

14-16840

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**JEFF SILVESTER, BRANDON COMBS,
THE CALGUNS FOUNDATION, INC., a
non-profit organization, and THE
SECOND AMENDMENT FOUNDATION,
INC., a non-profit organization,**

Plaintiffs and Appellees,

v.

**KAMALA HARRIS, Attorney General of
California (in her official capacity),**

Defendant and Appellant.

On Appeal from the United States District Court
for the Eastern District of California

Case No. 1:11-cv-02137-AWI-SKO
The Honorable Anthony W. Ishii, Judge

**APPELLANT'S REPLY IN SUPPORT OF
URGENT MOTION TO STAY ENFORCEMENT OF JUDGMENT**

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REPLY ARGUMENT

I. APPELLANT IS LIKELY TO SUCCEED ON THE MERITS OF THE APPEAL

A. This Appeal Passes the “Serious Questions” Test

Appellees do not dispute that this appeal presents serious legal questions of first impression. Rather, Appellees incorrectly argue that to satisfy the likelihood-of-success factor, Appellant must show both presence of a serious question and that a balance of hardships favors a stay. (Appellees’ Responsive Brief in Opposition to Motion to Stay (hereafter “Opp. Br.”) at 11, citing *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011).) Appellees, however, misread *Leiva-Perez*. Under *Leiva-Perez*, a showing that “serious legal questions are raised” is sufficient to show that an appellant has a substantial case for relief on the merits. 640 F.3d at 967-68. The constitutionality of state waiting period laws, an issue of first impression in an evolving field of law, presents the quintessential “serious legal question” justifying a stay. On this basis alone, Appellant satisfies this factor.

B. Appellant has Shown a Substantial Case for Relief on Merits

On an independent basis, Appellant has also shown that she is likely to succeed on the merits. Appellees incorrectly suggest that Appellant must make a “strong showing” that she is likely to succeed on the merits. (Opp. Br. at 11-12.) But that is not the proper standard in this circuit. Rather, Appellant needs only to show, and has shown, that she has a “reasonable probability,” “fair prospect,” or “substantial case for relief on the merits.” *Leiva-Perez*, 640 F.3d at 967-68. A

more stringent standard would require the court to conduct a “pre-adjudication adjudication,” defeating the purpose of a stay, which is to give the reviewing court the time to “act responsibly,” rather than doling out “justice on the fly.” *Id.* at 967.

1. The Waiting-Period Laws are Presumptively Lawful

Significantly, Appellees do not dispute that the Waiting-Period Laws are longstanding, presumptively lawful measures that impose qualifications on the commercial sale of arms. *See District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008). Appellant should prevail on this basis alone.

Appellees argue instead that the Waiting-Period Laws are not regulatory measures prohibiting possession of firearms by felons or the mentally ill, but rather “facilitate” such prohibitions. (Opp. Br. at 14.) *Heller*’s list of presumptively lawful regulatory measures, however, is not exhaustive. *Heller*, 554 U.S. at 626-27, n.26. The Waiting-Period Laws ensure that those prohibited are properly denied possession by providing Appellant sufficient time to conduct background checks and to investigate potential straw purchases. And because California has had some form of waiting period on firearm purchases since 1923, the Waiting Period Laws are therefore longstanding, presumptively lawful regulatory measures. (1923 Cal. Stat. ch. 339 §§ 10,11)

2. The Waiting-Period Laws Pass Intermediate Scrutiny

Appellees do not challenge the importance of the public safety objective served by the Waiting-Period Laws. Rather, Appellees argue that there is not a “reasonable fit” between the important public safety objectives and the waiting period. (Opp. Br. at 15.) To the contrary, the waiting period promotes public safety by providing a “cooling off” period, providing time for law enforcement to investigate and potentially stop straw purchases of firearms, and providing a potential opportunity for Appellant to conduct the background check on the most up-to-date data.¹ (Cal. S.B. 671, 1995-96 Regular Sess.; *Silvester*, 2014 WL 4209563, *11²) These rationales apply with equal force to persons with firearms and persons holding conceal carry weapon (CCW) licenses.

With regards to the public safety effect of the “cooling off” period, undisputed trial testimony shows that persons with firearms in the Automated Firearms System (AFS) may not have firearms available to them at all times. A

¹ As background for this third basis, Appellant’s databases are not always up-to-date because of the lag time between the occurrence of prohibiting events and the entry of those events into the databases by law enforcement agencies, courts, and mental health facilities. (*Silvester*, 2014 WL 4209563, *19-20.) Appellant could potentially conduct a further check within the waiting period, after an initial background check is completed, to ensure that there are no late-reported prohibiting events. The judgment eliminates Appellant’s ability to do so.

² In citing to the trial court’s findings of fact for purposes of this motion, Appellant does not concede the correctness of all findings on the cited pages.

person's registered firearm could be broken, lost, or stolen. (Exh. 3³ at 37:19-38:10, 173:20-22.) For example, appellee Silvester testified that one or more of his guns was not available for him to use. (*Id.* at 37:19-38:10.) A gun owner or a family member could surrender the firearm to law enforcement while the gun owner seeks mental-health treatment. (*Id.* at 478:22-479:3.) Additionally, persons who already own firearms may choose to acquire new or additional firearms to commit a planned act of violence. (*Id.* at 359:1-23.) In each of these instances, a cooling off period continues to serve the important public safety objective.

The waiting period provides time for law enforcement to investigate and potentially stop straw purchases. When law enforcement agents identify a potential straw purchase, the agents attempt to complete the investigation within the waiting period so that they may intercept a firearm before a straw purchaser transfers it to a prohibited person. (*Silvester*, 2014 WL 4209563, *21.) It would be more difficult for law enforcement to complete straw purchase investigations if the waiting period was less than 10 days. (*See ibid.*)

II. APPELLANT WILL BE IRREPARABLY INJURED ABSENT A STAY

Appellees argue that the enjoinder of state laws found by a district court to be unconstitutional, is not, by itself, irreparable harm to the state. (Opp. Br. at 4.)

³ Exhibit 3 is submitted as an exhibit to the Declaration of Peter H. Chang in support of this reply. It comprises of excerpts of trial transcript. Exhibits 1 and 2 were submitted with the Motion.

But *Coalition for Economic Equity*, in which the Ninth Circuit held that the State demonstrated “the clear possibility” of irreparable injury because “a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined,” remains good law. *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997).⁴

Even if the Court finds that the injury caused by the enjoinder of state laws is not dispositive of this factor of the stay inquiry, the Court should nonetheless recognize it as a form of injury to be considered in weighing the relative harm to the parties along with other factors. *See Latta*, 771 F.3d at 500. In addition to this injury, Appellant has also demonstrated that it will suffer irreparable concrete harms in the absence of a stay. (*See Motion at 15-17.*)

Appellees argue incorrectly that having to spend time and money is not a basis for a stay. (Opp. Br. at 6.) Unrecoverable expenditures of money and time is precisely the type of injury courts rely on in finding irreparable injury sufficient to grant stays or preliminary injunctions. *See Project Vote/Voting for America, Inc. v.*

⁴ *But see Independent Living Ctr. of So. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009)(characterizing the statement in *Coalition for Economic Equity* as dicta), *vacated and remanded on other grounds sub nom. Douglas v. Independent Living Ctr. of So. Cal., Inc.*, 132 S.Ct. 1204, 1207 (2012); *Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014)(citing *Coalition for Economic Equity* for suggesting that “a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined,” but noting that no opinion of the Court adopted the view and applying balancing test).

Long, 275 F.R.D. 473, 474-75 (E.D. Va. 2011) (finding that officials sufficiently demonstrated that they would suffer irreparable harm absent a stay by showing they were required to expend time and incur expense to implement the changes necessary to comply with the district court's judgment).

Here, absent a stay, Appellant would be required to expend significant amounts of money and time to make changes to its computer systems and to hire and train many new employees to implement the judgment. (Exh. 1 to Motion (Lindley Decl.) at ¶¶ 11-16; Exh. 2 to Motion (St. Pierre Decl.) at ¶ 18.) Such expenditures of money, time, and other resources cannot be recovered should this Court overturn or modify the district court's judgment.

Appellees do not dispute that, absent a stay, Appellant would be required to devote unrecoverable sources to the project. Rather, Appellees dispute *how much* Appellant would have to expend to comply with the judgment.⁵ (Opp. Br. at 6-11.)

⁵ In support of this argument, Appellees rely on a declaration from Donald Kilmer, their trial counsel. The Court, however, should disregard the declaration for two reasons. First, the declaration consists almost entirely of legal arguments, rather than factual information, in violation of FRAP 27(a)(2)(B)(ii). Paragraphs in the declaration that discuss facts are no more than declarant-counsel's summaries and characterizations of trial testimony and trial exhibits. Second, the declaration effectively circumvents the briefing page limits in violation of FRAP 27(d)(2). Appellees' opposition brief is effectively 32 pages long—20 pages in the opposition brief and an additional 12 pages in their counsel's declaration—exceeding the page limit by 12 pages. Appellees did not seek leave of this Court to exceed the page limit.

Specifically, Appellees contend that Appellant overstates her burden because Steve Buford, former Assistant Chief of the Bureau of Firearms (BOF), had testified that BOF's computer system could be redesigned to "check to say yes or no whether a person has a certificate of eligibility or whether a person has a CCW. That's a simple check. It's a yes-or-no answer." (Opp. Br. at 7-8; Exh. 3 at 279:11-24.)) Appellees, however, take Mr. Buford's testimony out of context.⁶

Although Mr. Buford explained that the system could be redesigned to perform the check he did not address the complexity of the technical changes necessary to implement the process, or the amount of unrecoverable resources that Appellant must expend to make the necessary changes. (Compare: Exh. 2 to Motion (St. Pierre Decl.) at ¶ 7.) While the proposed redesign is conceptually simple, the IT manager responsible for the implicated computer systems estimates that, to comply with the judgment, Appellant must modify at least seven separate data systems, which would take a vendor, working closely with Appellant's IT staff, at least six months to complete. (*Id.* at ¶¶ 8, 18.)

⁶ In addition to taking Mr. Buford's testimony out of context with respect to the difficulty entailed in modifying the computer systems, Appellees also assert incorrectly that his testimony was directed to whether a DROS application falls "into one of the three newly exempt classes." (Opp. Br. at 7.) However, Mr. Buford testified only as to whether a person has a certificate of eligibility or a CCW, not whether an applicant has a firearm registered in the AFS.

Appellees assert that Appellant has the internal staff and the funds to make the changes required to comply with the judgment. (Opp. Br. at 6 & 9.) These assertions, however, are irrelevant to the issue of whether Appellant would, absent a stay, suffer irreparable harm in the form of unrecoverable expenditures of time, money, and other resources.

Finally, Appellees suggest that Appellant could implement the order without significant costs by allowing dealers to release firearms, after completion of the background check, to purchasers who provide the dealer a copy of a CCW license or certificate of eligibility, along with proof of a firearm in the AFS at the time of purchase. (Opp. Br. at 10.) This suggested approach, however, would not relieve Appellant from the need to expend money, time, and other unrecoverable resources; to notify dealers of background check results before the waiting period has elapsed, Appellant must also alter her computer systems.⁷ (Exh. 3 at 231:6-16.)

III. THE BALANCE OF HARDSHIPS SHARPLY FAVORS A STAY

In weighing the balance of harms, the injury to be considered in the context of a motion to stay must be more concrete than that advanced by Appellees. In

⁷ Additionally, releasing firearms based solely on paper copies of certificates, which may be outdated or forged, without confirmation by DOJ's computer systems, compromises public safety.

each of the cases on which Appellees rely, the court found some form of concrete injury to the prevailing party:

- In *Latta v. Otter, supra*, the Ninth Circuit found that Idaho’s marriage laws imposed concrete injuries of “profound legal, financial, social and psychic harms” on its citizens. *Latta*, 771 F.3d at 500.
- In *Melendres v. Arpaio*, the Ninth Circuit found that the district court reasonably held that plaintiffs faced a real possibility that they would again be subject to unlawful detention on the basis of their immigration status. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).
- In *Elrod v Burns*, the Supreme Court found threatened and actual injury to employees’ First Amendment rights where many were threatened with discharge based on their political affiliation and others had agreed to support an opposing political party to avoid discharge. *Elrod v Burns*, 427 U.S. 347, 373-74 (1976). The Supreme Court also emphasized that, “[t]he timeliness of political speech is particularly important.” *Id.*, at 373, n.29.

In contrast to the cases above, Appellees have identified no concrete harm—no “profound legal, financial, social and psychic harms,” no risk of unlawful detention, and no time-sensitive impediments to their political speech.

The balance of hardships thus sharply favors a stay. On one hand, Appellant has demonstrated injury in the form of enjoinder of state laws and unrecoverable money, time, and other resources absent a stay. On the other hand, Appellees allege only abstract injury to their Second Amendment rights in the form of a possible slight delay in receiving purchased firearms.

IV. THE PUBLIC INTEREST FAVORS A STAY

Appellees assert two reasons that the public interest weighs against a stay. Both reasons fail. First, Appellees argue that it is in the public’s interest to prevent

a violation of a party's constitutional rights. However, whether the Waiting Period Laws violate any party's rights is precisely the issue before this Court. As Appellant demonstrated above, for purposes of assessing whether to grant a stay, she is likely to succeed on the merits on this appeal both because it passes the "serious question" test and because it has a substantial case for relief on the merits.

Second, Appellees incorrectly argue that there is no threat to public safety if a stay is not issued. Although the district court found otherwise, Appellant has shown that the waiting period, in addition to providing time for background checks, furthers public safety objectives by providing a "cooling off" period and providing time for law enforcement to investigate and potentially stop straw purchases of firearms.⁸

CONCLUSION

Appellant has shown that each of the four stay factors have been met and that the balance of hardships tips sharply in favor of a stay. At present, Appellant's deadline to comply with the judgment is February 23, 2015. Appellant thus respectfully requests that the Court impose the stay significantly before that date.

⁸ Appellees' argument that California's Armed and Prohibited Persons System provides a "safety net" also fails. That system identifies firearms that must be retrieved from prohibited persons. Retrieving firearms from prohibited persons can be dangerous for both the public and the law enforcement officers. (Exh. 3 at 470:19-25.)

Dated: December 29, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: **Silvester, Jeff et al. v. Kamala
D. Harris (APPEAL)**

No. **14-16840**

I hereby certify that on December 29, 2014, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**APPELLANT'S REPLY IN SUPPORT OF URGENT MOTION TO STAY
ENFORCEMENT OF JUDGMENT**

**DECLARATION OF PETER H. CHANG IN SUPPORT OF APPELLANT'S REPLY IN
SUPPORT OF URGENT MOTION TO STAY ENFORCEMENT OF JUDGMENT**

EXHIBIT TO DECLARATION

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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 with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On December 29, 2014, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

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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 29, 2014, at San Francisco, California.

V. Sanchez

Declarant

/s/ V. Sanchez

Signature

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14-16840

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**JEFF SILVESTER, BRANDON COMBS,
THE CALGUNS FOUNDATION, INC., a
non-profit organization, and THE
SECOND AMENDMENT FOUNDATION,
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Plaintiffs and Appellees,

v.

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Defendant and Appellant.

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Case No. 1:11-cv-02137-AWI-SKO
The Honorable Anthony W. Ishii, Judge

**DECLARATION OF PETER H. CHANG IN SUPPORT OF
APPELLANT'S REPLY IN SUPPORT OF
URGENT MOTION TO STAY ENFORCEMENT OF JUDGMENT**

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1. I make this declaration of my own personal knowledge, and, if called upon as a witness to testify in this matter, I could and would testify competently to the matters stated herein.

3. Attached as Exhibit 3 are excerpts from the transcript of the trial court proceedings in *Silvester v. Harris*, No. 11-cv-2137-AWI. For the Court's convenience, testimony cited in the concurrently-filed reply brief are underlined.

Executed on December 29, 2014, at San Francisco, California.

/s/ Peter H. Chang

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. ANTHONY W. ISHII

JEFF SILVESTER, et al.,)	1:11-cv-2137-AWI
)	
Plaintiff,)	
)	COURT TRIAL
vs.)	
)	Day 1
KAMALA D. HARRIS, Attorney)	
General of California, and)	
DOES 1 to 20,)	
)	
Defendants.)	

Fresno, California

Tuesday, March 25, 2014

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Volume 1, Pages 1 to 158, inclusive

REPORTED BY: GAIL LACY THOMAS, RMR-CRR
Official Court Reporter
CSR NO. 3278

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140

1 Q. Okay. So you would make -- right. Okay.

2 But to drive there a second time to pick up a handgun
3 makes it financially unfeasible to buy that gun?

4 A. Yes.

5 Q. So it's the expense of having to travel to a faraway
6 location like Redding a second time that makes it financially
7 unfeasible to buy that gun. Right?

8 A. Yes.

9 Q. Now, the closest gun dealer to you is 8.2 miles from your
10 house; is that correct?

11 A. Currently?

12 Q. Currently.

13 A. Today? No.

14 Q. Okay. Today, what is the closest gun dealer to you?

15 A. Maybe two miles.

16 Q. Okay. The closest gun dealer to you is two miles. And
17 you have also bought a gun from a dealer as far away as
18 41 miles from your house; correct?

19 A. Yes.

20 Q. A gun shop called PRK Arms; correct?

21 A. Correct.

22 Q. And you take business trips, right, as part of your
23 business as a commercial insurance salesman?

24 A. Yes.

25 Q. And you drive while on these business trips, right?

1 A. Yes.

2 Q. You drive on these business trips at least once a month?

3 A. Yes.

4 Q. In fact, you drive past one or more gun dealers while on
5 these business trips at least once a month; correct?

6 A. Yes.

7 Q. Now, Mr. Silvester, you testified you have a gun; correct?

8 A. Yes.

9 Q. In fact, you have more than one gun?

10 A. Yes.

11 Q. Now, these guns are legally registered to you?

12 A. Yes.

13 Q. These guns were not always available to you for use;
14 correct?

15 A. Would you be more specific about what you mean?

16 Q. Well, there are times when one or more of your guns were
17 not in working condition; correct?

18 A. Yes.

19 Q. In fact, there are times when one or more of your guns
20 were not in working condition for months at a time.

21 A. Um-hmn.

22 Q. If a gun is not in working condition, it's not available
23 for you to use; correct?

24 A. Yes.

25 Q. And there are times when you didn't have the proper

1 ammunition for one or more of your guns; correct?

2 A. Yes.

3 Q. In fact, there are times when you didn't have the proper
4 ammunition for one or more of your guns, and you had no
5 specific plans to acquire ammunition, the proper ammunition;
6 correct?

7 A. Yes.

8 Q. If a gun lacks the proper ammunition, it is not available
9 to be used; correct?

10 A. Yes.

11 Q. Different guns are also suitable for different purposes;
12 correct?

13 A. Generally speaking, I would agree.

14 Q. Okay. For example, a gun that's suitable for sports
15 shooting or hunting may not be best suited for self-defense.

16 A. By my personal definition of best suited, yeah.

17 Q. What is your personal definition of best suited?

18 A. The -- my personal definition would be something like, you
19 know, the best suited weapon for the environment and the
20 easiest for me to manipulate and handle for the situation.

21 Q. Thank you.

22 Now, there's some exceptions to the Waiting-Period
23 Law that could apply to you, right?

24 A. I'm not aware of any.

25 Q. Well, for example, if your immediate family were to give

1 you a gun, it wouldn't be subject to the waiting period,
2 right?

3 A. I'm not a hundred percent sure about the law, but -- I'm
4 going to say, no, because I'm not sure a hundred percent.

5 Q. Well, your father has given you a gun; correct?

6 A. Yes.

7 Q. Now, when your father gave you the gun, was there a 10-day
8 waiting period before you could receive the gun?

9 A. No, there was not.

10 Q. You received the gun immediately; correct?

11 A. Yes.

12 Q. Now, if you loan a gun to someone, you also don't need to
13 wait 10 days; correct?

14 A. Correct.

15 Q. You can just give the gun to that person immediately?

16 A. Um-hmn.

17 Q. If you borrow a gun from someone, you don't need to wait
18 10 days for that; correct?

19 A. Correct.

20 Q. And you can just have the gun immediately?

21 A. Correct.

22 Q. Do you have friends who own firearms?

23 A. A few.

24 Q. You have loaned -- have you loaned guns to your friends?

25 A. I have loaned one gun, yes.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. ANTHONY W. ISHII

JEFF SILVESTER, et al.,)	1:11-cv-2137-AWI
)	
Plaintiff,)	
)	COURT TRIAL
vs.)	
)	Day 2
KAMALA D. HARRIS, Attorney)	
General of California, and)	
DOES 1 to 20,)	
)	
Defendants.)	

Fresno, California

Wednesday, March 26, 2014

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Volume 2, Pages 159 to 366, inclusive

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CSR NO. 3278

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1 Vehicles files to ensure that the purchaser's identification
2 information is accurate. We know who we're doing the
3 background check on.

4 Q. Is it ever the case that a person applying for a firearm
5 uses an incorrect DMV license or a personal identification?

6 A. Every day.

7 Q. And if an applicant uses a mismatched or an incorrect
8 identification, what does that mean for the application?

9 A. That means that the application has to be rejected. And
10 so we reject the application and notify the dealer not to
11 deliver the firearm.

12 Q. Is the -- is the DMV check, is it against the computer
13 database, is it against written records? How is it --

14 A. It goes against the DMV electronic database, the
15 Department of Motor Vehicles files electronic database.

16 Q. Is the initial comparison done by a computer or by a
17 person?

18 A. The initial comparison is done by the computer.

19 Q. Is a human being ever involved in checking on the DMV
20 record?

21 A. When there is a mismatch.

22 Q. Why is a human being involved in that part of the process?

23 A. Because we would not be able to keep up with the work.

24 There's just so many of them that happen. Every day we
25 receive between -- at this point in time between 2 to 3,000

1 gun purchase applications a day. So that was the process
2 because we collect the identification information, because
3 that information is automated within the Department of Motor
4 Vehicles. It makes it easy for us to use the systems to run
5 that match because basically you're just matching numbers and
6 the information exactly.

7 Q. Is there -- are there any other databases that are checked
8 at that initial point along with or near in time to the DMV
9 check?

10 A. Yes. We also strip off the information relating to the
11 firearm, and we run that information against the Department of
12 Justice Automated Firearms System to see if the firearm had
13 been previously reported lost or stolen by a law enforcement
14 agency.

15 Q. Why does the Bureau of Firearms check if a firearm is
16 reported lost or stolen?

17 A. Well, I believe it's Penal Code Section 11106 or -- yes,
18 Penal Code Section 11106 basically says that's the Attorney
19 General's role is to maintain a database to return lost or
20 stolen firearms. And so part of the DROS process, a lot of
21 the firearms that are involved in that process potentially
22 could be used -- had been reported lost or stolen, and
23 occasionally we do bump into something, and we try to make
24 sure those guns are returned back to the rightful owners.

25 Q. Is the AFS check done completely by a computer, or are

1 human beings involved?

2 A. That's computerized as well because we have computerized
3 records of lost and stolen firearms as reported by law
4 enforcement.

5 Q. If a DROS application runs through the AFS system and it
6 comes back that there is a hit, that this firearm matches up
7 to a lost or stolen firearm, what happens next in the process?

8 A. The law enforcement agency that made the actual lost or
9 stolen entry is notified by the department and asked to
10 investigate to determine if the firearm involved in the
11 transaction is the actual firearm that had been previously
12 reported lost or stolen. And they're also contacted to verify
13 whether lost or stolen entry in the database is still valid
14 and active.

15 Q. So these law enforcement agencies, are they part of the
16 Bureau of Firearms?

17 A. No, these are state-wide law enforcement agency,
18 state-wide police -- police offices and sheriff's offices.

19 Q. When you say statewide, do you mean that they're part of
20 state government, and they're not part of local government?

21 A. No, they're local government. They're local chiefs --
22 local police stations, local Sheriff's Offices, County
23 Sheriff's Offices and City police and other police -- police
24 entities within the state. Police agencies, I should say.

25 Q. When there is a match for a lost or stolen firearm, and

1 group of people?

2 A. No.

3 MR. EISENBERG: I have no further questions for
4 Assistant Chief Buford.

5 THE COURT: All right. Cross-examination.

6 MR. EISENBERG: Should we take a break before cross?

7 THE COURT: Would you like a couple minutes?

8 THE WITNESS: Sure.

9 MR. KILMER: I have no objection to that.

10 THE COURT: Let's take a quick five-minute break.
11 We'll come back in five minutes.

12 (Recess.)

13 THE COURT: Back on the record with
14 cross-examination.

15 MR. KILMER: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. KILMER:

18 Q. Good morning, Mr. Buford. I'm Donald Kilmer. I represent
19 the plaintiffs in this case.

20 A. Good morning.

21 Q. You testified earlier that waiting periods have two
22 primary purposes, and that is to prevent -- to a cooling-off
23 period to prevent impulsive violent acts, either a homicide or
24 suicide or assault and also to permit your organization to
25 conduct background checks.

1 A. Yes, as well as to notify the dealers.

2 Q. Okay, so the second reason for the 10-day waiting period
3 is to not only perform the background check, but to notify the
4 dealer to release the weapon.

5 A. To not release the weapon.

6 Q. Okay. So is that the way the system works, if the dealer
7 doesn't hear back from you, they can just release it in 10
8 days?

9 A. Historically that's how it worked. It's different now.
10 Now they get a red light, green light. Pretty much after the
11 10-day waiting period, the light turns green. Basically a
12 button lights up and says that they can deliver the gun.

13 Q. And where is this button located?

14 A. It's on their PC.

15 Q. So this is part of the new system?

16 A. It's part of the new system. It's all automated now.

17 Q. And this is the new system that California took over on
18 its own from, I believe, Verizon?

19 A. Yes, Verizon dropped the contract, and California
20 essentially developed our own system to take on the front-end
21 part of the system.

22 Q. All right. And does this system permit your department to
23 immediately notify the dealer to take some action?

24 A. Yes, we can immediately notify them to deny a firearm.

25 Q. All right. And would it be fair to say that the three

1 categories of responses that a dealer can get from your agency
2 is to either approve the sale, deny the sale, or delay the
3 sale for further investigation?

4 A. And there is a fourth category now called "undetermined."

5 Q. And how does "undetermined" work?

6 A. "Undetermined," those are when after 30 days, we're unable
7 to -- if we're unable to obtain the disposition or the
8 information we need, and so at that point in time, under state
9 law, the law that just took effect this year, we would
10 identify the DROS, and the dealer system is an undetermined,
11 and the dealer gets a letter indicating that they can deliver
12 the firearm at their discretion.

13 Q. So that kind of almost works like a presumption of
14 innocence for the gun dealer?

15 A. Yes, very similar to the NICS system.

16 Q. All right. I want to ask you a few questions about the
17 cooling-off period. Now, I guess the logic behind the
18 cooling-off period is that we want to prevent people from
19 committing impulsive violent acts either from self-harm or
20 harm to another in buying a gun in a fit of rage; is that
21 correct?

22 A. That's part of it. That was part of the legislative
23 intent.

24 Q. What is another part?

25 A. The other part is to give the department time to review

1 handgun per month?

2 A. Right.

3 Q. So that reject doesn't necessarily indicate that the
4 person is prohibited from having guns?

5 A. They are prohibited because it's against the law to make
6 that application.

7 Q. Well, actually are they prohibited to purchase that gun or
8 they become a prohibited person by trying to make a purchase?

9 A. They're prohibited from purchasing that particular gun at
10 that particular time.

11 Q. Okay, so they don't fall under the category of prohibited
12 person like a felon or a misdemeanor?

13 A. No, not necessarily.

14 Q. So what's the process there, does the person say, oh, you
15 know, facepalm, and they say, oh, I bought a gun 28 days ago,
16 and they start the process over after 30 days?

17 A. I don't know. I'd be speculating on why people would try
18 to purchase more than one gun in a 30-day period.

19 Q. Okay. Is that a prosecutable offense?

20 A. I believe so.

21 Q. Do you know whether or not the Department of Justice
22 prosecutes people for those attempts to purchase a second
23 firearm within 30 days?

24 A. I'm not aware of enforcement activities.

25 Q. All right.

1 MR. KILMER: Your Honor, may I have a moment to
2 confer with cocounsel and my clients?

3 THE COURT: Yes.

4 (Pause in the proceedings.)

5 MR. KILMER: I just have two more questions for you,
6 but don't hold me to that because it may turn into three.

7 BY MR. KILMER:

8 Q. You testified earlier that you helped design the -- the
9 system of background checks.

10 A. Yes.

11 Q. All right. Could the system be designed or redesigned --
12 and I'm asking technically here, not legally -- to run a gun
13 buyer through the standard background check, then also make
14 the following inquiry whether the person has a COE, a CCW, or
15 a gun already in the system and then generate a message based
16 on that information?

17 MR. EISENBERG: Objection. Lacks and compound.

18 THE COURT: Overruled, if you can answer.

19 THE WITNESS: It could, but it would be incomplete.

20 BY MR. KILMER:

21 Q. So the answer is, yes, the system could generate --

22 A. It could check to say yes or no whether a person has a COE
23 or whether a person has a CCW. That's a simple check. It's a
24 yes-or-no answer.

25 Q. Okay.

1 A. So, yeah, we could check that. The problem is, that that
2 in itself doesn't mean that the person is still eligible to
3 own or possess a firearm.

4 Q. Yeah, and maybe I --

5 A. Because things change.

6 Q. Maybe my question was a little long. Because what I meant
7 to ask was, could the system be made to run the person through
8 the complete background check, and then as a last inquiry --
9 inquire whether they have a COE, a CCW, or a gun already in
10 the AFS system. That's the question I want.

11 A. It could run the background check, but then someone's
12 going to have to look at the hits, and someone's going to have
13 to match up the records, and someone's going to have to review
14 the record to make sure that the information in those records
15 is up-to-date, accurate, and correct.

16 Q. Okay. Now, you also testified earlier that approximately
17 20 percent of the DROS's that are processed are auto-approved
18 within an hour.

19 A. Right.

20 Q. Okay. And of those 20 percent that are auto-approved
21 within an hour, you can add as a further check whether or not
22 the person has a COE, a CCW, or a gun already in the AFS
23 system. That's possible.

24 A. That's possible.

25 MR. KILMER: Thank you. Nothing further, Your Honor.

1 holder now has a criminal conviction?

2 A. Yeah. That's a possibility.

3 Q. Is that something that's done instantly to all of the
4 local enforcement agencies?

5 A. That's probably outside of my job scope, so I'm not sure
6 how that process would actually happen.

7 Q. It's been suggested that a person who already has -- well,
8 let me lay some foundation.

9 Have you ever heard of the concept of a cooling-off
10 period for a firearm purchase?

11 A. Yes.

12 Q. What's your understanding of that concept?

13 A. Basically the idea behind that concept, or at least my
14 understanding is, that it would allow a person to rethink
15 potential bad acts they may be planning, or something like
16 that if they were forced to delay the acquisition of a weapon
17 that they were trying to acquire.

18 Q. It's been suggested that for a person who already has a
19 firearm, a cooling-off period really could not have an effect
20 in terms of reducing violence. Are you aware of any
21 situations where the cooling-off effect could still be
22 possible if a person already has a gun?

23 MR. KILMER: Objection. Calls for speculation.

24 THE COURT: Sustained. Foundation.

25 BY MR. EISENBERG:

1 Q. Are you aware of any situations where a person who already
2 has a firearm acquires a new firearm and uses the new firearm
3 to commit an act of violence?

4 A. Yes.

5 Q. Are you aware -- let me rephrase it.

6 How could it be the cooling-off period that could
7 have an effect on whether that person commits a violent act --

8 MR. KILMER: Objection. Calls for --

9 MR. EISENBERG: -- with the new firearm.

10 MR. KILMER: Objection. Calls for speculation.

11 THE COURT: Overruled. Go ahead.

12 THE WITNESS: If someone has, let's say, a single
13 shot .22 rifle or maybe a revolver, or something like that,
14 and they were planning on doing something outlandish and
15 illegal with those weapons, or their existing pool of weapons,
16 they may seek to acquire something that they could do more
17 harm with, maybe a semiautomatic or maybe something more
18 powerful along the lines of a rifle or shotgun or something
19 like that. And you can purchase multiple long guns, for
20 example, in one transaction, so they might want to buy a clump
21 of weapons or a group of weapons on a successive purchase if
22 they already have, say, one or two. So they could arm
23 themselves more, I guess, is my final there.

24 MR. KILMER: I renew my objection, Your Honor. Move
25 to strike. The initial answer was whether or not he had

1 personal knowledge of somebody using a new firearm to commit
2 the violent act. The previous testimony was all speculation
3 based on a hypothetical person.

4 THE COURT: All right. Response?

5 MR. EISENBERG: I guess I can ask him more questions
6 to try to pin it down to a situation.

7 THE COURT: All right. I'll go ahead and sustain the
8 objection. Go ahead.

9 BY MR. EISENBERG:

10 Q. Special Officer Graham, are you merely speculating about
11 situations, or are there situations that you're aware of in
12 your law enforcement experience that are like that?

13 A. The one thing that I can think of, there is a shooting
14 that occurred in the Cupertino area of the Bay Area in
15 California. It was an individual that shot and killed
16 people -- I think it was at a rock quarry, or something like
17 this. He had lawfully purchased some firearms, and at least
18 one, and then he acquired more. So I think that was
19 responsive to your question in the way in which you phrased
20 it. And I was thinking about that specific shooting incident.

21 Q. I'd like to speak now about exemptions to the
22 Waiting-Period Law. Are you aware that there are statutory
23 exemptions to the Waiting-Period Law?

24 A. Yes.

25 Q. Are you aware that there is an exemption for peace

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. ANTHONY W. ISHII

JEFF SILVESTER, et al.,)	1:11-cv-2137-AWI
)	
Plaintiff,)	
)	COURT TRIAL
vs.)	
)	Day 3
KAMALA D. HARRIS, Attorney)	
General of California, and)	
DOES 1 to 20,)	
)	
Defendants.)	

Fresno, California

Thursday, March 27, 2014

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1 even normal businesses deal with. One, they've gone through
2 the Dangerous Weapons Permit process normally, a slight
3 variation of the entertainment permit, so we've done a full
4 background on them. Most of the firearms that they have on
5 the premise that they're using will oftentimes don't fire real
6 bullets anymore. They've been gunsmithed to fire blank
7 ammunition. A lot of that deals with the insurance companies
8 that insure these events, the movie industry. And they have
9 very strict guidelines of what they want on those sets because
10 accidents have happened in the past.

11 So just the regulations that the insurance companies
12 and the movie industry has put on themselves are oftentimes
13 far greater than what we would have placed on them or have
14 placed on them. But, again, they're subject to inspection by
15 us at any time.

16 Q. What kind of safeguards are you aware that the movie
17 industry uses that's not necessarily required by state law?

18 A. Well, I can talk about Universal Studios. And they have
19 their prop masters that have dangerous weapons permits. All
20 the stunt actors that would use that firearm also has a
21 Dangerous Weapon Permit. That's just by their policy. So
22 when their -- I guess one of the events they have is a
23 *Terminator* ride or a *Terminator* show, the prop master will
24 bring that firearm in a locked safe to the event, hand it to
25 the actor or the stunt person. They check it, they use it,

1 they come back, it's put right back in the safe, locked and
2 taken back to their master safe. And those firearms cannot
3 fire a regular 9-millimeter bullet. It's some form of a blank
4 that is firing. They're very protected because of insurance
5 purposes to ensure they don't have any accidents on the
6 facility.

7 Q. You're aware that the background checks that the Bureau of
8 Firearms does sometimes lead to the denial of firearm
9 purchases; correct?

10 A. Correct.

11 Q. Does the Bureau of Firearms -- do they do any work
12 retrieving firearms that are in the hands of prohibited
13 people?

14 A. We have our Armed Prohibited Person System.

15 Q. In terms of public safety, is it preferable to have one
16 versus the other? Is it preferable to stop the release of a
17 firearm to a prohibited person, or is it preferable to
18 retrieve a firearm from a prohibited person?

19 A. It's always far easier, cheaper, and in the public's best
20 interest to prevent a prohibited person from possessing a
21 firearm in the first place. Retrieving a firearm from
22 someone, especially, let's say, they have some mental health
23 issues, can be a very dangerous event for the public, for the
24 agents, or the officers that are allowed to do that, and for
25 the individual that's prohibited.

1 Q. Are there any examples of where California's background
2 check system has prevented firearms from being released to
3 prohibited persons that you're aware of, any specific
4 instances?

5 A. There are thousands of them, there's a couple that come to
6 mind as far as notable instances that happened within the last
7 couple years.

8 Q. Please describe those instances.

9 A. I believe his name is John Bedell, B-E-D-E-L-L. He was
10 the Pentagon shooter back in March. I believe he did the
11 shooting at the Pentagon early March of 2010. That individual
12 was a California resident. He tried to purchase a firearm, I
13 believe, in January of that year here in California. That
14 purchase was denied because -- and he had some prohibitions.
15 Unfortunately, after that denial, he drove to Las Vegas and
16 purchased actually two handguns from a private dealer in
17 Las Vegas at a gun show, then drove out to Arlington, Virginia
18 and conducted the shooting at the Pentagon.

19 One of far more recent is the individual who shot
20 several people at the Santa Monica College. Again, I believe
21 his name was John Zawahri, Z-A-W-A-R-I, I believe. He tried
22 to purchase a handgun in California as well and was denied
23 because he had several firearm prohibitions. Unfortunately,
24 he was able to obtain a gun illegally and conduct the shooting
25 at the college. So those are the two instances where

1 entire line of questioning. Is the witness testifying as to
2 his own personal experience, or is he testifying to newspaper
3 articles he's read?

4 THE COURT: All right. Foundation?

5 MR. EISENBERG: Okay.

6 THE COURT: Sustained. Foundation.

7 BY MR. EISENBERG:

8 Q. Have you had any personal experience with the scenarios
9 described?

10 A. Yes.

11 Q. What's the basis of those experiences?

12 A. They were forwarded to my telephone number, and I talked
13 to these family members personally.

14 Q. In what capacity were you speaking to them?

15 A. As the Chief of the Bureau of Firearms and as a police
16 officer, a human, someone they can turn to for some
17 assistance.

18 Q. Is there anything that law enforcement is authorized to do
19 in a situation like that?

20 A. Well, if an individual wants to surrender firearms for
21 safekeeping to law enforcement, they're allowed to do that.
22 And oftentimes, these citizens are doing that. Oftentimes,
23 it's a wife or close family member that wants to get the
24 firearms out of the house until that individual, their loved
25 one can seek treatment through the VA system for their PTSD

1 that they sustained as a cause of the war.

2 They oftentimes tell me that, you know, they're not
3 going to commit suicide by taking pills, you know, jumping to
4 death, suffocating themselves or hanging themselves, but
5 because they're very familiar with firearms, they will shoot
6 themselves. And they oftentimes quote the data, I think that
7 was a 2012 data, that the military especially the U.S. Army
8 was sustaining more losses through suicide, returning soldiers
9 than they were going through on --

10 MR. KILMER: Objection.

11 MR. EISENBERG: Let him finish his testimony.

12 THE COURT: Well, hold on.

13 MR. KILMER: The witness is testifying as an expert
14 now regarding mental health issues, Your Honor.

15 THE COURT: Sustained. Rephrase the question.

16 BY MR. EISENBERG:

17 Q. Was the entire testimony stricken or just part of it,
18 Your Honor?

19 THE COURT: Well, just for clarity, I'll strike the
20 entire last answer. Go ahead and rephrase and restate the
21 question.

22 BY MR. EISENBERG:

23 Q. What, if anything, can law enforcement do in a situation
24 like that where one family member wants to take guns away from
25 another family member?

1 A. Well, in a case of a husband or wife, identify it as
2 community property so they can surrender those firearms to law
3 enforcement for safekeeping.

4 MR. EISENBERG: I have no further questions at this
5 time.

6 THE COURT: And cross-examination.

7 MR. KILMER: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. KILMER:

10 Q. Good afternoon, Mr. Lindley. Is it Director Lindley?

11 A. It's Chief Lindley.

12 Q. Chief Lindley, I'm sorry.

13 You testified earlier that when it comes to
14 regulating the sale of firearms, timing was safety. Am I
15 accurately remembering your testimony?

16 A. Yes.

17 Q. Does that mean also more time equals more safety?

18 A. I think there's a limit in order of what time frame we can
19 do the background check. Oftentimes, we have to delay a
20 purchase for longer than the 10 days because we're trying to
21 trace down the disposition. At one point, we can do that for
22 a much longer period. Recently under current California law,
23 we can only now do that for 30 days.

24 Q. All right. So sometimes on one side of the equation, you
25 need more time in order to get to more safety.

1 (Court was adjourned at 4:03 PM.)

2
3
4 I, Gail Lacy Thomas, Official Court Reporter, certify
5 that the foregoing transcript is true and correct.

6 Dated: 04/10/2014

7 /s/ Gail Lacy Thomas
8 GAIL LACY THOMAS, RMR-CRR
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