
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1798 **Hearing Date:** June 21, 2016
Author: Cooper
Version: February 8, 2016
Urgency: No **Fiscal:** No
Consultant: JRD

Subject: *Firearms: Imitation Firearms: Gun- Shaped Phone Cases*

HISTORY

Source: Author

Prior Legislation: SB 199 (De León) – Chapter 915, Statutes of 2014

Support: Association of Orange County Deputy Sheriffs; California Association of Highway Patrolmen; California Police Chiefs Association; California Peace Officers Association; California State Sheriffs' Association; California Statewide Law Enforcement Association; Fraternal Order of Police; Long Beach Police Officers Association; Peace Officers Research Association of California; Sacramento County Deputy Sheriffs' Association

Opposition: None known

Assembly Floor Vote: 74 - 0

PURPOSE

This bill specifies that an imitation firearm includes a cell phone case that is substantially similar in coloration and overall appearance to a firearm, as to lead a reasonable person to perceive that the case is a firearm.

Existing federal law states that no person shall manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has permanently affixed to it a blaze orange plug inserted in the barrel of such toy, look-alike, or imitation firearm. Such plug shall be recessed no more than six millimeters from the muzzle end of the barrel of such firearm. (15 U.S.C. § 5001(a) and (b).)

Existing federal law provides that the term “look-alike firearm” means any imitation of any original firearm which was manufactured, designed, and produced since 1898, including and limited to toy guns, water guns, replica nonguns, and air-soft guns firing nonmetallic projectiles. The term “look-alike firearm” does not include traditional BB, paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure. (15 U.S.C. § 5001(c).)

Existing federal law states that the provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with

provisions of this section provided that no State shall:

- Prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898; or,
- Prohibit the sale (other than prohibiting the sale to minors) of traditional BB, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

(15 U.S.C. § 5001(g))

Existing law prohibits, subject to specific exceptions, purchase, sale, manufacture, shipping, transport, distribution, or receipt, by mail order or in any other manner, of an imitation firearm. Manufacture for export is permitted. (Penal Code § 20165.)

Existing law defines “BB device” as “any instrument that expels a projectile, such as a BB or a pellet, through the force of air pressure, gas pressure, or spring action, or any spot marker gun.” (Penal Code 16250.)

Existing law defines “imitation firearm” as “any BB device, toy gun, replica of a firearm, or other device that is so substantially similar in coloration and overall appearance to an existing firearm as to lead a reasonable person to perceive that the device is a firearm.” (Penal Code § 16700(a).)

Existing law states that an “imitation firearm,” for purposes of the prohibition on purchase, sale, manufacture, etc., of an imitation firearm, does not include the following:

- A nonfiring collector's replica that is historically significant, and is offered for sale in conjunction with a wall plaque or presentation case.
- A spot marker gun which expels a projectile that is greater than 10mm caliber.
- A BB device that expels a projectile, such as a BB or pellet, that is other than 6mm or 8mm caliber.
- A BB device that is an airsoft gun that expels a projectile, such as a BB or pellet, that is 6mm or 8mm caliber which meets the following:
 - If the airsoft gun is configured as a handgun, in addition to the blaze orange ring on the barrel required by federal law, the airsoft gun has a trigger guard that has fluorescent coloration over the entire guard, and there is a two centimeter wide adhesive band around the circumference of the protruding pistol grip that has fluorescent coloration. The band shall be applied in a manner not intended for removal, and shall be in place on the airsoft gun prior to sale to the governor.
 - If the airsoft gun is configured as a rifle or long gun, in addition to the blaze orange ring on the barrel required by federal law, the airsoft gun has a trigger guard that has fluorescent coloration over the entire guard, and there is a two centimeter wide adhesive band with fluorescent coloring around the circumference of any two of the following:
 - The protruding pistol grip.
 - The buttstock.

- A protruding ammunition magazine or clip.
- A device where the entire exterior surface of the device is white, bright red, bright orange, bright yellow, bright green, bright blue, bright pink, or bright purple, either singly or as the predominant color in combination with other colors in any pattern, or where the entire device is constructed of transparent or translucent materials which permits unmistakable observation of the device's complete contents.

(Penal Code § 16700(b) and (c).)

Existing law provides that sale of any BB device to a minor is a misdemeanor, punishable by up to six months in county jail, a fine of up to \$1,000, or both. (Penal Code § 19910.)

Existing law states that every person who furnishes any BB device to any minor, without the express or implied permission of a parent or legal guardian of the minor, is guilty of a misdemeanor, punishable by up to six months in county jail, a fine of up to \$1,000, or both. (Penal Code § 19915.)

Existing law makes it a misdemeanor, with specified exceptions, for any person to change, alter, remove, or obliterate any coloration or markings that are required by any applicable state or federal law or regulation for any imitation firearm in a way that makes the imitation firearm or device look more like a firearm. (Penal Code § 20150.)

Existing law requires any imitation firearm manufactured after July 1, 2005, at the time of offer for sale in this state, to be accompanied by a conspicuous advisory in writing as part of the packaging to the effect that the product may be mistaken for a firearm by law enforcement officers or others, that altering the coloration or markings required by state or federal law or regulations so as to make the product look more like a firearm is dangerous, and may be a crime, and that brandishing or displaying the product in public may cause confusion and may be a crime. (Penal Code § 20160.)

Existing law prohibits any person from openly displaying or exposing any imitation firearm in a public place, as defined. (Penal Code § 20170.) A violation of this provision is an infraction punishable by a fine of \$100 for the first offense, and \$300 for a second offense. A third or subsequent violation is punishable as a misdemeanor. (Penal Code § 20180.)

Existing law states that any person who, except in self-defense, draws or exhibits an imitation firearm, as defined, in a threatening manner against another in such a way as to cause a reasonable person apprehension or fear of bodily harm is guilty of a misdemeanor punishable by imprisonment in a county jail for a term of not less than 30 days. (Penal Code § 417.4.)

This bill specifies that the definition of imitation firearm described above includes, but is not limited to, a protective case for a cellular telephone that is so substantially similar in coloration and overall appearance to an existing firearm as to lead a reasonable person to perceive that the device is a firearm.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Legislation

According to the author:

Currently available for purchase on-line are cellular/smartphone cases that are similar in color, shape, and operation to that of a real handgun.

Federal law prohibits the manufacturing, shipping, transporting or receiving any toy, look-a-like or imitation firearm unless it has an identifying mark that identifies it as a toy or look-a-like. Furthermore, state law makes it a felony not to comply with this federal law. Generally, the “mark” is that the imitation is a totally different color than a real firearm or the mark is an orange or red tip at the end of the barrel.

This bill is necessary because existing law is not sufficient in its definition to clearly prohibit the manufacture, import, or distribution of gun shaped cellular/smartphone cases. Specifically, these cases do not have a standalone, protruding barrel that can be visibly seen on all sides, and in the front. Thus, the barrel cannot be properly marked depicting the device is an imitation.

2. Effect of this Legislation

According to the New York Times:

An iPhone case that looks like a handgun is drawing warnings that it could be too easily mistaken for a real weapon.

That has been the message for weeks from some police departments in the United States, concerned that the case could add to the uncertainty of confrontations with suspects.

The cases — in black, white and pink — are made by a number of foreign manufacturers. Most appear to be imported from Asia.

Last week, Deputy Inspector Judith Harrison of the New York Police Department posted a message on Twitter warning consumers against buying the case.

The New Jersey State Police also recommended that people not buy the case.

“This cell phone case is a terrible idea,” the department said in a Facebook posting. “Officers do not have the luxury of time when making split-second decisions while interacting with the public.”

The prosecutor’s office in Ocean County, N.J., also commented on Facebook.

“Please folks — this cell phone case is not a cool product or a good idea,” the posting read. “A police officers job is hard enough, without having to make a split second decision in the dark of night when someone decides without thinking to pull this out while stopped for a motor vehicle violation.”

In what appeared to be the first remarks on the issue by a federal legislator, Senator Chuck Schumer said Tuesday that sales of the cases might be illegal and urged online retailers, including Amazon and eBay, to immediately stop selling them.

On Tuesday evening, a spokesman for Amazon, Erik Fairleigh, said in an email that the item was no longer listed for sale on the site. He declined to elaborate.

Mr. Schumer said a federal law requires toy or imitation guns to feature a highly visible orange mark at the end of the barrel to identify them as harmless. Since the phone case does not have the marker, he said, he would work with customs officials to block its import and sale.

“For years, we have been concerned about realistic-looking fake weapons,” Mr. Schumer said, “and that’s precisely why this federal law was put into place.”

Michael J. Bouchard, a Michigan sheriff, said last week there was too much potential for dangerous misunderstanding if a student walked into a school or a person walked into a bank with one of the cases.

“It looks like literally you have a weapon sticking out of your back pocket,” he said in an interview with WXYZ-TV in Detroit. “We are not a big fan of it on any level.”

(Gun-Shaped iPhone Case ‘Is a Terrible Idea,’ Police Officials Warn, Christine Hauser and Katie Rogers, New York Times, July 7, 2015, www.nytimes.com/2015/07/08/us/gun-shaped-iphone-case-is-a-terrible-idea-police-officials-warn.html.)

To address these concerns, this legislation would treat a cellphone case, that is “substantially similar” in appearance to a firearm, as an imitation firearm. As such, these cellphone cases would have to be “white, bright red, bright orange, bright yellow, bright green, bright blue, bright pink, or bright purple, either singly or as the predominant color in combination with other colors in any pattern, or where the entire device is constructed of transparent or translucent materials which permits unmistakable observation of the device's complete contents.” (Penal Code § 16700.)

3. Federal Preemption

The Supremacy Clause of the United States Constitution states:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

(US Const., Art VI, cl (2).)

This provision means that any state or local laws that interfere with, or are contrary to, federal law are invalid. (*Id.*) This is known as the doctrine of preemption.

In determining whether a state or local law is preempted by a federal law, Congressional intent is “the ultimate touchstone.” (*Retail Clerks v. Schermerhorn*, (1963) 375 U.S. 96, 103.) Congress may indicate pre-emptive intent through a statute’s express language or through its structure and purpose. (*Jones v. Rath Packing Co.*, (1977) 430 U.S. 519, 525.) Even if a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains. (*Freightliner Corp. v. Myrick*, (1995) 514 U.S. 280, 287.)

The Federal Toy Gun Law regulates the manufacture of and interstate commerce in “look-alike” or imitation firearms. (15 USC § 5001.) Federal law requires that “each toy, look-alike, or imitation firearm shall have as an integral part, permanently affixed, a blaze orange plug inserted in the barrel of such toy, look-alike, or imitation firearm. Such plug shall be recessed no more than 6 millimeters from the muzzle end of the barrel of such firearm.” (15 USC § 5001(b)(1).) However, these requirements do not apply to any “. . . traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure.” (15 USC § 5001(c).)

The Federal Toy Gun Law has an express preemption clause:

The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section provided that no State shall--

- (i) prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or
- (ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure. (15 USCS § 5001(g).)

The question this raises is whether the provisions of this bill are inconsistent with the federal law. Given the novelty of this issue (firearm shaped phone cases), it has not been specifically addressed by federal law. Thus, there are likely no preemption issues with this legislation.

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