



USCA DOCKET # (IF KNOWN)

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT**

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL: Rothery, et al. v. Blanas, et al (See attached for all parties)	DISTRICT: Eastern CA JUDGE: MENDEZ	
	DISTRICT COURT NUMBER: 2:08-CV-02064-JAM-KJM	
	DATE NOTICE OF APPEAL FILED: 8-24-2009	IS THIS A CROSS-APPEAL? <input type="checkbox"/> YES
	IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY): n/a	

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

The validity of California Carrying Concealed Weapons (CCW) laws and Honorary Deputy Badges, as applied, under the Equal Protection clause of the 14th Amendment. In addition, the application of the Second Amendment as it applies to CCW laws, pending a decision on the Second Amendment in Nordyke v. King No. 07-15763 (En Banc Review)

PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:

Whether the Second Amendment confers and individual right to keep and bear firearms, and whether made applicable to the States through the 14th Amendment? Nordyke v. King No. 07-15763 (En Banc Review). Whether the lower court judge error in dismissing Plaintiffs' case without leave to amend the First Amended Complaint?

PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POSTJUDGMENT MOTIONS):

Nordyke v. King No. 07-15763 (9th Cir. En Banc Review)

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

- Possibility of settlement
- Likelihood that intervening precedent will control outcome of appeal
- Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify) _____
- Any other information relevant to the inclusion of this case in the Mediation Program _____

Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges

LOWER COURT INFORMATION

JURISDICTION		DISTRICT COURT DISPOSITION	
FEDERAL	APPELLATE	TYPE OF JUDGMENT/ORDER APPEALED	RELIEF
<input checked="" type="checkbox"/> FEDERAL QUESTION <input type="checkbox"/> DIVERSITY <input type="checkbox"/> OTHER (SPECIFY):	<input checked="" type="checkbox"/> FINAL DECISION OF DISTRICT COURT <input type="checkbox"/> INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT <input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY): <input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> DEFAULT JUDGMENT <input type="checkbox"/> DISMISSAL/JURISDICTION <input checked="" type="checkbox"/> DISMISSAL/MERITS <input type="checkbox"/> SUMMARY JUDGMENT <input type="checkbox"/> JUDGMENT/COURT DECISION <input type="checkbox"/> JUDGMENT/JURY VERDICT <input type="checkbox"/> DECLARATORY JUDGMENT <input type="checkbox"/> JUDGMENT AS A MATTER OF LAW <input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> DAMAGES: SOUGHT \$ _____ AWARDED \$ _____ <input type="checkbox"/> INJUNCTIONS: <input type="checkbox"/> PRELIMINARY <input type="checkbox"/> PERMANENT <input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED <input type="checkbox"/> ATTORNEY FEES: SOUGHT \$ _____ AWARDED \$ _____ <input type="checkbox"/> PENDING <input type="checkbox"/> COSTS: \$ _____

CERTIFICATION OF COUNSEL

I CERTIFY THAT:

1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.
2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).
3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.
4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.

/s/Gary W. Gorski

Digitally signed by /s/Gary W. Gorski
DN: cn=/s/Gary W. Gorski, o=anAttorney at Law, email=gary@pacbell.net, c=US
Date: 2009.08.24 13:23:39 -0700

Signature

8-24-09

Date

COUNSEL WHO COMPLETED THIS FORM

NAME: Gary W. Gorski

FIRM: Law Offices of Gary W. Gorski

ADDRESS: **8549 Nephi Way, Fair Oaks, CA 95628**

E-MAIL: usrugby@pacbell.net

TELEPHONE: 916.965-6800

FAX: 916-965-6801

***THIS DOCUMENT SHOULD BE FILED IN THE DISTRICT COURT WITH THE NOTICE OF APPEAL*
*IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS***

CAPTION ATTACHMENT OF PARTIES

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

-ooOoo-

JAMES ROTHERY, Esq.; ANDREA)	CASE NO.: 2:08-cv-02064-JAM-KJM
HOFFMAN)	
)	
Plaintiffs/Appellants,)	
)	
vs.)	
)	
Former Sheriff LOU BLANAS; SHERIFF)	
JOHN MCGINNIS; Detective TIM SHEEHAN;)	
SACRAMENTO COUNTY SHERIFF'S)	
DEPARTMENT, an independent branch of)	
government of the COUNTY OF)	
SACRAMENTO; COUNTY OF)	
SACRAMENTO; STATE OF CALIFORNIA)	
ATTORNEY GENERAL JERRY BROWN;)	
DOES 1 through 225, unknown co-conspirators)	
)	
Defendants/Appellees.)	
_____)	

1 JOHN A. LAVRA, CSB No. 114533
2 JERI L. PAPPONE, CSB No. 210104
3 AMANDA L. BUTTS, CSB No. 253651
4 Longyear, O’Dea and Lavra, LLP
5 3620 American River Drive, Suite 230
6 Sacramento, Ca. 95864
7 Telephone: (916) 974-8500
8 Facsimile: (916) 974-8510
9 Attorneys for County of Sacramento
10 (also erroneously sued herein as Sacramento
11 County Sheriff’s Department); Lou Blanas,
12 John McGinness, Timothy Sheehan

9 **UNITED STATES DISTRICT COURT EASTERN DISTRICT**
10 **OF CALIFORNIA SACRAMENTO DIVISION**

12 JAMES ROTHERY, Esq.; ANDREA)
13 HOFFMAN,)
14 Plaintiffs,)
15 v.)
16 Former Sheriff LOU BLANAS; SHERIFF)
17 JOHN MCGINNESS; Detective TIM)
18 SHEEHAN; SACRAMENTO COUNTY)
19 SHERIFF’S DEPARTMENT, an independent)
20 branch of government of the COUNTY OF)
21 SACRAMENTO; COUNTY OF)
22 SACRAMENTO; STATE OF CALIFORNIA)
23 ATTORNEY GENERAL JERRY BROWN;)
24 LONGYEAR, O’DEA AND LAVRA, LLP;)
25 DOES 1 through 25, unknown)
26 conspirators,)
27 Defendants.)

CASE NO. 2:08-CV-02064-JAM-KJM
ORDER

22 On July 15, 2009, the hearing on Defendants, County of Sacramento, Lou Blanas, Sheriff
23 John McGinness, and Timothy Sheehan’s Motion to Dismiss pursuant to FRCP 12(b)(6), was
24 held before the Honorable John A. Mendez.

25 Daniel Karalash appeared for Plaintiffs James Rothery and Andrea Hoffman. Geoffrey
26 Graybill appeared on behalf of the State of California Attorney General Jerry Brown. John A.
27 Lavra of Longyear, O’Dea and Lavra appeared on behalf of the Defendants, County of
28 Sacramento, Lou Blanas, Sheriff John McGinness, and Timothy Sheehan, hereinafter “County

1 Defendants”.

2 After consideration of the Defendants’ moving papers, Plaintiffs’ opposition brief, and
3 Defendants’ reply brief, together with oral argument presented at the hearing, and good cause
4 appearing therefore, the court hereby rules as follows:

5 The County Defendants’ Motion to Dismiss the first claim for relief alleging violation of
6 the RICO statute (18 U.S.C. §§1961-1968) is granted. Plaintiffs’ complaint fails to state a claim
7 upon which relief can be granted. The court hereby adopts the findings made at the time of the
8 hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are attached to
9 this order as Exhibit 1, and incorporated herein.

10 The County Defendants’ Motion to Dismiss the second claim for relief alleging a
11 violation of Equal Protection Clause pursuant to 42 U.S.C. § 1983 is granted. Plaintiffs’
12 complaint fails to state a claim upon which relief can be granted. The court hereby adopts the
13 findings made at the time of the hearing as set forth in the transcript of the proceedings. Excerpts
14 of the transcript are attached to this order as Exhibit 1, and incorporated herein.

15 The County Defendants’ Motion to Dismiss the third claim, brought under the First and
16 Fourteenth Amendments pursuant to 42 U.S.C. § 1983 is granted. Plaintiffs’ complaint fails to
17 state a claim upon which relief can be granted. The court hereby adopts the findings made at the
18 time of the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are
19 attached to this order as Exhibit 1, and incorporated herein.

LONG YUEN PAO, Clerk of Court, U.S. District Court, District of Columbia (202) 974-8510

20 The County Defendants’ Motion to Dismiss the fourth claim alleging violation of Second
21 Amendment on the grounds that the denial of CCW permits violates Plaintiffs’ right to bear arms
22 under the Second Amendment, is granted. Plaintiffs’ complaint fails to state a claim upon which
23 relief can be granted. The court hereby adopts the findings made at the time of the hearing as set
24 forth in the transcript of the proceedings. Excerpts of the transcript are attached to this order as
25 Exhibit 1, and incorporated herein.

26 The County Defendants’ Motion to Dismiss the fifth claim brought under the Privileges
27 and Immunities Clause pursuant to 42 U.S.C. § 1983 is granted. Plaintiffs’ complaint fails to
28 state a claim upon which relief can be granted. The court hereby adopts the findings made at the

1 time of the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are
2 attached to this order as Exhibit 1, and incorporated herein.

3 The County Defendants' Motion to Dismiss the sixth claim brought under Ninth and
4 Fourteenth Amendments pursuant to 42 U.S.C. § 1983, alleging that those amendments provide a
5 constitutional right to carry a concealed weapon, is granted. Plaintiffs' complaint fails to state a
6 claim upon which relief can be granted. The court hereby adopts the findings made at the time of
7 the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are attached
8 to this order as Exhibit 1, and incorporated herein.

9 The County Defendants' Motion to Dismiss the seventh claim, which is purportedly a
10 claim for injunctive relief and declaratory relief is granted. The declaratory and injunctive relief
11 claim is not a separate claim for relief upon which relief may be based and therefore, Plaintiffs'
12 complaint fails to state a claim upon which relief can be granted. The court hereby adopts the
13 findings made at the time of the hearing as set forth in the transcript of the proceedings. Excerpts
14 of the transcript are attached to this order as Exhibit 1, and incorporated herein.

15 The court further orders that this case, and each and every claim, be dismissed with
16 prejudice and without leave to amend, for the reasons as set forth in both the Attorney General's
17 and the County Defendants' briefs. There is no legal basis for the Plaintiffs' claims, and even if
18 given the opportunity to amend, Plaintiffs would be unable to plead a legally cognizable
19 complaint. The court finds this lawsuit to be almost frivolous, if not frivolous. There is no
20 support in the law for this lawsuit. And even if the Court gave the Plaintiffs an opportunity to
21 amend, they would be unable to. These are all solid, well-founded legal reasons set forth in the
22 defendants' briefs as to why this case should not go forward. This lawsuit is just a rehash of
23 David K. Mehl, et al. v. Lou Blanas, et al., U.S. District Court for the Eastern District of
24 California, Civ. No. S03-2682 MCE KJM, and the findings and orders of Judge England from
25 that case are incorporated herein in full.

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27 ///

28 ///

1 **APPROVED AS TO FORM :**

2 /s/ Gary W. Gorski
3 DATED: July 24, 2009

DANIEL M. KARALASH or GARY GORSKI
COUNSEL FOR PLAINTIFFS

4
5
6 /s/ Geoffrey L. Graybill
7 DATED: July 24, 2009

GEOFFREY LLOYD GRAYBILL
DEPUTY ATTORNEY GENERAL

8
9
10 /s/ John A. Lavra
11 DATED: July 24, 2009

JOHN A. LAVRA
ATTORNEY FOR COUNTY DEFENDANTS

12
13
14 **IT IS SO ORDERED:**

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16
17 Dated: July 27, 2009 /s/ John A. Mendez

HONORABLE JOHN A. MENDEZ
UNITED STATES DISTRICT JUDGE

18
19 LONG YU CHANG, Clerk of Court, (415) 974-8510

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25
26
27
28

1 EDMUND G. BROWN JR., State Bar No. 37100
Attorney General of California
2 DOUGLAS J. WOODS, State Bar No. 161531
Supervising Deputy Attorney General
3 GEOFFREY GRAYBILL, State Bar No. 53643
Deputy Attorney General
4 1300 I Street, Suite 125
P.O. Box 944255
5 Sacramento, CA 94244-2550
Telephone: (916) 324-5465
6 Fax: (916) 324-8835
E-mail: Geoffrey.Graybill@doj.ca.gov

7 *Attorneys for Defendant Edmund G. Brown Jr.,*
8 *Attorney General for the State of California*

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12
13
14 **JAMES ROTHERY, Esq.; ANDREA**
15 **HOFFMAN,**

16 Plaintiffs,

17 v.

18 **Former Sheriff LOU BLANAS; SHERIFF**
19 **JOHN MCGINNIS; Detective TIM**
20 **SHEEHAN; SACRAMENTO COUNTY**
21 **SHERIFF'S DEPARTMENT, an**
22 **independent branch of government of the**
23 **COUNTY OF SACRAMENTO; COUNTY**
24 **OF SACRAMENTO; STATE OF**
25 **CALIFORNIA ATTORNEY GENERAL**
26 **JERRY BROWN; DOES 1 through 225,**
27 **unknown co-conspirators,**

28 Defendants.

Case No. 2:08-cv-02064-JAM-KJM

**ORDER DISMISSING FIRST AMENDED
COMPLAINT WITH PREJUDICE AS TO
DEFENDANT ATTORNEY GENERAL**

Date: July 15, 2009

Time: 9:00 a.m.

Ctrm: 6

Judge: The Honorable John A. Mendez

Action Filed: September 3, 2008

26 The motion by Defendant Attorney General of California Edmund G. Brown Jr. to dismiss
27 the First Amended Complaint ("FAC") came on regularly for hearing before this Court on July
28 15, 2009, with Deputy Attorney General Geoffrey L. Graybill appearing for defendant moving

1 party and Daniel M. Karalash appearing for plaintiffs in opposition. For the reasons stated on the
2 record at the hearing and summarized below, the Attorney General's motion to dismiss is
3 GRANTED, with prejudice. A copy of the transcript of the Court's ruling at the hearing is
4 attached hereto and incorporated by reference as though fully set forth herein. The Court has
5 adopted much of the reasoning set forth in the unpublished Memoranda and Orders by the
6 Honorable Morrison C. England, Jr. entered on September 3, 2004 and February 5, 2008 in *David*
7 *K. Mehl et al. v. Lou Blanas et al.*, U.S. District Court for the Eastern District of California, No.
8 CIV. S 03-2682 MCE KJM. Except for allegations against Sacramento County defendants in this
9 action regarding violations of the federal Racketeer Influenced and Corrupt Organizations Act
10 (RICO), the allegations in *Mehl* and in this case are virtually identical. Judge England's orders
11 are attached hereto for ease of reference.

12 Of the seven causes of action alleged in the FAC, two are directed against Sacramento
13 County defendants only and are addressed in a separate order.

14 The first cause of action alleged against the Attorney General is the Second Cause of
15 Action of the FAC, which claims pursuant to 42 U.S.C. section 1983 that on their face and as
16 applied by defendants California Penal Code sections 12027, 12031(b) and 12050-12054 deny
17 plaintiffs equal protection of the law by providing preferences to certain classes of applicants for
18 carry concealed weapons licenses ("CCW"). For the reasons the Court stated at the hearing
19 including adoption of portions of Judge England's orders, these allegations fail to state a claim for
20 which relief can be granted and cannot be amended to state a claim.

21 The second cause of action alleged against the Attorney General is the Fourth Cause of
22 Action of the FAC, which alleges pursuant to 42 U.S.C. section 1983 that the Second Amendment
23 incorporated through the Fourteenth Amendment prohibits operation of the CCW statutes to
24 preclude plaintiffs from carrying loaded concealed weapons outside their homes. Even if
25 incorporated through the Fourteenth Amendment, the Second Amendment as interpreted by the
26 United States Supreme Court and by the United States Court of Appeals for the Ninth Circuit
27 does not provide such a right. Therefore, this cause of action fails to state a claim for which relief
28 can be granted and cannot be amended to state a claim.

1 The third cause of action alleged against the Attorney General is the Fifth Cause of Action
2 of the FAC, which alleges pursuant to 42 U.S.C. section 1983 that the Privileges or Immunities
3 Clause of the Fourteenth Amendment prohibits operation of the CCW statutes to preclude
4 plaintiffs from carrying loaded concealed weapons outside their homes. As explained by this
5 Court at the hearing and in Judge England's orders, there is no authority to support this
6 contention. Therefore, this cause of action fails to state a claim for which relief can be granted
7 and cannot be amended to state a claim.

8 The fourth cause of action alleged against the Attorney General is the Sixth Cause of
9 Action of the FAC, which alleges pursuant to 42 U.S.C. section 1983 that the Ninth Amendment
10 prohibits operation of the CCW statutes to preclude plaintiffs from carrying loaded concealed
11 weapons outside their homes. As explained by this Court at the hearing and in Judge England's
12 orders this contention has been squarely rejected by the United States Court of Appeals for the
13 Ninth Circuit. Therefore, this cause of action fails to state a claim for which relief can be granted
14 and cannot be amended to state a claim.

15 The last cause of action alleged against the Attorney General is the Seventh Cause of
16 Action of the FAC, which seeks declaratory and injunctive relief against all defendants based on
17 the previous causes of action. As explained by this Court at the hearing and in Judge England's
18 orders, this is not a proper separate claim because it merely requests relief based on the previous
19 causes of action. Since the previous causes of action fail to state claims upon which relief can be
20 granted, this cause of action also fails to state a claim for which relief can be granted and cannot
21 be amended to state a claim.

22 Since none of the causes of action alleged against the Attorney General state a claim for
23 which relief can be granted and the action is being dismissed as to him without leave to amend
24 and with prejudice, this Court declines to consider his contentions that this action is barred by the
25 Eleventh Amendment and that plaintiffs do not have standing under Article III. *See Silveira v.*
26 *Lockyer*, 312 F.3d 1052, 1066-1068 (9th Cir. 2002).

27
28

1 For the reasons explained above, defendant Attorney General's motion to dismiss the First
2 Amended Complaint as to him is granted. Wherefore, the First Amended Complaint is hereby
3 DISMISSED, with prejudice

4 Correspondingly, and because it was procedurally improper as the pleadings here were
5 never closed, plaintiffs' counter motion for judgment on the pleadings as to defendant Attorney
6 General is DENIED.

7 IT IS SO ORDERED.

8

9 DATED: July 28, 2009

10 /s/ John A. Mendez
11 JOHN A. MENDEZ
12 UNITED STATES DISTRICT COURT JUDGE

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DATED: July 27, 2009

APPROVED AS TO FORM:

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23 30793059.doc

/s/ GARY W. GORSKI
GARY W. GORSKI
Law Office of Gary W. Gorski

Law Offices of Daniel M. Karalash

Attorneys for Plaintiffs Rothery and Hoffman

24

25

26

27

28

SERVICE LIST

FOR APPELLANTS JAMES ROTHERY, Esq.; ANDREA HOFFMAN

Gary William Gorski
Law Offices of Gary W. Gorski
8549 Nephi Way
Fair Oaks, CA 95628
(916) 965-6800
Fax: (916) 965-6801
Email: usrugby@pacbell.net

Daniel M Karalash
Law Offices of Dan Karalash
1207 Front Street
Suite 15
Sacramento, CA 95814
916-787-1234
Fax: 916-787-0267
Email: dmkaralash@surewest.net

**FOR APPELLEES Former Sheriff LOU BLANAS; SHERIFF JOHN MCGINNIS;
Detective TIM SHEEHAN; SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, an
independent branch of government of the COUNTY OF SACRAMENTO; COUNTY OF
SACRAMENTO**

Jeri Lynn Pappone
Longyear, Odea & Lavra, LLP
3620 American River Drive Suite 230
Sacramento, CA 95864
(916) 974-8500 x106
Fax: (916) 974-8510
Email: pappone@longyearlaw.com

John A Lavra
Longyear, Odea & Lavra, LLP
3620 American River Drive Suite 230
Sacramento, CA 95864
(916) 974-8500 x103
Fax: (916) 974-8510
Email: lavra@longyearlaw.com

FOR APPELLEES

STATE OF CALIFORNIA ATTORNEY GENERAL JERRY BROWN

ATTORNEY GENERAL, STATE OF CALIFORNIA

Timothy Lee Rieger
Attorney General's Office for the State of California
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550
916-445-9555