MEMO

TO: CDM
FROM: KCQ
RE: AFFECT OF DEGUZMAN ON KIRK-ROWLAND
DATE: August 13, 2004

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1. THE KIRK-ROWLAND ARGUMENT

The argument of *Kirk-Rowland* and is that because courts have found that the term "any" is ambiguous, only one count can be charged for possession of more than one prohibited item.

The heart of the argument came in the case of *People v. Kirk* (1989) 211 Cal.App.3d 58 [259 Cal.Rptr. 44] (superceded by statute in Penal Code section 12020(k)(l).) The *Kirk* court, directly addressed the use of the word "any" in a California firearm statute. In *Kirk*, the defendant was charged with two violations of Penal Code section 12020 (a) which, in 1985, provided that: "[a]ny person ... who ... possesses ... *any* instrument or weapon of the kind commonly known as a ... sawed-off shotgun ... is guilty of a felony, ..." (*Id.* at 60, emphasis added.) The defendant had possessed an illegal sawed-off shotgun and sawed-off rifle, both of which were in his home. The court overturned the conviction, holding in criminal statutes "the word 'any' has long been construed as ambiguously indicating the singular or the plural." (*Id.* at 62.) The court found that Penal Code section 12020(a) was facially ambiguous and allowed for only one count on Penal Code section 12020 to cover all firearms.

In reaction to *Kirk*, the Legislature amended Penal Code section 12001 (which defines terms under the "Deadly Weapons Chapter") by adding new subdivisions (k) and (l). (Stats. 1994 (1993-1994 1st Ex. Sess.) res. ch. 32, § 1.) The new sections added

> (k) For purposes of Sections 12021, 12021.1, 12025, 12070, 12072, 12073, 12078, and 12101 of this code, and Sections 8100, 8101, and 8103 of the Welfare and Institutions Code, notwithstanding the fact that the term 'any firearm' may be used in those sections, each firearm or the frame or receiver of the same shall constitute a distinct and separate offense under those sections.
>
> (l)For purposes of Section 12020, a violation of that section as to each firearm, weapon, or device enumerated therein shall constitute a distinct and separate offense.

A few years after the amendment to Penal Code section 12001, the court in *People v. Rowland* (1999) 75 Cal.App.4th 61 [88 Cal.Rptr.2d 900], addressed the continued applicability of *Kirk*. In *Rowland*, the defendant was charged with unlawful possession of a weapon while in state prison in violation of Penal Code section 4502. The *Rowland* court found that "with the addition of new subdivisions (k) and (*l*), the Legislature intended to permit application of the *Kirk* holding to any statute not specifically listed in the new subdivisions." The court found that the "Legislature gave thought to the exact statutes to which the rule would apply." The court stated

> We do not read the further expression of Legislative intent as making the list of statutes included in new subdivisions (k) and (l) open-ended to include even

> omitted weapons statutes such as section 4502, subdivision (a). Instead, we view this language as broadening the legislative overruling of the Kirk rule to include, not just the possession of illegal weapons at issue in Kirk, but also the manufacture, importation, sale, lease, receipt, *or* possession that is proscribed in the statutes specifically listed in subdivisions (k) and (*l*)

The court further opined that "[i]t would nullify the applicable rule of statutory construction to read into this legislative pronouncement an intent to extend the statutory definition of the word 'any' set forth in subdivisions (k) and (*l*) to all weapons statutes wherever found, even though only certain statutes were specified in those subdivisions. To hold otherwise would be to speculate the Legislature committed an oversight and then, by judicial opinion, to correct that oversight." (*Rowland, supra*, 75 Cal.App.4th at 67.)

Simply put, "[i]f the Legislature intends the word "any" [in a weapons statute] to have the same meaning as it does in section 12020, subdivision (a), it needs to say so." (*Rowland, supra*, 75 Cal.App.4th at 67.) Since the legislature is obviously capable of stating other areas in which the amendment applies, the fact that it did not do so to a particular statute evidences that it did not intend Penal Code section 12001's amendment to apply.

3. *KIRK'-ROWLAND'S* APPLICATION TO OTHER PENAL CODE SECTIONS

Defendant's are often charged with one count under 12280 for each "assault weapon." Penal Code section 12280 provides that "[a]ny person who, within this state, manufactures or causes to be manufactured, distributes, transports, or imports into the state, keeps for sale, or offers or exposes for sale, or who gives or lends *any* assault weapon . . . ."

The use of the word *any* has allowed for a straight application of *Kirk.* See Kirk motions in Burks and Kovac for discussion of legislative history also supporting this position.

Penal Code section 12303.2, provides, "[e]very person who recklessly or maliciously has in his possession *any* destructive device or *any* explosive on a public street or highway, in or near any theater . . ." The lessor included offense of straight possession under Penal Code section 12303 also provides that "[a]ny person, firm, or corporation who, within this state, possesses *any* destructive device, other than fixed ammunition of a caliber greater than .60 caliber . . . ."

Penal Code sections 12303 and 12303.2 utilize the "any" language.

In prior *Kirk* motions (*Burks*) it was argued that the proof of the lasting effect of *Kirk* on Penal Code section 12303.2 is Senate Bill 929. Under Senate Bill 929, the proposed changes to Penal Code section 12303.2 would read "[e]very person who recklessly or maliciously has in his *or her* possession ~~any~~ *a* destructive device or ~~any~~ *an* explosive on a public street . . . ."

In debating SB 929, the Legislature specifically mentions that it wishes to take some of the destructive device statutes (those which concern more than straight possession) out of the auspice of the *Kirk* case. In addressing the above-referenced changes, the Legislature is specifically

considering the background prepared by the California District Attorneys' Association. (See Exhibit B.) The District Attorney discusses the case of Al DeGuzman, who was caught with 54 bombs at his home, along with plans to commit a massacre at De Anza Community College. Mr. DeGuzman was convicted of 54 counts of willful and malicious possession of a destructive device in a public place and 54 counts of possession of a destructive device with the specific intent to injure a person or property. The District Attorney's findings stated that "[d]espite the defendant's detailed plan for each of the bombs, the court ruled that People v. Kirk (1989) 211 Cal.App.3d 58 and People v. Rowland (1999) 75 Cal.App.4th 61, barred conviction on all but two counts - one count of malicious possession of a destructive device and one count of possession of a destructive device with intent to injure. . . ." The Legislature, using the report from the District Attorney, has constructed a proposed change in the law which would allow for multiple counts of destructive device under select destructive device statutes.

4. *DEGUZMAN*

The facts of *Deguzman* are set out above. The *Deguzman* court noted that the defendant's arguments that only a single court is warranted "follow[ed] the Kirk-Rowland trail." The court also found that it "accept[ed] the Kirk-Rowland premise that the statutes are ambiguous in the sense that they do not necessarily define the unit of possession in singular terms." However, the court noted that "it does not follow that the rule of lenity applies to resolve the ambiguity in defendants favor." (545-46.)

The court then summarily states the legislative intent of 12303.2 and various DD statutes:12303, 12303.1, 12303.6, 12304,12308, 12309, and 12310. Without any cite to actual legislative history, the court noted that "[t]here can be no doubt that the Legislature enacted this network to single out destructive devices for special treatment because such devices are fundamentally different from ordinary weapons." The court also noted that "[a]lmost uniquely, bombs have an 'inherently dangerous nature.' [Citation.].... As one court has observed: 'A bomb has special characteristics which obviously differentiate it from all other objects. In the first place, the maker often loses control over the time of its detonation.... In the second place, it may wreak enormous havoc on persons and property. In the third place, its victims are often unintended sufferers. And finally, considering its vast destructive potentialities, it is susceptible of fairly easy concealment.' [Citation.]" (*Degusman* citing *People v. Morse*(1992) 2 Cal.App.4th 620, 646, 3 Cal.Rptr.2d 343.)

The court first states that "section 12303.3 itself which is fundamentally different from ordinary weapons statutes such as those at issue in Kirk and Rowland: rather than prohibiting mere possession, section 12303.3 equates possessing a bomb with exploding or attempting to explode a bomb." Therefore, the court starts out by saying that 12303.3 can be distinguished from the statutes in Kirk and Rowland because those cases dealt with straight possession of dangerous weapons. As seen below, the court later changes its position.

The opinion starts a downward spiral with a discussion of *People v. Ramirez* (1992) 6 Cal.App.4th 1762. *Ramirez* addressees PC 12308, where the defendant exploded a single device intending to murder two victims. On appeal, he contended that, since he exploded a single

device, he committed the *actus reus* of the crime only once and could not suffer two convictions. The court disagreed, noting that section 12308 defined the crime in terms of an act of violence against the person.

The *Deguzman* court then notes "[t]hus, under the reasoning of Ramirez, there can be no doubt that a person who explodes more than one device at the same time and place with intent to injure more than one person commits multiple violations of section 12303.3." Of course, this is a correct statement. If a defendant harms more than one person then he is subject to one count per person harmed. Regardless of whether there is one DD or 100 DD's. However, the court does not grasp this and misplaces the relevance of the definition of *any*. *Any* in 12308 deals with the DD—not the person killed. While *any* allows for multiple items to be treated as one (AW, DD, etc.), if the intent is to kill more than one person than each *person not device* allows for its own count. This reasoning has nothing to do with the *Kirk-Rowland* line of cases. The *Deguzman* court completely misses the point of *Ramirez* and the strong line of cases which allows for each person harmed to be it own crime–even if the same device was used on all persons. (See *Neal v. California* (1960) 55 Cal.2d 11; *People v. Gaither* (1959) 173 Cal.App.2d 662 (one bag of poisoned candy intended to kill family allows for separate counts.)

Armed with its misunderstanding of the rationale of *Ramirez,* the Deguzman court then justifies separate counts for each DD stating that "[w]e therefore discern a legislative intent that the word "any," as used with reference to exploding in section 12303.3, defines the unit of possession in singular terms." So, now that court has concluded that multiple devices constitute multiple crimes even if there is no intent to injure multiple people.

The court then notes that "[s]ince the Legislature has equated possessing with exploding in section 12303.3,[this statement is wholly without support] the term 'any' in section 12303.3 has the same meaning with reference to possessing as it has to exploding. (Id. noting *People v. Godwin* (1995) 31 Cal.App.4th 1112, 1117.) And there it is, the change of opinion on straight possession.

Keeping this "logic" going, the court then "discern(s) the same legislative intent concerning the use of the word "any" in section 12303.2" as it has made up for 12303.3. The court reasons that "[s]ections 12303.2 and 12303.3 are part of the same statutory scheme. The only material difference between them is that the former prohibits possession in certain places while the latter prohibits possession with an intent to injure or the like." The court then notes that "[i]t would be incongruous for the Legislature to intend that the word "any" have a different meaning in section 12303.2 than it has in section 12303.3."

The court then further justifies it finding by noting that "[i]llustrative of the Legislatures intent as to the meaning of the word "any" in the destructive-device network is section 12307." The court reasons that because 12307–a nuisance forfeiture statute– states that "[t]he possession of *any* destructive device in violation of this chapter shall be deemed to be a public nuisance and the Attorney General or district attorney ... may bring an action before the superior court to enjoin the possession of any destructive device. Any destructive device found to be in violation of this chapter shall be surrendered...."

The court notes that "[s]ection 12307 is plainly directed at each and every destructive device possessed by the person in question: an injunction would be ineffective unless directed at each and every device; the surrender obligation would be meaningless unless applied to each and every device. In other words, section 12307 uses the word "any" to define the unit of possession in singular terms."

The court seems to completely misunderstand the *any* argument. The court's argument is contrary to what it's point is. The court argues that if *any* were to used they way we believe it is then it would have to bring a 12307 against each item it wants to forfeit. This argument is exactly backwords. We are arguing that all DD be treated as a single count. Therefore ONE 12307 would go to ALL DD's. In the government's argument, EACH DD must be treated separately, therefore they would have to file a 12307 for EACH firearm. The use of the 12307 completely disproves their point, yet they rely on it.

IMPACT ON FUTURE CASES

1. **Deguzman does not address 12303–straight possession. However, the way the opinion is written, this holding will apply to 12303 and all DD statutes. So, the argument will be have to be made that Deguzman is wrong. The legislative history of 12301**

Penal Code section 12301 was added in 1967 following legislative passage of Assembly Bill 1326, introduced by Assembly member W. Craig Biddle on March 28, 1967. This bill was "one of four bills which were recommended by the Assembly Committee on Criminal Procedure as a result of interim studies conducted in 1966."

This committee did not undertake a general study of the subject of firearms control during the 1965-1967 interim period.' However, in the course of the committee's hearings on the Los Angeles riot the Attorney General of California and officers of the Los Angeles Police Department pointed out certain defects in the law governing the control of weapons. The committee felt that the problems pointed out by these officials were sufficiently serious to warrant holding a hearing for the purpose of taking additional testimony on the subject.

On October 13, 1966, the committee attended a demonstration firing, arranged by the Attorney General, to observe the operation and effect of certain military-type weapons and new firearms now generally available to private citizens in California. The following day, October 14, 1966, the committee convened in Los Angeles to take testimony from Attorney General Lynch, officials of the Los Angeles Police Department, and private citizens interested in weapons control.

With regards to "destructive devices," this same Report explained its concerns as follows:

1. "Destructive devices." The committee is concerned over the availability in

> California of antitank guns, land mines, hand grenades, mortars, and other military-type weapons. The tremendous destructive potential of these weapons makes them unfit for use outside the confines of a military reservation but they are nevertheless readily available through mail order houses and retail outlets around the state. While we have extensive provisions in the Penal Code regulating the sale and possession of concealable weapons there are no status regulating the sale or possession of military armaments.

There is an Enrolled Bill Memorandum analysis of Assembly Bill 1326 which described the bill, in part, as follows:

Assembly Bill 1326 deals with weapons and devices which are commonly referred to as "military-type weapons" and "heavy weapons"; such weapons are referred to in the bill as Destructive Devices.....

Assembly Bill 1326 defines Destructive Devices as bombs, grenades, and projectiles containing explosive or incendiary materials, and the devices for launching or firing such explosive weapons;..

It is important to note that Assembly Bill 1326 applies only to weapons the bill will not prohibit emergency or distress signaling flares, nor will it restrict pyrotechnics and fireworks devices.

Assembly Bill 1326 imposes penalties for the unlawful sale, possession and transportation of Destructive Devices. Appropriate law enforcement and military personnel and agencies are exempted from the operation of the bill. The bill makes provision for the possession and use of Destructive Devices on issues of a permit from the Bureau of Criminal Identification and Investigation. The Chief of the Bureau is authorized to issue such permits to commercial enterprise which deal in such devices as part of their business, as well as to motion picture and television studios who use such devices in the preparation of dramatic presentations.

Assembly Bill 1326 provides that the illegal possession of a Destructive Device is a public nuisance, and provision is made for the destruction and disposal of illegal devices when their retention as evidence, or for other legal purpose, is no longer necessary.

To understand the scope of the terms within the definition of "destructive devices" as used in section 12301, you may find it helpful to review the Assembly Committee's Report, which stated that its ".60-caliber limitation appears to be a reasonable dividing line since that is the distinction which the United States Army draws between small and heavy arms."

An Enrolled Bill Memorandum produced by the Legislative Secretary for the Governor also explained the terms in section 12301, stating as follows:

> The bill defines destructive devices as bombs, grenades, and projectiles containing explosive or incendiary materials, and the device for launching or firing such explosive weapons; examples of such devices are the "bazooka" and explosive cannon projectiles. Also included within [sic] the definition are weapons which fire fixed ammunition or which launch rockets as well as the ammunition and the rockets for such weapons, if the weapons are of a calibre larger than .60 calibre; an example of a weapon which would be included in this category are the anti-tank cannons which have become available through military surplus sources. (See Exhibit #3, document PE-2)

It is important to note that the legislative history of Penal Code section 12301 does not address an allowable unit of prosecution under the statute.

2. Deguzman does not address 12280. However, its "logic" would be applicable to that statute as well. The focus on AW's should be 1) Deguzman is wrong, 2) the AW legislative history is much more comprehensive than 12303 and shows that the legislature intended for single prosecution. Briefing on the application of the AW history is in *Burks* and *Kovac*.

Anytime a DA shepardizes Rowland, they will see Deguzman. Keep in mind that although the Deguzman court states that they rely on intent, the opinion in Deguzman really does not discuss what the legislative intent of 12301 is. A DA will likely argue that the rationale behind 12301 and 12280 – prior military use items which now serve to legitimate purpose.

Just like the history for PC 12301, the legislative history of Penal Code section 12280 does not address an allowable unit of prosecution under the statute. The relevant portions of Penal Code sections 12280 and 12276 were enacted in 1989 by Assembly Bill 357 and Senate Bill 292 (hereinafter "Roberti-Ross Act"). Senate Bill No. 23 (1999-2000 Reg. Sess.) (hereafter S.B. 23) sets forth additional firearms which are prohibited as defined under Penal Code section 12276.1.

Much like 12301, the legislative history of the Roberti-Roos Act and S.B. 23 also does not show a desire to make unusually harsh punishments part of the statute. In fact, the Robert-Ross Act is not an outright ban on the possession of "assault weapons."

The Legislature has also been particularly concerned with the difficulty of identifying which firearms fall under Penal Code section 12280. There is expressed concern about making once lawfully purchased and possessed firearms unlawful, thereby creating a risk of making persons unwitting felons. As the Legislature noted

> [C]onsidering the fact that the great majority of gun owners are law abiding citizens, regardless of their opinion of a particular law, it is unlikely that a 90% rate of noncompliance [with registration] can [be] explained as a concerted political statement. Far more likely is the possibility that owners of assault weapons were simply unaware of the deadline, *or unaware that their particular weapons were included on the list of proscribed firearms*.

(Sen. Com. on Judiciary, Rep. on Sen. Bill No. 263 (1991- 1992 Reg. Sess.) p. 3, italics added;

See *Harrott v. County of Kings* (2001) 25 Cal.4th 1138 [discussing history].)

The Legislatures were also careful to note that "*no public interest is served by punishing a large class of individuals for failure to perform due to insufficient disclosure of the law. Certainly, respect for the law is not served by the punishment of individuals lacking an opportunity to know its terms and conditions.* Thus, some additional opportunity for compliance, accompanied by a genuine education effort, seems reasonable." (*Id.* at p. 4, italics added; see *Harrott v. County of Kings*, *supra*, 25 Cal.4th at 1151, italics in original.)

While there is nothing affirmative in the legislative record which states the intent to allow a unit of prosecution for each firearm, the history is replete with concerns of making persons unknowing felons after they have lawfully purchased firearms.

The amendment to Penal Code section 12001 provides that "notwithstanding the fact that the term "any firearm" may be used in those [listed] sections, each firearm or the frame or receiver of the same shall constitute a distinct and separate offense under those sections." Relevant portions of Penal Code section 12280 were enacted in 1989. The amendment to Penal Code section 2001 was enacted five years later in 1994. Therefore, Penal Code section 12280 was in effect when the Legislature specifically noted that the *Kirk* ruling would not apply to Penal Code sections 12021, 12021.1, 12025, 12070, 12072, 12073, 12078, 12101, and 12020.

Further, when the amendments to Penal Code section 12280 took place in 2000, *Rowland* had been decided. The Legislature was undoubtedly aware of the courts ruling that any "Deadly Weapons" statute excluded from the 12001 list would still fall under the *Kirk*. Yet, the Legislature did nothing to take Penal Code section 12280 out of the auspices of *Kirk* and *Rowland*.

For decades, court opinions have clearly stated that if a legislative body wanted to make a statute allow for one count for each firearm, it could simply refer to "a firearm" rather than to "any firearm." When legislatures have use "a firearm," courts have found no ambiguity and have upheld separate conviction or punishment for each unlawful firearm possessed. (See *United States v. Alverson* (9th Cir.1982) 666 F.2d 341 [finding possession of machineguns in violation 26 United States Code section 5861(d) prohibiting the " 'unlawful for any person--(d) to receive or possess a firearm...." to allow one unit of prosecution for each firearm].)

The history of the "deadly weapons" statutes in California shows a clear ability to make each firearm a single offense when the legislature so desires. When the entire "Deadly Weapons" scheme is evaluated, it is evident that the Legislature is aware that "any firearm" is ambiguous, and has taken measures to define the term under certain statutes. (See Pen. Code, § 12001.) The Legislature has not done so for Penal Code section 12280. As of the filing of this motion, there does not appear to be any legislation pending which would amend Penal Code section 12280, nor does it seem likely. The Legislature has reserved its ability to make one unit of prosecution for each item almost exclusively for crimes greater than mere possession. As noted in the above-mentioned SB 929 debate, the records reflect that the Legislature has considered that "Kirk and Rowland involved statues that apply to the mere possession of a weapon. In contrast, the Penal Code Section 12303.3 requires the intent to injure, intimidate, terrify or destroy."

Penal Code section 12280 concerns mere possession of an item, which appears to be what the Legislature is stating does not warrant multiple counts in SB 929. The "Deadly Weapon" statutes taken together show that the Legislature is aware that "any" is ambiguous and can clear

up the ambiguity if it so desires.

Beyond the language of the statute, cases often focus on the intent of the person possessing the items. "If possession of the two weapons were but a single 'course of conduct,' the double punishment proscription would apply. (*People v. Wasley* (1966) 245 Cal.App.2d 383 [53 Cal.Rptr. 877] citing *Neal v. State of California* (1961) 51 Cal.2d 11 [9 Cal.Rptr. 607, 357 P.2d 839].) "But that turns on whether the course of conduct is divisible, which in turn depends upon the 'intent and objective of the actor'" (*Wasley*, supra, citing *Neal,* 51 Cal.2d at 19.)

While the alleged firearms in the instant case may be separate firearms, they are all alleged to violate Penal Code section 12280's prohibition against "assault weapons." In *Kirk*, the court noted that 12020 "makes no distinction between rifles and shotguns so long as they are the illegal dimensions fixed by the statute." (*Kirk, supra*, 211 Cal.App.3d at 61.) "Therefore, multiple convictions cannot be sustained by drawing an analogy to cases that have upheld multiple convictions for possession of different *kinds* of illegal narcotics." (*Id.* noting *In re Adams* (1975) 14 Cal.3d 629, 635 [122 Cal.Rptr. 73, 536 P.2d 473] and authorities cited; *In re Hayes* (1969) 70 Cal.2d 604, 606 [75 Cal.Rptr. 790, 451 P.2d 430], and authorities cited.) Rather, the question is whether defendant can be twice convicted for possessing two of the same kind of illegal item. (*Kirk, supra*, 211 Cal.App.3d at 61; noting e.g., *In re Adams, supra*, 14 Cal.3d at p. 635.) Here, Penal Code section 12280 makes no distinction as to "assault weapons," making all similarly illegal under the statute.

Penal Code section 12280 utilizes language which has been repeatedly held to allow for one unit of prosecution for all items, particularly when used in firearm statutes. The Legislative history shows that when the Legislature amended to statutes to allow for each firearm to be charged in separate counts, it did not include Penal Code section 12280. And the statutory scheme shows a desire to make multiple prosecutions allowed when there is more than mere possession. Taken as a whole, there can be no doubt that the Legislature has had every opportunity to draft and amend the statute and chose not to.

DIFFERENCES

If a DA argued Deguzman on a 12280 case, I would first argue that Deguzman is limited to DD's. I would also argue the differences in legislative intent. For example, 12280 is not a statute which bans the items, merely regulates them. Also there is more history of firearms cases which allow for firearms to be treated as one. Also, and most importantly, I would argue that the changes to 12001 after Kirk specifically relate to section 12280.