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To: California District Attorneys

From: Fresno County District Attorney Edward W. Hunt

Date: November 9, 2001

Re: Hunt v. Lockyer, Fresno Superior Court Case No. 01CECG03182

Dear Fellow Prosecutor:

As you may have heard, this office recently filed a civil law suit in Fresno Superior court against the California Department of Justice (DOJ) and the Attorney General (AG) over DOJ implementation of SB 23 (1999). SB 23 created a new class of firearms deemed to be assault weapons, expanding the list of assault weapons (AW) created under the original 1989 law.

Under the original 1989 provisions of the AWCA, firearms were condemned as assault weapons based on the make and model of the firearm. SB 23 amended the 1989 AWCA by adding new definitions to the original 1989 definition of AW. These new definitions, contained in Penal Code section 12276.1, are based on the features those firearms possess.

Understanding and defining what these features are can raise substantial technical problems requiring significant expertise. The legislative history of SB 23 indicates that the Legislature was aware of this, and was depending on DOJ to clarify the issues through interpretive regulations. Unfortunately, in some respects this has not occurred at all, and in others the DOJ effort has been inadequate. The result is that many of the technical feature issues are unclear. This hinders prosecution and/or raises the spectre that prosecution may result in parts of the statute being declared fatally vague.

That is why the lawsuit was filed. I have no desire to pick a quarrel with the Attorney General on this issue. I have brought suit only because the various statutes in SB 23 are unintelligible despite (or even because of) AG-DOJ regulations and actions that were supposed to clarify it. I fear this results from political expediency in the administrative (or legislative)

process.

CONFUSIONS UNDER THE NEW ASSAULT WEAPON PROVISIONS

Via the lawsuit, we seek a definitive judicial interpretation of what SB 23 means. The AG's office has characterized this suit as "unprecedented" and has dismissed my confusion as a result of a failure to attend DOJ training classes on the subject. I have, however, made great efforts at understanding the law, and have consulted with DOJ representatives on several occasions in an unsuccessful attempt to comprehend the law's requirements. Regardless, training classes should not be necessary to understand a law, and, if they are, how are civilians that cannot attend those classes supposed to determine their obligations?

In light of these and other issues raised by the statute, I write to sensitize you to the issues involved and to request your support, if only moral. I urge you to review, and have your expert's review, the Complaint and Points and Authorities submitted in this case. These are available through this office.

Below I set out some representative examples of the practical difficulties involved in understanding and enforcing this law.

1. High Capacity Tubular Ammunition Feeding Devices

One thing I seek to clarify is the confusion DOJ has created and exacerbated by issuing special letters to allow importation of "large capacity" lever action magazine rifles into Riverside County in some circumstances. In 2000, and again this year, DOJ issued letters to the Single Action Shooting society (SASS), a "cowboy action" shooting association, with copies sent to the Riverside County District Attorney's office and Riverside County law enforcement. SASS holds an important charitable "cowboy action" shooting contest in Riverside County. The effect of the DOJ letters is to specially allow out-of-state SASS members attending this contest to bring with them their "large [over 10 round] capacity" magazine lever action rifles in apparent violation of Penal Code 12020 (a)(2) which prohibits importation of such rifles.

I am not unsympathetic to the fact that cowboy action shooting is a harmless pastime, or that the Riverside County contest is an important charitable fund raising event. If the court upholds DOJ's position here, I will happily accept this. But, as I read it, Penal Code 12020 (a)(2) plainly bans importation of these firearms and provides no exemption for non-residents importing them to participate in such events. It bears emphasis that the DOJ letters offered no rationale whatever justifying or explaining (or confining) this apparently special exemption for Riverside County.

This matter is of special concern to me because SASS also holds a shooting contest in Fresno County. Do the DOJ letters mean that non-residents can bring these rifles into California to participate in the Fresno

County contest? What about cowboy action shooting contests run by different associations? Are their out-of-state residents free to bring their large magazine rifles into Fresno County to participate in such contests? What about large capacity shotguns, which are also, covered by Penal Code 12020 (a)(2) making it illegal to import them? If large capacity rifles can be brought in for shooting contests, can shotguns be brought in as well? And, in any event, what is the rationale for these determinations? Is DOJ interpreting the statute as just prohibiting merchants from importing these kinds of firearms for the purpose of sale? Does that mean people emigrating to California from other states are allowed to bring in these guns for their own use?

Well after my suit was filed, the Legislature enacted SB 626. It quiets (but does not explain) this particular issue by exempting large magazine lever action rifles from Penal Code 12020 (a)(2). But this leaves unresolved the same set of problems as to large capacity shotguns, which are still illegal to import or buy.

2. Acknowledgment of Law Enforcement Confusion

The AG's protestations about the law's clarity are belied by his and DOJ's own conduct regarding portions of this year's Senate Bill 626 (Perata), which the Governor just signed. Along with exempting high capacity tubular magazine rifles (as discussed above) SB 626 gives a special exempting from SB 23 to law enforcement officers. This portion of SB 626 was sparked by the many inquiries DOJ received from police officers as to what rifles Penal Code 12276.1 covers. These officers were unclear as to which of their own personal weapons had to be registered. Besieged by the police unions, DOJ asked Sen. Perata to sponsor a bill that would allow police officers a special 16-month extension of the deadline for registration, which had already expired for everyone else. The idea was that during that period DOJ would make a special education effort for the benefit of police only.

Although that was the original form of this portion of SB 626, the bill eventually evolved into a complete exemption from the AWCA for police who could obtain departmental sanction for their own personal AWs (without any requirement or certification that the weapon was needed or would be used for police activities).

SB 626 implicitly acknowledges the existence of confusion over which privately owned guns are covered by the law, and particularly over what guns police officers were supposed to register. The bill recognizes that many police officers own "assault weapons" but did not register their firearms by the Dec. 31, 2000 deadline established by the 1999 amendments. In fact, it even exempts officers who failed to register assault weapons on the 1989 list by the 1992 deadline established by the original 1989 AWCA (although they may have been civilians when this original deadline passed).

Thus I am not alone in finding the AW definitions confusing. The passage of SB 626 underscores that law enforcement officers found, and find, both the 1989 and 1999 AW definitions confusing.

3. Flash Suppressor

The most egregious of the several examples in my complaint involves new Penal Code 12276.1's "flash suppressor" language.

Penal Code 12276.1 focuses on "flash suppressor," a term that has an established technical meaning based on the parts intended use and design. But CCR Title 11, Penal Code 12.8.978.20(b) improperly expands the meaning of "flash suppressor" to include two completely different devices (muzzle brakes and compensators) if they have an incidental, unintended effect of reducing flash, or just redirecting it. But the only way of determining whether a muzzle brake or compensator has any such effect is actual range testing under specific conditions. Such testing is something, which ordinary owners are in no position to do. Indeed, experts inform me that even law enforcement laboratories are unable to do the testing because the DOJ definition fails to specify the standards required.

The confusion surrounding the meaning of "flash suppressor" is illustrated by the DOJ's own letter rulings which approve both the Springfield Armory "Muzzle Break" and the Browning BOSS system as being legal under SB 23. This approval (which preceded the AG-DOJ regulation) violates the regulation because, as the manufacturers themselves concede, both of these devices redirect flash from the shooter's field of vision. This brings these under the DOJ regulation which condemns any devices that does just that. DOJ indicates that these devices were approved by DOJ because the federal Bureau of Alcohol, Tobacco & Firearms (ATF) approved them under the federal "assault weapon" law. But ATF uses an entirely different standard in evaluating these devices and that standard does not conform to the DOJ regulation definition of flash suppressor.

This places me and other prosecutors in a position of hopeless confusion. We are supposed to follow the regulation which, having been promulgated under the APA, has the force of law. But we are also supposed to be under the direct supervision of AG (Cal. Constitution, Art. V, Penal Code 12) and to follow DOJ's direction as to the AWCA which it administers. If we deem the Springfield Armory "Muzzle Break" and the Browning BOSS system to be flash suppressors, then we will be contradicting DOJ's letter rulings specifically finding that these devices are not flash suppressors.

This quandary is complicated by the fact that numerous other muzzle brakes redirect flash exactly as do the Springfield Armory muzzle brakes and Browning BOSS system. If in enforcing section 12276.1 we deem these other muzzle brakes not to be flash suppressors, we will be acting inconsistently with the AG-DOJ regulation definition, which has the force of law. But to treat these other muzzle brakes as flash suppressors would contradict DOJ's determination that the indistinguishably operating

Springfield armory muzzle brake and Browning BOSS system are not flash suppressors under section 12276.1.

CONCLUSION

These illustrations should serve to make my point and demonstrate why I am particularly concerned in this matter. To do justice (as we are all compelled to do under the Government Code) I must know when I can or should prosecute and when I cannot or should not. And I do not want my deputies to be faced by a criminal defense lawyer asserting that even if my prosecution is based on a correct reading of SB 23, his client relied on an DOJ-issued letter and so is entitled by due process not to be prosecuted.

I again urge you to have your experts scrutinize these claims by reviewing the Complaint and Points and Authorities posted on the Internet. Once satisfied, I encourage you to contact me to discuss ways in which your office might help with this effort. I recognize the political considerations inherent in taking a stance on these matters, and am prepared to treat your inquires with the utmost discretion.

Sincerely,

Edward W. Hunt
DISTRICT ATTORNEY