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MEMORANDUM

To: Chair Patricia Bates
Supervisor John M.W. Moorlach, Second District
Supervisor Bill Campbell, Third District
Supervisor Chris Norby, Fourth District

CC: Darlene Bloom, Clerk of the Board

FROM: Vice Chair Janet Nguyen *[Signature]*
FOR SUPERVISOR JANET NGUYEN

DATE: Friday, May 15, 2009

SUBJ: Proposed Alternate Response to the Grand Jury Report,
Item #44, Meeting of the Board of Supervisors,
May 19, 2009

CLERK OF THE BOARD
ORANGE COUNTY
BOARD OF SUPERVISORS

2009 MAY 15 PM 2:27

MEMORANDUM

Proposed alternate response attached (2 pages).

**2008-9 Grand Jury Report
Let the Sheriff Do Her Job
Responses to Findings and Recommendations**

Response to Finding

F.1 California Penal Code: The California Penal Code gives the Sheriff the power to establish both a policy and an application process for the issuance of concealed weapons permits/licenses. This includes the power to revoke prior licenses /permits not issued in conformance with the code.

Response: Disagree partially with finding.

While California Penal Code Section 12050 gives the Sheriff of a county the power and discretion over the issuance of Carry Concealed Weapons (CCW) permit process, this discretion is not unfettered. The first statement of finding is an overgeneralization of the law. The second statement of finding, "[the Sheriff's power] includes the power to revoke prior licenses/permits not issued in conformance with the code," is neither accurate, nor relevant to our current situation. The Sheriff's power to revoke is checked by the "abuse of discretion" standard applied by the court. Therefore, any categorical and unqualified statement that the Sheriff has the power to revoke is incorrect. A change in the definition of "good cause," after the CCW permit was already legally issued, does not retroactively make the permit "not issued in conformance with the code." Therefore, while this finding may be a correct statement of law in some limited instances, it is inapplicable here.

The question presented is not whether the Sheriff has the discretion to issue or revoke CCW permits; she does. The more appropriate question is whether the Sheriff has the power to refuse to issue or to revoke CCW permits for arbitrary and capricious reasons, or without evidentiary support.

With respect to the Sheriff's power to issue CCW permits, *Gifford v. City of Los Angeles*, 88 Cal.App.4th 801 (2001) says no to the latter question. While that court recognized the "broad discretion" given to the Sheriff with respect to the issuance of CCW permits, the court did recognize its power to review sheriff department actions that were "arbitrary, capricious, or entirely lacking in evidentiary support."

The requirement that the Sheriff act in a non-arbitrary and non-capricious manner in the issuance of CCW permits is consistent with the express requirements of section 12050. The Younger AG Opinion, in analyzing section 12050, concluded that "[a] local sheriff, police chief, or police commission has the duty to consider, investigate, and make a determination, on an individual basis, as to every license application under section 12050."

Furthermore, the Court in *Nichols v. County of Santa Clara*, 223 Cal.App.3d 1236 (1990), cited *Salute v. Pitchess*, 61 Cal.App.3d 557 (1976), for the proposition that "a writ of mandate would lie to compel the sheriff to exercise discretion on an individual basis on every application under Penal Code section 12050." Further on point, the *Salute* court ruled expressly that a uniform, blanket rule is an abuse of, and not an exercise of, discretion, as required under section 12050.

Therefore, individualized discretion, exercised in a non-arbitrary and non-capricious manner is required in issuance cases, and given the clear and specific grounds provided in section 12050 for and against the issuance of CCW permits, the issue as to the arbitrary and capricious nature of the Sheriff's decision in denying to issue is usually one of fact.

Regarding the Sheriff's discretion to "revoke" CCW permits, we do not have any law directly on point to guide our analysis. Therefore, we must infer from case law and other provisions within the statute and the Code. This inferential process is, of course, subject to personal bias and agenda. We must resist such pitfalls. It is also worth noting at the outset that since the August 23, 1977 Attorney General Opinion addressed the issuance, and not the revocation, of CCW permits, its applicability to our case in the "revocation" context is qualified, at best.

Again, the Sheriff has the discretion to revoke CCW permits, although not without limits to such discretion. Case law is consistent in holding that the Sheriff has "extremely broad discretion" in CCW revocations. Nevertheless, the

requirement to exercise discretion on an individual basis is the same, as in issuance cases. The seminal case that has been oft-cited by the Sheriff's supporters is Nichols. That case also involved the revocation of an existing CCW permit. The Appellants in that case raised, among others, the discretion requirement under Salute. The Nichols court did not reject Salute. In fact, that court specifically found that the respondents did rely on specific information obtained on the appellant's background before exercising their discretion in revoking appellant's CCW permit.

Therefore, the Sheriff is required to exercise her discretion on an individual basis in CCW revocation cases. Salute further requires that in making those decisions she does not abuse her discretion. Implicit in this language is the prohibition against arbitrary and capricious conduct.

Here, we have an articulated policy by the Sheriff that current CCW holders are presumed to have received their permits without adequate good cause. This conclusion was made "in advance, as a uniform rule", and the notices went out en masse to the permit holders without any facts cited to challenge or question the particular basis for good cause found by the prior Sheriff in these individual cases. In other words, the CCW permit holders were notified of the Sheriff's decision to revoke without any meaningful review being done into the circumstance of each situation. This is similar to the conduct that was prohibited by the court in Salute v. Pitchess.

Response to Recommendation

R.1 Carry Concealed Weapons License Permit Policy: Allow the Sheriff to continue her legally permissible actions in establishing a CCW license permit policy and the adherence to an application process. This includes the possible revocation of permits issued by the prior Sheriff and the review of each applicant to ensure compliance with the mandates of the penal code as to "good cause," training, good moral character and residency.

Response: The recommendation will not be implemented because it is not warranted

While we again acknowledge the Sheriff's authority to issue and revoke CCW permits, we again assert that this authority is constrained by case law and other relevant factors. Additionally, this recommendation is ambiguous, legally and factually; therefore, it does not accomplish the advisory role it seeks to serve. Saying "[a]llow the Sheriff to continue her legally permissible actions" again raises the questions of "what is legally permissible in revocation cases," as well as whether the current approach the Sheriff has put in place is legally permissible?

A blanket rule was applied in almost all revocations by this Sheriff without any individualized, factual determination to warrant such revocations. The CCW permit holders are placed in the position of having to meet a much higher, much more onerous and yet not clearly defined standard of good cause, after they have already been notified of the presumption of revocation of their permits.

Therefore, the policy employed by this Sheriff has been an arbitrary and capricious revocation of CCW permits. Good cause is now an indecipherable standard in many cases, except when it "feels" like good cause to the Sheriff's staff. Whole classes of applicants have been arbitrarily deemed to be lacking good cause. Applicants, who face grave risks similar to those traditionally accepted in CCW applications, are now told their risks are not sufficiently dangerous. Given this arbitrary and capricious nature of the sheriff's conduct, it cannot be said that the Sheriff's policy is "legally permissible actions."

This recommendation is also vague as to which prior Sheriff it refers to. The revocations have not been targeted only at CCW permits that were issued by the "prior Sheriff." In fact, all permit holders were lumped in and treated similarly. This makes any claims that the Recommendation "certainly refers" only to the Sheriff who was recently convicted particularly unpersuasive.