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 REPLY BRIEF

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ARGUMENT

I. THE PRIMARY THEORY OF CONVICTION IS LEGALLY ERRONEOUS

A. The Assault Weapons Control Act Only Regulates A Subclass Of Assembled Semi-Automatic Firearms As Assault Weapons

This is a case of first impression. And, for the first time in this case, the Department of Justice, which is the agency charged with educating, enforcing and implementing the Assault Weapons Control Act (Penal Code §12075, *et seq.*), has argued in Respondents' Brief a primary theory of conviction that directly conflicts with its own published regulations, statements and guidance relating to the possession of "assault weapons." The primary theory of conviction of "attempted" "assault weapon" possession and manufacture based upon the possession of parts that could, among other lawful firearms, be used to assemble an "assault weapon" is legally erroneous.

In the United States, the term "assault weapon" was rarely used before gun control political efforts emerged in the late 1980s. In 1989, California became the first U.S. state to identify and outlaw "assault weapons." Because the term "assault weapon" is a legal fiction fabricated in the late 1980s for the sole purpose of identifying and classifying certain firearms for regulation, there was much confusion as to what distinguished a firearm as an "assault weapon." Though its legal precedent was overturned on other grounds, *Kasler v. Lungren* (1998) 61 Cal. App. 4th 1237, provides a factual understanding of the distinction between "assault weapons" and military type firearms, noting that "assault weapons" merely look like, but do not function, like military "assault rifles":

Some firearms can fire more than once without the need to break open the action, utilizing some device to feed ammunition to the chamber. The simplest family within this class consists of bolt-action, lever-action and pump-action guns which feed cartridges into the chamber as fast as the shooter operates the action. An example would be the classic Winchester rifle. Another family in this class is the "self-loading" gun, which typically uses the recoil or expanding gas of a gunshot to work the action: After a cartridge is fired, the gun reloads itself with the next cartridge in the magazine or belt. There are two kinds of self-loading guns. Machine ("automatic") guns fire until the ammunition is exhausted or the shooter releases the trigger. Semiautomatic guns reload themselves after each shot is fired, but the trigger must be pulled each time the shooter fires.

***

. . . The [Assault Weapons Control] Act has nothing to do with machine guns.

***

Semiautomatic guns have been around for over a century. (Encyclopedia Britannica CD 97 ["Technology of War: Self-loaders"].) They may be pistols, rifles or shotguns. They can have internal ("integral") magazines or detachable magazines, which can come in many sizes. Some semiautomatic guns look like or are patterned after machine guns. For example, the Israeli "Uzi" was designed as a selective fire machine gun. (Small Arms of the

World, p. 122, Small Arms Today, pp. 167, 328.) But there is a semiautomatic version for consumption in the United States. Similarly, the "AR-15" (Armalite 15) family of rifles includes the selective-fire "M-16," but also includes semiautomatic rifles, such as the AR-15 Sporter, generically referred to as "AR-15s" to distinguish them from M-16s. (Small Arms of the World, pp. 46-47, 747-748.) *But many, if not most, semiautomatic guns have no relationship to automatic guns*. Ordinary pistols like the current U.S. issue M9 nine millimeter series and its predecessor, the M1911 .45 caliber series, are semiautomatic and can accept detachable clips, yet neither is patterned after an automatic gun. (Small Arms Today, supra, pp. 393-394; Small Arms of the World, supra, pp. 739-740.)

***

However, the term "assault weapon" has entered the political lexicon, now meaning a "*military-looking*" semiautomatic weapon . . . . (Citation omitted.)

(Emphasis added.)

The California Legislature created a list identifying the specific semiautomatic firearms regulated by make and model it deemed to be "assault weapons." The Assault Weapons Control Act was passed in 1989. It consists broadly of four parts: a list of so-called "assault weapons," which the Department of Justice calls Category 1 type "assault weapons"; a mechanism for adding other firearms to the list (through regulatory action)

that the Department of Justice calls "Category 2" type "assault weapons"; a registration system; and penal provisions.

In 1999, via Senate Bill 23, the Legislature took a third approach expanding the definition of "assault weapons" – defining them in terms of certain types of semiautomatic firearms that are configured with specific generic characteristics – as well as specifically regulating *only* one of the many "assault weapon" features: "large capacity magazines." (**Exhibit A.**)

While the Legislature intended to regulate certain firearms that possess features it defined as "assault weapons," it did *not* intend, the Legislature stressed, to place restrictions on weapons "primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities." (Emphasis added. Penal Code §12275.5.)

To assist in the identification of firearms for the purposes of registration as well as the penal provisions, the Legislature mandated that "[t]he Attorney General shall prepare a description for identification purposes, including a picture or diagram, of each assault weapon listed in Section 12276, and any *firearm* declared to be an assault weapon pursuant to this section, and shall distribute the description to all law enforcement agencies responsible for enforcement of this chapter. Those law enforcement agencies shall make the description available to all agency personnel." (*Harrott v. County of Kings* (2001) 25 Cal. 4th 1138, 1153. See also Penal Code §12276.5(a), emphasis added.)

Attached to the Appellant's Notice of Lodgment as **Exhibit B** is a copy of the Department of Justice Assault Weapons Identification Guide prepared in response to

Penal Code section 12276.5 subd. (a). While the guide addresses Category 3 type "assault weapons" with some detail, including a broad array of definitions, nowhere in the Department of Justice Assault Weapons Identification Guide does it identify the possession of parts or a combination of parts that could be used to assemble a Category 3 "assault weapon" as an "assault weapon."

This is likely because the Department of Justice has *not* been of such an opinion. To clarify the very question at issue in this case, the Department of Justice has issued a letter ruling declaring that the possession of all of the parts necessary to assemble a Category 3 "assault weapon" does not constitute an "assault weapon":

> Would possession of a completely disassembled Category 3 "assault weapon" constitute an unlawful possession of an "assault weapon"? In practical terms, if someone has removed any SB 23 offending feature(s) from their rifle so that it is no longer an "Assault weapon," are they in violation of the law if they continue to possess the removed features along with the rifle?
>
> - **No.**

(See **Exhibit C**, emphasis in original.)

Such an interpretation is established in Department of Justice issued regulations regarding Category 3 "assault weapons":

> The DOJ will accept voluntary cancellations for assault weapons that are no longer possessed by the registrant. Cancellations will also be accepted for assault weapons, defined and registered pursuant to Penal Code section [12276.1] *that*

have been modified or reconfigured to no longer meet the assault weapon definition. Cancellation requests must be signed, dated, and provide the following information.

(Emphasis added. 11 C.C.R. 5473(a).)

And, the fact that the features must be on the firearm for it to be deemed an "assault weapon" is currently emphasized on the Department of Justice website page addressing frequently asked "assault weapon" questions:

> If I registered my SB 23 assault weapon and now I remove the characteristic(s) that make it an assault weapon, can I cancel the registration?
>
> *Yes. If the defining characteristics establishing a firearm as an SB 23 assault weapon are removed, it is no longer an assault weapon and the registration may be canceled.* However, once the registration is canceled, you can never *replace* the characteristic(s) that make it an assault weapon, or you will be in possession of an illegal weapon.

(Emphasis added. **Exhibit D.**)

Such interpretations comport with the plain reading of Penal Code section 12276.1. The penal provision of the Assault Weapons Act, Penal Code section 12280 (a) and (b) prohibits any person from possessing or manufacturing an "assault weapon." It does not prohibit any person from possessing or manufacturing semiautomatic firearms generally. Nor does it prohibit the individual or collective possession of flash suppressors, pistol grips, thumbhole stocks or other features listed in Penal Code section 12276.1, which defines an "assault weapon" as a "semiautomatic, centerfire rifle that <u>has</u>

the capacity to accept a detachable magazine" and also has a "pistol grip that protrudes conspicuously beneath the action of the weapon." (Penal Code § 12276.1(a)(1).) It is important to note that the size of ammunition, or caliber, is irrelevant for the purposes of defining "assault weapons" pursuant to Penal Code section 12276.1.

The express language of Penal Code section 12276.1 makes it clear that the subject of the sentence, "assault weapon," is an assembled firearm. First, Penal Code section 12276.1 requires that the firearm be "semiautomatic" in action. The Department of Justice's Assault Weapons Identification Guide defines "semiautomatic" as "a firearm that is self-loading, but not self firing. A single pull of the trigger results in a single shot being fired." **(Exhibit B.)** So too did the People's witness – in a much more attenuated manner. (2 RT 213-214.) Thus, the firearm must be in a condition in which it can be fired, with a trigger installed, in order to be "semiautomatic." Additionally, the express language states that the *firearm*, not the person possessing the firearm, must have certain features such as a "conspicuously protruding pistol grip" or "flash suppressor."

This is further emphasized by the definitions issued by the Department of Justice. For example, a "forward pistol grip" is defined as "a grip that allows for a pistol style grasp forward of the trigger." How can a device be deemed a "forward pistol grip" without first being installed on a firearm to determine its location in relation to the trigger?

In addition to the express language of the Assault Weapons Control Act, any broad interpretation of the act to include possession of parts alone would be contrary to the Legislature's policy of permitting possession of each of the parts. First, there is the mere

fact that "assault weapon" parts and components can be used to make lawful firearms (2 RT 301).

Second, the Legislature had every opportunity to regulate the possession of any of the Penal Code section 12276.1 features individually or collectively in passing SB 23 (1999), and subsequently. Yet, it only chose to regulate the *manufacture* and *sale* of only one of those "assault weapon" features– "large capacity magazines." (Penal Code § 12020(a)(2).) It did not, however, regulate the *possession* of such "large capacity magazines." Nor did it regulate the manufacture, sale or possession of *any* of the other features identified in Penal Code section 12076.1.

Third, the Penal Code is clear when it regulates subcomponents of firearms. For example, Penal Code section 12020 regulates the manufacture, causing to be manufactured, importation into the state, keeping for sale, or offering or exposing for sale, giving, lending, and possessing of "short-barreled shotguns" and "short-barreled rifles." (Penal Code §12020(a)(1).) Penal Code section 12020 subdivision (c)(1) clearly defines "short-barreled shotgun" to include specific subcomponents:

> As used in this section, a "short-barreled shotgun" means any of the following:
>
> (A) A firearm which is designed or redesigned to fire a fixed shotgun shell and having a barrel or barrels of less than 18 inches in length.
>
> (B) A firearm which has an overall length of less than 26 inches and which is designed or redesigned to fire a fixed shotgun shell.

(C) Any weapon made from a shotgun (whether by alteration, modification, or otherwise) if that weapon, as modified, has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length.

(D) Any device which may be readily restored to fire a fixed shotgun shell which, when so restored, is a device defined in subparagraphs (A) to (C) inclusive.

(E) Any part, or combination of parts, designed and intended to convert a device into a device defined in subparagraphs (A) to (C) inclusive, or any combination of parts from which a device defined in subparagraphs (A) to (C), inclusive, can be readily assembled if those parts are in the possession or under the control of the same person.

(Emphasis added.)

And, Penal Code section 12020 subdivision (c)(2) clearly defines "short-barrel rifle" to include specific subcomponents:

As used in this section, a "short-barreled rifle" means any of the following:

(A) A rifle having a barrel or barrels of less than 16 inches in length.

(B) A rifle with an overall length of less than 26 inches.

(C) Any weapon made from a rifle (whether by alteration, modification, or otherwise) if that weapon, as modified, has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length.

(D) Any device which may be readily restored to fire a fixed cartridge which, when so restored, is a device defined in subparagraphs (A) to (C), inclusive.

(E) Any part, or combination of parts, designed and intended to convert a device into a device defined in subparagraphs (A) to (C), inclusive, or any combination of parts from which a device defined in subparagraphs (A) to (C), inclusive, may be readily assembled if those parts are in the possession or under the control of the same person.

(Emphasis added.)

It is important to note that the Legislature was aware of this specific language relating to parts and components, as SB 23 amended this very section by adding restrictions on "large capacity magazines." (*See* SB 23 – **Exhibit A.**)

Additionally, when regulating "machineguns," Penal Code section 12200 clearly defines "machineguns" to include specific subcomponents:

The term "machinegun" as used in this chapter means any weapon which shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. *The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under*

the control of a person. The term also includes any weapon deemed by the federal Bureau of Alcohol, Tobacco, and Firearms as readily convertible to a machinegun under Chapter 53 (commencing with Section 5801) of Title 26 of the United States Code.

(Emphasis added.)

No such language applicable to "assault weapons" is included anywhere within the Assault Weapons Control Act or the Penal Code. Thus, the Act only applies to a *fully assembled* "assault weapon."

B. AK 47s Are Not Per Se "Assault Weapons."

As discussed in detail, Penal Code section 12276.1 only regulates certain semiautomatic rifles configured with specific characteristics. Respondents' Brief is rife with evidence and contentions that Appellant intended to possess and manufacture an AK 47 type firearm, but such allegations are irrelevant. Appellant does not dispute that the facts demonstrate that he attempted to manufacture a firearm. The record indicates that Appellant admitted that he had personally altered a receiver and bent it into the proper shape to assemble the "AK 47." (1 RT 122.) And the record indicates that, as a person prohibited from possessing firearms, he admitted that he knew making and having his own "AK 47" was "wrong." (CT 16 [minute order], 1 RT 123.) In fact, Appellant later pled guilty to and admitted the additional charges of being a felon in unlawful possession of firearms and ammunition. (CT 123.)

However, and of immense significance here, is the fact that Appellant was charged with attempted manufacturer and possession of an "assault weapon," not attempted

manufacture of a *firearm* or *AK 47*. (CT 31 [minute order], 188-189 [verdict forms].) While some AK 47s are "assault weapons," not all are – they must have been either added to the list of "assault weapons" by "make" and "model" or *have* the requisite features of an "assault weapon." (See *Harrott v. County of King* (2001) 25 Cal. 4th 1138.) Here, Appellant possessed neither: he merely possessed an unassembled parts kit that required further manufacturing and assembly before it could be assembled into a firearm – let alone into a firearm with an "assault weapon" configuration. (1 RT 119-122, 152, 2 RT 213-216, 294, 301, 307, Penal Code §12276.1)

C. Mere Possession Of Parts That Can Be Assembled Into Non-Assault Weapons Is Insufficient To Establish Attempted Possession And Manufacture Of An Assault Weapon Under Penal Code §664.

Respondents argue that there was sufficient evidence presented to establish Appellant's intent to manufacturer an "assault weapon." While there is evidence of an intent to manufacture a firearm, Respondents' entire Brief, as well as the evidence at trial, is void of any evidence that indicates that Petitioner intended to manufacturer an "assault weapon," as opposed to a non-"assault weapon" configuration of an AK 47. Not once do Respondents indicate any reference to statements made by Appellant or others supporting such claims. The record is void of any evidence that Appellant intended to assemble the firearm as an "assault weapon."

Respondents cite two cases as evidence that "other cases have upheld conviction for attempted manufacture of prohibited items." Respondents' citations 1) are inaccurate, and 2) favor Appellant's position. First, we address *People v. Luna* (2009) 170 Cal.App.4th 535. (RB 8.) In *Luna*, a jury convicted the defendant of attempting to

manufacture a controlled substance – hashish. (*Id.* at 539.) Although the *defendant acknowledged at trial that he bought certain equipment with the intention of making hashish*, he claimed that he did not try to purchase marijuana after acquiring the remainder of the necessary equipment. (*Id.*) However, contrary to Respondents' assertions, the Court of Appeal *reversed the conviction*. The court held that there was *insufficient* evidence to support defendant's conviction. It found no act—not even a slight act—on the part of defendant that went beyond preparation and could be regarded as an unequivocal overt act that could be said to be a commencement of the commission of the intended crime. At the time that defendant was arrested, he had no ability to begin manufacturing hashish. In order to begin manufacturing hashish, *defendant still had numerous steps to accomplish, including assembling the components of the manufacturing device, which were found unassembled and in pieces in his truck*. The court concluded that the acts undertaken by defendant were *too preliminary* to indicate *with any certainty* that a crime was about to be consummated absent an intervening force. (*Id.* at 553-544.) As such, *Luna* supports Appellant's contentions that Penal Code section 664 is inapplicable given the fact that, by all accounts, additional machining and assembly (into a specific configuration) would be required in order to turn the parts into a firearm – let alone an "assault weapon."

The second case cited by Respondents, *People v. Heath* (1998) 66 Cal.App.4th 697, 705, was cited as holding that the "Legislature intended to criminalize all acts which are part of the [controlled substance] manufacturing process, whether or not those acts directly result in completion of the final product." Respondents agree. Unlike the

Assault Weapons Control Act at issue here, Health and Safety Code 11379.6 expressly regulates the compounds, derivatives, processes and preparation:

> Every person who *manufactures, compounds, converts, produces, derives, processes, or prepares, either directly or indirectly by chemical extraction or independently by means of chemical synthesis*, any controlled substance specified in Section 11054, 11055, 11056, 11057, or 11058 shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, five, or seven years and by a fine not exceeding fifty thousand dollars ($50,000).

In that regard, the express provisions are more akin to the Penal Code's definitions of "short-barreled shotguns", "short-barreled rifles" and "machineguns" – each of which includes subcomponents in their definitions. (Penal Code §§ 12020(c)(1) and (2), 12200.) Under the Assault Weapons Act, there are no such restrictions on the possession of "assault weapon" subcomponents. (Penal Code §§12020, 12275 *et seq.*)

Thus, *Heath* does not stand to support Respondents' primary theory. Moreover, *Luna* supports Appellant's argument in support of reversing Appellant's conviction under the attempt theory.

II. THERE WAS A DUE PROCESS VIOLATION BY TRIAL COURT'S PRIMARY THEORY OF CONVICTION BECAUSE THERE WAS INSUFFICEINT EVIDENCE OF SCIENTER

Appellants contend that there was a due process violation by the trial court's primary theory of conviction because there was insufficient evidence of scienter establishing that Appellant intended to manufacture an "assault weapon." The question 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* (1975) 443 U.S. 307, 319.) However, "evidence leading only to speculative inferences is irrelevant." (*People v. Kraft* (2000) 23 Cal.4th. 978, 1035. *See also People v. De La Plane* (1979) 88 Cal. App. 3d 223, 244 [151 Cal. Rptr. 843].)

Respondents argue that, applying the standards of *In re Jorge M.* (2000) 23 Cal.4th 866, there was sufficient evidence that Appellant intended to build a rifle he knew was a prohibited "assault weapon." (RB 14.) First, this case does not involve the possession of a fully assembled "assault weapon" as did In re *Jorge M.* and each and every case in a line of cases that followed. Rather, this case is an extraordinary case of first impression in which the salient characteristics of the parts are extremely obscure because the case involves possession of parts that could, with additional machining and assembly, be converted into an "assault weapon" *or another type of firearm that would not be deemed an "assault weapon."* (2 RT 305.) As discussed above, a fully assembled AK-47 is not necessarily an "assault weapon."[1]

Harrott v. County of Kings, supra, discusses the requirement of the California Department of Justice to add firearms to the list by make and model in order for an "AK Series" type firearm to be deemed an "assault weapon" regardless of its features. The California Department of Justice's authority to add firearms, including AK47 type firearms, to the list of "assault weapons" was removed by Cal. Assembly Bill 2728 (2006).

A review of the whole record shows nothing indicating an attempt or intent to manufacture or possess an "assault weapon." The evidence referred to by Respondents includes Appellant's substantial and unhindered possession of al[l] the parts needed to manufacturer and assemble a fully functioning AK-47 that may or may not be an "assault weapon" depending on the method of configuration. (RT 14. 1 RT 113-114.) And, as in the case of *People v. Luna*, supra at 535, possession of the components is insufficient evidence to support Appellant's conviction.

Respondents cite a string of incorrect and unrelated evidence to support the claim. They incorrectly cite Appellant's possession of a [D]TC rifle as a "*semiautomatic* rifle" which appellant admitted he assembled himself. (RB 14.) However, the DTC firearm is not "semiautomatic," but rather, Respondents' witness Officer Chapman testified that it is a bolt-action. (1 RT 105.) As such, that rifle was not and could not be an "assault weapon" under Penal Code section 12275 *et seq*. and is irrelevant to any intent to manufacture separate and unrelated parts into an "assault weapon."

Respondents cite Appellant's use of guns to go hunting, his possession of legal large caliber ammunition for two different types of legal firearms, his visit to a website titled AK-Builder.com, and his admission that he had begun building an AK-47 rifle. (RB 14, 1 RT 103, 116-18, 121-123.) Again, none of this relates to "assault weapons" nor implies any intent to build an "assault weapon," though these facts could indicate intent to manufacture a firearm for "hunting" or "sporting use" as expressly permitted by Penal Code section 12275.5.

Finally, Respondents cite Appellant's statement that he knew making and having his own AK-47 rifle was wrong. (RB 14, 1 RT 123.) What is important here is 1) Defendant knew he was a person prohibited from possessing firearms pursuant to 12021, subd. (a)(1), and 2) this is not an express admission of any intent to build an "assault weapon." To the extent that Appellant's statement that his having a rifle was "wrong" would constitute an admission of intent to build an "assault weapon," the facts still favor Appellant. In *Luna*, the fact that the defendant possessed equipment to manufacture hashish and provided testimony admitting intent to manufacture hashish were deemed insufficient under Penal Code section 664. As such, the same should hold true here and Appellant's conviction should be reversed.

III. THE STATUTE IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO APPELLANT

Respondents' main theory is this: Appellant should have been aware that his possession of the parts of an AK-47 rifle [which has non-"assault weapon" variants] violated the laws prohibiting his possession and manufacture of an "assault weapon." (RB 17.)

To withstand a vagueness challenge, a penal statute must satisfy two basic requirements. First, the statute must provide adequate notice of those who must observe it. (*People v. Rubacalva* (2000) 23 Cal.4th 322, 332; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106; see U.S., Const., 5th & 14th Amends.; Cal. Const., art I, §15.) Respondents cite not one law that identifies parts or possession of the parts possessed by Appellant as being prohibited.

Rather, they cite the same string of facts to support a policy argument that goes against the express language of the statutes, regulations, letter opinions, and historical practice relating to semiautomatic firearms generally – as discussed in Part I of this Brief.

Moreover, the policy arguments made by Respondents are the same policy arguments currently being debated in support of California Senate Bill 249, which has yet to pass – but which provides insight into the vagueness created by the lack of clarity in the Penal Code and the Department of Justice's conflicting regulations. On May 22, Senator Yee amended Senate Bill 249 to criminalize the possession of parts that can be used to convert a firearm into an "assault weapon."

> This bill would, commencing July 1, 2013, and with certain exceptions, prohibit any person from importing, making, selling, loaning, transferring, or possessing any conversion kit, as defined, designed to convert certain firearms with a fixed magazine into firearms with the capacity to accept a detachable magazine and other features making the firearm an assault weapon and would make violations subject to criminal penalties. By *creating new crimes*, this bill would impose a state-mandated local program.

(**Exhibit E.** Emphasis added.) Senate Bill 249 has not been passed.

Thus, not only has adequate notice not been given to the public, Plaintiff's theory has not been enacted into law – as evidenced by the fact that Senate Bill 249, as amended on May 22, 2012, expressly states that it would be "creating new crimes."

Second, the statute must provide sufficiently definite guidelines. A vague law impermissibly delegates policy matters to the police, judges, and juries for resolution on a

subjective basis, with the attendant risk of arbitrary and discretionary enforcement. (*People v. Superior Court* (Casswell) (1998) 46 Cal.3d. 381, 390; *People v. Ellison* (1998) 68 Cal.App.4th 203, 207.) The terms of a statute can be construed by reference to other legitimate sources such as statutes, legislative history, and judicial decisions. (*People ex rel. Gallo v. Acuna*, supra, 14 Cal.4th at pp. 1116-1117.) As described herein, nothing in the statute provides sufficient guidelines in support of Respondents' theory. In fact, as discussed in detail above, the statutes, legislative history, and judicial decisions prove that Penal Code section 12276.1 does not apply to possession of incomplete parts or disassembled firearms. The result of the ambiguity as applied is that, after over ten years in effect, the Assault Weapons Control Act has been applied for the first time in a manner that applies solely to possession of commonly used and interchangeable parts – not complete and assembled firearms. Such application impermissibly delegates policy matters, as here, to the police, judges, and juries. This becomes more significant where the public was not placed on notice prior to the expiration of the 2001 registration requirements contained within the Assault Weapons Control Act – potentially subjecting hundreds of thousands of firearm owners to prosecution for failing to register firearm parts kits and/or firearms without the requisite features installed.

The one argument made by Respondents is that *People v. Jackson* (1968) 266 Cal.App.2d 341, 347, which held that a violation of Penal Code section 12021 required proof that the weapon was fully operational, was abrogated by subdivision (c) of Penal Code section 12001. (RB 9.) Appellants agree. Yet, Penal Code section 12001 *was amended* to specifically defines "receivers" as "firearms" for the purposes of Penal Code

section 12021, and other *specified* statutes. However, Respondents state, without authority, that the abrogation applies to "assault weapons." This is in direct conflict with the express language of Penal Code 12001 (c), which states: "(c) 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." (Emphasis added.) Penal Code section 12021 is expressly cited and abrogated - Penal Code 12276.1 is not. Thus, Respondents' argument is without merit – and a receiver is not a firearm for the purposes of the "assault weapon" laws. (Penal Code §12275 *et al.*)

Moreover, in determining the meaning of a statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. When the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of a statute is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability. (See *Harrott v. County of Kings*, at 1154) (See also, *Crandon v. United States* (1990) 494 U.S. 152, 158 [110 S. Ct. 997, 1001-1002, 108 L. Ed. 2d 132]; *United States v. Thompson/Center Arms Co.* (1992) 504 U.S. 505, 517-518 [112 S. Ct. 2102, 2109-2110, 119 L. Ed. 2d 308] [applying the rule of lenity in a federal firearms case].)

IV. THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE REGARDING THE .50 DTC AND THE .50 DTC BEOWULF AMMUNITION

Respondents allege that the admission of the DTC tended to show that Appellant should have known the nature of the "assault weapon." (RB 18, 1 RT 18-19, 22.) Specifically, Respondents argue that the DTC and ammunition strongly supported the reasonable inference that Appellant had the experience and knowledge about assembling firearms to successfully assemble the AK-47 type weapon and should and must have known the weapon he was building had the characteristics of an illegal AK-47 type weapon. Respondents further argue that "Appellant's intent to assemble a completed AK-47 rather than merely to possess a random collection of parts of that weapon is shown by the fact that he has already assembled a *semiautomatic rifle*. It shows he had knowledge, ability, and intent to manufacturer another 'high powered weapon.'" (RB 20-21. Multiple emphases added.)

First, the fact that the DTC is a "very large" caliber is irrelevant as evidence of intent to manufacture another firearm into an "assault weapon," as a firearm "caliber" is not a "feature" used to identify an "assault weapon" pursuant to Penal Code section 12276.1.

Second, Respondents mistakenly identify the DTC firearm as a "semiautomatic rifle" -- which is one characteristic of an "assault weapon." The rifle, however, is not a "semiautomatic." (1 RT 105.) In fact, the DTC, unlike an AK-47, is described as a "very large, large-caliber *bolt action* type rifle." (*Id.* Emphasis added.) Due to the DTC's function as a bolt action, not a semiautomatic, it is impossible for the firearm to be

deemed an "assault weapon" under Penal Code section 12276.1. The sheer size of the firearm, and the fact that its action functioned substantially differently than any "assault weapon," made its admission a substantial danger of undue prejudice, confused the issues, and misled the jury. This is evidenced by the Respondents' own brief which repeatedly refers to the firearm as "semiautomatic" in function -- a requisite element of Penal Code section 12276.1.

The same holds true for the ammunition, which is not the same caliber as the "AK-47" and which is irrelevant, and caliber is not a feature of Penal Code section 12276.1. Nor was any evidence proffered to allege as much.

As such, the admission of the DTC rifle and the .50 caliber ammunition were improperly admitted, caused undue prejudice, confused the issues, and mislead the jury.

CONCLUSION

Accordingly, petitioner respectfully requests the judgment be reversed.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204 of the California Rules of Court, I certify that the foregoing Appellant's Reply 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 5,454 words.

Dated: September 11, 2012 DAVIS AND ASSOCIATES

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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 September 11, 2012, I served APPELLANT'S REPLY 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 September 11, 2012, at Rancho Santa Margarita, California.

/s/ Jason Davis

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