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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. **MODEL 1911, .45 CALIBER PISTOL, UNKNOWN MANUFACTURER, SERIAL NUMBER KTO 03041002; MODEL AR15, .223 CALIBER FIREARM, UNKNOWN MANUFACTURER, NO SERIAL NUMBER; MODEL 1911, .45 CALIBER PISTOL, UNKNOWN MANUFACTURER, SERIAL NUMBER 03041001; and RIFLE, NO CALIBER, UNKNOWN MANUFACTURER, NO SERIAL NUMBER,** Defendants.	**Cause No. CV 06-85-BU-SEH** **RICHARD CELATA'S PRINCIPAL BRIEF IN SUPPORT OF MOTION TO DISMISS**

COMES NOW Claimant, Richard Celata, and in support of his Motion to Dismiss, submits the following:

PRINCIPAL BRIEF

INTRODUCTION

Plaintiff United States of America ("the Government") has filed this forfeiture action under 18 U.S.C. § 924(d)(1), claiming that the four named firearm defendants are subject to forfeiture because they were "used in a willful violation of 18 U.S.C. § 922(a)(1) which prohibits a person from engaging in the business of manufacturing and/or selling firearms without a license." The complaint, however, was filed more than 120 days after the firearms were seized. It is thus untimely. Furthermore, the complaint fails to state sufficient facts to support an allegation that the defendant firearms were actually used in the business of manufacturing and/or selling firearms without a license.

In addition, the underlying predicate offense as alleged is based upon the claimed manufacture and/or sale not of finished firearms capable of "expelling a projectile," but of products consisting of unfinished firearm components,[1] incapable of

recognizable [to parties unspecified] as a frame or receiver of a firearm as defined by 18 U.S.C. § 921(a)(3)." The products Celata made, however, required significant additional manufacturing by the ATF before they could expel a projectile. They were therefore not firearms. Meanwhile, the Government cannot even articulate a standard to evaluate whether unfinished components in general, or the specific products described in this case, consists of a firearm. Thus, given the uncertainty over what consists of a firearm under 18 U.S.C. § 921(a)(3), the statute is unconstitutionally vague. For all these reasons, the complaint should be dismissed, with prejudice.

ARGUMENT

1. The complaint should be dismissed because the Court lacks jurisdiction over the subject matter.

A motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., if based on an expired statute of limitations, may be granted only "if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled."[2] A complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim.[3] Similarly, a court should not grant a motion under Rule 12(b)(6) if the factual and legal issues set forth in the complaint are not sufficiently clear to permit determination with certainty whether equitable tolling could be successfully invoked.[4] "[B]y its very nature,

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2 Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).

3 Id. (citing Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

4 Supermail Cargo, Inc. v. U.S., 68 F.3d 1204, 1207 (9th Cir. 1995).

equitable tolling concerns itself with the equities of dismissal for untimely filing **caused** by factors **independent** of the plaintiff."[5] Thus, if the allegations set forth in a complaint subject it to a statutory time-bar, and if the complaint alleges no reason why, based on the fault of someone **other** than the plaintiff, it would be unfair to apply the time-bar, then the action can and should be dismissed under Rule 12(b)(6).[6]

In this case, the complaint alleges in ¶ 5(tt) that the subject firearms were seized on June 7, 2006. The clerk's stamp indicates it was filed on November 31, 2006 [sic] (obviously an error), and the complaint was signed on December 1, 2006. Meanwhile, any action or proceeding for the forfeiture of the firearms under 18 U.S.C. § 924(d)(1) must be commenced within 120 days of the seizure.[7] The relevant statutory part in context, provides (with bold emphasis supplied):

> Provided, that upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. **Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.**

Assuming the allegations of the complaint to be true, it was filed 177 days after seizure of the defendant firearms. It therefore is untimely by 57 days. Thus, unless there

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[5] Huynh v. Chase Manhattan Bank, 465 F.3d 992, 1004-05 (9th Cir. 2006) (emphasis added).

[6] Id. at 1005.

[7] Accord, 27 C.F.R. § 72.21(b); 27 C.F.R. § 478.152(a).

appears in the complaint some reason to conclude the statute of limitations was equitably tolled, it ought to be dismissed.[8]

Equitable tolling does not apply where, as here, a statute is jurisdictional in nature.[9] When determining whether a limitation period is jurisdictional, the main purpose of the inquiry is to discover "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances."[10] This is held to be the "basic inquiry."[11] For purposes of forfeiture, congressional intent is informed by the maxim that "forfeitures are not favored and should be enforced only when within **both** the letter and the spirit of the law."[12] Thus, provisions of forfeiture statutes providing for remission of forfeited property should be "liberally construed to effectuate remission."[13] In harmony with these principles, courts hold that extensions of time for civil forfeiture actions violate Congress's "'clear intent that the government move expeditiously in bringing forfeiture proceedings.'"[14] Allowing the statute of limitations to be tolled on

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[8] Vaughan, 927 F.2d at 478; Jablon, 614 F.2d at 682.

[9] Compare Shendock v. Director, Office of Workers' Compensation, 893 F.2d 1458, 1466-67 (3rd Cir.1990) with King v. California, 784 F.2d 910, 914-15 (9th Cir.1986).

[10] Burnett v. New York Central R.R. Co., 380 U.S. 424, 427, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941 (1965).

[11] King, 184 F.2d at 915.

[12] United States v. One 1936 Model Ford V-8 De Luxe Coach, 307 U.S. 219, 226, 59 S.Ct. 861, 865, 83 L.Ed. 1249 (1939) (emphasis added).

[13] See U.S. v. One 1991 Ford Mustang LX, VIN 1FACP44E6MF151861, With All Attachments Thereon, 909 F.Supp. 831, 834 (D. Colo. 1996).

[14] United States v. 1986 Ford Bronco, 782 F.Supp. 1543, 1545-46 (S.D.Fla.1992) (quoting Dwyer v. United States, 716 F.Supp. 1337, 1339 (S.D.Cal.1989)). See also, One 1991 Ford Mustang LX, 909 F.Supp. at 834; U.S. v. 1986 Ford Bronco, 782 F.Supp. 1543, 1546 (S.D.Fla.,1992); United States v.

equitable or other grounds would negate the intent that the Government "move expeditiously." As a result, the time limit imposed by 18 U.S.C. § 924(d)(1) is jurisdictional. Consequently, equitable tolling cannot apply in this case. The Government's failure to file timely therefore deprives the Court of jurisdiction, and under Rule 12(b)(6), Fed.R.Civ.P., it ought to dismiss the complaint with prejudice.[15]

Moreover, even if equitable tolling did apply, the result would be the same. Under federal law, equitable tolling applies only where an untimely filing is "caused by factors independent of the plaintiff."[16] Defining it in more detail:

> The doctrine of equitable tolling "has been consistently applied to excuse a claimant's failure to comply with the time limitations where she had neither actual nor constructive notice of the filing period." ... It focuses on whether there was excusable delay by the plaintiff: "If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs."[17]

Here, the Government obviously understands the time limits imposed upon it by law. There can be no reason for its delay independent of its own fault. Thus, even if the time-bar set forth under 18 U.S.C. § 924(d)(1) were not of jurisdictional import, equitable estoppel can in no way save the complaint from dismissal.

One White 1987 Tempest Sport Boat Named "El Matador", 726 F.Supp. 7, 9 (D.Mass.1989) (court deprived of authority to extend deadline for filing after expiration thereof).

[15] Huynh, 465 F.3d at 1004-05. Indeed, with subject matter jurisdiction lacking on the very face of the complaint, dismissal would likewise be warranted under Rule 12(b)(1), Fed.R.Civ.P. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1038 (9th Cir. 2004).

[16] Huynh, 465 F.3d at 1004-05.

[17] Johnson v. Henderson, 314 F.3d 409, 414 (9th Cir. 2002) (citations omitted).

2. The complaint fails to allege with particularity sufficient allegations to state a claim for relief.

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[18] If the facts alleged are insufficient to support the legal claims for relief, however, the case should be dismissed.[19]

A. The complaint fails to allege with particularity that the defendant firearms were "used" in violation of the law.

Rule C(2)(d)(iii) of the Federal Supplemental Rules of Certain Maritime Claims, which applies to firearms forfeiture actions,[20] requires a complaint in actions in rem to state "all allegations required by the statute under which the action is brought." Likewise, in a forfeiture action, if the theory plead is that the defendant property was actually involved in a crime, "the Government shall establish that there was a **substantial connection** between the property and the offense."[21] Thus, in order to prevail in this forfeiture action, the Government must show, as the Complaint admits in ¶ 1, that the defendant firearms were actually "**used** in a willful violation of 18 U.S.C. §

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[18] Jensen v. Oxnard, 145 F.3d 1078, 1082 (9th Cir.1998). See Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

[19] E.g, National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000).

[20] 18 U.S.C. § 983(a)(3)(A); Supplemental Rules A and C(1)(b) (applicable to statutory condemnation proceedings analogous to maritime actions in rem).

[21] 18 U.S.C. § 983(c) (emphasis added).

922(a)(1), which prohibits a person from engaging in the business of manufacturing and/or selling firearms without a license." [22]

In this case, the complaint fails to state facts which, if true, would establish that the defendant firearms were in some way "used" in the business of manufacturing and/or selling firearms. For example, in ¶ 5(tt) the Government states that "[t]he defendant property is consistent with items previously sold by Celata to ATF" and "believed to be evidence of Celata's manufacturing of firearms in violation of the Gun Control Act." There is no allegation in ¶ 5(tt) or elsewhere, however, that the defendant firearms were "used" in such an alleged violation. For example, there is no allegation that Celata either manufactured or sold the defendant firearms. Moreover, the conclusory statement, unsupported by any evidence, that the firearms are "believed to be evidence of Celata's manufacturing of firearms" is insufficient. If there was any evidence whatsoever that Celata had used the firearms in the business of manufacturing and selling other firearms, the Government would obviously state it.

Indeed, forfeiture complaints are required to "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for more definite statement to commence an investigation of the fact and to frame responsive pleadings."[23] The heightened standard of pleading[24] requires that if

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[22] Complaint, ¶ 1.

[23] Rule E(2), Supplemental Rules.

[24] 5 Wright & Miller, Fed. Prac. and Proc. § 1227, at 165 (1969); 7A Moore's Fed. Prac., ¶ E.03 (Matthew Bender).

in fact any evidence of "use" of the defendant firearms in business of manufacturing and selling of firearms, the Government is obligated to state it. Since it has not, the Court should presume it cannot.[25] Absent an allegation that the defendant firearms were used in the alleged predicate violation, the complaint fails to state a claim upon which relief may be granted. It should therefore be dismissed.

B. The complaint fails to allege with particularity that Celata acted willfully.

As stated, the Government must allege Celata's conduct was willful.[26] The word "willfully" denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute, it generally means "an act done with a bad purpose."[27] The U.S. Supreme Court defines "willfully" this way:

> The word "willfully" is sometimes said to be "a word of many meanings" whose construction is often dependent on the context in which it appears. ... Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. ... As a general matter, when used in the criminal context, a "willful" act is one undertaken with a "bad purpose." In other words, in order to establish a"willful" violation of a statute, "the Government must prove that the defendant acted **with knowledge that his conduct was unlawful**."[28]

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[25] Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226, 59 S.Ct. 467, 474, 83 L.Ed. 610 (1939) (citing Clifton v. United States, 45 U.S. (4 How.), 242, 11 L.Ed. 957 (1846)) (held it is well settled that the production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse). See also, Thelma C. Raley, Inc. v. Kleppe, 867 F.2d 1326, 1330 (11th Cir. 1989); Steiner v. Commissioner of Internal Revenue, 350 F.2d 217, 223 (7th Cir. 1965).

[26] 18 U.S.C. § 924(d)(1).

[27] Bryan v. United States, 524 U.S. 184, 192, n. 12, 118 S.Ct. 1939, 1945, n. 12, 139 L.Ed.2d 507 (1998)

[28] Id., 524 U.S. at 192, 118 S.Ct. at 1944-45 (emphasis added).

Thus, the Government must allege facts with particularity that show Celata "acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful."[29] If it fails to do so, the complaint fails to state a claim upon which relief can be granted.

In this case, the complaint does not allege that Celata "acted with knowledge that his conduct was unlawful." For example, the complaint does not allege that Celata manufactured and sold anything with the knowledge that to do so requires a license. Instead, however, it merely claims he manufactured and sold unfinished products which:

(a) Expert ATF Firearms Technology Officer Michael Curtis could finish into a firearm by performing "machining operations" including "cutting frame rails and drilling an ejector pinhole;"[30]

(b) Technology Officer Curtis could finish into a firearm by "drilling a selector hole, hammer and sear pin holes, a pivot and take down hole," followed by threading a buffer tube hole and installing various parts;[31]

(c) Technology Officer Curtis could finish into a firearm by "cutting rail slots and drilling a take down lever hole";[32] and

(d) Technology Officer Curtis could finish into a firearm by:

(i) "drilling of the hammer, trigger, selector and take down and pivot pin holes;"

(ii) "drilling of a circular cavity on the left side of the frame in the pistol grip area to accommodate the selector detent and spring;"

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29 Id., 524 U.S. at 193, 118 S.Ct. at 1946.

30 Complaint, ¶ 5(g).

31 Id., ¶ 5(ee).

32 Id., ¶ 5(ii).

(iii) "tapping and drilling a hole in the frame to attach a pistol grip"; and

(iv) "complete [sic] the threading of the buffer tube."[33]

Thus, assuming everything in the complaint to be true, Celata made unfinished products requiring technically demanding machine processing by a trained expert technician of the ATF before they could be combined with other parts to expel a projectile. Nowhere, however, does the Government state that Celata knew that manufacturing and selling such unfinished products requires a license. Its failure to do so is fatal to the complaint.[34]

Equally important, the complaint alleges Celata advertised his unfinished products to the consuming public, talked freely about them in the news media, and made no effort to hide his operations from the eyes of whomever cared to look.[35] Even drawing all reasonable inferences in favor of the Government, Celata can only have believed his conduct was legitimate. The sole reasonable inference is that he thought his activities amounted to no more than the unregulated manufacture and sale of unfinished firearms components – not actual firearms. Because this is the sole reasonable inference, the Government does not allege Celata knew he needed a license to do so. Yet, to survive, the complaint must allege that Celata acted "willfully", i.e., "with [the] bad purpose either

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33 Id.

34 C.f., Bryan, 524 U.S. at 192, 118 S.Ct. at 1944-45.

35 Id., ¶¶ 5(d), (ee), (ff), (h), (i), (j), (k), (l), (m), (n), (q), ®, (s), (w), (x), (y), (z), (aa), (bb), (dd), (jj), (kk), (oo), (qq), (rr).

to disobey or to disregard the law."[36] The Government does not so allege, and as a result, the complaint fails on its face. It should therefore be dismissed with prejudice.

3. Celata did not manufacture or sell firearms.

According to the complaint, Celata violated 18 U.S.C. § 922(a)(1) by manufacturing and selling products that meet the definition of a firearm.[37] "Firearm" is defined by 18 U.S.C. § 921(a)(3):

> The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

In this case, the items described in the complaint as manufactured and sold by Celata will not expel a projectile by action of an explosive or otherwise. Instead, according to the complaint, only after additional machining, drilling and assembly – by a Technical Officer of the ATF – would Celata's unfinished products expel a projectile. Such raw materials do not fit the plain language of the statute because the unfinished products cannot be converted without further manufacturing.

The Government would change the statute to read that if a set of raw materials "can be readily modified to accept all parts necessary to expel a projectile," then they constitute a firearm.[38] It claims, regardless of whether a set of raw materials can actually

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[36] United States v. Pomponio, 429 U.S. 10, 13, 97 S.Ct. 22, 24, 50 L.Ed.2d 12 (1976)

[37] Complaint, ¶¶ 5(g), (ee), and (ii).

[38] Complaint, ¶ 5(g).

expel a projectile, if a product has reached some unspecified "stage of manufacture where all critical machining operations have been completed" then it is "recognizable," in the eyes of the Government, as a firearm.[39] If raw materials can be manufactured to expel a projectile in a machine shop by an ATF Technical Office gunsmith "in approximately 44 minutes" then the Government considers that they "may readily be converted" to do so and therefore constitute firearms within the meaning of the statute.[40]

This construction defies the plain meaning of the phrase "readily converted," which is always the starting point for interpreting a statute.[41] The word "readily" means: "In a manner indicating or connoting ease; easily."[42] The complaint describes a technical process of "conversion" requiring machine tools, drill presses and specialized instrumentalities in the hands of an expert technician. Such methods and efforts do not "connote ease." Rather, the term "readily converted" means "easily" assembled by an ordinary consumer using, at most, simple and generally available hand tools. Thus, Celata's unfinished components do not amount to firearms under the statute.

At best the statute is ambiguous. A statute is ambiguous if it "gives rise to more than one reasonable interpretation."[43] However unlikely, perhaps Congress intended

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39 Id., ¶ 5(ee).

40 Id., ¶ 5(ee).

41 United States v. Tobeler, 311 F.3d 1201, 1203 (9th Cir.2002).

42 "Readily." The American Heritage® Dictionary of the English Language, 4th ed. Boston: Houghton Mifflin, 2000. www.bartleby.com/61/. February 1, 2007.

43 DeGeorge v. United States Dist. Court for the Cent. Dist. of Cal., 219 F.3d 930, 941 (9th Cir.2000).

"readily converted" to mean "finished in a machine shop by a trained gunsmith." Even if one could fairly read this meaning into the statute, however, the "easily assembled" construction suggested by a plain language reading is at least an equally reasonable interpretation. If such alternative readings were reasonable, they would render the statute ambiguous, and the Court would be allowed to look beyond its plain language to construe it.[44]

When a statutory scheme is penal in nature, the "rule of lenity" requires any ambiguity to be interpreted against imposition of the penalty.[45] Penal statutes are those intended "to punish an offense against the public justice of the ... state[.]"[46] The test to determine whether a statute is penal is whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person."[47] Moreover, the rule of lenity applies in civil cases, especially those involving firearms.[48]

In this case, the statutes, designed to punish illegal firearms manufacture and sale, are penal in nature. They therefore should be interpreted in favor of lenience.

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[44] United States v. Thompson/Center Arms Co., 504 U.S. 505, 518-19, 112 S.Ct. 2102, 212109-10, 119 L.Ed.2d 308 (1992).

[45] Id. See also, Dept. of Livestock v. Sand Hills Beef, Inc., 639 P.2d 480, 484 (Mont. 1981); Missoula High School Legal Defense Ass'n v. Superintendent of Public Instruction, 637 P.2d 1188, 1192 (Mont. 1981).

[46] Yahoo! Inc. v. La Ligue Contre Le Racisme Et L', 433 F.3d 1199, 1219 (9th Cir. 2006) (citing Chavarria v. Superior Court, 40 Cal.App.3d 1073, 1077, 115 Cal.Rptr. 549 (1974) and Huntington v. Attrill, 146 U.S. 657, 673-74, 13 S.Ct. 224, 36 L.Ed. 1123 (1892)).

[47] Huntington, 146 U.S. at 682, 13 S.Ct. 224.

[48] Thompson/Center Arms Co., 504 U.S. at 517-18; 112 S.Ct. at 2009-10.

Under such a construction, Celata's products do not fit the statutory definition of firearms, and his manufacturing and sale is not a violation of 18 U.S.C. § 922(a)(1). Consequently, the defendant firearms are not subject to forfeiture, and the complaint ought to be dismissed.

Moreover, the complaint alleges Celata manufactured and sold only items that could be readily converted into firearms "frames" and "receivers."[49] Under 18 U.S.C. § 921(a)(3)(A) only weapons that are readily converted to expel a projectile are firearms. "Readily converted," however, does not apply to "frames" and "receivers," which are set forth under subsection (B). Under this language, only finished frames and receivers qualify as "firearms." The statute is at least ambiguous on this point, and should therefore be interpreted in favor of lenity. Since the complaint alleges Celata made and sold only unfinished receivers and frames, he did not create or sell firearms. The complaint should therefore be dismissed.

4. The statute defining "firearm" is void for vagueness.

The Government charges that Celata's unfinished products "may readily be converted to expel a projectile by the action of an explosive," which under 18 U.S.C. § 921(a)(3) defines a firearm. The definition of firearm is, however, unconstitutionally vague because it does not (1) "define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited;" or (2) "establish standards

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[49] Complaint, ¶¶ (g), (ee), and (ii).

to permit police to enforce the law in a non-arbitrary, non-discriminatory manner."[50] The complaint should therefore be dismissed.

"The due process clause of the Fourteenth Amendment guarantees individuals the right to fair notice of whether their conduct is prohibited by law."[51] As the Ninth Circuit Court of Appeals has held:

> Although only constructive rather than actual notice is required, individuals must be given a reasonable opportunity to discern whether their conduct is proscribed so they can choose whether or not to comply with the law. ... Statutes need not be written with "mathematical" precision, nor can they be thus written. ... But they must be intelligible, defining a "core" of proscribed conduct that allows people to understand whether their actions will result in adverse consequences.[52]

Thus, a statute is void for vagueness if persons of common intelligence must necessarily guess at its meaning.[53] Meanwhile, all doubts are resolved in favor of avoidance when the statute imposes criminal penalties.[54]

In this case, the need for guess work is abundantly clear. Although the statute offers a variety of definitions for all kinds of firearms related terms, it offers nothing to define the term "readily converted." A tiny quantity of gun powder exploded in a plastic PaperMate® pen tube will expel a wad of paper. Committing such a prank could hardly be construed as manufacturing a firearm. Yet, under the Government's reading of the

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50 In Planned Parenthood Federation of America, Inc. v. Gonzales, 435 F.3d 1163, 1181 (9th Cir. 2006)

51 Forbes v. Napolitano, 236 F.3d 1009, 1011-1012 (9th Cir. 2000).

52 Id.

53 Planned Parenthood v. Arizona, 718 F.2d 938, 947 (9th Cir.1983)

54 Planned Parenthood Federation of America, Inc. v. Gonzales, 435 F.3d at 1181.

statute, the pen is "readily converted" to, and is therefore, a firearm. Moreover, cutting from a large ingot of aluminum a smaller block the size of an AR-15 rifle receiver (as described in the complaint) is one step in the process of manufacturing an AR-15. Yet, at this early stage, is the smaller block deemed "readily converted" into a rifle? If not, how many more steps in the manufacturing process must be taken until it reaches the point of "ready conversion"? It is impossible for anyone, let alone a lay-person of ordinary intelligence, to say.

The same is true here. The Government claims that because its expert gunsmith could, using an ATF machine shop in combination with additional parts, convert Celata's unfinished products to expel a projectile "in approximately 44 minutes," then they are readily converted to a firearm. It fails to state (a) what (if any) specialized training, experience and skill were required to finish the product; (b) what machine tools the process actually required; or (c) their cost or their general availability. If conversion takes such effort and instrumentalities by an ATF Technological Officer, how "readily converted" would the component really be in the hands of one of Celata's internet customers? How would Celata know, from reading the statute, that his unfinished parts are "readily converted" by an average customer? How can he know at what point his products are sufficiently complete to become firearms? These question defy any response upon which one should have to risk his freedom. A good example of such vagueness was found in the statute declared void in Planned Parenthood:

> As a result, doctors who perform non-intact D & E abortions, which the government contends are **not** intended to be outlawed by the Act, have

> good reason to fear that they will be deemed subject to its prohibitions. At the least, **they cannot be reasonably certain that their conduct is beyond the reach of the Act's criminal provisions**; nor can they be reasonably assured that the Act will not be arbitrarily enforced.[55]

Thus, where a statute contemplates a continuum or progression of events – as here – but the statute does not draw a clear line where, in the progression, legal conduct becomes illegal conduct – as here – then it is too vague to meet the requirements of due process.

As for the second factor, a criminal statute must provide standards to prevent arbitrary enforcement.[56] Without such standards, a statute is impermissibly vague even if it does not reach a substantial amount of constitutionally protected conduct, because it subjects people to the risk of arbitrary deprivation of their liberty.[57] Regardless of what type of conduct the criminal statute targets, the arbitrary deprivation of liberty is itself offensive to the Constitution's due process guarantee.[58]

In this case, 18 U.S.C. § 921(a)(3) does not provide standards to prevent arbitrary enforcement. Just as ordinary people are left to guess as to whether an unfinished firearm component has become a firearm under 18 U.S.C. § 921(a)(3), expert law enforcement officers are also left to guess – or, as here to arbitrarily declare – whether a person's actions are in violation of the statute. Because the statute provides none of the required guidance, the ATF Technology Officer in this case was left to speculate on

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55 Id., at 1183 (emphasis added).

56 City of Chicago v. Morales, 527 U.S. 41, 52, 119 S.Ct. 1849, ___, 144 L.Ed.2d 67 (1999).

57 Id.

58 Smith v. Goguen, 415 U.S. 566, 575, 94 S.Ct. 1242, ___, 39 L.Ed.2d 605 (1972).

whether Celata had manufactured firearms. At best, the issue was resolved upon criteria that the Officer himself was left to create, constructing his own meaning for "may be readily converted." Those criteria are neither derived from the plain language of 18 U.S.C. § 921(a)(3), nor implemented under any standards provided by that statute.

In addition, the fact that 18 U.S.C. § 921(a)(3) contains a purported definition of a firearm as an item which "may readily be converted to fire a projectile" is not enough to survive vagueness review as the definition itself is vague. For example, in Planned Parenthood, the government argued that "partial-birth abortion" is an "expressly defined term [in the statute] ··· and thus cannot itself support a vagueness challenge."[59] Nevertheless, the 9th Circuit ruled that "the mere fact that 'partial-birth abortion' is an 'expressly defined term' in the statute is not enough to survive vagueness review if that definition is itself vague, as is the case here."[60]

The same is true for this case. Without further definition of "readily," "converted," or "readily converted" or without clear regulations duly promulgated and published to enforce 18 U.S.C. § 921(a)(3) – and thus give notice to ordinary people of what conduct will violate the statute and as well as guidance to police so that they can enforce this statute in a non-arbitrary fashion, this statute is unconstitutionally vague.

In the last resort, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[61] To do so in this case, the Court would have to

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59 718 F.2d at 1183.

60 Id.

61 U.S. v. Buckland, 289 F.3d 558, 564 (9th Cir. 2002).

adopt a construction consistent with those suggested in part 3 herein: (a) unfinished firearms parts are not firearms if they require additional machining and parts before they will expel a projectile; and/or (b) unfinished firearms frames and receivers are not firearms until they are finished. Only under these interpretations can the statute be said to give sufficient guidance as to what is and what is not a "firearm." Otherwise, the statute is unconstitutionally vague.

CONCLUSION

On the face of the complaint, the Government filed 57 days too late, and there is no possibility for the application of equitable tolling. The complaint therefore fails to state a claim upon which relief can be granted. Equally important, the Government has fatally failed to plead the use of the defendant firearms in the alleged predicate violation. Even if it had, there was no such violation because Celata neither manufactured nor sold any firearms. Finally, the statutory scheme upon which the complaint is based is void for vagueness. The complaint therefore ought to be dismissed, with prejudice.

DATED this 1st day of February, 2007.

Respectfully submitted,

SULLIVAN, TABARACCI & RHOADES, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2007, a copy of the foregoing document was served on the following persons by the following means:

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