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6 Attorney for Defendant, Ludovic Rosenberger

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 COUNTY OF LOS ANGELES - TORRANCE

9 PEOPLE OF THE STATE OF

10 CALIFORNIA,

11 Plaintiff,

12 Vs.

13 LUDOVIC ROSENBERGER,

14 Defendant.

) Case No.: YA048860

) **NOTICE OF MOTION TO DISMISS**

) **(Pursuant to Penal Code §§995; 1385)**

) DATE: January 24, 2002

) TIME: 0830 am

) DEPT.: "G"

15 **TO THE ABOVE-ENTITLED COURT AND TO THE DISTRICT ATTORNEY OF LOS**  
16 **ANGELES COUNTY, STATE OF CALIFORNIA:**

17  
18 **PLEASE TAKE NOTICE** that on January 24, 2002, in Department "G" at 0830 hrs, or  
19 as soon thereafter as the matter may be heard, the defendant will move that the Court  
20 set aside the information under Penal Code section 995 because the defendant was  
21 committed without reasonable or probable cause under count(s) one through three,  
22 which each allege violations of Penal Code section 12280. This motion will be based on  
23 the attached memorandum of points and authorities, the preliminary hearing transcript,  
24 and on argument at the hearing on this motion.

25 Dated: 01/11/02

26  
27 **COPI**  
28 Barry O. Bernstein  
Attorney for the Defendant

1  
2 **FACTS**

3 Defendant Ludovic Rosenberger, is being charged in the Felony Complaint with  
4 violating Penal Code sections 12280(b) - Possession of an Assault Weapon, to wit  
5 Norinco 84-S; Penal Code §12280(b) - Possession of an Assault Rifle to wit a  
6 Thompson Cal .45 Carbine; Penal Code §12280(b) - Possession of an Assault Rifle, to  
7 wit a Kimel Industries AP-9 Assault Weapon.  
8

9 The defendant is a white male of Romanian descent, who resides in a lower  
10 class, primarily black neighborhood in the City of Los Angeles. There is a long history  
11 of neighborhood conflict between the defendant and neighbors. In the incident reports,  
12 deputies stated that they personally have "a unique knowledge of the current situation  
13 involving" the parties.  
14

15 On or about July 14, 2001, Los Angeles Sheriff Deputies responded to 1424  
16 103<sup>rd</sup> Street in the city of Los Angeles regarding a call from both Defendant  
17 Rosenberger and neighbors. It was alleged that defendant Rosenberger had a weapon.  
18 Defendant Rosenberger also asserted that the neighbors were throwing rocks at him  
19 and his house (which is the above location).  
20

21 Upon arriving at the scene, officers observed Mr. Rosenberger standing on his  
22 front lawn. He was not described as having anything in his hands, including a weapon.  
23 Mr. Rosenberger was detained for further questioning. The deputies performed a  
24 "protective sweep" of the residence.  
25

26 In the course of this search, deputies seized two assault rifles from a closet  
27 inside of a bedroom.  
28

1 According to the Incident Reports, the Kimel Industries 9 mm pistol was  
2 registered to Mr. Rosenberger in AFS. Other weapons seized were not and Mr.  
3 Rosenberger was charged for failing to register.  
4

5 This charge is the subject of this motion. Defendant will move to dismiss these  
6 allegations from the Complaint.

7 On or about November 2, 1993, Mr. Rosenberger purchased a Thompson .45  
8 firearm (Attached is a copy of the purchase receipt).  
9

10 On or about 1987 (unknown exact date), Mr. Rosenberger purchased the  
11 Norinco – 84-S firearm. Pursuant to Penal Code §12280 (b), weapons purchased prior  
12 to June 1, 1989 are exempt if either registered or relinquished.

13 On or about September 29, 1993, Mr. Rosenberger purchased the Kimel  
14 Industries AP-9 firearm. (Attached is a copy of the purchase receipt).  
15

16 These firearms were lawfully kept at Mr. Rosenberger's residence. The firearms  
17 were legally purchased, but the firearms were not registered pursuant to the statute he  
18 is being charged under.  
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1 Defendant submits the following points and authorities in support of the motion to  
2 dismiss:

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4 **SUMMARY OF ARGUMENTS**

- 5 1. The State was aware that the defendant possessed the weapons, however, the  
6 State never notified the defendant of the requirements to register them under the  
7 statute.
- 8 2. Violation of Due Process: The statute contemplated that those rightfully in  
9 possession of such weapons would be difficult to reasonably and properly notice  
10 of the requirements to register. Mr. Rosenberger has now suffered exactly that  
11 which the legislature anticipated.
- 12 3. Public Policy: There is no rational basis for the statute to apply as a felony when  
13 the failure to register is merely an administrative regulation without any clear  
14 function.
- 15 4. There is a violation of Equal Protection of the application of the statute.
- 16 5. The defendant, having now learned of the failure to register and the requirements  
17 of the statute, has no ability to make good.
- 18 6. The allegations in Counts 2 and 3 of the Felony Complaint alleging possession of  
19 a Thompson Assault Rifle and Kimel Industries AP-9 are not plainly designated  
20 as "assaults weapons" in Penal Code section 12276 of the statute.
- 21 7. The Dangerous Weapons Control Laws (Roberti-Roos Assault Weapons Control  
22 Act of 1989) – aka Penal Code sections 12275-12290 are extremely intricate,  
23 convoluted and difficult to understand to defense counsel, that to expect a lay  
24 person to understand and follow them is unreasonable and violates the notice  
25 requirements of due process.
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1 **ARGUMENTS**

2  
3 **The State was aware that the defendant possessed the weapons, however, the**  
4 **State never notified the defendant of the requirements to register them under the**  
5 **statute.**

6 The defendant recorded and registered the weapons with the state when the weapons  
7 were originally purchased by an through the gun dealers, who act as agents and under  
8 the authority of the state in the regard of the sales of weapons. The defendant paid  
9 state sales tax when the weapons were purchased. The State of California is and was  
10 at all times aware that Mr. Rosenberger possessed the weapons.

11 Additionally, Mr. Rosenberger never intentionally or knowingly attempted to hide  
12 or secretly own the weapons. Although the state had records and documentation of the  
13 ownership of the weapons, and that Mr. Rosenberger possessed them, the state never  
14 properly or reasonably notified the defendant of the need for the registration  
15 requirements.

16  
17 **Violation of Due Process: The statute contemplated that those rightfully in**  
18 **possession of such weapons would be difficult to reasonably and properly notice**  
19 **of the requirements to register. Mr. Rosenberger has now suffered exactly that**  
20 **which the legislature anticipated.**

21 The legislature contemplated that the Department of Justice should avoid and not  
22 trap individuals, like Mr. Rosenberger, in a situation of failing to reasonably notify and  
23 inform of the laws under this section. Secondly, they anticipated the need for avoidance  
24 of drafting voluminous and complex laws.

25 Penal Code Section 12289 specifically contemplated this and states in relevant

26 part:

27 *(a) The Department of Justice shall conduct a public education and notification*  
28 *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*

1 *of public service announcements in a variety of media approaches, to ensure*  
2 *maximum publicity of the limited forgiveness period of the registration*  
3 *requirement specified in subdivision (f) of Section 12285 and the consequences*  
4 *of nonregistration. The department shall develop posters describing gunowners'*  
5 *responsibilities under this chapter which shall be posted in a conspicuous place*  
6 *in every licensed gun store in the state during the forgiveness period.*

7 Defendant challenges specifically: what was accomplished under these  
8 requirements and guidelines to notice him?

9 Accordingly, and as true with all statutes, there was a need to provide adequate  
10 notice to those affected or potentially affected by the statute. Mr. Rosenberger has thus  
11 in effect been ensnared in this "Catch 22 situation" whereas the statute has been  
12 applied in a manner whereas no adequate notice has been presented to those intended  
13 to be reached under the statute. Application of this statute to one who has in all good  
14 faith possessed such weapons without the understanding of the need to register, has  
15 therefore violated the clear legislative intent of the statute.

16 Secondly, and more obvious, is the clear violation of due process under state  
17 and federal constitutions.

18 **Public Policy: There is no rational basis for the statute to apply as a felony when**  
19 **the failure to register is merely an administrative regulation without any clear**  
20 **function.**

21 Making it a felony for an individual gun owner, with no criminal history, who  
22 collects, and in good faith possesses a firearm in his own home, violates any  
23 reasonable public policy interest.

24 There is simply no reason for failing to register to be a felony.

25 It is unconstitutional whereas there is no public purpose served for the violation  
26 of the statute to be a felony because it is merely an administrative regulation. The  
27 purpose alleged under the intent (Penal Code section 12275.5) cites the "...health,  
28 safety and security of all citizens of this state..." What difference does making it a

1 felony, versus an infraction have on this alleged protective interest? It furthers no better  
2 interest one way or the other.

3 Secondly, the stated intent indicates that it does not intend to limit the lawful use  
4 (Penal Code § 12275.5).

5 Penal Code Section 12275.5 (Legislative Intent) states in part that:

6 "...It is not, however, the intent of the Legislature by this chapter to  
7 place restrictions on the use of those weapons which are primarily  
8 designed and intended for hunting, target practice, or other legitimate  
9 sports or recreational activities."  
10

11  
12 The statute is unequally applied

13 The penal consequences under the statute are conflicting and somewhat  
14 meaningless in their rationale. For example, Penal Code section 12280(a)(1) makes it a  
15 **FELONY** to "manufacture...distribute...sell..." an assault weapon. Penal Code section  
16 12280(b) [which the defendant has been charged], makes it a "**PUBLIC OFFENSE** and  
17 upon conviction shall be punished by imprisonment in the state prison, or in county jail,  
18 not exceeding one year..." for possession of any assault weapon. Penal Code section  
19 12280 (c) makes it an **INFRACTION** for a first time violation of subdivision (b) if certain  
20 requirements have been met, including but not limited to proof of prior possession prior  
21 to when it was defined an assault weapon (subsection (1), no previous convictions  
22 (subsection 3), person has since registered the weapons (subsection(5)).  
23  
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26 Penal Code section 12280(d) even mandates the return of any firearms seized  
27 under the previous section.  
28

1 So if the intent of this statute was really to "place restrictions on the use of  
2 assault weapons" (Penal Code section 12275.5), then such restriction must be so  
3 equivocally applied so as to perform the function intended. It has not.  
4

5 **Violation of Equal Protection**

6 Accordingly and considering the aforementioned examples - had the defendant  
7 registered said weapons several months prior to being charged, he may have merely  
8 suffered an infraction or misdemeanor, and even as much of potentially the return of the  
9 weapons. Instead, because of when he was found in possession, he faces the threat of  
10 a felony. Where is the rationale in this application?  
11

12 There is clearly an equal protection issue raised since the application of the  
13 statute does not treat people similarly situated the same. The defendant Mr.  
14 Rosenberger, faces a potential felony merely because of the timing of when he was  
15 found in possession of weapons - that had someone else possesses months earlier,  
16 they would be facing different penal consequences. This lacks logical congruence and  
17 violates fundamental Equal Protection of laws under the constitution.  
18

19 Finally, once the weapons are actually registered, there will be nothing done with  
20 the registration. The defendant Mr. Rosenberger, is not a registered felon, sex offender  
21 or high risk citizen under the close watch of the Department of Justice. He is a citizen  
22 who collects weapons as is his right. Arguendo, assuming he had registered within the  
23 statutory time frames, the Department of Justice would be in no better position.  
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2 **The defendant, having now learned of the failure to register and the requirements**  
3 **of the statute, has no ability to make good.**

4       There is no policy reason or reasonable purpose for not allowing the opportunity  
5 to register once found in possession. The defendant, in good faith, has since attempted  
6 to register the weapons and has been denied.

7  
8 **The allegations in Counts 2 and 3 of the Felony Complaint alleging possession of**  
9 **a Thompson Assault Rifle and Kimel Industries AP-9 are not plainly designated as**  
10 **“assaults weapons” in Penal Code section 12276 of the statute.**

11       Penal Code section 12276 (a) designates what shall be considered “assault  
12 weapons” under the act, and the Thompson and Kimel Industries do not appear to be  
13 contained in the list. At least, under defense counsel’s reasonable person-laymen  
14 understanding of weapons, cannot find them in the act.

15  
16 **The Dangerous Weapons Control Laws (Roberti-Roos Assault Weapons Control**  
17 **Act of 1989) – aka Penal Code sections 12275-12290 are extremely intricate,**  
18 **convoluted and difficult to understand to defense counsel, that to expect a lay**  
19 **person to understand and follow them is unreasonable and violates the notice**  
20 **requirements of due process.**

21       The crux problem with defendant being charged with a felony under the statute  
22 lies in the language of the statute itself. The statute is extremely complicated and  
23 difficult for the reasonable person to figure out and understand. It has changed so  
24 many times and so many advisory opinions and amendments have been published.  
25 The dates and retroactivity and “grace periods” complicate the notice element of the  
26 statute.

27       Defense counsel challenges the court to figure out how to apply the statute.  
28 (Attached is a copy of Penal Code sections 12275-12290).

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**POINTS AND AUTHORITIES**

The Defendant Rosenberger has been charged with three counts of violating Penal Code §12280(b) which states In part::

*“...any person who, within this state, possesses any assault weapon, except as provided in this chapter, is guilty of a public offense and upon conviction shall be punished by imprisonment in the state prison, or in a county jail, not exceeding one year. However, if the person presents proof that he or she lawfully possessed the assault weapon prior to June 1, 1989, or prior to the date it was specified as an assault weapon, and has since either registered the firearm and any other lawfully obtained firearm specified by Section 12276 or 12276.5 pursuant to Section 12285 or relinquished them pursuant to Section 12288, a first-time violation of this subdivision shall be an infraction punishable by a fine of up to five hundred dollars (\$500), but not less than three hundred fifty dollars (\$350), if the person has otherwise possessed the firearm in compliance with subdivision (c) of Section 12285. In these cases, the firearm shall be returned unless the court finds in the interest of public safety, after notice and hearing, that the assault weapon should be destroyed pursuant to Section 12028. [Emphasis added].*

**Background of the statute**

Section 12285 generally provides a procedure whereby persons who lawfully possessed an assault weapon prior to June 1, 1989, must register the weapon, and describes the conditions under which the registered weapon may be possessed. Section 12285, subdivision (a) originally established the requirement that all such assault weapons had to be registered by January 1, 1991. In 1991 section 12285 was

1 amended to, inter alia, add subdivisions (f) and (g). (Stats. 1991, ch. 954, § 5 (SB No.  
2 263).) Section 12285, subdivision (f) provided that: "For 90 days following the effective  
3 date of Senate Bill 263 of the 1991-1992 Regular Session, a forgiveness period shall  
4 exist to allow persons specified in subdivision (b) of Section 12280 to register with the  
5 Department of Justice assault weapons which they lawfully possessed prior to June 1,  
6 1989." (Italics added.) The effect of the addition of subdivision (f) was to give those  
7 persons who had failed to register qualifying assault weapons by January 1, 1991,  
8 another opportunity to do so. Subdivision (g) provided that any person who takes  
9 advantage of the forgiveness period to register, "shall not be charged with a violation of  
10 subdivision (b) of section 12280, if law enforcement becomes aware of that violation  
11 only as a result of the registration of the assault weapon." (Pen. Code, § 12285, subd.  
12 (g).) Pursuant to section 12285, subdivisions (f) and (g), registration within the  
13 "forgiveness period" may constitute a complete defense to a section 12280 subdivision  
14 (b) charge, if the police became aware of the violation only as a result of the  
15 registration.

16  
17  
18 **Knowledge of Characteristics of the weapons and the statute**

19 Provision of Assault Weapons Control Act (AWCA) criminalizing possession of  
20 an assault weapon requires knowledge of, or negligence in regard to, the facts making  
21 possession criminal; the People bear the burden of proving the defendant knew or  
22 reasonably should have known the firearm possessed the characteristics bringing it  
23 within the AWCA. In re Jorge M. (2000) 98 Cal.Rptr.2d 466, 23 Cal.4th 866, 4 P.3d 297,  
24 rehearing denied.

25 Question of the defendant's knowledge or negligence that the firearm possessed  
26 the characteristics bringing it within the Assault Weapons Control Act (AWCA) is for the  
27 trier of fact to determine, and depends heavily on the individual facts establishing  
28

1 possession in each case. In re Jorge M.(2000) 98 Cal.Rptr.2d 466, 23 Cal.4th 866, 4  
2 P.3d 297, rehearing denied.

3 Any duty of reasonable inquiry into whether possessed weapon had  
4 characteristics bringing it within the Assault Weapons Control Act (AWCA) must be  
5 measured by the circumstances of possession; one who was in possession for only a  
6 short time, or whose possession was merely constructive, and only secondary to that of  
7 other joint possessors, may have a viable argument for reasonable doubt as to whether  
8 he or she either knew or reasonably should have known the firearm's characteristics. In  
9 re Jorge M.(2000) 98 Cal.Rptr.2d 466, 23 Cal.4th 866, 4 P.3d 297, rehearing denied.

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12 I.

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14 **TO ENFORCE THE STATUTE AS IT NOW READS WOULD VIOLATE THE**  
15 **PROHIBITION AGAINST EX POST FACTO LAWS**

16  
17 In California, a statute may not be applied retrospectively to change the legal  
18 consequences of past conduct to the detriment of defendants. Article I, §9, of the  
19 California Constitution and Article I, §10, of the United States Constitution both prohibit  
20 the enactment of ex post facto laws.

21  
22 A statute violates the ex post facto clause of the federal Constitution if it either: (1)  
23 makes criminal an act that was not criminal at the time it was done; (2) increases the  
24 penalty for a crime after its commission; or (3) alters the legal rules of evidence in order  
25 to convict the offender. (Collins v. Youngblood (1990) 497 US 37, 111 L Ed 2d 30, 110  
26 S Ct 2715; Cal. Dept. of Corrections v. Morales (1995) 514 US 499, 115 S. Ct. 1597,  
27 1601-1602.)  
28

1 The California Supreme Court has stated in defining the ex post facto clause found in  
2 both the California and the federal Constitutions:

3  
4 "Each prohibits retroactive application to a criminal defendant of a statute or  
5 statutory amendment which enlarges the elements of an offense—making criminal  
6 conduct that was encompassed within the statutory definition of the offense at the  
7 time of the defendant's conduct, lessens the People's burden of proof, or increases  
8 the penalty over that in effect at the time of the crime. [Citations omitted.]" (People v.  
9 Jennings (1988) 46 Cal 3d 963, 984, 251 Cal Rptr 278, 760 P2d 475.)

10  
11 "The purpose of the constitutional provisions prohibiting ex post facto laws is to assure  
12 that the Legislature gives fair warning of the effects of the law and permit individuals to  
13 rely upon the law until changed." (People v. Carrasco (1988, 2nd Dist) 202 Cal App 3d  
14 1078, 1081, 249 Cal Rptr 154.)

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18 II.

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20 II.

21 **A DEFENDANT CAN SUGGEST THAT A COURT CONSIDER DISMISSAL OF**  
22 **CHARGES AGAINST HIM UNDER PENAL CODE §1385**

23  
24 A court may, either upon its own motion or upon motion of the prosecuting attorney,  
25 order that an action be dismissed 'in furtherance of justice.' In so doing, the court must  
26 set forth its reasons for dismissing the charge in an order entered upon the minutes.  
27 (California Penal Code §1385.)  
28

1 "[W]hile a defendant can informally suggest that a court consider a dismissal of  
2 charges against him, section 1385 does not provide for a formal motion by the  
3 defense to accomplish the same result." (People v Smith (1975, 1st Dist) 53 Cal App  
4 3d 655, 657, 126 Cal Rptr 195.)  
5

6 **III.**  
7

8 **A COURT HAS BROAD DISCRETION TO DISMISS AN ACTION UNDER PENAL**  
9 **CODE §1385 IN FURTHERANCE OF JUSTICE**  
10

11 A court has "broad" power to dismiss an action under Penal Code §"[T]he language  
12 of that section, 'furtherance of justice,' requires consideration both of the constitutional  
13 rights of the defendant, and the interests of society represented by the People, in  
14 determining whether there should be a dismissal. [Emphasis deleted.] ... At the very  
15 least, the reason for dismissal must be 'that which would motivate a reasonable judge.'  
16 (People v Orin (1975) 13 Cal 3d 937, 945, 120 Cal Rptr 65, 533 P2d 193.)  
17

18 **CONCLUSION**  
19

20 The court should exercise its broad discretion and dismiss this action under Penal  
21 Code §1385 for the following reasons:  
22

- 23
- 24 8. The State was aware that the defendant possessed the weapons, however, the  
25 State never notified the defendant of the requirements to register them under the  
26 statute.
  - 27 9. Violation of Due Process: The statute contemplated that those rightfully in  
28 possession of such weapons would be difficult to reasonably and properly notice

1 of the requirements to register. Mr. Rosenberger has now suffered exactly that  
2 which the legislature anticipated.

3 10. Public Policy: There is no rational basis for the statute to apply as a felony when  
4 the failure to register is merely an administrative regulation without any clear  
5 function.

6 11. There is a violation of Equal Protection of the application of the statute.

7 12. The defendant, having now learned of the failure to register and the requirements  
8 of the statute, has no ability to make good.

9 13. The allegations in Counts 2 and 3 of the Felony Complaint alleging possession of  
10 a Thompson Assault Rifle and Kimel Industries AP-9 are not plainly designated  
11 as "assaults weapons" in Penal Code section 12276 of the statute.

12 14. The Dangerous Weapons Control Laws (Roberti-Roos Assault Weapons Control  
13 Act of 1989) – aka Penal Code sections 12275-12290 are extremely intricate,  
14 convoluted and difficult to understand to defense counsel, that to expect a lay  
15 person to understand and follow them is unreasonable and violates the notice  
16 requirements of due process.

17  
18 The defendant therefore moves for an order setting aside the information filed herein  
19 in Counts one through three.

20  
21  
22 Dated: 01/11/02

\_\_\_\_\_  
Barry O. Bernstein  
Attorney for Defendant