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E-FILED on 11/6/09

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IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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SAN JOSE DIVISION

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IN RE:

No. C-09-80136 MISC RMW

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DESTRUCTION OF FIREARMS AND
AMMUNITIONORDER SETTING ASIDE JULY 27, 2009
DESTRUCTION ORDER

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[Re Docket No. 6]

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Kevin Dugan has moved for reconsideration of the court's July 27, 2009 Order Authorizing Destruction of Certain Firearms and Ammunition. The firearms and ammunition were seized from Dugan and were kept as evidence with respect to his prosecution in criminal action number CR-03-20010. The destruction order was apparently signed without notice to Dugan and by a judge who had disqualified himself from presiding over Dugan's criminal trial. Dugan's criminal case resulted in his conviction which is now on appeal.

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Dugan submits that the destruction order should be set aside. The government opposes the motion on the grounds that Civil Local Rule 7-9 which governs motions for reconsideration does not apply because the destruction order is a final order, and reconsideration is permitted only with respect to interlocutory orders. The government also contends that even if the criminal conviction were reversed on appeal, there is ample evidence of record that Dugan was an unlawful user of a

1 controlled substance at the time he possessed the ammunition and firearms and therefore was
2 prohibited from possessing them.

3 The court hereby sets aside the July 27, 2009 Order. The government's point that Civil Local
4 Rule 7-9 only allows reconsideration of interlocutory orders may be correct. However, the court
5 will treat the motion as one to set aside the order under Fed. R. Civ. P. 60(b). The order is properly
6 set aside because it is void having been obtained without proper service and was inadvertently
7 rendered by a district judge who had disqualified himself from handling Dugan's criminal case and
8 undoubtedly would have disqualified himself in this action had he realized Dugan's involvement.

9 The government can renew its request to have a final judgement entered. However, subject
10 to being convinced otherwise, the court does not believe that the firearms and ammunition should be
11 destroyed pending the final disposition of Dugan's criminal case.

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13 DATED: 11/6/09



RONALD M. WHYTE
United States District Judge

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14 Counsel are responsible for distributing copies of this document to co-counsel that have not
15 registered for e-filing under the court's CM/ECF program.

16 **Dated:** 11/6/09

CCL
Chambers of Judge Whyte