eliminate the defense of justifiable homicide in situations where the peace officer commits gross negligence, is also confusing because it incorporates a civil negligence standard into a criminal state and is unclear as to what conduct would constitute "gross negligence."

Finally, the resolution does not track the language of AB 931, either in its original or amended form. The most recent amendment to AB 931 leaves Penal Code section 196 intact without any

amendments and simply amends Penal Code section 835a, as discussed below.

Penal Code section 835a provides that a police officer who reasonably believes a person to be arrested has committed a crime, may use reasonable force to effect the arrest, prevent escape, or overcome resistance. (Pen. Code, § 835a, subd. (a).) The current statute also provides that a police officer in the process of arresting a suspect "need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrest" or lose the right to self-defense by using reasonable force to effect an arrest, prevent escape, or overcome resistance. (Pen. Code, § 835a, subd. (b).) The jury instructions for the state and federal claims provide that the officer may use only "reasonable force" from the perspective of a reasonable police officer to effect an arrest in light of the seriousness of the crime at issue and whether the decedent "reasonably appeared to pose an immediate threat to the safety" of the officers or the public. (CACI Nos. 1305, 3020.)

This resolution would eliminate a police officer's right not to retreat from the arrest where the suspect is resisting or threatening to resist an arrest. The problem with the proposed amendment to section 835a, to eliminate the language that an officer need not retreat if a suspect is resisting, is that if a suspect is resisting a lawful arrest, regardless of the manner of the resistance, the officer would need to stop trying to effectuate the arrest. Thus, if a suspect is resisting an arrest, regardless of the manner, such as punching an officer, pulling a knife, or using a gun, the elimination of the clause that an officer "need not retreat" in this situation would seem to mean that an officer would have to retreat. Also, if the suspect is resisting arrest, regardless of the underlying crime committed, the officer would not be able to continue attempting to arrest the suspect. This makes no sense.

The resolution is also confusing because although it retains the current standard of reasonableness for nonlethal force, it changes the standard to "necessary" for lethal force. The resolution defines "necessary" as meaning "no reasonable alternative" to the use of deadly force that would prevent imminent death or serious bodily injury" which includes "facts available to the police officer at the time." The problem with this standard is threefold. First, where a police officer is in a use of force situation it is often a rapidly evolving situation where the danger may change from moment to moment. Second, whether the force was "necessary" can only be viewed with 20/20 hindsight. However, based on a suspect's behavior, actions, and statements, a reasonable officer may reasonably perceive that deadly force is necessary, only to learn after the fact, that the suspect was unarmed. The other problem with the definition of "necessary" is that it limits the use of deadly force to prevent imminent death or serious bodily injury without including the *threat* of imminent death or serious bodily injury. Third, the definition of "necessary" conflicts with the definition of AB 931 and the federal use of force standards.

Finally, the argument that police officers are not held accountable when they use deadly force improperly is simply not true. Police departments and juries are not afraid to rule against police officers when the use of deadly force is unreasonable. In addition, a Texas jury recently found an officer guilty of murder for shooting an unarmed suspect.

This resolution is similar to AB 931 (Weber), which passed the Assembly and was last referred to the Senate Rules Committee.

This resolution is related to Resolution 09-06-2018.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code sections 196 and 835a to read as follows:

§ 196

Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, ~~either~~ as follows:

~~1.~~

(a) In obedience to any judgment of a competent ~~Court; or,~~ court.

~~2.~~

(b) When ~~necessarily committed in overcoming actual resistance~~ necessary given the totality of the circumstances, pursuant to ~~the execution~~ subdivision (d) of ~~some legal process, or in the discharge of any other legal duty; or,~~ 835a, unless committed by a public officer whose gross negligence substantially contributed to making it necessary.

~~3.When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.~~

§ 835a

(a) The Legislature finds and declares that the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that must be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life. The Legislature further finds and declares that every person has a right to be free from excessive force by officers acting under color of law.

(b) Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent ~~escape~~ escape, or to overcome resistance.

(c) A peace officer ~~who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor~~ shall ~~such officer~~ not be deemed an aggressor or lose his or her right to self-defense by the use of reasonable force to effect the ~~arrest or~~ arrest, to prevent ~~escape~~ escape, or to overcome resistance.

(d)(1) Notwithstanding any other law, a peace officer may use deadly force only when such force is necessary to prevent imminent and serious bodily injury or death to the officer or to a third party.

(2) A peace officer shall not use deadly force against an individual based on the danger that individual poses to himself or herself, if the individual does not pose an imminent threat of serious bodily injury or death to officers or to other members of the public.

(3) A peace officer may use deadly force against persons fleeing from arrest or imprisonment only when the officer has probable cause to believe that the person has committed, or intends to commit, a felony involving serious bodily injury or death, and there is an imminent risk of

serious bodily injury or death to the officer or to another person if the subject is not immediately apprehended.

(4) For the purposes of this subdivision:

(A) "Necessary" means that, given the totality of the circumstances, a reasonable peace officer would conclude that there was no reasonable alternative to the use of deadly force that would prevent imminent death or serious bodily injury to the peace officer or to a third party. Reasonable alternatives include, but are not limited to, deescalation, tactics set forth in the officer's training or in policy, and other reasonable means of apprehending the subject or reducing the exposure to the threat.

(B) The "totality of the circumstances" includes, but is not limited to, the facts available to the peace officer at the time, the conduct of the subject and the officer leading up to the use of deadly force, and whether the officer's conduct was consistent with applicable training and policy.

(C) "Deescalation" means taking action or communicating verbally or nonverbally during a potential force encounter in an attempt to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction of the force necessary. Deescalation tactics include, but are not limited to, warnings, verbal persuasion, and tactical repositioning.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: As most recently demonstrated by the fatal police shooting of Stephon Clark in his own backyard in Sacramento, the time has come to confront the issue whether law enforcement officers are insufficiently discouraged from using deadly force when it may not be necessary. This resolution, based on Assemblywoman Shirly Weber's AB 931, introduced March 23, 2018, would shift the balance by providing greater protection to citizens against excessive use of deadly force by law enforcement when unnecessary.

Police officers have shot and killed 317 people since the start of this year, according to The Washington Post. California contributed 37 names to that list – more than any other state. Logic suggests that not all those deaths were necessary, and occasional capturing on film of police encounters by cell phone cameras, and even police cameras, reinforces that conclusion. However, existing law provides so much protection for law enforcement officers in the use of deadly force that for all intents and purposes, there is no circumstance in which the use of deadly force is not legally justified. Based on the mounting evidence from filmed evidence, the time has come to shift the balance to provide greater protection to citizens who encounter law enforcement.

The Solution: Assembly member Shirley Weber has answered that call with Assembly Bill 931, which would permit police to use deadly force only when necessary. This is a notable shift from the current policy of officials being able to use deadly force when "reasonable," and would encourage officers to defuse confrontations or use less deadly weapons.

The changes prescribed in this bill are long overdue. For decades, the trend of people dying – oftentimes meaninglessly – at the hands of law enforcement has persisted. CCBA has both a moral obligation and the responsibility to urge the Legislature to take action that may end or at least reduce these unjustified deaths.

Of course, law enforcement groups have criticized the bill, arguing it would cause officers to second-guess their decisions in the field, potentially endangering the public and leading to an increase in crime.

But we're far past the point of fearmongering. There has been a seemingly unending number of cases in which deadly force was used when unnecessary. If an officer truly fears for his or her life when they fire their weapon, they can make their case in court, as they have done in recent years under the current standard. The difference if that they will have to show the use of deadly force was necessary, not merely reasonable; which is a virtually standardless word when jurors are judging police conduct, because it is so subjective.

California has seen enough "split-second decisions" and "mistakes" by police officers. The use of deadly force is only reasonable when it is necessary to use it.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
Assem. Bill No. 931 (2018)

AUTHOR AND/OR PERMANENT CONTACT: John T. Hansen, 582 Market Street, 17th Floor, San Francisco, CA 94104, (510) 910-1392, jhansenlaw101@gmail.com.

RESPONSIBLE FLOOR DELEGATE: John T. Hansen