SENIOR COUNSEL
C. D. MICHEL*

SPECIAL COUNSEL
JOSHUA R. DALE
W. LEE SMITH

ASSOCIATES
ANNA M. BARVIR
SEAN A. BRADY
SCOTT M. FRANKLIN
THOMAS E. MACIEJEWSKI
CLINT B. MONFORT
TAMARA M. RIDER
JOSEPH A. SILVOSO, III
LOS ANGELES, CA

*ALSO ADMITTED IN TEXAS

WRITER'S DIRECT CONTACT:
562-216-4444
CMICHEL@MICHELLAWYERS.COM

MICHEL & ASSOCIATES, P.C.
Attorneys at Law

OF COUNSEL
DON B. KATES
BATTLEGROUND, WA

RUTH P. HARING
MATTHEW M. HORECZKO
LOS ANGELES, CA

GLENN S. MCROBERTS
SAN DIEGO, CA

AFFILIATE COUNSEL
JOHN F. MACHTINGER
JEFFREY M. COHON
LOS ANGELES, CA

DAVID T. HARDY
TUCSON, AZ

February 15, 2013

Honorable Tani G. Cantil-Sakauye, Chief Justice
and the Honorable Associate Justices
SUPREME COURT OF CALIFORNIA
350 McAllister Street
San Francisco, CA 91402-4797

VIA HAND DELIVERY

Re: *People v. Tien Duc Nguyen*, Cal. App. Fourth Dist. No. G046081
Request for Depublication (Cal. Rules of Court, rule 8.1125)

Honorable Chief Justice and Associate Justices of the California Supreme Court:

We write on behalf of our clients, *FFLGuard*, the licensed firearm dealers it represents in California, and the CRPA Foundation. Under California Rules of Court, rule 8.1125(a)(1), our clients request depublication of *People v. Nguyen* (2013) 212 Cal.App.4th 1311 [151 Cal.Rptr.3d 771] in its entirety. Alternatively, our clients seek depublication of Section II, subsections A-C of the opinion, discussing the "Right to Possess Unassembled Parts," "Attempt," and "Statutes Unconstitutional as Applied."

I. INTEREST OF *FFLGUARD* AND CRPA FOUNDATION

FFLGuard is a legal service program offered by attorneys versed in state and federal firearm laws. The *FFLGuard* program is designed to provide Federal Firearms Licensees (FFLs) nationwide with legal assistance concerning state and federal firearm laws and regulations. *FFLGuard* provides regulatory compliance assistance, assessments of ATF regulated premises, and legal advice and representation. *FFLGuard*'s clients in California are all state and federally licensed firearm dealers, and they all sell firearms within the state of California.

CRPA Foundation is a non-profit entity classified under section 501(c)(3) of the Internal Revenue Code and incorporated under California law. CRPA Foundation represents the interests of California Rifle and Pistol Association members who own and possess firearms in the state of California, including gun collectors, hunters, target shooters, law enforcement, and those who choose to own a gun to defend themselves and their families.

Members of both *FFLGuard* and CRPA Foundation own and possess firearms that are legal to sell and possess in California, including some properly registered legal "assault weapons" and firearms similar in appearance and function, but do not meet the legal definition of an "assault weapon" and so did not need to be registered. Further, it is common for a licensed FFL or individual to posses the parts necessary to assemble an "assault weapon," but lack the intent to create such a firearm.

Unless depublished, the *Nguyen* decision will create uncertainty regarding what firearm parts an FFL or individual may possess legally. Law enforcement and firearm owners, including members of *FFLGuard* and CRPA Foundation, need clear authority interpreting the already confusing "assault weapon" laws in California. The decision only creates further confusion, which will ultimately result in the improper arrests, prosecutions, and convictions of law-abiding firearm sellers and owners.

II. STATEMENT OF FACTS

Detective Brian Chapman of the Orange County Auto Theft Task Force came to search Defendant Tien Duc Nguyen's automobile repair shop. (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 776.) When Detective Chapman asked if Mr. Nguyen had any weapons on the premises, Mr. Nguyen affirmatively responded that he had a .50 caliber DTC hunting rifle. (*Ibid.*) Detective Chapman noticed the rifle had no serial number or manufacturer's name.

Mr. Nguyen explained that he purchased the uncompleted lower portion of the rifle from the Internet and personally assembled it. (*Ibid.*) Mr. Nguyen also revealed .50 caliber DTC ammunition, .50 caliber Beowulf ammunition, and "AK-47" rifle parts that he planned to assemble. (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 776.)

Upon examining the "AK-47" parts kit, Detective Chapman observed that the receiver lacked a serial number or manufacturer's name. (*Id.* at p. 777.) Like the .50 caliber hunting rifle, Mr. Nguyen admitted he had purchased the AK-47 "flat" receiver[1] on the Internet and personally bent the receiver into shape for assembly. (*Ibid.*) When asked by Detective Chapman whether he knew it was wrong for him to have and make his own "AK-47," Mr. Nguyen admitted that he knew it was wrong. (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 777.)

Detective Chapman confirmed with the Santa Ana Police Department's forensic service and the Orange County Sheriff's Department that the kit contained all the parts necessary to make an "AK-47."

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[1] A "flat" is an unfinished part of a firearm that still requires work by the owner to complete. Persons commonly make firearms by acquiring flats, completing (bending and drilling) the flat into a "receiver," and assembling the rest of the parts. The "receiver" is the part of a firearm that is commonly considered a "firearm" under both state and federal law. (Pen. Code, § 16520, subd. (b); 18 U.S.C. § 921(a)(3)(B)). Because a flat is not a completed receiver, flats do not need to be transferred by a licensed firearm dealer. Typically in California, completed receivers must be acquired through a licensed firearm dealer. (Pen. Code, § 27545). All of the other parts of a firearm may usually be gathered without purchasing them from a licensed firearm dealer.

California and federal laws do not generally prevent a person from making a firearm for their personal use (provided the end result is not a firearm the person is prohibited from making or possessing). One must be considered to be engaged in the business of manufacturing firearms before being required to have a state or federal license as a firearm "manufacturer." (18 USC § 922(a)(1)(A); Pen. Code, § 29010).

(*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 777.) The kit possessed the bolt to fire centerfire ammunition, a magazine release, a folding stock, and a forward pistol grip. (*Ibid.*)

Mr. Nguyen's trial counsel called a firearm expert, Michael Penhall, who testified that an additional part could have been purchased (i.e., a magazine disconnect locking device), and with it a legal firearm with a non-detachable as opposed to a "detachable" magazine (i.e., a California legal firearm not considered to be an "assault weapon") could have been made from the parts Nguyen possessed. (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 783.)

III. PROCEDURAL HISTORY

Mr. Nguyen was charged with possession of a firearm by a former felon (Pen. Code, § 39800, subd. (a) [formerly Pen. Code, § 12021, subd. (a)(1)][2] and possession of ammunition by a prohibited person (Pen. Code, § 30305(a) [formerly 12316(b)(1)]), attempted "assault weapon" activity (Pen. Code, § 664, subd. (a); Pen. Code, § 30600 [formerly Pen. Code, § 12280, subd. (a)(1)]), and attempted possession of an "assault weapon" (Pen. Code, § 664, subd. (a); Pen. Code, § 30605[formerly Pen. Code, § 12280, subd. (b)]; *Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 777). It was also alleged that Mr. Nguyen was previously convicted of a serious and violent felony – i.e., carrying a concealed firearm by a member of a criminal street gang. (*Ibid.*)

He pleaded guilty to the possession of firearm and ammunition charges before trial, and he was convicted of the two attempted "assault weapon" charges by a jury. (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 777.) The Court of Appeals affirmed Mr. Nguyen's convictions. (*Id.* at pp. 780-92.)

IV. DEPUBLICATION OF *PEOPLE v. NGUYEN* IS WARRANTED

Mr. Nguyen was charged with *attempted* illegal "assault weapon" activity and *attempted* possession of an "assault weapon." Mr. Nguyen's counsel and the court, however, unnecessarily focused on the defense to *possession* of "assault weapons," instead of considering whether there was sufficient evidence that Mr. Nguyen had the requisite intent to *attempt* to fabricate and possess a firearm meeting the definition of an "assault weapon," i.e., one that would have had a "detachable" magazine and did not incorporate a magazine disconnect locking device that would render the magazine non-detachable. (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 777-778, 780-782.)

Consequently, the *Nguyen* decision is overly broad and confusing in its interpretation of the circumstances under which one may not possess the parts of an "assault weapon." The court even goes so far as to question whether the possession of these parts alone is a violation of California law – an issue not before them.

As a practical matter, tens of thousands of gun owners have relied on the Department of Justice's representation that possession of the parts that could be used to assemble an "assault weapon" does not constitute possession of an "assault weapon." If the *Nguyen* decision remains published, this

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[2] This case was filed before the renumbering of California's firearm laws in 2012. For clarity, both the current and former code sections are listed.

well-accepted wisdom will be called into question. The DOJ advises firearm dealers that if the dealer removes the parts that make a firearm an "assault weapon," they may possess and sell the firearm.[3]

A. Summary of California "Assault Weapon" Law

1. The Complexity of California "Assault Weapons" Law is Well Documented

The term "assault weapon" has no meaning in technical firearms parlance. It is a legal term defined by statute and administrative regulations. As a result, there is sincere confusion about what constitutes an "assault weapon." Private citizens, as well as police, prosecutors, and judges, share in this confusion.

For instance, in 2001, Fresno District Attorney Edward Hunt and the Law Enforcement Alliance of America ("LEAA") (a national association of law enforcement officers and civilians) challenged the "assault weapon" law for vagueness. The lawsuit alleged that the DOJ's regulations for implementing the law, which were supposed to clarify the terms used in the original statute, failed to clarify anything. The suit further alleged that the laws provide insufficient guidance to determine what features are prohibited and to enforce the law fairly.

Michael Bradbury, former Ventura County District Attorney, agrees that "deciphering these regulations is a near impossible task. If the Legislature wants to condemn a subclass of firearms, they have to identify those firearms clearly. If gun experts can't figure out what [the assault weapons law] covers, how is the average law abiding gun owner supposed to know?"

Both former Attorney General Dan Lundgren and former Governor of California Arnold Schwarzenegger acknowledge the confusion generated by California gun laws in general. Lundgren compared the complexity of California firearm laws to the state's byzantine tax laws.

Judges are equally confused. Perhaps California Appeals Court Justice Bedsworth, writing about another firearm law, said it best: "At first blush, the statutes seem impenetrable. Reading them is hard, writing about them arduous, reading about them probably downright painful. The [complexity] makes for tough sledding. As Alfred North Whitehead wrote of rationalism, the effort is, itself, 'an adventure in the clarification of thought.'" *Rash v. Lungren* (1997) 59 Cal.App.4th 1233, 1235 [69 Cal.Rptr.2d 700, 701] (citation omitted).

As described in detail below, *Nguyen* merely adds to this confusion.

2. The Three Categories of "Assault Weapon" Under California Law

Before confronting the complex issues surrounding California's "assault weapon" restrictions in this case, a brief summary of California's "assault weapons" laws is instructive.

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[3] California Department of Justice Bureau of Firearms website, Frequently Asked Questions Assault Weapon Registration at: http://oag.ca.gov/firearms/regagunfaqs#8 (last visited February 14, 2013).

a. Category 1 and 2 "Make and Model" "Assault Weapons"

One part of the Assault Weapons Control Act ("AWCA") specifically identifies "assault weapons" by "make and model." (Pen. Code, § 30510.) When the AWCA was first enacted in 1989, semiautomatic firearms were designated as "assault weapons" by: (1) being listed by type, series, and model in Penal Code section 30510 (formerly section 12276) (these are commonly called Category 1 "assault weapons"), or (2) by being declared an "assault weapon" under a regulatory add-on procedure set forth in section 30520 (formerly section 12276.5) (commonly called Category 2 "assault weapons") (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1142)..

Each of the firearms identified as Category 1 or 2 "assault weapons" are listed – and *must* be listed to satisfy notice requirements – in the Attorney General's Assault Weapons Identification Guide (AWIG) published by the California Department of Justice. (*Harrott*, *supra*, 25 Cal.4th at p. 1153.) So to determine whether any firearm is a Category 1 or 2 AWCA-type "assault weapon," an ordinary citizen is required *only* to consult the list of "assault weapons" identified in the AWIG. (*Ibid.*) Any firearm not so identified is *not* considered a Category 1 or 2 "assault weapon," even if it is identical in design or function to listed firearms.

Mr. Nguyen attempted to create his firearm from parts he gathered himself and a receiver "flat" that was not stamped with a manufacturer's name or specific rifle model that appears on the "assault weapon" list. (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 777.) If Mr. Nguyen had completed assembling his "AK-47," it could not have been considered a Category 1 or 2 make and model list "assault weapon" by this definition. While the opinion makes repeated reference to Mr. Nguyen possessing "AK-47" parts, *id.* at pp. 777, 780-784, even if Mr. Nguyen had completed his firearm, it would not have been illegal to possess merely because it was similar to firearms commonly called "AK-47s." But as discussed below, if the firearm had certain features, it could qualify as a Category 3 "assault weapon."

b. Category 3 Features Based "Assault Weapons"

On January 1, 2000, the AWCA was amended to add a new definition of "assault weapons" "in section [30515] 12276.1, subdivision (a). This definition defines "assault weapon" in terms of generic characteristics, for example, a 'semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine' and also has a 'pistol grip that protrudes conspicuously beneath the action of the weapon.' " (*Harrott*, *supra*, 25 Cal.4th at pp. 1141-1142.) Firearms meeting the legal definition of an "assault weapon" based on their characteristics are commonly known as Category 3 "assault weapons."

A rifle[4] is a Category 3 "assault weapon" if it:

1. Is semi-automatic; and
2. Centerfire; and
3. Has the capacity to accept a detachable magazine; and

[4] Because Mr. Nguyen was discovered in the process of making a rifle and had in his possession only the parts to create a rifle, we note only the definitions of "assault weapon" relevant to rifles. However, pistols and shotguns can also meet the definition of "assault weapon" based on their features.

4. Includes any one of the following characteristics:
- a pistol grip that protrudes conspicuously beneath the action of the weapon; or
- a thumbhole stock; or
- a folding or telescoping stock; or
- a grenade launcher or flare launcher; or
- a flash suppressor; or
- a forward pistol grip.

Semiautomatic, centerfire rifles that have a fixed magazine with the capacity to accept more than 10 rounds, and semiautomatic, centerfire rifles that have an overall length of less than 30 inches, can classify as "assault weapons" also. (Pen. Code, § 30515, subd. (a)(1)-(3) [formerly Pen. Code, § 12276.1]).

A rifle must be semi-automatic, centerfire, *with the capacity to accept a detachable magazine* in order for it to be considered a "Category 3 assault weapon" under Penal Code section 30515(a)(1). Unless a rifle meets all three of these criteria, the firearm is not a Category 3 "assault weapon" *no matter what additional features are attached to the rifle*. (Pen. Code, § 30515 [formerly Pen. Code, § 12276.1].)

The most common way to become compliant with California's "assault weapon" laws and avoid possessing a Category 3 "assault weapon" is to render the firearm's magazine ***non***-detachable.

California Code of Regulations defines "detachable magazine" as:

> [A]ny ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required. *A bullet or ammunition cartridge is considered a tool.* Ammunition feeding device includes any belted or linked ammunition, but does not include clips, en bloc clips, or stripper clips that load cartridges into the magazine.

(11 Cal. Code Regs., tit. 11, § 5469, emphasis added).

Many gun owners make a magazine non-detachable by attaching a "bullet button" (a form of magazine disconnect locking device) to replace the magazine release lever or button. A "bullet button" is a catch-all phrase used to describe a device that requires a "tool" to release the magazine from the firearm. Typically, the "tool" is the tip of a bullet. The device is designed in a way so that a human finger cannot release the magazine, and only something as small as a bullet tip can release the magazine from the firearm, thereby making the magazine non-detachable[5] under the law.

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[5] A "fixed" magazine is not synonymous with a "non-detachable magazine." According to the AWIG, a "fixed magazine" is defined as "a magazine which remains affixed to the firearm during loading. Frequently a fixed magazine is charged (loaded) from a clip (en bloc or stripper) of cartridges inserted through the open breech into the magazine." This process is appropriately referred to as top loading. Top loading means that the magazine is not removable, rather the shooter must load the ammunition from where the action is located. The shooter opens the action, inserts the round until the magazine is full, and then closes the action. All this is

With additional work, Mr. Nguyen could have assembled the parts in his possession to create a Category 3 "assault weapon," that is, a semiautomatic, centerfire rifle, with the capacity to accept a detachable magazine, possessing a pistol grip, folding stock, and forward pistol grip. But, as stated by firearms expert Micheal Penhall at trial, Mr. Nguyen *could* have purchased an additional common part, a "bullet button" or similar device, that could have rendered the magazine for his firearm not "detachable." If he had incorporated this magazine disconnect lock part when building the rifle, his rifle would not have been considered a Category 3 "assault weapon."

Countless Californians have acquired the parts (including a "bullet button") to create their own lawful (not an "assault weapon") firearm. These firearms, when assembled, are semiautomatic, centerfire, and may possess one or a number of the following features: a pistol grip, collapsible stock, forward pistol grip, and/or flash suppressor. But the firearms do not have the capacity to accept a detachable magazine because the firearm is equipped with a "bullet button."

There is no evidence that Mr. Nguyen possessed a "bullet button" along with the other rifle parts at the time of his arrest.

B. The *Nguyen* Opinion Inappropriately Focuses on the *Possession* of Firearms Parts as a Defense to *Attempted* Manufacturing and Possession of an "Assault Weapon"

Mr. Nguyen (and consequently the court) spent a significant amount of time discussing whether Mr. Nguyen could possess the non-functioning parts of a firearm, rather than focusing on the issue at hand – i.e., whether there was sufficient evidence of an *attempt* to manufacture and possess an unlawful "AK-47" "assault weapon." According to the decision, "[d]efendant first argues that the applicable statutory scheme permitted him to legally possess the unassembled parts of the AK-47 and that it was error to convict him of any crime under the first and second counts [(the "attempt" counts)]." (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 777.)

The court first focuses on Mr. Nguyen's argument regarding whether a firearm must be semiautomatic in order to violate the AWCA. (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 779.) If this were simply a case charging "assault weapon" possession and manufacturing, Mr. Nguyen's argument would have had merit. Penal Code section 30510, which lists firearms by make and model, states that "the following designated *semiautomatic* firearms" are "assault weapons." And also, a rifle *must* be semiautomatic to meet the definition of a Category 3 "assault weapon" according to its features. (Pen. Code, § 30515, subd. (a)(1)-(3) [formerly Pen. Code, § 12276.1]). But, as the court states: "[I]t would be absurd to construe the AWCA as authorizing the possession of an AK-47 kit such that sections 12276.1 and 12280 would bar conviction for *attempted* possession or manufacture of an assault

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done without removing the magazine.

In contrast, the "bullet button" on a rifle, allows a magazine to be released with the use of a tool. Once the magazine is removed, the shooter reloads the ammunition into the *detached* magazine. Therefore, according to the plain definition found in the AWIG, a firearm with a "bullet button" does *not* have a "fixed magazine." But the magazine cannot be said to be "detachable" either. The California Code of Regulations clearly defines "detachable magazine" to exclude those feeding devices removed from the firearms by use of a tool, like the tip of a bullet. The "bullet button" rifle is therefore neither fixed nor detachable. Rather, it is non-detachable.

weapon based upon possession of such a kit." (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 780, emphasis added.) And the court, in this instance, is correct. When a person is prosecuted for actually possessing or manufacturing an "assault weapon," as opposed to attempting to, the firearm must already be semiautomatic in order for the person to be convicted. But if a person is prosecuted for *attempted* possession or manufacturing, the underlying offense is incomplete, and the firearm need not be semiautomatic, provided there is evidence that the defendant possessed the requisite intent to violate the underlying offense by ultimately possessing or manufacturing an "assault weapon."

Prompted by Mr. Nguyen's red-herring argument that the Legislature would have made the possession of "assault weapons" parts illegal if that were indeed what it intended to do, the court went on to review a number of laws unrelated to the AWCA that implicate the doctrine of constructive possession. (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 780-781.) For instance, the court cites laws regarding firearms transfers and possession by prohibited persons, and laws restricting the possession of the parts to make a short-barreled shotgun or rifle or a machinegun. (*Ibid.*) Again, had Mr. Nguyen been convicted of actual possession or manufacturing of an :"assault weapon" this line of reasoning would have been persuasive. But, as it is, Mr. Nguyen "was not convicted of a violation of section [30600] 12280. Rather, he was convicted of attempt." (*Id.* at p. 781.)

This is where the court ventures into an problem area, and where it repeatedly chastised Mr. Nguyen's counsel. (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 781.) When discussing that a frame or receiver can constitute a "firearm" for purposes of certain statutes that prohibit certain persons from possessing all firearms (not just "assault weapons"), the court asks: "If possession of only a receiver constitutes the possession of a firearm by a convicted felon, *why shouldn't possession of all of the parts of an AK-47 constitute the possession of an assault weapon*?" (*Id.* at p. 781, emphasis added). This is the crux of the problem with this decision. The evidence established to the court's satisfaction that Nguyen possessed the intent necessary to be convicted of *attempted* manufacturing and possession of an "assault weapon." The question of whether Nguyen ever *actually* possessed an "assault weapon" was never raised or put before the jury.

To the extent Nguyen's argument attempted to defend against an actual possession charge his argument is irrelevant. And to the extent the court considered or concluded that the possession of "assault weapon" parts could suffice to sustain a conviction for possession of an "assault weapon," the consideration was improper and the conclusion was incorrect. Insofar as the court went beyond the attempt convictions at issue to opine on the elements of "assault weapon" possession, *Nguyen* goes too far. The decision should be depublished to prevent other courts' reliance on an opinion that purports to interpret the complex laws regarding "assault weapons" possession – an issue the court never had before it.

C. The *Nguyen* Decision Blurs the Distinction Between Attempted Possession and Actual Possession and Invites Improper Prosecutions and Convictions

The evidence established that Nguyen had the requisite state of mind to be convicted of attempted possession and attempted manufacturing of an "assault weapon." (*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 783.) He acquired the parts necessary to complete an "assault weapon," he machined a flat near to completion, and he did not acquire the necessary parts (i.e., a bullet botton magazine locking device) that could have made his completed firearm California compliant (i.e., a "bullet

button"). Nguyen *admitted to law enforcement that he was making an "AK-47," and stated that he knew he was in the wrong.* (*Ibid.*) But gathering and possessing of the parts alone does not form the basis of a conviction for *possession* of an "assault weapon." Nor, without more evidence of intent, does it necessarily constitute *attempted* possession. But this distinction is lost in the opinion.

In discussing the "attempt" charges, for both manufacturing and possession, Mr. Nguyen's statements are overlooked:

> Here, defendant familiarized himself with the AK-Builder.com Web site and obtained all the parts necessary to build an AK-47. Those parts, according to Schuch's testimony, would assemble into a firearm that met the definition of an "assault weapon" as set forth in section 12276.1, subdivision (a)(1). Once in possession of the parts, defendant bent the flat receiver so that the weapon could be assembled. Thus, he went beyond mere preparation, and took direct action towards the construction of the weapon, inasmuch as he obtained the parts and took at least one step towards assembly. He was prevented from completing the construction of the weapon by the police, who confiscated the parts. The evidence is sufficient to support a conviction for attempted manufacture of an assault weapon.
>
> . . .
>
> As discussed above, defendant acquired all the parts of an AK-47 assault weapon and took the step of bending the flat receiver, which may be construed as a direct action towards possessing a fully functional weapon. Had the police not intervened, defendant would have completed the assembly and thereupon been in possession of an "assault weapon" within the meaning of section 12276.1, subdivision (a)(1). Consequently, the evidence is sufficient to support a conviction for attempted possession of an assault weapon

(*Nguyen*, *supra*, 151 Cal.Rptr.3d at p. 782.) Only later does the court reference Mr. Nguyen's admission that he knew it was wrong to make and possess his own "AK-47." (*Id.* at p. 784.)

According to Judicial Council of California, Jury Instruction 460, to prove a defendant is guilty of attempt (other than attempted murder), the People must prove that:

1. The defendant took a direct but ineffective step toward committing <insert target offense>;
   AND
2. The defendant intended to commit <insert target offense>.

To prove possession and manufacture of an "assault weapon" the prosecution must prove:

1. The defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) (an assault weapon, specifically [a/an] <insert type of weapon from Pen. Code, § 30510 or description from § 30515>/a .50 BMG rifle);
2. The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed

for sale/gave/lent) it;
AND

3. The defendant knew or reasonably should have known that it had characteristics that made it (an assault weapon/a .50 BMG rifle).[6]

If someone lacks the intent to commit the underlying offense, possession of the parts is not enough for a conviction of attempted manufacturing or possession of an "assault weapon". And possession of parts is certainly not enough to be charged with manufacturing or possession of an "assault weapon" without actually making or possessing a firearm that meets the definition of an "assault weapon." The court fails to make that important distinction.

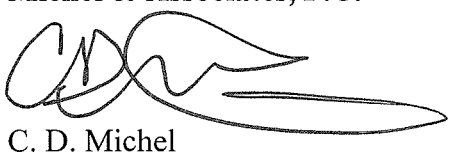
The court's failure to address this distinction poses a significant enforcement and practicality problem. The crime of attempt naturally assumes the person would commit the actual crime had they not been prevented or delayed in completing their actions. When a person merely possesses all the necessary parts to commit a crime, this assumption is much harder to rationalize. For instance, a gun owner might have extra parts that, when placed in a certain way or on a certain firearm, would create a prohibited weapon. Under the *Nguyen* opinion, however, this person could be convicted even if there was no indication that the individual would ever create such an "assault weapon."

V. CONCLUSION

Because this case turned on situation-specific facts, the court went further than necessary to uphold the conviction, it incorrectly conflated the analysis for *attempted* possession with *actual* possession, and counsel for the defendant contributed to the court's confusion in an area of law that is already rife with permutations that are difficult (if not impossible) to comprehend, the continued publication of this case will almost certainly result in injustice. Namely, it adds yet another layer of uncertainty as to how the public is supposed to comply with California's "assault weapon" laws. It jeopardizes the liberty of firearm dealers, collectors, and owners, who *lawfully* possess parts for legitimate reasons and who lack the *intent* to manufacture and possess an "assault weapon." Under current statutory law, merely possessing such parts does not make people criminals, but the effect of this case if it remains published will be to subject them to unjust prosecution.

Accordingly, and based on the foregoing, *FFLGuard* and the CRPA Foundation respectfully request the Court depublish the Fourth District Court of Appeal's decision in *People v. Nguyen.*

Sincerely,
Michel & Associates, P.C.



C. D. Michel

CDM/ca

[6] Judicial Council Of California, Criminal Jury Instruction 2560.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200 Long Beach, CA 90802.

On February 15, 2013, I served the foregoing document(s) described as

REQUEST FOR DEPUBLICATION (CAL. RULES OF COURT, RULE 8.1125)
***PEOPLE V. TIEN DUC NGUYEN*, CAL. APP. FOURTH DIST. NO. G046081**

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Jason A. Davis
Davis & Associates
27201 Puerto Real, Ste. 300
Mission Viejo, CA 92691

Attorney for Defendants/Appellant

Susan E. Miller
Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

Attorney for Plaintiff/Respondent

California Court of Appeal
Fourth District, Division 3
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

California Court of Appeals

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Executed on February 15, 2013, at Long Beach, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed on February 15, 2013, at Long Beach, California.

CLAUDIA AYALA