In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

BARRY ALLEN TURNAGE,

Defendant and Appellant.

Case No. S182598

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

REPLY TO THE ANSWER TO PETITION FOR REVIEW

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
RACHELLE A. NEWCOMB, Acting
Supervising Deputy Attorney General
PAUL E. O'CONNOR
Deputy Attorney General
State Bar No. 170829
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5290
Fax: (916) 324-2960
Email: Paul.OConnor@doj.ca.gov
Attorneys for Plaintiff and Respondent

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The People as respondent make this Reply to appellant's Answer to the Petition for Review. In brief, appellant has failed to demonstrate why the issues presented by the People do not warrant review. As to the issues proffered in his Answer, appellant has made no attempt to show why such issues warrant review under the relevant standards.

A. The Finding of Equal Protection Violation

In the Petition for Review, the People pointed out that the Court of Appeal's legal determination of unequal protection of the laws was indefensible, in that there was a conceivable basis, even if only speculative to some degree, for basing (1) availability of felony punishment, for false weapons of mass destruction (WMDs) and false bombs, on (2) affirmative proof of sustained fear (necessarily including proof of recognition) as to false WMDs and no affirmative proof of any fear (including proof of recognition) at all as to false bombs. (Petition for Review, Arg. I.) The People specifically noted the importance of the issue and the need for statewide uniformity. (Petition for Review 1-2, 10.) In particular, it was noted that the effects of the Court of Appeal's ruling was not limited to the parties. (Petition for Review 9, fn. 3.)

1. Warrant for Review

Although appellant argues that the People are wrong on the merits, he makes no argument whatsoever that the issues presented in the Petition for Review are unimportant or not in need of statewide uniformity as to decision. Appellant's belief that he has a better argument on the merits does nothing to diminish whether review of the merits is warranted on the important issue whether there should have been judicial invalidation, on constitutional grounds, of the Legislature's authorization of felony punishment for appellant's offense. Review should be granted.

2. Merits

Appellant is also wrong as to his view of the merits. First, appellant asserts the Legislature intended to indicate "that the false bomb and false WMD statutes concern similar conduct and the penalties should be similar." (Answer 4.) Given that the Legislature's actual *enactment* does not treat the placements of the items the same in all respects – the very premise of the claim of unequal protection – there can be no logic to an argument based on the premise that the Legislature intended that such conduct be treated similarly in all respects. Indeed, appellant severely undercuts his own theory, in that he argues against finding that the "sustained fear" which the Legislature required proven as to false WMDs was intended to transfer to the false bomb context at all. (See Answer 11-12.) Thus, appellant's assertion regarding legislative intent is unsound in the first instance. Moreover, because a claim of unequal protection is in no way limited to what can be divined as legislative *intent*, appellant's assertion adds nothing helpful to the discussion. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201.)

Second, appellant asserts the Legislature intended to avoid "automatic exposure to the Three Strikes Law" as to placement of a false WMD in the absence of proof of sustained fear. (Answer 4.) Generously construed, it appears his suggestion is that there is a "compelling" reason to believe the Legislature likewise intended to avoid exposure to the Three Strikes Law for placement of a false *bomb* in the absence of affirmative proof of sustained fear. (Answer 4.) But, again, such argument is meaningless. The Legislature's clear *intent* to expose appellant to the Three Strikes Law, even in the absence of affirmative proof of any fear, is found in the Three Strikes Law itself. Fully cognizant of the law as it existed in 1993, the Legislature (like the Electorate) deliberately targeted every offense which qualified as a felony as of 1993 when enacting the

Three Strikes Law in 1994. (Pen. Code, § 667, subd. (h).) Given that appellant's offense was punishable as a felony in 1993, even without affirmative proof of any fear, it is illogical to suggest the Legislature's intent in any way favored the result in this case. Worse, again the constitutional question is not constrained by what affirmative proof there might be of legislative intent – as opposed to what conceivably *could* justify what the Legislature *did*, whether or not the Legislature actually contemplated that justification. (*People v. Hofsheier, supra,* 37 Cal.4th at p. 1201.)

Third, appellant notes that the Court of Appeal limited its consideration as to conceivable bases for legislative distinction on what happens once it is known to victims that a particular item is intended to represent a bomb or a WMD. Under that view, the potential effect or extent of fear is at least as great as to a perceived WMD, as to a perceived bomb. Thus, where it is known that the items have been recognized as dangerous items, there is no basis for more serious treatment of a false bomb. (Answer 4-5.) But even were that view correct, it would simply clarify that the justification to be focused upon, when viewing the Legislature's presumptively-valid distinction regarding the offenses, is *not* whether there is a difference once both items are recognized. Rather, given that every presumption favors upholding the distinction, the proper judicial focus should have been on whether there was a conceivable basis for distinction as to the likelihood that there would be recognition at all. And appellant avoids any and all discussion on the point whether it is conceivable that one is more recognizable than the other.

Instead, he engages the pretense that the Legislature assumed proof of fear as to both offenses – but only *sustained* fear as to false WMDs. (Answer 5.) But that is false. It would be conceivable for the Legislature to speculate that -- in an acceptably large percentage of cases involving

placement of false bombs – recognition, resulting fear, and sustained fear was too likely. Thus, the false bomb statute requires no *affirmative* proof at all of resulting fear – sustained or otherwise – even when felony punishment is imposed. (Pen. Code, § 148.1, subd. (d).) It would be conceivable for the Legislature to speculate, in contrast, that in an unacceptably large percentage of cases involving placement of false WMDs, recognition and resulting fear was too speculative, and sustained fear accordingly too speculative, to make felony punishment available in the absence of proof. That distinction, even if speculative, is advanced by a legislative scheme requiring proof of sustained fear (necessarily including affirmative proof of recognition) in one case and not the other. It is irrelevant that the Legislature's method may be imperfect, illogical, unscientific, and occasionally susceptible to some inequality of result. (*Heller v. Doe* (1993) 509 U.S. 312, 319-321.)

Fourth and finally, appellant argues the People had the burden to point out this conceivable basis for distinction in the Court of Appeal, prior to that court's decision. (Answer 5-6.) However, the People had no burden *at all*. It was appellant who had the burden of overcoming every basis for distinction that was even *conceivable* – and not merely such bases as the People might *argue* (in advance of any knowledge of what the Court of Appeal might choose to focus upon). The Court of Appeal's duty, before judicially invalidating the *statutory* punishment scheme as enacted by the Legislature – immediately affecting trial prosecutions statewide – was to ensure there was no conceivable basis for justification. While the People may indeed strive to anticipate such failure, and to guard against it, in truth the People had no *affirmative* burden at all. In any event, this was not a new claim raised only in a Petition for Rehearing as respondent refuted appellant's claim of equal protection denial in the Respondent's Brief. (RB 11-16.) As noted, respondent merely failed to anticipate the Court of

Appeal's ruling and rationale. Finally, appellant fails to make any suggestion why a court properly should not consider every argument – even if presented on rehearing for the first time – before invalidating an enactment by a co-equal branch of government. (*Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 120-121.)

B. The Remedy for the Alleged Equal Protection Violation

In the Petition for Review, the People pointed out that appellant stands convicted of the offense enacted by the Legislature and faces the felony punishment authorized by the Legislature for that offense. The Petition directly addressed the arguments made by appellant below in his answer to rehearing. Specifically, and citing *Cunningham v. California* (2007) 549 U.S. 270, inter alia, the People pointed out that if the judicial branch found the Constitution imposed a condition external to the statutory scheme, in order for the result *already authorized* by statute to obtain, then it followed that the Constitution imposed no bar to fulfillment of that condition. (Petition for Review, 13-14, 16.)

In his Answer, appellant omits any reference to *Cunningham*, and in chief he simply reiterates the points in his answer to the petition for rehearing below. (Answer 7-18.) Such points having been addressed in the Petition for Review, there is little to add in this Reply. Moreover, while appellant again makes clear that he disagrees with the People's arguments on the merits, he makes no attempt to demonstrate that the importance of the issue fails to warrant this Court's determination of those merits.[1]

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[1] Further, appellant argues that the Court of Appeal's statement of facts demonstrates that it rejected the evidence that the dispatch center was evacuated (evidence of sustained fear). (Answer 11.) Respondent called the Court of Appeal's attention to this omission or misstatement of fact in its Petition for Rehearing. (Petition for Rehearing 12.) Accordingly, this

(continued...)

C. Appellant's Proffer of Additional Issues

In scattershot fashion, appellant proffers a broad array of additional issues for this Court to examine – but without discussion as to how such issues meet the standards for granting review. (Answer 19-35 [restatement of merits arguments]; but see Cal. Rules of Court, rule 8.500(b) [standards for review] & rule 8.504(b)(2) ["petition must explain how the case presents a ground for review under rule 8.500(b)"].) For example, claims that a penal offense is vague in definition falter sharply when an element of the offense is specific intent.[2] Appellant does not even attempt a showing as to why his proffered issue of vagueness (Answer 19-23) presents any important question in light of this settled standard, given that his crime required specific intent to cause fear. Similarly, the term "bomb," in California statutory parlance, has long been judicially understood to include broadly any device which is designed to explode in harmful fashion. (See *People v. Quinn* (1976) 57 Cal.App.3d 251, 257-258.) And Penal Code section 148.1 has been amended since then, with no indication of disfavor. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 303 ["the Legislature is presumed to be aware of existing judicial decisions"].) Appellant makes no attempt to show how his proffered issue of insufficient evidence – apparently on a theory that not every explosive device is a

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(...continued)
Court should not accept the Court of Appeal's erroneous omission or misstatement. (Cal. Rules of Court, rule 8.500(c)(2).)

[2] See *In re M.S.* (1995) 10 Cal.4th 698, 718 ("The United States Supreme Court has emphasized the value of a specific intent requirement in mitigating potential vagueness of a statute. (. . . *Dennis v. United States* (1951) 341 U.S. 494, 515 [] ["[A] claim of guilelessness ill becomes those with evil intent."]; *Screws v. United States* [(1945)] 325 U.S. 91, 104 [] [" 'A mind intent upon willful evasion is inconsistent with surprised innocence.' "].)

"bomb" (Answer 24-26) – presents an important question in light of these points.

These examples suffice to show that appellant makes no serious attempt to show that additional issues warrant this Court's review. Review should be denied as to appellant's proffered additional issues.

CONCLUSION

For the foregoing reasons, respondent's petition for review should be granted. Review should be denied as to appellant's proffered additional issues.

Dated: June 2, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
RACHELLE A. NEWCOMB, ACTING
Supervising Deputy Attorney General

PAUL E. O'CONNOR
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY TO THE ANSWER TO PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 1,809 words.

Dated: June 2, 2010

EDMUND G. BROWN JR.
Attorney General of California

Paul E O'Connor

PAUL E. O'CONNOR
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 3, 2010, I served the attached **REPLY TO THE ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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

The Honorable Jeff W. Reisig
District Attorney
Yolo County District Attorney's Office
301 Second Street
Woodland, CA 95695

CCAP
Central California Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816

Clerk of the Superior Court
Yolo County Superior Court
725 Court Street
Woodland, CA 95695

Court of Appeal
Third Appellate District Court
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

On June 3, 2010, I caused four (13) copies of the **Reply To The Answer To Petition For Review** in this case to be delivered to the California Supreme Court at **350 McAllister Street, San Francisco, CA 94102-4797** by **Messenger Service**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 3, 2010, at Sacramento, California.

Declarant

SA2008306331
Document in ProLaw