

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

ETHAN SALEEM,

Defendant and Appellant.

Case No. S _____

Second Appellate District, Division Three, Case No. B204646
Los Angeles County Superior Court Case No. NA073164
The Honorable John David Lord, Judge

PETITION FOR REVIEW

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
ROBERTA L. DAVIS
Deputy Attorney General
State Bar No. 223015
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Attorneys for Respondent

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TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE
CALIFORNIA SUPREME COURT:

The People of the State of California, plaintiff and respondent, petition this Honorable Court to grant review of the published decision of the California Court of Appeal, Second Appellate District, Division Three. In its December 17, 2009 decision, the majority of the court determined that Penal Code section 12370, subdivision (a), which prohibits a violent felon from possessing “body armor,” is unconstitutionally vague and therefore void. The Court of Appeal consequently reversed appellant’s conviction. Respondent attaches a copy of the Court of Appeal’s opinion as Appendix A.

ISSUE PRESENTED

Is Penal Code section 12370, subdivision (a) void for vagueness when the statute refers to a definition of “body armor” that gives an ordinary person notice of what is prohibited (possession by a violent felon of a “bulletproof vest”), and provides a precise definition sufficient to prevent arbitrary enforcement of the law (the item must provide ballistic resistance to penetration from certain types of ammunition)?

STATEMENT OF THE CASE

About 3:05 a.m. on January 23, 2007, Los Angeles Police Officer Jeffrey Rivera and his partner observed an approaching vehicle abruptly pull to the side of the road. The officers circled the block and approached the vehicle. The driver’s side window was rolled down, and the engine was still running. After pointing spotlights at the vehicle, Officer Rivera saw someone sitting in the driver’s seat, attempting to hide from view.

Suddenly appellant and another occupant in the back seat appeared into view. Appellant repeatedly reached under the seat, and the officers ordered everyone out of the vehicle. Appellant did not comply until the fourth or fifth command. Once out of the vehicle, appellant had to be ordered four times to step onto the curb with his hands up before he complied. Appellant then took several steps away from the vehicle. The officers again had to issue several commands for appellant to come back before he complied. Officer Rivera then observed that appellant was wearing a bulletproof vest. The camouflage vest weighed 10 pounds and was labeled, “body armor, fragmentation protective vest for ground troops.” Appellant was taken into custody. (7RT 1833-1850, 1857-1858.) Appellant had been released on parole for manslaughter nine days earlier. (1CT 1, 135; see 7RT 1960.)

A jury convicted appellant of illegal possession of body armor by a violent felon pursuant to Penal Code¹ section 12370, subdivision (a). Appellant admitted a prior strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and five prior prison terms (§ 667.5, subd. (b)). He was sentenced to eight years in state prison. (1CT 216-217, 230-233.)

On appeal, appellant contended that section 12370, subdivision (a) was void for vagueness. Section 12370, subdivision (a) makes it a felony when “[a]ny person who has been convicted of a violent felony . . . purchases, owns, or possesses body armor, as defined in Section 942 of Title 11 of the California Code of Regulations.” Code of Regulations, Title 11, generally sets forth the process by which body armor is certified for purchase by law enforcement agencies in California. Title 11, section 942, subdivision (e) defines body armor as follows: “‘Body armor’ is popularly

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

called a ‘bulletproof vest.’ For purposes of these regulations, ‘body armor’ means those parts of a complete armor that provide ballistic resistance to the penetration of the test ammunition for which a complete armor is certified. In certain models, the body armor consists of ballistic panels without a carrier. Other models have a carrier from which the ballistic panels may be removed for cleaning or replacement.”

In a divided opinion, the Court of Appeal held that section 12370, subdivision (a) is unconstitutionally vague because a person of ordinary intelligence has no reasonable way of knowing whether a bulletproof vest meets all the technical requirements necessary to qualify as “body armor” under the statute. (Appendix A at pp. 15-25.) The majority interpreted section 12370’s reference to the Code of Regulations as meaning that the law only prohibits possession of bulletproof vests that are “equivalent to, or better than, body armor that is certified for sale to law enforcement.” (*Id.* at pp. 9, 16.) The court explained, “We read the first sentence of subdivision (e) as merely giving a general introductory characterization to the term ‘body armor,’ and the second sentence as providing the actual definition.” (*Id.* at p. 16.) The court found that “only an expert would know if any particular protective body vest was proscribed by section 12370,” and thus that the statute failed to provide fair notice to a defendant or meaningful guidelines to law enforcement. (*Id.* at pp. 20-21.) The court concluded, “Even if Saleem had read section 12370 and the Regulations, he could not have reasonably ascertained his vest possessed the characteristics making it illegal under section 12370.” (*Id.* at p. 25.) The court therefore reversed appellant’s conviction. (*Id.* at p. 26.)²

² Because the majority found the statute void for vagueness, it declined to “reach Saleem’s contentions there was insufficient evidence he knew he was wearing illegal body armor, and that the trial court failed to
(continued...)

In dissent, Justice Aldrich disagreed that section 12370, subdivision (a) is unconstitutionally vague, because the law “defines body armor sufficiently to give ordinary persons ample notice of what is prohibited,” and “provides a precise definition sufficient to prevent arbitrary enforcement of the law.” Justice Aldrich reasoned that to satisfy the knowledge element, the prosecution must show that “the defendant knew he or she possessed, owned, or purchased the garment, and knew, or reasonably should have known, that the garment was body armor or a bulletproof vest as those terms are popularly understood. [Citation.] The People need not prove the defendant knew the technical specifications of the garment, or that it was equivalent to the body armor certified for use by California peace officers.” (Appendix A, Diss. at pp. 1-17, 21.) Justice Aldrich noted that even under the majority’s interpretation that section 12370, subdivision (a) requires proof that the bulletproof vest meets the certification standard, the law is not unconstitutionally vague because there are situations when an ordinarily intelligent person would know whether his or her bulletproof vest meets that standard. (*Id.* at pp. 17-18.)

REASONS FOR GRANTING REVIEW

The Court of Appeal’s decision to void section 12370, subdivision (a), has an immediate and serious impact on public and officer safety. This criminal statute was enacted in 1998 as a result of San Francisco Police Officer James Guelff being killed by a heavily armed carjacking suspect wearing two layers of protective body armor, and of other gun battles

(...continued)
properly instruct the jury on the definition of body armor.” (Appendix A at p. 25, fn. 9.)

between police officers and violent felons with armor, including the “North Hollywood shootout” in which 10 Los Angeles Police Officers and seven civilians were injured and the two bank robbers ultimately killed.³ For 11 years, the law has been enforced and upheld with no sign that it is somehow too vague to give the proper notice to dangerous felons that they should not possess a “bulletproof vest.” But now, the Court of Appeal has effectively taken the law off the books, wrongly voiding a law and jeopardizing the lives of those that depend on it for protection.

This Court should grant review to settle whether section 12370, subdivision (a) is void for vagueness when a reasonable and practical construction can be given to the law’s language, which provides both notice to an ordinary person of what is prohibited, and a precise definition sufficient to prevent arbitrary enforcement of the law. In finding the law void for vagueness, the majority wrongly conflates the knowledge and possession elements by requiring that to violate the statute, it is insufficient that a violent felon believe that he or she possesses a bulletproof vest as “popularly” known; the violent felon must also understand that all of the technical specifications required for the possession element are satisfied.

A. The Court of Appeal’s Opinion Fails to Follow this Court’s Test for Determining Whether a Statute Is Vague

The majority’s analysis contradicts the well-established standard articulated by this Court for assessing a law’s validity. Under this standard, a law will survive a void-for-vagueness challenge if a reasonable and constitutional construction can be given to the law’s language, even if the law is susceptible to a different interpretation that would render it

³ In 1992, responding to these and other events, Congress also enacted a statute criminalizing the possession of body armor by violent felons. (18 U.S.C. § 931.)

unconstitutional. (*People v. Morgan* (2007) 42 Cal.4th 593, 605-606; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1107; *People v. Heitzman* (1994) 9 Cal.4th 189, 209; *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 253; see *In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 116 [“A statute will not be held void for vagueness if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources,” including the legislative history or purpose of the statute], quoted with approval in *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117.) ““The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers.” [Citations.]” (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 509, quoting *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828.) Accordingly, a law may not be voided for vagueness unless it: (1) fails to provide adequate notice to ordinary people of what conduct is prohibited, or (2) authorizes arbitrary and discriminatory enforcement. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332; *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at pp. 1106-1107; see *Kolender v. Lawson* (1983) 461 U.S. 352, 357-358 [103 S.Ct. 1855, 75 L.Ed.2d 903]; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 498 [102 S.Ct. 1186, 71 L.Ed.2d 362].)

Section 12370, subdivision (a) plainly is not void for vagueness under this standard. The statute defines “body armor” in a manner that not only provides a definition sufficient “to give ordinary persons ample notice of what is prohibited,” i.e., possession of an item that is popularly called a “bulletproof vest,” but it also “provides a precise definition sufficient to prevent arbitrary enforcement of the law,” i.e., the item provides ballistic resistance to penetration from the types of ammunition specified in the

regulations as test ammunition. (Appendix A, Diss. at pp. 1, 5-6, 10, 12-14, 17; see *People ex rel. Gallo v. Acuna, supra*, 14 Cal.4th at p. 1117 [“Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line”], quoting *Boyce Motor Lines v. United States* (1952) 342 U.S. 337, 340 [72 S.Ct. 329, 96 L.Ed. 367]; see also *People v. King* (2006) 38 Cal.4th 617, 627 [in a prosecution for possession of a short-barreled rifle, the prosecution must prove the rifle was less than 26 inches long and that the defendant knew the rifle was unusually short, but it need not prove the defendant knew the rifle’s actual dimensions]; *In re Jorge M.* (2000) 23 Cal.4th 866, 888 [“the Legislature presumably did not intend the possessor of an assault weapon to be exempt from the [assault weapon statute]’s strictures merely because the possessor did not trouble to acquaint himself or herself with the gun’s salient characteristics”].) In this case, for example, it defies common sense to find that appellant was not on notice that he possessed “body armor” in violation of section 12370, subdivision (a) when he wore a 10-pound, camouflage, bulletproof vest, labeled “body armor.” Section 12370, subdivision (a) is *not* a law that violates due process by “failing to give a person of ordinary intelligence a *reasonable opportunity* to know what is prohibited.” (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 498-499, italics added.)

The majority, however, foregoes a straightforward application of this Court’s precedent in favor of a concern that an ordinary person might not be able to discern whether his or her bulletproof vest provides ballistic resistance to the listed ammunition. (Appendix A at pp. 19-20, 23-25.) But again, as this Court has held, it is not necessary that an ordinary person fully understand the technical specifications of a prohibited item, so long as the statute prohibiting possession provides an ordinary person ““a reasonable degree of certainty”” of what might constitute the item. (*People*

ex rel. Gallo v. Acuna, supra, 14 Cal.4th at p. 1117, quoting *Boyce Motor Lines v. United States, supra*, 342 U.S. at p. 340; *Tobe v. City of Santa Ana, supra*, 9 Cal.4th at p. 1107; *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 270-271; *American Civil Liberties Union of Southern California v. Board of Education of the City of Los Angeles* (1963) 59 Cal.2d 203, 218.) A contrary rule would render “the void-for-vagueness doctrine internally inconsistent: the notice requirement would compete with the need to provide precise standards for law enforcement. When . . . a statutory standard requires scientific measurement, the very factor that assures due process under the ‘standards’ component would violate due process under the ‘notice’ requirement.” (*Burg v. Municipal Court, supra*, 35 Cal.3d at p. 270.)

That expert testimony may be employed to prove an item falls within section 12370, subdivision (a)’s prohibition does not impact the statute’s constitutionality. (See Appendix A at pp. 20-21.) Expert testimony is probative to show that the item at issue actually is a bulletproof vest, in order to satisfy the possession element of the crime. The knowledge element, on the other hand, is met if the defendant *believed* it was a bulletproof vest—not necessarily that the defendant confirmed every technical detail required to make it one.⁴

B. The Court of Appeal’s Opinion Contradicts the Legislature’s Intent in Enacting the Body Armor Statute

Additionally, review should be granted because the majority’s determination, that section 12370, subdivision (a) prohibits possession only

⁴ Analogously, in narcotics possession cases, knowledge of the illicit nature of a substance is routinely imputed to the defendant, even though technical expert testimony might be required at trial to prove the substance’s illicit nature.

of items that meet the certification standard, violates well-established rules of statutory interpretation by giving short shrift to the first sentence of the definition of “body armor.” As this Court has consistently held, when interpreting a statute, the court’s “fundamental task is to determine the Legislature’s intent so as to effectuate the law’s purpose.” (*People v. Lewis* (2008) 43 Cal.4th 415, 491, quoting *People v. Murphy* (2001) 25 Cal.4th 136, 142; *People v. King, supra*, 38 Cal.4th at p. 622.) The court should “begin by examining the statute’s words, giving them a plain and commonsense meaning.” (*People v. Lewis, supra*, at p. 491, quoting *People v. Murphy, supra*, at p. 142.) “If the plain, commonsense meaning of a statute’s words is unambiguous, the plain meaning controls. But if the statutory language may reasonably be given more than one interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.” (*People v. King, supra*, at p. 622, internal quotation marks and citations omitted; accord, *People v. Ramirez* (2009) 45 Cal.4th 980, 987.) The court must “follow the fundamental rule of statutory construction that requires every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely necessary. Significance should be given, if possible, to every word of an act. Conversely, a construction that renders a word surplusage should be avoided.” (*People v. Arias* (2008) 45 Cal.4th 169, 180, internal quotation marks and citations omitted.)

Section 12370, subdivision (a), by reference to the Code of Regulations, provides a clear definition of “body armor”: an item popularly called a “bulletproof vest” that prevents penetration from specified types of ammunition. The majority opinion declines to assign significance to the first sentence of Code of Regulations, Title 11, section 942, subdivision (e), i.e., “‘Body armor’ is popularly called a bulletproof vest,” as part of the

definition of “body armor,” instead supposing the sentence is “a general introductory characterization.” (Appendix A at p. 16.) Ironically, the majority claims such denigration of the first sentence is necessary so as not to render the second sentence meaningless. (Appendix A at p. 16.) In doing so, the majority unjustifiably fails to adopt the construction that renders both sentences meaningful: the first sentence provides a layperson’s definition to give notice of what is prohibited, i.e., to satisfy the knowledge element and the second sentence provides a technical definition to prevent arbitrary enforcement of the law, i.e., to satisfy the possession element. In other words, a “bulletproof” vest, by its plain and commonsense meaning, *is* an item that provides ballistic resistance to the penetration of ammunition. This reading not only gives meaning and effect to both sentences, but it renders the statute constitutional.

Moreover, the stated legislative purpose in enacting section 12370 is at odds with the Court of Appeal’s finding that the prohibited item must meet the detailed requirements for certification, which include specifications as to configuration, labeling, testing procedures, and workmanship. Section 12370 was enacted as the James Guelff Body Armor Act of 1998, in response to several incidents in which citizens and police officers were injured and killed by criminals wearing body armor, including an hour-long standoff in North Hollywood between two criminals and 350 officers, and a separate incident in which San Francisco Police Officer James Guelff was killed by a criminal wearing body armor. (Sen. Com. on Public Safety, Rep. on Sen. Bill No. 1707 (1997-1998 Reg. Sess.) June 23, 1998, pp. 3, 6; Assem. Com. on Public Safety, Rep. on Sen. Bill No. 1707 (1997-1998 Reg. Sess.) March 24, 1998, pp. 1-3.) Nothing in the legislative history of section 12370 suggests that the Legislature intended to create two categories of body armor, one of which is permissible for violent felons to possess even though it prevents penetration by the ammunition

used by police officers, simply because the item fails to meet some aspect of the detailed certification requirements. (See Appendix A, Diss. at pp. 8-10; see also *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1107 [in evaluating a statute for vagueness, the court must consider the purpose of the law and read its terms in context].) In fact, such an interpretation would thwart the Legislature’s goal: “to help stem the tide of recent criminal incidents which create[s] a dangerously threatening environment for both police officers and citizens.” (Sen. Com. on Public Safety, Rep. on Sen. Bill No. 1707 (1997-1998 Reg. Sess.) June 23, 1998, p. 3.)

C. The Court of Appeal’s Opinion Needlessly Abrogates the Entire Body Armor Statute

Lastly, review should be granted because, aside from the majority’s incorrect interpretation of the definition of “body armor,” its complete invalidation of section 12370, subdivision (a) on vagueness grounds directly violates this Court’s command not to invalidate a law on its face unless it is unenforceable in all its applications. (See *People v. Morgan*, *supra*, 42 Cal.4th at pp. 605-606 [party attacking the statute must show the law is impermissibly vague *in all of its applications*]; accord, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, *supra*, 455 U.S. at pp. 494-495, 497.) As Justice Aldrich notes in dissent, even under the majority’s interpretation that section 12370, subdivision (a) only outlaws possession of bulletproof vests that are “equivalent to, or better than, body armor that is certified for sale to law enforcement,” the statute is not unconstitutionally vague for failing to provide notice to ordinary persons of what is prohibited. (Appendix A, Diss. at pp. 17-18.)

A person of ordinary intelligence has reasonable ways to discern whether a vest meets the certification standard. For example, if the vest is stolen from a law enforcement officer, or if the seller assures the buyer that the vest was certified, or if the vest itself is labeled in a manner indicating

that it met the certification standard, then the possessor does know or should know that the vest falls within the majority's interpretation of what section 12370, subdivision (a) prohibits. (Appendix A, Diss. at pp. 17-18.) Any difficulty prosecutors might face proving such knowledge does not render the law void for vagueness. (Appendix A, Diss. at p. 18, citing *People v. Morgan, supra*, 42 Cal.4th at pp. 605-606.)

The Court of Appeal's majority opinion runs afoul of this Court's constitutional precedent, wrongly voiding a law and jeopardizing public and officer safety. It also enunciates an erroneous rule of statutory interpretation that could nullify other valid statutes if applied to them.

CONCLUSION

For the stated reasons, respondent respectfully requests that this Court grant review and reverse the Court of Appeal's decision that invalidates the "body armor" statute, section 12370, subdivision (a).

Dated: January 20, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General

ROBERTA L. DAVIS
Deputy Attorney General
Attorneys for Respondent

RLD:lds
LA2009509069;60514791.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3,404 words.

Dated: January 20, 2010

EDMUND G. BROWN JR.
Attorney General of California

ROBERTA L. DAVIS
Deputy Attorney General
Attorneys for Respondent