

1 BENBROOK LAW GROUP, PC
2 BRADLEY A. BENBROOK (SBN 177786)
3 STEPHEN M. DUVERNAY (SBN 250957)
4 400 Capitol Mall, Suite 1610
5 Sacramento, CA 95814
6 Telephone: (916) 447-4900
7 Facsimile: (916) 447-4904

8 Attorney for Plaintiffs,
9 ALVIN DOE and PAUL A. GLADDEN
10

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

ALVIN DOE and PAUL A. GLADDEN,

Plaintiffs,

v.

KAMALA D. HARRIS, in her official capacity
as Attorney General of California; and
STEPHEN J. LINDLEY, in his official capacity
as Chief of the California Department of Justice
Bureau of Firearms,

Defendants.

Case No.: 34-2014-00163821

**DECLARATION OF KEN LUNDE IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

1 I, Ken Lunde, declare:

2 1. I have personal knowledge of the matters set forth in this declaration, and would be
3 able to testify competently to these facts if called as a witness.

4 2. I hold a federal firearms license as a collector of curios and relics, issued pursuant
5 to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code. I also have a
6 current certificate of eligibility issued by the California Department of Justice ("DOJ"). I have
7 held both the collectors' license and a certificate of eligibility since 2005.

8 3. In the summer of 2005 I contacted DOJ officials regarding the scope of the licensed
9 collectors' exemption in Penal Code section 27535(b)(9) (then Penal Code section
10 12072(a)(9)(B)(x)). On August 22, 2005 I e-mailed Randy Rossi, then-director of the DOJ's
11 Firearms Division, requesting clarification of the exemption. In it, I explained:

12 [A]s the Penal Code is currently written, it is clear that the exemption is stated in
13 terms of describing characteristics of the *person* effecting the transfer,
14 specifically that the person is a licensed collector and holds a valid COE, and not
15 about the characteristics of the handgun that is being transferred. The fact that the
16 second word of that specific exemption is the word "person" makes this very
obvious, because it is clearly the subject of the clause. In fact, I want to make it
absolutely clear that this exemption states *nothing* about the characteristics of the
handgun being transferred.

17 Attached to this declaration as Exhibit 1 is a true and correct copy of my e-mail to Rossi.

18 4. Later that day I received a response from Alison Merrilees, a Deputy Attorney
19 General assigned to the Firearms Division, who informed me that the licensed collectors'
20 exemption applied only to purchases of curios or relics. Attached to this declaration as Exhibit 2 is
21 a true and correct copy of Merrilees's e-mail.

22 5. I sent Merrilees a response that day outlining several points of disagreement.

23 6. On September 1, 2005 I received an e-mail from Merrilees reversing course and
24 explaining that, in fact, the licensed collectors' exemption applied to all firearms purchases.
25 Specifically, she wrote:

26 I have been advised that it is our long-standing policy for DOJ to exempt all
27 firearms purchases by C&R licensees from the provisions of 12072(a)(9)(A) [the
28 "one gun per month" limit], even if the firearms are not curios and relics.

1 Attached to this declaration as Exhibit 3 is a true and correct copy of the September 1, 2005 e-mail
2 from Merrilees.

3 I declare under penalty of perjury under the laws of the State of California that the
4 foregoing is true and correct. Executed June 3, 2014 in California.

5
6 KEN LUNDE
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 1

From: Ken Lunde Redacted
Subject: Penal Code question
Date: August 22, 2005 at 9:55:09 AM PDT
To: randy.rossi@doj.ca.gov

Mr. Rossi,

I just spoke with you by phone with regard to a Penal Code question. My question is about a specific exemption to the "one handgun per thirty days" limit, excerpted from the actual Penal Code text:

12072(a)(9)(A) No person shall make an application to purchase more than one pistol, revolver, or other firearm capable of being concealed upon the person within any 30-day period.

(B) Subparagraph (A) shall not apply to any of the following:

(x) Any person who is licensed as a collector pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto and who has a current certificate of eligibility issued to him or her by the Department of Justice pursuant to Section 12071.

I was told, multiple times by phone, from California DOJ staff, that the exemption set forth in paragraph 12072(a)(9)(B)(x) applies only to C&R handguns. However, as the Penal Code is currently written, it is clear that the exemption is stated in terms of describing characteristics of the *person* effecting the transfer, specifically that the person is a licensed collector and holds a valid COE, and not about the characteristics of the handgun that is being transferred. The fact that the second word of that specific exemption is the word "person" makes this very obvious, because it is clearly the subject of the clause. In fact, I want to make it absolutely clear that this exemption states *nothing* about the characteristics of the handgun being transferred. For this reason, I believe that those who hold a valid C&R FFL and valid COE are exempt from the "one handgun per thirty days" limit.

BTW, I am a licensed collector, meaning that I have a valid C&R FFL (#9-77-085-03-8G-00982 expiring on 07/01/2008), and hold a valid COE (#13138, expiring on 03/27/2005). When you have a chance, I'd like clarification on this issue.

With best regards...

-- Dr. Ken Lunde

Redacted

EXHIBIT 2

From: Alison Merrilees <Alison.Merrilees@doj.ca.gov>
Subject: Re: Penal Code question
Date: August 22, 2005 at 3:52:55 PM PDT
To: Redacted
Cc: Randy Rossi <randy.rossi@doj.ca.gov>

Mr. Lunde,

I am the Deputy Attorney General assigned to the Firearms Division. Mr. Rossi forwarded your email for my response.

I understand your question to be whether your C&R FFL makes you exempt from the "one gun per month" limit in 12072(a)(9)(A) for all firearm purchases, or just for purchases of curios and relics. I can see why you would be confused by relying solely on the wording in 12072. As you correctly point out, the exemption in 12072(a)(9)(B)(x) does not explicitly state that the exemption is limited to the purchase of curios and relics. However, you are required by the terms of your FFL to comply with federal codes and regulations when purchasing firearms in California. Federal laws limit the application of your license to the purchase of curios and relics. Here is some information regarding C&R licenses that I found on the FAQ section of the ATF website:

(G1) Is there a specific license which permits a collector to acquire firearms in interstate commerce? [[Back](#)]

Yes. The person may obtain a collector's license; however, this license applies only to transactions in curio or relic firearms. [27 CFR 178.41(c), (d), 178.50(b) and 178.93]

(G2) Does a collector's license afford any privileges to the licensee with respect to acquiring or disposing of firearms other than curios or relics in interstate or foreign commerce? [[Back](#)]

No. A licensed collector has the same status under the GCA as a nonlicensee except for transactions in curio or relic firearms. [27 CFR 178.93]

This limitation makes sense. Otherwise, C&R licensees could acquire an unlimited number of firearms that are not curios and relics under the auspices of their C&R licenses. Therefore, the "California DOJ staff" with whom you spoke gave you correct information.

Please feel free to email or call me if you have any questions, or if you need additional information.

Sincerely,

Alison Merrilees
Deputy Attorney General
Firearms Division
California Department of Justice
(916)263-0802

>>> Ken Lunde Redacted 08/22/05 9:55 AM >>>
Mr. Rossi,

I just spoke with you by phone with regard to a Penal Code question. My question is about a specific exemption to the "one handgun per thirty days" limit, excerpted from the actual Penal Code text:

12072(a)(9)(A) No person shall make an application to purchase more than one pistol, revolver, or other firearm capable of being concealed upon the person within any 30-day period.

(B) Subparagraph (A) shall not apply to any of the following:

(x) Any person who is licensed as a collector pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto and who has a current certificate of eligibility issued to him or her by the Department of Justice pursuant to Section 12071.

I was told, multiple times by phone, from California DOJ staff, that the exemption set forth in paragraph 12072(a)(9)(B)(x) applies only to C&R handguns. However, as the Penal Code is currently written, it is clear that the exemption is stated in terms of describing characteristics of the *person* effecting the transfer, specifically that the person is a licensed collector and holds a valid COE, and not about the characteristics of the handgun that is being transferred. The fact that the second word of that specific exemption is the word "person" makes this very obvious, because it is clearly the subject of the clause. In fact, I want to make it absolutely clear that this exemption states *nothing* about the characteristics of the handgun being transferred. For this reason, I believe that those who hold a valid C&R FFL and valid COE are exempt from the "one handgun per thirty days" limit.

BTW, I am a licensed collector, meaning that I have a valid C&R FFL (#9-77-085-03-8G-00982 expiring on 07/01/2008), and hold a valid COE (#13138, expiring on 03/27/2005). When you have a chance, I'd like clarification on this issue.

With best regards...

-- Dr. Ken Lunde
Redacted



EXHIBIT 3

From: Alison Merrilees <Alison.Merrilees@doj.ca.gov>

Subject: Re: Penal Code question

Date: September 1, 2005 at 3:41:27 PM PDT

To: Redacted

Mr. Lunde,

I have been advised that it is our long-standing policy for DOJ to exempt all firearms purchases by C&R licensees from the provisions of 12072(a)(9)(A) [the "one gun per month" limit], even if the firearms are not curios and relics.

C&R license holders are also exempt from the ten day waiting period in 12072(c)(1), but only for purchases of curios and relics (See PC 12078(t)(1)).

Sorry for the confusion. If you have any problems, feel free to email me, or call me at (916)263-0802.

Good luck,

Alison

>>> Ken Lunde Redacted 08/22/05 4:24 PM >>>

Alison,

You wrote:

- > I am the Deputy Attorney General assigned to the Firearms Division.
- > Mr. Rossi forwarded your email for my response.

Thank you for the prompt reply to my inquiry. I very much appreciate it.

I have some counterpoints that I'd like to express, if that's okay with you.

I will quote portions below, as appropriate:

- > I understand your question to be whether your C&R FFL makes you exempt
- > from the "one gun per month" limit in 12072(a)(9)(A) for all firearm
- > purchases, or just for purchases of curios and relics. I can see why
- > you would be confused by relying solely on the wording in 12072. As
- > you correctly point out, the exemption in 12072(a)(9)(B)(x) does not
- > explicitly state that the exemption is limited to the purchase of
- > curios and relics. However, you are required by the terms of your FFL
- > to comply with federal codes and regulations when purchasing firearms
- > in California. Federal laws limit the application of your license to
- > the purchase of curios and relics. Here is some information regarding
- > C&R licenses that I found on the FAQ section of the ATF website:
- >
- > (G1) Is there a specific license which permits a collector to acquire
- > firearms in interstate commerce? [Back]
- >
- > Yes. The person may obtain a collector's license; however, this
- > license applies only to transactions in curio or relic firearms. [27
- > CFR 178.41(c), (d), 178.50(b) and 178.93]

- >
- > (G2) Does a collector's license afford any privileges to the licensee
- > with respect to acquiring or disposing of firearms other than curios
- > or relics in interstate or foreign commerce? [Back]
- >
- > No. A licensed collector has the same status under the GCA as a
- > nonlicensee except for transactions in curio or relic firearms. [27
- > CFR 178.93]

Note that FAQ #G2 states "in interstate or foreign commerce," but non-C&R handguns are transferred through a normal (non-C&R) FFL, which means that once the handgun is at the dealer in California, this is considered neither interstate commerce nor foreign commerce. I do understand that as far as the ATF is concerned, a C&R FFL holder is granted no additional privileges, but that is clearly in the context of interstate and foreign commerce.

And, I would like to point out that while the ATF states that a collector's license does not afford any non-C&R privileges, the way in which California Penal Code paragraph 12072(a)(9)(B)(x) is written does grant such a privilege at the state level.

Granted, non-C&R handguns must still be transferred through a (non-C&R) FFL holder, meaning that an ATF Form 4473 is effected for each handgun, along with a DROS form for the state.

Considering that the exemption is only for the "one handgun per thirty-day" limit, and not a way to bypass filling out 4473s, DROSing, or the ten-day waiting period, it seems to me that the spirit of 12072(a)(9)(B)(x) is being misinterpreted by the California DOJ.

- > This limitation makes sense. Otherwise, C&R licensees could acquire
- > an unlimited number of firearms that are not curios and relics under
- > the auspices of their C&R licenses.

With all due respect, I don't agree that the limitation makes sense.

If a person is a licensed collector (meaning that the ATF conducted a background investigation on the licensee), and 4473s and DROS forms are properly filed, I don't understand why this is an issue. Getting an exemption to the "one handgun per thirty days" limit is not related to filling out 4473s or filing DROSes. Those forms still get processed as usual. Handguns are registered with the California DOJ through the DROS system.

With best regards...

-- Ken