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State of California

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OPINION	:	No. 83-616
	:	
of	:	<u>FEBRUARY 16, 1984</u>
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G. B. CRAIG, DIRECTOR, DIVISION OF LAW ENFORCEMENT,  
CALIFORNIA DEPARTMENT OF JUSTICE, requests an opinion on the following  
question:

Is a person previously convicted of the crime of unlawful sexual intercourse  
prohibited by Penal Code section 12021.1 from possessing a firearm capable of being  
concealed upon the person?

CONCLUSION

A person previously convicted of the crime of unlawful sexual intercourse is  
not prohibited by Penal Code section 12021.1 from possessing a firearm capable of being  
concealed upon the person.

## ANALYSIS

Subdivision (a) of Penal Code section 12021.1<sup>1</sup> prohibits any person previously convicted of any of the offenses listed in subdivision (b) of section 12021.1 from owning or having in his possession or under his custody or control "any pistol, revolver, or other firearm capable of being concealed upon the person. . . ." Among the offenses so enumerated in subdivision (b), each of which is characterized as a "violent offense," is "[r]ape."

Rape is defined in section 261 (Stats. 1983, ch. 949, § 1) as follows:

"Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

"(1) Where a person is incapable, because of mental disease, defect, or disorder or because of physical disability, of giving consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1, (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disease, defect, or disorder or physical disability rendered the alleged victim incapable of giving consent.

"(2) Where it is accomplished against a person's will by means of force or fear of immediate and unlawful bodily injury on the person or another.

"(3) Where a person is prevented from resisting by an intoxicating, narcotic, or anesthetic substance, administered by or with the privity of the accused.

"(4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused.

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<sup>1</sup> Unless otherwise specified, all statutory references in this opinion will be to provisions of the Penal Code. Section 12021.1 was enacted in 1982 (Stats. 1982, ch. 136, § 7) and our research has disclosed no reported judicial decision construing the statute. The statute is set out in full in the appendix to this opinion.

"(5) Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

"(6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph 'threatening to retaliate' means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death."

Rape is also defined in section 262 (Stats. 1983, ch. 1193, § 1):

"(a) Rape of a person who is the spouse of a perpetrator is an act of sexual intercourse accomplished against the will of the spouse by means of force or fear of immediate and unlawful bodily injury on the spouse or another, or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this subdivision 'threatening to retaliate' means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death."

"(b) The provisions of Section 800 shall apply to this section; however, there shall be no arrest or prosecution under this section unless the violation of this section is reported to a peace officer having the power to arrest for a violation of this section or to the district attorney of the county in which the violation occurred, within 90 days after the day of the violation."

We are asked whether rape, as used in section 12021.1, includes unlawful sexual intercourse with a female under the age of 18, as defined in section 261.5 (Stats. 1970, ch. 1301, § 2). Section 261.5 states:

"Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."

We conclude that the offense of unlawful sexual intercourse described in section 261.5 is not the offense of rape listed in section 12021.1, subdivision (b). Consequently, a person

convicted of the crime of unlawful sexual intercourse is not subject to section 12021.1 by reason of that conviction.

The consent of the victim is a defense to the crime of rape. (§ 261.6; *People v. Harris* (1979) 93 Cal.App.3d 103, 115-116.) On the other hand, for the crime of unlawful sexual intercourse, as defined in section 261.5 (and in former section 261, subdivision (1) (Stats. 1913, ch. 122, § 1)), the consent or nonconsent of the victim is immaterial. (*People v. Brown* (1973) 35 Cal.App.3d 317, 326; *People v. Johns* (1959) 173 Cal.App.2d 38, 46-47.) Indeed, rape and unlawful sexual intercourse are distinct crimes, as explained in *People v. Puckett* (1975) 44 Cal.App.3d 607, 610-611 where the question was whether an assault with an intent to commit rape (under section 220) included an assault with an intent to have unlawful sexual intercourse:

"Prior to 1970, section 261 of the Penal Code, which is the section defining 'rape,' contained, as subdivision 1 of the section, sexual intercourse with a female under the age of 18 years. As the statute then read, it would have been legally possible to commit an assault on a female with intent to have intercourse regardless of whether the assaulter intended to go so far as an actual rape. But, in 1970, the Legislature amended section 261 by deleting the old subdivision (1) and enacting a new section, section 261.5, creating a new crime denominated 'unlawful sexual intercourse.' The distinction was carried forward by the amendment of section 264 by the same statute, expressly setting forth different penalty provisions for 'rape' and for 'unlawful sexual intercourse.' We think it plain that, after 1970, 'rape,' as used in section 220, meant only rape as now defined in section 261 and that it does not include the offense, separately denominated, created by section 261.5."<sup>2</sup>

Similarly, we conclude that rape as used in section 12021.1 is intended to mean rape as defined in section 261 and in section 262 and not to mean unlawful sexual intercourse as independently defined in section 261.5.

An underlying issue remains to be considered: whether section 12021.1 applies when there is a prior conviction of "statutory rape," i.e., a conviction under former section 261, subdivision (1).

To answer the inquiry we must "ascertain the intent of the Legislature" when it enacted section 12021.1. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) Statutes should be interpreted "according to the usual ordinary import of the

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<sup>2</sup> The offense of unlawful sexual intercourse is not an offense necessarily included within the offense of rape. (*People v. Chapman* (1975) 47 Cal.App.3d 597, 603-604.)

language employed in framing them." (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.) When the Legislature enacted section 12021.1 in 1982, the term "rape" no longer encompassed the conduct described in former section 261, subdivision (1). The Legislature was aware that rape was specifically defined in section 261 and in section 262 and that these definitions excluded unlawful sexual intercourse or what was known as "statutory rape" prior to 1970.

In this opinion we construe only Penal Code section 12021.1. Under Penal Code section 12021, however, any person convicted of a felony is prohibited from possessing a concealable firearm. The crimes of unlawful sexual intercourse and "statutory rape" may be either misdemeanors or felonies depending upon the sentences imposed. (Pen. Code, § 264.) Consequently, if the prior conviction were a felony, section 12021 would be applicable.

We conclude that a person previously convicted of the crime of unlawful sexual intercourse under section 261.5, or under former section 261, subdivision (1), is not prohibited by Penal Code section 12021.1 from possessing a firearm capable of being concealed upon the person.<sup>3</sup>

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<sup>3</sup> In this conclusion we are assuming that the prior conviction did not include any other conduct covered by section 12021.1, subdivision (b), such as great bodily injury or personal use of a dangerous or deadly weapon. (See Appendix.)

## APPENDIX

Section 12021.1. (a) Notwithstanding the provisions of subdivision (a) of Section 12021, any person who has been previously convicted of any of the offenses listed in subdivision (b) and who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person is guilty of a public offense, and shall be punished by imprisonment in a county jail for at least six months and not exceeding one year, or by imprisonment in the state prison. If probation is granted, or if the imposition or execution of sentence is suspended, it shall be a condition of the probation or suspension that the defendant serve at least six months in a county jail.

(b) As used in this section, a violent offense includes any of the following:

(1) Murder or voluntary manslaughter.

(2) Mayhem.

(3) Rape.

(4) Sodomy by force, violence, duress, menace, or threat of great bodily harm.

(5) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.

(6) Lewd acts on a child under the age of 14 years.

(7) Any felony punishable by death or imprisonment in the state prison for life.

(8) Any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice, which has been charged and proven, or any felony in which the defendant uses a firearm which use has been charged and proven.

(9) Attempted murder.

(10) Assault with intent to commit rape or robbery.

(11) Assault with a deadly weapon or instrument on a peace officer.

(12) Assault by a life prisoner on a noninmate.

- (13) Assault with a deadly weapon by an inmate.
- (14) Arson.
- (15) Exploding a destructive device or any explosive with intent to injure.
- (16) Exploding a destructive device or any explosive causing great bodily injury.
- (17) Exploding a destructive device or any explosive with intent to murder.
- (18) Robbery.
- (19) Kidnapping.
- (20) Taking of a hostage by an inmate of a state prison.
- (21) Attempt to commit a felony punishable by death or imprisonment in the state prison for life.
- (22) Any felony in which the defendant personally used a dangerous or deadly weapon.
- (23) Escape from a state prison by use of force or violence.
- (24) Assault with a deadly weapon or force likely to produce great bodily injury.
- (25) Any attempt to commit a crime listed in this subdivision other than an assault.
- (26) Any offense enumerated in Section 12001.6.

(c) Any person previously convicted of any of the offenses listed in subdivision (b) which conviction results from certification by the juvenile court for prosecution as an adult in adult court under the provisions of Section 707 of the Welfare and Institutions Code, who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person is guilty of a public offense, and shall be punished by imprisonment in a county jail for at least six months and not exceeding one year, or by imprisonment in the state prison. If probation is

granted, or if the imposition or execution of sentence is suspended, it shall be a condition of the probation or suspension that the defendant serve at least six months in a county jail.

(d) The court shall apply the minimum sentence as specified in subdivisions (a) and (c) except in unusual cases where the interests of justice would best be served by granting probation or suspending the imposition or execution of sentence without the imprisonment required by subdivisions (a) and (c), or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in subdivisions (a) and (c), in which case the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by such a disposition.

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