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In the Supreme Court of the State of California

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

SUPREME COURT
FILED

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Yolo County Superior Court, Case No. 0605019
The Honorable Thomas Edward Warriner, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

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ARGUMENT

The Court of Appeal found that appellant's felony punishment under the false bomb statute (Pen. Code, § 148.1, subd. (d))[1] violated equal protection. (*People v. Turnage* (Apr. 1, 2010, C059887) [cert. for part. pub.], hereafter "Slip Opn.," 9.) In the view of appellant and the court, the statute unconstitutionally made felony punishment available for placing a false bomb without proof a disruptive reaction resulted whereas felony punishment is available for placing false weapons of mass destruction ("WMDs") (§ 11418.1) only upon proof that "sustained fear" had resulted. (Slip Opn. 10-14; Answer Brief on the Merits, hereafter "AB," 8-26.)

The Court of Appeal further refused to remand to allow the People to prove "sustained fear" as a condition of retaining felony punishment even though the Legislature had authorized such punishment for conviction of the false bomb offense of which appellant had already been convicted. Instead, the Court of Appeal barred felony punishment for appellant and reduced his offense to a misdemeanor. (Slip Opn. 14-15.)

A distinction between criminal statutes does not violate equal protection when there is both a legitimate governmental purpose and a reasonably conceivable state of facts providing a rational basis for differing treatment. Here, given the great deference to the Legislature in enacting laws and in distinguishing between the appropriate punishment for different offenses, appellant's right to equal protection was not violated. There is a rational basis for allowing felony punishment for placement of a false bomb, without proof that such placement caused a disruptive reaction,[2]

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

[2] Because the phrase "sustained fear" is a term of art that might be confused with the ordinary term "fear" (see § 148.1, subd. (d)), respondent (continued...)

even though felony punishment is allowed for placement of a false WMD only when "sustained fear" is proven. It is at least conceivable that placement of a false bomb is more likely to result in a disruptive reaction than is placement of a false WMD because individuals are generally more familiar with bombs than with WMDs and are therefore more likely to perceive a false bomb to be a dangerous object than to perceive a false WMD to be dangerous at all.

However, even if it would be unconstitutional to allow appellant to receive felony punishment without additional proof of "sustained fear," the remedy should not be to shield appellant from felony punishment altogether. The evident intent of the Legislature was to ensure the availability of felony punishment for those whose placement of a false bomb (or false WMD) resulted in "sustained fear." The proper remedy would thus be to allow the People to prove that appellant's placement of a false bomb resulted in that disruptive reaction, i.e., "sustained fear," so that felony punishment remains available for appellant's conduct.

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

Much is undisputed. Both bombs and weapons of mass destruction (WMDs) are clearly dangerous. Moreover, appellant does not dispute that when a person places an item *falsely* intended to represent either a bomb or a WMD, and a member of the public perceives the item as a bomb or

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(...continued)
in this brief generally refers to "disruptive reaction" instead of "sustained fear."

WMD, similar if not identical fear-based disruption is likely. Nor does appellant appear to dispute that, as to availability of felony punishment, what the Legislature has *done* is enacted a statute which makes such punishment available for false bombs without requiring any proof of recognition and yet enacted another statute which makes such punishment available for false WMDs only upon proof of such recognition (without which, there could be no resulting disruption).

Despite the Legislature's enactment of a scheme that encompasses this very difference—one in which availability of felony punishment is linked to proof of recognition as to one item (false WMD) but not the other (false bomb)—appellant posits the Legislature was merely careless. (AB 23.) However, at least equally plausible is that the Legislature purposefully enacted a scheme that linked punishment with recognition as to one item, but not the other, acknowledging at least legislative speculation that the items differed in the likelihood they would be recognized.

And there is a weighty thumb on the scale in choosing among these possibilities—*every* presumption must be drawn in favor of finding that a statute is constitutional. (*People v. Hansel* (1992) 1 Cal.4th 1211, 1219 [courts must uphold a statute unless its unconstitutionality "'clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity'"]; *People v. Jablonski* (2006) 37 Cal.4th 774, 826.) Moreover, it is presumed that the Legislature acts intentionally both when it includes a requirement in one statute and excludes that same requirement in a different but "similar statute." (*People v. Licas* (2007) 41 Cal.4th 362, 367.) Combining these presumptions, there is no rational argument that a court can conclude that the Legislature did not *intend* the very disparity, in availability of felony punishment as to false bombs versus false WMDs, which the Legislature's enactments caused. Appellant's arguments, garnered toward the conclusion that the judicial branch should be deemed

more attentive to the effects of legislation than was the Legislature itself, not only fails to credit the afore-mentioned presumptions, it also strikes an unwarranted insult against the co-equal legislative branch of government.[3]

Accepting then, as a *fact*, that the Legislature *intended* the disparity which the Legislature itself enacted, the main question remaining is whether any conceivable basis justifies that disparity. As stated in the Opening Brief on the Merits (hereafter "OB") at pages 6 and 10-11, and all but ignored in the Answer Brief on the Merits, the question whether a hypothetical justification is conceivable is not informed by *judicial* query whether such justification may lack empirical foundation or even lead to results either unfair, imperfect, illogical, or at times inequitable. Rather, "any reasonably conceivable state of facts that could provide a rational basis" for the disparity, whether or not actually contemplated by the Legislature, will suffice to uphold the statute against an equal protection challenge. (*Heller v. Doe* (1993) 509 U.S. 312, 320, internal quotation marks and citation omitted.)

Here, there is such a conceivable premise upon which to enact otherwise roughly parallel statutes: (a) one statute (§ 11418.1) which necessarily requires proof that a false WMD was recognized as intending to represent a WMD before felony punishment is available, and (b) another statute (§ 148.1(d)) which requires no proof at all that a false bomb was recognized as intending to represent a bomb before felony punishment is available. Specifically, the Legislature could believe that familiarity with bombs (on the part of both criminals and victims) is sufficiently great that one seeking to cause others to think an item is a bomb will likely succeed,

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[3] See AB 23 ("As the appellate court correctly concluded, the Legislature just overlooked the disparate treatment between the two crimes.")

and that familiarity with WMDs is not so sufficiently great that one falsely seeking to cause others to think an item is a WMD will not always succeed. Because *all* fear-based harm flowing from false bombs and false WMDs is conditioned on victims *recognizing* the false items as what they are intended to represent, a legislative body could elect to tread more carefully as to making felony punishment available as to the item (false WMD) where recognition is deemed less certain—and thus insist on proof in that instance.

Appellant's only response to this specific distinction is the bald declaration that if an item is "unrecognizable," or possibly even if it is actually "not recognized," as a WMD—despite the criminal's *intent* that it be so recognized as a WMD—then the Legislature does not criminalize it as a false WMD. (AB 19-21.) However, his argument finds no basis in any statute. To the contrary, criminalization of placing a false WMD is founded on the element of specific intent (§ 11418.1 [false WMD placed "with the intent to cause" another or others to fear for safety]; see *People v. Warner* (2006) 39 Cal.4th 548, 557 [specific intent crimes include an intent to "do some further act or achieve some additional consequence," quoting *People v. Atkins* (2001) 25 Cal.4th 76, 82]), which suffices to allay virtually all concerns about trapping the unwary.[4]

Putting aside appellant's attempt to rewrite the very elements of the false WMD statute, he has no response as to why it was not at least conceivable that the Legislature could have believed that, as to defendants placing items intended falsely to be perceived as WMDs, the likelihood of success in many or most cases is more speculative than as to defendants

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[4] See *In re M.S.* (1995) 10 Cal.4th 698, 718 and cases cited therein ("The United States Supreme Court has emphasized the value of a specific intent requirement in mitigating potential vagueness of a statute.").

placing items intended falsely to be perceived as bombs. It matters not that one might identify factual scenarios wherein a *particular* type of false WMD might be as recognizable (or more so) as a *particular* type of false bomb. (AB 21, fn. 8; see also AB 21.) At most, that would simply show that all legislation is likely imperfect, leading to the possibility of results in individual cases that one might think to be unfair, imperfect, illogical, or at times inequitable. But that would not enable the judicial branch to declare unconstitutional the enactment of the legislative branch. (*Heller v. Doe, supra,* 509 U.S. at pp. 319-321.)

None of appellant's additional points have merit either. First, to be clear, respondent is not suggesting that the term "sustained fear" in section 11418.1 be replaced with "disruptive reaction" or that "disruptive reaction" be used in section 148.1(d). (See AB 16-18.) Rather, respondent uses this term to prevent confusion with the ordinary term "fear" and the phrase "sustained fear" which is specially defined by statute. (See *ante*, fn. 2; OB 2 & fn. 1; see also OB 20 [noting the illogic in presuming that the Legislature required proof of some reaction other than "sustained fear"].) In fact, respondent's argument is that proof of any type of fear or disruptive reaction is not required in section 148.1(d) to make it constitutional, despite the "sustained fear" language in section 11418.1. However, should this Court believe that felony punishment for a violation of section 148.1(d) would be unconstitutional without requiring proof of "sustained fear," then respondent merely contends that it be given the opportunity to meet this new requirement in light of its inability to address this argument and new requirement in the court below.[5]

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[5] Respondent addresses this argument in more detail in the following section.

Second, appellant's attempt to distinguish *People v. Wilkinson* (2004) 33 Cal.4th 821 demonstrates a fundamental misunderstanding of the case. (AB 23-24.) In *Wilkinson*, the defendant's equal protection claims were two-fold: disparate treatment resulting from charging decisions of prosecutors and lack of rational basis for a statutory scheme that authorized different sentences for comparable crimes. (*Wilkinson*, at p. 836.) The former equal protection claim concerned discriminatory charging choices by the executive branch that allowed prosecutors to punish some individuals more harshly than others for similar acts. (*Id.* at pp. 838-839.) The latter claim concerned discriminatory statutory schemes enacted by the legislative branch that resulted in harsher punishment for an entire offender group that was similarly situated to another offender group by virtue of the similar nature of their offenses. (*Id.* at p. 839.) In addressing the latter equal protection issue, the important consideration is not whether the crimes in the different statutes are identical[6] (see AB 23-24) but whether the offenders are similarly situated for the purpose of punishment under equal protection principles.

Third, appellant's arguments overlook the crucial fact that the legislative intent for section 11418.1 does not inform the question of the legislative intent for the previously enacted section 148.1(d) covering a different set of circumstances. Indeed, the Legislature's actual *enactment* of the two statutes -- with different requirements for the availability of

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[6] Indeed, even the premise of identical crimes is questionable since the United States Supreme Court has rejected a lower court's attempt to find an equal protection violation in the context of identical statutes resulting in differing penalties. (*United States v. Batchelder* (1979) 442 U.S. 114, 123-125.) The high court rejected the lower court's attempt to find a violation based upon "distinguishing overlapping statutes with identical standards of proof from provisions that vary in some particular." (*Id.* at p. 124.)

felony punishment -- indicates some differing legislative intent for each. As noted by appellant (AB 23) and the Court of Appeal (Slip. Opn. at p. 9), the Legislature necessarily was aware of the differences between the statutes because section 11418.1 was "modeled" on section 148.1(d). And yet, the Legislature chose not to make any changes to section 148.1(d) despite its awareness of the differences. (See *People v. Wilkinson, supra,* 33 Cal.4th at p. 839 [Legislature's act of amending § 243 to include references to custodial officers while simultaneously not repealing § 243.1 suggests that "it contemplated that the ostensible 'lesser' offense of battery without injury sometimes may constitute a more serious offense and merit greater punishment than the 'greater' offense of battery accompanied by injury"].)

Moreover, in determining legislative intent, reference is first made to statutory language. (*People v. Licas, supra*, 41 Cal.4th at p. 367.) If such language is unambiguous, courts should presume that the Legislature meant what it said rather than seeking to inject ambiguity by resorting to legislative history. (*Ibid.*)

Finally, the legislative choice to enact the two statutes with different requirements need not be supported by empirical data or evidence but may be based on mere rational speculation. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 650.) It is "constitutionally irrelevant whether [the] reasoning" actually impelled the Legislature. (*Ibid.*, internal quotation marks and citations omitted.) Here, the reasoning supporting the enactment of section 11418.1 does not obviously inform the reasoning for enacting an earlier statute (148.1(d)), and the reasoning for enacting section 11418.1 would be "constitutionally irrelevant" in any event.[7]

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[7] Unexpectedly, appellant argues that the legislative history for section 148.1(d) (as well as that of the Three Strikes Law) is irrelevant to

(continued...)

Fourth, appellant argues that support for his position that the Legislature merely was careless can be taken from the Legislature's separate choice to punish WMD "threats" (§ 11418.5, subd. (a)) more harshly than bomb "reports" (§ 148.1, subds. (a)-(c)). (AB 22-23.) Preliminarily, the specific acts involved in each of these separate crimes are evident by the substantial difference in language between the two crimes.

(...continued)
the equal protection analysis (AB 21) even though it could inform why the Legislature contemplated felony punishment for those who place false bombs. (AB 21-22.) Because these laws predate the enactment of section 11418.1, appellant argues they "shed no light" regarding why the availability of punishment for false bombs is greater than that for false WMDs. (AB 21-22; see also AB 22 [noting only the 1991 amendment to subdivision (d) of section 148.1 and not granting significance to the 1998 amendment to section 148.1].) On the contrary, assuming any legislative history is relevant, there is no basis in reason for ignoring the legislative history of the very statute upon which the court is deciding constitutionality. In addition, the 1998 amendment of section 148.1 after the 1994 enactment of the three strikes law demonstrates the Legislature's choice to continue allowing the availability of felony punishment for placement of false bombs in spite of the increased punishment provisions of the three strikes law for felony offenders. (*People v. Chenze* (2002) 97 Cal.App.4th 521, 527-528 [the amendment of a statute has the legal effect of reenacting the statute, even the unamended portions].)

Furthermore, respondent's attachment of documents pertaining to the enactment of section 148.1(d) was proper. (See AB 21, fn. 20.) California Rules of Court rule 8.520(h) does not require respondent to request judicial notice of any attachments. Attached documents need not even be judicially noticeable material. California Rules of Court rule 8.520(h) requires nothing more than that the attached documents be "relevant" and "citable" but "not readily accessible" nor "exceed a combined total of 10 pages." Since the attached documents, which are not readily accessible, pertain to the enactment of section 148.1(d), they are relevant and citable. Even assuming some of these documents are not cognizable legislative history (see AB 21, fn. 20), they inform this Court regarding *public* recognition of and familiarity with bombs (see, e.g., OB, Att. A, pp. 1-2, 5), an issue which specifically addresses whether there is a conceivable basis for the challenged disparate treatment.

This alone serves as a basis to differentiate the punishment for each. More importantly, appellant's argument demonstrates his misunderstanding of respondent's primary contention; indeed, it advances the contention.

The placement of false bombs is treated more harshly than the placement of false WMDs because false bombs conceivably are more readily recognizable than false WMDs. This element of recognition is completely absent from either "reports" or "threats" of false or real bombs or WMDs because once the suspect has reported or threatened to use a bomb or WMD, recognition of the bomb or WMD for what is reported or threatened to be is presumed. Here, in the context of *false* bombs and WMDs, the primary harm to be addressed is the disruption which results once the false items are *recognized* as the criminal intended them to be. A "conceivable" basis for such a legislative scheme—the *effect* of which is to condition the availability of felony punishment upon proof of recognition as to one item, and not to condition such availability on proof of recognition as to the other item—is that, as between the two items, there is room for debate as to the likelihood of recognition. And, tellingly, the only real alternative scenario is that the Legislature is simply inattentive to what it is doing, so the judiciary may casually assume the Legislature did not mean to do what it actually did.

Respect for separation of powers demands more. There is a conceivable basis in reason for what the Legislature did. Courts may not demand proof that there is an empirical basis to support the classifications to which the Legislature gave effect when it enacted the disparate statutory scheme.[8] Rather, the judicial duty in this case is to recognize that the

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[8] Although, as between what the statutory scheme actually *does* and the possibility that such is only a hypothetical justification, the fit is almost too neat *not* to suppose that as the actual premise. (Cf. *Professional*
(continued...)

statutory scheme is not affirmatively proven to be without any "conceivable" justification. This, accordingly, ends the inquiry.

II. EVEN ASSUMING EQUAL PROTECTION REQUIRES AFFIRMATIVE PROOF OF "SUSTAINED FEAR" BEFORE FELONY PUNISHMENT IS AVAILABLE FOR FALSE BOMB PLACEMENT, THIS COURT MUST MAKE PARAMOUNT THE LEGISLATURE'S CHOICE OF REMEDY; THAT REMEDY, WHICH MEETS ANY CONSTITUTIONAL CONCERNS, ALLOWS THE PEOPLE TO PROVE THAT APPELLANT CAUSED "SUSTAINED FEAR" SO THAT FELONY PUNISHMENT REMAINS AVAILABLE FOR HIS CRIME

Assuming any remedy is necessary in this case, appellant limits this Court's choices to only invalidation of section 148.1(d) as written (imposing a new misdemeanor-only punishment option) and judicial reformation of section 148.1(d) to include "sustained fear." (AB 27-42.) Although he recognizes that the Legislature's preference is the primary consideration in determining an appropriate remedy (AB 27), he ignores the very words of the statute and determines that the misdemeanor-only punishment option is the only one available here because judicial reformation of section 148.1(d) would result in a myriad of problems, most notably, the creation of a new crime and the continued perpetuation of unequal treatment. (AB 27-42.) Appellant's narrow view fails to comprehend respondent's position. Respondent's remedy—allowing the prosecution to prove the newly required "sustained fear" to obtain the option of felony punishment—neither creates a new crime nor perpetuates inequality. Rather, allowing the People to prove "sustained fear" under section 148.1(d) as a condition to retaining the felony sentence in this case most closely matches what the Legislature intended.

(...continued)
Engineers in Cal. Government v. Schwarzenegger (2010) 50 Cal.4th 989, 1046.)

Respondent neither seeks to judicially insert "sustained fear" into the false bomb statute (AB 30-42) nor to create a new crime with a new element (AB 36, 40). Instead, respondent seeks the opportunity to prove formally that appellant's present conviction meets a newly created constitutional prerequisite for the availability of felony punishment. The elements of section 148.1(d) do not have to be altered to find appellant guilty of placing a false bomb with the requisite intent; he already stands convicted of the offense. (See AB 52 [arguing that judicial reformation is required].) The Court of Appeal did not find his conviction invalid but rather vacated his sentence to alleviate alleged equal protection concerns.[9] (Slip Opn. at pp. 14-15, 21.) Here, respondent merely seeks the option of felony *punishment* in appellant's case by meeting any newly imposed constitutional pre-condition to that punishment—proof that appellant's conduct resulted in "sustained fear." When viewed in this light, this remedy best matches the Legislature's intent to allow felony punishment for those who place false bombs.

Moreover, the misdemeanor-only option of section 148.1(d) would not be eliminated by allowing the prosecution to make such proof. (See AB 31, 36.) Defendants who place a false bomb that does not cause another person to be placed in "sustained fear" would still be subject to

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[9] Since appellant here will obviously not go "remediless" should his *conviction* stand and his sentence be reduced, appellant's analogy to *Welsh v. United States* (1970) 398 U.S. 333 is unavailing (AB 38, fn. 29; see also AB 45-46) and his reliance on section 1023, pertaining to convictions, is irrelevant (AB 47-50). Appellant's access to the benefit of misdemeanor-only punishment is one he would not have obtained but for the judicial finding below regarding equal protection. If the People prove additional facts demonstrating appellant's eligibility for felony punishment, then he is not harmed by any alleged disparity between the two statutes because he is being treated the same as those who place false WMDs under the same circumstances.

misdemeanor-only punishment if equal protection principles demanded it. However, for those defendants, like appellant, whose conduct "causes another person to be placed in sustained fear" (§ 11418.1), the option of felony punishment would still be available, just as the Legislature intended under section 148.1(d). The prosecution would simply be charged with proving this additional fact to obtain the felony punishment.

Furthermore, appellant's dubious reliance upon section 11418.1's legislative history as the most recent consideration of the punishment warranted for the placement of false objects broadly overlooks that section 11418.1 concerns only the placement of false *WMDs*, not the placement of *all false objects*. (AOB 38-39.) The plain language of section 148.1(d) demonstrates that the Legislature believed felony punishment should be available for the placement of false *bombs*. Hence, the only remedy "in perfect harmony" (AOB 29) with the Legislature's enactment is to allow for felony punishment (see *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1207 ["In choosing the proper remedy for an equal protection violation, our primary concern is to ascertain, as best we can, which alternative the Legislature would prefer."]).

In addition, appellant's attempt to limit this Court's choice of remedies (AB 36-40) evinces a misunderstanding of a court's duty when finding an equal protection violation. Here, because of the alleged overinclusivness of section 148.1(d), some defendants (those who place false bombs that do not result in the victim suffering "sustained fear") do not receive the benefit of the lesser misdemeanor punishment that the similarly-situated favored class (those who place false WMDs that do not result in the victim suffering "sustained fear") receive. The remedy for such overinclusiveness is two-fold. Those defendants who place false bombs that do not result in their victims suffering "sustained fear" should be given the benefit of the lesser misdemeanor punishment. However,

those defendants who place false bombs that subject their victims to "sustained fear" should be eligible for felony punishment at the court's discretion. In this case, because the constitutional prerequisite to felony punishment had not been established prior to the appellate court's decision below, the People did not have the opportunity to demonstrate for the trial court that appellant was eligible for felony punishment. Remand here compensates for equality concerns by determining the appropriate outcome for appellant under the revised interpretation of the statute. (See *Heckler v. Mathews* (1984) 465 U.S. 728, 739-740, italics original ["the right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against." Instead, "when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of *equal* treatment. . . ."].) This result most closely comports with the legislative intent and enactment of both sections 148.1(d) and 11418.1 in that both sections contemplate the availability of felony punishment for the placement of false objects when the victim suffered sustained fear. Under the circumstances, it would be inappropriate to give appellant misdemeanor punishment outright. (See *People v. Hofsheier, supra*, 37 Cal.4th at pp. 1208-1209 [extending benefit (discretionary registration) of overinclusive statute (requiring mandatory registration) to the excluded class but not withdrawing registration requirement in entirety].)

Furthermore, there is no difference in result here merely because a jury must make an additional finding regarding "sustained fear" before the court may exercise discretion to impose felony punishment.[10] As before at

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[10] For purposes of this argument, respondent assumes, arguendo, that it is the jury who has to decide upon remand that appellant's conduct resulted in "sustained fear." (See Slip Opn. 14, fn. 6, italics added [noting,
(continued...)

the petition stage, appellant fails to confront that *Cunningham v. California* (2007) 549 U.S. 270 and *People v. Sandoval* (2007) 41 Cal.4th 825 preclude his arguments against retrial. (AB 40, 43, 56; see also AB 39 [distinguishing *People v. Roder* (1983) 33 Cal.3d 491 because it involved a jury instruction question rather than an equal protection claim].)

In *Cunningham v. California, supra*, 549 U.S. at page 293, the court found that California's determinate sentencing scheme violated the Sixth Amendment right to jury trial. Noting that altering its scheme to comport with constitutional requirements was an acceptable solution, it let California choose how to remedy the constitutional violation. (*Id.* at pp. 293-294.) In *People v. Sandoval, supra*, 41 Cal.4th at page 844, this Court's primary concern was to determine the Legislature's preferred remedy for the violation in *Cunningham*. Considering the Legislature's actions post *Cunningham*,[11] it concluded that revision was superior to invalidation. (*Id.* at p. 845.) As noted by respondent in its opening brief (OB 17, 21-22 & fn. 6), this Court and several other states also had previously concluded that the remedy most closely comporting with the most pertinent consideration of legislative intent was to permit the

(...continued)
but not deciding, that the People may seek a "special *jury* finding of sustained fear" to obtain felony punishment]; see also *Cunningham v. California* (2007) 549 U.S. 270, 274-275 [Sixth Amendment right to jury trial prohibits judges from imposing sentences above the "statutory maximum" based on facts, other than prior convictions, not found by a jury or admitted by the defendant].)

[11] Appellant asserts that *Sandoval* is inapposite here because legislative intent was easy to divine there since the Legislature had already rewritten the relevant law. (AB 40.) While the Legislature's rewriting of the statute post *Cunningham* certainly made it easier to determine the appropriate remedy, a rewrite of a statute is not the only means to discern this remedy. Here, the Legislature's intent is very clear from the words of its very enactment of section 148.1(d).

additional constitutional condition to be met rather than invalidate the statute.

These cases make obvious that a court must consider all constitutionally permissible options that comport with legislative intent and remedy the constitutional infirmity, regardless of whether that infirmity is based in the equal protection clause or some other portion of the Constitution. When the judiciary makes legislative objectives paramount in eradicating constitutional infirmity in legislative enactments, it does not impinge upon (see AB 41-42), but rather recognizes, the separation of powers doctrine (*Kopp v. Fair Political Practices Com.* (1995) 11 Cal.4th 607, 615). It also respects the doctrine that the Legislature is presumed to act constitutionally. (*Nadler v. Schwarzenegger* (2006) 137 Cal.App.4th 1327, 1338.)

Here, the alleged equal protection violation occurred when appellant was subjected to felony punishment without additional proof that his victim(s) suffered "sustained fear." His rights were not violated by mere conviction under the statute because appellant's conduct remains criminal: he placed a dangerous false object with the intent to cause fear. If indeed equal protection has any role here, it would be limited to requiring that his higher degree of culpability (discretionary felony punishment) rest upon specific additional proven facts (whether he caused his victim(s) to suffer "sustained fear"). Thus, the constitutional violation is in the punishment imposed. The nature of the constitutional violation is akin to the one in *Cunningham,* not by virtue of the constitutional amendment violated (see AB 56), but because it allows increased punishment without appropriate "sentence-elevating factfinding." (*Cunningham v. California, supra*, 549 U.S. at p. 274.) And the remedy is akin to the one in *People v. Sandoval, supra,* 41 Cal.4th at page 845: remand to allow the People to present additional facts demonstrating that appellant should be subject to increased

felony punishment (because his aggravated conduct resulted in his victims suffering "sustained fear"). Although these facts are already in the record here (IRT 43; see also Slip Opn. at pp. 4-6, 19),[12] remand is appropriate to allow the parties to fully contest the issue. (See *Sandoval*, at pp. 838-840 [explaining why remand for trial on the aggravating circumstance was preferable to finding harmless error on appeal].)[13] If this Court imposes a new requirement that additional facts be shown before felony punishment may be imposed, the People should be allowed to prove these additional facts to allow for the increased punishment the Legislature intended be available. This approach has been approved by both the United States Supreme Court and this Court.

As stated at the outset, there was no equal protection violation. Thus, this entire discussion regarding remedy is unnecessary for this Court's proper resolution. However, appellant's lengthy but ineffective attempt to avoid the obvious and logical remedy for the (alleged) equal protection violation only serves to underscore that the correct result surely could not be to let him escape felony punishment against the plain intent of the Legislature. Rather, in the event this Court were to reach the question, the remedy, which is commanded by the Legislature's intent that conduct such as appellant's be recognized and punished as a felony, is to remand for whatever new judicial requirement might obtain for such felony treatment.

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[12] Hence, appellant has "always [been] within the constitutional part of the statute." (AB 54.)

[13] Indeed, appellant's argument regarding forfeiture under California Rules of Court rule 8.500(c)(2) (AB 44-45) is a non sequitor because the Court of Appeal was not in a position to, and did not, make a finding regarding whether appellant's victims suffered "sustained fear" because such findings were obviously not required for the imposition of felony punishment prior to the Court of Appeal's decision.

CONCLUSION

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

Dated: February 16, 2011

Respectfully submitted,

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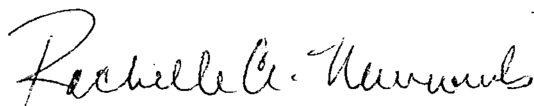
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 4,344 words.

Dated: February 16, 2011

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

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

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

On February 17, 2011, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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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 February 17, 2011, at Sacramento, California.

Declarant

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