CASE NO: G046081

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

TIEN DUC NGUYEN

Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE
SUPERIOR COURT NO. 10WF0918
THE HONORABLE DAPHNE SCOTT

APPELLANT'S OPENING BRIEF

Jason A. Davis – S.B.N. 224250
DAVIS & ASSOCIATES
30021 Tomas Street, Suite 300
Rancho Santa Margarita, CA 92688
Telephone: (949) 436- 4867
Facsimile: (949) 288-6894

Attorney for Appellant

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INTRODUCTION

In a jury trial, Appellant was convicted of attempted possession and attempted manufacture of a Penal Code[1] section 12276.1(a)(1) type "assault weapon." Section 12276.1 provides, in relevant part, that the term shall mean a: 1) semi-automatic, 2) centerfire; 3) rifle; 4) with the capacity to accept a detachable magazine; 5) and any one of six statutorily listed features including: a conspicuously protruding pistol grip, forward pistol grip, or folding stock.[2] It is the People's burden to show that defendant knew or reasonably should have known the firearm possessed the characteristics bringing it within the AWCA. (See *In re Jorge M* (2000) 23 Cal.4th 866; *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1144-45.) The AK47 Kit ("Kit") at issue in Counts 1 and 2, and consisting of parts and an incomplete receiver, however, constitutes neither a rifle nor an "assault weapon" in their disassembled and inoperable state. The Kit was disassembled and incomplete in manufacture to be an "assault weapon."

Appellant also, prior to trial, plead guilty in two other counts: Count (3) felon in possession of a firearm and Count (4) felon in possession of ammunition.

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[1] Unless otherwise specified, all statutory references are to the Penal Code. Though these provisions were numbered effective January 1, 2012, the provisions cited are the provisions applicable at all times referenced.

[2] "Assault weapons" are specifically defined by statute and are divided into three classification categories: Category 1 – Section 12276, subdivisions (a) (c) (Roberti Roos Assault Weapons Control Act of 1989 (the "AWCA"), which specifically enumerates regulated "assault weapons" by make and model; Category 2 – Section 12276, subdivisions (e) and (f), which regulate AK and AR 15 "series" firearms that have been listed in regulations promulgated by the DOJ pursuant to Section 12276.5; and Category Three – Section 12276.1 (SB23), which defines "assault weapons" based upon their features.

The judgment relating to "assault weapons," however, must be reversed because the trial court's primary theory of conviction is invalid for four reasons: (1) The primary theory of conviction was legally erroneous where the legislature crafted the AWCA to permit possession of parts in a disassembled state; (2) The trial court's primary theory of conviction violated due process because there was insufficient evidence of the scienter element; (3) The trial court's primary theory of conviction violated due process because the statute is unconstitutionally vague as applied to appellant's possession and modification of a the Kit; and (4) The court abused its discretion in admitting testimony and evidence regarding the .50 DTC rifle, .50 DTC ammunition, and Beowulf ammunition.

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment of conviction. The judgment is appealable under Penal Code section 1237, subdivision (a).

STATEMENT OF THE CASE

On April 6, 2004, appellant Tien Duc Nguyen was charged in a four-count information filed in Orange County Superior Court. (C.T. 123-124.) Count one charged attempted manufacture of an "assault weapon" pursuant to Section 664 subdivision (a) and 12280, subdivision (a) (1). (C.T. 123.) Count two charged attempted manufacture of an "assault weapon" as described in Sections 664 subdivision (a) and 12280, subdivision (b). (*Id.*) Count three charged possession of a firearm by a felon as described in Section 12021 subdivision (a)(1). (C.T. 124.) Count four charged possession of ammunition by a prohibited person under Section 12316 subdivision (b)(1). (*Id.*) The information further

50 DTC Bolt Action Rifle

Appellant informed Chapman that he had a rifle for hunting and lead Chapman to storage area within the facility where there was a fully assembled .50 DTC caliber rifle. (R.T. 103 & 105.)[3] Appellant informed Chapman that he purchased the rifle lower off the internet as an "80 percent lower." (R.T. 113.) Appellant explained to Chapman that he had to mill, drill, or finish the product himself because it was not complete when he purchased it and therefore was not a "receiver"[4] when he bought it. (R.T. 114.) Appellant also stated that he assembled the device and it was "ready to fire." (*Id.*) The .50 DTC was "dry-fired" without ammunition by Chapman but never fired with actual ammunition. (R.T. 114 & 144-145.)

Ammunition

Chapman testified that he inquired about ammunition for the .50 DTC rifle and Appellant directed him to a box of 50 rounds of .50 DTC ammunition. (R.T. 115.) Chapman inquired whether Appellant had any more ammunition and the Appellant produced a box of 120 rounds of 50 Beowulf caliber ammunition. (R.T. 117.)

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[3] Appellant did not testify at trial. (R.T. 327.) All statements attributed to Appellant are not presented as true and correct statements by Appellant, but were offered in testimony by Chapman.

[4] Penal Code section 12001 subdivision (c) states: "As used in Sections 12021, 12021.1, 12070, 12071, 12072, 12073, 12078, 12101, and 12801 of this code, and Sections 8100, 8101, and 8103 of the Welfare and Institutions Code, the term "firearm" includes the frame or *receiver* of the weapon."

Receipt & Packing Slip

Upon searching Appellant's home, Chapman seized a receipt that identified the ammunition and the .50 DTC barrel and a packing slip and instructions identifying parts of the upper assembly for the 50 DTC rifle . (R.T. 127.)

AK 47 Parts Kit & Incomplete Receiver

Chapman testified that he asked Appellant if he had any more weapons in his possession, and Appellant informed him that he was making an AK 47 and directed Chapman to a box of parts for the AK 47. (R.T. 118-119.) Appellant explained that he purchased a flat piece of metal with holes drilled in it which has to be molded or bent into shape in order to hold the internal parts. (R.T. 122.) Appellant told Chapman that he personally altered the receiver and bent it into the proper shape to assemble an AK-47. (*Id.*) In a follow-up interview with Chapman, Appellant described how he purchased a "flat" and then bent it into shape with a die press and purchased the parts, but never assembled the parts into a complete firearm. (C.T. 300-304.)

Chapman testified that he met with Rocky Edwards, a fire examiner from the Forensic Services Department of the Santa Ana Police Department and Sergeant Greg Schuch, of the Orange County Sheriff's Department to compare Appellant's parts Kit to a disassembled AK-47 and confirmed that all the parts were present, with slight variations. (R.T. 139-142.)[5]

[5] Respondents provided testimony regarding the specific parts within the parts Kit to counter Chapman's own testimony that a meeting he had with David Teague,

Chapman testified that the "receiver" was "not entirely completed," "not all parts had been installed into the receiver," the receiver required the drilling of "several holes." (R.T. 156, 162.)

Likewise, Respondent's expert witness Gregory Schuch testified that a portion of the incomplete receiver called the barrel block had been "riveted" but that "maybe a couple of more holes" need to be drilled and rivets inserted. (R.T. 199.) He also stated that parts known as the "lower guide rails . . . can either be attached -- either attached by tack welding with a small tack welder, or they can be screwed into place." (R.T. 202.)

Schuch provided testimony identifying the items within the AK-47 parts Kit. (R.T. 202-210.) There was no magazine seized. (R.T. 202-210, 235.)

Schuch did not provide testimony that the parts Kit "is" or "was" configured with the requisite parts that would render a conclusion that the parts constitute an "assault weapon." Rather, the Respondents provided testimony as to what the parts Kit "would be." Specifically, the parts "would be" a semi-automatic firearm. (R.T. 213.) The parts "are made for a centerfire weapon." (R.T. 214.) The parts that are present "would" have the capacity to accept a detachable magazine. (R.T. 215.) The firearm that these parts would create "would" have a pistol grip protruding conspicuously beneath the action of the weapon and "would" have a folding stock." (R.T. 216.)

Rangemaster with the Orange County Sheriff's Department, had informed Chapman that the parts Kit was missing two parts: a sear and a hammer. (R.T. 136-137.)

In fact, Schuch admitted that the receiver did not have the capacity to accept a detachable magazine in its current state because the trigger guard and magazine release are not attached. (R.T. 233.)

Appellant's expert, Michael Penhall, agreed stating that the receiver "does not look like its ready to be installed" as any form of firearm. (R.T. 273.) Appellant's expert stated that "it would take a fair amount of work to make it functional" and described some of the necessary work that would need to be done to make the firearm operate. (R.T. 276.) Penhall further testified that the installation of the parts necessary to make the firearm incapable of accepting a detachable magazine would probably be done after the receiver was riveted and welded together, after it was refinished, but before a pistol grip or collapsible stock was installed. (R.T. 288.) Penhall detailed the process by which the parts could be worked into a firearm, but stated that parts, in their current state, do not constitute a "rifle" in any form, as it would take eight hours to complete. (R.T. 292-298, 307.) Penhall detailed the various methods of building a legal AK-47 rifle by installing a fixed magazine locking device such as a "bullet button," by installing alternative grips such as a "monster man," or by simply not installing the grip at all. (R.T. 301-305.)

ARGUMENT

I. THE PRIMARY THEORY OF CONVICTION WAS LEGALLY ERRONEOUS WHERE THE LEGISLATURE CRAFTED THE AWCA TO PERMIT POSSESSION OF PARTS IN A DISASSEMBLED STATE

The trial court's primary theory of conviction under Counts 1 and 2 was that modification to and possession of the parts necessary to make both legal firearms as well as the more regulated "assault weapon" in a disassembled and inoperable state by a

person who has knowledge of firearm construction constitutes attempted manufacture and attempted possession of an "assault weapon" as defined in Section 12276.1(a)(1). (R.T. 336-356.)

The evidence was undisputed that the receiver did not have the capacity, as configured, to accept a detachable magazine. (R.T. 233.) Without having the capacity to accept a detachable magazine, the parts Kit fails the elements of Section 12276.1(a)(1); further, the parts Kit did not qualify as an "assault weapon" in this condition because it was neither configured nor operable as a "semiautomatic" rifle since it could not fire at all; and constructive possession does not apply to Section 12276.1 type "assault weapons." (R.T. 276.) Respondents theory of attempted manufacture and possession on the basis of possession of the requisite, but incomplete parts, was erroneous and contradicts statutory law permitting the possession of the parts at issue without being subject to the "assault weapon" scheme.[6] (Pen. Code, § 12276.1, subd. (a)(1).)

A. Background of AWCA

In 1989, the Legislature enacted the Roberti-Roos Assault Weapons Control Act ("AWCA"). The AWCA imposed new restrictions on a class of semiautomatic firearms defined as "assault weapons." (Pen. Code, § 12275, et seq.)

Prior to the amendments of the AWCA in 1999, semiautomatic firearms were designated as "assault weapons" by (1) being listed by type, series, and model in section

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[6] This is a pure question of statutory interpretation based on undisputed facts. Accordingly, de novo review is required. (*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 604 ["Questions of statutory interpretation, and the applicability of a statutory standard to undisputed facts, present questions of law, which we review de novo"].)

12276, or (2) being declared an assault weapon upon petition of the Attorney General under section 12276.5 (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 477-478.) As originally enacted, the AWCA did not define "assault weapons" by their generic characteristics. (*J.W. Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1145; *Kasler, supra*, 23 Cal.4th at p. 487.)

In 1999, the Legislature amended the AWCA to add a third category of "assault weapons" defined solely by generic characteristics. (*Kasler, supra*, 23 Cal.4th at p. 478.) The new generic definition of "assault weapons" was set forth in Section 12276.1, which provides in relevant part:

> (a) Notwithstanding Section 12276, "assault weapon" shall also mean any of the following:
>
> (1) A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and any of the following:
>
> (A) A pistol grip that protrudes conspicuously beneath the action of the weapon.
>
> (B) A thumbhole stock.
>
> (C) A folding or telescoping stock.
>
> (D) A grenade launcher or flare launcher.
>
> (E) A flash suppressor.
>
> (F) A forward pistol grip.

B. The Trial Court's Interpretation of Section 12276.1 Was Legally Erroneous

The People's Felony Complaint originally charged Appellant with manufacture and possession of an "assault weapon" in Counts 1 and 2. At the Preliminary hearing, however, the People could not prove that the Appellant manufactured or possessed an "assault weapon" by merely possessing the AK 47 Parts Kit. (C.T. 108-121) However, the court found that there was probable cause that the lesser offenses of attempted manufacture and attempted possession of an "assault weapon" was committed by Appellant. (*Id.*) However, nothing in either the language or the legislative history of section 12276.1 supports this interpretation of the statute. On the contrary, the ability to fire as a semiautomatic is an essential feature of any generically-defined "assault weapon" under section 12276.1, subdivision (a)(1). Properly construed, the statute only applies to rifles that are actually operable as semiautomatic firearms.

The starting point for interpreting a statute is the language of the statute itself. "In interpreting a statute where the language is clear, courts must follow its plain meaning." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.) However, "under the traditional 'rule of lenity,' language in a penal statute that truly is susceptible of more than one reasonable construction in meaning or application ordinarily is construed in the manner that is more favorable to the defendant." (*People v. Canty* (2004) 32 Cal.4th 1266, 1277.)

When the Legislature defined the essential characteristics of a generic "assault weapon" in 1999, it chose to require that the weapon must be a "semiautomatic rifle." (Pen. Code, § 12276.1, sub. (a)(1).) By definition, the word "semiautomatic" describes how the weapon actually functions. It means that the weapon must fire a bullet, extract

the fired cartridge, and chamber a fresh cartridge with each pull of the trigger, allowing the shooter to fire multiple shots without reloading manually. (See Pen. Code, § 12126, subd. (e); *Silveira v. Lockyer* (9th Cir. 2002) 312 F.3d 1052, 1057, fn. 1.)

Because the word "semiautomatic" describes the actual function of the weapon, a rifle that cannot fire semiautomatically is not an "assault weapon" under section 12276.1. The Legislature defined generic "assault weapons" by their features and the way they operate, not by brand name or model. Thus, a firearm that is missing the parts necessary to operate as a semiautomatic is not a generic "assault weapon," even though it may have originally been designed to shoot semi-automatically. At the very least, this is a reasonable construction of the statutory language that should be adopted under the rule of lenity. (*People v. Canty, supra,* 32 Cal.4th at p. 1277.)

By construing the law to prohibit mere possession of parts that could be assembled into an "assault weapon," the trial court effectively added words and phrases that cannot be found anywhere in the statute itself. It is settled that "[w]ords may not be inserted in a statute under the guise of interpretation." (*In re Miller* (1947) 31 Cal.2d 191, 199.)

Other principles of statutory construction also support Appellant's interpretation of the law. First, in contrast to other firearm statutes, the Legislature did not include any language in the AWCA banning the possession of discrete *parts* of a semiautomatic rifle. In other firearm statutes, the Legislature has clearly indicated such an intention by stating that "the term 'firearm' includes the frame or receiver of the weapon."[7] (§ 12001, subd.

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[7] By its terms, this definition applies only to "Sections 12021, 12021.1, 12070, 12072, 120.73, 12078, 12101 and 12801 of [the Penal Code], and Sections 8100, 8101 and 8103

(c).) Notably, the Legislature enacted this definition in 1969 to nullify the prior ruling of *People v. Jackson* (1968) 266 Cal.App.2d 341, 347, which had held that a violation of section 12021 required proof that the weapon was operable. (See *People v. Nelums* (1982) 31 Cal.3d 355, 357 [noting that section 12001(c) "effected a legislative abrogation of" *Jackson*].)

In enacting and amending the AWCA, however, the Legislature did not include any similar language stating that "assault weapons" are defined to include the frame or receiver or any other *parts* of a semiautomatic rifle. In these circumstances, it must be inferred that the Legislature did not intend to enact such a ban. "When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in the meaning." (*People v. Trevino* (2001) 26 Cal.4th 237, 242.) "The Legislature is presumed to have in mind existing law when it passes a statute [citation], and, when the Legislature has carefully employed a term in one place and excluded it in another, the term should not be implied where it has been excluded." (*Clark v. Workers' Comp. Appeals Bd.* (1991) 230 Cal.App.3d 684, 695-696.)

Likewise, the Legislature did not include any language in the AWCA of the type it has used in other firearm statutes that explicitly ban the possession of weapons "designed to be used" as a firearm or "which may readily be converted to" a firearm. (§§

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of the Welfare and Institutions Code ..." (§ 12001(c).) For all other firearm statutes, courts are "left 'free' to interpret" the applicable laws to achieve their individual objectives in determining whether firearm operability is required. (*People v. Nelums* (1982) 31 Cal.3d 355, 359, citing *People v. Hayden* (1973)30 Cal.App.3d 446, 451.)

12001(a)(1) & (b), 1460(b)(2)(D).) There is no similar language in the AWCA stating that the term "semiautomatic rifle" includes rifles originally "designed to be used" in a semiautomatic fashion or "which may readily be converted" to semiautomatics. Again, the Legislature's omission of definitional phrases used in other related firearm statutes suggests that a different meaning must have been intended. (*Clark, supra,* 230 Cal.App.3d at pp. 695-696.)

In sum, mere possession of the disassembled parts of a firearm defined as an "assault weapon" is contemplated and permitted by Section 12276.1, any application that would render mere possession alone a violation. As a matter of law, the trial court's construction of section 12276.1 to allow a lesser of "attempt" without more evidence than mere possession of a parts Kit was erroneous.[8] Properly construed, the statute only applies to rifles that are actually operable as semiautomatic firearms.

II. THE TRIAL COURT'S PRIMARY THEORY OF CONVICTION VIOLATED DUE PROCESS BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF THE SCIENTER ELEMENT

The trial court's primary theory of conviction – that possession of the parts capable of making an "assault weapon" constitute attempted possession and attempted manufacture of an "assault weapon" in violation of Section 12276.1(a)(1) – was also deficient for another reason. There is no evidence that Appellant intended to manufacture or possess a firearm that he knew or reasonably should have known had the essential

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[8] At a minimum, the Jury should have been instructed that "mere possession of the parts necessary to assemble an "assault weapon" as defined in Penal Code section 12276.1 cannot be used to infer intent to manufacture or intent to possess an 'assault weapon'."

characteristics that make up an assault weapon, as required under the holding of *In re Jorge M.* (2003) 23 Cal.4th 866.

"A state court conviction that is not supported by sufficient evidence violates the due process clause of the Fourteenth Amendment and is invalid for that reason." (*People v. Rowland* (1992) 4 Cal.4th 238, 269, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In reviewing the insufficiency of evidence, the questions is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia, supra*, 443 U.S. at p. 319.)

To establish a violation of the AWCA, "the People must prove ... that a defendant charged with possessing an unregistered assault weapon *knew or reasonably should have known* the characteristics of the weapon bringing it within the registration requirements of the AWCA." (*In re Jorge M., supra*, 23 Cal.4th at pp. 869-970.) The Supreme Court concluded in *Jorge M.* that "without such a scienter element, the possibility of severely punishing innocent possession is too great." (*Id.* at p. 885.) The court expressly found that the AWCA "was not intended to define a strict liability offense." (*Id.* at p. 869.)

Under *Jorge M.*, appellant could not have been found guilty of attempted possession and attempted manufacture of an "assault weapon" by mere possession of the parts alone unless he intended to manufacture a firearm he knew or reasonably should have known that the rifle was still a "semiautomatic" firearm in this condition. However, the only relevant evidence in the record is to the contrary. The box of parts could have been built into any number of legal configurations. (C.T. 300-304, R.T. 301-305.)

The trial court erroneously treated the crime as a strict liability offense in violation of *Jorge M.*

In sum, there was insufficient evidence of the scienter element of the offense as to the trial court's primary theory of conviction. The conviction cannot rest on appellant's possession of the parts alone, because there is no evidence that appellant intended to build a rifle he knew or should have known it had the necessary characteristic of being an "assault weapon" as defined in Section 12276.1. The trial court's reliance on this unsupported theory violated appellant's Fourteenth Amendment due process rights under *Jackson v. Virginia, supra,* 443 U.S. at p. 319.

III. THE TRIAL COURT'S PRIMARY THEORY OF CONVICTION VIOLATED DUE PROCESS BECAUSE THE STATUTE IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO APPELLANT'S POSSESSION AND MODIFICATION OF A PARTS KIT

The trial court's primary theory of conviction also violated due process because the statute is unconstitutionally vague as applied to the particular circumstances of appellant's case. Neither the statute nor any prior judicial decision gave constitutionally adequate notice that the AWCA applies to a possession of a parts Kit that can be, with the requisite knowledge, skill, and work, be configured into both legal firearms as well as an "assault weapon." (§ 12276.1, subd. (a)(1).)

In making an "as applied" challenge to a penal statute, a defendant may seek relief from the specific application of a facially valid statute as a result of the manner or circumstances in which the statute has been applied. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) Such an "as applied" challenge "contemplates analysis of the facts

of a particular case or cases to determine the circumstances in which the statute ... has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Ibid.*)

Specifically, a defendant may assert that his conviction is invalid on the basis that the penal statute is unconstitutionally vague *as applied* to the particular circumstances of his case. (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 744-746.) "The constitutional interest implicated in the questions of statutory vagueness is that no person be deprived of 'life, liberty, or property without due process of law,' as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California Constitution (Cal. Const. Art. I, § 7)." (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567.)

To satisfy this constitutional command, two requirements must be met: (1) the statute must be sufficiently definite to provide adequate notice of the conduct proscribed; and (2) the statute must provide sufficiently definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. (*Tobe v. City of Santa Ana, supra*, 9 Cal.4th at pp. 1106-1107; *People v. Hagedorn*, 127 Cal.App.4th at p. 745.)

"There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' [Citations.] Second ... the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. [Citations.] Third, although clarity at the requisite level may be supplied by judicial gloss

on an otherwise uncertain statute [citations], due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope [citations]. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." (*United States v. Lanier* (1997) 520 U.S. 259, 266.)

For all of the reasons stated in Arguments I and II, *ante*, neither the AWCA nor any prior judicial decision fairly disclosed to appellant that it was unlawful for him to possess or modify firearm parts of in a disassembled state that may be assembled into an "assault weapon." In these circumstances, the trial court's primary theory of conviction violates due process because the statute is unconstitutionally vague as applied to Appellant's conviction for attempted possession and manufacture of an "assault weapon" based solely on the possession of an AK-47 parts Kit.

IV. THE COURT ABUSED ITS DISCRETION IN ADMITTING TESTIMONY AND EVIDENCE REGARDING THE .50 DTC RIFLE, .50 DTC AMMUNITION, AND BEOWOLF AMMUNITION

A. The Relevant Facts

Though Appellant had plead to Counts 3 and 4, the People sought to introduce the .50 DTC rifle, .50 DTC ammunition, and Beowulf ammunition during trial for Counts 1 and 2 under People's contentions that the .50 DTC rifle constitutes an "assault weapon" that Appellant had constructed before and the ammunition goes to the fact that "he's in the business of creating weapons, not tinkering." (R.T. 21-25.) Despite the fact that the .50 DTC rifle was not an "assault weapon" (as the People misinformed the court) since it

was a "bolt action" not "semi-automatic" rifle, and the rifle itself and ammunition for the .50 DTC are much larger than that of the AK-47, and despite the objection of Appellant's counsel, the court permitted such testimony. (*Id.*)

In doing so, the court permitted side-by-side comparisons of the 50 DTC ammunition to that of 50 BMG rifles. (R.T. 116.) Neither of which are relevant to an AK-47 nor its construction – let alone an AK-47 parts Kit.

Further, the court permitted testimony and comparisons of the 50 Beowulf cartridges. (R.T. 117.) Though the court struck a portion of the answer referring to .50 BMG as illegal, it permitted Chapman to provide testimony on the unrelated .50 DTC rifle:

> Q: And when you were talking about - you have a conversation about the DTC ammo versus the .50 BMG ammo? What is that about, if you can clarify?
>
> A: Well, I looked online. And my understanding that the .50 BMG, which is a military round is that the.50 -- well, *it's not legal in California*.[9] And the law is very specific as to the dimensions of the .50 BMG round. So they came up with this .50 DTC. And my understanding is that it uses the same bullet, the same type of cartridge, which would be like the brass. but they neck it down ever so slightly and taper it so the dimensions are exactly the same.

[9] Like actual "assault weapons," .50 BMG Rifles are not "illegal" per se, but rather regulated under a registration and/or permit scheme. (*See* Penal Code section 12285-12287.)

I put a .50 BMG round up next to it. And this one is just slightly shorter, so it doesn't fit the criteria of a .50 BMG.

(R.T. 133-134.)

The size of two large cartridges compared side-by-side provides no probative value into the manufacture or possession of an "assault weapon," especially where the firearm at issue was not alleged to be either of the calibers.

Trial court also permitted a comparison of the .50 DTC rifle ammunition unrelated to the AK-47 parts Kit with that of "the .40 caliber Smith and Wesson *handgun* ammunition that [Chapman] carry[s] on duty when [he's] on patrol, which is provided for [him] by the City of Buena Park. (R.T. 143.)

During trial, the court permitted People's expert to testify extensively about how the .50 DTC could be converted into a .50 Beowulf by removing the upper, which contains the barrel, fire control system, trigger, and sear, and "all the operating parts" and replacing it "in a manner of seconds" with an upper designed for the .50 Beuwulf - despite the fact that no such upper was found within the possession of Appellant, nor was the .50 DTC rifle or ammunition at issue. (R.T. 173-180.)

During the trial, the court permitted Schuch to describe the meaning of the term "semi-automatic" using the much larger .50 DTC bolt action rifle rather than the semi-automatic AK-47 exemplar brought by People's expert specifically for comparison purposes. (R.T. 213.)

The court erred in admitting the evidence. The probative value of permitting the .50 DTC rifle, .50 DTC ammunition, and .50 Beowulf ammunition with respect to Counts

1 and 2 for attempted possession and manufacture of "assault weapons" is weak and speculative. The People could have described via testimony, without introducing the actual rifle and ammunition, the similarities (where they existed) between the manufacturing process of the .50 DTC and that of the AK 47 – to the extent that such testimony was actually probative. In fact, Plaintiffs case is void of any instruction on the similarities of the assembly and manufacture of the two firearms.

On the other hand, the evidence was inflammatory and prejudicial because the .50 DTC rifle and cartridge is a much larger caliber rifle and cartridge than the AK-47and the ammunition for it, thereby appearing more menacing as a firearm, especially when the cartridges compared with other cartridges as the People did - without demonstrating such a comparison for the caliber that would be used by the Parts Kit had it been assembled. Further, admission of these items permitted incited incorrect testimony regarding the illegalities and "military" use of those firearms and the "military" history of those firearms not at issue. The admission of the .50 DTC rifle, .50 DTC ammunition, and .50 Beowulf violated state law, and denied appellant a fair and reliable jury trial under the Fifth, Sixth, Eighth and Fourteenth Amendments. Reversal is required.

B. Standard of Review

A challenge to a trial court's choice to admit or exclude evidence under section 352 is reviewed for abuse of discretion. (*People v. Harris* (1998) 60 Cal.App.4th 727, 736-737.) The trial court's determination "will not be overturned on appeal in the absence of a clear abuse of that discretion, upon a showing that the trial courts decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently

grave as to amount to a miscarriage of justice." (*People v. Lamb* (2006) 136 Cal.App.4th 575, 582, quoting *In Re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385.)

C. The Admission of the .50 DTC Rifle and Ammunition Was More Prejudicial Than Probative

"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Branch* (2001) 91 Cal. App.4th 274, 286.) "[E]vidence should be excluded as unduly prejudicial when it is of such nature to inflame the emotions of the jury, motivating them to use the information, not logically evaluate the point upon which it is relevant, but to reward or punish one side because of the juror' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009.)

Firearms evidence is inherently prejudicial and akin to gang evidence – especially where the People allude to the firearms as illegal and military in origin as they did here. As the California Supreme Court noted, "evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (holding that trial courts have the discretion to sever the gang enhancement from underlying felony due to the inherent prejudice of gang evidence), citing *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.) Evidence of gang membership casts a sinister light upon a defendant and erodes the presumption of innocence. The California Supreme Court has emphasized that gang evidence is "highly

inflammatory" and has cautioned against its admission unless the evidence bears substantial probative value. "When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." (*People v. Cox* (1991) 53 Cal.3d 618, 660.) "It is fair to say that when the word "gang" is used . . . . , one does not have visions of the characters from the "Our Little Gang" series. The word gang . . . connotes opprobrious implications . . . . [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.) Likewise, firearms connotes similar emotions to many – especially when a large caliber rifle is testified to as being for military use, illegal and/or essentially the same as its illegal. "Erroneous admission of gang related evidence, particularly regarding criminal activities, has frequently been found to be reversible error because of its inflammatory nature and tendency to imply criminal disposition, or actual culpability." (*People v. Bojorquez* (2002) 104 Cal.App.335, 342.)

The prejudicial effect is two-fold. First, the .50 DTC Rifle, .50 DTC ammunition, and .50 Beowulf ammunition when testified to as above suggest that the defendant is the type of person predisposed to commit violent acts. (See *People v. Luparello* (1986) 187 Cal.App.3d 410, 426.) Second, the evidence leads to the assumption of guilt based upon possession of otherwise lawful firearms. (*Bojorquez, supra*, 104 Cal.App.4th 335, 342.O

The admission of large caliber firearms and ammunition alleged to be both illegal and/or substantially similar to contraband, like gang evidence and the admission of other-crimes evidence, requires the trial court to "weight the admission of [the challenged]

evidence carefully in terms of whether the probative value of the evidence is greater than the potentially prejudicial effects its admission would have on the defense." (*People v. Perez, supra*, 114 Cal.App.3d at 478.) "[T]he fundamental rule [is] that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted." (*People v. Haston* (1968) 69 Cal.2d 223, 246.)

Thus, given the inherently prejudicial nature of the evidence, it was incumbent upon the prosecution to establish that the probative value of the introduction of the .50 DTC rifle, the .50 DTC ammunition, and the .50 Beowulf.

The prosecution offered the firearm and ammunition to show how Plaintiff had put together an "assault weapon" once before – when in fact, the .50 DTC is not an "assault weapon" nor could it be one by the mere fact that it is a bolt action and, therefore, mechanically different and outside the scope of the AWCA. In fact, most of the testimony relating to the .50 DTC was entirely unrelated to the AK-47 parts Kit at issue.

Moreover, the testimony of the Chapman and the People's expert could have just as easily testified without the need of the actual firearm and ammunition, that Plaintiff had admitted to manufacturing a firearm in the past. The prosecutor needed no more than appellant's general admission to Chapman that he built the .50 DTC. (R.T. 113-114.)

Thus, the admittance of the .50 DTC and ammunition did not carry substantial probative value. The court erred in admitting them.

D. The Error Is Reversible

It is reasonably probable that appellant would have received a more favorable result at trial had this evidence been excluded. (*People v. Watson, supra*, 46 Cal.2d 818,

836.) The prosecution's case was not free of doubt. There was no admission of intent to manufacture an "assault weapon," there was no statement made by Appellant that he intended on putting the firearm together in a configuration that would be an "assault weapon," The prosecutions case consisted entirely of the inference that Appellant's possession of the parts necessary to configure the firearm into both a legal rifle as well as an "assault weapon." No physical evidence in the form of other "assault rifles," correspondence, third party communications corroborated such an intent. The .50 BMG rifle and ammunition admitted undermined the defense case by portraying appellant as someone engaged in illicit manufacture of illegal and/or marginally legal sinister military rifles that serve no legitimate purpose.

The error also implicates the Due Process Clause of the Fourteenth Amendment. Although state-law evidentiary errors do not generally rise to the level of federal constitutional error, the erroneous admission of prejudicial or inflammatory character evidence is the srot of evidentiary error that has been recognized to be a due process violation. (See generally, *Estelle v. McGuire* (1991) 502, U.S. 62, 75 (Due Process Clause is violated when evidentiary error "infuse[s] the trial with unfairness as to deny due process of law"); *Henry v. Estelle* (1993) 993 F.2d 1423, 1427 (admission of inflammatory other-crimes evidence violated due process), rev. on the grounds that sub nom *Duncan v. Henry* (1994) 513 U.S. 364; *McKinney v. Rees* (1993) 993 F.2d 1378, 1380 (admission of evidence of weapon possession and other misconduct violated due process).)

Such is the case here. By admitting this evidence, the court denied appellant a fiar trial under the Due Process Clause and undermined the reliability of the guilt phase determination under the Eighth Amendment. Under *Chapman v. California* (1967) 386 U.S. 18, the burden rests with the State "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.) For the reasons stated above, the error is reversible.

Evidence Code section 352 was sufficient to preserve a federal due process claim for appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 436 (a trial objection on Evidence Code section 352 grounds preserves the appellate argument that admitting the evidence violated a defendant's federal due process rights); *People v. Thornton* (2007) 41 Cal. 4th 391, 434, fn.7.) Reversal is required.

CONCLUSION

For the reasons stated in Argument I, the judgment must be reversed. In the alternative, for the reasons stated in Arguments II - V, the trial court's primary theory of conviction should be invalidated and the judgment should be reversed and remanded for further proceedings on the alternative theory. Finally, for the reasons stated in Argument VI, the probation condition that appellant "maintain residence and associates as approved by your probation officer" must be stricken.

Dated: February 21, 2012 LAW OFFICES OF DAVIS AND ASSOCIATES

By: _____
Jason A. Davis,
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204 of the California Rules of Court, I certify that the foregoing Appellant's Opening Brief was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 6,329 words.

Dated: February 21, 2012 LAW OFFICES OF DAVIS AND ASSOCIATES

By: _____
Jason A. Davis,
Attorney for Appellant

Jason Davis

Davis & Associates

30021 Tomas St., Ste 300

Rancho Santa Margarita, CA 92688

CERTIFICATE OF SERVICE

I, Jason A. Davis, am employed in the County of Orange, California. I am over the age of 18 years and not a party to the within action. My business address is 30021 Tomas St. Ste. 300, Rancho Santa Margarita, California 92688. On February 21, 2012, I served APPELLANT'S OPENING BRIEF by mailing a copy by first-class mail in separate envelopes addressed as follows:

SEE ATTACHED MAILING LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on 21, 2012. at Rancho Santa Margarita, California.

/s/ Jason Davis

Jason Davis

MAILING LIST

Central Justice Center

700 Civic Center Drive West

Santa Ana, CA 92701

For Del to: Hon. Daphne Scott

Office Of The State Attorney General

P O Box 85266

San Diego, CA 92186-5266 I

Orange County District Attorney

401 Civic Center Dr.

Santa Ana, CA 92701

Tien Duc Nguyen

CDRC # AK4943

701 Scofield Avenue

P.O. Box 8800

Wasco, CA 93280