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MEMORANDUM OF LAW

Re: Protect Yourself!
California's Politicized Gun Confiscation Program
Threatens Uninformed Gun Owners

Date: May 23, 2013

I. Introduction

Are you certain that you are not prohibited from possessing firearms? If you have firearms registered in your name, then unless you're sure about your status, police may knock on your door!

Unless you want your guns seized and face criminal charges, read on!

As part of their recent efforts to restrict gun ownership, California politicians are enhancing a program that identifies people who are prohibited from possessing firearms, ammunition, ammunition components, clips, magazines, and speed loaders, and it sends police out to collect them. And with a new funding source, the program will be getting more aggressive.

"California is the first and only state in the nation to build an automated system for tracking handgun and assault weapon owners who pose a *threat to public safety*," said a state senator from California. "Taking guns away from *dangerous, violent individuals* who are prohibited by law from owning them is smart and efficient law enforcement," said Attorney General Harris.

Sounds great doesn't it? Too bad the "system" doesn't work that way.

As everyone in California's Silicon Valley will attest, learning from failure is a part of innovation. When a concept or product fails there, founders throw a party to *celebrate*. The Silicon Valley motto is

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“failing is learning.” Once the office lights are turned out, entrepreneurs take the lessons they have learned and move on to try something new, but without the defects that they created and abandoned.

Two hours up highway I-80 in the California Capital of Sacramento, failure is a foreign word but a recurring reality. If Sacramento politicians learned from failure like Silicon Valley execs do, California would be much better off, and politicians would do a lot more celebrating. Instead, politicians don't acknowledge failures -- unless they are blaming someone else for them. And in California, no center-left politician will admit to gun control's abject failures. In fact, with all manners of gun control again on the lips of elected officials, politicians have dusted off every tired old idea that the gun ban lobby ever had, and they are pushing these ill-conceived laws as novel concepts. Worse though, they “spin” flawed programs to sound like successes and, in the process, fool others into supporting and funding them.

Case in point: Politicians have found a “sounds-good” program which, as the quotes that start this article reflect, they claim is taking guns out of the hands of “violent” and “dangerous” criminals. It's the Armed Prohibited Persons System (APPS). While the APPS program was good in theory, the politicians have been using the recent tragedies to make it sound like something it is not, promoting it as a huge success, trying to steal millions of dollars from gun buyers to expand the program, and adopting tougher prosecution policies that could cause trouble for gun-owners and their families, many of whom are unaware of their prohibited status.

II. The APPS Program

People who are suspected of illegally being in possession of firearms are tracked through APPS. APPS is California's technology for matching gun registration records against people who have had their gun ownership rights restricted -- temporarily or permanently. It is administered by the California Department of Justice (DOJ) Firearms Bureau, and it cross-references individuals who have firearm restrictions against those who have registered handguns, “assault weapons,” or voluntarily registered firearms. People get listed in APPS because they legally acquired handguns through a licensed firearm dealer (long guns acquired through a dealer will also be registered to the recipient automatically after January 1, 2014) or they registered their firearms (either voluntarily, as “assault weapons,” or handguns registered by personal handgun importers or after conducting intra-familial transfers, etc.), and were then placed on the prohibited list due to a subsequent criminal conviction, mental illness diagnosis, or for a variety of other, often arcane, reasons.

The noble initial goal of the APPS program was to make sure that anyone who once owned a registered gun, but who had their right to gun ownership suspended, would forfeit their firearms unless they got their right to possess a gun legally restored. The assumption was that this would take guns away from violent bad guys. The promising program was launched, with the NRA's support, on July 1, 2002, following the passage of SB 950 (2001). But APPS hasn't lived up to its promise. Don't expect to see any gangland thugs or serial violent predators going to jail through APPS. Far from capturing violent criminals and felons with guns, APPS largely disarms people without violent criminal records. And because of California's byzantine rights revocation statutes and the fact that courts never bothered to advise hundreds of thousands of people that the plea bargain they were making included a loss of gun rights, most people listed in APPS don't even know they are prohibited from owning guns. These are far from “violent” or “dangerous” criminals. And most of these folks, if they had an attorney file some paperwork, could get their gun rights back.

III. A False Premise

The first broken cog in APPS machinery for getting guns from violent criminals is its reliance on gun registration. People in the APPS system were at one time not prohibited from owning guns, and thus had no reservation about registering them. But your typical inner city gang member – the criminal class using guns to commit 94% of the homicides – almost never buys guns at retail and so never gets pulled into California's mandatory handgun registration system for lawful gun transfers.

According to studies published by the federal Bureau of Justice Statistics, nearly 80% of crime guns come from outside of the retail chain half of them from street dealers and half through "acquaintance" purchases, which often include buying guns from other criminals (acquiring firearms this way is already a violation of state and federal law). California is a large state, with a large criminal population. State prisons hold over 163,000 people, 63% (103,000) of whom are there on violent crime charges. California also has a high recidivism rate with 52% of serious/violent crimes being committed by repeat offenders. Often mocked for its "revolving door" criminal justice system, California has functionally excluded these perpetual desperados from the APPS database. These criminal firearms acquisitions never get run through the National Instant Criminal Background Check System (NICS), and the black market gun buyers never enter California's APPS database. Because of criminals' non-participation in California's gun registration system, most of the bad guys are automatically shielded from APPS.

This single aspect crippled APPS' effectiveness at getting guns away from violent criminals from the start.

Tellingly, APPS' ineffectiveness at reaching violent criminals, the true bad guys, has not been reported by the same politicians who demand more gun control in general, and who showcase APPS to other states as proof of efficacy. California politicians refuse to consider that violent career criminals do not register guns, but nonetheless brag about California's APPS and urge the export of APPS to other states.

It's a convenient way to justify universal gun registration. And mandatory gun registration has been the dream of the gun control movement since the Brady Campaign was originally called Handgun Control, Inc. So now, if certain politicians have their way, other states may use APPS to justify universal firearm registration.

There is no incentive to take a hard look at APPS in those political circles. But what has APPS really done? According to these very politicians, in the 16 years APPS has been an active state program, 12,000 firearms have been confiscated – about 750 each year. Yet the APPS database shows 40,000 known firearms in the hands of 20,000 prohibited owners, most likely non-violent first offenders. Stated differently, in sixteen years APPS has removed 23% of the known firearms and 0% of the unregistered guns in gang member pockets. The California DOJ also notes that they are losing ground. Last year the DOJ teams disarmed 2,033 prohibited people, but 3,000 more names were added to the system.

IV. Unknowing Victims of APPS

The second flaw with APPS is its list of prohibited persons. The media and Attorney General are portraying these prohibited persons as violent criminals. But in fact, most often the people in APPS do not

even know that they can't legally possess guns. Most are not dangerous. In many cases the person in APPS only learns that he or she can't have firearms when law enforcement arrives to take them.

A. Rampant Confusion

The confusion results from the reality that firearms rights loss and restoration laws are incredibly complex. The laws that trigger a firearm prohibition are countless and almost impossible to spot. It's not just felony convictions, the obvious disabling conviction that people have to worry about. People can be prohibited from possessing guns under federal and California law for numerous reasons and for various lengths of time. In some cases a person can have their firearm rights restored months or a few years into the restriction; some firearm restrictions can last a person's lifetime. Someone can be prohibited from possessing firearms for certain misdemeanor convictions, mental health commitments, and certain restraining orders. California's Penal Code, Health and Safety Code, Corporations Code, and Government Code, etc. list over a thousand *non-violent* felonies. A conviction of any one will prohibit a person from possessing firearms.

The court's opinion in *Rash v. Lungren*, 59 Cal.App.4th 1233, 1235 (1997), shows that Judges recognize the problem officially. California Appeals Court Justice William Bedsworth, writing about firearm laws that trigger a loss of firearms possession rights, said it best:

At first blush, the statutes seem impenetrable. Reading them is hard, writing about them arduous, reading about them probably downright painful. The [complexity] makes for tough sledding. As Alfred North Whitehead wrote of rationalism, the effort is, itself, an adventure in the clarification of thought.

Subsequently, in 2006, the Legislature passed the Assembly Concurrent Resolution, ACR 73 (2005), which described the state of California firearm laws: "WHEREAS, Title 2 (commencing with Section 12000) of Part 4 of the Penal Code, relating to the control of deadly weapons, is lengthy and complex, and could be simplified...."

Considering the complexity and obscurity of some of the laws that trigger a prohibition on possessing firearms, many folks do not know they have a firearm restriction until law enforcement knocks on their door. At that point, the person faces the loss of a valuable collectible or a family heirloom, not to mention potential prison time.

B. Felony Convictions – Temporary and Permanent

If, at the moment of a felony conviction, the defendant has firearms registered in his or her name, he or she is listed in APPS.

Far too often, people are not aware or advised that they are prohibited from possessing firearms and ammunition from the moment the conviction is entered into the system by the court. In many cases, judges who have 30-40 cases before them that day are more interested in moving cases along or defense attorneys who have other places to be (or are ignorant of the consequences of a conviction) have failed to inquire whether their client possesses firearms and then inform them of the firearm restriction. This is particularly common when it's a misdemeanor conviction, or a felony conviction that can later become one. Criminal convictions that carry with them firearm

restrictions become prohibiting *the second* the plea is entered. A person who pleads guilty to a criminal offense that results in a firearm restriction, goes home, and has access to firearms in his or her gun safe, is in violation of state or federal law as soon as they walk in the door.

Often when people get a felony conviction that only results in probation, once they complete probation they are confused about whether they actually have a felony conviction that triggers a firearm restriction (especially when that conviction is their only conviction on their record and the conviction occurred years ago).

In some cases (for felonies or misdemeanors), the person's attorney tells them that in a few years they can get an "expungement," and it will be "like the conviction never occurred." Unfortunately, a shocking number of attorneys have misinformed their clients that a California expungement removes a conviction from their record, or that it restores firearms possession rights. In addition, a large percentage of convicted individuals believe that an expungement acts as an eraser, removing the conviction from their record. It doesn't. California's expungement section, Penal Code Section 1203.4, does not remove a conviction from a person's record or restore firearm rights. A person is still considered "convicted" of an offense "expunged" under section 1203.4 for purposes of state and federal firearm restrictions. Consequently, it is not unusual for a person, following their expungement, to have no idea that they are still prohibited from possessing firearms.

If a probationary sentence or a jail sentence less than one year is imposed, some felony convictions can be reduced to a misdemeanor when the sentence is completed, and usually gun rights are restored in the process. But doing this requires a motion to be brought in court under Penal Code section 17(b). It's a simple form, but many lawyers neglect to follow through and file it for their clients, and many clients don't realize the form has to be filed to get their rights back.

C. Certain Misdemeanor Convictions

Aside from felony convictions, there are plenty of other ways to lose your gun rights.

Even if a person was charged with a felony that was later reduced to a misdemeanor, some misdemeanor convictions themselves come with a firearms restriction under state or a lesser known federal law. Certain California misdemeanors can prohibit a person from possessing firearms for 10 years, or for life. People convicted of misdemeanor crimes of "domestic violence" do not always know that their misdemeanor conviction carries a lifetime firearm restriction under *federal* (but not state) law.

Believing that their misdemeanor conviction is relatively minor, persons with a prohibiting misdemeanor conviction are very often unaware of their restriction. And for good reason. For years, judges, prosecutors, and even defense attorneys have failed to tell them.

D. Mental Health "Commitments"

Those whom law enforcement may have taken into custody because there was *probable cause* to believe the person was a danger to themselves can be prohibited from possessing firearms for five years. Many people don't understand when their "counseling" or alcohol or drug treatment

becomes a “commitment” that triggers a firearm prohibition. Even years later, after the persons are no longer a danger to themselves, law enforcement can still come knocking at their door and seize firearms. Far too often, these individuals are not aware of their firearm restriction and unaware of the procedure they could have used to restore their firearm rights.

Hospitals often fail to make certain mental health patients aware of their state or federal law firearm restriction upon discharge.

The federal mental health commitment restriction for firearm ownership is a lifetime ban. Frequently, a person's California law restriction ends, but the person does not realize they are still subject to a lifetime federal restriction.

E. Restraining Orders

The restraining order system has become a well known game to family lawyers. Triggering a restraining order can effect parental rights, child support, and alimony, and can give divorce lawyers leverage in negotiations. So separating spouses or lovers are sometimes encouraged to seek one even when they aren't necessary. And they can be issued *without notice*. Individuals are not always aware that a court issued restraining order carries with it a firearm ban, and they are often uninformed and unaware of their firearm restriction.

V. Anything Worth Doing, Is Worth Doing on Overtime!

The third flaw in APPS is execution. The DOJ Bureau of Firearms oversees the APPS Program, and it periodically uses its own agents, or else “conscripts” DOJ Special Agents (SAs) from other parts of the DOJ, to go out on “sweeps” to seize firearms from people in the APPS system. Most SAs don't like the duty. They view the people from whom guns are being seized as not dangerous, and the program as politicized, designed primarily to seize large numbers of guns in order to promote the success of the program.

Raids under APPS vary from mundane to comical. Search warrants typically cannot be obtained because the “probable cause” standard cannot be met by old gun registration records and a state database riddled with inaccuracies. Since nearly all APPS suspects have no violent criminal record, and because they are very often unaware that their gun rights have been rescinded, most APPS confiscations are placid “knock and talk” affairs. Half a dozen or more heavily armed and battle ready DOJ SAs – ironically driving black unmarked Suburban SUVs, clad in black SWAT gear, and carrying machine guns – merely “talk” their way into the home, stirring up the neighborhoods as they stand on the front lawn waiting for “consent” to enter. Machineguns in hand, they “ask” if there are guns in the house and take them when they leave. Follow-up prosecutions are appropriately rare.

So for example, the SAs knock on a door and the home owner consents for them to come in, the SAs then ask the home owner if there are any guns in the home. Usually, wanting to be helpful and fearful that if they don't respond or ask for a lawyer they appear dishonest, the home owner answers honestly. The SAs ask where the firearms are, they are shown the firearms, and take the firearms; usually explaining the seizure as “safe keeping.”

With the renewed focus on APPS you can anticipate more paramilitary government "visits" to otherwise sedate neighborhoods as heavily armed SWAT teams come to confiscate your clueless, white collar neighbor's hunting rifle, personal defense handgun, and grandfather's wallhanger.

VI. Property Damage

A fourth flaw involves the actual seizure of the firearms. When law enforcement seizes firearms they seize *everything*. This presents two problems. Wallhangers, collector's items, heirlooms, and firearms that have been in families for generations are taken. Rarely do these valuable pieces of family history receive the care or consideration that valuable antiques deserve. Often firearms are thrown in piles or lumped together in police property units. The firearms are rarely returned in the same condition. They come back with new scratches and dents, patches of rust, and/or evidence of "test firing"; resulting in substantial loss of value for large collections and sentimental pieces.

VII. Innocent Others

The other half of the problem when firearms or property are actually taken involves firearms owned by non-prohibited persons. A spouse or roommate of a prohibited person, often unaware of their co-habitant's prohibited person status, will usually see their private firearms taken along with the prohibited person's. This becomes even more troubling when the firearms that are seized from the non-prohibited person were never "possessed" or accessible by the prohibited person.

If a person is prohibited from possessing firearms under state or federal law, that person cannot have possession, access, or control over firearms. But if firearms are locked securely away from that person without the prohibited person being able to access them, the firearms should not be seized by law enforcement. Yet inaccessible firearms stored away from the prohibited person often are taken. If you live with a prohibited person, don't let them have access!

VIII. Robbing Gun Buyers by Raiding the DROS Account

The next problem with APPS is funding.

The California DOJ estimates that there are currently 20,000 prohibited individuals, possessing approximately 40,000 guns, in California. There are only 33 DOJ SAs designated to track these people and collect these guns. Last year, agents recovered 2,033 guns. Every year, 3,000 more names are added to the list. The number of prohibited persons who have firearms registered to them continues to rise in California due to a lack of police enforcement priority and manpower. According to Special Agent John Marsh of the DOJ, "[t]his type of enforcement is very labor intensive. When you're going after armed prohibited people, it heightens the level of potential violence." DOJ estimates that it would cost roughly \$25 million to collect all the guns from people who are prohibited from having them.

APPS could be done *a lot* more efficiently. But as the saying goes in some law enforcement circles: "Anything worth doing, is worth doing on overtime." So expect this to cost a bundle.

Squads of SAs in SWAT gear are not cheap, and these raids are often conducted in the early morning hours, thus requiring overtime pay. It would not be unreasonable to expect the number of justifications for ending your gun rights to increase once registration and the means for confiscation are in place.

After Stephen Lindley, Chief of the DOJ Bureau of Firearms, testified that his office lacked sufficient money for staff to confiscate weapons from those convicted of certain offenses and the mentally ill, lawmakers introduced a bill that would raid other special accounts for that purpose. This bill is on its way to the governor's office having passed out of both houses. Amidst the recent barrage of gun ban law proposals, California politicians are trying to funnel millions of dollars into the APPS program. Senator Mark Leno is proposing to syphon money from the "Dealer Record of Sale (DROS)" account - - that collects \$19 for background checks on each gun purchase - - and use it to confiscate firearms. The DROS account has a \$20 million surplus, the result of overcharging gun buyers for their background checks. By raiding the money in this DROS account, the state could hire more agents to confiscate guns.

In other words, politicians want to pay for police work that should be paid for from the state's general fund through the pockets of firearm owners who legally got their firearms through a licensed dealer. Big problem with that: it's an after-the-fact tax, prohibited by state law and the Constitutional protections of the Second Amendment.

IX. Horror Stories

One SA who asked not to be identified explains a couple of typical examples of how the APPS program becomes politicized. In one instance, the agent went to a farm where a husband and wife lived, and the husband was prohibited from possessing firearms. The husband had transferred all of his firearms to his father to possess, because he knew he was prohibited. The DOJ Bureau of Firearms Agent wanted to go to the father's house and seize the guns, arguing that the son could go there and get them. The SAs who weren't affiliated with the firearms program angrily refused to follow the Bureau of Firearms Agent's instructions to go to the father's house, because clearly the firearms were not be "possessed" by the prohibited person.

In another case, SAs obtained consent to enter a house and then started asking questions of a husband and wife. Their son was a prohibited person, but he no longer lived at the house, though he had access to the house to come visit his parents. The father had a valuable collection in his gun safe. The wife off handedly remarked that she thought the son probably had the combination to the gun safe. As a result, the DOJ Bureau of Firearms Agent insisted that all of the guns in that gun safe be seized because the son could theoretically gain access to them.

Because of client confidentiality we cannot discuss some of the other egregious cases we have handled. But you don't want to join this Club!

X. What Should You Do?

A. Check Your Eligibility

If you have any doubt about your ability to possess firearms, links to California DOJ forms that can be used check your eligibility status and assign someone power of attorney to transfer your firearms on your behalf if you are prohibited, along with other articles on this topic, can be found at our website: CalGunLaws.com. I go into much more detail on who is prohibited from possessing firearms (and how to restore firearm rights) in my book, *California Gun Laws*, which can be ordered through www.CalGunLawsbook.com.

B. Don't Exercise "Dominion" or "Control" Over Firearms in Your Home

If you are prohibited, don't "possess" firearms! "Possession" means dominion and control. If someone's else's guns are locked up in a safe you don't know the combination to, by law you should not be considered to be in "possession" of them. If you are prohibited, whatever actions you take to transfer the firearms to someone else, whether in or outside your home, should be done in consultation with a lawyer.

C. Don't "Consent" to a Search

If law enforcement comes to your door without a warrant, you and your spouse are not required to talk to them, let them in, or consent to a search. So if the police from the APPS program knock on your door, you can politely say, through the door if possible, "No you cannot come in," and tell them they will need to call your lawyer. If you then close the door, they will typically leave.

They may try to convince you to speak to them. Don't argue or discuss it. They may threaten to arrest you, but the reality is that when a police officer comes to your door, if police have the evidence they need to arrest you, then they are going to arrest you, no matter what you say or do.

Make sure your spouse is aware of this and does not consent to a search because consent from one spouse or resident is typically treated as consent from the other. Even if law enforcement arrests you, do not consent to a search. You are not required to consent to the search of your home even then.

D. Remain Silent

You are not going to talk yourself out of being arrested if they intend to anyway and have the evidence to. But you could very well talk yourself *into* being arrested by trying to cooperate. This is the unfortunate reality in today's politicized gun control enforcement climate in California. Whereas most gun owners would bend over backwards to cooperate with police, programs like APPS, the 24-hour theft reporting ordinances, and other pending state laws have put gun owners in a situation where they should not talk to police without getting legal advice first because they risk saying something that can be used or "spun" against them and used as evidence to prosecute them or their family members.

E. Hire a Lawyer

Often getting your rights back is just a matter of filing the right paperwork. While this is done, or if you can't get them back, transferring the firearms out of your possession, with a lawyer's help, is a good move. You can get a free know your rights card at:
<http://michellawyers.com/order-civil-rights-advocacy-cards-stickers-and-other-free-stuff>

Still got a question? Email legalquestion@michellawyers.com.

XII. Conclusion

APPS will not affect California's violent crime rate. Despite years of APPS and an eternity of other California gun control laws, the Golden State still has a violent crime rate higher than the national average. Law enforcement certainly knows this, though politicians appear to remain willfully ignorant.

The APPS program has become a politicized tool that gun ban advocates can mischaracterize and use to advance their universal registration agenda. Don't get snared!

For Further Assistance:

For links to free information on firearms laws, the Legal Resources section of our www.calgunlaws.com website has subsections on various firearms law topics. Check it out!

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