

**CASE NO: G046081**

COURT OF APPEAL, STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION THREE

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

Plaintiff and Respondent,

vs.

**TIEN DUC NGUYEN**

Defendant and Appellant,

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

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**APPELLANT'S REQUEST FOR JUDICIAL NOTICE; MEMORANDUM  
OF POINTS AND AUTHORITIES; SUPPORTING DECLARATION OF  
JASON DAVIS; PROPOSED ORDER**

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Attorney for Appellant

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Attorney for Appellant

**TO THE COURT AND ALL ATTORNEYS OF RECORD FOR THE PARTIES  
HEREIN:**

Pursuant to rule 8.252 of the California Rules of Court, and to Evidence Code sections 451 and 452, appellant, through his counsel, requests this court to take judicial notice of the following exhibits:

<b>EXHIBIT</b>	<b>DOCUMENT</b>	<b>EVIDENCE CODE</b>
EXHIBIT A	A true and correct copy of Senate Bill 23 (1999).	Evidence Code sections 451(a), 452(b), (c), & (h).
EXHIBIT B	A true and correct copy of the California Department of Justice Assault Weapons Identification Guide (2003) 3 <sup>rd</sup> Edition 2001.	Evidence Code section 452(c) & (h).
EXHIBIT C	A true and correct copy of the California Department of Justice Bureau of Firearms Letter Ruling Dated May 1, 2003.	Evidence Code section 452(c) & (h).
EXHIBIT D	A true and correct copy of the California Department of Justice – Assault Weapons Frequently Asked Questions Webpage Printed September 11, 2012: <a href="http://oag.ca.gov/firearms/regagunfaqs#8">http://oag.ca.gov/firearms/regagunfaqs#8</a>	Evidence Code section 452(c) & (h).
EXHIBIT E	Senate Bill 249 – As Amended May 22, 2012. The relevant text of this bill occurred after the judgment against Appellant was issued.	Evidence Code section 451(a), 452(b), (c), & (h).

This request for judicial notice is based on the following points and authorities.

Dated: September 14, 2012

LAW OFFICES OF DAVIS & ASSOCIATES

By: \_\_\_\_\_

Jason A. Davis,  
Attorney for Appellant

## MEMORANDUM OF POINTS AND AUTHORITIES

California Rules of Court, rule 8.252 provides the means for judicial notice on appeal. The rule provides in subdivision (a)(2) that the motion must state:

(a) Why the matter to be noticed is relevant to the appeal; (b) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court, and (C) Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal.

### EXHIBIT A

Appellant is asking this court to take judicial notice of Exhibit A, which is a true and correct copy of Senate Bill 23 (1999). Judicial notice of Senate Bill 23 is appropriate pursuant to Evidence Code sections 451(a), which states that judicial notice shall be taken of the . . . public statutory law of this state . . .” SB 23 was chaptered by the Secretary of State on July 19, 1999 as Chapter 129, Statutes of 1999.

Additionally, the Court may take judicial notice of Senate Bill 23 (1999) pursuant to Evidence Code section, 452(b), (c), & (h), which allows discretionary notice of the: “legislative enactments issued by or under the authority of . . . any public entity in the United States,” “official acts of the legislative . . . departments of . . . any state of the United States,” and “facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.”

SB 23 is the bill that added the relevant definition of “assault weapon” to Penal Code section 12276.1, as well as separately regulated *only one* of the multitude of other “features” a firearm must possess in order to be deemed an “assault weapon” via Penal Code section 12276.1. That feature is “large capacity magazines,” whose transfer and importation are regulated, but whose not possession is not regulated separately. (See Penal Code section 12020 and SB23.) Judicial notice of SB 23 is requested as it demonstrates that possession of parts were not separately regulated, and were not intended to be regulated as “assault weapons” if disassembled. To do so would ignore the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). (*People v. Rowland* (1999) 75 Cal.App, 61.) This is especially true in light of the State’s regulation of parts, as well as complete firearms, for “short-barreled shotguns”, “short-barreled rifles” and “machineguns” – each of which includes subcomponents in their definitions – where the definition of “assault weapon” does not include specific regulation of subcomponents. (Penal Code §§ 12020(c)(1) and (2), 12200, & 12276.1.) SB 23 demonstrates that the legislature had the opportunity to regulate parts separately, and chose to do so only with “large capacity magazines,” leaving the possession of all other parts that are not fully assembled into an “assault weapon” unregulated. Thus, SB 23 is used to demonstrate that the application of Penal Code section 12276.1 to criminally prosecute Appellant for the possession of such parts, without further evidence of intent to manufacturer an “assault weapon,” exceeded the scope of the Assault Weapons Control Act, is unconstitutionally vague, and violates Appellant’s Due Process rights.

### EXHIBITS B-D

Appellant is asking this court to take judicial notice of Exhibits B-D, which are true and correct copies of the California Department of Justice Assault Weapons Identification Guide (2003) 3<sup>rd</sup> Edition 2001, California Department of Justice Letter Ruling dated May 1, 2003, and California Department of Justice Assault Weapons Frequently Asked Questions Webpage Printed September 11, 2012:  
<http://oag.ca.gov/firearms/regagunfaqs#8>.

This court may take judicial notice of these exhibits pursuant to Evidence Code section 452(c) & (h), which allows discretionary notice of the: "official acts of the executive . . . departments of . . . any state of the United States," and "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Exhibits B-D are official acts of the executive department of the State of California, as evidenced on the face of each document, which identifies the executive agency of the California Department of Justice as their author and publisher, and may be verified as a result of the public distribution of the documents by the California Department of Justice via the California Department of Justice's website.

The California Department of Justice is the State agency responsible for the training and education of law enforcement agencies with respect to Assault Weapons. Penal Code § 12289 states:

The Department of Justice shall conduct a public education and notification program regarding the registration of assault weapons and the definition of

the weapons set forth in Section 12276.1. The public education and notification program shall include outreach to local law enforcement agencies and utilization of public service announcements in a variety of media approaches, to ensure maximum publicity of the limited forgiveness period of the registration requirement specified in subdivision (f) of Section 12285 and the consequences of nonregistration. . . .

Penal Code section 12281 subd. (f)(4) states: “(4) The department shall conduct a public education and notification program as described in Section 12289, commencing no later than January 1, 1999.”

Penal Code § 12276.5 states [in part]: “the 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.”

Moreover, as the head of the Department of Justice, “it shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced.” (Cal. Const. Art. V Sect. 13.)

For the first time in this case, via the Respondent’s Brief, the California Department of Justice has opined that the theory of prosecution is a valid theory. This position is a direct contradiction to the materials produced, distributed, and published by them in accordance with their constitutional and statutory duties to ensure that the

“assault weapon” laws are *uniformly* enforced. Exhibits B-D should have been introduced by trial counsel and admitted by the trial court. But, they were not and are not a part of the trial record. However, Exhibits B through D constitute judicially noticeable publicly disseminated materials produced by the Department of Justice pursuant to their constitutional and statutory duty to educate the public and law enforcement – uniformly. These documents both impliedly and expressly negate the theory under which Appellant was prosecuted, as described below. Failure to admit these materials may result in non-uniform application of the law that directly contradicts these previously produced, published, and publicly distributed, materials which both the public and law enforcement historically relied upon for registration while the registration periods were open, and currently rely upon as Exhibits B and D are currently being published on the Department of Justice’s webpage.

*Exhibit B: Assault Weapons Identification Guide:*

In fulfilling their statutory duties pursuant to Penal Code section 12075.5, the California Department of Justice promulgated an “Assault Weapons Identification Guide,” (Exhibit B) an 84-page publication which describes the Assault Weapons regulated in Penal Code (former) sections 12276, 12276.1, and 12276.5. Nowhere in that guide does it identify or provide guidance that a combination of parts that can be assembled into an “assault weapon” can constitute an “assault weapon.” Thus, neither law enforcement nor the public have been made aware that the possession of a combination of parts that can be assembled into either a non-prohibited firearm or



“assault weapon” will constitute an “assault weapon.” This directly contradicts the theory of prosecution currently on appeal, as described in Appellant’s Reply Brief.

*Exhibit C: California Department of Justice Letter Ruling*

In fulfilling their duties pursuant to Penal Code 12281 subd.(f)(4) and 12289, the Department of Justice provided a letter ruling response to counsel for the National Rifle Association. (Exhibit C.) That letter expressly states that possession of a combination of parts that can be assembled into an “assault weapon” pursuant to Penal Code section 12276.1 does not constitute possession of an “assault weapon.” This directly contradicts the theory of prosecution currently on appeal, as described in Appellant’s Reply Brief.

*Exhibit C: Assault Weapons Frequently Asked Questions Webpage:*

In fulfilling their duties pursuant to Penal Code 12281 subd.(f)(4) and 12289, the Department of Justice publicly publishes a webpage for public education and guidance, <http://oag.ca.gov/firearms/regagunfaqs#8> (Exhibit D). That webpage describes a procedure by which removal of the Penal Code section 12276.1 features would render an “assault weapon” no-longer an “assault weapon,” permitting the possessor to unregister their firearm. This directly contradicts the theory of prosecution currently on appeal, as described in Appellant’s Reply Brief.

**EXHIBIT E**

Appellant is asking this court to take judicial notice of Exhibit E, which is a true and correct copy of Senate Bill 249 – As Amended May 22, 2012. This Court may take judicial notice of Senate Bill 249 pursuant to Evidence Code section, 452(b), (c), & (h), which allows discretionary notice of the: “legislative enactments issued by or under the

authority of . . . any public entity in the United States,” “official acts of the legislative . . . departments of . . . any state of the United States,” and “facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.”

Senate Bill 249, as amended May 22, 2012, expressly states that it was designed to create “*new law*” that prohibits the combination of parts that can be used to assemble an “assault weapon.” Because SB 249 would create “new law” that parallels the theory of prosecution currently on appeal, it clarifies the fact that, under current law, possession of parts that can be used to assemble an “assault weapon” is not prohibited. Senate Bill 249 (2012) was not proposed as amended on May 22, 2012, at the time of trial. Therefore, SB 249 was not and *could not* be a part of the trial court record. Nevertheless, the express language of Senate Bill 249, as amended May 22, 2012, directly contradicts the theory of prosecution currently on appeal, as described in Appellant’s Reply Brief.

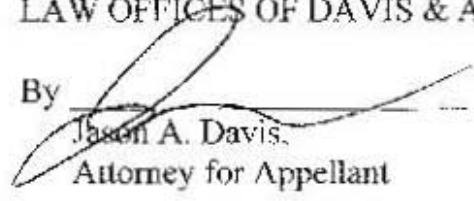
It is respectfully submitted that the above referenced Exhibits clarifying the historical notice made to the public and law enforcement regarding California’s “assault weapon” laws by the agency statutorily and constitutionally charged with enforcing, education, and regulating such laws uniformly, further supports Appellant’s position that a Respondent’s theory of prosecution exceeds the scope of the California’s Assault Weapons Control Act (Penal Code §12275 *et seq.*) and is unconstitutional as applied.

It is respectfully requested that this court take judicial notice of Exhibits A through E under Evidence Code, sections 451 and 452, as described herein.

Dated: September 14, 2012

LAW OFFICES OF DAVIS & ASSOCIATES

By

A handwritten signature in black ink, appearing to read "Jason A. Davis", is written over a horizontal line. The signature is fluid and cursive.

Jason A. Davis,

Attorney for Appellant

## DECLARATION OF JASON DAVIS

I, Jason Davis, hereby declare that I am competent to testify truthfully to the following facts of my percipient knowledge:

1. I am an attorney at law duly authorized to practice before all the California courts.
2. I am associated with Davis & Associates, attorneys of record for Appellant.
3. I have the primary responsibility for advocating appellant's position with respect to the pending appeal before this Court.
4. It is respectfully submitted that Exhibits A through E are relevant to the appeal under review. (California Rules of Court, rule 8.252.)
5. Attached as **Exhibit A** is a true and correct copy of Senate Bill 23 (1999) downloaded from the following website: [http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0001-0050/sb\\_23\\_bill\\_19990719\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0001-0050/sb_23_bill_19990719_chaptered.pdf).
6. Attached as **Exhibit B** is a true and correct copy of the California Department of Justice Assault Weapons Identification Guide (2003) 3rd Edition 2001. downloaded from the following website:
7. Attached as **Exhibit C** is a true and correct copy of the California Department of Justice – Bureau of Firearms Letter Ruling dated May 1, 2003, which constitutes a response to a letter that I personally drafted under the Partner's name and submitted to the Department of Justice during my employment at the Law Offices of Trutanich-Michel, LLP. I personally received the Letter Ruling shortly after May 1, 2003. And, while representing the National Rifle Association through

Trutanich-Michel, LLP, have advised clients and law enforcement in accordance with the Letter Ruling.

8. Attached as **Exhibit D** is a true and correct copy of the California Department of Justice Assault Weapons Frequently Asked Questions Webpage downloaded on September 11, 2012, from <http://oag.ca.gov/firearms/regagunfaqs#8>
9. Attached as **Exhibit E** is a true and correct copy of Senate Bill 249 (2012), as amended May 22, 2012, downloaded from the following website:  
[http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_0201-0250/sb\\_249\\_bill\\_20120522\\_amended\\_asm\\_v96.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_249_bill_20120522_amended_asm_v96.pdf).
10. The theory of prosecution under Penal Code section 12276.1, which is currently at issue, is a novel and unique application of the "assault weapon" laws, heretofore, contradicted by the agency charged with uniform application of Assault Weapons Act. Moreover, the theory of prosecution is contradicted by the origin bill, Senate Bill 23 (1999) and recent proposed legislation, Senate Bill 249 (2012).
11. It is respectfully submitted that Exhibits A through E, relate to the scope of Penal Code section 12275 *et seq.* and clarify the historical notice made to the public and law enforcement regarding California's "assault weapon" laws by the agency statutorily and constitutionally charged with enforcing, educating, and regulating such laws *uniformly*, further supports Appellant's position that Respondent's theory of prosecution exceeds the scope of the California's Assault Weapons

Control Act (Penal Code §12275 et seq.) and is unconstitutionally vague as applied.

12. In accordance with Rule 8.252, a proposed order is submitted with this motion.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 14, 2012 at Rancho Santa Margarita, California.

By: 


Jason A. Davis, Declarant

## 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 REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING DECLARATION OF JASON DAVIS; PROPOSED ORDER 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 14, 2012, at Rancho Santa Margarita, California.

  
/s/ Jason Davis

Jason Davis

## MAILING LIST

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For Del to: Hon. Daphne Scott

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