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



Firearms - Environmental - Land Use - Employment Law Civil Litigation - Criminal Defense

180 East Ocean Boulevard • Suite 200 Long Beach • California • 90802 562-216-4444 • www.michellawyers.com 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

MEMORANDUM OF LAW

Re:CRPA Foundation and *FFLGuard* Seek Depublication of *People v. Nguyen* DecisionDate:March 8, 2013

I. The *People v. Nguyen* Decision

The <u>People v. Nguyen</u> opinion ((2013) 212 Cal.App.4th 1311) presents serious dangers for California firearm owners and dealers. The decision can arguably be read to hold that a person cannot possess firearm parts that, if put together a certain way, would create an illegal "assault weapon." It is specifically laid out in both California and federal law that possessing the parts of machineguns, short-barreled rifles and short-barrelled shotguns is illegal. Possession of unassembled parts of those firearms can be prosecuted as possession of the illegal firearm, just as if the parts were fully assembled. (This is commonly, and incorrectly, referred to as "constructive possession" Constructive possession is the legal principle that allows a person can be considered in "possession" of an item directly or through another person) No such law exists for "assault weapons," in recognition of the many *lawful* configurations into which one can assemble a firearm.

If someone could be prosecuted for possession of unassembled "assault weapon" parts, it would cause legal problems for the countless numbers of dealers and firearm owners who innocently possess these unassembled parts in reliance on common sense, the law, and the California DOJ's position that possession of "assault weapon" parts (though not receivers for "assault weapons" listed by make and model) is not illegal. DOJ advises dealers that they may acquire and sell Category 3 "assault weapons" (meaning firearms that are prohibited because of their features) if the dealer first removes the prohibited features. http://oag.ca.gov/firearms/regagunfaqs#8

A. Facts of the Case & Trial

Mr. Nguyen, a previously convicted felon, owned an auto repair shop that was inspected by the Orange County Auto Theft Task Force. According to police, the officers conducting the search asked Mr. Nguyen if he had any firearms present. He admitted he did, and showed the officers a .50 caliber DTC rifle that he had made himself. When officers asked if he had any other firearms, Mr. Nguyen told officers he

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was making an "AK-47" and showed them the parts he had gathered. He told officers that he purchased a flat receiver and bent it into shape. Mr. Nguyen also showed the officers the website where he had purchased the flat. Mr. Nguyen possessed the near-complete receiver and the parts to complete the firearm. Amongst these parts he possessed a pistol grip, folding stock, and forward pistol grip for the firearm. Mr. Nguyen did not possess a magazine lock (commonly called a "bullet button"). When asked by the officers if he knew it was wrong to make and have his own "AK-47," *Mr. Nguyen admitted knowing it was wrong.*

Mr. Nguyen was charged with *attempted* "assault weapon" manufacturing and *attempted* "assault weapon" possession. Nguyen's "intent" to assemble the parts was a key legal element of the attempt charges. A conviction for attempting to commit a crime should not happen unless the requisite intent to attempt to make or possess an illegal firearm is established. Only if the requisite intent is present should a conviction for *attempted* manufacturing and/or *attempted* possession be possible. According to the DOJ opinion letters, Californians can possess unassembled parts of an "assault weapon" (provided, according to law enforcement and DOJ, the receiver is not banned by "make and model"). So they *should* not be charged with attempted possession of an "assault weapon" unless there is sufficient evidence that they have the intent to assemble, or actually possess, an illegal "assault weapon."

According to testimony at his trial, Mr. Nguyen never possessed a completed "assault weapon." But there was enough evidence that he admitted he intended to make and possess an illegal "assault weapon" for the jury to convict him. Mr. Nguyen was sentenced to six years in state prison. (He initially pleaded to being a prohibited person in possession of a firearm and ammunition and was sentenced on those charges to four years in state prison having been subject to a sentencing enhancement as well for his past felony conviction). The fact Mr. Nguyen was a convicted felon was not put before the jury. In other words, the jury did not know about Mr. Nguyen's felony conviction and prohibited person in possession of ammunition and firearm charges.

B. Legal Issues and Appellate Strategy

On appeal Nguyen's lawyer correctly argued that possession of the unassembled parts of an "assault weapon" does not constitute illegal "assault weapon" possession. But instead of focusing on the evidence of the *attempt* to possess and manufacture by challenging evidence of Mr. Nguyen's intent to assemble the parts illegally (i.e. his statements and what exactly they meant) the lawyer argued that the possession of the parts by themselves was legal. Had Mr. Nguyen been convicted of making and possessing an "assault weapon" based on his possession of firearm parts, that argument would have been appropriate. But Mr. Nguyen was convicted of *attempting* to manufacture and *attempting* to possess an "assault weapon," so the defense's argument confused the issues, and the court.

This confusing defense prompted the California Court of Appeal to ominously ask, "If possession

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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?" *People v. Nguyen* (2013) 212 Cal.App.4th 1311. That spells trouble.

II. Depublication Request

If the *Nguyen* case is not depublished, that simple question by the court will have far reaching criminal consequences for many gun owning Californians. Although Mr. Nguyen was convicted of *attempting* to make and possess an "assault weapon" based on his actions and stated intentions, there is a substantial danger of misinterpretation of the *Nguyen* decision by law enforcement and prosecutors. They may use the *Nguyen* decision to argue that possession of the parts of a firearm that may be assembled into an "assault weapon" is illegal under California law without further evidence.

On behalf of the [California Rifle and Pistol Association Foundation] and [*FFLGuard*,] [Michel & Associates, P.C.] has asked the California Supreme Court [depublish the *Nguyen* opinion] so it is no longer usable as legal precedent.

III. Warning!

The Nguyen decision highlights the danger of making statements to police. They can easily be misinterpreted or "spun" and used against you. In light of this opinion, if you are ever questioned about your possession of firearms or firearm parts by law enforcement, you can and should refuse to answer any questions without an attorney present. In this case, Mr. Nguyen provided law enforcement with the very evidence they needed to prosecute and convict him for attempting to commit a crime. If Mr. Nguyen had exercised his 5th Amendment right to remain silent and not discussed anything about his intentions with the police, he might not have been convicted of the attempted "assault weapon" possession and manufacturing charges.

For Further Assistance:

For links to free information on firearms laws, the Legal Resources section of our <u>www.calgunlaws.com</u> website has subsections on various firearms law topics. Check it out!

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