23-5442
No. 22-_____ ORIGINAL

SUPREME COURT OF THE UNITED STATES

Wayne Johnson, Petitioner,

vs.

State of California, Respondent.

On Petition for a Writ of Certiorari to the California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Wayne Johnson
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Petitioner

I. Questions Presented

1) Whether it is unconstitutional, i.e., **cruel and unusual, double jeopardy**, and a violation of the **due process clause** to impose two separate strikes on Petitioner for allegedly shooting a person once with a pellet simply because the prosecution charged Petitioner for the same act under two separate statutes, i.e., corporal injury to a person in a dating relationship (Penal Code Section 273.5(a)) and assault with a deadly weapon (Penal Code Section 245(a)(1).

Clearly none of the offenses for which Petitioner was ultimately convicted rise to the level of a felony after the only arguable felony was reduced to a wobbler after his appeal. This case has nationwide legal significance because the three strikes statute is designed to punish repeat behavior not to punish the same act multiple times under separate code sections. That consequence was not envisioned by the California legislature.

2) Whether it is arbitrary thereby unconstitutional under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution to charge Petitioner with felonies when the statutes provide each of the crimes are "wobblers," offenses that can be charged alternatively as misdemeanors, when the statutes set forth no guidelines to determine when each crime is a felony as opposed to a misdemeanor.

Petitioner alleges California Penal Code Sections 245(a)(1), 273,5(a), and Penal Code Sections 646.9(a) are constitutionally vague because they permit a court to convict a person of a felony, but set forth absolutely no guidelines for a judge to follow in deciding which alleged crime is a felony or a misdemeanor. The judge in this case was not guided by constitutional principles and he had far too much discretion in deciding not to reduce the crimes to misdemeanors.

The trial judge had to know no judge should have issued the restraining order and that it would be declared void and there was no evidence of great bodily injuries (GBIs). He dismissed the final GBI for insufficient evidence and nothing supported a finding that the remaining charges could be charged as felonies.

II. List of Parties and Related Cases

Wayne Johnson vs. State of California (S279161) (Supreme Court of California) Order Entered May 31, 2023

People vs. Wayne Johnson (A166399) (California Court of Appeal - Opinion Entered March 16, 2023)

Wayne Johnson v. State of California (22-6490) (Supreme Court of The United States) Order Entered March 20, 2023

Wayne Johnson vs. State of California (S276932) (Supreme Court of California) Order Entered November 22, 2022

People vs. Wayne Johnson (A159389) (California Court of Appeal - Opinion Entered May 26, 2022)

Related Cases

Wayne Johnson v. Superior Court of California (A161862) (Petition For Writ of Habeas Corpus -California Court of Appeal - Order Entered May 26, 2022)

Wayne Johnson v. Superior Court of California (S258995) (Supreme Court of California Order March 11, 2020)

Cindy M. v. Wayne Johnson (A156750) (California Court of Appeal - Opinion Entered January 3, 2020 – No appearance by Opposing side – Complaining Party in Criminal Case, Address unknown)

III. Index of Appendices

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VI. Petition for Writ Of Certiorari

Wayne Johnson, a person without any previous criminal convictions, respectfully petitions this court for a writ of certiorari to review the California Supreme Court's Decision to deny his Petition For Review in Johnson v. California, Case Number S276932, denied en banc May 31, 2023.

This petition for Writ of Certiorari raises substantial federal questions about imposing two strikes, i.e., serving a life sentence in prison for allegedly violating state statutes that are void for vagueness. There is not only a question of whether the wobblers in this case can even qualify as felonies, and there is a substantial question whether the conduct they attributed to Petitioner gives notice to a reasonable person that the alleged conduct is criminal in nature.

These federal questions are crucial to the decision because they severely impact the life of this Petitioner who allegedly committed acts that do not universally constitute crimes in California or other states.

Petitioner has exhausted all of his state remedies and the highest court has denied review.

A California jury convicted Petitioner of five felonies, including one count of stalking with the jurors erroneously believing he was subject to a restraining order that was void from its inception. Most of these charges are counts that stem from the same alleged conduct. They are not in actuality five separate felonies. One of the alleged acts gives rise to three of the offenses, and an enhancement.

The Court of Appeal changed the Penal Code Section 646.9(b) to a second Penal Code Section 646.9(a), which is a wobbler, and should not have been charged as a felony in the first place. The Penal Code § 646.9(b) consisted of three incidents, a December 1, 2018 assault with a deadly weapon, one incident wherein alleged victim alleged Petitioner pointed at her, and another incident when alleged victim alleged she saw Petitioner in public. Petitioner denies the incidents happened. No one ever claimed to see any weapons and alleged victim's medical records do not support the existence of any acute or serious injuries.

On remand, the trial court re-sentenced Petitioner by reducing a suspended sentence by a year. It also addressed the issue of imposing two strikes for one alleged act.

Petitioner submits this writ to seek uniformity in this court in light of its ruling in ***Ewing v. California*** 538 U.S. 11 (2003). In ***Ewing***, this court suggested trial courts must use objective factors when deciding to reduce wobblers to misdemeanors. It also discussed the conditions under which a state may impose strikes.

Petitioner never had an opportunity to move to have his convictions reduced to misdemeanors because even though the restraining order was void from its inception, throughout the trial the prosecution illegally insisted Petitioner acted while a restraining order was in place, which caused them to unfairly treat Petitioner's case as though all of the charges were felonies and that prevented him from reducing the alleged felonies to misdemeanors.[1]

The charging document also erroneously alleged Petitioner caused alleged victim to suffer a great bodily injury that the judge was forced to dismiss because there were not any medically discernible acute injuries.

The charging document charged Petitioner with personally discharging a pellet or BB gun, when there was no objective evidence of a weapon. No weapon existed. The prosecution never sought or recovered a weapon and no witness claimed to see a weapon.

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1 They knew the restraining order was void and they never should have published it to the jury. They published it because they knew it would have an extremely prejudicial impact on the entire case. It made Petitioner look as though he was a felon even before they convicted him and it impacted the court's decision to revoke Petitioner's bail. The only factors that would qualify any of Petitioner's charges as felonies were the void restraining order and the great bodily injuries that were all dismissed based upon insufficient evidence. Nobody ever claimed to see a pellet gun, and alleged victim is the only witness who claimed to see an actual pellet, that she said some unknown person at the hospital gave to her. And, she did not produce it at trial. However, neither a pellet nor anyone giving her pellet is mentioned anywhere in her medical records.

Prosecutors accused Petitioner of crimes that never happened and they shifted the burden to him to prove that the crimes did not take place. Even alleged victim testified she was not sure Petitioner committed some of the acts. Petitioner faced the insurmountable task of disproving conduct that did not occur.

It was even more difficult for Petitioner to fight his case after being wrongfully remanded into custody after he bailed out under the guise of public safety. The court did not cite any reasons for not releasing Petitioner and it was obvious they detained Petitioner solely to prevent Petitioner from assisting in his defense and from locating witnesses and evidence to prove his innocence.

Petitioner unequivocally denies he ever committed a single violent or criminal offense. In fact, Petitioner has never had a violent confrontation in his adult life. Alleged victim sought medical treatment following alleged assaults, one on September 4, 2018, and the other on December 1, 2018. Her medical records are completely void of any swelling, redness, or bleeding, things that would suggest an acute injury. The prosecution failed to present any medical evidence anyone suffered any acute injuries following either alleged assault.

Despite there being surveillance cameras at both alleged assaults, and all of the alleged vandalism, there is not a single video image of Petitioner on the scene or a single frame of anyone committing any wrongful acts. There was not single witness who testified they saw petitioner commit a single wrongful act.[2]

During the resentencing, the court reduced the sentence on one of the suspended sentences, which had no impact on the actual sentence.

The trial court imposed two separate strikes for the same alleged battery, under the guise it could do so if it suspended sentence on one of them. They

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[2] Alleged victim did testify on September 4, 2018, around 11 P.M. Petitioner attacked her in her garage, but she did not describe how or what part of her body he touched. She denied he ever hit her. She reported to the hospital around 7 A.M. the following morning; however, neither the photographs nor her medical records confirm she suffered a visible or acute injury.

described one of the charges a domestic violence and the other assault with a deadly weapon. That is a violation of the **due process clause, double jeopardy,** and the **Eighth Amendment, cruel and unusual punishment**.

After the restraining order was declared void from its inception, and the court dismissed the great bodily injury claims, none of the remaining alleged crimes qualified as a felony.

In Kansas, the Supreme Court found the fraudulent use of criminal protective orders, which is the criminal counterpart of a civil restraining order, so extreme that it overturned two murder convictions and disbarred the prosecutor for falsely representing the defendants were restrained by a criminal protective order.[3]

After the remittitur, instead of eliminating the prison sentence altogether, the trial judge reduced one of the suspended sentences by one year, which had no effect on the actual time served. The judge continued to impose two strikes for one alleged offense although it admitted it probably would not have any future impact.

That suspended sentence was assault with a deadly weapon, Penal Code Section 245(a)(1), allegedly committed December 1, 2018. That alleged assault is what the prosecution claimed is also a corporal injury to alleged victim, Penal Code Section 273.5(a), as well as a separate enhancement for use of the alleged deadly weapon (other than a firearm), and one of the Penal Code Section 646.9(b) alleged stalking incidents.

In essence, they convicted Petitioner multiple times for the same December 1, 2018 alleged assault with a deadly weapon, relating to an alleged weapon that no one even claimed to see.

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3 See https://www.koamnewsnow.com/news/crime/state-panel-recommends-bourbon-county-prosecutor-be-disbarred/article_613f244a-f65a-5603-ac5e-6274323cc422.html

The evidence presented does not establish and cannot possibly establish the existence of a single felony. There is nothing about the facts in this case that could possibly rise to the level of a felony.

VII. Opinions Below

On March 16, 2023 the Court of Appeal rejected Appellant's appeal. On April 20, 2023, Mr. Johnson filed a Petition For Review with the Supreme Court of California. On May 31, 2023 the California Supreme Court denied Review.

That Court of Appeal Decision, the Petition For Review and the Supreme Court Denial are attached at Appendix A-C. ("App.") at 1-14.

VIII. Jurisdiction

Title 28 U.S.C. § 1257 (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Rule 13 of the Supreme Court prescribes the time for filing for Review on Certiorari. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.

Petitioner seeks Supreme Court review following the State of California's denial of his Petition for Review impacting his rights and privileges claimed under the United States Constitution, particularly his right

to due process, Right not to be subject to double jeopardy, and the Right not to be subject to Cruel and Unusual Punishment. The State imposed two strikes on Petitioner under the false premise it could do so if it stayed one of the strikes.

Mr. Johnson invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the Supreme Court's wrongful denial of his Writ of Petition Of Review.

DIRECT APPEAL

How The Court Erred

The judge listed both counts 4, and 5, Penal Code Sections 245(a)(1) and Penal Code Section 273.5(a) as separate serious felonies, and therefore, strikes, even though the prosecution alleged them to be the same with a deadly weapon.[4]

Petitioner asks that this court decide only pure questions of law and therefore does not believe his filing this Petition for Writ of Certiorari will prejudice any one.

Why Review Is Necessary

The Supreme Court may Review The Court of Appeal Decision:

(1) When necessary to secure uniformity of decision or to settle an important question of law;

(4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

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[4] Not only did the Court charge Petitioner with two crimes that are essentially the same assault with a deadly weapon, it charged Petitioner with an enhancement for the same alleged assault with a deadly weapon. So Petitioner was convicted of three assaults with a deadly weapon for a single alleged assault. The Court of Appeal misapplied the California Supreme Court's ruling in ***People v. Landry*** (2016) 2 Cal.5th 52 wherein the court held it was "absurd" for the trial court to look only at the language in the statute and to ignore the suspect's behavior. Charging the same alleged assault with a deadly weapon under two separate statutes and enhancing those offenses with use of a deadly weapon does not change or deter repeat behavior. That is **cruel and unusual punishment**.

Petitioner Petitions the Supreme Court to correct clear errors in the law and to compel the Court of Appeal to remove one or both of the serious felonies, and grant any other remedies consistent with the evidence. Other than this Writ, there are no other plain, speedy and adequate alternative remedies at law.

How Strikes impact a person's life and why they have Constitutional Importance.

Penal Code Section 667(e) reads For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions that apply, the following apply if a defendant has one or more prior serious or violent felony convictions:

(1) If a defendant has one prior serious or violent felony conviction as defined in subdivision (d) that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

Procedural and Factual Background

Petitioner has no prior criminal history. Petitioner worked for over forty years, paid taxes, raised children, and helped raise grandchildren.

Alleged victim alleged she had previously been in a dating relationship with Petitioner and that he committed violent acts against her.

Petitioner denies committing a single violent or criminal act. He does not believe anyone ever committed any of the alleged crimes. The prosecution did not introduce any evidence that supported the existence of a qualifying dating relationship. They were not married, they shared no children, they did not live together, did not know each other long, and no one testified Petitioner expected affection or sexual favors.

On February 28, 2019, the Contra Costa County District Attorney filed a complaint that charged Appellant with: Count 1 PC §646.9(a), Count 2 PC §273.5(a) with an enhancement for great bodily injury (GBI), Count 3 PC

§646.9(b), Count 4 PC §273.5(a) with an enhancement for GBI and a separate enhancement for use of a deadly weapon, and Count 5 PC 245(a)(1).

Most of the alleged criminal acts allegedly occurred in public, where surveillance cameras were present, but not a single violent act was captured on video. There was never a valid restraining order, and not a single photograph or medical records to support the existence of a visible or acute injury, so none of the charges should have been treated as a felony or a strike. They convicted Petitioner of causing corporal injuries that did not exist and using a weapon that did not exist and that nobody described or claimed to see.

IX. Constitutional Provisions Involved

United States Constitution, Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the **right of the people peaceably to assemble**, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put **twice in jeopardy** of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an **impartial jury** of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens** of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

X Statement of the Case

A jury in Contra Costa County convicted Petitioner of: 1) one count of domestic violence on September 4, 2018; 2) one count of stalking in September 2018; 3) a separate count of domestic violence December 1, 2018, for allegedly firing a BB or pellet gun, with an enhancement for use of a pellet/BB gun; 4) one count of assault with a deadly weapon December 1, 2018 for the same alleged use of a pellet/BB gun; and 5) a separate count of stalking while a restraining order was in effect December 2018 – January 2019.

The way the opinion is written, one would assume the prosecution had iron clad evidence Petitioner committed the crimes in this case. Nothing can be farther from the truth. The entire case is built upon implications, innuendos, circumstantial evidence, and unfounded accusations.

The case is essentially broken down into two categories, 1) incidents that allegedly occurred in September in Contra Costa County in 2018 that purportedly gave Contra Costa County jurisdiction over the incidents that allegedly occurred in San Francisco and Alameda County in December 2018 and in January 2019; and 2) incidents that allegedly occurred in San Francisco and Alameda County in December 2018 and in January 2019.

There is allegedly one violent incident on September 2018 in Contra Costa County. Alleged victim alleged Petitioner took her down to her garage floor. Alleged is the only witness to that alleged incident. Alleged victim reported to the hospital eight hours later; however, her medical records to not document any evidence of a physical attack and there are no reported acute injuries.

There is allegedly a second violent incident on December 1, 2018 in San Francisco. Alleged victim speculated Petitioner discharged some projectile at the back of her head as she and her escort was leaving a nightclub after 2 A.M. There are no witnesses to Petitioner being physically present on the scene. There are no witnesses who claimed to see any weapons. Alleged victim was transported to the emergency room. However, her medical records do not document any acute physical injuries, i.e., the only medical expert who testified did not recall the incident and she did not document any blood, swelling, or discolorization that would support the existence of any acute injuries.

On remand, following Petitioner's conviction, the trial court addressed its application of the three strikes law and the fact it imposed two strikes for the same act. The United States Constitution and California law prohibits that. The reviewing Court of Appeal ignored the prejudicial impact of publishing the void restraining order to the jury and it upheld the conviction after substituting the stalking with a restraining order in place with simple stalking. That is unconstitutional because Petitioner should have been allowed to argue to the jury that there was no restraining order or confirmation of any prior act of violence.

During the initial appeal, the trial court admitted the introduction of a restraining order that was void from its inception that unfairly signaled to the jury Petitioner was guilty of some of the crimes before he received a trial and also unreasonably casted him in a false light so it unduly prejudiced Petitioner's right to a fair trial. The underlying TRO had never been served which would have given Petitioner the right to appear in court and challenge the issuance of the

restraining order, i.e., prove he was not in a qualified domestic violence relationship and prove he did not commit any violent acts.

Alleged victim alleged she dated Petitioner and she further alleged from January to July 2018 Petitioner abused her. However, she alleged she could not recall the dates, details, or possible reasons for the alleged abuse. There was absolutely no corroborating evidence to support her claims of previous violent incidents, and her electronic emails proved she was the angry one.

Petitioner would have hoped to prove her defective memory was due to her alcoholism, prescription drug use, and her mental illness triggered by years of an unhappy marriage and her husband catching her in a marital affair.

Petitioner denied any violence on his part and there is no evidence Petitioner was involved in a relationship that qualified Petitioner for a conviction for domestic violence in California.

Moreover, the stalking laws are vague in that they permit evidence of harassment or abuse, which do not necessarily qualify as criminal acts unless coupled with credible threats, which is also vague and extremely subjective.

Ironically, the trial judge would not allow Petitioner to introduce any of alleged victim's long documented history of violence and elder abuse.[5]

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[5] Court documents stated alleged victim physically assaulted her mother, her estranged husband, and posted false statements about the family court evaluator. The trial judge would not allow Petitioner to explain why alleged victim plea to battery was relevant to his defense. She had been convicted and subject to a criminal protective order for abusing her elderly mother and for assaulting her estranged husband, which limiting her access to her children and barred her from her former family home. That triggered many of alleged victim's drunken violent episodes. It explained why alleged victim had such a poor memory and why alleged victim wanted Petitioner to be involved in a relationship with her, which prosecutors unfairly described as Petitioner trying to control her.

Alleged victim was so violently frustrated with the system she often said she wanted to kill her family court judge, the child custody evaluator, and her husband for taking away her children and destroying her life. However, the trial judge would not allow Petitioner to introduce that evidence to show alleged

Alleged victim alleged on September 4, 2018, around 11:00 P.M. Petitioner attacked her in her garage and broke her nose.[6]

Three days later alleged victim testified she went to a dance place where she conversed and danced with Petitioner. Although she approached him, she testified she did not want to dance or speak with him. If she wanted to avoid Petitioner she would not have appeared in that venue or conversed with him.

Regardless, Petitioner testified alleged victim asked him to contact her. However, when she did not return his call he never made another attempt. She did not produce any evidence he ever attempted to communicate with her after mid-September 2018.

The alleged garage attack that did not result in any medically proven injuries was one of the stalking allegations in September 2018. However, the trial court allowed the prosecution to imply Petitioner was involved in other questionable behavior without any evidence to support it such as:

1) alleged vandalism to alleged victim's vehicle in San Francisco on three different occasions and one to her home when there is no absolutely evidence anyone committed those acts. Despite each of the areas being under video surveillance, there no evidence to suggest any of the alleged incidents occurred.

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victim's irrational thinking or to show she victimized Petitioner because she could not punish her husband.

Petitioner testified alleged victim would become angry with him for not sympathizing her and she would leave only to return intoxicated and demand entry into his home. She sometimes followed Petitioner home from the dance club and she often camped out in front of his residence for hours. Alleged victim was angry and violent not Petitioner.

6 She reported to the hospital that following morning around 7:00 A.M.; however, her medical records failed to document any acute facial fractures and it did not describe any visible or acute injuries. That broken nose great bodily injury claim was dismissed at the preliminary hearing because it was an old scar alleged victim knew resulted from plastic surgery. However, alleged victim continued to allege Petitioner fractured her nose at trial.

2) They alleged Petitioner anonymously returned alleged victim's earrings by taping them to her front window at night. That is a favor not a criminal offense; and

3) Alleged victim alleged Petitioner drove past her parked vehicle on a public street in San Francisco, California at an unknown speed. That is not a criminal offense.

Months later, December 1, 2018, alleged victim alleged Petitioner shot her with something in the back of her head as after she was leaving a nightclub in San Francisco at closing time. She testified she turned around and saw a dark Volkswagen (VW) leaving the scene.[7]

Her on scene video interview with San Francisco police captures alleged victim denying she saw anyone. No witness claimed to see a weapon.

Alleged victim reported to the hospital however, no one at the hospital made any findings or diagnosed any acute injuries. The prosecution solicited hearsay testimony from alleged victim that someone at the hospital gave her an object that she said they told her they removed from her scalp.[8]

The prosecutor called only one medical expert, an emergency room physician who testified she ordered a CT scan based upon alleged victim's statement she was struck in the head; however, she did not recall the incident and she testified she did not document any acute injuries, i.e., blood, swelling, or redness. She testified the CT scan was obscured because of a "streak artifact." She described a streak artifact as a distortion in the CT image. Alleged victim's

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7 She did not know what allegedly struck her head and she did not know who might be involved. She claimed she believed a Volkswagen (VW) was involved and for that reason she suspected Petitioner. Ironically, when she allegedly courted Petitioner alleged victim did claim Petitioner owned or operated a VW.

8 Alleged victim's hospital records do not document anyone recovering any objects from anyone's scalp or giving any object to anyone, and it would have been highly irregular for hospital staff to give evidence of a crime to alleged victim. Moreover, the scalp is vague. It can be the layer of skin that covers the hairy portion of the head. Some refer to the hair close to the head as the scalp.

medical records do not state anyone recovered anything from alleged victim's body and nobody testified the streak artifact was a projectile and nobody testified anyone recovered anything from alleged victim's person.

That evidence does not support the prosecution's claim that anyone struck alleged victim with anything and it does not justify imposing a single strike.

Aside from the December 1, 2018 alleged incident, they alleged Petitioner stalked alleged victim by being public places where he was entitled to be. Even if true, those sightings would not have been crimes either.

The court also allowed alleged victim to allege all sorts of uncorroborated prior bad acts that she mentioned for the first time only after she alleged Petitioner attacked her in September 2018.

Petitioner's attorney did not attack the accusations or cross-examine the witnesses about the accusations. He just sat there.

No one claimed to capture Petitioner on any video.[9] No one ever claimed to see or recover a weapon. Either Petitioner was extremely lucky or the events did not occur.

Petitioner denied he was in any of the circumstances that qualified him to be convicted of domestic violence. Simply alleging a person is a girlfriend or boyfriend is not sufficient to qualify a person for a domestic violence conviction. He must be married, in a long-term relationship, cohabitate, share a child, or expect affection or sexual favors. Nobody testified that any of those factors existed or presented any evidence that any of those conditions existed.

Petitioner testified what triggered alleged victim's false allegations were his behavior that irritated her regarding a $105 bill she caused him to incur doing her a favor. She even once threatened to make him walk home for asking a question.

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[9] The prosecution introduced a distorted unidentifiable image of a human purportedly walking on alleged victim's porch the night she claimed she was attacked in her garage. They also introduced sounds of shoes moving on the sidewalk past alleged victim's home the evening they claim Petitioner returned alleged victim's earrings.

The definition of "credible threat" is vague. The prosecution had to prove more than one incident happened involving a credible threat in each of the alleged stalking charges. Only the alleged attack in her garage possibly qualified as a possible threat. However, when alleged victim reported to the hospital the following morning, she did not report any visible injuries and her records do not document any acute injuries that would prove Petitioner made any physical contact with her person.

Alleged victim's claims she felt threatened in public places where she heard Petitioner was present before she arrived. She cannot claim she felt threatened if there was no evidence Petitioner was present such as when she alleged vandalism.

Given the lack of witnesses, medical evidence of acute injuries, evidence of a qualified dating relationship, and video evidence, it is absurd to conclude the admission of the void restraining order did not have an impact on the jury.

Although Petitioner denied he was in a qualified relationship and there was no evidence of that or of any previous act of violence, the void restraining order suggested otherwise.

Moreover, they used void restraining order to create a false impression Petitioner did not have the right to be in public places travel, thus placing an unconstitutional chilling effect on his right travel, particularly at dancing places where alleged victim testified she saw him, even when she denied they interacted.

Furthermore, even if it were not absurd to suggest the introduction of the void restraining order unduly prejudiced Petitioner, the fact the jury even thought a restraining order existed was so prejudicial it would not have made a difference had the court imposed restrictions on its use.

Even when alleged victim testified Petitioner was in a public places where he was lawfully entitled to be, she traveled there after her friends told her Petitioner was already present and went from room to room until she allegedly located him. It is clear she was stalking Petitioner, not the other way around.

There are numerous dancing locations in the San Francisco Bay Area.

Petitioner had danced and taught people to dance at many of those places for over two decades while alleged victim was just learning to dance. Alleged victim expected to see Petitioner around those places; however, the reverse was not true.

The trial judge also improperly told the jury during the trial in September 2019, if Petitioner claimed he was not driving his vehicle December 1, 2018, he had an obligation to tell the jury who was driving his vehicle. It is ridiculous to assume anyone would know who was driving a vehicle at a place he frequented on a random date nine months before unless that person is the only person who drives that vehicle, and the prosecution did not allege that. They wrongfully implied he had no legitimate business in that particular public place. Petitioner's trial attorney was either too drunk or incompetent to present the evidence to the jury.

Aside from the fact that many vehicles leave nightclubs at closing time it is unreasonable to assume any possible attack came from a vehicle. Moreover, it is implausible that alleged victim or her escort never saw a single digit of a license plate from a vehicle she claim was used as a launching pad for an attack when she testified the vehicle was three to six feet away when she turned around.

The trial judge unfairly shifted the burden of proof when he told the jury Petitioner had to tell who was driving his vehicle that evening. That presupposed the incident actually occurred and his vehicle was present. It unfairly shifted the burden of proof to Petitioner to prove an assault did not take place and that he did not commit the alleged assault when nobody proved the crime actually took place.

XI. IMPOSING MULTIPLE STRIKES FOR A SINGLE ACT CREATES CONFUSION IN THE COURTS BECAUSE THE THREE STRIKES LAW WAS ENVISIONED TO PUNISH BAD ACTIONS NOT REWARD ARTFUL PLEADERS.

Although the court admitted the second strike was for the same act, it opined the second strike most likely could not be used as a second strike anyway as it was the same alleged act, thus leaving open the remote possibility a future court could count it as two strikes. If one prosecutor can manufacture a case

without a strike, a second prosecutor can manufacture another case, but using the two false strikes.

1) Both Strikes relate to a single act with a single actus reus and a single mens rea. The purpose of the strikes law is to punish repeat offenders, not to punish a person repeatedly under different statutes for a single act.

2) The potential for enhancing / compounding a subsequent offense is cruel and unusual punishment when both strikes are but one alleged offense.

A strike is an enhancement that can increase a penalty on a subsequent offense. However, not all violations of Penal Code Sections 245(a)(1), 273.5(a), and or 646.9(a) are considered felonies and surely in this case without a restraining order, a description of a weapon, or acute injuries, they should not be considered strikes.[10]

Based upon alleged victim's hearsay statement some unknown person at the hospital gave her an object that the court incorrectly assumed could only be

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[10] 1) Neither a pellet nor pellet guns in the abstract are deadly weapons. However, the prosecution did not introduce a pellet gun, or a pellet. They only introduced an enlarged photograph of an object alleged victim testified someone at the hospital gave her. No witness compared the photograph to the alleged object and nobody testified that that particular object could be discharged from a dangerous device. Moreover, they could not without seeing the alleged device.

2) Moreover, they absolute nothing about pellet guns, or how they work. The only way such a device could be a deadly weapon is by virtue of the manner in which it is allegedly used. Assuming a pellet gun had been used, pellet guns can have varying degrees of power depending on the compression that is in the chamber. They can be decompressed to the point that they have absolutely no ability to discharge anything whatsoever, in which case they would not be a danger to anyone. There is no evidence that any particular device was used or could be used to penetrate human tissue.

3) A pellet can be discharged in many ways, many of which are not by way of a pellet gun or other dangerous methods.

4) There are no acute injuries to any person that are consistent with that person being struck by a deadly or dangerous weapon.

5) No one observed anything being discharged so no one was able to testify that any object came from a particular location or from a vehicle.

discharged from a pellet gun, the trial judge imposed a strike on Petitioner for assault with a deadly weapon and separate strike for domestic battery. Allege victim claimed she felt only one blow. So, even if shooting a person with a pellet is truly a strike, it is unconstitutional to impose two strikes for the same alleged act. (See ***People v. Vargas*** (2014) 59 Cal.4th 635.) That is giving two strikes for one swing at the bat. Furthermore, without acute injuries, or anyone seeing a deadly or dangerous weapon there is no basis for imposing a single strike.

Charging Petitioner with domestic violence with an enhancement for the alleged use of a deadly weapon and assault with a deadly weapon for the alleged assault with a deadly weapon is absurd. To claim they constitute two separate offenses or two strikes is beyond absurd.

To begin with, they overcharged Petitioner with great bodily injuries and acting with a restraining order in place. That deprived Petitioner of a fair trial because the restraining order meant Petitioner had committed at least one violent act. And, the trial court did not explain to the jury he dismissed the claims of great bodily injuries because they did not exist.

Moreover, nobody saw Petitioner on the scene of the alleged pellet gun incident, even if he had been present, he had a right to be there.

Not a single witness claimed to see any violent act. There are no acute injuries, and no evidence anyone used any device in a dangerous manner.

They unfairly placed Petitioner in a position to prove he did not assault anyone, use a deadly weapon, or use anything in a dangerous manner.

They convicted Petitioner of domestic violence without any proof of violence, stalking in places Petitioner had a right to be, when no one claimed to see him and he was not personally captured on video, and stalking with a restraining order in place that was not lawfully issued.

All of the evidence was speculative. Nobody, not even alleged victim, described exactly what happened on any date. Ironically, alleged victim did not

even accuse Petitioner of committing all of the wrongful acts. She testified she hoped Petitioner had not committed the alleged vandalism.

Imposing two strikes on Petitioner is double jeopardy and cruel and unusual punishment. (See ***People v. McGee*** (1993) 15 Cal.App.4th 107, 19 Cal.Rptr.2d 12; ***People v. Landry*** (2016) 2 Cal.App.5th 52, 127.) Even under California law, the court is supposed to consider the elements of the offense in the abstract and determine whether they are in fact multiple offenses. The court is not supposed to impose a multiple penalties for a single criminal act or even present multiple offenses stemming from a single act to the jury.

The principles set forth in the ***Landry*** and ***McGee*** cases hold it is unduly prejudicial for a court to present both a charge of assault with a non-firearm deadly weapon and an enhancement for using that non-firearm from the same act to the jury. The Court of Appeal chose to limit that holding to a particular statute. However, it is just as absurd to impose two separate strikes for the same alleged act, thereby calling two strikes for one swing at the bat.

Imposing any strikes for what are not felonies is arbitrary. Nobody would possibly have notice that such an alleged act would give rise to two separate batteries. They charged Petitioner with assault with a deadly weapon just in case the prosecutor is not able to establish the existence of a relationship and prove domestic violence. That is a form of alternative pleading and alternative pleading does not give rise to a separate charge.

Multiplicity is the charging of a single offense in several counts. *See* 1 **C. Wright,** ***Federal Practice and Procedure***, § 142 at 469 (1982); ***United States v. Burton***, 871 F.2d 1566, 1573 (11th Cir. 1989)

The tests commonly used are: (1) identical proof and (2) legislative intent. The first test simply involves the determination of whether each offense requires proof of an additional fact that the other does not. *See* ***United States v. Blockburger***, 284 U.S. 299 (1931); ***United States v. Albrecht***, 273 U.S. 1 (1927). The test is designed to guard against the possibility that confusion as to the basis

of the verdict may subject the defendant to double jeopardy. The second test is legislative intent. This test often involves the determination of whether the Congress intended to prohibit each individual act or a course of conduct composed of a series of acts. ***United States v. Universal C.I.T. Credit Corp.***, 344 U.S. 218 (1952); ***Ebeling v. Morgan***, 237 U.S. 625 (1915).

In the case of a prosecution for false statements, if a document contains numerous false statements, the government need only prove one of the statements was false to obtain a conviction. (See ***Warszower v. United States***, 312 U.S. 342 (1941)) If the false statements are contained in one document, however, it is preferable to indict only one count for the entire document. This preferred course of action is in response to expressed judicial displeasure on multi-count indictments based on one document. (See ***United States v. Fisher***, 231 F.2d 99, 103 (9th Cir. 1956).)

The problem here is the prosecution alleged Petitioner discharged the phantom device only once from an unknown location and they now claim it constitutes two strikes. That is not only cruel and unusual, that is gross overreaching because they charged Petitioner with multiple crimes for the same alleged act, thus making it appear that there are several unlawful acts, and making it appear that each of the acts is a separate serious felony, and therefore, a separate strike.

This is an issue purely of law that this court should decide.

Based upon the evidence, the trial judge dismissed all of the remaining claims of great bodily injury, sua sponte. It was inconsistent for the trial judge to impose a strike on Petitioner when alleged victim suffered no acute injuries and even he found no evidence of a great bodily injury. No one claimed to see an actual weapon and nobody except alleged victim claimed to see an actual pellet that she never showed to the police or a prosecutor. Her testimony that some unidentified person at the hospital gave her an object is inadmissible hearsay because it is not corroborated anywhere in her medical records.

XII. WHY THE WOBBLERS CHARGED IN THIS CASE ARE UNCONSTITUTIONAL

The ***Ewing v. California,*** 538 U.S. 11 (2003) case hold courts must look to the legislative intent in deciding whether it can impose strikes. It also holds that a court can treat a wobbler as a felony strike unless it is reduced to a misdemeanor. That implies a defendant has a fair opportunity to move to reduce the felony to a misdemeanor.

Each of the offenses charged in this case are wobblers, meaning they can be charged as felonies or misdemeanors. However, the judges denied Petitioner the opportunity to reduce the charges to misdemeanors because they unfairly alleged he stalked a victim with a restraining order in place. That meant all the charges were felonies that could not be reduced to misdemeanors. That also meant Petitioner could never bring a motion to reduce Penal Code Sections 245(a)(1), 273.5(a), or 646.9(a) to misdemeanors, even though they are really misdemeanors.

There was actually no reason to treat any of the charges as felonies because there was no restraining order, no medically diagnosed acute injuries, and no one claimed to see anyone with a weapon.

The court should have expected Petitioner's to have a bad attitude at trial. One judge issued a void restraining order and another revoked his bail in part based upon that void restraining order. They refused to consider options short of revocation of bail to allow Petitioner to be free before his trial so that he could present evidence and contact witnesses, including his close friends to prove he did not commit any of the criminal acts.

Many of the acts they accused Petitioner of doing to support the alleged stalking charges were not criminal in nature, i.e., once returning earrings, once posting a note on alleged victim's door and appearing in public at dance venues he had frequented for years. They even implied Petitioner committed acts of vandalism when there was no evidence of any suspects and alleged victim denied she knew who was responsible.

The proportionality aspect of the Eighth Amendment requires that the court must look at objective factors in distinguishing felonies from misdemeanors in wobbler cases. When you eliminate the void restraining order, a phantom weapon that nobody claimed to see, and the absence of any medical signs of acute injuries,

this case seems more like a low level misdemeanor than a serious felony. Bringing false charges against Petitioner is justification for his possible attitude.

In ***Harmelin* v. *Michigan***, 501 U. S. 957 (1991) at 1000 the Court held the Eighth Amendment forbids only extreme sentences that are "grossly disproportionate" to the crime. (See ***Solem v. Helm***, 463 U. S. 277 at 288 (1983), 463 U. S. 303. *See also* ***Weems v. United States***, 217 U.S. 349 (1910) at 371 (Eighth Amendment prohibits "greatly disproportioned" sentences); ***Coker v. Georgia***, 433 U. S. 584, (1910) at 592 (1977) (Eighth Amendment prohibits "grossly disproportionate" sentences); ***Rummel v. Estelle***, 445 U. S. 271 (1980).)

While Petitioner is not serving life in prison, it is not the sentence per se, which he complains. It is his potential exposure to whatever enhanced sentence Petitioner could face according to someone else's whim under the three strikes law that some overzealous court may arbitrarily decide. It happened before so it can happen again.

There is not one piece of evidence Petitioner has ever touched a pellet gun, committed a single violent act, or that he was even on the scene where a violent act was allegedly committed.

Moreover, the basis for the court's claim it can impose two strikes for the same alleged assault is it suspended sentence on one and alleged victim's claim Petitioner was once her boyfriend, and therefore, subject to a conviction for domestic violence. That is punishment for alleged status; however, allegedly being a person's boyfriend or girlfriend is not sufficient to prove the existence of a qualified dating relationship.

The prosecutor was aware alleged victim was really obsessed with following and punishing Petitioner because she could not punish her estranged husband who had her barred with a criminal protective order from the family home for her own domestic violence.

The entire case hinges on a void restraining order that ironically, the Court of Appeal erroneously claimed was incidental to the case. The void restraining

order provided all the alleged motives and claimed justifications for the acts they alleged Petitioner committed.

But for the void restraining order, Petitioner would have been free during the trial to locate witnesses and evidence in his own defense. But for the void restraining order, the prosecution would not have charged Petitioner with the only crime that could not be reduced to a misdemeanor before the trial. But for the void restraining order, the jury would not have assumed Petitioner was in a qualified dating relationship with alleged victim. But for the void restraining order, the jury would not have assumed Petitioner committed previous violent acts against alleged victim. But for the void restraining order, the jury would not believe Petitioner did not have the right to be in certain public places when alleged victim claims he was. But for the void restraining order the jury would not erroneously believe Petitioner just accepted the restraining order without going to the TRO hearing to challenge it or that he did not take steps to quash or appeal the issuance of the void restraining order. But for the void restraining order, the prosecution would not have cross-examined Petitioner about the police unlawfully detaining him on a public highway to serve the void restraining order and ask all sorts of unlawful questions in front of the jury about whether he was familiar with the false allegations against him.[11]

The sentence, and the imposition of two separate strikes for the same alleged act, in this case is extreme and exceedingly rare because there is not a case where a person is convicted of two offenses that may not necessarily have the

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[11] Ironically, the prosecutors used one other alleged stalking incident to revoke Petitioner's bail that they ultimately did not mention during the trial. They alleged at a bail hearing alleged victim's friends told her Petitioner was present at a random public venue where she was also present; however, they did not see each other. That is a testament to how random and arbitrary, therefore unconstitutional, the stalking allegations were in this case.

same elements, yet are the same act, and do have the same mens rea and actus reus.

The void restraining order impacted every aspect of this case. Even when Petitioner presented the issue of the void restraining order to the Court of Appeal, it down played the impact it had upon his trial and the prosecutors' decision to charge him with felonies. It is not even possible that a jury can believe a person was subject to a restraining order and not believe he is guilty of the other crimes of which he is accused.

Therefore, we can only assume the court used subjective factors, such as race, envy, and contempt when it decided to charge the misdemeanors as felonies.

California Penal Code 245 reads:

(a)(1) Any person who commits an assault on another person with a deadly weapon or instrument, other than a firearm, will be punished by imprisonment in a state prison for two, three, or four years, ***or a county jail for up to one year***, or by a fine up to ($10,000), or both.

California Penal Code Section 273.5 reads:

(a) Any person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim described in subdivision (b) is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, ***or in a county jail for not more than one year***, or by a fine of up to six thousand dollars ($6,000), or by both that fine and imprisonment.

California Penal Code Section 646.9 reads:

(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a ***county jail for not more than one year***, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

California Penal Code Section 17 (b) provides a judge may consider when a crime is punishable, in the discretion of the court; however, that code section fails to set forth any criteria for the judge to employ in determining when the crimes should be treated as felonies or misdemeanors. (See ***Connally v. General Construction Co***. 269 U.S. 385 (1926); and, ***Kolender v. Lawson***, 461 U.S. 352 (1983). Those cases require that the stature be described with such specificity that a judge not be able to make arbitrary interpretations.)

Nowhere does the statute provide guidelines for the court to follow outside the judge's discretion in deciding whether the crimes charged in this case should be charged as felonies or misdemeanors.

The fact that the Petitioner did not have a criminal record, there was not a restraining order, and there were no great bodily injuries or any acute injuries required that none of the charges be treated as a felony.

The fact that the restraining order in this case was declared to be void from its inception should have been grounds for reducing the crimes to misdemeanors or dismissing the entire action.

They initially charged Petitioner with two great bodily injury enhancements, both of which were dismissed for lack of evidence. None of allege victim's medical records revealed any acute injuries.

That jury wrongfully convicted Petitioner of acting while a valid restraining order was in place. Meanwhile, they unlawfully held Petitioner in jail without bail, and the case relating to the restraining order had been briefed and submitted to the Court of Appeal at six months before the criminal trial began. It was unfair and unconstitutional to have Petitioner sit in jail while awaiting a prolonged overdue ruling by the Court of Appeal relating to the restraining order.

It was improper for the trial court to introduce that false and void document to the jury because it was unconstitutionally issued and also unduly prejudicial. Moreover, it is absurd to issue a void restraining order and twice as absurd to tell the jury it was valid and not allow Petitioner the right to challenge it.

Certain things, such as falsely telling the jury a person is a convicted rapist or child molester are so unduly prejudicial that their mere utterance denies a person a fair trial. Besides , no reasonable jurist would think a judge would be so incompetent as to knowingly issue a restraining order against a person without allowing that person an opportunity to be heard beforehand. Telling the jury Petitioner used a pellet gun when not a single witness claimed to see on and there is no objective evidence one existed is likewise unduly prejudicial.

Laws can be arbitrary in their language or in their application and both are per se unconstitutional. Without acute injuries, and / or a restraining order, there are absolutely no guidelines for explaining why they charged this case as a felony.

In this case, the strikes are completely arbitrary because the underlying felonies should have been charged as misdemeanors, if charged at all.

The void restraining order was the only tangible piece of evidence. That void restraining order and all the false allegations that went with it made it impossible for Petitioner to prove his defense, that being he was not violent and that he had zero culpability.

The Court of appeal was forced by law to overturn the only offense that was not arguably a wobbler, Penal Code Section 646.9(b). That charge unfairly misled the jury into believing Petitioner engaged in criminal activities after a restraining order had been lawfully issued, when it had not been lawfully issued and he had not committed any unlawful acts. Yet, the Court of Appeal refused to overturn the entire conviction. The Court of Appeal erroneously modified the Penal Code Section 646.9(b) conviction and changed it to Penal Code Section 646.9(a) under the erroneous assumption the jury had not considered restraining order until it already decided he violated the Penal Code Section 646.9(b). They were not ordered not to consider it for other purposes such as in deciding that Petitioner had committed an assault with a deadly weapon.

Those judges disliked the fact Petitioner fought the void restraining order and they punished him for it by issuing a warrant for his arrest. It was on appeal

during his trial and they misled the jurors into believing Petitioner failed to appear despite having had notice of the hearing on the void restraining order. They also misled the jurors into believing Petitioner had not taken legal steps to challenge it.

When the restraining order was declared void and the Penal Code Section 646.9(b) thrown out, the entire conviction should have been overturned.

Despite the fact that there were no diagnosed acute injuries whatsoever, the court continued to treat Petitioner as though there were great bodily injuries, a valid restraining order, and he used a deadly weapon.

Even the alleged stalking allegations were unconventional and the subject of speculation. They may not have even been stalking, let alone felonies.

The element of credible threats is missing from the stalking allegations. Moreover, any claim Petitioner left non-threatening messages was entitled to a sua sponte instruction relating to the First Amendment freedom of speech.

In addition, the allegations a prosecutor must prove such as willfully, maliciously, and repeatedly follows or maliciously harasses another person and who makes a credible threat is about as vague a definitions as a law can have. Following and harassing are vague in and of themselves. Moreover, if a person does not utter a word a credible threat must be assumed from conduct, and alleging Petitioner appeared in public or wore dark warm clothing in the winter cannot be used to describe threatening behavior.

The first alleged stalking incident is replete with allegations that cannot be proven. On all but two of the allegations, allege victim denied seeing Petitioner. On two of the incidents where she did not see him, she says Petitioner left non-threatening messages at her residence, most of which were messages she had previously sent him. On three of the incidents where she did no see him, alleged victim says someone damaged her vehicle at random places San Francisco. She said someone also damaged her home locks. She also alleged one night Petitioner's vehicle zoomed past her parked vehicle at an unknown rate of speed. Lastly, she says she conversed with Petitioner on another night when he grabbed

her wrist and forcefully insisted they dance. That is random isolated activity in which a reasonable person would not even believe was criminal, not to mention in which he or she would believe he or she was responsible.

XIII. CALIFORNIA PENAL CODE SECTIONS 245(A)(1); 273.5(A) AND 646.9(A) ARE ARBITRARY LAWS AND THE SUPREME COURT HELD ARBITRARY LAWS ARE A VIOLATION OF DUE PROCESS.

The United States Supreme Court gives particular scrutiny to vague and arbitrary laws. According to the U.S. Supreme Court in ***Connally v. General Construction Co.***, supra, 269 U.S. 385, a criminal statute which either forbids or requires the doing of an act in terms so vague that men of ***common intelligence must guess at its meaning*** and differ as to its application lacks the first essential of due process of law. (***Id.*** at 391.)

In ***Kolender v. Lawson***, supra, 461 U.S. 352 the Supreme Court explained that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory treatment."

A law that defines a crime in vague terms is likely to raise due-process issues. Courts in the United States give particular scrutiny to vague laws relative to First Amendment issues because of their possible chilling effect on protected rights. Loitering laws are one example of laws that can be unconstitutionally vague. Stalking laws can also be arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law; and contrary to constitutional right, power, privilege, or immunity because they may involve constitutionally protected speech, or other activities such as appearing in public places where one has a right to be and harassment without involving a component of a credible physical threat.

What the prosecution alleged Petitioner did on two of the three incidents of the second stalking charge was appear in public places where he had a right to be. On the December 1, 2018, stalking charge, nobody claimed to see Petitioner.

Alleged victim stated on her recorded interview she suspected Petitioner struck her with a BB because she claimed he was her ***"ex-boyfriend"*** and she had a ***restraining order*** against him. Not only did alleged victim admit she did not know what allegedly struck her, she admitted she did not see anyone, and even when she changed her story about seeing Petitioner, she denied seeing a weapon.

Petitioner denies being her "boyfriend." However, the void restraining order reads otherwise.

On the second allegation of the second stalking charge alleged victim testified in December 2018 she went to the Allegro Ballroom after learning Petitioner was present, and then she testified she went outside and noticed he was already outside leaning against a wall. Then she said he pointed at her. The prosecutor insinuated the point meant he previously shot her with a pellet.

Provided that even occurred, pointing is one of the most nondescript actions a person can take. Nobody can explain what that means.

Provided that even occurred there is no way anyone could possibly know what Petitioner's actions meant. Any law that denies a person the right to point his finger is too vague to be upheld, and is too vague to be considered a felony.[12]

On the third allegation, she testified she arrived at the ballroom first, at which time she noticed Petitioner briefly peeking inside the window, but she never

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12 The Court of Appeal must have recognized alleged victim's allegations did not support a stalking conviction because it changed the facts in its opinion to state Petitioner followed alleged victim outside when she clearly testified he was already outside when she stepped outside. However, no matter how you interpret it, it still requires some imagination to reach the level of criminal behavior. Alleged victim's subjective imagination or paranoia cannot be the foundation of a criminal threat or a stalking conviction. Any laws that require Petitioner not appear in public or that he stands at attention and not make eye contact is Constitutionally impermissible. That is how they forced "Negroes" to behave during "Jim Crow."

saw him again. There is nothing about either of the final two allegations that are criminal in nature; however, the void restraining order suggests otherwise. A criminal statute which either forbids or requires the doing of an act in terms so vague that men of *common intelligence must guess at its meaning* and differ as to its application is unconstitutional.

To suggest Petitioner was somehow criminally liable for allegedly returning a person's property in September 2018 and or allegedly sending a nonthreatening message to the person relating to a previous interaction and not otherwise interacting with that person unfairly curtails constitutionally protected behavior.

Alleged victim did not allege she received any communications from Petitioner after mid-September 2018 so the thrust of the stalking prosecution was Petitioner appeared in public places in San Francisco and Alameda County, where he lived. That cannot be the lawful basis of a stalking conviction.

Alleged victim did not alleged Petitioner interacted with her after mid-September 2018. There is no evidence Petitioner ever communicated with alleged victim after mid-September 2018 and it is unconstitutional to suggest Petitioner is criminally liable for appearing in public places even when he did not interact with alleged victim. It unfairly restricts his lawful behavior.

And, the prosecutor unlawfully shifted the burden to Petitioner to prove that he did not engage in behavior that is not even unlawful.

The prosecutor even implied Petitioner at trial he had to explain why his vehicle was near a dance club nine months before and the judge implied Petitioner should have an answer. Assuming Petitioner's vehicle was there, which nobody proved, there is no law that prevented him from being there.

Second, provided his vehicle was present, it does not mean he could randomly explain its presence nine months prior when he previously appeared there religiously for years before the alleged incident. Third, it does not mean that vehicle was involved in any unlawful activity. Moreover, it t is unfair for

prosecutors to suggest that an unlawfully obtained and void restraining somehow denied Petitioner the right to be near any particular dance venue, particularly near his residence and place of employment when alleged victim resided miles away and in a different county. A person of ordinary intelligence would not believe it is unlawful to be in a public place in his own neighborhood, especially if he is not interacting with a person who is hostile to him.

The Supreme Court frowns on using a statute to punish anyone for behavior a person of ordinary intelligence would not believe is a crime.

A clarification of the modern Supreme Court's concerns regarding overly vague statutes is found in ***Grayned v. City of Rockford***, 408 U.S. 104 (1972).

In ***Grayned***, the Court suggested three reasons why overly vague statutes are unconstitutional.

First, due process requires that a law provide fair warning and provides a "persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."

Second, the law must provide "explicit standards" to law enforcement officials, judges, and juries so as to avoid "arbitrary and discriminatory application."

Third, a vague statute can "inhibit the exercise" of First Amendment freedoms and may cause speakers to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."

By definition, arbitrary explains decisions made or actions taken that are not necessarily based on established facts, but instead on opinions. Arbitrary decisions do not made with regards to existing facts or established circumstances.

However, the concept of **arbitrariness** applies to both the law under which a person is arrested and how the court applies the law to a given case. An arrest or detention may be arbitrary if the law is arbitrary or if the actions of a criminal justice actor (e.g., a police officer or the prosecutor) are arbitrary.

A law is arbitrary if one person is convicted of a felony for engaging in a crime with the identical fact pattern as another person who is convicted of a misdemeanor. Under vagueness doctrine, a statute is also void for vagueness if a legislature's delegation of authority to judges and/or administrators is so extensive that it would lead to arbitrary prosecutions such as in this case.

In this case, the language in all three statutes is arbitrary. Nowhere do they describe the circumstances in which a judge should declare an offense to be a misdemeanor as opposed to a felony and the judge did not declare any. That means he can arbitrarily decide to place some on probation and imprison others.

Some statutes provide in the case of theft that stealing items under a certain value are misdemeanors and those with greater values are felonies.

A battery that does not result in acute injuries is usually a misdemeanor so one would assume the September 4, 2018 alleged garage attack could be at most misdemeanor trespassing. Given there are no diagnosed acute injuries in any of alleged victim's medical records, the trial judge had entirely too much discretion to charge Petitioner with a felony. However, there is nothing in the record that explains why the prosecutor or the judge overcharged this case and treated it as a felony as opposed to a misdemeanor case. There is no explanation as to why the court admitted a restraining order that shows on its face that nobody actually served Petitioner with the underlying temporary restraining order.

They admitted a photograph of a supposed pellet when the actual pellet itself would not be admissible. No one followed an accepted chain of custody.[13]

What happened in this case is worse than slavery because they refuse to admit the real reasons behind the ill treatment so Petitioner can defend against it.[14]

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13 A person at the hospital would not give alleged victim evidence from a criminal investigation or fail to document recovering it. They deprived Petitioner of the right to call an expert to determine whether that object could even be discharged from a dangerous device or that it might pierce body tissue. Not only that, alleged victim's medical records do not reflect any acute injuries.

Appellate Judge Margulies said that introduction of that void restraining against a Petitioner had no consequence because the prosecution did not rely heavily on it. That is absurd because no single piece of evidence could be more unduly prejudicial than to falsely instruct the jury that Petitioner was under the restraints of a restraining order, including the presumption he was already in a relationship that qualified him to be convicted of domestic violence, and that presumed Petitioner committed at least one violent act to deserve the restraining order.

There was no evidence in this case that supports a felony conviction and the trial court placed him in circumstances that prevented him from reducing the felonies to misdemeanors. Clearly, at least one, if not all of the jurors, convicted Petitioner based upon a false assumption he was subject to a restraining order.

Without any guidelines, it is not fair to give a single trial judge unfettered discretion to decide whether a crime is a misdemeanor or a felony. It opens the door to bigotry, favoritism, nepotism, and racism.

In addition, the prosecution falsely alleged Petitioner caused Alleged victim to suffer great bodily injuries when her records do not support a single acute injury. The trial judge dismissed all great bodily injuries allegations, but not until the jury erroneously heard Petitioners caused them. That permitted them to speculate that those false claims had been dismissed based upon an unstated technicality as opposed to the law.

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[14] It is obvious that the court sentenced Petitioner to prison for allegedly insulting a white woman, a crime that historically called for his lynching and this country has an extremely long documented history of lynching Black men for that alleged activity, even when there is no evidence he committed a crime. (See 100 Years of Lynchings by Ralph Ginzburg, https://books.google.com /books/about/100_Years_of_Lynchings.html?id=0km *frJZALIC; see also History of Lynching in American, NAACP https://naacp.org/find-resources/ history-explained/history-lynching-america.*)

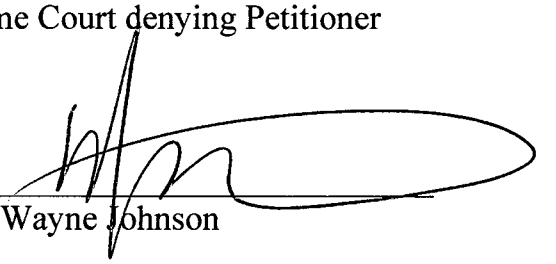
After 130 years, this society only recently removed that enslaved "Mammy" archetype, Aunt Jemima, from the pancake box.

This a real case and controversy that impacts real people because, more frequently than thought, California judges who are faced with Penal Code Sections 245(a)(1), 273.5(a) and or 646.9(a) randomly convict some people of felonies who should be convicted of misdemeanors or not be convicted of any crimes at all.

CONCLUSION

For the foregoing reasons, Mr. Johnson respectfully requests that this Court issue a writ of certiorari to review the judgment of the California Court of Appeals, and the decree of the California Supreme Court denying Petitioner justice.

Respectfully submitted,



Wayne Johnson