FILED

Darren D. Chaker
NAME

PRISON IDENTIFICATION/BOOKING NO.
311 N. Robertson Blvd. #123
Beverly Hills, CA 90211

ADDRESS OR PLACE OF CONFINEMENT

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his name, address, telephone and facsimile numbers, and e-mail address.

2008 NOV 17 AM 10:46

CLERK, U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

BY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Fee Paid

DARREN D. CHAKER
FULL NAME (*Include name under which you were convicted*)

Petitioner,

v.

530

COLLEENE PRECIADO, CHIEF PROBATION OFFICER
NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER

Respondent.

CASE NUMBER:

CV SACV08-1300 AG(RC)

To be supplied by the Clerk of the United States District Court

☐ _____ **AMENDED**

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY
28 U.S.C. § 2254

PLACE/COUNTY OF CONVICTION ORANGE

PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT
(*List by case number*)

CV SACV08-0772-AG (RC)

CV 2007cv00830-AG (RC)

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.

2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge the judgment entered by a different California state court, you must file a separate petition.

3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum.

5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

6. You must pay a fee of $5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds $25.00, you must pay the filing fee.

7. When you have completed the form, send the original and two copies to the following address:

Clerk of the United States District Court for the Central District of California
United States Courthouse
ATTN: Intake/Docket Section
312 North Spring Street
Los Angeles, California 90012

LODGED
CLERK, U.S. DISTRICT COURT
NOV 14 2008
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

11/18/2008 3:19:04 PM Receipt #: 113191
Cashier : ABELLAMY [LA 1-1]
Paid by: D. CHAKER
8:CV08-01300
2009-006900 Writ Habeas Corpus(1)
Amount : $5.00

M.O. Payment : P9670 / 5.00

Total Payment : 5.00

PLEASE COMPLETE THE FOLLOWING: (*Check appropriate number*)

This petition concerns:
1. ☒ a conviction and/or sentence.
2. ☐ prison discipline.
3. ☐ a parole problem.
4. ☐ other.

PETITION

1. Venue
   a. Place of detention Orange County Probation Department
   b. Place of conviction and sentence Sentenced to 3 Years Formal Probation on July 14, 2006

2. Conviction on which the petition is based *(a separate petition must be filed for each conviction being attacked)*.
   a. Nature of offenses involved *(include all counts)*: Possessing an Assault Rifle
   b. Penal or other code section or sections: PC12276.1
   c. Case number: 02HF1533
   d. Date of conviction: June 20, 2006
   e. Date of sentence: July 14, 2006
   f. Length of sentence on each count: Sentenced to 3 Years Formal Probation on July 14, 2006
   g. Plea *(check one)*:
      ☒ Not guilty
      ☐ Guilty
      ☐ Nolo contendere
   h. Kind of trial *(check one)*:
      ☐ Jury
      ☒ Judge only

3. Did you appeal to the California Court of Appeal from the judgment of conviction? ☒ Yes ☐ No
   If so, give the following information for your appeal *(and attach a copy of the Court of Appeal decision if available)*:
   a. Case number: G037362
   b. Grounds raised *(list each)*:
      (1) Unconstitutional Denial of Right to Self Representation

(2) Unconstitutional Denial of Judge Forcing Prosecution to Meet Each Element of the Crime

(3) Perjurious Testimony by State Witness

(4) Unconstitutional Probation Condition

(5) _____

(6) _____

c. Date of decision: 02/04/2008

d. Result

Affirmed, probation condition modified.

4. If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision? ☒ Yes ☐ No

If so give the following information *(and attach copies of the Petition for Review and the Supreme Court ruling if available)*:

a. Case number: S161620

b. Grounds raised *(list each)*:

(1) Unconstitutional Denial of Judge Forcing Prosecution to Meet Each Element of the Crime

(2) Court of Appeal Failing to Address Issue(s) on Appeal

(3) _____

(4) _____

(5) _____

(6) _____

c. Date of decision: 05/14/2008

d. Result

Petition for Review Denied.

5. If you did not appeal:

a. State your reasons

N/A

b. Did you seek permission to file a late appeal? ☐ Yes ☐ No

6. Have you previously filed any habeas petitions in any state court with respect to this judgment of conviction?

☒ Yes ☐ No

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: Court of Appeal, Fourth District, Division Three

(2) Case number: G034803

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: 12/08/2004

(4) Grounds raised *(list each)*:

(a) The Assault Weapon Control Act (AWCA) is an Unconstitutional Statute

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: 12/13/2004

(6) Result
Denied.

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

b. (1) Name of court: Court of Appeal, Fourth District, Division Three

(2) Case number: G035185

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: 03/04/2005

(4) Grounds raised *(list each)*:

(a) The Assault Weapon Control Act (AWCA) is an Unconstitutional Statute

(b) Search Warrant Violated Fourth Amendment

(c)

(d)

(e)

(f)

(5) Date of decision: 03/11/2005

(6) Result
Denied.

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

c. (1) Name of court: Court of Appeal, Fourth District, Division Three

(2) Case number: G035185

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: 12/14/2005

(4) Grounds raised *(list each)*:

(a) The Assault Weapon Control Act (AWCA) is an Unconstitutional Statute

(b) Search Warrant Violated Fourth Amendment

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: 01/12/2006

(6) Result

Denied.

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

7. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

CAUTION: *Exhaustion Requirement*: In order to proceed in federal court, you must ordinarily first exhaust your state court remedies with respect to each ground on which you are requesting relief from the federal court. This means that, prior to seeking relief from the federal court, you first must present all of your grounds to the California Supreme Court.

a. Ground one: The Trial Court Violated Petitioner's Right to Have Each Element Proven Since The Rifle Was Missing 13 Parts, Thus Was Not a Violation of PC12276.1 Due to The Fact All of The Parts Were Not Located to Operate it.

(1) Supporting FACTS:

Penal Code section 12276.1 like criminal possession laws generally, requires knowledge of the object's existence and of one's control over it. In re Jorge M., 23 Cal. 4th 866. During the bench trial there was no evidence the rifle had all the parts necessary for it to opertate. In fact, the "bolt carrier group" consists of 13 intergral parts including the firing pin. Without these 13 parts, the rifle cannot fire, inasmuch fire in a semi automatic fashion. By the trial court convicting Petitioner of violating Penal Code section 12276.1, it missed critical elements of the statute required to find Petitioner guilty. The court bypassed these two critical elements (semi automatic + center fire) the conviction is unconstitutional.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

b. Ground two: The Assault Weapon Control Act (AWCA) is Unconstitutional Since The Terms Used to Define 'What' An Assault Rifle is, is Not Defined by Statute and Has Forced Multiple DA's to File Suit Against the Atty. General.

(1) Supporting FACTS:

As enacted by the Legislature, section 12276.1 has no statutory or regulatory definition. Such a vague definition makes it difficult for public officials, and impossible for owners, to determine if what is required to make an "assault weapon" "permanently inoperable." Thus, if a firearm owner wishes to comply with the law by means of rendering their firearm "permanently inoperable" they do so at an unpredictable, unmeasurable risk of being prosecuted and having their property deemed forfeit, based on a test they cannot perform with the security of defined boundaries.In short, a person in possession of a semiautomatic rifle reasonably would be expected to be have notice what is or not it is not unlawful.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

c. Ground three: The AWCA and Regulations Are So Vague And Confusing as to Raise Questions Under The AWCA's Mens Rea Requirement.

(1) Supporting FACTS:

The lack of a definition interpreting what measures an otherwise law abiding firearm owner must take to ensure that his firearm is rendered "permanently inoperable" is so defective as to make it difficult or impossible for even police and prosecutors to identify and/or test for whether particular firearms are covered by the AWCA, not to mention civilians. A fortiori, they make it difficult or impossible for police and prosecutors to know or prove that the owner of a gun "reasonably should have known" it is "permanently inoperable," especially when, as in the present case, Petitioner attempted to render his firearm "permanently inoperable" by removing essential components.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

d. Ground four: The Lack Of Any Statutory Measurement Provision, And The Impossibility Of The Public Define "Permanently Inoperable," Demonstrates the Ambiguity and Vagues of Penal Code Section 12285.

(1) Supporting FACTS:

As enacted by the Legislature, section 12276.1 has no statutory or regulatory definition. Such a vague definition makes it difficult for public officials, and impossible for owners, to determine if what is required to make an "assault weapon" "permanently inoperable." Thus, if a firearm owner wishes to comply with the law by means of rendering their firearm "permanently inoperable" they do so at an unpredictable, unmeasurable risk of being prosecuted and having their property deemed forfeit, based on a test they cannot perform with the security of defined boundaries.In due process terms this is expressed as a need for clarity so people may have the opportunity to conform to the law.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

e. Ground five: The Court Erred When it Failed to Hold a Hearing When it Knew or Should Have Known a Conflict Existed After Receiving Two Letters Pre-Trial From Petitioner Providing Explicit Reasons Why a Conflict Existed.

(1) Supporting FACTS:

Petitioner's relationship with trial counsel as illustrated in the letters dated May 22, 2006 and June 15, 2006. Although Petitioner's letters were not a formal motion, the letters were sufficient to invoke his right to request a continuance. See, People v. Lucky (1988) 45 Cal.3d 259, 281 "[w]e do not necessarily require a proper and formal legal motion, but at least some clear indication by defendant that he wants a substitute attorney." Both of Petitioner's letters to the Court were not addressed and personified the reasons why counsel should have been replaced, including the fact counsel failed to investigate defenses related to the position of the Attorney General regard the AWCA. No inquiry was made.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

8. If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons:

9. Have you previously filed any habeas petitions in any federal court with respect to this judgment of conviction?
☒ Yes ☐ No

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: United States District Court, Central District

(2) Case number: SACV08-772-AG (RC)

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: 8/05/08

(4) Grounds raised *(list each)*:

(a) The Assault Weapon Control Act (AWCA) is an Unconstitutional Statute

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: 8/25/08

(6) Result
Dismissed Dismissed Without Prejudice; Petitioner Did Not Amend in Time.

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

b. (1) Name of court: United States District Court, Central District

(2) Case number: 2007cv00830

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: 3/7/07

(4) Grounds raised *(list each)*:

(a) The Assault Weapon Control Act (AWCA) is an Unconstitutional Statute

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: 5/2/07

(6) Result
Dismissed Without Prejudice due to Pending State Habeas.

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

10. Do you have any petitions now pending (i.e., filed but not yet decided) in any state or federal court with respect to this judgment of conviction? ☐ Yes ☒ No

If so, give the following information *(and attach a copy of the petition if available)*:

(1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

11. Are you presently represented by counsel? ☐ Yes ☒ No

If so, provide name, address and telephone number:

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding,

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 11/13/08 Darren D. Chaker

Date *Signature of Petitioner*

Darren D. Chaker
311 N. Robertson Blvd. #123
Beverly Hills, California 90211
Tel: 916.674.9865
Fax: 25.449.3303

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DARREN D. CHAKER,

Petitioner/Defendant,

vs.

COLLEEN PRECIADO, CHIEF PROBATION OFFICR,

Respondent/Plaintiff.

Case No.:

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS

PLEASE TAKE NOTICE, Petitioner, DARREN D. CHAKER hereby files this Memorandum of Points and Authorities in Support of his Writ of Habeas Corpus.

FACTS AND LAW IN SUPPORT OF GROUND 1, 2, 3, & 4 FOR RELIEF

I. THE TRIAL COURT ERRED WHEN IT FOUND PETITIONER GUILTY ABSENT A SHOWING DEMONSTRATING EACH ELEMENT OF THE STATUTE WAS FUFILLED, SINCE THE RIFLE WAS NOT A FUNCTIONAL SEMI AUTOMATIC-CENTER FIRE RIFLE, THEREFORE THE CONVICTION IS UNCONSTITUTIONAL SINCE IT IS AN ELEMENT OF A SEMI THE STATUTE TO HAVE POSSESSED AUTOMATIC CENTER FIRE RIFLE

Penal Code section 12276.1 like criminal possession laws generally, requires knowledge of the object's existence and of one's control over it. *In re Jorge M., 23 Cal. 4th 866.* Similarly, in *Galvan v. Superior Court* (1969) 70 Cal. 2d 851, 868 [76 Cal. Rptr. 642, 452 P.2d 930], construing a San Francisco gun registration law, we stated, " 'The only knowledge required is *knowledge of the character of the object possessed*; knowledge that the possession is illegal is unnecessary.' " (Italics added.) "It is, of course, true that to establish unlawful possession of a

contraband object it must be shown that the defendant exercised dominion and control over the object with *knowledge of its* presence and *contraband character*." (*People v. Prochnau* (1967) 251 Cal. App. 2d 22, 30 [59 Cal. Rptr. 265], italics added.)

A court recently reached a contrary conclusion as to section 12020's prohibition on carrying a concealed dirk or dagger, holding it requires knowledge that the instrument has the characteristics making it a dirk or dagger, despite the absence of any language of mens rea in that statute. (*People v. Rubalcava* (2000) 23 Cal. 4th 322, 331-332 [96 Cal. Rptr. 2d 735, 1 P.3d 52].)

"That the statute contains no reference to knowledge or other language of mens rea is not itself dispositive. As we recently explained, the requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure expressly to state it." (*In re Jorge M.* (2000) 23 Cal. 4th 866, 872 [98 Cal. Rptr. 2d 466, 4 P.3d 297].)

For example, in the case of *People v. Coria* (1999) 21 Cal. 4th 868 [89 Cal. Rptr. 2d 650, 985 P.2d 970], our Supreme Court held that knowledge of the character of the substance being manufactured is an essential element of the crime of manufacturing methamphetamine. (Health & Saf. Code, § 11379.6.) The court pointed out that a person could be engaged in a portion of the manufacturing process without necessarily knowing that the end product was methamphetamine. The court noted that it had reached the same conclusion with regard to other drug statutes: "Although criminal statutes prohibiting the possession, transportation, or sale of a controlled substance do not expressly contain an element that the accused be aware of the character of the controlled substance at issue [citations], such a requirement has been implied by the courts. [Citations.] For the same reason, the manufacturing statute must be construed to include such a knowledge element. [Citation.]" (*People v. Coria, supra*, 21 Cal. 4th 868, 878.) In reaching this conclusion, the court disapproved our decision in *People v. Telfer* (1991) 233 Cal. App. 3d 1194 [284 Cal. Rptr. 913], a case relied on by the prosecution in this case.

In a prosecution under section 12276.1, that is to say, the People bear the burden of proving the defendant *knew or reasonably should have known* the firearm possessed the characteristics bringing it within the AWCA." (*Jorge M.,* at p. 887, fn. omitted.) In the recent case of *People v. Garcia* (2001) 25 Cal. 4th 744 [107 Cal. Rptr. 2d 355, 23 P.3d 590], our

Supreme Court held that a violation of the sex offender registration law requires knowledge of the registration requirement because the violation was triggered by inaction, i.e., a failure to register, rather than by action.

In addition, Penal Code section 26 provides that a person is incapable of committing a crime where an act is performed in ignorance or mistake of fact negating criminal intent; a crime cannot be committed by mere misfortune or accident. [Citation.]" (*People v. Coria, supra,* 21 Cal. 4th 868, 876; see also *People v. Garcia, supra,* 25 Cal. 4th 744, 754.) Knowledge is not identical with intent. [Citations.] It is, nevertheless, a mental state." (*People v. Foster* (1971) 19 Cal. App. 3d 649, 655 [97 Cal. Rptr. 94].)

Another example is seen in the case of *People v. Coria* (1999) 21 Cal. 4th 868 [89 Cal. Rptr. 2d 650, 985 P.2d 970], our Supreme Court held that knowledge of the character of the substance being manufactured is an essential element of the crime of manufacturing methamphetamine. (Health & Saf. Code, § 11379.6.)

In other words, there must be a union of act and wrongful intent, or criminal negligence. (Pen. Code, § 20; *People v. Vogel* (1956) 46 Cal. 2d 798, 801 [299 P.2d 850].) 'So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication.' (*People v. Vogel*, *supra*, at p. 801, fn. omitted.)" (*People v. Coria* (1999) 21 Cal. 4th 868, 876 [89 Cal. Rptr. 2d 650, 985 P.2d 970].)

In the federal context, it is "black letter law" that the government has the burden to prove each and every element of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *In re Winship*, 397 U.S. 358, 364 (1970); *Davis v. U.S.*, 160 U.S. 469 (1895). This burden never shifts to the defendant who maintains a presumption of innocence throughout the trial. An affirmative defense which undermines intent provides a complete defense by undermining an essential element of the charge by the government beyond a reasonable doubt. *In re Winship* 397 U.S. 35 (1970). It is an unconstitutional shift of the burden if a defendant must prove his innocense by negating an element of the statute. *Mullaney v. Wilbur*, 421 U.S. 684, 702 (1975).

During the bench trial there was no evidence the rifle had all the parts necessary for it to operate. In fact, the "bolt carrier group" consists of 13 integral parts including the firing pin. Without these 13 parts, the rifle cannot fire, inasmuch fire in a semi automatic fashion. By the trial court convicting Petitioner of violating Penal Code section 12276.1, it missed critical

elements of the statute required to find Petitioner guilty. Since the court bypassed these two critical elements (semi automatic and center fire) it bypassed due process and convicted Petitioner without determining the elements were met.

II. THE ASSAULT WEAPON CONTROL ACT (AWCA) IS UNCONSTITUTIONAL INCE IT FAILS TO PROVIDE ANY DEFINITION TO THE LAUNDRY LIST OF TERMS USED TO DETERMINE WHAT CHARACTERISTICS MAKE A RIFLE AN ASSAULT RIFLE, AND THE FACT THE STATE HAS NO CLEAR POLICY HOW TO INFORM CITIZENS HOW TO COMPLY WITH THE COMPLEX LAW; THESE VAGUE AND AMBIGUOUS TERMS CONFUSED THE PETITIONER AND, IN FACT CONFUSE MANY DISTRICT ATTORNEYS TO THE POINT MULTIPLE DISTRICT ATTORNEY AND LAW ENFORECEMENT ORGANIZATIONS FILED SUIT AGAINST THE ATTORNEY GENERAL IN HUNT V. LOCKYER, THEREFORE THE AWCA IS UNCONSTITUTIONAL

INTRODUCTION

Holding Mr. Chaker liable for possession of an "assault weapon" under 12280(a) is contrary on three interrelated grounds. First, Mr. Chaker was not in possession of an "assault weapon" at the time of arrest. Second, it would be inconsistent with the *mens rea* standard for these laws. (*In re Jorge M.* (2000) 23 Cal.4th 866 [98 Cal.Rptr.2d 466, 4 P.3d 297] [firearm owners must undertake reasonable inquiry (only) to determine if their arms fall under the law].) Third, to do so would violate his due process right of certainty.

In a recent opinion, the Supreme Court recognized the Legislature's concern with the difficulties for police and prosecutors in deciding which firearms the highly complex "assault weapon" law (hereafter AWCA) covers; wherefore defendants have been charged by the Legislature to provide clear explanations thereof.1 The Court itself strongly emphasized an even more vital consideration when it quoted (adding emphasis to) the following from a Senate Judiciary Committee Report: *[N]o public interest is served by punishing a large class of individuals for failure to perform [the registration duty imposed by the AWCA] due to insufficient Harrott* v. *County of Kings* (2001) 25 Cal.4th 1138, 1144 [103 Cal.Rptr.2d 445, 25 P.3d 649]

"The legislative history of the amendments to the [AWCA] reveal strong concern that law enforcement personnel be clearly advised [by the Attorney General and/or DOJ] which firearms

are 'assault weapons' within the meaning of the [AWCA] so as to prevent the erroneous confiscation of legal weapons." (Quotation from the court of appeal opinion; ellipses by Supreme Court). At footnote 4 the Supreme Court quoted a legislator emphasizing the need for clarification by defendants because "Unfortunately, a great many law enforcement officers who deal directly with the public are not experts in specific firearms identification." (*Id.* at 1147 & fn. 4.) (*Certainly, respect for law is not served by the punishment of individuals lacking an opportunity to know its terms and conditions.)* (*Harrott* v. *County of Kings* (2001) 25 Cal.4th 1138, 1151, italics by Supreme Court.)

Regrettably, the new AWCA registration period expired on Dec. 31, 2000 – Even more regrettably, regulations still fail to clarify many crucial issues and even added confusion where the law itself was relatively clear. When asked how to make an "assault rifle" legal today, the DOJ's response is to make it "permanently inoperable." (Karen J.Kerr).

POSSESSION OF A "PERMANENTLY INOPERABLE" ASSAULT RIFLE IS NOT A VIOLATION OF PENAL CODE 12276.1

1. Introduction.

Mr. Chaker was convicted of violating Penal Code section 12276.1 (formerly charged with 12280(b)) One provision within the same chapter, Penal Code section 12285(b) provides that "[a]ny person who (A) obtains title to an "assault weapon" ... shall, within 90 days, render the weapon permanently inoperable." Thus, under Penal Code 12285(b), "assault weapons" that are rendered permanently inoperable under the proper conditions are no longer "assault weapons."

The term "permanently inoperable" within Penal Code section 12285(b) is not defined by statute, nor is it defined by any regulation. Nor have the courts addressed the specific definition of "permanently inoperable" as it is used in section 12285(b). Thus, it is impossible to predict whether removing essential components of an "assault weapon" such as the firing pin and/or the bolt would render the firearm "permanently inoperable." However, in *People* v. *Jacskon* (1968) 266 Cal.App.2d 341 the court required more than possession of a broken firearm for criminal liability to apply and provided us with an analysis of the courts interpretation of "permanent inoperability."

2. The Jackson Ruling.

In *People v. Jackson* (1968) 266 Cal.App.2d 341, a pistol which was incapable of being fired because it had a broken firing pin was not a pistol within the meaning of Penal Code section 12021 (possession of concealable weapon by one convicted of a felony) in the absence of a showing that a workable firing pin was also in the possession of defendant and that a simple substitution of pins would have made the weapon operable. The court held that it is not a violation to carry a pistol that is so broken or out of repair that it cannot be used to shoot with or cannot be fired.

3. Current Statutory Limitations on the Jackson Ruling.

At the time of the *Jackson* decision Penal Code section 12001 read in pertinent part: "Pistol,' 'revolver,' and 'firearm capable of being concealed upon the person' as used in this chapter shall apply to and include any device, designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and which has a barrel less than 12 inches in length." In 1969 this section was amended by the addition of a second sentence, "*Pistol*,' '*revolver*,' and '*firearm* capable of being concealed upon the person' as used in Sections 12021, 12072, and 12073 include the frame or receiver of any such weapon." (Stats.1969, ch. 1002, s 1, p. 1973.)

With the exception of *People* v. *Tallmadge* (1980) 103 Cal.App.3d 980, every case acknowledging this "legislative abrogation" of the ruling in *Jackson* properly applied Penal Code section 12001's limited abrogation of the *Jackson* ruling to "firearms capable of being concealed." First, though cited, the *Jackson* ruling would not apply to *Tallmadge* because all the components necessary to assemble the firearm were within the defendants possession. Second, the firearm in *Tallmadge* was a "machine gun. Nevertheless, without analyzing the applicability of 12001(c) to a machine gun which is neither a "pistol, revolver, or firearm capable of being concealed," the court stated, in err, that "Penal Code section 12021 nullified the effect of *Jackson* by making it a crime to possess a frame or receiver.

However, it is not the possession, revolver, or firearm capable of being concealed upon the person at issue here, but rather the possession of an "assault rifle" in violation of Penal Code section 12080. In fact, Penal Code 12001(c)(which legislatively abrogated the applicability to the Jackson ruling to handguns) explicitly states that the term "firearm" includes the frame or receiver of the weapon is applicable to "sections 12021, 12021.1, 12070, 12071, 12072, 12073,

12078, 12101, and 12801 of this code, and Sections 8100, 8101, and 8103 of the Welfare and Institutions Code." By it's own terms, Penal Code section 12001(c) does not apply to charges of possessing unregistered "assault rifles" pursuant to 12280 et seq. Nor has any other statute or case expressly overturned the application of the Jackson ruling as applied to firearms deemed "assault rifles" pursuant to 12280 et seq. or 12276.1.

3. Other Limitations of the Jackson Ruling.

The *Jackson* court relied on *People v. Guyette*, 231 Cal.App.2d 460, 467, 41 Cal.Rptr. 875, 880, which held that a deadly weapon does not cease to be such by becoming temporarily inefficient, nor is its essential character changed by dismemberment if the parts may be easily assembled so as to be effective. The court in *People v. Guyette* (1964) 231 Cal. App. 2d 875 disagreed with the appellants contentions that a sawed-off shotgun "was not ready for immediate use, because it was broken down into its three component parts at the time of its discovery, no crime was committed....The evidence indicated that the gun could be assembled and used in a matters of seconds. The court relied on *People v. Williams* (1929) 100 Cal.App. 149, 151, a prosecution for possession of a disassembled slung-shot under the Deadly Weapon's Act, which also held:

> The rule is well settled that a deadly weapon does not cease to be such by becoming temporarily inefficient, nor is its essential character changed by dismemberment if the parts may be easily assembled so as to be effective. Further, "inoperable" cannot be defined as an unloaded firearm or a firearm without a magazine:
> A firearm does not cease to be a firearm when it is unloaded or inoperable." (*People v. Steele* (1991) 235 Cal.App.3d 788, 794 [286 Cal.Rptr. 887].) This applies to semiautomatic firearms as well as any other kind. When a clip is removed from a semiautomatic firearm, the firearm does not suddenly become a billy club, a stick, or a duck. (*People v. Miceli* (2002) 104 Cal.App.4th 256, 270; 127 Cal.Rptr.2d 888, 898.)
> Thus, under this analysis, merely disassembling a firearm where it can be easily reassembled does not render it so inoperable that "it cannot be used to shoot or cannot be fired" since it's parts may be easily reassembled so as to be effective.

4. Possession of an "Assault Weapon" Without a Firing Pin or Otherwise in Disrepair is Not a Violation of Penal Code Section 12276.1.

A. The Jackson Rule Directly Applies to Assault Rifles.

Under the *People v. Jackson* analysis, a firearm that cannot easily reassembled would be rendered "permanently inoperable." In addition, the court specifically held that

a firearm without a firing pin was not a pistol for the purposes of a criminal possession statute. In essence, a firearm without an essential piece of equipment2 needed to fire is rendered permanently inoperable until a replacement part is in place or within the possession of the defendant. However, if no replacement part is within the possession and/or control of the accused it is as permanently inoperable as any other device that would require repair.

Unlike a stock, site, spare magazine, grip or some other pieces of equipment, an essential element of every firearm is it's firing pin. A firing pin is the part of a firearm that, when released by the trigger being pulled, strikes the primer of a bullet causing the bullet to be fired. Without a firing pin, a firearm is rendered inoperable since it cannot perform it's essential function of striking the primer.

While the *Jackson* rule was statutorily abrogated with respect to handguns by Penal Code 12001, it was not abrogated with respect to "assault weapons." Thus, despite its negative treatment, *Jackson* is still good law as applied to "assault rifles." Hence, possession of any "assault weapon" in such a state that it "cannot be used to shoot with or cannot be fired" cannot be a crime.

B. <u>The Jackson Rule Provides Insight on the Term "Permanently Inoperable"</u>.

As stated above, Penal Code section 12285(b) is a statutory provision explicitly exempting "assault weapon" that have been made "permanently inoperable" from the registration requirements. Further, the Department of Justice advises the public that possession of a permanently inoperable "assault rifle" is not a violation of Penal Code section 12280. The *Jackson* rule provides weight to an otherwise undefined definition of the term "permanent inoperable" within Penal Code section 12285(b). As stated above, Penal Code section 12285(b) waives liability for possession of an "Assault weapon" in certain circumstances if the firearm is "rendered permanently inoperable." Generally, the term "permanent" is interpreted as meaning an alteration that is irreversible. This is invalid because it attributes factual error to the Legislature and renders the "permanently altered" provision meaningless Assault weapons are largely metal, though some parts are made of high strength plastics and other materials. Given time to reverse it, *no* alteration to a metal object can meet defendants' interpretation of being irreversible. Someone willing to spend $1000.00 to reverse an alteration to a $ 30.00 magazine can reverse it. Thus the position that a firearm missing an essential component that is not within

the possession or control of the accused violates the fundamental principle that laws may not be construed as involving that which is impossible, or operative only under circumstances that cannot occur. To so construe a law implies that the Legislature was foolish or ignorant in passing it, an implication inconsistent[1] with the respect the Judicial owes the Legislative Branch.

Moreover, to interpret the law allowing "permanent" alterations as so factually wrong that it can never operate violates another canon: not even words -- much less whole provisions--of a statute are to be so construed that they have no purpose or meaning. In contrast, the statutory term "permanently inoperable" makes perfect sense when understood in light of how *non*-permanent reduction in firearm magazine capacity has traditionally occurred. Throughout most of the 20th Century, California and many other states have imposed magazine capacity limits on firearms when being used in certain kinds of hunting, e.g. the three shot limit for hunting fowl with shotguns. To comply with these limits, hunters were required and allowed to insert a metal or wooden dowel into the magazine to reduce the number of rounds it would hold. In other words they *non*permanently altered the magazine capacity.[2]

So what section 12285(b) means by "permanently inoperable," is altering the firearm so that it is not easily reversible, e.g. one that involves metalworking, machining, welding, brazing, soldering or similar processes making it difficult to render the firearm operable. In essence, the term "permanently inoperable" requires that the firearm be in the same condition as that

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[1] "[I]t is fundamental that a statute should not be interpreted in a manner that would lead to absurd results." (*People* v. *Morris* (1988) 46 Cal.3d 1, 15 [249 Cal.Rptr. 119, 46 Cal.3d 1].) Even where the words would seem to so indicate, courts "need not follow the plain meaning of a statute when to do so would 'frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results.'" (*California School Employees Ass'n.* v. *Governing Board* (1994) 8 Cal.4th 333, 340, 341 [33 Cal.Rptr.2d 109, 878 P.2d 1321], brackets by court, and cases there cited.)

[2] ". . . we must presume that every word, phrase and provision in a statute was intended to have some meaning." (*Board of Retirement* v. *Terry* (1974) 40 Cal.App.3d 1091, 1096 [115 Cal.Rptr. 718]; *City of San Jose* v. *Superior Court* (1993) 5 Cal.4th 47, 55 [19 Cal.Rptr.2d 73]; *People* v. *Medina* (1995) 39 Cal.App.4th 643, 650-651 [46 Cal.Rptr.2d 112] ["It is an elementary rule that a statute should be construed so that 'effect [is] given, if possible, to every word, clause and sentence of a statute."] and cases there cited; Compare *People* v. *Superior Court* (1996) 13 Cal.4th 497, 520. [53 Cal.Rptr.2d 789, 917 P.2d 628] [where statute uses the phrase "pursuant to" another statute which it names, that phrase may not be rendered meaningless by assuming that other unnamed statutes were meant instead or as well].)

described in the *Jackson* ruling. To so construe section 12285(b) would comport both with the canons requiring that statutory provisions be interpreted to have meaning and the familiar principle that in interpreting them one must "take into account matters such as context. . . the history of the times, and of legislation\ upon the same subject. . . ." In this respect our Supreme Court recommends Justice Holmes' view "a page of history is worth a volume of logic...."

Here, as in *Jackson*, the "assault weapon" did not contain an essential component of operation, the firing pin. Further, the firearm did not contain an essential component that injects the cartridge into the chamber where it can be fired, the bolt. This alone renders the "assault weapon" "permanently inoperable" in accordance with Jackson. Further, given that California has banned the sale and possession of such firearms, the relative market for obtaining such a component has limited the availability of replacement firing pins to the select few California Dealers that are permitted to lawfully market "assault weapons" and to out of state sources. The difficulty of obtaining a replacement firing pin and/or bolt coupled with the fact that Defendant did not possess a firing pin nor a bolt places him in a similar category of those who can, at great expense, repair a firearm that for all intents and purposes has been rendered "permanently inoperable."

Since the "Assault weapon" possessed by Petitioner did not contain the essential components of a firearm, and since the firearm could not be easily reassembled, the firearm was rendered "permanently inoperable" in accordance with *Jackson* and in compliance with Penal Code section 12285(b)(2).[3]

C. Conclusion.

Because Petitioner did not possess a firing pin nor the bolt, essential components of an any firearm, the weapon was in such a state of disrepair that it is deemed no longer a rifle under the *Jackson* Rule. Further, given Penal Code section 12280's exemption from criminal violations for "assault weapons" rendered permanently inoperable and the Department of Justice's statements that possession of an "assault weapon" that has been rendered permanently inoperable

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[3] See, *Lammers* v. *Superior Court* (2000) 83 Cal.App.4th 1309, 1321 [100 Cal.Rptr.2d 455]; *In re Walters* (1995) 39 Cal.App.4th 1546, 1558 [47 Cal.Rptr.2d 279]; *Harry Carian Sales* v. *Agricultural Labor Relations Board* (1985) 39 Cal.3d 209, 223 [216 Cal.Rptr. 688, 703 P.2d 27]. 6 *Santa Clara Local Tranport. Authority* v. *Guardino* (1995) 11 Cal.4th 220, 235 [45 Cal.Rptr.2d 207, 902 P.2d 225].

is not a violation, the lack of a definition of makes it impossible to conform with the statute. Only *Jackson* provides guidance on rendering an "assault weapon" permanently inoperable and defendant was in compliance with the *Jackson* rule.

D. In Combination, The AWCA and Regulations Are So Vague And Confusing as to Raise Questions Under The AWCA's Mens Rea Requirement.

In re Jorge M., supra, 23 Cal.4th at page 887, holds that defendants may only be liable under the AWCA if they knew, or "reasonably should have known" that it regulates the firearm they possessed. The lack of a definition interpreting what measures an otherwise law abiding firearm owner must take to ensure that his firearm is rendered "permanently inoperable" is so defective as to make it difficult or impossible for even police and prosecutors to identify and/or test for whether particular firearms are covered by the AWCA, not to mention civilians. A fortiori, they make it difficult or impossible for police and prosecutors to know or prove that the owner of a gun "*reasonably* should have known" it is "permanently inoperable," especially when, as in the present case, Petitioner attempted to render his firearm "permanently inoperable" by removing essential components in order to comply with Penal Code section 12285(b).

1. The Lack Of Any Statutory Measurement Provision, And The Impossibility Of The Public Define "Permanently Inoperable," Demonstrates the Ambiguity and Vaguest of Penal Code Section 12285.

As enacted by the Legislature, section 12276.1 has no statutory or regulatory definition. Such a vague definition makes it difficult for public officials, and impossible for owners, to determine if what is required to make an "assault weapon" "permanently inoperable." Thus, if a firearm owner wishes to comply with the law by means of rendering their firearm "permanently inoperable" they do so at an unpredictable, immeasurable risk of being prosecuted and having their property deemed forfeit, based on a test they cannot perform with the security of defined boundaries.

Our Supreme Court has embraced Justice Holmes' dictum that "the tendency of the law, must always be to narrow the field of uncertainty."7 The lack of a definition violates this principle, one that is as basic to the construction of statutes as to due process itself: To reiterate the point to which the Supreme Court added italics in the quotation given earlier, there is no public purpose in punishing people who violated a law because they did not understand what it meant, especially where they have attempted to comply. The Legislature does not pass laws as an

excuse to punish people but rather to have them obeyed. So, independent of any constitutional imperative, it is never proper to make a law unintelligible to the public. In due process terms this is expressed as a need for clarity so people may have the opportunity to conform to the law rather than being punished for violating it -- and to establish standards for the guidance of prosecutors and courts. As a matter of statutory interpretation, this principle is expressed as requiring that laws be so construed as "to make them workable and reasonable, in accord with common sense," thereby producing "fairer and more predictable consequences," **not** results that are confusing, "elusive and unpredictable," uncertain or impractical.[4]

The lack of a definition for "permanently inoperable" ignores all these cannons when it imposes a standard that requires testing that ordinary people cannot perform or understand. By the same token, the lack of a definition ignores the primary considerations on which statutory construction are based: "the objective sought to be achieved by the statute" (which is that the covered guns are to be registered) "as well as the evil to be prevented" (which is eliminating possession of unregistered guns). To hold the Defendant liable despite his attempts to render the firearm inoperable ignores these considerations.

The only logical deduction is that a law does *not* require testing or measurement if it neither mentions them nor provides standards that are required for measurement and testing to occur. Once again, laws are to be so construed as to produce practical, workable, predictable, and consistent results rather than "elusive and unpredictable" ones.

It bears emphasis that in the same session that produced section 12276.1 (one provision to which 12285(b) applies), the Legislature enacted a gun law that clearly requires testing of firearms -- making that clear by both expressly saying so, and by setting out ornate standards to govern the testing. (See Pen. Code, § 12125 *et seq.* [providing for safety testing of certain firearms].) So what the absence of comparable language in section 12276.1 demonstrates is that

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[4] See *Ornelas* v. *Randolph* (1993) 4 Cal.4th 1095, 1107 [17 Cal.Rptr.2d 594, 847 P.2d 560] quoting THE COMMON LAW; See, e.g., *People* v. *Superior Court (Caswell)* (1988) 46 Cal.3d 381, 389-90 [250 Cal.Rptr. 515, 758 P.2d 1046] and *Burg* v. *Municipal Court* (1983) 35 Cal.3d 257, 269 [198 Cal.Rptr. 145, 673 P.2d 732], citing numerous prior U.S. and California Supreme Court cases. 10 *Voss* v. *Superior Court* (1996) 46 Cal.App.4th 900, 912-913 [54 Cal.Rptr.2d 225] (citations omitted). *Escobedo* v. *Snider* (1997) 14 Cal.4th 1214, 1226 [60 Cal.Rptr.2d 722, 930 P.2d 979].

testing is *not* required thereby. It is a well-settled principle of statutory construction that "[w]here a statute with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed."[5]

2. The "Permanently Inoperable" Provision's Meaning is Unintelligible to Ordinary People Because it Requires Information Not Available To Them, And The Record Reflects Petitioner Submitted Several California Public Record Acts Requests to Various District Attorneys And The Attorney General Without The Production of a Single Policy Reinforces This Theory.

How is an owner of an "assault weapon" supposed to know what measures are required to render the firearm "permanently inoperable" to avoid criminal liability pursuant to Penal Code section 12285(b) and comply with the law? Disposing of the essential components renders the firearm just as permanently inoperable as any other method short of destroying the firearm. Had the legislature intended total destruction of the firearm the only method of rendering an "assault weapon" "permanently inoperable "they would have stated as such. How are owners to know if somewhere in the world there is another firing pin or bolt (or one of the other items) with precise dimensions corresponding to their firearm?

Absent a curative DOJ regulation, "assault weapon" owners had no way during the registration period or subsequently of determining what was intended by the term "permanently inoperable." In this dearth of information they were left with only three choices, each of which is unconscionable: 1) Owners could just blindly assume that the method by which they chose to render their firearm inoperable is deemed permanent, 2) register the pistol as an AW, or 3) turning their firearm into the law enforcement authorities. Independent of the danger of prosecution, Defendant submit that compelling persons to make such uninformed choices on pain of forfeiture of property violates their "rights to acquire, enjoy, own and dispose of

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[5] *Traverso* v. *People ex rel Department of Transportation* (1993) 6 Cal.4th 1152, 1166 [26 Cal.Rptr.2d 217, 864 P.2d 488]. In determining legislative intent, courts compare statutes on cognate subjects, looking to the presence (*or absence)* of similar provisions. (*Dyna- Med, supra*, 43 Cal.3d at 1387, *People* v. *Woodhead* (1987) 43 Cal.3d 1002, 1010 [239 Cal.Rptr. 6556, 741 P.2d 154] ["It is an equally settled axiom that when the drafters of a statute have employed a term in one place and omitted it in another it should not be inferred where it has been excluded."], *In re Dylan T.* (1998) 65 Cal.App.4th 765, 774 [76 Cal.Rptr.2d 684] (same).)

property" as guaranteed by both the U.S. and the California constitutions. (See, e.g., *Lynch* v. *Household Finance Corp.* (1972) 405 U.S. 540, 544 [92 S.Ct. 1113, 31 L. Ed.2d 424]; *Sei Fujii* v. *State of California* (1952) 38 Cal.2d 718, 728 [242 P.2d 617].)

Several courts have found "assault weapon" definitions fatally vague in similar circumstances. In *People's Rights Organization* v. *City of Columbus* (6th Cir. 1998) 152 F.3d 522, 535-36 (hereafter *PRO*) where the term "assault weapon" was defined to include any semiautomatic rifle "that *accepts* a detachable magazine with a capacity of 20 rounds or more." (Emphasis added.) The vagueness of "accepts" is similar to the vagueness of section 12285(b)'s "permanently inoperable" language in that they both relate to the functionality of firearms. And the analysis plaintiffs offer here follows that of *PRO*, *supra*, 152 F.3d at 535-36:

> [This] provision is little more than a trap for the unwary. The record indicates that any semiautomatic rifle that accepts a detachable magazine will accept a detachable magazine *of any capacity that might exist*, as it is the magazine, not the rifle, that determines capacity. Therefore, anyone who possesses a semiautomatic center fire rifle or carbine that accepts a detachable magazine is subject to prosecution *so long as a magazine exists [anywhere] with a capacity of twenty rounds or more*. Since the ordinance contains no scienter requirement, an owner's *complete lack of knowledge as to the magazine's existence is of no consequence*. Plaintiff Smolak is a perfect example. . . . [H]e owns a hunting rifle that has a detachable magazine with a capacity of four rounds and that he has never possessed or seen any other magazine which would fit his rifle. However, Smolak also states that his rifle would accept a detachable magazine with a capacity of twenty rounds or more if one has ever been manufactured. Under the current ordinance, Smolak presumably would face criminal penalties in the event such a magazine is discovered. Due process demands more than this. (Emphasis added.)

PRO follows an earlier case, *Springfield Armory*, *supra*, 29 F.3d 250, invalidating an ordinance that banned certain named rifles *and* all others that were just "slight modifications" of the named rifle. The *Springfield Armory* Court held both "slight" and "modification" to be fatally vague. In so doing, it propounded the same rationale plaintiffs urge the Court to adopt here: To know a gun is a "modification" of some other gun, one must know the operation and design history of each gun. But such knowledge is not something it can be assumed that people of ordinary intelligence possess -- any more than it can be assumed that the average user of a television or a microwave oven knows how it operates or understands its design history in

relationship to that of other such devices. *A fortiori*, average owners cannot be expected to know whether somewhere in the world there exists a silencer (etc.) whose threads are conformable to those on the owners' pistols.

This *Springfield Armory* conclusion was based on the identical holding of the Colorado Supreme Court in *Robertson* v. *Denver* (1994) 874 P.2d 325, 334. *Robertson* invalidated a ban of pistols that were defined only as being modifications of certain other weapons that the ordinance did specifically name. This definition was fatally vague, *Robertson* concluded, because it:

> does not provide sufficient information to enable a person of common intelligence to determine whether a pistol they possess or may purchase has a design history of the sort which would bring it within this section's coverage. . . . Ascertaining the design history and action design of a pistol is not something that can be expected of a person of common intelligence. (*Robertson*, *supra*, 874 P.2d at 335.)

The technical information an owner needs to know under section 12285(b) is far more arcane and obscure than that involved in any of the cases just cited. Barring total destruction of the firearm, any measure taken to render the firearm "permanently inoperable "can be remedied with time and the proper tools.

In *Robertson*, where it was "argue[d] that a number of publications are available which provide all the information [an owner would] need[] to determine whether a pistol is an assault pistol." (*Robertson*, *supra*, 874 P.2d at 334.) In addition, the defendants there apparently cited a prior case upholding another Denver ordinance against vagueness challenge because the ordinance itself cited a reference source containing the requisite information. But *Robertson* rejected this argument, in part because

> "The assault weapon ordinance does not specify any source which would aid in defining what an assault pistol is, nor does it state where such a source can be found." At least in abeyance of such a source being cited in the legislation, whether persons of ordinary intelligence must necessarily guess as to an ordinance's meaning and application does not turn on whether some source exists for determining the proper application of a law. . . . [¶ The section involved] does not provide sufficient information to enable a person of average intelligence to determine whether a pistol they possess or may purchase has a design history of the sort which would bringit within this section's coverage [and] ascertaining the design history and action design of a pistol is not something that can be expected of a person of common intelligence.

By the same token ordinary people cannot be expected to know or ascertain a lawful method of render the firearm inoperable when there is no statute or regulation that defines the precise method by which an "Assault weapon" can be rendered inoperable in accordance with section 12276.1.

1. The Vagueness Problem Could Be Solved By Curative Interpretation.

The vagueness problem with section 12276.1 exists only because its "render permanently inoperable" language is susceptible of so many possible interpretations. The vagueness problem would have disappeared if DOJ had defined the statutory phrase "permanently inoperable" to provide an ordinary user of such a firearm with clear terms by which they can avoid criminal liability.[6]

2. The AWCA is Subject to Strict Scrutiny for Vagueness Because Its Mens Rea Requirement Departs From The Traditional Criminal Scienter Standard.

As discussed above, the AWCA does not require a traditional scienter element, in contrast to *Staples* v. *United States* (1994) 511 U.S. 600 [114 S.Ct. 1793, 128 L.Ed.2d 608] which interpreted federal law to require that the prosecution prove the defendant knew that the firearm had the characteristics that made its possession contrary to federal law. *Jorge M.*, *supra*, 23 Cal.4th at 869-70, held a conviction may be obtained "upon proof of negligent failure to know, as well as actual knowledge of, the weapon's salient characteristics . . . ." Under this "knew-or-should-have-known requirement," *Jorge M.* upheld conviction based on the theory that the defendant "*reasonably* should have investigated and determined the gun's characteristics." (*Id.* at 885, emphasis added.)

For that reason we have been at pains to show that vagueness problems cannot be resolved by investigations the ordinary person can *reasonably* be expected to make. Our showing on that, however, should not be misunderstood as accepting that the *Jorge M.*, *supra*, 23 Cal.4th 866 scienter standard insulates the State against due process vagueness challenge.

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[6] Compare *PRO*, *supra*, 152 F.3d at 535-36, noting that the ordinance definition referring to any semiautomatic center fire rifle "that accepts a detachable magazine with a capacity of 20 rounds or more" could be understood in at least four different ways. Criminal law cannot be phrased "in terms so vague that [persons] of common intelligence must necessarily *guess at its meaning* and *differ as to its application*." (*Roberts* v. *U.S. Jaycees* (1984) 468 U.S. 609, 628 [104 S.Ct 3244], emphasis added.)

On the contrary, Petitioner's position is that a strict standard of review is required because the Act departs from the traditional scienter element. *Jorge M.* expressly recognizes that its "reasonably should have known' formulation departs somewhat from the usual description of criminal negligence." (*Id.* at 887 & fn.11.) The mens rea rule from which *Jorge M.* departs is that "to constitute a criminal act the defendant's conduct must go beyond that required for civil liability and must amount to a 'gross' or 'culpable' departure from the required standard of care."16 (*Id.* at 887, fn.11.) The issue of a person's "knowledge or negligence" is factual, and liability would exist if "the possessor did not trouble to acquaint himself or herself with the gun's salient characteristics." (*Id.*at 888.)

In short, a person in "possession of a semiautomatic firearm reasonably would be expected to know whether or not it is of a make or model listed in section 12276 or has the clearly discernable features described in section 12276.1." (*Ibid.*) "This aggravated conduct sets criminal negligence apart from civil negligence, which . . . does not require aggravated, gross, or reckless behavior. . . . Until today, no decision of this court has held that someone can be prosecuted under a criminal law that contains no express mental state requirement, based merely on the person's civil negligence." (*Jorge M.*, *supra*, 23 Cal.4th at 891- 92 (disn. opn. of Kennard, J.).)[7]

Given the above, the Act's definitions are subject to a strict test for vagueness, and the Department was remiss in not clarifying them. "The due process clause of the Fourteenth Amendment guarantees individuals the right to fair notice of whether their conduct is prohibited by law." (*Forbes* v. *Napolitano* (9th Cir. 2000) 236 F.3d 1009, 1011 [invalidating on its face a prohibition on medical experimentation due to the vagueness of the terms "experimentation," "investigation," and "routine"].) This is particularly true where criminal penalties are involved:

If a statute subjects transgressors to criminal penalties, as this one does, vagueness review is even more exacting. (See *Kolender* v. *Lawson*, (1983) 461 U.S. 352, 357 [103 S.Ct. 1855, 75 L.Ed.2d 903] [holding that penal statutes must define criminal offenses with "sufficient definiteness," and "in a manner that does not encourage arbitrary and discriminatory

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[7] "The only prosecutions that are likely to be aided by the majority's 'should have known' standard are those of novice firearm owners, such as a widow who inherits her husband's rifle that she has never fired or even handled." (*Jorge M.*, *supra*, 23 Cal.4th at 895 (disn. opn. of Kennard, J.).)

enforcement"]; *Winters* v. *New York* (1948) 333 U.S. 507, 515 [68 S.Ct. 665, 92 L.Ed. 840] [holding that where a statute imposes criminal penalties, the standard of certainty involved in vagueness review is higher].) In addition to defining a core of proscribed behavior to give people constructive notice of the law, a criminal statute must provide standards to prevent arbitrary enforcement. (*City of Chicago* v. *Morales* (1999) 527 U.S. 41, 52 [119 S.Ct. 1849, 144 L.Ed.2d 67].) Without such standards, a statute would be impermissibly vague even if it did not reach a substantial amount of constitutionally protected conduct, because it would subject people to the risk of arbitrary deprivation of their liberty. (*Id.*) Regardless of what type of conduct the criminal statute targets, the arbitrary deprivation of liberty is itself offensive to the Constitution's due process guarantee. (*Smith* v. *Goguen* (1972) 415 U.S. 566, 575 [94 S.Ct. 1242, 39 L.Ed.2d 605].) (*Forbes*, *supra*, 236 F.3d at 1011-12.)

"Where a statute imposes criminal penalties, the standard of certainty is higher. . . This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application." (*Kolender*, *supra*, 461 U.S. at 358-59, fn.8, citing *Lanzetta* v. *New Jersey* (1939) 306 U.S. 451 [59 S.Ct. 618, 83 L.Ed.888].) *Lanzetta*, which invalidated a prohibition on "gang" membership as vague, stated the classic principle thus: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." (*Lanzetta*, *supra*, 306 U.S. at 452-53.)

A law without traditional scienter requirements, like the AWCA , must be closely scrutinized where vagueness appears. *Colautti* v. *Franklin* (1979) 439 U.S. 379 [99 S.Ct. 675, 58 L.Ed.2d 596], explained:

> This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea. . . . Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than "a trap for those who act in good faith." (*Id.* at 395, quoting *United States* v. *Ragen* (1942) 314 U.S. 513, 524 [62 S.Ct. 374, 86 L.Ed. 383] [tax-evasion case].)

"The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement — depends in part on the nature of the enactment." (*Village of Hoffman Estates* v. *Flipside Hoffman Estates, Inc.* (1982) 455 U.S. 489, 498 [102 S.Ct. 1186, 71 L.Ed.2d 362].) The following is particularly applicable here:

> Thus, economic regulation is subject to a less strict vagueness test . . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.
> (*Village of Hoffman* Estates, *supra*, 455 U.S. at 498-99.)

To say the least, the Act here "is not an ordinance that 'simply regulates business behavior and contains a scienter requirement." (*Morales*, *supra*, 527 U.S. at 55.) It is instead a felony crime which allows a mere civil negligence standard for conviction and imprisonment. "When criminal penalties are at stake . . . a relatively strict test is warranted." (*PRO*, *supra*, 152 F.3d at 533 ["assault weapon" definitions held facially vague].) "We also must consider whether the statute contains a scienter requirement or imposes strict liability. . . .Indeed, '[i]n the absence of a scienter requirement . . . [a] statute is little more than a trap for those who act in good faith.'" (*Id.* at 534.)

FACTS AND LAW IN SUPPORT OF GROUND 5 FOR RELIEF

III. THE COURT ERRED WHEN IT FAILED TO HOLD A HEARING WHEN IT KNEW OR REASONABLY SHOULD HAVE KNOW OF A CONFLICT OF INTEREST AFTER RECEIVING TWO LETTER STATING SUCH, THEREFORE DENYING PETITIONER SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

NOTICE OF CONFLICT: COURT KNEW OR SHOULD HAVE KNOWN

On the duty of a trial court to appoint substitute counsel in the face of irreconcilable conflict or complete breakdown in communication between counsel and client, there is near-unanimity among the circuits.[8] The Court knew of should have known a serious and

[8] *See United States v. Mullen,* 32 F.3d 891, 897 (4th Cir.1994) (holding that the trial court abused its discretion in refusing to appoint substitute counsel where "there was a total breakdown in communication between [counsel and client]" that "ma[de] an adequate defense unlikely"); *Smith v. Lockhart,* 923 F.2d 1314, 1320 (8th Cir.1991) (explaining that a defendant is entitled to a substitution of counsel where there exists "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant"); *United States v. Padilla,* 819 F.2d 952, 955 (10th Cir.1987) (same); *Wilson v. Mintzes,* 761 F.2d 275, 280 (6th Cir.1985) (same); *United States v. Welty,* 674 F.2d 185, 188 (3d Cir.1982) (same); *United States v. Young,* 482 F.2d 993, 995 (5th Cir.1973) (same); *United States v. Calabro,* 467 F.2d 973, 986 (2d Cir.1972) (same); *see also United States v. Zillges,* 978 F.2d 369, 372

irreconcilable conflict existed between Petitioner and trial counsel after reviewing the letter contained in both the trial and appellate file. In *Mickens v. Taylor,* Justice Scalia, delivering the opinion of the court, sets out two important principles, the underpinnings of which should be applied to petitioner in the case at bar. First, Justice Scalia cites *Cuyler v. Sullivan,* 446 U.S. 335, at 347-348, for the notion that the trial court's duty to inquire into the propriety of a potential conflict is required only when "**the trial court knows or reasonably should know that a particular conflict exists**." *Mickens* at 1242 (emphasis added). By the Court failing to appoint new counsel such was analogous to what the court found in *United States v. Moore,* 159 F.3d 1154, 1160 (9th Cir.1998) (finding irreconcilable conflict where counsel told the court: "it seems to me that if Mr. Moore is forced to go to trial now with me as his attorney, that he will be denied a fundamental right; that is, to have counsel, effective, a zealous counsel"); Other cases have found a conflict to be present and has been repeatedly asserted[9] in other appellate cases, and this court should too declare a conflict with trial counsel and replace them.

A defendant's subjective evaluation of his counsel's performance, or subjective belief in the existence of a conflict with his counsel, do not create an "irreconcilable conflict." *See Cronic,* 466 U.S. at 657, 104 S.Ct. 2039; *Wheat,* 486 U.S. at 159, 108 S.Ct. 1692. Instead, an "irreconcilable conflict" requires specific objective evidence of a significant internal conflict between the defendant and counsel that rises to such a level that counsel could not or would not act as an effective advocate account the conflict. *See Cronic,* 466 U.S. at 659 n. 21, 104 S.Ct. 2039. In *Mickens v. Taylor,* Justice Scalia, delivering the opinion of the court, sets out two important principles, the underpinnings of which should be applied to petitioner in the case at bar.

(7th Cir.1992) (in evaluating motion to substitute counsel, court must consider several factors, including "whether the conflict between the defendant and his counsel was so great that it resulted in a total lack of communication preventing an adequate defense"); *United States v. Allen,* 789 F.2d 90, 92 (1st Cir.1986) (same); *cf. United States v. Graham,* 91 F.3d 213, 221 (D.C.Cir.1996) ("A defendant [has] the right to effective representation by appointed counsel, and this right may be endangered if the attorney-client relationship is bad enough.").

[9] See, *United States v. Walker,* 915 F.2d 480, 483-84 (9th Cir.1990) (finding irreconcilable conflict where counsel told the court: "I do believe that there is, given his refusal to confer with me, there is a[sic] irreconcilable difference that does prevent me from representing him"), *overruled on other grounds, United States v. Nordby,* 225 F.3d 1053, 1059 (9th Cir.2000), *in turn overruled, United States v. Buckland,* 289 F.3d 558, 568 (9th Cir.2002) (en banc).

First, Justice Scalia cites *Cuyler v. Sullivan,* 446 U.S. 335, at 347-348, for the notion that the trial court's duty to inquire into the propriety of a potential conflict is required only when "the trial court knows or reasonably should know that a particular conflict exists." *Mickens* at 1242 (emphasis **9* added).[10] Justice Scalia adds, importantly, that this situation is not to be confused with the "vague, unspecified possibility of conflict, such as that which 'inheres in almost every instance of multiple representation.'" *Id.* ("knows or reasonably should know that a particular conflict exists" it must initiate an inquiry about that conflict. [*Cuyler*], 446 U.S. at 347, 100 S.Ct. 1708 and there must be a "knowingly and intelligently waived his right to conflict-free counsel, *Maiden,* 35 F.3d at 481 n. 5 (citing *Johnson v. Zerbst,* 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)) *See also, People v. Jones*, 33 Cal.4th 234, 14 Cal.Rptr.3d 579 Cal.,2004.

In *Wheat, supra,* 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 the United States Supreme Court discussed the extent to which the federal Constitution limits a trial court's power to remove an attorney for a conflict of interest. Under *Wheat, supra,* 486 U.S. at page 163, 108 S.Ct. 1692 the trial court had "substantial latitude" to eliminate the potential conflict by discharging Heller Ehrman LLP as Petitioner's attorney. This much was clear under *Strikldand v. Washington*, 466 U.S. 668 (1984). As the Court put it there: " Actual or constructive denial of the assistance of counsel all together is legally **presumed** to result in prejudice." *Id.* at 692. As put here, and evident through the lodgment of exhibits on July 18, 2007 along with the instant supplemental, Petitioner was denied effective assistance of counsel.

In essence, "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' " (quoting *Anders,* 386 U.S. at 743, 87 S.Ct. 1396) And just as in *United States v. Williams*, "[i]t is clear from the [trial record] that client and attorney were at serious odds and had been for some time." 594 F.2d at 1259. By the Defendant repeatedly sending letter to the Court, there is little question once reading Exhibit 1 & 2 that a conflict existed between Petitioner and trial counsel and the trial court should inquired about the conflict.

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[10] *See also*, "a state court has duty to inquire into defense counsel's possible conflicts of interest if the court knows or reasonably should know that a particular conflict exists." *Fullwood v. Lee, 290 F.3d 663, 59 Fed. R. Evid. Serv. 115 (4th Cir. 2002).*

Although Petitioner's letters were not a formal motion, the memo was sufficient to invoke his right to request a continuance. *See*, *People v. Lucky* (1988) 45 Cal.3d 259, 281 "[w]e do not necessarily require a proper and formal legal motion, but at least some clear indication by defendant that he wants a substitute attorney." Similarly, both Lucky's right to substitute counsel, and Petitioner's right to conflict free counsel pertain to due process. Inasmuch even if the trial court did not formally entertain the Petitioner's request for a continuance, the fact it was contained in the file, dictated the trial court consider it. This Court decided a similar issue in *People v. Lloyd* (1992) 4 Cal.App.4th 724, 731 [even though trial judge may not have been personally aware of defendant's letter requesting appointment of new counsel or right of self-representation, the trial court still had a duty to act on it]. However, the inaction from the Superior Court dictates the appellate court must act and issue a writ on this matter since the Superior knew or reasonably should have known of the conflict prior to and during the trial. [11]

NO INQUIRY INTO THE CONFLICT WAS MADE

A defendant's subjective evaluation of his counsel's performance, or subjective belief in the existence of a conflict with his counsel, do not create an "irreconcilable conflict." *See Cronic,* 466 U.S. at 657, 104 S.Ct. 2039; *Wheat,* 486 U.S. at 159, 108 S.Ct. 1692. Instead, an "irreconcilable conflict" requires specific objective evidence of a significant internal conflict between the defendant and counsel that rises to such a level that counsel could not or would not act as an effective advocate account the conflict. *See Cronic,* 466 U.S. at 659 n. 21, 104 S.Ct. 2039. In *Mickens v. Taylor,* 535 U.S. 162 (2002) 240 F.3d 348 Justice Scalia, delivering the opinion of the court, sets out two important principles, the underpinnings of which should be applied to petitioner in the case at bar. First, Justice Scalia cites *Cuyler v. Sullivan,* 446 U.S. 335, at 347-348, for the notion that the trial court's duty to inquire into the propriety of a potential conflict is required only when "**the trial court knows or reasonably should know that a particular conflict exists.**" *Mickens* at 1242 (emphasis added).[12] Justice Scalia adds, importantly, that this situation is not to be confused with the "vague, unspecified possibility of

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[11] Any doubt as to whether a court should have been aware of the conflict is dispelled when the conflict is explicitly raised at trial. *U.S. v. Jiene* 140 F.3d 124

[12] *See also*, "a state court has duty to inquire into defense counsel's possible conflicts of interest if the court **knows or reasonably should know** that a particular conflict exists." *Fullwood v. Lee, 290 F.3d 663, 59 Fed. R. Evid. Serv. 115 (4th Cir. 2002).* (emphasis added)

conflict, such as that which 'inheres in almost every instance of multiple representation.'" *Id.* ("knows or reasonably should know that a particular conflict exists" it **must initiate an inquiry** about that conflict. [*Cuyler*], 446 U.S. at 347, 100 S.Ct. 1708 and there must be a "knowingly and intelligently waived his right to conflict-free counsel, *Maiden,* 35 F.3d at 481 n. 5 (citing *Johnson v. Zerbst,* 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)) *See also, People v. Jones*, 33 Cal.4th 234, 14 Cal.Rptr.3d 579 Cal.,2004. Petitioner formerly lodged these letters with the Court of Appeal and California Supreme Court. After a careful reading of these exhibits there is little question not only did Petitioner have a subjective fear trial counsel failed to investigate significant issues related to his defense, but those very fears were realized and objectively sustainable for all the reasons set forth in the habeas petition filed July 18, 2007 with the California Supreme Court.[13] *U.S. v. Shorter* 54 F.3d 124, C.A.7 (Ind.), 1995 reversed on a conflict that was not indicated in the record:

> A criminal defendant is entitled to counsel whose undivided loyalties lie with his client." *United States v. Ellison,* 798 F.2d 1102, 1107 (7th Cir.1986), *cert. denied,* 479 U.S. 1038, 107 S.Ct. 893, 93 L.Ed.2d 845 (1987); *see also Wood v. Georgia,* 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981) (noting a "right to representation that is free from conflicts of interest"); *United States v. Ziegenhagen,* 890 F.2d 937, 939 (7th Cir.1989) (noting that Sixth Amendment "guarantee includes representation that is free of any conflict of interest with counsel").
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> Because the district court **failed to conduct a hearing** and determine the impact of the conflict of interest, *see Dently v. Lane,* 665 F.2d 113, 117 (7th Cir.1981) (requiring evidentiary hearing on issue of conflict of interest), we will presume that the conflict prejudiced Tanksley if he has shown a possibility of prejudice. *Ziegenhagen,* 890 F.2d at 940 (explaining that reviewing court will presume prejudice where defendant shows **possible prejudice** and trial court fails to conduct inquiry into conflict)."
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> * * * * * * * * * *
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> Because **we cannot find any indication in the record** that Tanksley waived the conflict, we remand for resentencing rather than an evidentiary hearing on the issue of waiver. *See Ziegenhagen,* 890 F.2d at 941 ("An actual conflict of interest between retained counsel and a represented party requires an evidentiary hearing to determine whether or

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[13] Petitioner requests the court take judicial notice of the California Supreme Court case number S155449. (Fed. R. Evid. 201)

> not the represented party made a knowing and intelligent waiver of the conflict."); *cf. Ellison,* 798 F.2d at 1108 (remanding for new proceeding because "[t]here is no indication in the record that the trial judge considered the propriety of disqualification or advised defendant of the conflict").
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> * * * * * * * * * *
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> This guarantee is so important that, unlike with other Sixth Amendment claims, when a defendant **alleges** an unconstitutional actual conflict of interest, "**prejudice must be presumed,**" *Delgado v. Lewis,* 223 F.3d 976, 981 (9th Cir.2000) (citing *Cuyler v. Sullivan,* 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and *Flanagan v. United States,* 465 U.S. 259, 268, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984)), and harmless error analysis does not apply. *United States v. Allen,* 831 F.2d 1487, 1494-95 (9th Cir.1987) (citing *Cuyler,* 446 U.S. at 349, 100 S.Ct. 1708). (quoting *Lockhart v. Terhune* 250 F.3d 1223 C.A.9 (Cal.), 2001.

There is little doubt once a court knows or should have known of a potential conflict, inquiry is mandated. Every circuit of the United States Court of Appeals has reached the same conclusion: A trial court should conduct an inquiry into the basis for a defendant's colorable motion to appoint substitute counsel. *United States v. Morrison*, 946 F.2d 484, 499 (7th Cir. 1991) ("the courts of appeals have held that 'the district court must engage in at least some inquiry as to the reasons for the defendant's dissatisfaction with his existing attorney'") (citing *McMahon v. Fulcomer*, 821 F.2d 934, 942 (3d Cir. 1987)) (internal quotation omitted).[14]

NO CONFLICT WAIVER TAKEN

Before a defendant can knowingly and intelligently waive a conflict, the court must: (1) advise the defendant about potential conflicts; (2) determine whether the defendant understands the risks of those conflicts; and (3) give the defendant time to digest and contemplate the risks, with the aid of independent counsel if desired. *U.S. v. Kliti* 156 F.3d 150.

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[14] *See also United States v. Graham*, 91 F.3d 213 (D.C. Cir. 1996); *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991); *United States v. Iles*, 906 F.2d 1122 (6th Cir. 1990); *United States v. Gallop*, 838 F.2d 105 (4th Cir. 1988); *United States v. Padilla*, 819 F.2d 952 (10th Cir. 1987); *United States v. Hillsberg*, 812 F.2d 328 (7th Cir. 1987); *United States v. Allen*, 789 F.2d 90 (1st Cir. 1986); *Thomas v. Wainwright*, 767 F.2d 738 (11th Cir. 1985); *United States v. Welty*, 674 F.2d 185 (3d Cir.1982); *United States v. Young*, 482 F.2d 993 (5th Cir. 1973); *United States v. Calabro*, 467 F.2d 973 (2d Cir. 1972); *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970).

Further, writing a letter to the court was appropriate. Numerous courts, both state and federal recognize writing letters to the court is an important medium of communication.[15]

REVERSAL IS AUTOMATIC UNDER FEDERAL LAW

In order to ensure that a criminal defendant's right to conflict-free counsel is not abridged, a district court **must** "initiate an inquiry when it knows or reasonably should know of the possibility of a conflict of interest." *Strouse v. Leonardo*, 928 F.2d 548, 555 (2d Cir. 1991). This initial obligation to inquire arises whenever a district court is "sufficiently apprised of even the possibility of a conflict of interest." *Levy*, 25 F.3d at 153. When a possible conflict has been "entirely ignored" by the district court, reversal has been "automatic." See id; see also *Ciak*, 59 F.3d at 307 (discussing the "automatic reversal rule" and reversing on that basis); *United States v. Lussier*, 71 F.3d 456, 461 (2d Cir. 1995) (suggesting that district court's failure to make conflict inquiry constitutes "per se reversible error"), cert. denied, 517 U.S. 1105, 116 S. Ct. 1321, 134 L. Ed. 2d 474 (1996).

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[15] Some recent cases where the appellate court discusses a party writing a letter to the trial or appellant court include:

State: *In re Justice P.*, 123 Cal.App.4th 181 "Stephen wrote a letter to the court, saying he "would never [relinquish] my parental rights""; *People v. Muldrow*,144 Cal.App.4th 1038, "Defendant a letter to the court; "Alice a letter to the court in which she expressed her concerns..."; *People v. Lovings*,118 Cal.App.4th 1305,"...appellant a letter to the court asking to withdraw his plea..."; *Nestande v. Watson*, 111 Cal.App.4th 232, "...a letter to the court that..."; *People v. Rivers*, 20 Cal.App.4th 1040, "He also a letter to the court protesting his innocence."; *Richaud v. Jennings*, 16 Cal.App.4th 81 "...respondent's attorney a letter to the court ..." "AT & T a letter to the court..." *Lebbos v. State Bar*, 53 Cal.3d 37, "She a letter to the court commissioner..."

Federal: *U.S. v. Mays*, Slip Copy, 2007 WL 869509, S.D.Tex., Mar 20, 2007 "Mays wrote a letter to this Court on September 28, 2004, expressing dissatisfaction with his court-appointed counsel..."; *Madrane v. Hogan*, Slip Copy, 2007 WL 404032, M.D.Pa., Feb 01, 2007 "Petitioner wrote a letter to the Court..."; *U.S. v. Tomero*, 471 F.Supp.2d 448, S.D.N.Y., Jan 25, 2007; *Robinson v. Dang*, Slip Copy, 2007 WL 61071, E.D.Cal., Jan 08, 2007 "They simply wrote a letter to the Court..."; *U.S. v. O'Brien*, Slip Copy, 2006 WL 3247242, N.D.Tex., Nov 09, 2006 Defendant also wrote a letter to the court in July 2006 requesting new counsel..." *Burkes v. Nassau County Police Dept.*, Slip Copy, 2006 WL 3314642, E.D.N.Y., Nov 08, 2006 "Plaintiff wrote a letter to the Court dated July 4, 2005, stating that he would pay the required fee..."

VIEWED PROPERLY AS A MOTION TO REPLACE RETAINED COUNSEL, PETITIONER'S MOTION SHOULD HAVE BEEN GRANTED; THE ERROR REQUIRES REVERSAL PER SE UNDER STATE LAW

Although the trial court's denial of a Petitioner *Marsden* motion is reviewed pursuant to the deferential abuse of discretion standard, reversal is automatic when, as here, a Petitioner has been deprived of his right to discharge retained counsel and defend with counsel of his choice. (*Lara, supra*, 86 Cal.App.4th at p. 154, citing *People v. Ortiz, supra*, 51 Cal. 3d at p. 988.) The court may refuse the request of a defendant with retained counsel to substitute new counsel to ensure orderly and expeditious judicial administration only if the defendant is "unjustifiably dilatory or . . . arbitrarily desires to substitute counsel at the time of trial." (*Id.* at p. 153, quoting *People v. Blake* (1980) 105 Cal. App. 3d 619, 623-624.)

"Where fundamental rights are affected by the exercise of discretion by the trial court, . . . such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action." (*In re Carmaleta B.* (1978) 21 Cal. 3d 482, 496; *People v. Davis* (1984) 161 Cal. App. 3d 796, 802-803.)

"A criminal defendant's right to decide how to defend himself should be respected unless it will result in 'significant prejudice' to the defendant or in a 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' [] In other words, we demand of trial courts a 'resourceful diligence directed toward the protection of [the right to counsel] to the fullest extent consistent with effective judicial administration.'" (*Ortiz*, at pp. 982-983, quoting *People v. Crovedi* (1966)

DUE TO AN ACTUAL CONFLICT, PETITIONER WAS CONSTRUCTIVELY DENIED COUNSEL

Petitioner's relationship with trial counsel as illustrated in the letters dated May 22nd and June 15th was far worse than what the 9th Circuit found to be in *Nguyen,* where the Court held that "Nguyen was constructively denied counsel. *Nguyen,* 262 F.3d at 1004 ("There is no question in this case that there was a complete breakdown in the attorney-client relationship. By the time of trial, the defense attorney had acknowledged to the Court that Nguyen 'just won't talk to me anymore.' In light of the conflict, *Nguyen* could not confer with his counsel about trial strategy or additional evidence, or even receive explanations of the proceedings. In essence, he was 'left to fend for himself.' "). Similarly, in *Brown,* the 9th Circuit found that the defendant was

constructively denied his right to counsel where he "was forced into a trial with the assistance of a particular lawyer with whom he was dissatisfied, with whom he would not cooperate, and with whom he would not, in any manner whatsoever, communicate." *Brown,* 424 F.2d at 1169. In that case, the defendant and his public defender became embroiled in an irreconcilable conflict. *Id.* at 1169.

Nonetheless, even due to total breakdown of communication with trial counsel, as the 9th Circuit has pointed out more than once, even when a client forecloses avenues of investigation, the defense does not shut down. Lawyers must look for the "alternate sources of information and evidence." *Silva v. Woodford*, 279 F. 3d 825, 847 (9th Cir.) *cert. den.* 123 S. Ct. 342 (2002); accord *Douglas v. Woodford*, 316 F. 3d 1079, 1086 (9th Cir., 2003). The California Supreme Court recently embraced the Ninth Circuit Court of Appeals consideration of three factors when determining if a court should declare a conflict: (1) timeliness of the motion, (2) adequacy of the court's inquiry into the defendant's complaint, and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense. *People v. Abilez* --- Cal.Rptr.3d ----, 2007 WL 1839142 Cal.,2007.

Both of Petitioner's letters to the Court were not addressed and personified the reasons why counsel should have been replaced. California Court's are in unison that criminal defense counsel has the duty to investigate carefully all defenses of fact and of law that may be available to the defendant. (*In re Williams* (1969) 1 Cal.3d 168, 175, 81 Cal.Rptr. 784, 460 P.2d 984.) As promised, counsel failed to pursue viable defenses as outline in Petitioner's letters to the Court and described herein.

Additionally, in *Shell v. Weitek*, 218 F. 3d 1017 (9th Cir., 2000), the Court gave habeas review to a California state court residential burglary conviction. There had been disagreement between trial counsel and the accused about how to combat the State's fingerprint evidence. *Id.* at 1020. The *Shell* Court recognized the ruling in *Brown v. Craven*, *supra*, 424 F. 2d 1166, noting that the accused who is charged with a 'grievous crime' and goes to trial with a lawyer with whom he has become embroiled in an irreconcilable conflict will be deprived of any counsel whatsoever. *Id.* at 1170.

As here, not only was one issue at issue with me and trial counsel, but numerous issues were discarded or not pursued and I was continuously ignored and yelled at when spoken to.[16] Thus, Petitioner is in a more superior position than in *Shell* since the multiple and critical issues at odds with counsel and his demeanor towards me compounds the conflict. Further the 9th Circuit decided *Hudson v. Rushen*, 686 F. 2d 826 (9th Cir., 1982). *Hudson* added to *Brown v. Craven*, *supra*, the requirement that the record of proceedings include: "An appropriate inquiry into the grounds for [a motion for new counsel] ..." (*Shell v. Weitek*, *supra*, 218 F. 3d at 1025.) Where the record on the extent of the breakdown in the relationship between client and counsel itself is murky, the 9th Circuit has determined that further evidence may be taken to determine "... whether that conflict deprived [the accused] of the representation to which he was entitled by the Sixth Amendment". *Id.*at1027.

Contrary to the State's possible argument, the law does not require that the facts largely favor the accused where an irreconcilable conflict between counsel and client has deprived the client of the assistance of counsel. This much was clear under *Strikldand v. Washington*, 466 U.S. 668 (1984). As the Court put it there: "Actual or constructive denial of the assistance of counsel all together is legally presumed to result in prejudice." *Id.* at 692. The Supreme Court reiterated this rule when it decided *Mickens v. Taylor*, 122 S. Ct. 1954 (2002), a case involving an alleged conflict of interest caused by defense counsel's prior representation of the victim of a capital murder. The 9th Circuit has generally considered that where the conflict between conflict and counsel is such as to amount to a constructive denial of counsel, a Sixth Amendment violation carrying the **presumption of prejudice attached**. (*Shell v. Weitek*, *supra*, 218 F. 3d at 1027.)

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[16] Numerous issues in letters dated May 22, 2006 and June 15, 2006 exemplify why court's are to inquire about conflict. The United States Supreme Court has reiterated that *Strickland* applies where the ineffectiveness of counsel deprives the defendant of a substantive or procedural right to which the law entitles him. (*Williams v. Taylor*, 529 U.S. 362, 393-394 (2000); accord *Lockhart v. Fretwell*, 506 U.S. 364, 372(1993).)

THE LETTERS TO THE COURT AND TRIAL RECORD REVEALS A TOTAL BREAKDOWN OF COMMUNICATION AND THE CONFLICT DEPRIVED PETITIONER OF EFFECTIVE ASSISTANCE OF COUNSEL

A. Attorney/Client Relationship was Damaged Beyond Repair and Irretrievably Irreconcilable.

Petitioner recognizes that *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983), holds that a defendant is not entitled to a "meaningful relationship" with counsel. Precedent notes, however, that if the relationship between lawyer and client completely collapses, the refusal to appoint new counsel violates the Sixth Amendment. See, e. g., *Moore*, 159 F.3d 1 154. I 158.

While no United States Supreme Court case directly addresses the issue of irreconcilable conflict, Supreme Court precedent has long recognized that a criminal defendant's right to counsel is a fundamental component of our justice system. *See. e.g.*, *Powell v. Alabama*, 287 U.S. 45. 69 (1932). The Supreme Court's silence on this exact issue does not prevent this Court from identifying and applying governing principles to the case at hand. *Robinson v. Ignacio*, 2004 WL 433959 at *9 (9th Cir. March 10, 2004). Ninth Circuit precedent is "persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law and may also help [] determine what law is 'clearly established. '" Id. (quoting *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000)).

B. Trial Counsel Failed to Impeach The State Witness Who Alleged Having a Partially Assembled Rifle Qualifies As An Assault Weapon, Even Though Documentation From The Attorney General Shows The Opposite, Therefore Counsel Failed to Cross Examine The Witness, Raise a Defense, or Otherwise Provide Effective Assistance of Counsel by Ignoring This Information Since False or Otherwise Unreliable Testimony Was Provided and Heavily Relied on By The Court.

The California Court's could have addressed this issue under Penal Code section 1473, subdivision (b)(1), permits a petition for habeas corpus to be granted upon a showing that "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against" the defendant. The grounds enumerated in section 1473 do not limit the right to seek habeas corpus relief on other, nonstatutory grounds. (Pen.Code, § 1473, subd. (d).) *In re Pratt* 69 Cal.App.4th 1294, 82 Cal.Rptr.2d 260 Cal.App. 2 Dist.,1999.

United States v. Wallach, 935 F.2d 445, 473 (2nd Cir. 1991): "the perjury of one of the government's key witnesses infected the trial proceedings and interfered with the jury's [judge's] ability to weigh his testimony."

"In general, impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime,' *United States v. Petrillo,* 821 F.2d 85, 90 (2d Cir. 1987); *see also Giglio v. United States,* 405 U.S. [150,] 154-55, 92 S.Ct. [763,] 766 [31 L.Ed.2d 104]

Further, "[F]or purposes of discovery, the government is presumed to know of and have access to all material in the possession of any of the agencies it works with. *United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir.)*, cert. denied, 110 S. Ct. 167 (1989) ("The prosecution will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal [state] agency participating in the same investigation of the defendant.")

Among the basic duties that must be performed by defense counsel in a criminal case is the careful investigation of "**all defenses of fact and law that may be available to the defendant.**" (*People v. Pope* (1979) 23 Cal.3d 412, 425.) The nature of the investigation that needs to be undertaken depends on the circumstances of each case, but counsel must investigate the facts of any available and **viable defense**. (*People v. Ledesma, supra,* 43 Cal.3d at 222; *Strickland v. Washington* (1984) 466 U.S. 668, 691.) In sum, a defendant is entitled to "expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate preparation and preparation." (*In re Cordero, supra,* 46 Cal.3d at 180, quoting *People v. Ledesma,* supra, 43 Cal.3d at 215, emphasis added.)

As the record in this case demonstrates, trial counsel totally ignored or other failed to investigate material that was contradictory to the State's star witness. Mr. Abad was the only witness that provided expertise in the field of what does and does not qualify as an assault rifle. Mr. Abad's response to the judge's question whether his testimony was the "policy" of the Attorney General was fatal since a policy of a public agency is supposed to be supported by writings. No writings were prepared or submitted as evidence to support Mr. Abad's testimony the partially assembled rifle qualified as an "assault weapon" and the attached exhibits contradict Mr. Abad's testimony. Petitioner was entitled to expect that before counsel undertakes to act or not to act, he or she will make a rational and informed decision on strategy and tactics **founded** on adequate investigation and preparation. (*See*, e.g. *In re Hall (1981) 30 Cal.3d 408, 426;*

People v. Frierson (1979) 25 Cal.3d 142, 166.) It is well-established that failure to investigate fully the factual and legal basis for a potential defense falls below the standard of reasonably competent representation. (*In re Sixto* (1989) 48 Cal.3d 1247, 1259-1262; *In re Cordero* (1988) 46 Cal.3d 161, 167; *People v. Ledesma* 1987) 43 Cal.3d 171; *People v. Pope* (1979) 23Cal.3d412,427.) It is undisputed trial counsel failed to investigate any relevant impeachment material and discarded such prior to investigation.

By trial counsel failing to impeach, cross examine or otherwise discredit Mr. Abad's testimony was fatal to Petitioner's defense since this was the **sole source** of information for the court to determine guilt or innocence and contradicted the Legislative History (Lodged with the California Supreme Court and California Court of Appeal, Ex. 22) as well as internal Attorney General documents (Ex. 23).

In fact, the court noted how it heavily relied on Mr. Abad's testimony as the determining factor of finding Petitioner guilty. The trial court also noted how odd Mr. testimony was in the sense that Petitioner could have simply removed the pistol grip but had a fully functioning assault rifle and it would have been legal. Clearly, trial counsel was ineffective for failing to investigate this defense or provide this information to the court during cross examination.

Similarly, the California Supreme Court in *People v. Frierson* (1979) 25 Cal.3d 142, reversed a criminal conviction for ineffective assistance of counsel where counsel failed to obtain a psychological evaluation of his client and failed to consult experts to investigate a diminished capacity defense. The court explained "By his inaction, deliberate or otherwise, counsel deprived himself of the reasonable bases upon which to reach informed tactical and strategic trial decisions." (*Id.* at 541.) Conversely, it was not the Court restricting cross-examination, it was trial counsel and not the trial court who denied Petitioner his right to cross examine the State's witness with information from the Attorney General that contradicted a witness from the Attorney General (Mr Abad).

CONCLUSION

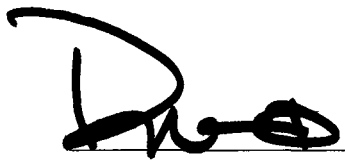
When a defendant accuses his counsel of improper behavior and the counsel disputes his client's accusations, an actual conflict of interest results because any contention by counsel that defendant's allegations are not true contradicts his client. *U.S. v. Shorter* 54 F.3d 1248; 1995 U.S. App. LEXIS 10061 cert denied 516 U.S. 896. An actual conflict of interest between retained counsel and a represented party requires an evidentiary hearing to determine whether or not the

CONCLUSION

It is for the above reasons a writ should issue.

DATED: November 13, 2008

Respectfully submitted,



Darren D. Chaker
Petitioner

TERRY NAFISI
District Court Executive
and Clerk of Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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312 North Spring Street, Room G-8 Los Angeles, CA 90012
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Monday, November 17, 2008

DARREN D. CHAKER
311 N. ROBERTSON BLVD. #123
BEVERLY HILLS, CA 90211

Dear Sir/Madam:

A [X] Petition for Writ of Habeas Corpus was filed today on your behalf and assigned civil case number SACV08- 1300 AG (RC)

A [ ] Motion pursuant to Title 28, United States Code, Section 2255, was filed today in criminal case number _____ and also assigned the civil case number _____

Please refer to these case numbers in all future communications.

Please Address all correspondence to the attention of the Courtroom Deputy for:

[ ] District Court Judge _____

[X] Magistrate Judge **Rosalyn M. Chapman**

at the following address:

[X] U.S. District Court
312 N. Spring Street
Civil Section, Room G-8
Los Angeles, CA 90012

[ ] Ronald Reagan Federal
Building and U.S. Courthouse
411 West Fourth St., Suite 1053
Santa Ana, CA 92701-4516
(714) 338-4750

[ ] U.S. District Court
3470 Twelfth Street
Room 134
Riverside, CA 92501

The Court must be notified within fifteen (15) days of any address change. If mail directed to your address of record is returned undelivered by the Post Office, and if the Court and opposing counsel are not notified in writing within fifteen (15) days thereafter of your current address, the Court may dismiss the case with or without prejudice for want of prosecution.

Very truly yours,

Clerk, U.S. District Court

By: CPOWERS
Deputy Clerk