

SUPREME COURT

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SUPREME COURT
FILED

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

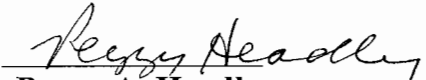
PEOPLE OF THE STATE OF CALIFORNIA,]	No. S182598
Plaintiff and Appellant,		Court of Appeal
		No. C059887
vs.		
		Yolo County 06-5019
BARRY ALLEN TURNAGE,		No. 04-1665
Defendant and Respondent.		REQUEST FOR
		JUDICIAL NOTICE

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Pursuant to Evidence Code section 450, section 452, subdivisions (a) and (c), Evidence Code section 459, California Rules of Court, rule 8.252, subdivision (a) and rule 8.520, subdivision (g), appellant respectfully requests this Court to take judicial notice of the Legislative Analysis by the Senate Committee on Public Safety of Assembly Bill 1838 (2001-2002 Reg. Sess), as amended March 7, 2002, for hearing on June 18, 2002. The Legislative Analysis pertains to Penal Code section 11418.1, placing a false or facsimile weapon of mass destruction (Stats 2002, c. 606 (A.B. 1838), § 6, eff. September 17, 2002).

The request for judicial notice is supported by the following points and authorities. A copy of the Legislative Analysis by the Senate Committee on Public Safety of Assembly Bill 1838 (2001-2002 Reg. Sess), as amended March 7, 2002, for hearing on June 18, 2002, is attached as Exhibit A.

DATED: NOV. 4, 2010


Peggy A. Headley
Attorney for Appellant Turnage

MEMORANDUM OF POINTS AND AUTHORITIES

One of the questions upon which this Court granted review is whether section 148.1, subdivision (d) violates equal protection. The Court of Appeal concluded that it did. In so deciding, the Court of Appeal took judicial notice of the legislative history of section 11418.1, concerning false weapons of mass destruction (“WMD”), and relied upon that legislative history in deciding appellant’s equal protection rights were violated. (*People v. Turnage* (2010) 183 Cal.App.4th 458, 464-465, review granted July 14, 2010, SS182598.) Just as this legislative history was judicially noticeable in the Court of Appeal, it is also judicially noticeable in this Court.

In particular, the Law Revision Commission Comments to Evidence Code section 450 state:

Under the Evidence Code, as under existing law, courts may consider whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law. *That a court may consider legislative history...is inherent in the requirement that it take judicial notice of the law.* In many cases, the meaning and validity of statutes, the precise nature of a common law rule, or the correct interpretation of a constitutional provision can be

determined only with the help of such extrinsic aids...Section 450 will neither broaden nor limit the extent to which a court may resort to extrinsic aids in determining rules of law that it is required to notice.

(Law Rev. Com. Comment to Evid. Code, § 450.)

Evidence Code section 452, subdivision (a) permits judicial notice of “The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.”

Evidence Code section 452, subdivision (c) permits judicial notice of: “Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.”

Evidence Code section 459, subdivision (a) provides, in pertinent part: “The reviewing court may take judicial notice of any matter specified in Section 452.”

As this Court has stated: “We must, of course, judicially notice California statutory law. (Evid. Code, § 451, subd. (a).) We may also judicially notice matters underlying such law.” (*Estate of Joseph* (1998) 17 Cal.4th 203, 210, fn. 1, citing *Schmidt v. Southern Cal. Rapid Transit Dist.* (1993) 14 Cal.App.4th 23, 30, fn. 10.)

In construing statutes, and determining equal protection issues, courts frequently consider legislative history. (See e.g. *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1204-1207 [discussing legislative history of statutes in deciding that equal protection violated]; *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 373 [discussing legislative history in rejecting equal protection claim]; *G.G. Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1103 [discussing analysis of assembly bill by Senate Committee on Public Safety].)

The material here is cognizable legislative history. (*People v. Allegheny Casualty Co.* (2007) 41 Cal.4th 704, 710-714 [discussing analysis of assembly bill by Senate Committee on Public Safety]; *G.G. Doe v. California Depart. of Justice, supra*, 173 Cal.App.4th at p. 1103 [discussing analysis of assembly bill by Senate Committee on Public Safety]; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-38.)

The analysis by the Senate Committee on Public Safety of Assembly Bill 1838 (2001-2002 Reg. Sess), as amended March 7, 2002, for hearing on June 18, 2002, is attached as Exhibit A.

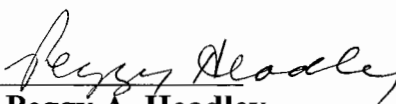
It may also be located at the Official California Legislative Information website, at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1801-1850/ab_1838_cfa_20020618_141005_sen_comm.html

Pursuant to the authority set out above, appellant respectfully requests that this Court take judicial notice of this legislative history.

CONCLUSION

For the reasons stated above, appellant respectfully requests that this Court grant this judicial notice motion.

DATED: NOV. 4, 2010


Peggy A. Headley
Attorney for Appellant

ORDER

FOR GOOD CAUSE SHOWN, this Court takes judicial notice of the analysis by the Senate Committee on Public Safety of Assembly Bill 1838 (2001-2002 Reg. Sess), as amended March 7, 2002, for hearing on June 18, 2002.

Dated: _____

CHIEF JUSTICE
CALIFORNIA SUPREME COURT

EXHIBIT A

SENATE COMMITTEE ON Public Safety
Senator Bruce McPherson, Chair A
2001-2002 Regular Session B

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AB 1838 (Hertzberg)
As Amended March 7, 2002
Hearing date: June 18, 2002
Penal Code (URGENCY)
JM:br

WEAPONS OF MASS DESTRUCTION - ADDITIONAL CRIMES AND PENALTIES

HISTORY

Source: Los Angeles County District Attorney

Prior Legislation: AB 140 (Hertzberg-Alarcon) - Ch. 573, Stats. 1999

Support: Riverside Sheriff's Association; Association for Los Angeles Deputy Sheriffs; Los Angeles Police Protective League; Peace Officers Research Association of California; California State Sheriffs' Association; California Highway Patrol; Attorney General; California District Attorneys Association (co-sponsor)

Opposition: American Civil Liberties Union (unless amended to be consistent with SB 1287 (Alarcon))

[NOTE: THIS ANALYSIS REFLECTS AMENDMENTS DISCUSSED AMONG THE SPONSOR, COMMITTEE STAFF, AND REPRESENTATIVES OF THE AUTHOR'S OFFICE. THESE AMENDMENTS WILL CONFORM THIS BILL TO SB 1287 (ALARCON) AS TO THE SECTIONS SHARED BY THE TWO BILLS.]

KEY ISSUES

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SHOULD ANY MURDER COMMITTED THROUGH USE OF A WMD BE DEFINED AS FIRST DEGREE?

SHOULD A CONVICTION FOR USE OF A WEAPON OF MASS DESTRUCTION (WMD) BE CLASSIFIED AS A SERIOUS AND A VIOLENT FELONY?

(CONTINUED)

SHOULD THE DEFINITION OF A WEAPON OF MASS DESTRUCTION (WMD) INCLUDE RESTRICTED BIOLOGICAL AGENTS, AIRCRAFT, VESSELS OR SPECIFIED VEHICLES WHEN USED AS DESTRUCTIVE WEAPONS?

SHOULD "USED DESTRUCTIVE WEAPON" BE DEFINED TO MEAN USED WITH INTENT TO CAUSE WIDESPREAD GREAT BODILY INJURY (GBI) OR DEATH BY A FIRE OR EXPLOSION, RELEASE OF CHEMICAL, BIOLOGICAL, NUCLEAR OR RADIOACTIVE AGENT?

SHOULD THE CRIME OF USE OF A WMD AGAINST ANIMALS OR CROPS BE AMENDED TO INCLUDE SEED AND SEED STOCK?

SHOULD PENALTIES FOR UNLAWFUL POSSESSION, DEVELOPMENT, TRANSFER, ETC. OF A WMD BE RAISED FROM 3, 6 OR 9 YEARS IN PRISON, TO 4, 8, OR 12 YEARS?

SHOULD THE CRIME OF USE OF A WMD TO DAMAGE OR DISRUPT THE FOOD OR WATER SUPPLY BE EXTENDED TO COVER A "SOURCE OF DRINKING WATER" AND PENALTIES RAISED FROM 4, 8, OR 12 YEARS IN PRISON, TO 5, 8 OR 12 YEARS?

SHOULD THE CRIME OF POSSESSING ANY RESTRICTED BIOLOGICAL AGENT BE EXTENDED TO A MICROORGANISM, VIRUS, INFECTIOUS SUBSTANCE, OR BIOLOGICAL PRODUCT THAT HAS THE SAME, OR SUBSTANTIALLY SIMILAR, CHARACTERISTICS TO RESTRICTED AGENTS UNDER EXISTING LAW (PEN. CODE 11418.5), SUCH AS ANTHRAX, EBOLA, PLAGUE, SMALLPOX, BOTULINUM TOXINS, ETC?

SHOULD THE LEGISLATURE CREATE A NEW "WOBBLER" - DRAWN FROM THE CRIME

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OF PLACING A FACSIMILE BOMB - FOR SENDING OR PLACING A FALSE OR FACSIMILE WMD THAT CAUSES SUSTAINED FEAR, AND SHOULD SUCH A CRIME BE

A MISDEMEANOR IN THE ABSENCE OF SUSTAINED FEAR?

SHOULD CHANGES BE MADE IN DEFINITIONS IN AND ELEMENTS OF CRIMES RELATED TO MAKING CREDIBLE THREAT TO USE A WMD AND THE CRIME CREATED BY THIS BILL OF PLACING OR SENDING A FACSIMILE WMD - TO EVACUATION OF A RESIDENCE, SCHOOL OR BUSINESS, IN ADDITION TO THE EXISTING REFERENCE TO ISOLATION OR QUARANTINE?

PURPOSE

The purposes of this bill are to (1) define use of a WMD as a serious and violent felony; (2) define murder by use of a WMD as first degree murder; (3) require a sentence of life without parole (LWOP) for use of a WMD in a form that may cause widespread death or injury and that causes death or great bodily injury to any person; (4) expand the definitions concerning weapons of mass destruction (WMD), particularly as concerns water and food supplies; (5) increase penalties for use of a WMD; (6) expand the crime of possessing restricted biological agents and infectious substances; (7) expand and clarify the crime of making a credible threat to use a WMD; and (8) create the crime of making a false WMD report or placing a facsimile WMD - a crime similar to an existing law concerning false bombs.

Homicide and Related Provisions

Existing law defines murder as the unlawful killing of a human being with malice aforethought. (Pen. Code 187.) Malice is express "when there is manifested a deliberate intention" . . . to kill another person. Malice is implied when the killing resulted from an intentional act; the natural consequences of the act are dangerous to human life; and the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. (People v. Dellinger (1989) 49 Cal.3d 1212, 1222.)

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Existing law provides that all murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape,

carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or torture, specified sex offenses or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

All other kinds of murders are of the second degree. (Penal Code 189.)

Existing law provides that murder in the first degree (deliberate and premeditated murder) is punished by death or life in prison without possibility of parole where special circumstances are shown. Otherwise, first degree murder is punished by a prison sentence of 25 years to life. Murder in the second degree is generally punished by a term of 15 years to life in state prison or by a term of life without parole if the defendant has previously been convicted of murder or the murder of a peace officer. (Pen. Code 190, 190.05, 190.2.)

Existing law includes a lengthy list of special circumstances applicable to first-degree murder. These factors include law enforcement or firefighter victim, multiple victims, crime witness victim, victim was juror, judge, prosecutor, government official, lying in wait, delivery of destructive device, financial gain, race, nationality, etc. of victim. (Pen. Code 190.2.)

This bill defines any murder perpetrated by means of a WMD as first degree murder.

This bill provides that use of a WMD in a form that may cause widespread great bodily injury and death, and which does cause great bodily injury or death, shall be punished by imprisonment in the state prison for life without the possibility of parole.

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Serious and Violent Felonies

Existing law defines specified felonies as serious or violent, with various consequences flowing from such a definition or designation. The list of serious felonies is set out Penal Code section 1192.7; violent felonies are found in Penal Code section 667.5, subdivision (c).

? Any serious or violent felony, as defined on March 8, 2002 - the effective date of Proposition 21 of the March 2000 Primary Election - constitute qualifying prior convictions

under the Three Strikes law. Felonies defined as serious or violent past that date will not constitute prior strikes unless and until the applicable provisions from Proposition 21 are amended.

- ? Enhancement of 5 years in serious felony sentence for every prior serious felony conviction. (Pen. Code 667, subd. (a).)
- ? Enhancement of 3 years in violent felony sentence for each prior violent felony conviction. (Pen. Code 667.5, subd. (a).)
- ? Inmates convicted of violent felonies may earn no more than 15% sentencing credit to reduce their prison terms.
- ? Plea bargaining is limited for serious felonies to cases in which the prosecution may be unable to obtain or present sufficient evidence or where the bargain would not change the sentence the defendant would otherwise receive. (Pen. Code 1192.7, subs (a)-(b).)
- ? The serious and violent felony lists set forth in Penal Code sections 1192.7 and 667.5 is employed in a number of other code sections. The following examples illustrate the use of this list for multiple purposes:

Prohibition from employment by a public or private

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- elementary or high school
 - Prohibition from employment by any school district
 - Increased scrutiny in restraining orders
 - Denial of specified teaching credentials
 - Limitation of probation in certain cases
 - Limitation of the application of Proposition 36 in certain cases
 - Specified distributions of bail forfeitures
 - Limitations on psychiatric placements
 - Restrictions on bail and non-bail release
 - Parole restrictions
 - Restrictions on placement of children in dependency cases
 - 5-year enhancements in current serious felony sentence for each prior
 - 3-year enhancement in current violent felony sentence for each prior

Sentence credits limited to 15% for inmates convicted of violent crimes

This bill adds offenses involving the use of a WMD to the list of serious and violent crimes.

Weapons of Mass Destruction - Definitions

Existing law defines "weapon of mass destruction" (WMD) to include chemical warfare agents, weaponized biological warfare or biological agents, nuclear agents, radiological agents, or the intentional release of industrial agents as a weapon. The law defines each category of weapon thus:

Chemical warfare agents include Tabun, Sarin, Soman, Choking Agents, Phosgene and Diphosgene, Blood Agents, Hydrogen Cyanide, Cyanogen Chloride, Arsine, and Blister Agents. Weaponized Biological agents include weaponized pathogens such as bacteria, viruses, yeasts, fungi and rickettsia. Nuclear or radiological agents include any improvised nuclear device (IND), radiological dispersal device (RDD), or any simple radiological dispersal device (SRDD). The intentional release of industrial agents is use of a WMD

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if committed with intent to harm and the use of such agent risks death, illness or serious injury, or endangers environment. (Pen. Code 11419.)

Existing law defines weaponization as "the deliberate processing, preparation packaging or synthesis of any substance for use as a weapon or munition. 'Weaponized agents' are those agents or substances prepared for dissemination through any explosive, thermal, pneumatic, or mechanical means." (Pen. Code 11417.)

This bill expands the definition of WMD to include additional biological agents and an aircraft, vessel or vehicle (as defined in Veh. Code 34500) used as a weapon. Vehicle Code section 34500 generally describes large commercial vehicles.

This bill - as suggested to be amended and as set out in SB 1287 (Alarcon) which passed this Committee in April - defines "used as a destructive weapon" as the use with the intent of causing widespread death or bodily injury by a fire or explosion, or release of a chemical, biological, nuclear or radioactive agent.

_____ Use of a WMD - Definitions and Penalties

_____ Existing law provides that a person who uses against another person a weapon of mass destruction (WMD) in a form that could cause widespread disabling injury or illness shall be punished by life in prison. (Pen. Code 11418.)

_____ Existing law provides that a person who uses a weapon of mass destruction (WMD) in a form that could cause widespread damage to, or disruption of, the water or food supply is guilty of a felony and shall be imprisoned for 4, 8, or 12 years and/or fined up to \$100,000. (Pen. Code 11418.)

_____ Existing law provides that any person who uses a weapon of mass destruction in a form that may cause widespread and significant damage to public natural resources, including coastal waterways and beaches, public parkland, surface waters, ground water, and wildlife, is guilty of a felony and shall be punished by

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imprisonment in the state prison for 3, 4, or 6 years. (Pen. Code 11418.)

_____ Existing law provides that a person who uses recombinant technology to create new or more virulent pathogens for the purposes specified in this section (to use against humans, crops, etc.) is guilty of an alternate felony/misdemeanor, punishable by up to one year in the county jail, or for 3, 6 or 9 years in state prison and/or a fine of up to \$250,000. (Pen. Code 11418.)

_____ Existing law provides that any person who unlawfully possesses, develops, acquires, etc., any WMD, is guilty of a felony punishable in state prison for 3, 6, or 9 years. These penalties are 4, 8, or 12 years in state prison if the defendant has been previously convicted of crimes such as the following: Ethnic/religious hate-type crimes, such as terrorizing with Nazi symbols, cross burning, arson of a health facility, bookstore or property owned by a person of a targeted race/ethnicity; exploding or attempting to explode a destructive device or explosive in specified locations with the intent to terrorize; paramilitary organizations practicing with weapons, or training another in explosives or destructive devices; and various other explosives device crimes. (Pen. Code 11411, 11412, 11413, 11460, 12303.1, 12303.2 and 12303.3.) (Pen. Code 11418.)

Existing law provides that a person or entity possessing any "restricted biological agent" (designated, particularly dangerous agents such as Ebola, anthrax, botulism, lassa fever virus, equine encephalitis, smallpox, etc.) shall be punished by imprisonment for 4, 8 or 12 years, and/or a full fine of \$250,000. (Pen. Code 11419.)

Existing law excludes the use of otherwise prohibited items by universities, research institutions, individuals, or hospitals registered with the Centers for Disease Control and Prevention utilizing the substances for prophylactic, protective or peaceful purposes. (Pen. Code 11419.)

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This bill - as suggested to be amended and as set out in SB 1287 (Alarcon) which passed this Committee in April - defines "used as a destructive weapon" as the use with the intent of causing widespread death or bodily injury by a fire or explosion, or release of chemical, biological, nuclear or radioactive agent.

This bill makes use of a WMD in a form that may cause widespread death or injury, and that actually causes death or injury to any person, punishable by life in prison without parole.

This bill increases penalties for possessing, developing, or manufacturing a WMD from 3, 6, or 9 years in state prison, to 4, 8, or 12 years.

This bill increases penalties for specified repeat WMD offenses from 4, 8, or 12 years in state prison, to 5, 10, or 15 years, and adds prior convictions for WMD crimes to the list of crimes that qualify as repeat offenses.

This bill increases penalties for using a WMD that causes widespread damage to or disruption of the food supply or drinking water from 4, 8, or 12 years in state prison, to 5, 8, or 12 years, and includes disruption of or damage to a "source of drinking water" to this crime.

This bill increases penalties for using biological advances to create new pathogens or more virulent forms of existing pathogens for a WMD, from a wobbler, punishable by one year in county jail, or 3, 6, or 9 years in state prison and/or a fine of up to \$250,000, to a straight felony punishable by 4, 8, or 12 years in state prison and a \$250,000 fine.

WMD Threats and Hoaxes

Existing law provides that a person who falsely makes a bomb report to police, fire officials, the media, transportation agents, etc. is guilty of an alternate felony-misdemeanor, punishable by up to one year in the county jail or in the state prison for 16 months, 2 years or 3 years. (Pen. Code 148.1.)

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Existing law provides that any person who sends, gives or places a false or facsimile bomb, with intent to cause fear, is guilty of an alternate felony-misdemeanor, punishable by up to one year in the county jail or in the state prison for 16 months, 2 years or 3 years. (Pen. Code 148.1.)

Existing law provides that any person who makes a credible threat to cause great bodily injury or death to the person to whom the threat was made, or a member of the threatened person's immediate family, is guilty of an alternate felony/misdemeanor, punishable by up to one year in the county jail or in the state prison for 16 months, 2 years or 3 years. (Pen. Code 422.)

Existing law provides that a person who makes a credible threat to use a WMD such that threatened victims must undergo decontamination or isolation shall be imprisoned for 3, 4, or 6 years and/or fined up to \$250,000. (Pen. Code 11418.5.)

This bill creates a new crime to send or place a facsimile of a WMD to a person or place with the intent to cause fear, punishable by up to 1 year in county jail, or 16 months, 2, or 3 years in state prison, and a fine of up to \$250,000. (It is suggested that this provision be amended to conform to SB 1287 by making the sending of a facsimile WMD with intent to cause fear a misdemeanor. The crime would be an alternate felony-misdemeanor if victim(s) experience "sustained fear.")

This bill expands the application of the crime of making an unequivocal, credible and immediate threat to use a WMD. The bill does so by not defining 'sustained fear' to mean the following: Evacuation of any building by any occupant, evacuation of a school by any student or employee, evacuation of a home by any resident/occupant, any decontamination, isolation or quarantine effort, or any other action taken in direct response to the threat to use a WMD. (It is suggested that this provision be amended to require "sustained fear" as defined otherwise in the bill. This amendment would conform

this provision to the equivalent provision in SB 1287 (Alarcon). SB 1287 passed this Committee in April, 2002.)

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COMMENTS

1. Need for This Bill

According to the author:

Current law penalizes any persons (with specified exceptions) who possess, develops, manufactures, produces, transfers, acquires or attains any weapon of mass destruction. It also penalizes any person who uses or threatens to use a weapon of mass destruction against another person, an animal, the food or water supply, crops or public natural resources. It is also a crime to maliciously possess or to expose any person to a false or facsimile bomb whether verbally, in writing or electronically. Current law states that a conspiracy to commit a crime involving using a weapon of mass destruction is punishable equal to actual commission of the crime.

This bill will penalize the use of a weapon of mass destruction against major infrastructure, landmarks, or economic activity. It penalizes this type of threat that causes widespread fear, business closures, or transportation disruption. Under specified circumstances it makes it a crime to possess or to expose any other person to a facsimile weapon of mass destruction. In addition, this bill specifies a minimum penalty for conspiracy to commit these crimes.

2. Related Legislation

A number of Senate terrorism bills within the jurisdiction of this Committee are pending in the Legislature. These include SB 1267 (Battin) - which was amended and passed Assembly Public Safety on June 11, 2000; SB 1287 (Alarcon) - set for hearing on June 25, 2002 in Assembly Public Safety; and SB 1686 (Margett) - which failed in Senate Public Safety on April 30, 2002, with reconsideration granted. SB 1267 would require defendants in hoax cases to pay the costs of emergency response. SB 1686

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would create a new crime and sentencing scheme, based on the gang statutes, for terrorism related crimes. SB 1287 was amended in this Committee to include many of the provisions of this bill, with relatively minor drafting differences, but without the murder, serious felony and violent felony provisions. It is suggested that this bill be amended to be consistent with SB 1287, at least in the provisions shared by the two bills. Discussions with the author's office and the sponsor indicate that the author will likely accept the suggestions of Committee staff.

3. Pressing Concerns for Meeting the Threat of Terrorism

Testimony before the Committee on Anti-Terrorism Policy at a March 11, 2002, hearing arguably established that the most pressing needs for California in preparing for the threat of terrorism is the expansion of the public health system, additional training for first-responders and coordination of communication and intelligence among various police and other public safety entities.

4. Prior Legislation Creating the Act Amended by This Bill and SB 1287 (Alarcon)

In 1999, Senator Alarcon and Assembly Member Hertzberg carried individual bills creating the California law specifically defining weapons of mass destruction. The bills were combined in the Senate Public Safety Committee as AB 140 - Ch. 573, Stats. 1999. The bill was tombstoned the "Hertzberg-Alarcon California Prevention of Terrorism Act."

In this session (2001-2002) Mr. Hertzberg and Senator Alarcon have introduced this bill (AB 1838) and SB 1287 respectively to amend the Hertzberg-Alarcon Act and to make related changes.

5. First-Degree Murder Provisions

Most of the provisions in AB 1838 amend existing sections in the Hertzberg-Alarcon Prevention of Terrorism Act. However,

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defining murder committed by use of a WMD as first-degree murder and defining use of a WMD as a serious and violent felony (Comment # 8) are new provisions not found in the Act.

The most common form of first-degree murder is deliberate and premeditated murder. However, a murder committed by means of a destructive device is first-degree murder. It appears that the rationale for defining murder by means of a WMD is that a destructive device and a WMD are very similar. Further, it may be argued that because a WMD is defined as a weapon that may cause widespread death or destruction, murder by use of a WMD is a more serious crime than murder by a destructive device.

The most important consequence of designating a murder as murder in the first-degree is that such crimes may be punished by the death penalty if the prosecutor proves specified special circumstances. The list of special circumstances is long. It is very likely that defendants convicted of murders by means of a WMD would be eligible for the death penalty in many, if not most, cases. For example, a murder committed because of the victim's race, nationality, religion, etc. constitutes special circumstances murder.

SHOULD MURDER BY USE OF A WMD BE DEFINED AS MURDER IN THE FIRST-DEGREE?

SHOULD A MURDER PERPETRATED BY USE OF A WMD BE PUNISHABLE BY THE DEATH PENALTY IF SPECIAL CIRCUMSTANCES ARE PROVED?

6. Life without Parole for Use of WMD Causing Death or GBI

In existing law using a WMD in a form that may cause widespread death, illness or injury is punishable by life in prison, which includes a minimum term before parole eligibility of 7 years. This bill requires a punishment of life in prison without the possibility of parole where a defendant is convicted of the use of a WMD in a form that may be widely lethal or injurious if any person actually suffers great bodily injury or death. Under California law, the penalty of life in prison without parole is, with rare exceptions, reserved for murder committed with special

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circumstances. Such crimes are generally also eligible for the death penalty.

? Crimes Carrying Penalty of Life Without Parole

- First-degree murder with special circumstances
- Explosion of destructive device causing death
- Infliction of gbi by person with 3 prison terms for violent crimes
- Treason/interference with national defense causing death or gbi
- Kidnapping for ransom where victim suffers death/gbi (or intentionally subjected thereto)
- Train wrecking (intentional)

Life without parole as a punishment for train wrecking, interference with national defense and kidnapping for ransom may be rather anachronistic in California law. These crimes may have arisen from particular events or circumstances and have been seldom charged. For example, the penalty of life without parole for kidnapping for ransom in which the victim suffers death or great bodily injury developed as a result of the infamous kidnapping of aviator Charles Lindbergh's baby. Many states throughout the country passed similar laws in response to public outcry. The penalty of life without parole for hindering the national defense so as to cause injury or death was created during World War II and the early Cold War. (People v. Gordon (1944) 62 Cal.App.2d 268; Mil. & Vet. Code 1670 - enacted 1951.) States across the county passed forms of a "Model Sabotage Act," in a response to World War II dangers that was similar to the response to the recent attack on the World Trade Center.

The issue of whether such a penalty is appropriate for the use of a WMD turns on whether or not the crime is defined so as to apply to truly serious conduct, such as committed by terrorists. It appears that no appellate decisions have interpreted phrases such as "used in a form that may cause widespread great bodily injury or death."

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It should be noted that "great bodily injury" is defined rather broadly in California law. Great bodily injury is any injury

that is not trivial or transitory. It can be an injury requiring sutures, a broken limb, etc. Arguably, this concern is balanced by the fact that the bill requires that the WMD be used in a form that may cause widespread great bodily injury or death. Thus, where a WMD is used in such particularly dangerous form, although actual injuries are relatively limited, the result is merely fortuitous. Such a defendant's culpability is equivalent to a person who does cause much more damage.

SHOULD USE OF A WMD IN A FORM THAT COULD CAUSE GBI OR DEATH AND THAT ACTUALLY RESULTS IN GBI OR DEATH BE TREATED AS SERIOUSLY AS PREMEDITATED MURDER WITH SPECIAL CIRCUMSTANCES?

IS GREAT BODILY INJURY SUFFERED BY AT LEAST ONE VICTIM SUFFICIENT HARM TO JUSTIFY A TERM OF LWOP FOR USE OF A WMD IN A FORM THAT MAY CAUSE WIDESPREAD DEATH OR GBI?

SHOULD THE LWOP PROVISION BE LIMITED TO CASES WHERE A VICTIM DIES, NOT WHERE A PERSON SUFFERS GBI?

7. Use and Possession of WMD (Other than LWOP-eligible Convictions)

a. Used as a Destructive Weapon - Defined

AB 1838 includes the following new definition so as to expand the law concerning WMDs: "'Used as a destructive weapon' means to use with the intent of causing a fire or explosion, a release of chemical, biological, or nuclear or radioactive agent that may cause widespread great bodily injury or death."

According to discussions with the sponsor of AB 1838 - the Los Angeles County District Attorney - this definition is designed to conduct similar or equivalent to the attack on the World Trade Center. Under this definition, a WMD is defined by the harm intended or caused through use of the weapon, rather than by listing specific targets.

The parallel provision in SB 1287 (Alarcon) was amended to

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define "used as a destructive weapon" as used "with the intent of causing widespread great bodily injury or death by causing a fire, explosion, or the release of a chemical biological or radioactive agent." It is suggested and proposed that AB 1838 be amended to conform to this provision in SB 1287. This amendment would define the crime in terms of the defendant's mens rea (criminal intent) and not possibly fortuitous or

accidental consequences of less egregious intent.

b. Use of Aircraft, Vessels or Vehicles as WMDs

This bill extends the WMD use crimes to an aircraft, vessel or vehicle, as described in Vehicle Code section 34500. This Vehicle Code section describes trucks designed to haul freight, as well as busses, trailers and other commercial vehicles. A specified mode of transportation becomes a WMD when "used as a destructive weapon." As noted above in "a" it is suggested that this provision to be amended to provide that the defendant's intent would be to cause widespread death or great bodily injury by means of a fire, explosion, etc.

c. Penalty Increases for Use of a WMD

AB 1838 increases prison terms for certain WMD use crimes, such as use of a WMD with specified prior convictions. Further, while current law makes use of a WMD in a form that may cause widespread disruption of the food or water supply a 4, 8 or 12-year felony, AB 1838 specifies that affected water supplies are "source [s] of drinking water" as defined in Health and Safety Code section 25249.11. AB 1838 expands the crime of using a WMD against the food supply, crops or animals to include "seed used seed stock . . ." (AB 1838, as amended 3/07/02, p. 12, lines 28-35.)

AB 1838, as proposed to be amended in Committee, would expand the crime of possessing a restricted biological agent (a 4, 8, or 12-year felony) to include agents that have similar or identical properties to those set out in existing law. This will allow prosecution in cases where a person possesses a

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particularly dangerous substance that is not specifically included in the law. This will avoid the necessity of constantly amending the governing law as variations on existing restricted biological agents are developed.

Note : As the bill was amended on March 7, 2000, the provision concerning new forms of restricted biological agents arguably covers relatively innocuous material, including common cold viruses, household weed killers, cleaning products, etc. Discussions with the sponsor and the author's office have confirmed that this provision will be limited as described in the paragraph above (and so as to conform to SB 1287

(Alarcon).

d. Suggested Amendment to Penal Code Section 11418, subd. (d)

The bill currently provides that a person who uses recombinant technology or other biological advance to create new or more virulent pathogens "for the purposes specified in this section" shall be subject to a prison term of 4, 8 or 12 years. However, section 11418 includes different forms and levels of prohibited use. It is suggested that subdivision (b) or Penal Code section 11418 (p. 13, lines 1-6) be amended to distinguish between use of a WMD against persons and other circumstances. Punishment for development of new pathogens for use other than against persons - such as food and water supply disruption, should be consistent with the penalties for actual use. With this amendment, the prison triad for developing new pathogens other than for use against persons would be 3, 6 and 9 years. The fines for development of new pathogens would remain above those for use, as those persons with ability to develop new pathogens may have more financial resources than persons who might use a WMD. SB 1287 (Alarcon) was amended in this manner and amendment of this bill would make these bills consistent.

8. Threats to Use WMD and WMD Hoaxes

AB 1838 creates a crime for sending or placing a facsimile WMD

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with the intent to cause fear. This new crime is an alternate felony-misdemeanor, with a very large fine of \$250,000. This crime closely tracks an existing crime for false or facsimile bomb threats found in Penal Code section 148.1. From discussions with the sponsor of AB 1838, it appears that the new WMD hoax crime was modeled on the bomb threats statute because police and prosecutors are familiar with the existing crime. Further, it was believed that since the conduct in both crimes is similar, the penalties should be similar.

This provision in SB 1287 was amended to provide that the crime can be a wobbler where sustained fear, as defined, is produced by the crime. In other cases, the crime would be a misdemeanor.

It is suggested that AB 1838 be amended to conform to SB 1287 in this regard.

AB 1838 also amends an existing WMD threat crime in Penal Code

section 11418.5. The existing threat crime was drawn from Penal Code section 422, which defines an alternate felony-misdemeanor for credible threats to kill or cause great bodily injury. Section 422 is applied for crimes similar to stalking and harassment.

AB 1838 amends the WMD credible threat crime to provide that a "statement" conveying a threat may be any form of communication, including conduct, as described in Evidence Code section 225. Existing law defines a credible threat to use a WMD as producing sustained fear and which results in an isolation or decontamination effort. The sponsor has stated that such a definition is too limited.

AB 1838 defines a credible threat to use a WMD as one producing "sustained fear." A separate subdivision defines sustained fear to include, but not be limited to, evacuation, isolation or decontamination. As proposed and suggested to be amended in Committee, the bill would be amended to remove an arguably overbroad reference to "any other action taken in direct response to the threat . . ." This is how the parallel provision in SB 1287 (Alarcon) reads.

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9. This Bill Defines Use of a WMD as a Serious or Violent Felony for Purposes Other than Defining Strikes

This bill expands the serious and violent felony lists to include any crime involving the use of a WMD, as defined in Penal Code section 11418, subdivisions (b)-(c). Pursuant to the enactment of Proposition 21 in the March 2000 Primary Election, only serious and violent felonies so defined or classified on March 8, 2000 constitute prior qualifying offenses under the Three Strikes law. (Pen. Code 667.1 and 1170.125.)

However, defining a crime as serious or violent has numerous consequences other than a Three Strikes sentence. The major criminal law consequences are these: Prison credit limit of 15%; sentence enhancement of 5 years in current case for each prior serious felony conviction, and 3 years in current case for each prior violent felony conviction, restrictions on plea bargaining and pre-trial release restrictions. Numerous employment restrictions apply to those with such felony convictions. See "Serious and Violent Felonies" section "Existing law" section above for more examples.

10. By Creating a New Felony for Facsimile WMDs, and by
Eliminating a Misdemeanor for Developing Pathogens for
WMD Use, the Bill Increases the Reach of the Three
Strikes Law

This bill creates an alternate felony-misdemeanor ("wobbler") for sending/placing a facsimile or false WMD with the intent to cause sustained fear. The new felony for WMD hoaxes is drawn from a parallel crime covering bomb hoaxes. The creation of this new felony for WMD hoaxes, as is the case with any new felony, expands the reach of the Three Strikes law. Since the enactment of the Three Strikes law in 1994, a majority of the members of this Committee has been reluctant to create new felonies for conduct that does not involve violence.

Arguably, however, the fear from and response to a facsimile nuclear device, anthrax, ebola, etc., is equivalent to the harm

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from violent conduct. This may be particularly true in light of the terrorist attacks in September 2001. Persons exposed to facsimile WMDs often must undergo invasive medical care or prophylactic treatment with antibiotics such as CIPRO that cause harmful and debilitating side effects.

Further, the bill eliminates the misdemeanor option in existing law for developing new or more virulent pathogens for use as WMDs. Arguably, this change is consistent with the laws concerning WMDs and the policy of this Committee. Inherent in the definition of a WMD is that such a weapon may cause widespread death or injury. Use of a WMD is clearly violent conduct. A person who develops new and more virulent forms of pathogens for use as WMDs is arguably as culpable as a person who uses such weapons. In some cases, a new pathogen can be so dangerous that its development for use as a WMD is more dangerous than actual use of a less destructive device.

Three Strikes Law Summary

Under the Three Strikes law, a defendant with two prior serious or violent felonies must receive a term of at least 25 years to life in the sentence for the commission of any new felony, including identity theft (an alternate felony/misdemeanor). Where the defendant has a single prior serious or violent felony, he or she shall receive a doubled term in the sentence imposed upon conviction of any new felony.

Alternate Felony-Misdemeanors and Three Strikes

Where a defendant has been convicted of an alternate felony misdemeanor that has been charged and prosecuted by the District Attorney as a felony, the sentencing court has the discretion to deem the offense to be a misdemeanor pursuant to the decision of the Court in People v. Superior Court (Alvarez) (1996) 14 Cal.4th 968 and Penal Code section 17, subdivision (b), unless the court's action is arbitrary and contrary to substantial justice.

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Judicial Discretion to Dismiss a Strike is Limited

Where a defendant has been convicted of a straight felony, or where the court has declined to deem a wobbler to be a misdemeanor, the court's ability to ameliorate the severity of the Three Strikes law is much more limited. A court has discretion to dismiss one or more prior "strikes," but only where the defendant's record and the current conviction establish that the defendant should be treated as though he or she does not fall under the terms of the Three Strikes law. (People v. Superior Court (Romero) (1996) 13 Cal.4th 497-530-531; People v. Williams (1998) 17 Cal.4th 198.)

SHOULD THE LEGISLATURE CREATE A NEW WOBBLER - THEREBY EXPANDING THE THREE STRIKES LAW - FOR SENDING OR PLACING A FACSIMILE OR FALSE WMD WITH INTENT TO CAUSE SUSTAINED FEAR, SUCH AS BY CAUSING EVACUATIONS AND DECONTAMINATION?

SHOULD THE LEGISLATURE ELIMINATE THE MISDEMEANOR OPTION FOR DEVELOPING NEW OR MORE VIRULENT FORMS OF PATHOGENS FOR USE AS WMDs?

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11. Representative Federal Terrorism Provisions Complementary to California WMD Laws

The California law on WMDs was created in 1999 through AB 140 (Hertzberg-Alarcon) - Ch. 573, Stats. 1999. California WMD law was drawn from federal law. Some definitions are different in California law, but the state and federal schemes are largely consistent. Federal law does also include definitions of terrorism and mass transportation vehicles that inform the issues raised by this bill.

a. Federal Law Defining Terrorism

Federal law, including recent amendments from the "Patriot Act," defines "international terrorism" and "domestic terrorism" thus:

? Acts that "involve violent acts or acts dangerous to human life that are a violation of laws of the United States or any State . . ."

? And the acts are intended to do one or more of the following:

- Intimidate or coerce a civilian population
- Influence government policy by intimidation or coercion
- Affect the conduct of a government by mass destruction, assassination, or kidnapping

International terrorism "occurs primarily outside the territorial jurisdiction of the United States, or transcend national boundaries . . ." Domestic terrorism occurs "primarily within the territorial jurisdiction of the United States." (18 U.S.C. 2331.)

b. Federal Law on Mass Transportation and Terrorism

Mass transportation means transportation by a conveyance that

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provides regular and continuing general or special transportation to the
and sightseeing transportation. (18 U.S.C. 1993(c)(6); 49
U.S.C. 5302(a)(7).)

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, a resident of Nevada County, over the age of 18 years of age, and not a party to the within action. My business address is Law Office of Peggy A. Headley, # 180, 11448 Deerfield Drive, Suite 2, Truckee, California, 96161. On November 4, 2010, I served the attached

Appellant's Request for Judicial Notice

By placing a true copy in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing said envelope in the United States mail at Truckee, California, with postage thereon fully prepaid. There is delivery service by United States mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 4, 2010, at Truckee, California.

Original signed by

Peggy A. Headley
Attorney for Appellant TURNAGE