

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, ]  
 ]  
 *Plaintiff and Respondent,* ]  
 ]  
 v. ]  
 ]  
 BARRY ALLEN TURNAGE, ]  
 ]  
 *Defendant and Appellant.* ]

NO. S182598

SUPREME COURT  
FILED

NOV 21 2011

AFTER A DECISION BY THE COURT OF APPEAL  
THIRD APPELLATE DISTRICT  
CASE NO. C059887  
HONORABLE THOMAS E. WARRINER

Frederick K. Ohlrich Clerk  
Deputy

SUPPLEMENTAL BRIEF  
REGARDING NEW AUTHORITIES AFTER  
MR. TURNAGE'S ANSWER BRIEF  
[CAL. RULES OF COURT, RULE 8.520(d)(1)]

LAW OFFICE OF PEGGY A. HEADLEY  
11448 Deerfield Drive, Suite 2, PMB 180  
Truckee, CA 96161  
CA Bar No. 127301  
(530) 550-7458  
Appointed by the California Supreme Court  
Attorney for Appellant  
BARRY ALLEN TURNAGE

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. THE DISTINCTION BETWEEN PLACING A FALSE WEAPON OF MASS DESTRUCTION WITHOUT “SUSTAINED FEAR” AND PLACING A FALSE BOMB WITHOUT “SUSTAINED FEAR” IS IRRATIONAL, THEREBY VIOLATING EQUAL PROTECTION	2
A. The Criminal Justice Realignment Act of 2011 signals the absence of a rational basis	3
B. The Criminal Justice Realignment Act of 2011 signals that respondent’s distinction is meritless	7
CONCLUSION	9
CERTIFICATE OF WORD COUNT	10

**TABLE OF AUTHORITIES**

**California Cases**

*People v. Hofsheier* (2006) 37 Cal.4th 1185..... 7

**State Statutes**

Pen. Code, § 17.5 ..... 5  
Pen. Code, § 148.1 ..... 1, 3, 5, 6, 8, 9  
Pen. Code, § 1170 ..... 4, 5  
Pen. Code, § 11418.1 ..... 1, 2, 3, 6, 8  
Pen. Code, § 11418.5 ..... 1, 6

**Court Rules**

Cal. Rules of Court, rule 8.520. .... 1

**Other Authorities**

Couzens & Bigelow, *Felony Sentencing After Realignment* (Revised  
10/16/11), p. 3-5,  
[http://www.courts.ca.gov/partners/documents/felony\\_sentencing.pdf](http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf). .... 3

**IN THE SUPREME COURT OF CALIFORNIA**

<b>PEOPLE OF THE STATE OF CALIFORNIA,</b>	]	
	]	
<b>Plaintiff and Respondent,</b>	]	<b>NO. S182598</b>
	]	
<b>v.</b>	]	
	]	
<b>BARRY ALLEN TURNAGE,</b>	]	
	]	
<b>Defendant and Appellant.</b>	]	

---

**INTRODUCTION**

After appellant Barry Turnage filed his Answer Brief, the Legislature passed the Criminal Justice Realignment Act of 2011. Felony false bomb defendants are included within realignment but felony false WMD defendants are not. (Pen. Code, § 148.1(d); Pen. Code, § 11418.1.) Realignment supports appellant’s argument that there is no rational basis for treating false bomb defendants more harshly than false WMD defendants. As permitted by California Rule of Court, rule 8.520(d)(1), Mr. Turnage is filing this supplemental brief to address this recent legislation.<sup>1</sup>

---

<sup>1</sup> All unspecified statutory references are to the Penal Code. For ease of reference, statutory subdivisions are abbreviated to section 148.1(d), section 11418.5(b), etc.

## ARGUMENT

### I.

#### **THE DISTINCTION BETWEEN PLACING A FALSE WEAPON OF MASS DESTRUCTION WITHOUT “SUSTAINED FEAR” AND PLACING A FALSE BOMB WITHOUT “SUSTAINED FEAR” IS IRRATIONAL, THEREBY VIOLATING EQUAL PROTECTION**

In the Answer Brief, appellant demonstrated that there is no rational basis for the uneven treatment between false bombs and false WMDs. Specifically, the distinction between placing a false WMD without “sustained fear” and placing a false bomb without “sustained fear” is irrational and no reasonably conceivable basis justifies treating false bombs more harshly than false WMDs.

In the Answer Brief, appellant relied upon section 11418.1’s legislative history, the common-sense recognition that WMDs, as weapons of *mass* destruction, are more difficult to escape, more dangerous, and naturally create more fear than bombs. Appellant demonstrated that respondent’s assertion that the Legislature meant to treat false bombs more harshly than false WMDs (because false WMDs are supposedly less recognizable than false bombs) easily fits within the realm of fictitious purposes not rationally within the Legislature’s contemplation.

With the Legislature's enactment of the Criminal Justice Realignment Act of 2011, there is now additional support to highlight the basic irrationality of the legislative distinction here. As discussed below, the new legislation further signals that there is no reasonably conceivable basis for believing the Legislature's goal was to treat false bombs more harshly than false WMDs.

**A. The Criminal Justice Realignment Act of 2011 signals the absence of a rational basis**

The Criminal Justice Realignment Act of 2011 identifies certain low-level felony offenses and mandates that the felony sentences for these offenses be served in county jail rather than state prison. (See Couzens & Bigelow, *Felony Sentencing After Realignment* (Revised 10/16/11), p. 3-5, [http://www.courts.ca.gov/partners/documents/felony\\_sentencing.pdf](http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf).) Felony false bomb defendants are included within these low-level felony offenses. (Pen. Code, § 148.1, subd. (d).) But felony false WMD defendants are not. (Pen. Code, § 11418.1.) Thus, realignment further signals that there is no rational basis for treating false bomb defendants more harshly than false WMD defendants.

Specifically, under section 1170, subdivision (h), certain defendants serve their felony sentences in county jail rather than state prison. These include (1) defendants convicted under a statute stating the crime is punishable under 1170(h) without specifying a particular term (Pen. Code, § 1170, subd. (h)(1)); and (2) defendants convicted under a statute providing the crime is punishable under 1170(h) and identifying a particular term. (Pen. Code, § 1170, subd. (h)(2).) Realignment changes the place where a felony sentence is served and does not appear to alter the length of the felony sentence.

Section 1170(h) excludes certain felony defendants from county jail. Excluded are defendants with a current or prior serious or violent felony conviction, defendants with an out-of-state felony conviction that qualifies as a serious or violent conviction under California law, defendants who are required to register as a sex offender, and defendants sentenced for section 186.11 aggravated theft.<sup>2</sup> (Pen. Code, § 1170, subd. (h)(3).)

---

<sup>2</sup> Appellant's criminal history means he would not serve his sentence in county jail (even if he was sentenced after October 1, 2011). (Pen. Code, § 1170 (h)(3); § 1170(h)(6).) For purposes of appellant's Equal Protection claim, this is irrelevant. It is irrelevant because the Equal Protection query hinges only on the distinction between the false bomb statute and the false WMD statute. Realignment informs the false bomb/false WMD distinction because it reveals felony false bomb defendants are viewed as low-level offenders but felony false WMD defendants are not.

In enacting the realignment legislation, the Legislature declared, in pertinent part:

(a) The Legislature finds and declares all of the following:....

(5) Realigning *low-level felony offenders* who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs, which are strengthened through community-based punishment, evidence-based practices, improved supervision strategies, and enhanced secured capacity, will improve public safety outcomes among adult felons and facilitate their reintegration back into society.

(6) Community-based corrections programs require a partnership between local public safety entities and the county to provide and expand the use of community-based punishment for *low-level offender populations*. Each county's Local Community Corrections Partnership, as established in paragraph (2) of subdivision (b) of Section 1230, should play a critical role in developing programs and ensuring appropriate outcomes for *low-level offenders*.

(Pen. Code, § 17.5, subd. (a)(5); (a)(6), italics added.)

Section 148.1(d), the false bomb statute, is encompassed by the realignment legislation. Section 148.1(d) now provides that a defendant convicted of placing a false bomb: “is guilty of a crime punishable by imprisonment in a county jail not to exceed one year, *or pursuant to subdivision (h) of Section 1170.*” (Pen. Code, § 148.1, subd. (d), italics added.) Thus, a felony false bomb defendant is “punishable by a term of imprisonment in a county jail for 16 months, or two or three years.” (Pen. Code, § 1170(h)(1), italics added.)

By contrast, section 11418.1, the false WMD statute, remains unchanged. A false WMD defendant who places a false WMD without “sustained fear” still fits within section 11418.1’s misdemeanor-only clause. A false WMD defendant who places a false WMD with “sustained fear” continues to be “punished by imprisonment in a county jail for not more than one year or in the state prison for 16 months, or two or three years and by a fine of not more than two hundred fifty thousand dollars (\$250,000).” (Pen. Code, § 11418.1.) Thus, a felony false WMD defendant must serve his sentence in state prison, and does not fit within the low-level felony offenders targeted by realignment. In contrast to false bombs, a felony false WMD sentence may not be served in the county jail.<sup>3</sup>

Accordingly, the realignment legislation signals that felony false bomb defendants have been identified as low-level felony offenders who may serve their felony sentences in county jail while felony false WMD defendants are not categorized as low-level offenders but instead must serve their felony sentence in state prison. Realignment therefore dramatically undercuts respondent’s view that the Legislature meant to treat false bomb defendants more severely than false WMD defendants.

---

<sup>3</sup> Section 11418.5(a), which prohibits WMD threats, also remains unaltered by the realignment legislation. By contrast, section 148.1(a), (b), and (c), which concern false reports of bombs, are included within realignment and punishable “pursuant to subdivision (h) of Section 1170.” (Pen. Code, § 148.1, subd. (a), (b), (c).)

Realignment shows it is irrational to treat false bomb defendants more harshly than false WMD defendants. Were it otherwise, felony false WMD defendants logically would be viewed as low-level felony offenders and serve their sentence in county jail, just like felony false bomb defendants. In sum, realignment demonstrates there is no rational reason why persons placing a false bomb without “sustained fear” are a class of “particularly incorrigible offenders,” warranting automatic exposure to a felony, distinct from false WMDs. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1207.)

**B. The Criminal Realignment Act of 2011 signals that respondent’s distinction is meritless**

The realignment legislation also flags respondent’s purported distinction – that the Legislature meant to treat false bombs more harshly than false WMDs because false WMDs are less recognizable than false bombs – as fitting within the realm of fictitious purposes not within the Legislature’s contemplation. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1201.)

In respondent’s Reply Brief, respondent continues to rely upon this purported distinction. “The placement of false bombs is treated more harshly than the placement of false WMDS because false bombs conceivably are more recognizable than false WMDs.” (RB, p. 10)

While continuing to rely upon this purported distinction, respondent neglects to address appellant's points about prosecution for attempt and provides no meaningful explanation or rational reason describing why an unrecognizable object could fit within the category of objects deemed to constitute actual false bombs or actual false WMDs. (See AB, p. 19-20) Respondent also seems to put forth the puzzling assertion that section 148.1(d) and 11418.1 describe different intents by stressing that the "criminalization of placing a false WMD is founded on the element of specific intent." (RB, p. 5) This assertion is confounding because the language under the pertinent part of both statutes is identical. (Pen. Code, § 148.1, subd. (d) ["with the intent to cause..."]; Pen. Code, § 11418.1 ["with the intent to cause..."].)

Besides these flaws and the others the Answer Brief discusses, the realignment legislation also highlights the basic illogic of respondent's argument. As described above, under realignment, felony false WMD defendants must serve their sentence in state prison. Yet felony false bomb defendants are identified as the type of low-level offenders who serve their felony sentence in county jail. This vividly undermines respondent's belief that the Legislature decided to treat felony false bomb defendants more severely via automatic exposure to a felony despite the absence of "sustained fear" and had a rational basis for doing so.

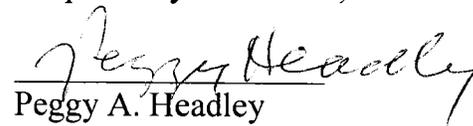
In sum, the realignment legislation adds to the numerous obstacles already inherent within respondent's confounding assertion that there is a rational reason for treating false bombs more severely than false WMDs. Rational basis review is not a bottomless well. It is surely counterintuitive to believe the Legislature meant to treat false bombs more harshly than false WMDs. It is surely illogical to believe a defendant who creates a false bomb instills more fear than a defendant who creates a false WMD. Realignment confirms these truisms.

### CONCLUSION

The Criminal Justice Realignment Act of 2011 signals the Legislature had no rational basis for treating false bombs more severely than false WMDs. For the reasons set forth above, and those in the Answer Brief, appellant's equal protection rights were violated. The remedy is misdemeanor punishment or section 148.1(d)'s invalidation, reversal and dismissal of appellant's conviction.

**DATED:** Nov. 17, 2011

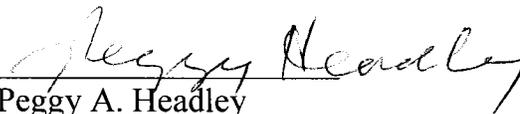
Respectfully Submitted,

  
Peggy A. Headley  
Attorney for  
BARRY ALLEN TURNAGE

## CERTIFICATION OF WORD COUNT

I, Peggy A. Headley, appointed counsel for appellant TURNAGE, certify that the word processing software word count function shows that this Supplemental Brief, excluding the tables under rule 8.204(a)(1), the cover information, proof of service and this certificate contains 1,760 words, which is within the authorized maximum of 2,800 words. (Cal. Rules of Court, rule 8.520(d)(2).)

DATED: Nov. 17, 2011

  
Peggy A. Headley  
Attorney for Appellant TURNAGE

## PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, a resident of Nevada County, over the age of 18 years of age, and not a party to the within action. My business address is Law Office of Peggy A. Headley, # 180, 11448 Deerfield Drive, Suite 2, Truckee, California, 96161. On November 17, 2011, I served the attached

### *Appellant's Supplemental Brief*

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.

Rachelle A. Newcomb, Esq.  
Office of the Attorney General  
P.O. Box 944255  
Sacramento, CA 94244

Yolo Superior Court  
725 Court Street  
Woodland, CA 95695

Bill Arzbaecher, Esq.  
CCAP  
2407 J. Street, Suite 301  
Sacramento, CA 95816-4736

Yolo District Attorney  
301 Second Street  
Woodland, CA 95695

Barry Allen Turnage  
G-32562  
Pelican Bay State Prison  
P.O. Box 7500  
Crescent City, CA 95532

Monica Brushia, Esq.  
Yolo Public Defender  
814 North St.  
Woodland, CA 95695

Court of Appeal, 3rd District  
621 Capitol Mall, 10th Floor  
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 17, 2011 at Truckee, California.

Original signed by

---

Peggy A. Headley  
Attorney for Appellant TURNAGE