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SUPREME COURT COPY

CASE NO. 2 CRIM. B212416

State Supreme Court

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SUPREME COURT FILED

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Deputy

In the Matter of V.V., a person
Within the Jurisdiction of the Juvenile Court

THE PEOPLE OF THE STATE OF CALIFORNIA

Respondent

vs.

V.V.

Appellant

) Sup. Ct. No.GJ25585

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE ROBERT LEVENTER, REFEREE PRESIDING

APPELLANT'S PETITION FOR REVIEW

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Attorney for Appellant
V.V



TABLE OF AUTHORITIES

CALIFORNIA CASES

<i>People v. Atkins</i> (2001) 25 Cal.4th 76	3, 4, 5, 6
<i>People v. Fry</i> (1993) 19 Cal.App.4th 1334	7
<i>People v. Green</i> (1983) 146 Cal.App.3d 369	6
<i>People v. Leyba</i> (1981) 29 Cal. 3d 591.....	7.

CALIFORNIA RULES AND STATUTES

California Rules of Court, Rule 8.500, subd(b)(1)	3,4
Penal Code section 450 subd.(e)	3, 5
Penal Code section 450 subd.(f).....	5, 6
Pen. Code section 451	2, 3, 4, 5, 7, 8
Penal Code section 452	2, 3, 4, 5, 6, 8
Welfare and Institutions Code section 602	1

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re V. V., a Person Coming Under the
Juvenile Court Law

THE PEOPLE OF THE STATE OF CALIFORNIA)
)
Respondent) S.Ct .No.---
) 2 Crim. B212416
vs.) (Juv. Ct. No. GJ25585)
) (Los Angeles)
)
V.V.,)
)
Petitioner)

PETITION FOR REVIEW

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

Petitioner V.V. respectfully petitions this court for review following the
decision of the Court of Appeal, Second Appellate District, Division One, filed on
September 24, 2009, affirming an order of the juvenile court finding him a ward
of the court pursuant to Welfare and Institutions Code section 602.. A copy of the
unpublished opinion is attached hereto as Exhibit A.

QUESTION PRESENTED

When the juvenile court found that the minor was a "good kid" who had no intention of causing a fire, was the intentional lighting of a firecracker that resulted in a fire on a hillside sufficient to constitute malice under Penal Code section 451 or was it the reckless causing of a fire under Penal Code section 452 ?

SUMMARY OF REASONS FOR REVIEW

This case arose because the minor and two friends set off a firecracker on a hillside in Pasadena and the hill caught fire. The juvenile court referred to the minor and his friends as “basically good kids” who “had no intention to set the hill on fire,” but it was persuaded that under this court’s decision in *People v. Atkins* (2001) 25 Cal. 4th 76, their conduct constituted arson rather than unlawfully causing a fire. The Court of Appeal agreed that the lighting of the firecracker was sufficient to establish malice for the arson statute, Penal Code section 451. The case squarely presents, therefore, the complex legal question of the parameters of intentional conduct sufficient to constitute malice for the purpose of arson, a general intent offense, as opposed to the reckless conduct that violates Penal Code section 452.. Review should be granted under Rule 8.500 subdivision (1) of the California Rules of Court, to clarify and settle an important matter of law that is not limited to the facts of this case but is of widespread application in the analysis of intentionality, malice, and recklessness under Penal Code sections 451 and 452.

The Court of Appeal erred in its construction of the *Atkins* opinion, because it conflated the elements of malice and intentional lighting. The error is significant because although the action of lighting the firecracker was intentional, there was nothing in the record to show that it was done out of a wish to “vex, defraud, annoy , or injure” another person, or out of “ an intent to do a wrongful act.” (See Pen Code § 450 subd.(e).) In *Atkins*, this Court carefully and

expressly explained that the malice requirement serves to distinguish arson's "deliberate and intentional" setting of fires from reckless and unintentional fires within the meaning of Penal Code section 452, which are committed by a person who is "aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property." (*People v. Atkins*, supra, 25 Cal. 4th at 89.)

The Court of Appeal's construction of the element of malice undermines the distinction between the arson statute, Penal Code section 451, and the crime of recklessly causing a fire, Penal Code section 452.. It essentially dispenses with the malice that *Atkins* held was a necessary element of the arson statute. Review is therefore appropriate under California Rules of Court, Rule 8.500, subdivision (b)(1) to settle an important question of law.

ARGUMENT

REVIEW SHOULD BE GRANTED TO SETTLE THE QUESTION WHETHER THE INTENTIONAL DOING OF ANY ACT THAT SUBSEQUENTLY CAUSES A FIRE IS SUFFICIENT TO CONSTITUTE THE ELEMENT OF MALICE NECESSARY TO THE CRIME OF ARSON AS DEFINED IN UNDER PENAL CODE SECTIONS 450 AND 452.

The question squarely presented in this case is what kind of intentional conduct is sufficient to constitute malice under Penal Code section 451 rather than recklessness under section 452. A person is guilty of arson when he or she "willfully and maliciously sets fire to or burns or causes to be burned or who

aids, counsels, or procures the burning of, any structure, forest land, or property." (Pen. Code § 451.) A person is guilty of unlawfully causing a fire "when he recklessly sets fire to or burns or causes to be burned, any structure, forest land or property." (Pen. Code § 452.) The terms "maliciously" and "recklessly" are both defined in Penal Code section 450.

"Maliciously" imports a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." (Pen Code § 450, subd (e).)

"'Recklessly' means a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property. The risk shall be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto." (Pen. Code § 450 subd (f).)

In *People v. Atkins*, this Court explained the malice requirement for arson as follows:

"Arson's malice requirement ensures that the act is 'done with a design to do an intentional wrongful act . . . without any legal justification, excuse or claim of right' (5 Am.Jur.2d (1995) Arson and Related Offenses, § 7, p. 786.) Its willful and malice requirement ensures that the setting of the fire must be a deliberate and intentional act, as distinguished from an accidental or unintentional ignition or act of setting a fire; 'in short, a fire of incendiary origin.' (*People v. Green*, supra, 146 Cal. App. 3d at p. 379; *People v. Andrews*, supra, 234 Cal. App. 2d at p. 75; 5 Am.Jur.2d, supra, Arson and Related Offenses, § 7, p. 786; accord, *U.S. v. Doe*, supra, 136 F.3d at p. 635.)

(*People v. Atkins* (2001) 25 Cal. 4th 76, 89.) In sum, *Atkins* holds that arson's malice requirement ensures that the act is done with a design to do an intentional wrongful act, without legal justification, excuse or claim of right. (*People v. Atkins*, supra, 25 Cal.4th at 88.) By contrast, "the offense of unlawfully causing a fire covers reckless accidents or unintentional fires, which, by definition, is committed by a person who is 'aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property' (§§ 450, subd. (f), 452.) For example, such reckless accidents or unintentional fires may include those caused by a person who recklessly lights a match near highly combustible materials.' (*People v. Atkins* (2001) 25 Cal. 4th 76, 89.)

In the instant case, in holding that the intentional lighting of a firecracker was sufficient evidence of malice, the Court of Appeal confused the intentional ignition of a firecracker with the intentional ignition of the resulting fire: "This was not an accidental ignition but a deliberate and intentional act of igniting and exploding the firecracker" under circumstances likely to cause a fire on the hillside. (Opinion, p. 4). In *Atkins*, by contrast, this Court offered similar conduct -- the intentional act of lighting a match near combustible materials --- as an example of an act that would constitute reckless conduct, not malice.

That the element of malice requires more than merely the intentional doing of an act that subsequently causes a fire can be demonstrated by a review of the cases cited with approval by this Court in *People v. Atkins*. (See e.g. *People v. Green* (1983) 146 Cal. 3d 369, 373 [defendant convicted of arson of property as well as arson of inhabited structure when fire he set in his estranged wife's

apartment burned a neighbor's car outside)]; *People v. Fry* (1993) 19 Cal. App. 4th 1334, 1337.[defendant convicted of arson of a structure as well as arson of property when he set fire to a car and the flames spread to a carport].) Conduct of this kind is a far cry from that of the minor, who lit a firecracker and accidentally set fire to the hillside

In the instant case, the Court of Appeal acknowledged that the juvenile court stated that the minor and his companions were "trying to throw the thing into a patch of green or into a cement area. So they're trying to avoid setting the hill on fire. I know they had no intention to set the hill on fire." (Opinion, p.3.) The Court of Appeal was correct in deferring to the juvenile court's finding that the minors did not intend to set the hill on fire. The trial court's factual findings, whether express or implied, must be upheld if they are supported by substantial evidence. (*People v. Leyba* (1981) 29 Cal. 3d 591.). However, the question whether particular conduct constitutes malice as a matter of law must be reviewed de novo, which is why this case is so deserving of review. The minor's intentional but reckless conduct in the instant case is akin to the reckless lighting of a cigarette near combustible materials that this court cited as an example of reckless but not malicious conduct in *People v. Atkins*, supra.

In this case, unlike *Atkins* , *Green*, or *Fry*, there was no evidence that the minor wanted to hurt or injure anyone, there was only evidence that he acted stupidly, and indeed recklessly. In finding that his conduct was sufficient evidence of malice to meet the requirements of Penal Code section 451, the Court of Appeal implicitly and incorrectly broadened the definition of malice far beyond what was expressed or implied in this Court's analysis in *Atkins*.

Accordingly, review should be granted to clarify and settle a complex area of law, the analysis of intentionality, malice, and recklessness in the context of the statutes governing arson and reckless burning.

CONCLUSION

It is important to clarify for the courts and the bar where the line should be drawn between Penal Code sections 451 and 452, in accordance with legislative intent and settled principles of statutory construction. If the line between malice and recklessness is blurred, as here, section 452 becomes meaningless. Review should be granted to clarify the proper construction of the arson statutes.

Respectfully submitted

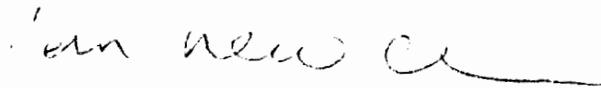


Laini Millar Melnick

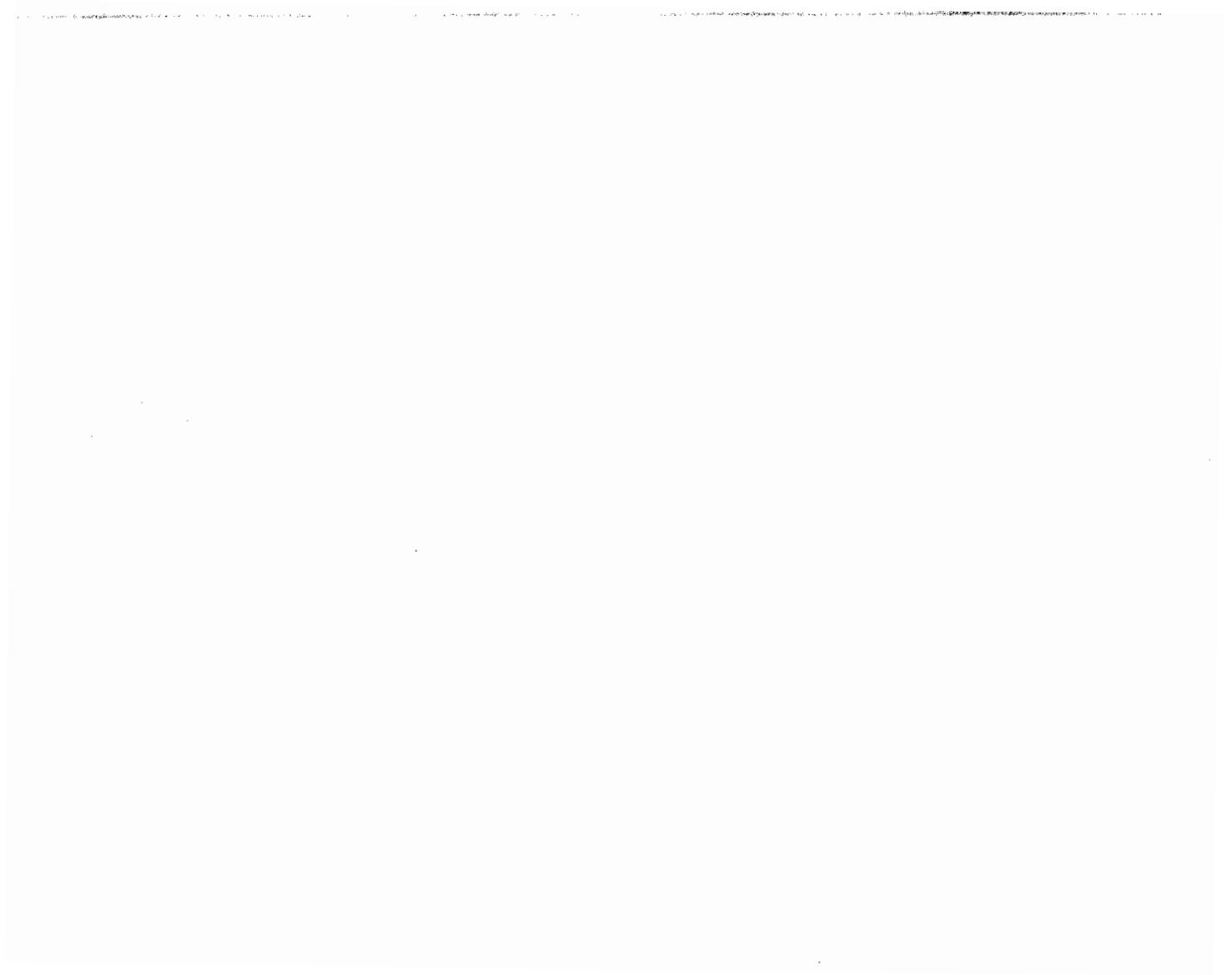
Certificate of Word Count

I hereby certify that the number of words in the Appellant's Petition for Review is 1,762.. This certification is made in reliance upon the word count of the computer program used to prepare the brief.

Signed:


Laini Millar Melnick

Dated: November 3, 2009



NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re V.V., a Person Coming Under the
Juvenile Court Law.

B212416
(Los Angeles County
Super. Ct. No. GJ25585)

THE PEOPLE,

Plaintiff and Respondent,

v.

V.V.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Robert Leventer, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Laini Millar Melnick, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Susan D. Martynec, Deputy Attorneys General, for Plaintiff and Respondent.

Minor V.V. appeals from the order of wardship entered following a finding that he committed arson in violation of Penal Code section 451, subdivision (c). (All further statutory references pertain to the Penal Code.) V.V. contends that the evidence was insufficient to support the finding. We affirm.

BACKGROUND

On the afternoon of July 18, 2008, 17-year-old V.V. and his two companions climbed a steep hill rising behind several homes in Pasadena. V.V. lit a firecracker, which his companion J.H. threw onto the ground. The firecracker ignited a brush fire.

Abel Ramirez testified he was in his backyard when he heard a “very loud boom.” He looked up at the hill and saw smoke, followed by flames. He also saw three young men run and slide down the hill. They landed in a yard, then ran down a street. Ramirez called 911 to report the fire and also provided a description of the clothing worn by the young men.

Ara Moujoukian lived at the foot of the hill. He heard young people laughing, yelling, and shouting. It sounded as if they were having a good time. Moujoukian went to the front of his house to investigate and saw V.V., J.H., and a third boy. One of the boys was in Moujoukian’s yard and the other two were on the sidewalk. He saw them “high-fiving.” Moujoukian shouted, “What are you guys doing?” The boys ran away. Moujoukian turned and saw that the hill behind his house was on fire. Moujoukian called 911 to report the fire. He also provided a description of the three boys.

Pasadena police officers detained the three boys about one-quarter mile from the hill. Officer Brian Bozarth patted down V.V. and found a disposable lighter and a large “cherry bomb” firecracker in his front trouser pocket. When Bozarth retrieved the firecracker from the pocket, V.V. said, “That’s what caused the fire.” V.V. also said he had blown up a firecracker on the mountain, causing the brush to catch fire.

Ramirez and Moujoukian identified the three boys in a field show-up and subsequently identified V.V. and J.H. at their joint adjudication hearing.

V.V. told Detective Jesse Carrillo that he lit the firecracker. He saw “a lot of green” on the hill and did not think the firecracker would start a fire. He just wanted to “make a lot of noise.” J.H. threw it, trying to make it land where it was “mostly green.”

J.H. told Carrillo that he brought the firecrackers, which he purchased in Compton on the Fourth of July. He held the firecracker while V.V. lit it, then he attempted to throw it at a concrete area. Carrillo testified that a particular concrete drainage ditch depicted in a prosecution exhibit was below and about 150 yards west of the fire’s point of origin. He did not know whether there were other concrete areas on the hill.

V.V. argued that the evidence showed that he did not act willfully and maliciously in starting the fire, that he was burning his own property (the firecracker), and that the fire was an accident. The juvenile court found that V.V. and his companions understood what they were doing and knew that “the natural consequence could be setting the hill on fire because they’re trying to throw the thing into a patch of green or into a cement area. So they’re trying to avoid setting the hill on fire. I know they had no intention to set the hill on fire” The court reasoned that “[*People v. Atkins* [(2001) 25 Cal.4th 76] clarifies that or redefines that and says that intentional at this point in the actual lighting of the firecracker without regard of their ultimate intention or the ultimate crime of burning down the hill. All they had to do is intend to light the firecracker or do so in such a way that is likely to produce the kind of injury that occurred.” The juvenile court sustained a Welfare and Institutions Code section 602 petition alleging arson and dismissed an allegation of reckless fire-starting (Pen. Code, § 452, subd. (c)). It declared V.V. to be a ward of the court and ordered him placed home on probation.

DISCUSSION

V.V. contends that the evidence was insufficient to support the juvenile court’s finding that he committed arson because there was no evidence he acted with malice.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the juvenile court’s finding, so

that a reasonable fact finder could find the allegation true beyond a reasonable doubt. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088–1089.)

“A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.” (§ 451.) “‘Maliciously’ imports a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.” (§ 450, subd. (e).)

Arson is a general intent crime. (*People v. Atkins, supra*, 25 Cal.4th at p. 84.)

“The statute does not require an additional specific intent to burn a ‘structure, forest land, or property,’ but rather requires only an intent to do the act that causes the harm.” (*Id.* at p. 86.) The statute’s requirement of willful and malicious conduct “ensures that the setting of the fire must be a deliberate and intentional act, as distinguished from an accidental or unintentional ignition or act of setting a fire; “in short, a fire of incendiary origin.”” (*Id.* at p. 88.) “Arson’s malice requirement ensures that the act is ‘done with a design to do an intentional wrongful act . . . without any legal justification, excuse or claim of right.’” (*Ibid.*) “‘Because the offensive or dangerous character of the defendant’s conduct, by virtue of its nature, contemplates such injury, a general criminal intent to commit the act suffices to establish the requisite mental state.’” (*Id.* at pp. 88–89.) “Thus, there must be a general intent to willfully commit the act of setting on fire under such circumstances that the direct, natural, and highly probable consequences would be the burning of the relevant structure or property.” (*Id.* at p. 89.)

Undisputed evidence established that V.V. intentionally ignited the firecracker with the knowledge and intent that his companion would throw the firecracker onto the hillside and it would explode amidst dry brush. This was not an accidental ignition, but a deliberate and intentional act of igniting and exploding the firecracker “under such circumstances that the direct, natural, and highly probable consequences would be the burning of” dry brush on the hill when the firecracker exploded. (*People v. Atkins, supra*,

25 Cal.4th at p. 89.) This was sufficient to establish malice, even if V.V. did not subjectively want the brush to burn.

DISPOSITION

The wardship order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.

PROOF OF SERVICE BY MAIL

I am employed in the county of Santa Barbara, State of California. My business address is 610 Anacapa Street , Santa Barbara, California 93101. I am over the age of 18 and not a party to the action herein.

On the date written below, I served the attached APPELLANT'S PETITION FOR REVIEW on all interested parties in this action by placing a copy in envelopes with postage fully prepaid, addressed as follows:

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Second District Court of Appeal, Division 1
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Clerk of the Superior Court
For delivery to
The Honorable Robert Leventer, Judge,
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Tiffany Forsberg
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Walter J. ...
100 ...

I deposited the aforesaid envelopes in the mail at Santa Barbara, California. I declare on penalty of perjury under the laws of the State of California that the foregoing is true and correct. Dated November 3, 2009

Jim Newell

Jim Newell



