

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department - Non-Limited	Entered by: m8
TITLE OF CASE: Sherrif Clay Parker vs. State of California	Case Number: 10CECG02116 JH
LAW AND MOTION MINUTE ORDER	

Hearing Date: **JANUARY 31, 2011**

Hearing Type: **From Chambers**

Department: **402**

Judge/Temporary Judge: **Jeff Hamilton**

Court Clerk: **M.Santana**

Reporter/Tape: **Not Reported**

Appearing Parties:

Plaintiff: **Not Present**

Defendant: **Not Present**

Counsel:

Counsel:

- ☐ Off Calendar
- ☐ Continued to ☐ Set for _____ at _____ Dept. _____ for _____
- ☐ Submitted on points and authorities with/without argument. ☐ Matter is argued and submitted.
- ☐ Upon filing of points and authorities.
- ☐ Motion is granted ☐ in part and denied in part. ☐ Motion is denied ☐ with/without prejudice.
- ☐ Taken under advisement
- ☐ Demurrer ☐ overruled ☐ sustained with _____ days to ☐ answer ☐ amend
- ☐ Tentative ruling becomes the order of the court. No further order is necessary.
- ☐ Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.
- ☐ Service by the clerk will constitute notice of the order.
- ☐ Time for amendment of the complaint runs from the date the clerk serves the minute order.
- ☐ Judgment debtor _____ sworn and examined.
- ☐ Judgment debtor _____ failed to appear.
 Bench warrant issued in the amount of \$ _____

Judgment:

- ☐ Money damages ☐ Default ☐ Other _____ entered in the amount of:
 Principal \$ _____ Interest \$ _____ Costs \$ _____ Attorney fees \$ _____ Total \$ _____
- ☐ Claim of exemption ☐ granted ☐ denied. Court orders withholdings modified to \$ _____ per _____

Further, court orders:

- ☐ Monies held by levying officer to be ☐ released to judgment creditor. ☐ returned to judgment debtor.
- ☐ \$ _____ to be released to judgment creditor and balance returned to judgment debtor.
- ☐ Levying Officer, County of _____, notified. ☐ Writ to issue
- ☐ Notice to be filed within 15 days. ☐ Restitution of Premises
- ☒ Other: See attached copy of Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication

FILED

JAN 31 2011

FRESNO SUPERIOR COURT

By _____ DEPT. 402 - DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

Sheriff Clay Parker, et al.,) No. 10 CECG 02116
Plaintiffs,)
v.) ORDER DENYING PLAINTIFFS'
State of California, et al.,) MOTION FOR SUMMARY JUDGMENT
Defendants.) AND GRANTING IN PART AND
ADJUDICATION
)

A hearing on Plaintiffs Sheriff Clay Parker's, Herb Bauer Sporting Goods, Inc.'s, California Rifle and Pistol Association Foundation's, Able's Sporting, Inc.'s, RTG Sporting Collectibles, LLC's, and Steven Stonecypher's motion for summary judgment, or, in the alternative, for summary adjudication was held in this court on January 18, 2011. Appearances by counsel were noted on the record. After argument by counsel, the Court orally denied PLAINTIFFS' motion for summary judgment, denied Plaintiff Herb Bauer Sporting Goods, Inc.'s motion for summary adjudication of its second cause of action for declaratory and injunctive relief - as applied vagueness challenge, and granted PLAINTIFFS' motion for summary adjudication of their first cause of action for

1 declaratory and injunctive relief - facial vagueness challenge.
2 The Court now issues the following written decision and rules as
3 follows:
4

- 5 1. PLAINTIFFS Sheriff Clay Parker's, Herb Bauer Sporting
6 Goods, Inc.'s, California Rifle and Pistol Association
7 Foundation's, Able's Sporting, Inc.'s, RTG Sporting
8 Collectibles, LLC's, and Steven Stonecypher's First
9 Cause of Action for Declaratory and Injunctive Relief -
10 Facial Vagueness Challenge

11 PLAINTIFFS Sheriff Clay Parker, Herb Bauer Sporting Goods,
12 Inc., California Rifle and Pistol Association Foundation, Able's
13 Sporting, Inc., RTG Sporting Collectibles, LLC, and Steven
14 Stonecypher have filed a motion for summary judgment of their
15 complaint and summary adjudication of their first cause of action
16 for declaratory and injunctive relief - due process vagueness -
17 facial. In PLAINTIFFS' first cause of action, the PLAINTIFFS
18 allege that an actual controversy has arisen and now exists
19 between PLAINTIFFS and all DEFENDANTS because the PLAINTIFFS
20 contend that Penal Code §§ 12060, 12061, and 12318 that regulate
21 "handgun ammunition" as defined in Penal Code §§ 12060(b) and
22 12323(a) are void for vagueness on their face and the DEFENDANTS
23 contend that the statutes are not unconstitutionally vague and
24 that they can be constitutionally enforced. In order to establish
25 a cause of action for declaratory relief, a plaintiff must prove:
26 (1) a proper subject of declaratory relief within the scope of
27 Code of Civil Procedure § 1060, and (2) an actual controversy
28 involving justiciable questions relating to the rights or
obligations of a party. (See 5 Witkin, California Procedure (5th
ed.) § 853.) Injunctive relief is a type of damage or relief and
Order - Parker, et al. v. State of California, et al. (10CECG02116)

1 is a derivative cause of action, not a stand-alone cause of
2 action.

3 The Court determines the issue of whether or not a statute is
4 facially vague as a matter of law. (*People v. Cole* (2006) 38 Cal.
5 4th 964, 988 ["Ultimately, the interpretation of a statute is a
6 question of law for the courts to decide."].)

7 Penal Code 12060(b) states:

8 "Handgun ammunition" means handgun ammunition as defined
9 in subdivision (a) of Section 12323, but excluding
10 ammunition designed and intended to be used in an
11 "antique firearm" as defined in Section 921(a)(16) of
Title 18 of the United States Code. Handgun ammunition
does not include blanks.

12 Penal Code § 12323(a) provides:

13 "Handgun ammunition" means ammunition principally for
14 use in pistols, revolvers, and other firearms capable of
15 being concealed upon the person, as defined in
subdivision (a) of Section 12001, notwithstanding that
the ammunition may also be used in some rifles.

16 Penal Code § 12001(a) states:

17 (a)(1) As used in this title, the terms "pistol,"
18 "revolver", and "firearm capable of being concealed
19 upon the person" shall apply to and include any device
20 designed to be used as a weapon, from which is expelled
21 a projectile by the force of any explosion, or other
22 form of combustion, and that has a barrel less than 16
inches in length. These terms also include any device
that has a barrel 16 inches or more in length which is
designed to be interchanged with a barrel less than 16
inches in length.

23 (2) As used in this title, the term "handgun" means any
24 "pistol," "revolver," or "firearm capable of being
concealed upon the person."

25 In their first cause of action, the PLAINTIFFS contend that
26 Penal Code §§ 12060, 12061, and 12318 that regulate "handgun
27 ammunition" as defined in Penal Code §§ 12060(b) and 12323(a) are
28 facially void for vagueness because the statutes fail to provide

1 notice to persons of ordinary intelligence regarding which
2 calibers of ammunition are "handgun ammunition" and thus subject
3 to enforcement under Sections 12060, 12061, and 12318 and because
4 the statutes encourage or invite arbitrary and discriminatory
5 enforcement of the law. Specifically, the PLAINTIFFS contend that
6 the entire statutory scheme envisioned by Sections 12060, 12061,
7 and 12318 fail for vagueness because the definition of "handgun
8 ammunition" -- the subject matter regulated by the statutes - is
9 itself facially impermissibly vague. After careful consideration,
10 the Court finds that the definition of "handgun ammunition" as
11 established in Penal Code §§ 12060(b) and 12318(b)(2) is
12 unconstitutionally vague and, because the definition of "handgun
13 ammunition" is vague, Penal Code §§ 12060, 12061, and 12318, which
14 define and regulate sales and transfers of "handgun ammunition"
15 are also impermissibly vague.

16 Consequently, the Court grants the PLAINTIFFS' motion for
17 summary adjudication of their first cause of action.

18 "The constitutional interest implicated in questions of
19 statutory vagueness is that no person be deprived of 'life,
20 liberty, or property without due process of law,' as assured by
21 both the federal Constitution (U.S. Const., Amends. V, XIV) and
22 the California Constitution (Cal. Const., art. I, § 7)."
23 (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567.) While Penal
24 Code § 12060 is simply a definitional statute, Penal Code §§ 12061
25 and 12318 are criminal statutes. More specifically, Section
26 12061(c)(1) provides that a violation of Section 12061(a)(3),
27 (a)(4), (a)(6), and (a)(7) is a misdemeanor and Section 12318(a)
28 provides that a violation of Section 12318 is a misdemeanor.

1 "Under both Constitutions, due process of law in this context
2 requires two elements: a criminal statute must "be definite enough
3 to provide (1) a standard of conduct for those whose activities
4 are proscribed and (2) a standard for police enforcement and for
5 ascertainment of guilt." (*Williams v. Garcetti* (1993) 5 Cal. 4th
6 561, 567 [quoting *Walker v. Superior Court* (1988) 47 Cal. 3d 112,
7 141].)

8 Although the doctrine focuses both on actual notice to
9 citizens and arbitrary enforcement, [the U.S. Supreme
10 Court] ha[s] recognized recently that the more important
11 aspect of the vagueness doctrine "is not actual notice,
12 but the other principal element of the doctrine - the
13 requirement that a legislature establish minimal
14 guidelines to govern law enforcement." [Citation.]
15 Where the legislature fails to provide such minimal
16 guidelines, a criminal statute may permit "a
17 standardless sweep [that] allows policemen, prosecutors,
18 and juries to pursue their personal predilections."
19 (*Kolender v. Lawson* (1983) 461 U.S. 352, 357-58 [quoting *Smith v.*
20 *Goguen* (1974) 415 U.S. 566, 574-75].)

21 "A facial challenge to the constitutional validity of a
22 statute or ordinance considers only the text of the measure
23 itself, not its application to the particular circumstances of an
24 individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069,
25 1084.)

26 The California Supreme Court has not articulated a
27 single test for determining the propriety of a facial
28 challenge. [Citation.] Under the strictest test, the
statute must be upheld unless the party establishes the
statute "inevitably pose[s] a present total and fatal
conflict with applicable constitutional prohibitions."
[Citation.] Under the more lenient standard, a party
must establish the statute conflicts with constitutional
principles "in the generality or great majority of
cases." [Citation.] Under either test, the plaintiff
has a heavy burden to show the statute is
unconstitutional in all or most cases, and "cannot
prevail by suggesting that in some future hypothetical

1 situation constitutional problems may possibly arise as
2 to the particular application of the statute."
3 (*Coffman Specialties, Inc. v. Department of Transportation* (2009)
4 176 Cal. App. 4th 1135, 1145.)

5 The Court evaluates the statute according to the following
6 standards:

7 Vague laws offend several important values. First,
8 because we assume that man is free to steer between
9 lawful and unlawful conduct, we insist that laws give
10 the person of ordinary intelligence a reasonable
11 opportunity to know what is prohibited, so that he may
12 act accordingly. Vague laws may trap the innocent by
13 not providing fair warning. Second, if arbitrary and
14 discriminatory enforcement is to be prevented, laws
15 must provide explicit standards for those who apply
16 them. A vague law impermissibly delegates basic policy
17 matters to policemen, judges, and juries for resolution
18 on an *ad hoc* and subjective basis, with the attendant
19 dangers of arbitrary and discriminatory application.
20 (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567-68 [quoting
21 *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-09].)

22 The starting point of our analysis is "the strong
23 presumption that legislative enactments 'must be upheld
24 unless their unconstitutionality clearly, positively,
25 and unmistakably appears. [Citations.] A statute
26 should be sufficiently certain so that a person may know
27 what is prohibited thereby and what may be done without
28 violating its provisions, but it cannot be held void for
uncertainty if any reasonable and practical construction
can be given to its language.'"
(*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 568 [quoting *Walker*
v. Superior Court (1988) 47 Cal. 3d 112, 143.]

29 **Statutes Fail to Provide Adequate Notice or Fair Warning.**

30 First, the Court must decide whether or not Penal Code §§
31 12060, 12061, and 12318 are sufficiently definite to provide
32 ordinary people and ammunition vendors adequate notice or fair
33 warning of the conduct proscribed. In other words, would a person
34 or ammunition vendor of ordinary intelligence understand what
35 ammunition falls into the definition of "handgun ammunition" -

1 ammunition "principally for use in" pistols, revolvers, and other
2 firearms with barrels less than 16 inches in length that cannot be
3 interchanged with a barrel 16 inches in length or more,
4 notwithstanding that the ammunition may also be used in some
5 rifles, and excluding ammunition designed and intended to be used
6 in an "antique firearm" and blanks - or does not fall within the
7 provided definition of "handgun ammunition?"

8 In considering whether a legislative proscription is
9 sufficiently clear to satisfy the requirements of fair
10 notice, "we look first to the language of the statute,
11 then to its legislative history, and finally to
12 California decisions construing the statutory language."
13 [Citation.] We thus require citizens to apprise
14 themselves not only of statutory language but also of
15 legislative history, subsequent judicial construction,
16 and underlying legislative purposes [Citation].
17 (Walker v. Superior Court (1988) 47 Cal. 3d 112, 143.)

18 The Court finds that the definition of "handgun ammunition"
19 established in Penal Code §§ 12060(b) and 12318(b)(2) fails to
20 provide adequate notice of the conduct proscribed to the people or
21 handgun ammunition vendors of ordinary intelligence to whom the
22 statutory scheme applies. Initially, the Court determines that
23 there are no state or federal cases that construe or interpret the
24 definition of "handgun ammunition" established in Penal Code §§
25 12060(b) and 12318(b)(2).

26 Next, the Court looks to the legislative context, the
27 legislative purpose, and the legislative history of Assembly Bill
28 962, the bill that enacted Sections 12060, 12061, and 12318. The
29 Legislature enacted Sections 12060, 12061, and 12318 as part of
30 the "Anti-Gang Neighborhood Protection Act of 2009." (Stats.
31 2009, ch. 628, § 1.) There is no legislative purpose clause or
32 preamble in the "Anti-Gang Neighborhood Protection Act of 2009."

1 Additionally, there is no discussion in the legislative history of
2 Assembly Bill 962 of exactly what types of ammunition, by caliber
3 or by cartridge, were supposed to be included in the definition of
4 "handgun ammunition." The Court notes that this lack of
5 discussion is probably because most of the definition of "handgun
6 ammunition" was taken from another statute already in effect
7 (Penal Code § 12323(a)). However, due to the lack of a
8 legislative purpose clause and lack of substantive discussions in
9 the legislative history, Assembly Bill 926's legislative history
10 does not help to clarify what ammunition the Legislature intended
11 to fall into the definition of "handgun ammunition."

12 Finally, the Court considers the text of the definition of
13 "handgun ammunition" itself and determines that the text of the
14 definition of "handgun ammunition" established in Penal Code §§
15 12060(b) and 12318(b)(2) fails to provide reasonable people or
16 ammunition vendors with an objective standard that individuals or
17 entities can use in order to determine what particular calibers or
18 cartridges of ammunition are "principally for use in pistols,
19 revolvers, and other firearms [with barrels of less than 16
20 inches, which are not interchangeable with barrels of 16 inches or
21 more]," notwithstanding that the ammunition may also be used in
22 rifles, and are thus regulated by Sections 12060, 12061, and
23 12318. In this case, it is not the definitions of the individual
24 words themselves that cause the confusion. In fact, "pistol,"
25 "revolver," and "firearm" all have clear, ordinary, and common
26 meanings. An average person can easily measure a barrel and
27 determine if the barrel is less than 16 inches or not or, even if
28 the barrel is less than 16 inches in length, if the barrel is

1 interchangeable with a barrel that is 16 inches in length or more.
2 In addition, the definition of "principally" has a clear,
3 ordinary, and common meaning -- "chiefly," "mainly," or
4 "primarily." (Dictionary.com Unabridged [based on Collins English
5 Dictionary (10th Ed., 2009)]
6 <<http://dictionary.reference.com/browse/principally>> [as of
7 January 28, 2011.]) "Primarily" is defined as "essentially" or
8 "mostly", "chiefly" is defined as "essentially" or "mostly," and
9 "mainly" is defined as "for the most part" or "to the greatest
10 extent." (Dictionary.com Unabridged [based on Collins English
11 Dictionary (10th Ed., 2009)]
12 <<http://dictionary.reference.com/browse/primarily>>,
13 <<http://dictionary.reference.com/browse/chiefly>>, and
14 <<http://dictionary.reference.com/browse/mainly>> [as of January 28,
15 2011.] Based on these definitions, it appears relatively clear
16 that "handgun ammunition" is ammunition that is for the most part
17 or to the greatest extent used in pistols, revolvers, and firearms
18 with a barrel length of less than 16 inches, even though the
19 ammunition may also be used in rifles. In different terms,
20 "handgun ammunition" is ammunition used in pistols, revolver, and
21 firearms with a barrel length of less than 16 inches more than
22 fifty percent of the time.

23 However, while the meanings of the individual words of the
24 definition are clear, the text of the "handgun ammunition"
25 definition provides no objective way or method for a person or a
26 handgun ammunition vendor to determine if a particular ammunition
27 caliber or cartridge is used more often, or used more than fifty
28 percent of the time, or used for the most part in pistols,

1 revolvers, or firearms with barrels of less than 16 inches, even
2 though the same ammunition caliber or cartridge may also be used
3 in rifles. Sections 12060(b) and 12318(b)(2) do not state that
4 particular calibers and/or cartridges of ammunition are "handgun
5 ammunition" or provide that, in order to determine what "handgun
6 ammunition" is, people and handgun ammunition vendors should look
7 at regulations or a guide propounded by a government agency for a
8 list of particular calibers and/or cartridges of ammunition that
9 qualify. (See *Harrott v. County of Kings* (2001) 25 Cal. 4th 1138,
10 1152-53 [the California Supreme Court found that vagueness issues
11 in the Roberti-Roos Assault Weapons Control Act of 1989 did not
12 reach impermissible levels because ordinary citizens did not have
13 to look at the language of the statute, but only had to consider
14 the California Code of Regulations and an Identification Guide
15 propounded by the Attorney General's office - objective uniform
16 standards - to determine if an weapon was classified as an assault
17 weapon].) Here, Penal Code §§ 12060, 12061, and 12318 do not
18 permit any law enforcement agency to establish regulations or an
19 identification guide to more narrowly define what ammunition is
20 encompassed in the "handgun ammunition" definition.

21 The Court finds that the statutory language of the "handgun
22 ammunition" definition encourages individual people and handgun
23 ammunition vendors to consider their own experience, conduct,
24 and/or actions in using or selling ammunition calibers and
25 cartridges in handguns or rifles to determine if a particular
26 ammunition caliber or cartridge is "handgun ammunition." One
27 person might use one caliber of ammunition solely in rifles, while
28 another person might only use that same caliber of ammunition in

1 handguns. If a person (Law Enforcement or citizen) or ammunition
2 vendor is forced to consider and rely upon their own subjective
3 experiences in order to determine what ammunition is "handgun
4 ammunition," each person or ammunition vendor is likely to
5 conceive of a definition of "handgun ammunition" that is in part,
6 or to a great extent, different from any other person's or
7 ammunition vendor's definition of "handgun ammunition."

8 Although DEFENDANTS assert that the ammunition vendor
9 "profession" might have more specialized knowledge about
10 ammunition use in handguns or rifles and that the Challenged
11 Statutes only apply to handgun ammunition vendors, Penal Code §
12 12318's application is not limited to handgun ammunition vendors,
13 but instead applies to all people or entities engaged in the
14 "delivery or transfer of ownership of handgun ammunition" and all
15 people or entities cannot be charged with any specialized
16 knowledge of ammunition use in handguns or rifles. Therefore, the
17 Court finds that the "handgun ammunition" definition established
18 in Sections 12060(b) and 12318(b)(2) does not provide people,
19 handgun ammunition vendors, or other entities with adequate notice
20 or fair warning of what ammunition is "handgun ammunition" so that
21 the people, handgun ammunition vendors, and other entities can
22 have a reasonable opportunity to determine what conduct is
23 prohibited by Sections 12060, 12061 and 12318.

24 Consequently, Penal Code §§ 12060, 12061 and 12318 fail to
25 meet the first requirement for a constitutionally valid criminal
26 statute -- that the statute be definite enough so that ordinary
27 people can understand what conduct is prohibited. (*Kolender v.*
28 *Lawson* (1983) 461 U.S. 352, 357.)

1 Standard for Enforcement is Non-Existent.

2 Second, the Court must decide whether or not Penal Code §§
3 12060, 12061, and 12318 are sufficiently definite to provide "a
4 standard for police enforcement and for ascertainment of guilt."
5 (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567 [quoting *Walker*
6 *v. Superior Court* (1988) 47 Cal. 3d 112, 141].) In other words,
7 is the definition of "handgun ammunition" in Penal Code §§
8 12060(b) and 12318(b)(2) sufficiently definite enough to provide a
9 standard or guidelines for the police and court to determine if a
10 person, handgun ammunition vendor, or other entity has violated
11 Sections 12060, 12061, and 12318 in order to prevent arbitrary and
12 discriminatory enforcement?

13 The Court finds that the definition of "handgun ammunition"
14 established in Penal Code §§ 12060(b) and 12318(b)(2) contains no
15 objective standard or method for determining what ammunition is
16 encompassed by the definition of "handgun ammunition" leaving the
17 law enforcement officers with "virtually complete discretion" to
18 determine whether or not a particular caliber and/or cartridge of
19 ammunition is "handgun ammunition." (*Kolender v. Lawson* (1983)
20 461 U.S. 352, 357.) Specifically, the full discretion accorded to
21 the enforcing law enforcement officer to determine if the
22 ammunition at issue is "handgun ammunition" or not "necessarily
23 '[entrusts] lawmaking to the moment-to-moment judgment of the
24 policeman on his beat.'" (*Kolender*, 461 U.S. at 360.) The
25 Legislature has simply left it open to the personal judgment call
26 and subjective understanding of each individual law enforcement
27 officer to determine if a particular caliber and/or cartridge of
28 ammunition is "handgun ammunition" under the definition in

1 Sections 12060(b) and 12318(b)(2) and to subjectively apply that
2 subjective definition of "handgun ammunition" to each issue of an
3 ammunition sale or transfer that comes to the attention of that
4 law enforcement officer.

5 Take, for example, two different law enforcement officers,
6 one a county sheriff and the other a city police officer,
7 separately conducting investigations into .32 caliber and .44
8 caliber ammunition sales to people who gave the ammunition to a
9 felon, which is a misdemeanor under Penal Code § 12317(a). One
10 officer goes to an ammunition vendor where one of the ammunition
11 sales occurred and requests to see the records of all "handgun
12 ammunition" sales, which the vendor is required to keep pursuant
13 to Section 12061(a)(3). The officer looks in the vendor's records
14 and sees that there is a record of a "handgun ammunition" sale to
15 the suspected individual for .32 caliber ammunition, but not for
16 .44 caliber ammunition. Now, the officer knows that the
17 individual under investigation purchased .44 caliber ammunition in
18 the same transaction as the .32 caliber ammunition sale, but since
19 the law enforcement officer does not believe that .44 caliber
20 ammunition is ammunition "principally for use" in pistols,
21 revolvers, and other firearms with barrels shorter than 16 inches
22 or "handgun ammunition", the law enforcement officer does not
23 arrest the vendor for committing misdemeanor violations of Penal
24 Code § 12061(a)(3), which requires an ammunition vendor to keep
25 records of all sales and transfers of "handgun ammunition" and
26 Section 12061(a)(4), which provides that a vendor "shall not
27 knowingly ... fail to make a required entry in" the "handgun
28 ammunition" records required by Section 12061(a)(3). Next, during

1 the course of his separate but parallel investigation, the other
2 law enforcement officer goes to the same ammunition vendor, also
3 requests to see the records, and notices in the records that there
4 is a record of a "handgun ammunition" sale to his suspect for .32
5 caliber ammunition, but not for .44 caliber ammunition. Again,
6 this second officer knows that his suspect purchased .44 caliber
7 ammunition in the same transaction as the .32 caliber ammunition
8 sale, but this time, since the second law enforcement officer
9 believes that .44 caliber ammunition is ammunition "principally
10 for use" in pistols, revolvers, and other firearms with barrels
11 shorter than 16 inches or "handgun ammunition," the law
12 enforcement officer arrests the ammunition vendor for misdemeanor
13 violations of Penal Code § 12061(a)(3) and (a)(4).

14 In another twist, the two officers could be investigating
15 improper sales and transfers of specific .44 caliber cartridge
16 ammunition that an ammunition vendor does not keep records of
17 because the vendor does not believe that the particular ammunition
18 cartridge qualifies as "handgun ammunition." However, while one
19 officer agrees with the vendor that the specific .44 caliber
20 cartridge ammunition is not "handgun ammunition," the vendor is
21 arrested by the other officer for misdemeanor violations of
22 Section 12061(a)(3) and (a)(4) because the other officer disagrees
23 with the vendor and believes that the specific .44 caliber
24 cartridge ammunition is ammunition "principally for use" in a
25 handgun. Because the language of the definition of "handgun
26 ammunition" fundamentally requires each law enforcement officer to
27 make a subjective determination as to whether or not the
28 ammunition at issue is ammunition "principally for use" in a

1 handgun and then subjectively apply their own definition to the
2 situation before them, the definition of "handgun ammunition"
3 established by Section 12060(b) and 12318(b)(2) gives unlimited
4 discretion to each individual law enforcement officer to determine
5 arbitrarily if the ammunition at issue is "handgun ammunition" and
6 to apply their particular classification of "handgun ammunition"
7 or not to the specific issue before them.

8 The DEFENDANTS contend that there is no evidence that the
9 DEFENDANTS will enforce the challenged definition arbitrarily and
10 that, before enforcing the statutes, law enforcement will need
11 probable cause to show that the ammunition at issue is used
12 principally in handguns within the terms of the definition of
13 "handgun ammunition." However, the DEFENDANTS appear to be
14 misunderstanding the actual issue. This Court is not finding that
15 the definition of "handgun ammunition" creates unconstitutional
16 discretion in the law enforcement personnel to arrest people for
17 violations of Sections 12061 and 12318 without probable cause that
18 the ammunition at issue is "handgun ammunition" as defined by
19 Sections 12060(b) and 12318(b)(2). Rather, the issue is that the
20 actual definition of "handgun ammunition" is so vague that it does
21 not establish an objective standard or method by which individual
22 law enforcement officers can determine what ammunition is properly
23 "handgun ammunition" as defined by Sections 12060(b) and
24 12318(b)(2).

25 The List.

26 DEFENDANTS' argue that the "list" of calibers and cartridges
27 that their firearms and ammunition expert, Blake Graham, compiled
28 is a list of calibers and cartridges that DEFENDANTS' consider to

1 be "handgun ammunition" within the definition established in
2 Sections 12060(b) and 12318(b)(2); the Court determines that this
3 "list" is not any limitation on the "vast amount of discretion"
4 granted to law enforcement in the enforcement of Sections 12061
5 and 12318. (See *City of Chicago v. Morales* (1999) 527 U.S. 41, 63
6 [holding that a general order of the Chicago police department of
7 internal rules limiting their enforcement of the statute at issue
8 in that case to certain designated areas of the city was not a
9 sufficient limitation on the vast amount of discretion granted to
10 the police in their enforcement of the challenged statute].)
11 Here, this "list" of the California Department of Justice is not a
12 proper administrative regulation that limits the vast amount of
13 discretion that law enforcement officers have to determine and
14 enforce their subjective definition of "handgun ammunition,"
15 because nothing in Assembly Bill 962, which includes Sections
16 12060, 12061, and 12318, grants the California Department of
17 Justice the authority to promulgate regulations limiting the
18 discretion of law enforcement officers when it comes to what
19 ammunition can be properly defined as "handgun ammunition."

20 Also, even if this "list" is evidence that the Department of
21 Justice is internally limiting the discretion of the law
22 enforcement officers that work for them, the Department of Justice
23 is not the only law enforcement agency in California that will be
24 enforcing Sections 12061 and 12318. In particular, Section
25 12061(a)(5) states that "handgun ammunition" records of ammunition
26 vendors are subject to inspection by any peace officer employed by
27 not only the Department of Justice, but also peace officers
28 employed by a sheriff, a city police department, or district

1 attorney and Section 12061(a)(7) and (c)(1) makes it a misdemeanor
2 for an ammunition vendor to refuse to permit a person authorized
3 under Section 12061(a)(5) to examine "handgun ammunition" records.
4 Therefore, more law enforcement agencies other than the Department
5 of Justice are entitled to enforce Sections 12061 and 12318 and
6 any internal policy limiting the discretion of Department of
7 Justice's peace officers does not apply to any other type of law
8 enforcement officer.

9 Due to the fact that the definition of "handgun ammunition"
10 established in Sections 12060(b) and 12318(b)(2) improperly fails
11 to contain any objective standard for determining what ammunition
12 is included in the definition of "handgun ammunition" and
13 encourages law enforcement officers to engage in the subjective
14 understanding and application of the "handgun ammunition"
15 definition when the law enforcement officers enforce Sections
16 12060, 12061 and 12318, the Court finds that the definition of
17 "handgun ammunition" in Sections 12060(b) and 12318(b)(2)
18 "furnishes a convenient tool for 'harsh and discriminatory
19 enforcement by local prosecuting officers, against particular
20 groups deems to merit their displeasure,' [Citation], and 'confers
21 on police a virtually unrestrained power to arrest and charge
22 persons with a violation.'" (Kolender v. Lawson (1983) 461 U.S.
23 352, 360.) Consequently, Penal Code §§ 12060, 12061, and 12318
24 fail to meet the second requirement for a constitutionally valid
25 criminal statute - that the statute's definition of the criminal
26 offense be definite enough to not encourage arbitrary and
27 discriminatory enforcement. (Kolender v. Lawson (1983) 461 U.S.
28 352, 357.)

1 Since Penal Code §§ 12060, 12061, and 12318 fail to "be
2 definite enough to provide (1) a standard of conduct for those
3 whose activities are proscribed and (2) a standard for police
4 enforcement and for ascertainment of guilt[,] the Court finds
5 that Penal Code §§ 12060, 12061, and 12318 are unconstitutionally
6 vague on their face. (*Williams v. Garcetti* (1993) 5 Cal. 4th 561,
7 567 [quoting *Walker v. Superior Court* (1988) 47 Cal. 3d 112,
8 141].) Therefore, the Court grants PLAINTIFFS' motion for summary
9 adjudication of their first cause of action for declaratory and
10 injunctive relief - due process vagueness - facial.

11

12 2. PLAINTIFF Herb Bauer Sporting Goods, Inc.'s Second Cause
13 of Action for Declaratory and Injunctive Relief - As
14 Applied Vagueness Challenge

15 PLAINTIFF Herb Bauer Sporting Goods, Inc. has filed a motion
16 for summary judgment of the complaint and summary adjudication of
17 its second cause of action for declaratory and injunctive relief -
18 due process vagueness - as applied. In PLAINTIFF's second cause
19 of action, the PLAINTIFF alleges that an actual controversy has
20 arisen and now exists between PLAINTIFF and all DEFENDANTS because
21 the PLAINTIFF contends that Penal Code § 12061(a)(1) and (a)(2)
22 are unconstitutional in that they are impermissibly vague and the
23 DEFENDANTS contend that the statutes are not impermissibly vague
24 and can be constitutionally enforced. In order to establish a
25 cause of action for declaratory relief, a PLAINTIFF must prove:
26 (1) a proper subject of declaratory relief within the scope of
27 Code of Civil Procedure § 1060, and (2) an actual controversy
28 involving justiciable questions relating to the rights or

obligations of a party. (See 5 Witkin, California Procedure
(4th ed.) § 809.) Injunctive relief is a type of damage or relief
and is a derivative cause of action, not a stand-alone cause of
action.

Penal Code § 12061(a)(1) and (a)(2) provide that:

(a) A vendor shall comply with all of the following
conditions, requirements and prohibitions:

1. A vendor shall not permit any employee who the
vendor knows or reasonably should know is a
person described in Section 12021 or 12021.1
of this code or Section 8100 or 8103 of the
Welfare and Institutions Code to handle, sell,
or deliver handgun ammunition in the course
and scope of his or her employment.
2. A vendor shall not sell or otherwise transfer
ownership of, offer for sale or otherwise
offer to transfer ownership of, or display for
sale or display for transfer of ownership of
any handgun ammunition in a manner that allows
that ammunition to be accessible to a
purchaser or transferee without the assistance
of the vendor or employee thereof.

Penal Code 12060(b) provides the definition of "handgun
ammunition" as used in Section 12061(a)(1) and (a)(2). "Handgun
ammunition" is defined as ammunition "principally for use in"
pistols, revolvers, and other firearms with barrels less than 16
inches in length that cannot be interchanged with a barrel 16
inches in length or more, notwithstanding that the ammunition may
also be used in some rifles, and excluding ammunition designed and
intended to be used in an "antique firearm" and blanks.

In the second cause of action, PLAINTIFF makes an as-applied
vagueness challenge to Penal Code § 12061(a)(1) and (a)(2)
contending that, as applied to PLAINTIFF, Sections 12061(a)(1)
and (a)(2) fail to provide notice to PLAINTIFF which calibers of
ammunition are "handgun ammunition" as defined in Penal Code

1 section 12060(b) and the vague definition encourages arbitrary and
2 discriminatory enforcement of the laws against PLAINTIFF in
3 violation of the Due Process Clause of the Fourteenth Amendment.
4 However, the Court denies the PLAINTIFFs' motion for summary
5 judgment and the PLAINTIFF's motion for summary adjudication of
6 its second cause of action because the PLAINTIFF has failed to
7 establish the second element of a cause of action for declaratory
8 relief - an actual controversy involving justiciable questions
9 relating to the rights and obligations of a party.

10 An as applied challenge may seek (1) relief from a
11 specific application of a facially valid statute or
12 ordinance to an individual or class of individuals who
13 are under allegedly impermissible present restraint or
14 disability as a result of the manner or circumstances in
15 which the statute or ordinance has been applied, or (2)
16 an injunction against future application of the statute
17 or ordinance in the allegedly impermissible manner it is
18 shown to have been applied in the past. It contemplates
analysis of the facts of a particular case or cases to
determine the circumstances in which the statute or
ordinance has been applied and to consider whether in
those particular circumstances the application derived
from the individual to whom it was applied of a protected
right.

19 (*Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084.)

20 However, the PLAINTIFF's only facts regarding any possible
21 application of Section 12061(a)(1) and (a)(2) do not demonstrate
22 that PLAINTIFF is seeking relief from the specific application of
23 the statute against PLAINTIFF, which caused PLAINTIFF to be under
24 an impermissible present restraint or disability due to the
25 statute's application or that PLAINTIFF is seeking an injunction
26 against future application of the statute in the allegedly
27 impermissible manner in which the statute was applied in the past.

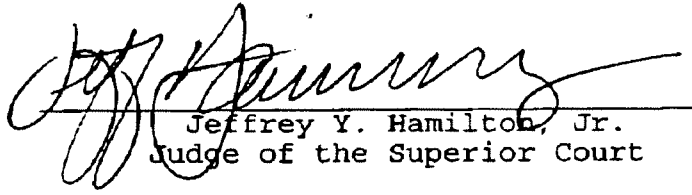
28 PLAINTIFF's Undisputed Material Fact No. 238 establishes
that, on December 30, 2009, the California Department of Justice
Order - Parker, et al. v. State of California, et al. (10CECG02116)

1 published an "Information Bulletin" providing a brief overview of
2 Assembly Bill 962, which included Penal Code § 12061(a)(1) and
3 (a)(2). PLAINTIFF's Undisputed Material Fact No. 239 proves that
4 Defendant California Department of Justice provided notice to all
5 California firearm dealers, including PLAINTIFF, that Penal Code §
6 12061(a)(1) and (a)(2) took effect on, and has been in force
7 since, January 1, 2010, effectively threatening all California
8 firearm dealers with enforcement of Section 12061(a)(1) and
9 (a)(2). (The Court assumes *arguendo* that providing notice of a
10 law is effectively threatening enforcement of that law.) However,
11 the PLAINTIFF has not provided any undisputed material facts
12 demonstrating that the California Department of Justice, or any
13 other Defendant, has actually ever enforced or applied Section
14 12061(a)(1) and/or (a)(2) against PLAINTIFF or anyone else in the
15 past or at the present time. Since an as applied vagueness
16 challenge in this case requires the Court to consider the facts of
17 how the statute has been applied against the PLAINTIFF or someone
18 else and the PLAINTIFF has failed to provide any facts
19 demonstrating that Section 12061(a)(1) and/or (a)(2) has ever been
20 applied to anyone, the PLAINTIFF has not established that there is
21 an active controversy between PLAINTIFF and DEFENDANTS as to
22 whether or not Section 12061(a)(1) and (a)(2) are impermissibly
23 vague as applied to PLAINTIFF.

24 Therefore, the PLAINTIFF has failed to establish each element
25 of a cause of action for declaratory relief. Consequently, the
26 burden never shifts to the DEFENDANTS to establish that a triable
27 issue of material fact exists. Accordingly, the Court denies the
28 PLAINTIFFS' motion for summary judgment and PLAINTIFF Herb Bauer

1 Sporting Goods, Inc.'s motion for summary adjudication of its
2 second cause of action for declaratory and injunctive relief - due
3 process vagueness - as applied.

4
5 DATED this 31st day of January, 2011.

6
7 
8 Jeffrey Y. Hamilton, Jr.
9 Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Department - Non-Limited 1130 "O" Street Fresno, CA 93724-0002 (559)457-1900		FOR COURT USE ONLY
TITLE OF CASE: Sherrif Clay Parker vs. State of California		
CLERK'S CERTIFICATE OF MAILING		CASE NUMBER: 10CECG02116 JH

Name and address of person served:

Peter Andrew Krause
Office of the Attorney General
1300 I Street, Ste 125
Sacramento, CA 95814

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of the 01/31/11 minute order and copy of Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at Fresno, California, on:

Date: **February 1, 2011**

Clerk, by , Deputy
M. Santana

C. D. Michel, 180 East Ocean Blvd., Suite 200, Long Beach CA 90802
Peter A. Krause, Office of the Attorney General, 1300 I Street, Ste 125, Sacramento CA 95814

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Department - Non-Limited 1130 "O" Street Fresno, CA 93724-0002 (559)457-1900	FOR COURT USE ONLY
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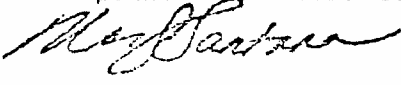
Name and address of person served:

C. D. Michel
Michel & Associates
180 East Ocean Blvd. Suite 200
Long Beach, CA 90802

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