In the Supreme Court of the State of California

MARTIN M., **a Person Coming Under the Juvenile Court.**	Case No. S177704
THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MARTIN M., a Minor,** **Defendant and Appellant.**	

SUPREME COURT
FILED

DEC - 2010

Frederick K. Ohlrich Clerk

Fourth Appellate District, Division Two, Case No. E045714
San Bernardino County Superior Court, Case No. J220179
The Honorable Michael A. Knish, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Penal Code section 148 makes it a crime to willfully resist, delay, or obstruct any public officer. The legislative history pertaining to Penal Code section 148, the broad use of the term "public officer" in the Penal Code, and public policy mandate a broad interpretation of the term "public officer" as used in that section. A public officer is one who has a duty delegated and entrusted to him under the law, the performance of which is an exercise of a part of governmental functions. As set forth in respondent's opening brief on the merits, this Court should hold that a school security officer employed by a public school district under the Education Code to protect persons and school property is a public officer for purposes of Penal Code section 148.

Notwithstanding, appellant asserts that well established case law requires a "public officer" to also have a fixed tenure of office. As such, he maintains that because school security officers do not have a tenured office they cannot be classified as "public officers" for purposes of Penal Code section 148. Appellant also argues that the rule of lenity requires this Court to reject respondent's interpretation of the term "public officer" for purposes of Penal Code section 148.

Respondent disagrees. In 1921, this Court held that the most general characteristic of a "public officer," "is that a duty is delegated . . . to him . . . the performance of which is an exercise of a part of the governmental functions." It further noted that a person may serve as a public officer without tenure, oath, or bond. In this case, because a school security officer employed by a public school district under the Education Code to protect persons and school property is delegated a duty under the law which is a governmental function, this Court should find that a school security guard is a "public officer" for purposes of Penal Code section 148.

Finally, respondent disagrees with appellant's assertion that the rule of lenity requires this Court to reject respondent's interpretation of the term "public officer." The rule of lenity is inapplicable to the case at hand because there is no egregious ambiguity and uncertainty to justify invoking the rule. The legislative history pertaining to Penal Code section 148 and the use of the term "public officer" in other contexts within the Penal Code, make it evident that the term "public officer" is not ambiguous and that the term was meant to have broad application.

ARGUMENT

I. A "PUBLIC OFFICER" FOR PURPOSES OF PENAL CODE SECTION 148 NEED NOT HAVE A TENURED POSITION

Contrary to appellant's argument, for purposes of Penal Code section 148, a "public officer" need not have a tenured position. Well settled case law does impose such a requirement. Instead, case law generally defines a "public officer" as one who has a duty delegated and entrusted to him under the law, the performance of which is an exercise of a part of governmental functions.

In *People v. Olsen* (1986) 186 Cal.App.3d 257, the Second District Court of Appeal was presented with a similar although distinct issue. In that case, the issue was whether a private paramedic was a "public officer," and thus fell within the ambit of Penal Code section 148.2. (*Id.* at p. 265.) Penal Code section 148.2 provides:

> Every person who willfully commits any of the following acts at the burning of a building or at any other time and place where any fireman or firemen or emergency rescue personnel are discharging or attempting to discharge an official duty, is guilty of a misdemeanor: . . . 2. Disobeys the lawful order of any fireman or public officer.

(*Ibid.*) In *Olsen*, the evidence established that the defendant interfered with a private paramedic, employed by a private company. (*Ibid.*) In reaching

its decision that the paramedic was not a "public officer," the court turned to a definition set forth in California Jurisprudence Third, which provided:

> "[o]ne of the prime requisites [of a public office] is that [it] be created by the *constitution* or authorized by some *statute*. And it is essential that the incumbent be clothed with some portion of the sovereign functions of government, either legislative, executive, or judicial to be exercised in the interest of the public. There must also be a duty or service to be performed, and it is the nature of this duty, not its extent, that brings into existence a public office and a *public officer*. Thus, an office, as a general rule, is based on some law that defines the duties appertaining to it and fixes the tenure, and it exists independently of the presence of a person in it."

(*People v. Olsen, supra,* at pp. 265-266, quoting 52 Cal.Jur.3d, Public Officers and Employees, § 12, pp. 176-177, fns. omitted.) In so defining a "public officer," the Court of Appeal concluded the private paramedic was not a "public officer" since he was employed by a private company.

Notwithstanding, the term "public officer" was more generally defined by this Court in 1921 in *Coulter v. Pool* (1921) 187 Cal. 181. In *Coulter*, this Court first recognized that "[a] public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public." (*Id.* at pp. 186-187.) However, this Court then went on to note that "[t]he most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting." (*Id.* at p. 187.) At the same time this Court recognized that there could be other incidents characterizing a public officer, such as, but not limited to, "a

fixed tenure of position, the exaction of a public oath of office and, perhaps, an official bond." (*Coulter v. Pool, supra,* 187 Cal. at p. 187.)

In other words, this Court in *Coulter* recognized the difficulty of creating a precise definition of the term "public officer" to effectively cover every situation. However, it underscored the most general characteristics of a "public officer" as including a delegated duty and the performance of governmental functions. (*Id.* at p. 187.) At the same time this Court properly recognized that there could be other incidents characterizing a public officer, including a fixed tenure of position, although recognizing that such a fixed tenure was not necessary to the creation of a public officer. (*Ibid.*)

Nevertheless, appellant asserts that in order to be classified as a "public officer," a school security officer or any other must have a fixed tenure. (ABOM 8-11.)

Respondent disagrees. Although more recent cases such as *Olsen* have defined a "public officer" as one having tenure, this Court properly defined the general characteristics of a "public officer" in *Coulter.* These characteristics include a delegated duty and the performance of governmental functions. And, although it may be true that some public officers will have a fixed tenure of law, as this Court found in *Coulter* such a characteristic is not required to classify a person's position as a "public office."

II. THE LEGISLATURE DID NOT ADOPT THE DEFINITION OF A "PUBLIC OFFICER" AS USED IN *OLSEN*

In a related contention, appellant contends that the Legislature's amendment of Penal Code section 148 in 1987, after the decision in Olsen and without defining the term "public officer," demonstrated the Legislature's intent to adopt the *Olsen* court's definition of the term "public officer." (ABOM 11.)

Respondent agrees that after the decision in *Olsen*, the Legislature amended Penal Code section 148. Specifically, in response to a request from Tuolumne County Sheriff's Department the Legislature amended Penal Code section 148 to include among those protected under Penal Code section 148, emergency medical technicians. (See Pen. Code, § 148, as amended by Stats. 1987, ch. 257, § 1.)

However, that amendment does not establish the Legislature's acquiescence with how the term "public officer" was defined in *Olsen*. It is true that a well-established principle of statutory construction is "that when the Legislature amends a statute without changing those portions of the statute that have previously been construed by the courts, the Legislature is presumed to have known of and to have acquiesced in the previous judicial construction." (*People v. Blakeley* (2000) 23 Cal.4th 82, 89.) At the same time, ordinarily, the Supreme Court "does not draw substantive conclusions based on legislative inaction." (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 897.) In fact, "[a]s a principle of statutory construction, legislative inaction is a 'slim reed upon which to lean.'" (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117, quoting *Quinn v. State of California* (1975) 15 Cal.3d 162, 175.)

Here, when the Legislature amended Penal Code section 148 there was no question emergency medical technicians were not public officers. In fact, the legislative history notes that emergency medical technicians did not even have an "office," which could be obstructed and instead only had a private employment. Thus, when it amended the statute the issue before the Legislature was not how a "public officer" should generally be defined, but instead more narrowly whether the statute should protect emergency medical technicians. (See Request for Judicial Notice, Exh. 7.) While the Legislature did amend section 148 to expand those who were protected by the statute, this Court should not view the Legislature's amendment as

persuasive evidence that the Legislature intended to acquiesce in judicial decisions construing the term "public officer." (See *People v. Morante* (1999) 20 Cal.4th 403, 429-430 [Legislature's amendment of Penal Code section 778a unaccompanied by any attempt to modify that statute to overrule the interpretation it had been given by the Supreme Court did not establish Legislature's acquiescence with court's decision because amendment added a new subdivision intended to expand the court's jurisdiction]; see also *People v. King* (1993) 5 Cal.4th 59, 75-77 [Legislature's amendment adding subdivision to Penal Code section 12022.5 did not endorse California Supreme Court's interpretation of that statute; whatever the amendment may have done it did not codify the court's decision].)

For the same reasons, amending Penal Code section 148 to include "emergency medical technicians" was not surplusage because under any definition an emergency medical technician privately employed by a company and whose position was not authorized by statute, would never be classified as a "public officer."

In contrast, the addition of "peace officers" to Penal Code section 148 was surplusage and that fact was noted by the proponent of the amendment to Penal Code section 148. The proponent noted that the "bill makes no substantive change in the law." (See Request for Judicial Notice, Exh. 6.) And, at least one court has recognized that "[a]lthough 'all peace officers are public officers, all public officers are not peace officers.'" (*In re Eddie D.* (1991) 235 Cal.App.3d 417, 422.)

III. THE RULE OF LENITY DOES NOT COMPEL A DIFFERENT RESULT SINCE THERE IS NO EGREGIOUS AMBIGUITY

Appellant's final contention is that the rule of lenity requires this Court to reject respondent's interpretation of the term "public officer." Specifically, appellant contends that both his definition of the term "public

officer" and respondent's are reasonable and as a result, this Court must interpret the term to exclude school security officers. (ABOM 13-16.) Appellant's argument should be rejected. The rule of lenity is inapplicable in this case because there is no egregious ambiguity and uncertainty to justify invoking the rule.

Under the rule of lenity, "courts must resolve doubts as to the meaning of a statute in a criminal defendant's favor." (*People v. Avery* (2002) 27 Cal.4th 49, 57.) However,

> "[T]he existence of statutory ambiguity is not enough to warrant application of the general rule [of lenity], because most statutes are ambiguous to some degree. The rule applies only if the court can do more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule."

(*People v. Bamberg* (2009) 175 Cal.App.4th 618, 629, quoting 1 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53.) Further, the rule is inapplicable "'unless two reasonable interpretations of the same provision stand in relative equipoise.'" (*People v. Avery*, supra, 27 Cal.4th at p. 58.) And, "although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*Ibid.*)

Here, there is no egregious ambiguity justifying application of the rule of interpretation urged by appellant. In fact, appellant falls to cite any ambiguity. Instead, appellant jumps to the conclusion that both interpretations of the term "public officer" are reasonable and thus, that the rule of lenity should be applied in his favor. (ABOM 14.)

However, as set forth above, in order to invoke the rule, there must exist an egregious ambiguity. In this case, as set forth in respondent's opening brief, when the legislative history and the term "public officer" as

used in other contexts of the Penal Code are reviewed, it is apparent that the term "public officer" encompasses all who are delegated a duty to perform a government function. Thus, there is no need to guess at the Legislature's intent.

Briefly stated, when Penal Code section 148 was enacted it broadly criminalized any person who willfully resisted, delayed, or obstructed any *public officer*. (See Pen. Code, § 148, as enacted, emphasis added.) And, since its enactment, it has only been amended twice. First, it was amended to make the willful resistance, delay, or obstruction against any public officer or *peace officer* a crime-although it was accepted that all peace officers are public officers. (See Pen. Code, § 148, as amended by Stats. 1983, ch. 73, § 1, emphasis added.) Thereafter in 1987, the Penal Code section was amended to protect "emergency medical technicians." (See Pen. Code, § 148, as amended by Stats. 1987, ch. 257, § 1.) Thus, the enactment and amendments evidence the Legislature's intent that the term "public officer" have broad application.

Moreover, use of the term "public officer" in other contexts of the Penal Code evidences the same. Among those individuals classified as public officers in the Penal Code are persons hired as conductors to perform fare inspection duties by a railroad corporation, transportation officers "appointed on a contract basis by a peace officer to transport a prisoner or prisoners," and sheriff's and police security officers who are employed to secure law enforcement facilities. (Pen. Code, §§ 830.14, 831,4, subd. (a), 831.6, subd. (a).)

Thus, the legislative history and those who have been classified in the Penal Code as "public officers" evidences that the term "public officer" is not ambiguous and that the term was meant to have broad application. Because there is no egregious ambiguity, this Court should find that the rule of lenity is inapplicable.

CONCLUSION

For the foregoing reasons and those stated in Respondent's Opening Brief on the Merits, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal.

Dated: December 6, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 2,551 words.

Dated: December 6, 2010

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **The People of the State of California v. Martin M., a Minor**
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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 6, 2011, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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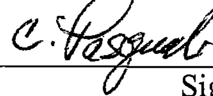
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 6, 2010, at San Diego, California.

C. Pasquali	
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