IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S182598

PEOPLE OF THE STATE OF CALIFORNIA,	Supreme Court No. ___
Plaintiff and Respondent,	Court of Appeal No. C059887
v.	
BARRY ALLEN TURNAGE,	Yolo Superior Court No. 06-5019
Defendant and Appellant.	No. 04-1665

APPELLANT TURNAGE'S ANSWER TO PETITION FOR REVIEW

Appeal From the Judgment of the Superior Court of the State of California of the County of Yolo

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ANSWER TO PETITION FOR REVIEW

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

On May 12, 2010, respondent filed a petition for review seeking review of two issues. Under rule 8.500, subdivision (a)(2), appellant Turnage files this answer for two reasons: (1) to show respondent's petition for review should be denied; and (2) to ask this Court to review the many issues that the Court of Appeal did not decide favorably to appellant if review is granted.

QUESTIONS PRESENTED (AS TO ISSUES NOT DECIDED FAVORABLY TO APPELLANT BY THE COURT OF APPEAL)

1. Whether Penal Code Section 148.1, Subdivision (d) Violates Due Process Because It Is Unconstitutionally Vague

2. Whether The Evidence Was Legally Insufficient To Prove Any False Or Facsimile Bomb

3. Whether The Evidence Was Legally Insufficient To Prove Intent To Cause Another To Fear For His Or Safety Or The Safety Of Others

4. Whether The Evidence Was Legally Insufficient To Prove The Penal Code Section 245(b) Prior Strike Conviction Because In 1978 Appellant Was Found Not Guilty By Reason Of Insanity; The Trial Court Was Without Jurisdiction In 1985 To Entertain A Plea of Guilty[1]

STATEMENT OF THE CASE AND FACTS

The factual and procedural summary in the appellate court's opinion is adequate for this petition, and is incorporated herein. (Opn. at p. 1-7.)

[1] All unspecified statutory references are to the Penal Code.

ARGUMENT

I. REVIEW SHOULD BE DENIED AS TO RESPONDENT'S FIRST ISSUE: AS THE COURT OF APPEAL CORRECTLY DECIDED, THERE IS NO RATIONAL BASIS FOR PUNISHING FALSE BOMBS WITHOUT SUSTAINED FEAR AS A FELONY AND PUNISHING FALSE WEAPONS OF MASS DESTRUCTION WITHOUT SUSTAINED FEAR *ONLY* AS A MISDEMEANOR

As to respondent's first issue, review should be denied. There is no rational basis for punishing false bombs more severely than false weapons of mass destruction (WMD). Under section 148.1, subdivision (d), placing a false or facsimile bomb, without sustained fear, is punishable as a felony. However, under section 11418.1, placing a false or facsimile WMD, without sustained fear, is *only* punishable as a *misdemeanor*. As the Court of Appeal correctly decided, appellant's equal protection rights were violated.

According to respondent, the rational basis is that false WMDs are less recognizable than false bombs. Respondent's argument is meritless.

Specifically, (1) respondent's distinction ignores the legislative history; (2) respondent's distinction is counter intuitive; (3) respondent's distinction focuses upon the wrong group -- one that experiences *no fear at all* (because they do not recognize a false WMD) -- but the question here is between two groups that *do experience fear,* albeit nonsustained; and (4) respondent's argument is forfeited because it was first raised in respondent's petition for rehearing.

First, respondent's distinction – that false WMDs are less recognizable than false bombs – ignores the false WMD statute's legislative history. Section 11418.1's legislative history figured prominently in the Court of Appeal's decision. As the Court of Appeal stressed, the false WMD statute's legislative history convincingly demonstrates there is no rational basis for punishing false bombs without sustained fear as a felony and punishing false WMDS without sustained fear *only* as a misdemeanor. (Opn. at p. 8-9; 12-13.) In particular, section 11418.1's legislative history includes a recognition that the false bomb and false WMD statutes concern similar conduct and the penalties should be similar. (Opn. at p. 9.)

Section 11418.1's legislative history also persuasively demonstrates the false WMD misdemeanor provision was designed to avoid automatic exposure to the Three Strikes Law, which is the precise adverse consequence suffered by appellant here under the false bomb statute, which was first enacted in 1972, prior to the Three Strikes law. (Opn. at p. 9, 12-13.) Respondent's failure to confront this compelling legislative history demonstrates respondent's petition for review should be denied.

Second, respondent's claim that false bombs should be punished more severely than false WMDs is decidedly counter intuitive. As a matter of common sense, a false weapon of *mass destruction* would likely cause greater fear than a false bomb. As the Court of Appeal explained: "The fear of a false WMD, given the more far-reaching effects of such devices, would generally be more severe

(even in the absence of sustained fear) than only an explosive device whose destructive effects could be more easily evaded, and yet the [false WMD] incurs the lesser punishment." (Opn. at p. 12.) Stated another way, with a false bomb, a victim can simply run away. With a false weapon of mass destruction, a fearful victim may be unable to reach a place of safety due to WMDs' far- reaching effects. Additionally, unlike a bomb, mere exposure to the WMD may be all that is needed to cause harm.

Third, respondent's purported distinction -- that false WMDs are less recognizable than false bombs focuses upon the wrong group -- one that experiences *no fear at all* (because they do not recognize a false WMD). Here, the question is between two groups that *do experience fear,* albeit nonsustained.

Thus, even if false WMDs are less recognizable than false bombs, this is the wrong distinction. It does not answer why there is a rational basis for distinguishing between two groups when victims of both groups do experience fear, albeit nonsustained fear. (See e.g. *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1205 ["It is not an argument that distinguishes between the two crimes"].)

Finally, respondent's rational basis argument is forfeited. It was first raised in the People's rehearing petition, as respondent essentially concedes. (Resp. Pet for Rev., p. 9, fn. 3; 9 Witkin, California Procedure (4th ed. 1997) Appeal, § 851, p. 886 ["It is the duty of counsel to see that all points are properly presented in the original briefs or argument, before submission"]; *CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1542 ["First, a reviewing court need not

consider points raised for the first time on petition for rehearing"].) Under rule 8.500, subdivision (c)(1), issues not timely presented in the Court of Appeal are not normally considered by this Court. Thus, the issue is forfeited.

For all these reasons, respondent's rational basis argument must fail. Inquiry into the link between the unequal treatment and legislative goals persuasively demonstrates that respondent's purported distinction is nothing more than a fictitious purpose, and there is no realistically conceivable legislative purpose for punishing false bombs without sustained fear as a felony, and punishing false WMDs without sustained fear, *only* as a misdemeanor. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1201.) The petition for review should be denied.

II. REVIEW SHOULD BE DENIED AS TO RESPONDENT'S SECOND ISSUE: THE COURT OF APPEAL'S REMEDY WAS CORRECT AND CONSISTENT WITH LEGISLATIVE INTENT; RESPONDENT NOW SEEKS A REMEDY THAT SUBVERTS A PLETHORA OF CONSTITUTIONAL PROTECTIONS

Review should be denied as to respondent's second issue. The Court of Appeal's remedy was correct and was overwhelmingly consistent with the Legislative intent. In arguing otherwise, respondent simply repeats, in altered form, the same relief requested by respondent's petition for rehearing (which the Court of Appeal denied) while at the same time sidestepping the compelling legislative history. As the Court of Appeal framed the question:

> Appellant's answer should be directed to the issue of whether the court should exercise its power of judicial reformation (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661; *Woods v. Horton* (2008) 167 Cal.App.4th 658, 678) to amend Penal Code section 148.1, subdivision (d) to require proof of "sustained fear" (as defined in Penal Code section 11418.5, subdivision (b)) in order to punish a violation as a felony, then reverse defendant's conviction and remand the matter for retrial.

As it was in the Court of Appeal, the answer here is a resounding no. If a new crime with a new element of sustained fear under section 148.1, subdivision (d) is to be created, then it is up to the Legislature to do so. Respondent's proposed remedy upends a multitude of constitutional protections, including infringing upon the separation of powers doctrine, double jeopardy rights under section 1023, due process and would also effectuate yet another violation of appellant's right to equal protection under the laws. Review should be denied.

A. This Court Should Not Judicially Reform Section 148.1, Subdivision (d) To Add A New Element Of Sustained Fear

This Court should not judicially reform section 148.1 to add a new element of sustained fear. As explained below, to do so (1) is outside the scope of permissible remedies for equal protection violations; (2) would not "effectuate policy judgments clearly articulated" by the legislature as the legislative history persuasively reveals; and (3) would create, by judicial fiat, a new crime with a new element of sustained fear in dramatic contravention of the separation of powers doctrine. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661.) In sum, the prerequisites for judicial reformation are missing. Thus, adding "sustained fear" would amount to judicial policymaking and usurp the power of the Legislature. (Cal. Const., Art. IV, § 1; Pen. Code, § 6.)

Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607 describes the standard for judicial reformation. Under *Kopp*:

> "[A] court may reform -- i.e., 'rewrite'-- a statute in order to preserve it *against invalidation under the Constitution*, when we can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute."

(*Id.* at p. 661, italics added; see also *Woods v. Horton* (2008) 167 Cal.App.4th 658, 678-679.)

The judicial reformation power is limited and restricted. It is a "comparatively drastic alternative." (*Arp v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 407.)

Courts must not indulge in judicial policymaking because judicial policymaking "encroaches on the Legislature's function and violates the separation of powers doctrine." (*Abbot Laboratories v. Franchise Tax Bd.* (2009) 175 Cal.App.4th 1346, 1361; citing *Kopp v. Fair Pol. Practices Com., supra*, 11 Cal.4th at p. 661 [judicial reformation rejected]; *Ventas Finance I, LLC v. Franchise Tax Bd.* (2008) 165 Cal.App.4th 1207, 1224 [same]; *Pederson v. Superior Court* (2003) 105 Cal.App.4th 931, 943 [same].)

First, section 148.1, subdivision (d) may not be reformed to add a new element of sustained fear because adding sustained fear falls outside the scope of remedies available for an equal protection violation.

Specifically, when a statute violates equal protection, an appellate court has two choices for the remedy: (1) it can invalidate the statute; or (2) it can *extend the benefits* to the party *aggrieved.* (*Kopp v. Fair Pol. Practices Com., supra,* 11 Cal.4th at p. 635, 649-653; *Woods v. Horton, supra*, 167 Cal.App.4th at p. 679.) There is no third option to reach out and rewrite the rest of the statute. That power is vested with the Legislative branch. (Cal. Const., Art. IV, § 1; Pen. Code, § 6.)

Here, the Court of Appeal did what it needed to do and no more. Extending section 11418.1's misdemeanor benefit to appellant remedies the equal protection violation of the party aggrieved – appellant. Respondent cites no authority demonstrating that judicial reformation in an equal protection context includes granting the benefits to the party aggrieved *and* also rewriting any other language in the statute that the People seek to change.

The cases respondent does cite are not on point because none of the defendants in those cases were aggrieved by the equal protection violation.[2] (*People v. Liberta* (1984) 64 N.Y.2d 152; 163-164, 170-173; *Plas v. State* (Alaska 1979) 598 P.2d 966; *State v. Books* (Iowa 1975) 225 N.W.2d 322.)

In short, respondent's proposed judicial overreaching must be avoided. For equal protection purposes, judicial reformation of a law enacted by the Legislature is restricted to the issue before the court, and the rights of the party aggrieved. To alter section 148.1, subdivision (d) by adding a new element of sustained fear would amount to judicial policymaking.

Second, matching up section 148.1 and 11418.1 is not necessarily as simple as merely adding section 11418.5's definition of "sustained fear" to section 148.1, subdivision (d) and the complexity demands that the Legislature do the job, rather than this Court.

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[2] In *People v. Liberta* (1984) 64 N.Y.2d 152, the defendant was not aggrieved by the equal protection violation: he was not married under the marriage definition and so striking the unconstitutional marital exemption from the sex crimes statutes had no impact upon his sex crimes convictions. Likewise, as a man, the defendant was not aggrieved by the statute that excluded women from being prosecuted for raping men. (*Id.* at p. 163-164, 170-173.) In *Plas v. State* (Alaska 1979) 598 P.2d 966, the female prostitute was not aggrieved by a prostitution statute that did not cover male prostitutes. In *State v. Books* (Iowa 1975) 225 N.W.2d 322, the defendant, who gave gifts to county employees, was not aggrieved by an unconstitutional statute that prohibited gifts to county employees but exempted state employees and officials from its scope. (*Id.* at p. 326.)

Under section 11418.5, "sustained fear" includes "isolation, quarantine, or decontamination effort" and this language would *not apply* to false bombs. (Pen. Code, § 11418.5, subd. (b).) Respondent asserts the dispatch center was evacuated, like respondent did below. The Court of Appeal's statement of facts demonstrates the Court of Appeal rejected respondent's claim. (Opn. at p. 4 ["No one else left the building, and as far as the dispatcher could recall the YCCC operations were not interrupted"].) This Court must accept the Court of Appeal's factual statement. (Cal. Rules of Court, rule 8.500, subd. (c)(2).)

Additionally, the legislative history refutes respondent's claim that section 148.1 should be doctored by adding 11418.5's definition of sustained fear. The history reveals the Legislature believed felony treatment of false WMDs, and thus exposure to the Three Strikes Law, was warranted because sustained fear from false WMDs could be equivalent to "violent conduct." (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1838 (2001-2002 Reg. Sess.) p. 19-20, as amended March 7, 2002, for hearing on June 18, 2002.) The legislative history explains that "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." (*Ibid.*)

These described circumstances, which were equated to violent conduct, would not arise with a false bomb. Thus, the legislative intent fails to show with certainty that the Legislature would add a new element of sustained fear to the

false bomb statute, section 148.1, subdivision (d).[3] Instead, the history persuasively demonstrates section 11418.5's definition of sustained fear is inapplicable to false bombs.

Consequently, this Court plainly cannot say "with confidence" that adding "sustained fear" would "closely [effectuate] policy judgments clearly articulated by the enacting body." (*Kopp v. Fair Political Practices, supra,* 11 Cal.4th at p. 611.)

Judicial reformation is a "comparatively drastic alternative." (*Arp v. Workers' Comp. Appeals Bd., supra*, 19 Cal.3d at p. 407; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 849.) *Kopp* ultimately rejected judicial reformation, *Woods* judicially reformed only to add the excluded benefits, and in *People v. Sandoval, supra,* 41 Cal.4th 825, the Legislature had already enacted the new determinate sentencing law, and it was simple to discern the legislative intent. (*Kopp v. Fair Pol. Practices Com., supra,* 11 Cal.4th at p. 671; *Woods v. Horton, supra*, 167 Cal.App.4th at p. 679; *People v. Sandoval* (2007) 41 Cal.4th 825, 849.)

Finally, the power to create crimes is vested in the Legislature. (Pen. Code, § 6; *People v. Chun* (2009) 45 Cal.4th 1172, 1183.) By extending section 11418.1's benefit to section 148.1, subdivision (d), the Court of Appeal created no

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[3] Also, section 11418.1 includes a fine of $250,000 but section 148.1, subdivision (d) does not. Section 11418.5, subdivision (a), regarding "threats" to use a WMD and section 148.1, subdivision (a), (b), and (c), regarding "reports" of false bombs or explosives, are worded very differently. As section 11418.5 was enacted more recently than section 148.1, the Legislature may wish to update section 148.1.

new crime because section 148.1, subdivision (d) is already a wobbler. But to add "sustained fear" to section 148.1, subdivision (d) would create, by judicial fiat, a new crime with a new element. That is not this Court's job. The Legislature is entrusted with the task, they are best suited to the job, and they have the tools at hand to perform it. To conclude otherwise would violate the separation of powers doctrine. (Cal. Const., Art. IV, § 1.)

B. If "Sustained Fear" Is Added To Section 148.1, Subdivision (d), Appellant May Not Be Retried For The New Crime

If "sustained fear" is added to section 148.1, subdivision (d), appellant may not be retried for the new crime. A retrial of appellant, with its attendant expense, is prohibited. This is because (1) a retrial would violate section 1023 and its double jeopardy prohibition; (2) it would violate due process to retry appellant; and (3) it would also violate equal protection.

Section 1023, California's statutory double jeopardy protection, prohibits retrial for a greater offense after a defendant is convicted of the lesser offense.[4] (Pen. Code, § 1023; see also *People v. Anderson* (2009) 47 Cal.4th 92, 113-114.) "Nearly 50 years before *Fields*, we interpreted section 1023 to mean that a conviction for a lesser included offense bars a later prosecution for the greater offense." (*People v. Anderson, supra*, 47 Cal.4th at p. 113.)

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[4] Penal Code section 1023 provides: "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading."

"We adhered to this interpretation in *Fields*, holding that section 1023 prohibits the retrial of a greater offense after a defendant's conviction of a lesser included offense even where there has been no express or implied acquittal of the greater offense." (*People v. Anderson, supra*, 47 Cal.4th at p. 113, citing *People v. Fields* (1996) 13 Cal.4th 289, 307.)

If this were not the rule, then section 1023 could be avoided "'by the simple device of beginning with the prosecution of the lesser offense and proceeding up the scale.'" (*People v. Fields, supra*, 13 Cal.4th at p. 307, quoting *People v. Greer* (1947) 30 Cal.2d 589, 597.) Retrying a defendant for a greater offense after he has already been convicted of a lesser included offense would also pose numerous practical difficulties. (See *People v. Fields, supra*, 13 Cal.4th at p. 307, fn. 5.)

Here, if a new crime of placing a false bomb with the new element of sustained fear is created by this Court, then appellant's misdemeanor conviction is a lesser included offense of the new crime because the misdemeanor contains all the elements of the new crime except for the new element of sustained fear. (See *People v. Lopez* (1998) 19 Cal.4th 282, 288.)

Thus, under section 1023, appellant's misdemeanor conviction prohibits retrial of the new crime with the new sustained fear element. Under the circumstances here – including that appellant suffered an equal protection violation and that the People's objection to defense counsel's questions relating to fear were sustained during the previous trial (1RT 56-57) -- the double jeopardy section 1023 consequences must be "borne by the People" and appellant's retrial is

prohibited. (*People v. Anderson, supra*, 47 Cal.4th at p. 114, citing *People v. Fields, supra*, 13 Cal.4th at p. 311.) Appellant certainly should not bear the consequences of a violation of his equal protection rights.

Respondent cites no authority to support the proposition that when a defendant's equal protection rights are violated, the appellate court may create a new crime with a new element and then remand to the trial court to retry the defendant for the new crime.[5] There is no authority because such a procedure would be fundamentally unfair and violate due process.

Specifically, this Court cannot do what would be forbidden if done by the Legislature – create a new crime and apply the new crime retroactively to conduct occurring before the crime was created.

Under Penal Code section 3, criminal statutes are presumed to be prospective only, unless the Legislature declares them to be retroactive.[6] (Pen. Code, § 3; see also *People v. Delgado* (2006) 140 Cal.App.4th 1157, 1167.) Thus, if the Legislature created a new crime with a new element of sustained fear under section 148.1, subdivision (d), that new crime would not be retroactively applied to a defendant, like appellant here, whose conduct occurred before the enactment. By parity of reasoning, this Court cannot create a new crime with a new element by judicial decision and retroactively apply it to appellant.

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[5] None of the cases cited by respondent involved such a situation. (*People v. Liberta, supra,* 64 N.Y.2d 152; *Plas v. State, supra,* 598 P.2d 966; *State v. Books, supra,* 225 N.W.2d 322.)

[6] Section 3 provides: "No part of it is retroactive, unless expressly so declared."

Retroactive application of a judicial decision may be a violation of due process. (*Bouie v. Columbia* (1964) 378 U.S. 347; *Marks v. United States* (1977) 430 U.S. 188; *People v. Crew* (2003) 31 Cal.4th 822, 853 [due process, rather than ex post facto, applies to retroactive application of judicial "construction" of statute].)

"'Thus, "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. [Citation.] The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' [citation], must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. [Citation.]" [Citations.]'" (*People v. Martinez* (1999) 20 Cal.4th 225, 238.)

Appellant submits that, as the Court of Appeal's equal protection analysis shows, section 148.1, subdivision (d) was punishable only a misdemeanor. It was a misdemeanor under equal protection principles from the time of the enactment of the false WMD statute and certainly at the point in time when the Court of Appeal declared it to be so. If this Court then goes on to create a new crime with a new element of sustained fear, the new crime cannot be retroactively applied to appellant because to do so would violate due process by increasing appellant's

punishment (because section 148.1, subdivision (d) was punishable only as a misdemeanor under equal protection principles). (See e.g. *People v. Morante* (1999) 20 Cal.4th 403, 432 ["Accordingly, it is appropriate that we give only prospective application to our decision abandoning that requirement, so as to avoid increasing the punishment for defendant's offenses after she committed them"].)

Additionally, appellant submits that it would violate equal protection to apply a new crime with a new element which was created by judicial fiat to appellant here. The federal and state equal protection guarantees are "essentially a direction that all persons similarly situated should be treated alike." (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439 [87 L. Ed. 2d 313, 320]; *In re Eric J* (1979) 25 Cal.3d 522, 531.) If the state adopts a classification that impacts two or more similarly situated groups in an unequal manner, and there is no rational basis for the distinction, then equal protection is violated. (*People v. Hofsheier, supra,* 37 Cal.4th at p. 1199; see also *In re Eric J., supra*, 25 Cal.3d at p. 530.)

Here, appellant is similarly situated to defendants who are convicted under a statute found by a Court to violate equal protection. The only difference is the particular statute found to violate equal protection.

Hofsheier reasoned that "most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose." (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1200.) This means there

must be a "plausible" and "reasonably conceivable" basis for the distinction. (*Id.* at p. 1201.)

Is there a legitimate purpose for judicially reforming a statute to create a new crime with a new element and then allowing retrial as to one defendant but leaving the job to the Legislature as to another defendant who was also convicted under a statute found to violate equal protection? Appellant submits there is not. There is no legitimate purpose or plausible basis for the distinction given it is the Legislature's function to create crimes, rather than the duty of the judiciary, as well established under the separation of powers doctrine. (Cal. Const., Art. IV, § 1; Pen. Code, § 6.) Consequently, it would violate appellant's equal protection rights for this Court to decide to judicially reform section 148.1, subdivision (d) to create a new crime with a new element, and then require that appellant be retried for the new crime. Thus, for this reason as well, retrial is prohibited.

In sum, respondent's proposed remedy violates a plethora of constitutional protections. In effect, it eliminates appellant's remedy for the violation of his right to equal protection under the laws, and instead puts him twice in jeopardy, contravenes due process, and violates his equal protection rights again. Respondent's petition for review should be denied.

III. THE WORDS "ANY FALSE OR FACSIMILE BOMB" ARE UNCONSTITUTIONALLY VAGUE, THEREBY VIOLATING THE FOURTEENTH AMENDMENT'S DUE PROCESS GUARANTEE

To satisfy due process, a statute must satisfy two tests: (1) it must give fair warning or notice of what is prohibited; and (2) it must provide definite standards for police and prosecutors so as to prevent arbitrary and discriminatory enforcement. (*Chicago v. Morales* (1999) 527 U.S. 41, 56; *United States v. Lanier* (1997) 520 U.S. 259, 266; *People v. Castenada* (2000) 23 Cal.4th 743, 751; *People v. Heitzman* (1994) 9 Cal.4th 189, 199.)

In this case, section 148.1(d)'s words "any false or facsimile bomb" fail both tests. Under section 148.1(d), individuals are only apprised about what the object is *not.* It is not a bomb. Section 148.1 omits any description of what features the item must have to fit into the category of a "false bomb" or "facsimile bomb," for which very serious criminal sanctions ensue.

Because section 148.1(d) fails to give notice about what objects are prohibited, and fails to provide sufficient guidelines so as to prevent arbitrary and discriminatory enforcement, it is unconstitutionally vague on its face.

Given the insubstantial and exceedingly nontechnical appearance of this small cardboard box with a little American flag, with no wires, fuse, ticking device, or tape, section 148.1(d) is also unconstitutionally vague as applied to appellant here.

What is a false bomb? Is it *anything* that is not a "real" bomb? What is a facsimile bomb? Is it an exact copy of a bomb? The words "any false or facsimile bomb" fail to provide constitutionally sufficient notice of exactly what items are prohibited under section 148.1, subdivision (d)'s statutory language.

First, section 148.1 contains no definition of "any false or facsimile bomb" and therefore the statute itself provides no notice. Subdivisions (a) (b) and (c) set forth no additional guidance. This is because they do not address the placement of *objects,* but instead prohibit false "reports" of bombs or explosives.

Thus, section 148.1's precise words and context fail to supply the requisite clarity and notice. (See e.g. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1107 [must consider language in context]; *Samples v. Brown, supra,* 146 Cal.App.4th at p. 800-801; *People v. North* (2003) 112 Cal.App.4th 621; 628 [statute vague; context did not supply meaning]; *People v. Beauford* (1977) 79 Cal.App.3d Supp. 1, 4 [clarity achieved by considering rest of statute].)

Second, the dictionary definitions do not supply the requisite notice. According to the dictionary, the word "false" means (1) "not genuine," (2) "adjusted or made so as to deceive," along with (3) "appearing forced or artificial." (Websters 9th New Collegiate Dict. (1988) p. 447.) By contrast, the word "facsimile" is defined as an "exact copy." (*Id.* at p. 444.)

These definitions do not eliminate the uncertainty. For one thing, they are contradictory. For example, does section 148.1(d) prohibit objects that are "exact copies" of bombs so long as they also "appear forced and artificial?" and "made so

as to deceive?" Further, considered together, they include too much – *any* object that is not a real bomb would be included.

Third, no case has construed the words "any false or facsimile bomb" and therefore past judicial interpretation provides no meaning. *People v. Quinn* (1976) 57 Cal.App.3d 251, 259 decided "bomb" should be understood in its common and popular sense. (*Id.* at p. 259.) However, *Quinn* fails to remedy the utter lack of clarity here. Understanding "bomb" in its ordinary sense sheds no light upon exactly what objects qualify as false bombs or facsimile bombs.

Other statutes, determined to lack the requisite notice, are instructive. (See e.g. *People v. Heitzman, supra*, 9 Cal.4th 189, 193; *People v. Mirmirani* (1981) 30 Cal.3d 375 ["social or political goals"]; *In re Newbern, supra*, 53 Cal.2d 786 ["common drunk"].)

Consistent with this authority, the words "any false or facsimile bomb" are likewise infirm. There is no notice of what features the item must have to fit into the category of a "false bomb" or "facsimile bomb," for which very serious criminal sanctions may be imposed.

As demonstrated, section 148.1, the dictionary definitions, and case law fail to shed light on precisely what objects fit into the category of "any false or facsimile bomb." It is therefore left to police and prosecutors to determine what objects are subject to section 148.1(d)'s prohibition.

The Fourteenth Amendment does not permit this type of "standardless sweep." (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, quoting *Smith v. Goguen*

(1973) 415 U.S. 566, 575.) "Of equal, if not greater, constitutional significance, police and prosecutors may lack sufficient standards under which to determine who will be charged with permitting such [elder] abuse." (*People v. Heitzman, supra*, 9 Cal.4th at p. 205.)

Section 148.1(d) does not provide sufficient standards for police and prosecutors and fails to prevent arbitrary and discriminatory enforcement, thereby violating due process.

As demonstrated above, section 148.1(d) is facially vague. It inevitably conflicts with constitutional due process guarantees, and is also facially vague under "the more lenient standard sometimes applied" in that it "conflicts with due process 'in the generality or great majority of cases.'" (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126-1127; quoting *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 673; see also *Chicago v. Morales, supra,* 527 U.S. at p. 55, fn. 22 [144. L.Ed.2d 67] (plurality opn. of Stevens, J.).)

Besides being facially vague, section 148.1(d) is also unconstitutional as applied to appellant. Appellant would not know that this small cardboard box, with nothing outside but the words "C-4" and an American flag, constituted "any false or facsimile bomb." The small cardboard box's nontechnical and insubstantial appearance was consistent with a joke. There was no fuse, ticking device or timer, wires or tape. (1RT 105) Plus, C-4 is an explosive rather than a bomb. (See Pen. Code, § 12301 [defining "destructive device" as including bomb while separately defining "explosive"].) Thus, section 148.1(d) is also

unconstitutionally vague as applied. (*Ortiz v. Lyon Management Group, Inc.* (2007) 157 Cal.App.4th 604, 613 [statutes unconstitutionally vague as applied]; *People v. Custodio* (1999) 73 Cal.App.4th 807, 812 [rejecting claim that "sharp instrument" vague as applied]; see also *Cranston v City of Richmond* (1985) 40 Cal.3d 755, 766.)

In sum, and consistent with the rule of lenity, section 148.1(d) is unconstitutionally vague, both on its face, and as applied to appellant.

IV. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE "ANY FALSE OR FACSIMILE BOMB," THEREBY VIOLATING THE FOURTEENTH AMENDMENT'S DUE PROCESS GUARANTEE

The evidence was legally insufficient to establish section 148.1(d)'s "false or facsimile bomb" element. (Pen. Code, § 148.1, subd. (d); 1CT 159; 2RT 374-375) Section 148.1(d)'s prohibits a "false or facsimile *bomb*." Although section 148.1(a), 148.1(b), and 148.1(c) all refer to "a bomb or other explosive," section 148.1(d) *omits* any reference to "explosive."

In this case, the prosecution's expert established that there was a false *explosive*. The expert identified C-4 as an explosive, extensively testified about explosives and stated the cardboard box was not an explosive. The expert never testified that the box was a false or facsimile bomb, and never even described the features or components of a real bomb.

Accordingly, the evidence was legally insufficient, appellant's due process rights were violated, and his conviction must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.)

Section 148.1(d) prohibits "false or facsimile bombs" but does not prohibit false explosives. Basic rules of statutory construction demonstrate the validity of this interpretation.

First, the plain language of section 148.1(d) omits any reference to explosives. Section 148.1(d) only prohibits "any false or facsimile bomb." Statutes must be interpreted according to their plain language. (*People v. Johnson* (2002) 28 Cal.4th 240, 244 ["If the plain language of the statute is clear and

unambiguous, our inquiry ends, and we need not embark on judicial construction"].)

Second, the rule "espressio unius exclusion alterius," which means the listing of some things implies the exclusion of others, also demonstrates that explosives are excluded from 148.1(d). (*People v. Giordano* (2007) 42 Cal.4th 644, 670; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550; *In re Timothy E.* (1979) 99 Cal.App.3d 349, 354.) Specifically, section 148.1(a), 148.1(b) and 148.1(c) all refer to "a bomb *or other explosive."* (Italics added.) By contrast, section 148.1(d) omits the word "explosive." Thus, the Legislature deliberately chose to omit explosives from section 148.1(d).

Third, other statutes demonstrate the Legislature does not use the words "bomb" and "explosive" interchangeably. (See e.g. Pen. Code, § 12301 [defining "destructive device" as including "bomb" while separately defining "explosive"]; Pen. Code, § 12303.3 [referring to "any destructive device or any explosive"]; Pen. Code, § 12303.2 [referring to "any destructive device or any explosive"]; Pen. Code, § 189 ["destructive device or explosive"]; Pen. Code, § 190.2 ["by means of a destructive device, bomb, or explosive"]; Pen. Code, § 11460 [using definition of "destructive device" under section 12301 and definition of "explosive" under Health and Safety Code section 12000]; Sts. & Hy Code, § 2544.2 [referring to "explosives, bombs, shells..."].) Finally, under the rule of lenity, section 148.1(d) therefore only applies to "any false or facsimile bomb."

(*People v. Franklin* (1999) 20 Cal.4th 249, 255, italics added; see also *United States v. Lanier, supra,* 520 U.S. at p. 266, italics added.)

For all these reasons, it is clear that the Legislature meant exactly what it said under section 148.1(d). Only false or facsimile bombs are prohibited.

Here, Officer Concolino, the prosecution's expert, was a member of the Yolo County Bomb Squad, was an Explosive Ordinance Disposal (EOD) technician, and had extensive training and experience including the investigation of objects that turned out to be what he characterized as "hoax device[s]." (2RT 202-204)

Officer Concolino never testified that the cardboard box was a false or facsimile *bomb*. He did not even describe the features or components of a real bomb. Rather, Officer Concolino explained that C-4 is a military *explosive*. (1RT 206) Officer Concolino described C-4, its uses and how it is obtained. (1RT 222-224) He described the protocol for determining whether an item "actually is an explosive as opposed to not an explosive." (1RT 210) Officer Concolino concluded the cardboard box was not an explosive. (1RT 212)

The evidence was legally insufficient to prove "any false or facsimile bomb." Appellant's due process rights were violated, and his conviction must be reversed. (*Jackson v. Virginia, supra,* 443 U.S. at p. 317-320.)

V. AT THE CLOSE OF THE PROSECUTION'S CASE, THE EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE "INTENT TO CAUSE ANOTHER TO FEAR FOR HIS OR HER SAFETY OR THE SAFETY OF OTHERS"

At the close of the prosecution's case, the evidence was legally insufficient to establish section 148.1(d)'s "intent to cause another to fear for his or her safety or the safety of others" element. (Pen. Code, § 148, subd. (d); 1CT 159; 2RT 374-375) Thus, appellant's motion for a judgment of acquittal should have been granted. (Pen. Code, § 1118.1.)

The evidentiary insufficiency is revealed by appellant's statements. Appellant repeatedly told the police (1) the box was a practical *joke*; (2) the box was *not meant* for anybody; and (3) appellant did not intend to harm anybody.

The evidentiary insufficiency is also revealed by the circumstances, including the insubstantial and exceedingly nontechnical appearance of this small cardboard box with a little American flag which was placed near an unmanned security gate on a Sunday morning when no one was present.

Because of the evidentiary insufficiency, the trial court erred in denying the motion for judgment of acquittal. (2RT 259) Appellant's due process rights were violated and his conviction must be reversed. (*Jackson v. Virginia, supra,* 443 U.S. at p. 317-320.)

VI. THE EVIDENCE IS LEGALLY INSUFFICIENT TO PROVE A PRIOR STRIKE 245(b) CONVICTION BECAUSE IN 1978 APPELLANT WAS FOUND NOT GUILTY BY REASON OF INSANITY; THE COURT WAS WITHOUT JURISDICTION IN 1985 TO ENTERTAIN A PLEA OF GUILTY

The evidence is legally insufficient to prove a prior 245(b) strike conviction. In 1978, appellant was found not guilty by reason of insanity of violating section 245(b). A not guilty by reason of insanity finding is *not a conviction* under the Three Strikes Law. (Pen. Code, § 667, subd. (d) [defining conviction]; *In re Merwin* (1930) 108 Cal.App. 31, 32.)

Appellant's 1985 "withdrawal" of his not guilty by reason of insanity "plea," and plea of guilty to violating 245(b), over the advice of counsel, so as to be released from his section 1026 commitment, is not, as a matter of law, substantial evidence of a conviction.

Specifically, having been found not guilty by reason of insanity in 1978, appellant was an insanity acquittee, and his 1978 *criminal* case was complete. (See Pen. Code, § 1026; *People v. Dodson* (2008) 161 Cal.App.4th 1422, 1430-1433.)

Thus, in 1985, the trial court had no jurisdiction to permit "withdrawal" of appellant's not guilty by reason of insanity "plea," and no jurisdiction to accept a plea of guilty. (Pen. Code, § 681; *People v. Parks* (2004) 118 Cal.App.4th 1, 9 [trial court, which had acquitted defendant of various offense, lacked jurisdiction, one month later, to convict defendant of lesser related offense]; *People v. Skinner* (1985) 39 Cal.3d 765, 771 [person may not be convicted while insane].)

Accordingly, the evidence is insufficient, as a matter of law, to prove the prior section 245(b) strike conviction, and reversal is required.

A. Background

In 1978, appellant was charged with violating sections 245(b), 243, and a section 12022.5 enhancement was alleged. (ACT 29-30) Appellant was found not guilty by reason of insanity. (ACT 89, 86, 3RT 736 ["It shows on 5/10 of '78 it shows two counts of felony, one for a 245(b), use PC, disposition, suspended, and it indicates insanity – committed insanity 1026PC. Note: Finding verdict of not guilty, insane"].) He was committed to Napa State Hospital. (ACT 89)

In 1985, over the advice of counsel, so that appellant could immediately be released from his section 1026 commitment, appellant "withdrew" his "plea" of not guilty by reason of insanity. (ACT 33-39) He pled guilty to violating section 245b, section 243, and admitted the use enhancement. (ACT 37) His sentence was deemed served and he was immediately released. (ACT 38-39; ACT 42-44)

B. Standard of Review

"The prosecution bears the burden of proving each element of a sentence enhancement beyond a reasonable doubt; a reviewing court must review the record in the light most favorable to the judgment to determine whether substantial evidence supports the factfinder's conclusion, i.e., whether a reasonable trier of fact could have found that the prosecution had sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v Jones* (1999) 75 Cal.App.4th 616, 631; see also *People v. Tenner* (1993) 6 Cal.4th 559, 566-567.)

C. The Three Strikes Law Only Applies To Prior Convictions; A Finding Of Not Guilty By Reason Of Insanity Is Not A Conviction

Section 667(e), part of the Three Strikes law, applies when a defendant has a prior strike conviction. (Pen. Code, § 667, subd. (d).) Section 667(d) defines prior convictions. The listed definitions do not include a finding of not guilty by reason of insanity.[7] (*Ibid.*)

Persons found not guilty by reasons of insanity plainly suffer no "conviction." (*In re Merwin, supra,* 108 Cal.App. at p. 32 ["It would require a peculiar process of reasoning to reach a conclusion that a defendant who was finally found not guilty by reason of insanity of a kind which rendered him incapable of committing the crime with which he was charged was nevertheless convicted of that crime"]; *Newman v. Newman* (1987) 196 Cal.App.3d 255, 259 [person found not guilty by reason of insanity suffered no conviction, and

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[7] Section 667 provides, in pertinent part: "(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as: (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. *None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive*: (A) The suspension of imposition of judgment or sentence. (B) The stay of execution of sentence. (C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony. (D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison." (Italics added.)

therefore CCP 340.3, which requires that person be convicted, inapplicable]; *People v. Skinner, supra,* 39 Cal.3d at p. 771.)

Rather, it is an acquittal of criminal charges due to insanity. (See e.g. *In re Moye* (1978) 22 Cal.3d 457, 460 ["acquittal of criminal charges because of insanity"]; *People v. Dobson, supra,* 161 Cal.App.4th 1422 ["insanity acquittee"]; *People v. Wilder* (1995) 33 Cal.App.4th 90, 105 [same].)

Consistent with the plain language of section 667(d) and the above authority, appellant, by virtue of the 1978 finding of not guilty by reason of insanity, suffered no conviction.

D. Because Appellant, In 1978, Was Found Not Guilty By Reason Of Insanity, His Criminal Case Was Complete; The Court Was Therefore Without Jurisdiction in 1985 To Entertain A Plea Of Guilty

Having been found not guilty by reason of insanity in 1978, appellant was an insanity acquittee, and his 1978 *criminal* case was *complete.* (See Pen. Code, § 1026 [describing procedures after NGI finding]; *People v. Dodson, supra,* 161 Cal.App.4th at p. 1430-1433 [describing section 1026 procedures].)

As stated in *People v. Williams* (1991) 233 Cal.App.3d 477, 485: "'He has had his criminal trial and been adjudicated not guilty by reason of insanity. The only remaining issue is how long he must remain committed to a state hospital for treatment.'"

"No person can be punished for a public offense, except upon a legal conviction in a court having *jurisdiction* thereof." (Pen. Code, § 681, italics added.)

"'It is fundamental to our system of jurisprudence that a person cannot be convicted for acts performed while insane.'" (*People v. Skinner, supra,* 39 Cal.3d at p. 771, quoting *People v. Nash* (1959) 52 Cal.2d 36, 50-51.)

Thus, in 1985, the trial court had no jurisdiction to permit "withdrawal" of appellant's not guilty by reason of insanity "plea," and no jurisdiction to accept a plea of guilty. (*People v. Parks, supra,* 118 Cal.App.4th at p. 9 [trial court, which had acquitted defendant of various offense, lacked jurisdiction, one month later, to convict defendant of lesser related offense]; *In re Alberto S.* (1991) 226 Cal.App.3d 1459, 1466 ["The court had already found that the evidence was insufficient to sustain the charged offenses and had, in effect, acquitted the minor. The minor cannot be held accountable for the court's action, which exceeded the bound of its authority"]; *P.S. & S., Inc. v. Superior Court* (1971) 17 Cal.App.3d 354, 360 ["On April 6, 1970, all defendants in the prosecution entitled People v. Collins, A-246-545, had been dismissed or acquitted. The action was concluded for all purposes. Under established rules the proceeding was no longer pending [Citation]; it was 'absolutely dead' and the court had no further jurisdiction of the subject matter"]; *People v. Woods* (1890) 84 Cal. 441, 443 [trial court had no jurisdiction to allow plea of guilty to petit larceny; plea null and void].)

In fact, having been found not guilty by reason of insanity in 1978, there was a presumption in 1985 that appellant was still insane. (*In re Franklin* (1972) 7 Cal.3d 126, 141, fn. 9; *In re Zanetti* (1949) 34 Cal.2d 136, 138; see also *People v. Baker* (1954) 42 Cal.2d 550, 564; Pen. Code § 1026.2 [procedures for restoration of sanity].)

Courts have no jurisdiction, and certainly should not be in the business, of permitting insanity acquittees to avoid *statutorily-mandated* restoration of sanity procedures, and statutorily-mandated *treatment*, merely because the acquittee, over the advice of counsel, wants to be immediately released, and avoid future section 1026.5 commitment extensions. (See e.g. Pen. Code, § 1026; § 1026.2; *People v. Dethloff* (1992) 9 Cal.App.4th 620, 625 ["If a court is without jurisdiction, no amount of consent or estoppel can bestow it"].)

Respondent below relied upon *unchecked* boxes to support the claim that appellant was found incompetent to stand trial. This amounts to reliance upon an absence of evidence. But it is settled that "A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established." (*Eramdjian v. Interstate Bakery Corp.* (1957) 153 Cal.App.2d 590, 602; accord *People v. Stein* (1979) 94 Cal.App.3d 235, 239.) Additionally, respondent speculates about what the absence of evidence proves, and speculation is not evidence. (*Ibid.*)

Appellant's contention that the trial court was without jurisdiction in 1985 to permit appellant to "withdraw" his "plea" of not guilty by reason of insanity is supported by the recent case of *People v. Vasilyan* (2009) 174 Cal.App.4th 443.

In *Vasilyan*, the defendant pleaded guilty in 1994 to violating section 422.7. But 422.7 is a penalty provision, rather than a substantive crime. Relying upon section 681, *Vasilyan* decided that because section 422.7 does not set forth a substantive crime, the trial court had no subject matter jurisdiction in 1994 to accept the defendant's guilty plea. Thus, the defendant's 1994 guilty plea was a nullity, and was subject to collateral attack. "When a court lacks jurisdiction in the fundamental sense, an ensuing judgment is void, and such a judgment is vulnerable to direct or collateral attack at any time." (*People v. Vasilyan, supra*, 174 Cal.App.4th at p. 450.) *Vasilyan* relied upon *Andrews v. Superior Court* (1946) 29 Cal.2d 208, also relied upon by appellant here.

Thus, just as the court in *Vasilyan* lacked subject matter jurisdiction in 1994 to accept the defendant's guilty plea because section 422.7 did not set forth a substantive crime, the trial court here lacked subject matter jurisdiction in 1985 to accept appellant's plea of guilty because appellant had already been found not guilty by reason of insanity.

Appellant's 1985 "conviction" is therefore insufficient evidence, as a matter of law, because the trial court had no jurisdiction to entertain a plea of guilty, it was "'a nullity, and can be neither a basis nor any evidence of any right whatsoever." (*Andrews v. Superior Court, supra*, 29 Cal.2d at p. 214-215.)

E. Conclusion

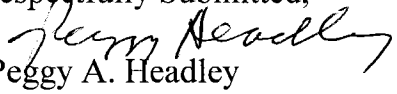
The 1978 finding of not guilty by reason of insanity is not a conviction under the Three Strikes Law. The 1985 "conviction" is insufficient evidence, as a matter of law, because the trial court had no jurisdiction to entertain the plea of guilty, it was "'a nullity, and can be neither a basis nor any evidence of any right whatsoever.'" (*Andrews v. Superior Court* (1946) 29 Cal.2d 208, 214-215.)

CONCLUSION

This Court should deny review. Respondent's petition for review is without merit. The Court of Appeal's decision on the equal protection issue is correct. If this Court does grant review, then it should also consider the other issues raised herein.

Dated: May 20, 2010

Respectfully Submitted,



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CERTIFICATION OF WORD COUNT

I, Peggy A. Headley, appointed counsel for appellant, hereby certify that the word processing software word count function shows that this document, excluding the table of contents, table of authorities, proof of service, and this certification of word count, contains 8,209 words, which is within the authorized maximum of 8,400 words. (Cal. Rules of Court, Rule 8.504, subd. (d)(1).)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 20, 2010, at Truckee, California.

Peggy A. Headley
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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 May 20, 2010, I served the attached

Appellant's Answer to Petition for Review

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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