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OPINION	:	No. 82-704
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of	:	<u>DECEMBER 31, 1982</u>
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THE HONORABLE EDWIN L. MILLER, JR., DISTRICT ATTORNEY,  
SAN DIEGO COUNTY, has requested an opinion on the following question:

May a California peace officer carry a sawed-off shotgun for law enforcement purposes if authorized by the agency that employs the officer?

CONCLUSION

A California peace officer may carry a sawed-off shotgun for law enforcement purposes if authorized by the agency that employs the officer.

ANALYSIS

As used in the Penal Code, the words "peace officer" signify any one of the officers mentioned in chapter 4.5 of title 3 of part 2 of that code. (Pen. Code, § 7(8).) The

various categories of peace officer are described in chapter 4.5 commencing with Penal Code section 830 and continuing through section 832.6. (See 65 Ops.Cal.Atty.Gen. 527 (1982).) We are asked to determine whether or not a peace officer may carry a sawed-off shotgun for law enforcement purposes if authorized by the agency that employs him or her.

As used in Penal Code section 12020, a sawed-off shotgun "means any firearm (including any revolver) manufactured, designed, or converted to fire shotgun ammunition having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by manufacture, alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches." (Pen. Code, § 12020(d)(1).)

#### STATE LAW:

Our discussion of state law will assume that the California law enforcement agency obtained its sawed-off shotguns in full compliance with state and federal laws<sup>1</sup> and that its officers will possess and carry the weapons for official purposes only. We will further assume that the weapons are owned by the law enforcement agency and maintained as part of its arsenal.

Penal Code section 12020, as part of the Dangerous Weapons Control Law (Pen. Code, §§ 12000-12601), prohibits the possession of sawed-off shotguns and certain other devices, providing in part as follows:

"(a) *Any person in this state* who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or *who* gives, lends, or *possesses* any cane gun or wallet gun, any firearm which is not immediately recognizable as a firearm, any ammunition which contains or consists of any flechette dart, any bullet containing or carrying an explosive agent, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, nunchaku, sandclub, sandbag, *sawed-off shotgun*, or metal knuckles, or who carries concealed upon his person any explosive substance, other than fixed ammunition or who carries concealed upon his person any dirk or dagger, *is guilty of a felony*, and upon conviction shall be punishable by imprisonment in the county jail not exceeding one year or in a state prison. A bullet containing or carrying an explosive agent is not a destructive device as that term is used in Section 12301." (Emphasis added.)

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<sup>1</sup> The federal law implications of the question will be discussed subsequently.

The statute has several exceptions, including that contained in subdivision (b)(1) which provides that the above prohibition does not apply to the "manufacture, possession, transportation or use, with blank cartridges, of sawed-off shotguns solely as props for motion picture films or television program production when such is authorized by the Department of Justice pursuant to Article 6 (commencing with Section 12095) of this chapter and is not in violation of federal law."

Another exception is found in subdivision (b)(7):

"Any other weapon as defined in subsection (e) of Section 5845 of Title 26 of the United States Code [National Firearms Act] and which is in the possession of a person permitted to possess such weapons pursuant to the Gun Control Act of 1968 (P.L. 90-618; 82 Stat. § 1213), as amended, and the regulations issued pursuant thereto."

The term "any other weapon," as defined in subdivision (e) of section 5845 of the National Firearms Act, means:

"[A]ny weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition."

The weapons described above are concealable smooth-bore firearms, handguns capable of firing shotgun shells, and rifle and shotgun combinations commonly known by configuration as "over and unders." We construe the subdivision (b)(7) exception to Penal Code section 12020(a) as a reference to those particular weapons when possessed in compliance with federal law, and not to sawed-off shotguns and short-barreled shotguns as defined in state and federal law. (Pen. Code, § 12020(d)(1); 18 U.S.C. §§ 921(6) and (8); 26 U.S.C. §§ 5845(a) and 5845(d).)

Other exceptions to Penal Code section 12020 include described "antique firearms" and firearms which are "curios and relics." (Pen. Code, §§ 12020(b)(4) and 12020(b)(6).)

We must examine other provisions of the Dangerous Weapons' Control Law. Section 12001.5 provides:

"Except as provided in section 12020, nothing in this chapter [the Dangerous Weapons' Control Law] shall be construed as authorizing the manufacture, importation into the state, keeping for sale, offering for sale, or giving, lending, or possession of any sawed-off shotgun as defined in section 12020."

Immediately following this provision in the code is section 12002(a) which states:

"Nothing in this chapter prohibits police officers, special police officers, peace officers, or law enforcement officers from carrying any wooden club, baton, or any equipment authorized for the enforcement of law or ordinance in any city or county."

Does section 12001.5 bar a peace officer from possessing a sawed-off shotgun since none of the exceptions within section 12020 applies to such situation? Does section 12002(a) allow a peace officer to possess a sawed-off shotgun if he or she carries it as an item of equipment authorized for the enforcement of law or ordinance?

We were confronted with similar questions in 65 Ops.Cal.Atty.Gen. 120 (1982). We were asked, *inter alia*, whether or not a billy club, blackjack or policeman's baton could be sold lawfully to a peace officer who was authorized to possess one by the head of his or her law enforcement agency. We noted that Penal Code section 12020(a) expressly prohibited any person in this state from keeping for sale, or offering or exposing for sale, or giving, lending or possessing "any weapon of the kind commonly known as a . . . blackjack, billy . . . ." Determining first that Penal Code section 12002(a) permitted police officers, when authorized by their employers, to carry such weapons as "equipment," we concluded as follows at page 122:

"Section [12002(a)] carves out an exception to the proscriptions of section 12020(a) to accommodate the needs of law enforcement. This exception allows peace officers to possess the proscribed weapons when so authorized by their department head. To make this exception meaningful, authorized peace officers must have some means of obtaining such weapons themselves or leave the state to acquire them. We are persuaded that the Legislature intended to authorize those who are engaged in the business of providing equipment to law enforcement agencies to sell those weapons proscribed by section 12020(a) to those officers authorized to carry the same as provided in section [12002(a)] within the State of California. Prudence

would suggest that the seller of such weapons obtain a copy of some written authorization of the buyer to carry the weapon prior to its sale and delivery to the buyer. We conclude that the sale of a billy club, blackjack or policeman's baton to a peace officer authorized by the head of the officer's law enforcement agency to carry the same is lawful in California."

We observe that Penal Code section 12002(a) allows police officers to carry "any wooden club, baton, or any equipment . . . ." Since a blackjack or a billy is a striking instrument similar to a wooden club or a baton, our opinion in 65 Ops.Cal.Atty.Gen. 120 (1982) might arguably be based on the rule of statutory interpretation known as *ejusdem generis*, i.e., when general words follow specific words, the general words will be limited in meaning to things of like kind or nature. (*Bader v. Coale* (1941) 48 Cal.App.2d 276, 279.) Our opinion does not purport to be so restricted in application. The term "any equipment" suggests a class of things more numerous than striking instruments. Law enforcement officers customarily carry equipment such as whistles, handcuffs, radios, handguns, bullet-proof vests and other items deemed necessary for law enforcement purposes. A sawed-off shotgun fits within the term "any equipment."

Examination of the legislative history of the pertinent state statutes is helpful. What is presently Penal Code section 12020(a) was enacted in substance in 1923. (Stats. 1923, ch. 339, § 1, p. 696.) At that time sawed-off shotguns were not listed among the prohibited items which then included blackjacks, slungshots, billys, sandclubs, sandbats, metal knuckles, concealed explosive substances and concealed dirks and daggers. On February 12, 1925, by a letter opinion, we responded to the question of whether or not officers of law could possess the listed instruments. We opined that they could not. Our opinion was not limited to the striking instruments but concerned all the weapons then identified. (Ops.Cal.Atty.Gen. 5238 (1925).) In 1925, in response to our opinion, the section was amended to include the following proviso (Stats. 1925, ch. 323, § 1, p. 543):

"[P]rovided, however, that nothing in this act shall prohibit police officers, special police officers, peace officers, or law enforcement officers from carrying any wooden club, baton, or any equipment authorized by the properly constituted authorities for the enforcement of law or ordinance in any town, municipality, county, city and county in the State of California." (Emphasis in original.)

This language was substantially incorporated into present Penal Code section 12002(a).

Sawed-off shotguns were added to the prohibited weapons listing in section 12020 in 1961. (Stats. 1961, ch. 996, § 1, p. 2645.) This was the first inclusion of a firearm among the proscribed weapons.

The January 1965 report of the California Assembly Interim Committee on Criminal Procedure, on the subject of regulation and control of firearms (Assembly Committee Reports, Vol. 22, No. 6) contains a discussion of California gun laws prepared by legislative counsel:

"Sawed-off shotguns are specially dealt with. A "sawed-off shotgun" under California law is a shotgun having a barrel or barrels of less than 18 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches (Sec. 12020, Pen.C.). It is unlawful to sell, possess, etc., such a weapon in this state and it is subject to seizure and destruction as a nuisance (Secs. 12020, 12028, 12029, Pen.C.; *but apparently peace officers could be authorized to possess such a weapon—see Sec. 12002, Pen.C.*) Additional penalties can be imposed for commission of a felony while armed with a sawed-off shotgun (Sec. 12022, Pen.C.)." (Emphasis added.)

Although there was no specific provision allowing peace officers to possess sawed-off shotguns, Penal Code section 12002 was understood at that time to be such an authorization.

Did the enactment of Penal Code section 12001.5 in 1965 (Stats. 1965, ch. 36, § 1, p. 915) cancel this authority of peace officers to possess and carry sawed-off shotguns as law enforcement equipment? The answer to the question is no because this section, when read together with other provisions of the Dangerous Weapons' Control Law, does not apply to sawed-off shotguns in the custody of the state and local law enforcement agencies.

In interpreting the Dangerous Weapons' Control Law we must follow the cardinal rule of statutory construction, namely, that the intent of the Legislature be ascertained so as to effectuate the purpose of the law. (*People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 40.) The various statutes should be read together as one law. (*Piazza Properties, Ltd. v. Department of Motor Vehicles* (1977) 71 Cal.App.3d 622, 633.) The purpose of the Dangerous Weapons' Control Law is to outlaw the possession of weapons common to the "criminal's arsenal." (*People v. Grubb* (1965) 63 Cal.2d 614, 620; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500; *People v. Mulherin* (1934) 140 Cal.App.212, 215.)

Penal Code section 12029 includes sawed-off shotguns among the weapons described therein as "nuisances."<sup>2</sup> Such a weapon is subject, under this section, to confiscation and summary destruction unless a judge or district attorney certifies that it be preserved from destruction, to subserve the "ends of justice," until the necessity for its use ceases. However, Penal Code section 12030 provides in part as follows:

"Any law enforcement agency which has custody of any firearms, or any parts of any firearms, which are subject to destruction as required by this chapter may, in lieu of destroying the weapons, retain and use any of them as may be useful in carrying out the official duties of the agency, or upon approval of a court, may release them to any other law enforcement agency, for use in carrying out the official duties of that agency, or may turn over to the criminalistics laboratory of the Department of Justice or the criminalistics laboratory of a police department, sheriff's office, or district attorney's office any weapons which may be useful in carrying out the official duties of their respective agencies."

The above section allows a sawed-off shotgun, otherwise subject to confiscation and destruction as an illegal weapon under Penal Code sections 12020(a) and 12028, to be retained by a law enforcement agency for use in carrying out official duties or, in other words, to be included in the agency's weapons arsenal as an item of equipment for the enforcement of law or ordinance. If the agency may so utilize a confiscated firearm *a fortiori* the agency would not be prohibited from utilizing a firearm obtained from a legitimate source such as a licensed firearms dealer. Consequently, by harmonizing Penal Code sections 12001.5, 12002(a) and 12020(a) with other parts of the Dangerous Weapons' Control Law, we discern no legislative intent to deny peace officers access to sawed-off shotguns as law enforcement equipment.

Accordingly, we conclude that a California peace officer under state law may carry a sawed-off shotgun for law enforcement purposes if authorized by the agency that employs the officer.

#### FEDERAL LAW:

The National Firearms Act, based on the taxing authority of the federal government, regulates manufacturing and transferring of firearms. (26 U.S.C. §§ 5801-5872; *Sonzinsky v. United States* (1937) 300 U.S. 506, 513.) The definition of firearm includes:

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<sup>2</sup> The other weapons are blackjacks, slungshots, billies, nunchakus, sandclubs, sandbags, metal knuckles and the instruments described in section 12020(c).

"(1) a *shotgun* having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a *shotgun* if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length . . . ." (26 U.S.C. § 5845(a).) (Emphasis added.)

The definition further defines shotgun and related weapons (26 U.S.C. §§ 5845(d) and 5845(e)):

"(d) Shotgun.—The term 'shotgun' means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.

"(e) Any other weapon.—The term 'any other weapon' means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed *shotgun shell*, weapons with combination *shotgun* and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition." (Emphasis added.)

Those engaged in the businesses of importing, manufacturing or dealing in firearms must register with the Secretary of Treasury. (26 U.S.C. § 5802.) A registrant may, without payment of a tax, make a firearm for or transfer a firearm to "any State, or possession of the United States, any political subdivision thereof, or any official police organization of such a government engaged in criminal investigations." (26 U.S.C. §§ 5853(a) and (b).) However, a registrant making a firearm for or transferring a firearm to such an entity must apply to the Secretary for approval. (26 U.S.C. § 5853(c).)

The National Firearms Act would not bar a state or local police agency from possessing a sawed-off shotgun obtained from an importer, manufacturer or dealer if such transferor is properly registered and has applied for and obtained the necessary approval. Any sawed-off shotgun involved in a violation of the Act is subject to seizure and forfeiture. (26 U.S.C. § 5872(a).)



The Gun Control Act of 1968 (18 U.S.C. §§ 921-928) requires firearm importers, manufacturers, dealers and collectors engaged in interstate commerce to be licensed. (18 U.S.C. § 923.) Under this act, it is unlawful for any person, other than a licensee, to transport a "shortbarreled shotgun" or a "short-barreled rifle"<sup>3</sup> in interstate or foreign commerce "except as specifically authorized by the Secretary consistent with public safety and necessity." (18 U.S.C. § 922(a)(4).) Moreover, the same requirement is placed upon a licensee who intends to sell or deliver a short-barreled shotgun or short-barreled rifle. (18 U.S.C. § 922(b)(4).) However, the Gun Control Act of 1968 (18 U.S.C. § 925(a)(1)) does not apply "with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, sold or shipped to or issued for *use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.*" (Emphases added.) This provision was examined in *Hyland v. Fukuda* (9th Cir. 1978) 580 F.2d 977, where the question was whether or not a state could refuse to hire Hyland, an ex-felon, as a correctional officer because he would be prohibited by the Gun Control Act of 1968 from receiving any firearm which had been shipped or transported in interstate or foreign commerce. (See 18 U.S.C. § 922 (h)(1).) The court ruled in favor of Hyland on this point, stating at page 979:

"It is undisputed that any firearm Hyland might be permitted to carry in the position he seeks would be owned by, and used exclusively for, the state. We agree with the district judge that the plain terms of section 925 (a)(1) remove firearms owned by the state and used exclusively for its purposes from the limitations of section 922."

However, the *Hyland* court ruled that the prospective correctional officer would not be immune from possible prosecution under other federal laws as an ex-felon receiving, possessing or transporting a firearm. (See 18 U.S.C. § 1202(a); *United States v. Kozerski* (D.N.H. 1981) 518 F.Supp. 1082, 1090-1091.) Indeed, a federally-licensed dealer is subject to the same requirements when selling a firearm directly to a peace officer for the officer's private use as he is with respect to a sale made to any other person. (See *United States v. Brooks* (5th Cir. 1980) 611 F.2d 614, 617-618.) Moreover, a federal licensee is prohibited from selling a firearm to any person in any state for private use where the purchase or

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<sup>3</sup> A "short-barreled shotgun" is defined as a shotgun "having one or more barrels less than eighteen inches in length and any weapon made from a shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than twenty-six inches." (18 U.S.C. § 921(6).) The term "short-barreled rifle" means a rifle "having one or more barrels less than sixteen inches in length and any weapon made from a rifle (whether by alteration, modification, or otherwise) if such weapon, as modified, has an overall length of less than twenty-six inches." (18 U.S.C. § 921(8).) These definitions correspond with the California definition. (Pen. Code, § 12020(d)(1).)

possession by such person would be in violation of any state law or published ordinance. (18 U.S.C. § 922(b)(2).) However, if the firearm will be used in the peace officer's official duties and that fact is certified by his or her employing agency, a sale may be made. The Federal Guide to Firearms Regulations, 1978 edition, instructs licensees as follows:

"Section 925(a)(1) of the Gun Control Act exempts law enforcement agencies from the transportation, shipment, receipt, or importation controls of the Act when firearms are to be used for the official business of the agency.

"If a law enforcement officer is issued a certification letter on the agency's letterhead signed by a person in authority within his agency stating that the officer will use the firearms in performance of his official duties, then that officer specified in the certification may purchase a firearm from you regardless of the State in which he resides or in which the agency is located. The seller is not required to prepare a Form 4473 covering such a sale, however, the transaction must be entered in the permanent record. The certification letter from the officer must be kept in your files.

"The Bureau [Bureau of Alcohol, Tobacco and Firearms] considers the following as persons having authority to make certifications that the law enforcement officer purchasing the firearms will use the firearms in performance of his official duties.

"1. In a city or county police department, the director of public safety or the chief or commissioner of police.

"2. In a sheriff's office, the sheriff.

"3. In a State police or highway patrol department, the superintendent or the supervisor in charge of the office to which the State officer or employee is assigned.

"4. In Federal law enforcement offices, the supervisor in charge of the office to which the Federal officer or employee is assigned.

"The Bureau would also recognize someone signing on behalf of a person of authority provided there is a proper delegation of authority and overall responsibility has not changed in any way."

No provision in the Gun Control Act of 1968 prohibits a state or local police agency from possessing a sawed-off shotgun for the use of its officers in performing official duties.<sup>4</sup>

We conclude, upon examination of the National Firearms Act and the Gun Control Act of 1968, that a California peace officer may under federal law carry a sawed-off shotgun for law enforcement purposes if authorized by the agency that employs the officer. However, the individual officer must not be under a disability created by federal law which forbids him or her personally from receiving, possessing or transporting a firearm. (18 U.S.C. § 1202; 26 U.S.C. § 5861; *Hyland v. Fukuda*, *supra*, 580 F.2d at p. 980.)

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<sup>4</sup> Concealable firearms are mailable, under postal laws, to "officers . . . of a State . . . whose official duty is to serve warrants of arrest or commitments. . . ." (18 U.S.C. § 1715.)