

## RESOLUTION 08-11-2015

### DIGEST

#### Criminal Law: No Criminal Liability When Photographing Law Enforcement

Amends California Penal Code section 148 to exempt individuals photographing police activity from criminal liability for obstruction of justice when certain criteria are met.

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Association recommends that legislation be sponsored to Amend California Penal Code section 148 to read as follows:

§148.

1 (a) (1) Except as provided in subsection (g), every person who willfully resists, delays, or  
2 obstructs any public officer, peace officer, or an emergency medical technician, as defined in  
3 Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or  
4 attempt to discharge any duty of his or her office or employment, when no other punishment is  
5 prescribed, shall be punished by a fine not exceeding one thousand dollars (\$1,000), or by  
6 imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment. (2)  
7 Except as provided by subdivision (d) of Section 653t, every person who knowingly and  
8 maliciously interrupts, disrupts, impedes, or otherwise interferes with the transmission of a  
9 communication over a public safety radio frequency shall be punished by a fine not exceeding  
10 one thousand dollars (\$1,000), imprisonment in a county jail not exceeding one year, or by both  
11 that fine and imprisonment.

12 (b) Every person who, during the commission of any offense described in subdivision (a),  
13 removes or takes any weapon, other than a firearm, from the person of, or immediate presence  
14 of, a public officer or peace officer shall be punished by imprisonment in a county jail not to  
15 exceed one year or pursuant to subdivision (h) of Section 1170.

16 (c) Every person who, during the commission of any offense described in subdivision (a),  
17 removes or takes a firearm from the person of, or immediate presence of, a public officer or  
18 peace officer shall be punished by imprisonment pursuant to subdivision (h) of Section 1170.

19 (d) Except as provided in subdivision (c) and notwithstanding subdivision (a) of Section  
20 489, every person who removes or takes without intent to permanently deprive, or who attempts  
21 to remove or take a firearm from the person of, or immediate presence of, a public officer or  
22 peace officer, while the officer is engaged in the performance of his or her lawful duties, shall be  
23 punished by imprisonment in a county jail not to exceed one year or pursuant to subdivision (h)  
24 of Section 1170. In order to prove a violation of this subdivision, the prosecution shall establish  
25 that the defendant had the specific intent to remove or take the firearm by demonstrating that any  
26 of the following direct, but ineffectual, acts occurred:

27 (1) The officer's holster strap was unfastened by the defendant.

28 (2) The firearm was partially removed from the officer's holster by the defendant.

29 (3) The firearm safety was released by the defendant.

30 (4) An independent witness corroborates that the defendant stated that he or she intended  
31 to remove the firearm and the defendant actually touched the firearm.

32 (5) An independent witness corroborates that the defendant actually had his or her hand  
33 on the firearm and tried to take the firearm away from the officer who was holding it.

34 (6) The defendant's fingerprint was found on the firearm or holster.  
35 (7) Physical evidence authenticated by a scientifically verifiable procedure established  
36 that the defendant touched the firearm.  
37 (8) In the course of any struggle, the officer's firearm fell and the defendant attempted to  
38 pick it up.  
39 (e) A person shall not be convicted of a violation of subdivision (a) in addition to a  
40 conviction of a violation of subdivision (b), (c), or (d) when the resistance, delay, or obstruction,  
41 and the removal or taking of the weapon or firearm or attempt thereof, was committed against  
42 the same public officer, peace officer, or emergency medical technician. A person may be  
43 convicted of multiple violations of this section if more than one public officer, peace officer, or  
44 emergency medical technician are victims.  
45 (f) This section shall not apply if the public officer, peace officer, or emergency medical  
46 technician is disarmed while engaged in a criminal act.  
47 (g) This section shall not apply to persons who photograph officers conducting  
48 investigations or performing their duties, provided the photographer stands at least 20 feet from  
49 the individual being investigated or behind a police line if one is established. Further, the fact  
50 that the subject of the investigation reacts negatively to photography, resulting in delay of the  
51 investigation, shall not constitute a violation of subsection (a).

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

**PROPONENT:** Beverly Hills Bar Association

## **STATEMENT OF REASONS**

The Problem: California law does not protect the First Amendment rights of persons who photograph law enforcement officers carrying out their duties in public by establishing where photographers may lawfully stand to take photographs. Further Penal Code section 148(a) subjects the photographer to potential prosecution if the subject of an investigation reacts negatively to the photography, delaying the investigation. This Resolution arises out of a case where a passerby who photographed a DUI investigation of a celebrity was arrested and prosecuted under section 148(a) for delaying and obstructing a police investigation. Federal case law establishes that taking photographs of police carrying out their duties in public is protected by the First Amendment. See *Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011), and the cases there cited. Moreover, the “First Amendment right to gather news is . . . not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press. *Id.*”

The Solution: This Resolution establishes where photographers may stand to take photographs of a police investigation and makes it clear the reactions of a criminal suspect who wishes to avoid photography may not subject the photographer to criminal prosecution. The proposed amendment fosters the exercise of First Amendment rights while promoting transparency in law enforcement and protecting the rights of both police and criminal suspects. U.S. Supreme Court case law establishes First Amendment rights may not be curtailed simply because the subject of the speech finds it outrageous or emotionally distressing or because the protected expressive conduct is generally offensive to public officials. See, e.g., *Hustler Magazine, Inc. v. Falwell*,

485 U.S. 46 (1988); *Cohen v. California*, 403 U.S. 15 (1971). Conduct protected by the First Amendment may not be abridged simply because it is likely to provoke an angry reaction from an audience. See *Texas v. Johnson*, 491 U.S. 397, 408-409 (1989). The angry reaction is referred to as the “Heckler’s Veto,” and the law is clear that those offended by First Amendment expression may not enlist the government to curtail it. See *Center for Bio-Ethical Reform, Inc. v. Los Angeles County, etc.*, 533 F.3d 780, 787-788 (2008). The proposed amendment specifies where a photographer may stand and establishes that a photographer may not be arrested simply because the subject of an investigation does not wish to be photographed.

### **IMPACT STATEMENT**

This Resolution would not affect any other statute or case law.

### **CURRENT OR PRIOR RELATED LEGISLATION**

Senate Bill 411 (Lara (D- Bell Gardens)) currently pending.

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### **RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

#### History:

Similar to Resolution 12-01-2012, which was approved in principle.

#### Reasons:

This resolution amends California Penal Code section 148 to exempt individuals photographing police activity from criminal liability for obstruction of justice when certain criteria are met. This resolution should be approved in principle because Courts have consistently held that the First Amendment protects this right, and because a bill providing for the exact change the proponent seeks has already been introduced and is pending in the California Legislature as Senate Bill 411(Reg. Sess. 2015-2016.)

The proposed amendment specifies where a photographer may stand and establishes that a photographer may not be arrested simply because the subject of an investigation does not wish to be photographed. However, existing case law already establishes this right -- passing a resolution, and eventually legislation, as drafted, does not cure the specific problem noted by the proponent – that certain *courts* are choosing to not follow existing law. Specifically, Federal case law establishes that taking photographs of police carrying out their duties in public is protected by the First Amendment. (See, e.g., *Glik v. Cunniffe*, (1st Cir. 2011) 655 F.3d 78, 82-83.) The proponent cites one case, involving a celebrity who did not wish to be filmed while being detained by law enforcement, as the reason for this resolution. The issue in that situation,

however, is that the court did not adhere to already existing law, and instead chose to be influenced by a celebrity defendant. This resolution should be approved in principle on the basis that the First Amendment already provides these protections, and further, a bill providing this exact relief (which was co-sponsored by CCBA) is on the Governor's desk awaiting signature as of July 25, 2015.