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In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **BARRY ALLEN TURNAGE,** **Defendant and Appellant.**	Case No. S182598

OCT 13 2010

Third Appellate District, Case No. C059887
Yolo County Superior Court, Case No. 065019
The Honorable Thomas Edward Warriner, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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ISSUES

This case concerns appellant's claim that his punishment as a felon for planting a facsimile "bomb" (Pen. Code, § 148.1, subd. (d)) violates equal protection because the similar offense of planting a facsimile weapon of mass destruction under the same circumstances is punishable only as a misdemeanor (Pen. Code, § 11418.1). As framed by this Court upon the grant of review, the issues are:

1. Does Penal Code section 148.1, subdivision (d), violate equal protection principles because a violation is punishable as an alternative felony-misdemeanor without a finding that a person was placed in sustained fear? (See Pen. Code, § 11418.1.)

2. If so, what is the proper remedy?

INTRODUCTION

In the early 1970s, recognizing a rapidly growing threat from bombs in California, the Legislature punished the placement of even false bombs. Because bombs were so prevalent, a disruptive reaction–e.g., panic, confusion, evacuation, etc.–immediately followed a victim's virtually guaranteed perception of an easily-manufactured false bomb. The Legislature found the availability of felony punishment to be appropriate when a false bomb was placed with an intent to make another person think it was real or, under a 1992 amendment to the law, when the bomb was placed with an intent to cause fear. Since the placement of a false bomb with malicious intent was recognized as virtually certain to cause a disruptive reaction, the Legislature required only proof of placement with malicious intent for the availability of felony punishment for perpetrators like appellant.

More recently, the Legislature became concerned with a new but less understood threat–the threat posed by weapons of mass destruction

(WMDs). Because the public had less experience and exposure to the many and various types of WMDs, the Legislature chose to approach the threat in light of those differences. But, while some *real* WMDs have the ability to cause more destruction than *real* bombs, WMDs come in diverse forms that might not be readily recognizable. Because potential victims therefore may be less likely to perceive the false object as something dangerous, they conceivably may be less likely to have a serious reaction to seeing a *false* WMD than to seeing a *false* bomb. Recognizing the difference between a sighting of a bomb and a sighting of a WMD, the Legislature apparently was not satisfied that malicious intent would almost invariably lead to actual disruptive reaction. Therefore, it reasonably chose to take an initially more cautious approach: making felony punishment available only when such a disruptive reaction – a reaction the Legislature labeled "sustained fear" and specifically defined in Penal Code section 11418.5, subdivision (b) – is proven.[1]

STATEMENT OF THE CASE

In 2006, appellant placed a false bomb near a government building (a dispatch center). (I RT 33-54, 92, 95-96, 108, 110.) The false bomb was a small box with "C-4" written on the front and an American flag sticking out of the top. (I RT 40, 52.) The dispatcher who saw the false bomb believed the object could be a bomb, "was scared," and summoned the bomb squad. (IRT 41-43, 54-58, 201-212, 216-218.) In addition, the dispatch center was evacuated. (IRT 43.)

[1] Because the phrase "sustained fear" is a term of art that might be confused with the ordinary term "fear" (see Pen. Code, § 148.1, subd. (d)), respondent in this brief generally refers to "disruptive reaction" instead of "sustained fear."

The Yolo County District Attorney charged appellant with placing a false bomb (Pen. Code, § 148.1, subd. (d))[2] and alleged that appellant had suffered two prior "strike" convictions. (I CT 104-105.) The jury found appellant guilty of placing the false bomb and found the prior-conviction allegations to be true. (I CT 206, 241, 242.) Imposing felony punishment for the section 148.1(d) offense, the court sentenced appellant to a total prison term of 30 years to life. (II CT 330-331.)

Appellant appealed. He argued, and in a partially published opinion the Court of Appeal agreed, that his felony punishment under the false bomb statute violated equal protection. In appellant's view, the statute was unconstitutional because it made felony punishment available for placing a false bomb without proof a disruptive reaction resulted whereas felony punishment would be available for placing false WMDs only upon proof that "sustained fear" had resulted.

The Court of Appeal declined to remand to allow the People to prove "sustained fear" as a condition of retaining felony punishment even though the Legislature had authorized such punishment for conviction of the false bomb offense of which appellant had already been convicted. Instead, rejecting a rehearing petition from the People on that precise point, the Court of Appeal barred felony punishment for appellant and reduced appellant's offense to a misdemeanor.

SUMMARY OF ARGUMENT

A distinction between criminal statutes does not violate equal protection when there is both a legitimate governmental purpose and a reasonably conceivable state of facts providing a rational relationship for differing treatment. Here, respondent suffered no violation of his right to

[2] All further undesignated statutory references are to the Penal Code. Section 148.1, subdivision (d), will be cited as section 148.1(d).

equal protection of the laws, for there is a rational basis for allowing felony punishment for a violation of section 148.1(d), placement of a false bomb, without regard to whether he caused a disruptive reaction, even though felony punishment is allowed for a violation of section 11418.1, placement of a false WMD, only when "sustained fear" is proven.

It is at least conceivable that placement of a false bomb is more likely to result in a disruptive reaction than is placement of a false WMD because individuals are generally more familiar with bombs than with WMDs and are therefore more likely to perceive a false bomb to be a dangerous object than to perceive a false WMD to be dangerous at all. In light of the great deference to be paid to the Legislature in enacting laws and in distinguishing between the proof required for different offenses, the equal protection clause does not prohibit the Legislature from prescribing wobbler punishment for appellant's offense without regard to any disruptive reaction, even though it requires proof of "sustained fear" for the different wobbler offense of placing a false WMD.

Even if it would be unconstitutional to punish appellant without proof of the "sustained fear" required to be shown in WMD statute, the remedy should not be to shield appellant from felony punishment altogether. The evident intent of the Legislature was to ensure the availability of felony punishment for those whose placement of a false bomb (or false WMD) resulted in "sustained fear." The proper remedy in this case would be to allow the prosecutor the opportunity to prove that appellant's placement of a false bomb resulted in that disruptive action, i.e., "sustained fear," so that felony punishment – with the accompanying impact of the Three Strikes law – remains available for conduct such as appellant's.

ARGUMENT

I. BECAUSE THE LEGISLATURE RATIONALLY MAY HAVE CONCLUDED THAT PLACING A FALSE BOMB IS MORE CERTAIN TO CAUSE A DISRUPTIVE REACTION, EQUAL PROTECTION PRINCIPLES DID NOT REQUIRE IT TO CONDITION FELONY PUNISHMENT ON THE SAME "SUSTAINED FEAR" ELEMENT NECESSARY TO PROVE THE FELONY VIOLATION OF PLACING A FALSE WMD

A person who places a false bomb, with intent to cause fear, is guilty of a crime punishable alternatively as a felony or misdemeanor, without the need for the prosecution to affirmatively prove that a disruptive reaction resulted from the placement. (§ 148.1(d).) In contrast, a person who places a false WMD, with the intent to cause fear, is guilty of a crime punishable only as a misdemeanor in the absence of proof of "sustained fear" and punishable as a felony only upon affirmative proof of "sustained fear." (§ 11418.1) The Legislature had a rational basis to distinguish between placing a false bomb and placing a false WMD in this way: placement is more certain to lead to a disruptive reaction in the false bomb context than in the WMD context. A false bomb is more readily perceived as a dangerous object while a false WMD more likely may not be perceived as intended to be a dangerous object at all. The statutes' differing proof requirements for felony punishment, therefore, are constitutional under the equal protection clause. Appellant has not "clearly, positively, and unmistakably" proven – with all "presumptions and intendments" in favor of rejecting his challenge[3] – that there is no conceivable basis for requiring differing proofs to reach the same punishment.

The United States Supreme Court has described the rational basis standard for review of equal protection claims in strong terms which bar

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[3] *People v. Falsetta* (1999) 21 Cal.4th 903, 912-913.

judges from engaging in probing examination of acts within the province of the legislative branch of government:

> We many times have said, and but weeks ago repeated, that rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, *fairness*, or *logic* of legislative choices." Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge if there is any *reasonably conceivable* state of facts that could provide a rational basis for the classification."
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational *speculation unsupported by evidence or empirical data*." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative *every conceivable basis* which *might* support it," whether or not the basis has a foundation in the record. Finally, courts are *compelled* under rational-basis review to accept a legislature's generalizations even when there is an *imperfect* fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some *inequality*.'" "The problems of government are practical ones and may justify, if they do not require, rough accommodations – *illogical*, it may be, and unscientific."

(*Heller v. Doe* (1993) 509 U.S. 312, 319-321, internal citations omitted, italics added.)

That standard governs appellant's challenge in this case. For, as this Court has explained: "Generally, when we interpret a provision of the California Constitution that is similar to a provision of the federal Constitution, we will not depart from the United States Supreme Court's construction of the similar federal provision unless we are given cogent reasons to do so." (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 168.)

While there must be "*some* footing in the realities of the subject addressed by the legislation" (*Heller v. Doe, supra*, 509 U.S. at p. 321, italics added), a court may intervene only when the "statutory classification" is one that """rests on grounds *wholly* irrelevant to the achievement of the State's objective."""" (*id.* at p. 324, italics added). And, it is not irrational to impose disparate requirements of proof – even assuming potentially similar factual results – if it is conceivable that there is a difference in how readily the operative facts can be ascertained. (*Ibid.*)

In similar fashion, this Court in *People v. Wilkinson* (2004) 33 Cal.4th 821 rejected the defendant's argument that his equal protection rights were violated by a statutory scheme that punished the so-called "lesser" offense of battery on a custodial officer without injury more severely than the "greater" offense of battery on a custodial officer with injury. This Court found the defendant's premise – that battery without injury is always a less serious offense than battery with injury – to be questionable. (*Id.* at p. 839.) Indeed, in refutation of the defendant's premise, this Court provided an example of "a hypothetical defendant who, in the course of grabbing the arm of a correctional officer, inflicts a puncture wound with her fingernail that requires medical attention" compared to a "defendant who repeatedly hits and kicks the correctional officer, intending to cause serious injury but does not do so through no lack of effort." (*Ibid.*, internal quotation marks omitted.) Thus, the statutory scheme was neither irrational nor offensive to

equal protection principles because the Legislature could have believed that the "ostensible 'lesser' offense . . . *sometimes* may constitute a more serious offense and merit greater punishment than the 'greater' offense." (*Ibid.*, italics added.)

Wilkinson further observed that the Legislature does not violate equal protection principles by "determining which class of crimes deserves certain punishments and which crimes should be distinguished from others." (*People v. Wilkinson, supra*, 33 Cal.4th at p. 840.) As long as the Legislature acts rationally, its duty is to recognize degrees of culpability when drafting laws. (*Ibid.*)

It is conceivable and logical to believe that a principal harm resulting from placement of a *false* bomb or WMD is the fear that results once another person mistakenly *perceives* the item to be a bomb or WMD. And it is conceivable that there are differences between the likelihood that a false bomb will trigger such perception and the likelihood that a false WMD will trigger such perception.

It would not be irrational for the Legislature to assume that, given the long-standing public exposure to bombs in their many forms, the typical defendant attempting to make an item look like a bomb will have a considerable likelihood of success. Thus, it would not be irrational to assume that the typical innocent person encountering the item will be likely to perceive the item as a bomb. Conceivably, it is easy enough to seal a box with a ticking clock inside or fashion a device with tell-tale wires exposed (things commonly shown on television or in movies) to create an object likely to be perceived as a bomb. Hence, it is rational to assume that a defendant who sets out to create fear, by means of a placing a false bomb, will succeed in a great majority of cases in causing a disruptive reaction, e.g., evacuation, panic, isolation.

Indeed, the legislative history of section 148.1(d) supports this conclusion. The author of the bill, Assemblyman Alister McAlister, who introduced Assembly Bill 547 (section 148.1, former subdivision (b)) to criminalize placement of a false bomb, noted that receipt of a false bomb "can cause the same apprehension and the same expense and turmoil that results when a real bomb is planted." (Attachment A, p. 1 [Press Release from the Office of Assemblyman McAlister regarding AB 547 (Stats. 1972, ch. 1142, § 1, p. 2210), Feb. 24, 1972, taken from Assemblyman McAlister's file].) Furthermore, a memo to Assemblyman McAlister noted that more than a quarter of all bombings in the United States in 1971 were in California (Attachment A, p. 2 [Memorandum to Assemblyman McAlister regarding tabulation of bombing incidents in United States, Mar. 9, 1972, taken from Assemblyman McAlister's file regarding AB 547 (Stats. 1972, ch. 1142, § 1, p. 2210)]), indicating that Californians were especially likely to recognize a bomb upon sight, whether false or real. Almost 20 years later, when section 148.1(d) was amended to add malicious possession of a false bomb and to alter the specific intent requirement for the crime, both foes and advocates of the amendments recognized that false bombs, when placed with an intent to cause fear, cause just as much fear and panic as real bombs. (Attachment A, p. 3 [Assem. Com. On Pub. Saf., Comment on Sen. Bill 384 (1991-1992 Reg. Sess.) as amended Apr. 22, 1991, p. 1, par. 3]; p. 5 [Executive Director Michael W. Sweet, California District Attorneys Association, letter to Senator Russell supporting Sen. Bill 384 (1991-1992 Reg. Sess.), Apr. 3, 1991]; p. 6 [Legislative Advocate Melissa K. Nappan, California Attorneys for Criminal Justice, letter to Sen. Russell opposing Sen. Bill 384, Apr. 5, 1991].) Again, this supports at least a basis to speculate that in California, victims of false bomb placement are likely to identify the false object as a bomb. Further, little or nothing is needed to anticipate that an ordinary

person's reaction would be to evacuate or isolate the object, once there has been such recognition.

In contrast, public exposure to WMDs is far less long-standing. And it is at least reasonably *conceivable* that for many persons – criminals and innocent members of the public – the appearance of WMDs is not so readily known. Items intended to falsely represent WMDs include many different objects (see § 11417) that an average person might readily dismiss, unaware that the (false) items were even intended to appear dangerous. For example, a false WMD could simply be an envelope containing trace amounts of talcum powder. An average person might readily dismiss that as not representing a dangerous item. A bottle or vial with liquid inside, labeled (or not) with the name of an obscure dangerous chemical agent, might be placed and thus encountered in many areas where (irrespective of the defendant's intent) the item simply may be dismissed, possibly as only cleaning material.

Thus, it is *conceivable* that a defendant who sets out to create fear, by means of a placing a false WMD, will be less likely to create any disruption at all." And because it is *conceivably* less certain that a false WMD will cause such disruption, a legitimate governmental objective would be to decline, at the present time, to extend felony treatment to placement of false WMDs in the absence of some assurance that such disruption actually resulted from this new form of crime.[4] Because "the question is at least

[4] "The Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident. [T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." (*People v. Silva* (1994) 27 Cal.App.4th 1160, 1170, internal quotation marks and citations omitted.)

debatable," the statute suffices under a rational basis review. (*Heller v. Doe, supra*, 509 U.S. at p. 326, internal quotation marks and citations omitted.) "States are not required to convince the courts of the correctness of their legislative judgments." (*Ibid.*, internal quotation marks and citations omitted.) Nor does the absence of empirical evidence to support their judgment dictate a certain result under the equal protection analysis. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1203.)

It does not suffice, to prove the unconstitutionality of a legislative scheme, that a court might suspect it is unfair, imperfect, illogical, or at times inequitable. (*Heller v. Doe, supra*, 509 U.S. at pp. 319, 321.) Therefore, it is not unconstitutional for the false bomb and false WMD statutes to (1) operate in light of that conceivable difference in the likelihood of resulting disruptive reaction by (2) requiring actual proof of a disruptive reaction (which the Legislature labeled "sustained fear") in one case, but not the other, to support felony punishment. In any event, there is considerable logic in the different requirements of proof.

As stated, a conceivable difference is that placement of a false WMD is somewhat (or at least sometimes) less likely than a false bomb to succeed in creating a disruptive reaction. The statutory scheme requires affirmative proof of success in the former case to obtain felony punishment and does not require affirmative proof of success in the latter to obtain felony punishment. It cannot be said that imposing the requirement of proof only in the more uncertain false WMD context is "wholly irrelevant" to a legitimate governmental objective of limiting the availability of felony punishment absent some reasonable assurance that harm has actually resulted from the newer form of crime.

The Court of Appeal overlooked this conceivable basis for distinction by focusing on a belief that WMDs and bombs are legally indistinguishable. (*People v. Turnage* (Apr. 1, 2010, C059887) [cert. for

part. pub.]), hereafter Slip. Opn., at p. 12.) But it is unnecessary to explore the correctness of that belief regarding *real* WMDs and bombs, the harm from which is inflicted whether or not the victims were aware of their presence and nature. Here, the Legislature's method of distinction focuses on harm caused by *false* WMDs and bombs. As is evident by the language in both statutes requiring the defendant to intend to cause fear in another by his actions, a substantial quantum of the harm with which the statute is concerned is a fear-based disruption which results only when a false device is *recognized* as the dangerous object it is intended to represent. If the device is not recognized for what it is intended to represent, then it will not instill fear or cause a disruptive reaction. It is thus at least conceivable that "sometimes" the false WMD is distinctly less harmful (i.e., less likely to induce fear because it is less likely to be perceived as a dangerous object) than a more recognizable false bomb.

It follows, under *Heller v. Doe, supra*, and *People v. Wilkinson, supra*, that it does not deny equal protection that felony punishment for placing a false WMD requires actual proof of a disruptive reaction, but felony punishment for placing a false bomb does not. As long as the statute "rationally advances a reasonable and identifiable governmental objective," courts "must disregard" alternative means of reaching the same objective that individual judges or the court "perhaps would have preferred." (*Heller v. Doe, supra*, 509 U.S. at p. 3330, internal quotation marks and citations omitted.)

Instead of addressing this distinction, the Court of Appeal limited its consideration as to conceivable bases for legislative distinction on what happens once it is *known* to victims that a particular item is intended to represent a bomb or a WMD. (Slip Opn. at p. 12.) Under that view, since the potential effect or extent of fear is at least equal for a perceived WMD and a perceived bomb once these items have been recognized as dangerous,

there is no basis for more serious treatment of a false bomb. (*Ibid.*; see also Answer to Petition for Review, hereafter Answer, 4-5.)

But even were that view correct, it would simply clarify that the justification to be focused upon is not whether there is a difference once both items are recognized. Rather, given that every presumption favors upholding the Legislative distinction, the proper judicial focus should have been on whether there was a conceivable basis for distinction as to the likelihood that there would be recognition at all. Moreover, appellant incorrectly argues that the Legislature required proof of the victim's fear reaction for both offenses – but only "sustained fear" for false WMDs. (Answer 5.) On the contrary, the Legislature required that a *defendant* must *intend* to cause fear for both statutes, but *proof* of success is only required for false WMDs.

In any event, it would be conceivable for the Legislature to assume that – in a sufficiently large percentage of cases involving placement of false bombs – recognition, resulting fear, and a disruptive reaction was too likely. Thus, the false bomb statute requires no affirmative proof at all of success (i.e. recognition, resulting fear, and inevitable disruption) even when felony punishment is imposed. (Pen. Code, § 148.1(d).) Conversely, it would be conceivable for the Legislature to conclude, in contrast, that in an unacceptably large percentage of cases involving placement of false WMDs, recognition and resulting disruption was too speculative to make felony punishment available in the absence of proof. That distinction, even if speculative, is advanced by a legislative scheme requiring proof of "sustained fear" (necessarily including affirmative proof of recognition) in one case and not the other. It is irrelevant that the Legislature's method may be imperfect, illogical, unscientific, and occasionally susceptible to some inequality of result. (*Heller v. Doe, supra*, 509 U.S. at pp. 319-321.)

In addition, this Court need not determine what the Legislature actually contemplated in creating this legislative distinction. (See Slip Opn. at pp. 8-9, 12-13.) In equal protection challenges, as this Court has explained, "it is irrelevant whether the perceived reason for the challenged distinction *actually* motivated the legislature." (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1201, italics added.) Rather, while a court should decline to invent a fictitious purpose that could not have reasonably been within the legislature's contemplation (*id.* at p. 1201), it is unnecessary to show that such reason actually was affirmatively contemplated. Instead, a statute's differentiation based on a challenged classification (other than race or another protected category) must be upheld against an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482, internal quotation marks, italics, and citations omitted; *Hofsheier*, at pp. 1200-1201), regardless of whether the Legislature may have acted for some other purpose in enacting the statute (*Warden v. State Bar* (1999) 21 Cal.4th 628, 650). Thus, equal protection requires only that the statutory classification be rationally related to a conceivable (even if not affirmatively known to be the actual) legitimate governmental purpose.

It is not significant that legislative history reflected that the penalties for these crimes should be similar since the conduct involved in each is similar. (Slip Opn. at pp. 9, 12; see also Answer 4.) Just as the conduct is similar, the penalties are also *similar*; indeed, they are the same. It is just that the way of obtaining that same punishment is not identical. (Compare Slip Opn. at p. 9 and *id.* at p. 12.) Nevertheless, given that the Legislature's actual *enactment* does not treat the placements of the items the same in all respects – the very premise of the claim of unequal protection – there can

be no logic to an argument based on the premise that the Legislature intended that such conduct be treated similarly in all respects.

Significantly, the Legislature added section 11418.1 while simultaneously refraining from amending section 148.1(d). The Legislature's actions tend to demonstrate that it contemplated the different proof required to obtain felony punishment for each offense and was aware that proof of placement of a false WMD may sometimes result in lesser punishment than proof of placement of a false bomb. (See *People v. Wilkinson, supra*, 33 Cal.4th at p. 839 [Legislature's act of amending § 243 to include references to custodial officers while simultaneously not repealing § 243.1 suggests that "it contemplated that the ostensible 'lesser' offense of battery without injury sometimes may constitute a more serious offense and merit greater punishment than the 'greater' offense of battery accompanied by injury"].) In any event, as explained above, a statute passes muster under equal protection principles if it is supported by a conceivable justification and the court may not insist on proof that the Legislature in fact relied on such an apparent justification. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1201.)

Appellant also unpersuasively asserts the Legislature intended to avoid "automatic exposure to the Three Strikes Law" as to placement of a false WMD in the absence of proof of "sustained fear." (Answer 4; see also Slip Opn. at p. 13.) He appears to suggest that there is a "compelling" reason to believe the Legislature likewise intended to avoid exposure to the three strikes law for placement of a false bomb in the absence of affirmative proof of "sustained fear." (Answer 4.) The argument fails. The Legislature's clear intent to expose appellant to the three strikes law, even in the absence of affirmative proof of any fear, is found in the three strikes law itself. When enacting the three strikes law in 1994, the Legislature deliberately targeted every offense that qualified as a felony as of 1993. (§

667, subd. (h).) Given that appellant's offense was punishable as a felony in 1993, even without affirmative proof of any fear or disruptive reaction, it is illogical to suggest the Legislature's intent in any way favored the result in this case. Worse yet, it is illogical to suggest that the legislative history of section 11418.1 has any effect or relevance to the previously-enacted section 148.1(d).

The constitutional question is what conceivably *could* justify what the Legislature did. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1201.) Here, it is at least conceivable that appellant's placement of a false bomb was more certain to result in a disruptive reaction than was placement of a false WMD. Therefore, the Legislature's chosen distinction between the proofs necessary to make felony punishment available for placement of false bombs versus placement of false WMDs does not violate equal protection.

II. EVEN IF EQUAL PROTECTION WOULD REQUIRE AFFIRMATIVE PROOF OF "SUSTAINED FEAR" BEFORE FELONY PUNISHMENT IS AVAILABLE FOR PLACING A FALSE BOMB, THE PEOPLE SHOULD BE ALLOWED TO PROVE THAT APPELLANT CAUSED "SUSTAINED FEAR" SO THAT FELONY PUNISHMENT WOULD REMAIN AVAILABLE FOR HIS CRIME

Even if equal protection principles were violated, the Court of Appeal's remedy – reducing appellant's sentence to a misdemeanor – precluded felony punishment for appellant, irrespective of whether he caused a disruptive reaction. In doing so, the Court of Appeal deprived the People of the opportunity to prove formally – with notice of the allegation to appellant – that he caused "sustained fear" when he placed the false bomb thus warranting felony punishment under the terms of section 148.1(d) and obviating any equal protection problem. But any remedy should track the result that the Legislature most likely would have wanted. Here, because the Legislature clearly wanted the option of felony punishment for a person such as appellant (who in fact was shown by the

evidence to have violated the terms of section 148.1 and also to have caused a disruptive reaction), the proper remedy is to remand to allow the People the opportunity to plead and prove that appellant caused "sustained fear."

In choosing an appropriate remedy for an equal protection violation, the court's primary concern should be to determine the Legislature's preference. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1207; *People v. Sandoval* (2007) 41 Cal.4th 825, 844, 845 [if legislative intent would best be furthered by revising statute rather than invalidating it, judiciary may revise the statute in a manner that avoids constitutional problems].) For example, in *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated the defendant's conviction for receiving stolen property under section 496 because the statute "created an unconstitutional presumption that relieved the prosecution of its burden of proving every element of the offense beyond a reasonable doubt." (*Sandoval*, at p. 844, fn. 7.) However, this Court modified the statute to render it constitutional and to effectuate the intent of the Legislature – to create only a permissive inference rather than a mandatory presumption – for purposes of future prosecutions and also *for retrial of Roder's case*. (*Roder*, at pp. 505-507; *Sandoval*, at p. 844 & fn. 7.)

Here, even if the false bomb statute violates equal protection, the result that most closely matches what the Legislature intended would be to require the People to prove "sustained fear" under the false bomb statute as a condition to retaining the felony sentence. The false WMD statute, enacted later in time, specifically made felony punishment available when "sustained fear" was proven. It is difficult to imagine the Legislature, which made felony treatment available for both false bombs and false WMDs at least when there is a disruptive reaction, would prefer that felony treatment simply be *unavailable* for a defendant who placed a false bomb –

and yet that is the result that the Court of Appeal reached. The Court of Appeal recognized the importance of ascertaining the Legislature's intent when considering the appropriate remedy for an unconstitutional statute (Slip Opn. at p. 14) and declared it would not foreclose the possibility of prosecutors proving "sustained fear" to obtain felony punishment for placement of false bombs (*id.* at p. 14, fn. 6). However, the result in this case does not comport with that statement, for the Court of Appeal foreclosed felony punishment for appellant. (*Id.* at p. 15.)

Such a result should be "reject[ed] out of hand" (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1208), given the clear intent to make felony punishment at least *available* for appellant's conduct of placing a false bomb, and given "the Legislature's goal that sentences be imposed 'proportionate to the seriousness of the offense.' (§ 1170, subd. (a)(1).)" (*People v. Sandoval, supra*, 41 Cal.4th at p. 851.) In addition, there has been a longstanding policy by the electorate and the Legislature to make *any* current felony an appropriate trigger to *end* a lengthy and harmful criminal career (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)). These policies "serve [the] important and vital public purpose[s]" (*Hofsheier*, at p. 1208) of imposing sentences which are commensurate with the severity of the crime and of preventing continuance of such a career of crime.

Here, the People proved beyond a reasonable doubt that appellant committed the offense enacted by the Legislature, and he received the felony punishment prescribed by the Legislature. Even if the Constitution requires some further condition before the Legislature's intended punishment could be imposed, it is not logical to suppose the Legislature would have preferred to preclude felony punishment for appellant, rather than allowing the People to take whatever remedial step was required by the Constitution. In short, if the Constitution does not permit the offense of placing a false bomb to result in the already prescribed sanction of felony

punishment unless such offense was also affirmatively proven to have resulted in "sustained fear," then the important public purpose of ending criminal careers should have permitted the People to make such remedial proof.

Indeed, as noted by the Court of Appeal, the dispatcher who saw the false bomb "was scared," believed the object could be a bomb, and treated it accordingly. (Slip Opn. at pp. 4-6.) In addition, the dispatch center was evacuated.[5] (IRT 43.) This falls within the statutory definition of "sustained fear" (see § 11418.5, subd. (b)) which "can be established by, but is not limited to, conduct such as evacuation of any building by any occupant . . . ." Moreover, the summoning of the bomb squad and the bomb squad's examination of the false bomb was equivalent to "any isolation, quarantine, or decontamination effort." (*Ibid.*; IRT 201-212, 216-218.)

In his Answer to respondent's Petition for Review at pages 10-12, appellant argued that, because portions of the definition of "sustained fear" in section 11418.5 would not equally be relevant to the false bomb statute, modification of section 148.1(d) requiring proof of "sustained fear" for felony punishment is ill-advised. However, the Legislature's careful use of the limiting phrase "can be established by, but is not limited to" refutes any alleged concern about cross-application. Rather than trying to limit when or how the definition of "sustained fear" would apply, the Legislature defined the phrase to be as inclusive as possible. Thus, the Legislature

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[5] In his Answer to respondent's Petition for Review, appellant argued that the Court of Appeal's statement of facts demonstrates it rejected the evidence that the dispatch center was evacuated. (Answer 11.) Since respondent called the Court of Appeal's attention to this omission or misstatement of fact in its Petition for Rehearing (Petition for Rehearing 12), this Court should not accept the Court of Appeal's erroneous omission or misstatement (Cal. Rules of Court, rule 8.500(c)(2)).

would clearly approve of use of the definition, even with potentially inapplicable parts, to the related crime of placement of false bombs. Absent some persuasive argument that the conduct legislatively defined as "sustained fear" – evacuation, isolation, etc. – would not be precisely what is expected upon recognition of either false device, it is illogical to suppose the Legislature would have intended proof of some other reaction – were affirmative proof required at all – in the context of a false bomb.

In a related argument in his Answer, appellant suggested that legislative history for section 11418.1 indicates that the Legislature desired felony treatment for placement of WMDs that resulted in sustained fear because such conduct was "violent." (Answer 11.) Appellant then suggested that, because certain parallel circumstances would not arise with false bombs, the Legislature would not want felony punishment for their placement. Assuminh legislative history for the WMD statutes (§§ 11418.1, 11418.5) is even relevant to section 148.1(d), it does not support appellant's argument. The Legislature already clarified its desire that felony punishment be available for placement of false bombs by expressly so stating in the statute itself. There is no need to look at the legislative history of section 148.1(d) or any other statute. (*In re Jennings* (2004) 34 Cal.4th 254, 263; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [to determine Legislature's intent, judiciary must first examine language of the statute]; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 658.)

In his Answer to respondent's Petition for Review, appellant also asserted that the already legislatively prescribed felony punishment for violating section 148.1(d) should not be permitted even upon proof of a disruptive reaction. He claimed that when a statute violates equal protection, a reviewing court has only two choices for the remedy: (1) it can invalidate the statute; or (2) it can extend the benefits to the party

aggrieved. Citing *Kopp v. Fair Political Practices Com.* (1995) 11 Cal.4th 607 (*Kopp*), appellant argued that permitting felony punishment upon proof of "sustained fear" improperly rewrites section 148.1(d) to judicially create a new crime with a new element. (Answer at pp. 7-12.)

But such argument fundamentally misses the mark. Appellant already stands convicted of the offense enacted by the Legislature and he already faces the felony punishment authorized by the Legislature for that offense as enacted. It is the judicial branch (through the Court of Appeal) that has found that such punishment violates equal protection principles. Implicitly, the judicial branch further found that such punishment would be constitutional if conditioned upon proof of "sustained fear." But, if such additional constitutional condition – external to the statute as written by the Legislature – is required, then the proper remedy is to permit such constitutional condition to be met. (See, e.g., *People v. Hofsheier, supra*, 37 Cal.4th at pp. 1208-1209 [where legislatively sanctioned requirement of registration may only be constitutionally imposed by having judge exercise judicial discretion, proper remedy is to remand so that condition may be met].)

Kopp itself supports such a result. *Kopp* noted that courts have extended the reach of underinclusive criminal statutes in order to avoid invalidity under equal protection principles. (*Kopp, supra*, 11 Cal.4th at p. 637.) *Kopp* cited several sister state cases which have extended (i.e., modified) criminal statutes in response to equal protection concerns: *People v. Liberta* (N.Y. 1984) 474 N.E.2d 567, 578-579 & footnote 15, citing additional cases (extending reach of rape law to married men who rape their wives and females who rape males); *Plas v. State* (Alaska 1979) 598 P.2d 966, 968-969 (extending coverage of prostitution statute to males); *State v. Books* (Iowa 1975) 225 N.W.2d 322, 325 (extending bribery statute to cover unlawful receipt of gifts to state as well as county

employees). (*Kopp*, at p. 637, fn. 33.) Moreover, the Supreme Court has approved modification of, and has encouraged other courts to follow its lead in modifying, otherwise vague or overbroad criminal statutes, such as criminal obscenity statutes, to render such statutes constitutional. (*Id.* at p. 638.)[6]

Here, there is no need to *extend* the reach of section 148.1(d) to permit felony punishment for placing a false bomb. To the contrary, by its own terms – terms in place long before appellant violated and was convicted for violating the statute – it *already* provides for such felony punishment as written. What respondent urges here is that, where the judicial branch finds itself obliged to impose an additional condition to permit the punishment prescribed by the Legislature, the judicial branch can hardly reject the option permitting the People to meet that judicially-imposed condition in order to effectuate the punishment intended by the Legislature.

In his Answer to respondent's Petition for Review, appellant also argued that, if "sustained fear" is "added" to section 148.1(d), he may not be retried for the "new crime" with the "extra sustained fear element." (Answer at pp. 13-14, citing § 1023 [double jeopardy] and *People v. Anderson* (2009) 47 Cal.4th 92, 113-114.) Further, appellant asserted that the new element of "sustained fear" under section 148.1(d) could not be

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[6] Indeed, *Kopp* cited a case involving a modification to preserve the constitutionality of the statute therein under attack: *In re Kay* (1970) 1 Cal.3d 930. *Kay* involved a Penal Code section making it a crime for anyone to "willfully disturb[]" any lawful meeting. (§ 403.) This Court found the term overbroad because it would criminalize protected speech under the First Amendment. To preserve the statute, this Court construed it to require that the defendant substantially impaired the conduct of the meeting by intentionally committing acts in violation of implicit customs or of explicit rules for governance of the meeting, of which he knew, or as a reasonable person should have known. (*Kay*, at p. 943; *Kopp, supra*, 11 Cal.4th at p. 644, fn. 39.)

retroactively applied to appellant because his conduct occurred before the grafting of the "new element" to the statute. Just as the Legislature is barred by the ex post facto clause from passing a retroactive law, his argument stated, a court is barred by the due process clause from achieving the same result by judicial construction. (Answer at pp. 13-15.)

But, as stated above, that fundamentally misses the mark because appellant *already* stands convicted of the offense enacted by the Legislature and *already* faces the punishment which the Legislature itself authorized as sanction for the offense as written. Thus, there can be no double jeopardy problem. Rather, even if this Court were to find an equal protection violation, the remainder of this case would concern only whether the punishment prescribed by the Legislature for the offense enacted by the Legislature can be obtained, consistent with the Constitution, only if there is proof of a disruptive reaction from appellant's offense. If imposition of this condition, a condition that is in fact external to the legislative terms, is the means by which the statute is rendered constitutional, then the People must be given the opportunity to remedy the matter by meeting the condition.

This Court's decision in *People v. Roder, supra*, 33 Cal.3d at pages 505-507, likewise disposes of appellant's retroactive application argument. As noted, in *Roder* this Court rendered the law against receiving stolen property (§ 496) constitutional by interpreting the mandatory presumption required under the law to be a permissive inference. (*Id.* at pp. 504-507.) This Court then remanded the case so that Roder could be retried under this interpretation, noting "On remand, the trial court should fashion an appropriate instruction, which informs the jury of the permissive inference but at the same time makes clear that the prosecution retains the burden of proving every element of the offense beyond a reasonable doubt. [Citation.]" (*Id.* at p. 507.)

Here, no full retrial is needed at all. To the contrary, in the event some additional matter must be proven for the Constitution to permit an in-place legislative sanction to apply based on proof of elements already prescribed by that legislative body, there is no legitimate argument against permitting such additional matter to be proven. (See *Cunningham v. California* (2007) 549 U.S. 270, 286, 294 [where Constitution itself imposes requirement of an additional jury proof – to allow punishment already authorized by legislatures upon more limited proofs to jury – constitutionally permissible remedy includes allowing such external constitutionally-imposed condition to be met on remand].) Thus, even if equal protection principles have been violated, there is no legitimate argument that the People should be barred from a remand to prove appellant's offense resulted in "sustained fear," as the condition to retaining the legislatively prescribed felony punishment for the offense enacted by the Legislature.

Indeed, due process of law is not a right held exclusively by criminal defendants; the People in a criminal case are also entitled to due process of law. (Cal. Const. art. I, § 29; see *United States v. Nixon* (1974) 418 U.S. 683, 713; *Stein v. New York* (1953) 346 U.S. 156, 196-197, overruled on other grounds in *Jackson v. Denno* (1964) 378 U.S. 368, 381; *Fay v. New York* (1947 332 U.S. 261, 288; *People v. Dennis* (1986) 177 Cal.App.3d 863, 873; *People v. Sahagun* (1979) 89 Cal.App.3d 1, 25; *People v. Alfaro* (1976) 61 Cal.App.3d 414, 427.) This right encompasses the right to be present during all important stages of the proceedings, the right to hear the testimony and see tangible evidence, the right to cross-examine and to present rebuttal evidence, and the right to be heard in meaningful arguments. (*Sahagun*, at p. 25; compare with *People v. Ault* (2004) 33 Cal.4th 1250, 1269 [interpreting Cal. Const., art. I, § 29, enacted in 1990 after *Sahagun*, and finding that the People's right to due process is not the

"exact equivalent" to the defendant's].) "There can be no such thing as a legal trial, unless both parties are allowed a reasonable opportunity to prepare to vindicate their rights." (*People v. Sarazzawski* (1945) 27 Cal.2d 7, 17, overruled on other grounds in *People v. Braxton* (2004) 34 Cal.4th 798, 817.)

In the instant case, even though the People in fact presented evidence of a disruptive reaction, the Court of Appeal ruling would prevent the state from obtaining the punishment the Legislature proscribed for appellant's offense. And that would remain so even though the evidence in this case demonstrated that appellant's conduct caused another person to be placed in "sustained fear" and thus warranted felony punishment. (See Slip Opn. at pp. 4-6, 19 [recognizing that the dispatcher who saw the false bomb "was scared," believed the object could be a bomb and treated it accordingly, and that even the bomb expert was wary of it].) This deprivation of due process is even more serious here because, since appellant never even raised his equal protection argument in the trial court, the People were without notice that it should seek a separate jury finding regarding "sustained fear" in an abundance of caution to prevent the exact result reached here.

Accordingly, even in the event this Court finds that the statutory scheme violates equal protection, respondent respectfully submits this Court should order a remand to permit an opportunity to prove "sustained fear" as a condition to retaining the present felony punishment for appellant's offense.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeal and rule that section 148.1 is constitutional as written. In the alternative, this Court should order a remand to allow the People an opportunity to prove "sustained fear" in order to submit appellant to the possibility of felony punishment for his offense.

Dated: October 11, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
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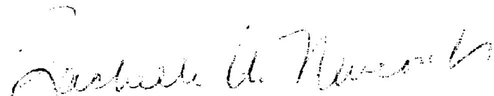

RACHELLE A. NEWCOMB
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 7,529 words.

Dated: October 11, 2010

EDMUND G. BROWN JR.
Attorney General of California

RACHELLE A. NEWCOMB
Deputy Attorney General
Attorneys for Plaintiff and Respondent

ATTACHMENT A

From the Office of
Assemblyman Alister McAlister
Room 2169 - State Capitol
Sacramento, California 95814
(916) 445-7874

February 24, 1972

FOR IMMEDIATE RELEASE

SACRAMENTO - Assemblyman Alister McAlister, D-San Jose, today introduced AB 547 to make it a crime to willfully send any facsimile bomb to any other person. The offense would be punishable by imprisonment in the state prison not to exceed 3 years or in the county jail not to exceed 1 year.

McAlister stated: "It has come to my attention that it is not presently a crime to send to another a facsimile or imitation bomb that deceives the receiving person into believing that it is a real bomb. The receipt of such a facsimile bomb can cause the same apprehension and the same expense and turmoil that results when a real bomb is planted."

#

March 9, 1972

MEMO TO: Alister McAlister

FROM: Gloria Chacón

SUBJECT: Tabulation of bombing incidents in United States, subdivided into California and San Jose.

The information given herein pertains to the year January 1971 to December 31, 1971. (Other information of this type usually cuts off with year ending in July, but Mr. Stewart figured it for an actual calendar year).

Just as a note of interest for the information to follow, it was indicated that tourist activity in the United States has increased since 1965 by 10,000%.

JANUARY 1971 to DECEMBER 31, 1971

United States--2,049 actual bombing incidents reported. The number of bombs found for these incidents was 2,585. (The reason for the discrepancy in number is that many times more than one bombing device was used.)

California--525 actual bombing incidents reported. The number of bombs found--654. California accounted for 25.6% of total United States bombings.

With the above number of bombings in the United States, 208 people were injured and 17 were killed. In California, 35 people were injured and 5 were killed. California accounted for 16.8% of the total US injured and 29% of those killed.

SAN JOSE--(within city limits)--97 bombs were found; 48 of these exploded and 49 were de-activated.

In other areas of the country there were major incidents that may have accounted for the number of bombings (riots, racial disturbances, etc.), however, California had no such events during 1971. California bombings have been a major critical problem. The bombings in this state in 1971 were singular and unrelated.

(The above information was taken from phone dictation of 3/9/72 by Mr. Joe Stewart, San Jose Police Department--gac)

Date of Hearing: June 25, 1991
Counsel: Paul Gerowitz

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
John Burton, Chair

SB 384 (Russell) - As Amended: April 22, 1991

PRIOR ACTION: Senate Judiciary: 8 ayes; 0 noes
Senate Floor: 32 ayes; 0 noes

ISSUE: SHOULD IT BE AN ALTERNATE FELONY/MISDEMEANOR TO MALICIOUSLY POSSESS A FALSE OR FACSIMILE BOMB?

DIGEST

Under current law any person who maliciously gives, mails, sends, or causes to be sent a false or facsimile bomb to another person, is guilty of an alternate felony/misdemeanor punishable by 16 months, two or three years in state prison and/or a fine up to $10,000, or up to a year in county jail and/or a fine up to $1,000. (Penal Code section 148.1.)

This bill makes malicious possession of a false or facsimile bomb, with intent that another person think it is a real bomb and with the knowledge that it is a false or facsimile bomb, an alternate felony/misdemeanor punishable by 16 months, two or three years in state prison and/or a fine up to $10,000 or up to a year in county jail and/or a fine up to $1,000.

COMMENTS

1) Purpose. According to the author, this bill is necessary because, "under existing law there is no penalty for possession of a facsimile bomb."

2) Definition of Malice. This bill contains no definition of malice. It is unclear how a person can maliciously possess an item, as opposed to maliciously delivering or sending the same item. Penal Code section 7 defines malice as having "a wish to vex, annoy, or injure another" or "to do a wrongful act." In this case, however, it is hard to see how a person can intend, by mere possession, any of these consequences. Faced with this vagueness, it is unknown how a trial court might construe the language of this bill. A suggested amendment would be to define 'maliciously possess' to mean 'possess with the intent to use in the commission of an offense.'

3) Opposition. California Attorneys for Criminal Justice oppose this bill. As they point out, 'a false bomb cannot cause damage, and unless sent or placed somewhere, as is already proscribed by current law, cannot even frighten another person.'

- continued -

SOURCE: San Bernardino Sheriff's Department

SUPPORT: California District Attorneys' Association

OPPOSITION: California Attorneys for Criminal Justice

SB 384

CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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APR 4 1991

April 3, 1991

The Honorable Newton R. Russell
California State Senate
State Capitol, Room 5061
Sacramento, CA 95814

Re: SB 384 - Support

Dear Senator Russell:

On behalf of the California District Attorneys Association (CDAA), I wish to commend you for introducing Senate Bill 384. You may be pleased to learn that CDAA will indeed support this legislation which would make it a crime to knowingly possess a false or facsimile bomb with the intent to make other persons believe it is a real bomb.

Bomb threats occur all to often in today's society. The horrific consequences manifested from such threats are panic, confusion and sometimes injury. To actually possess a false or facsimile bomb in order to make another person believe a real bomb exists, goes far beyond the norms of civilized behavior and should be punished aggressively. Your bill accomplishes this end, and we support it.

Sincerely,

Michael W. Sweet

Michael W. Sweet
Executive Director

MS:mi

cc: Senate Committee on Judiciary

California Attorneys for Criminal Justice CACJ

Senator Newton Russell
State Capitol - Room 5061
Sacramento, CA 95814

April 5, 1991 Re: SB 384

Dear Senator Russell:

CACJ regrets to inform you of our opposition to SB 384.

We can see absolutely no reason to criminalize the mere possession of a fake bomb. A false bomb, obviously, cannot cause very serious damage; and, unless sent or placed somewhere (already proscribed by current law), cannot even frighten another person.

Our county jails are so overcrowded that persons who commit real crimes are released without serving their terms. It seems like poor public policy, at best, to add to the jail population by criminalizing the mere possession of a harmless object.

If you or your staff wish to discuss this further, please contact me at my office.

Very truly yours,

Melissa K Nappan

Melissa K. Nappan
Legislative Advocate

cc: Members and consultants,
Senate Judiciary Committee

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Barry Allen Turnage** No.: **S182598**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 12, 2010, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Peggy A. Headley
Attorney at Law
Law Office of Peggy A. Headley
#180, 11448 Deerfield Drive, Suite 2
Truckee, CA 96161
Counsel for Defendant/Appellant
(2 Copies)

The Honorable Jeff W. Reisig
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Deena Fawcett
Clerk/Administrator, Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814-4719

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 12, 2010, at Sacramento, California.

Declarant

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