Supreme Court Copy

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **EDDIE JASON LOWERY,** **Defendant and Appellant.**	Case No. S179422

Fourth Appellate District Division Two, Case No. E047614
Riverside County Superior Court, Case No. INF062558
The Honorable John G. Evans, Judge

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QUESTION PRESENTED[1]

Whether the threat proscriptions of Penal Code section 140, subdivision (a), are constitutionally overbroad in violation of the First Amendment to the United States Constitution by failing to require specific intent, apparent ability to carry out threats, or their statutory equivalents? (ABOM 1.)

INTRODUCTION

Joseph Gorman hired appellant and his wife to do housecleaning and handy-man work around his house. Gorman left the two alone in his home for several hours when he went to a home repair store. When Gorman returned home, appellant and his wife were making a hasty retreat. After noticing his house was in disarray, Gorman discovered the $250,000 cash he kept hidden in his couch was gone. Appellant and his wife were separately prosecuted for the theft. Gorman testified against them at the separate trials. Appellant was acquitted; his wife was convicted of the theft and ordered to repay $250,000 to Gorman in restitution.

During jailhouse calls between appellant and his wife, appellant made several threats to kill Gorman, such as "Well, guess what I'm going to do? I'm gonna kill the bastard. And I'm gonna go down to Mr. Gorman's house, maybe this week, and I'm gonna blow his fucken' [*sic*] head away." Appellant was charged with threatening a victim or witness who provided assistance to law enforcement or a public prosecutor in a criminal court proceeding (Pen. Code, § 140, subd. (a)). The jury convicted appellant as charged.

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[1] Due to this Court's summary grant of review on appellant's petition, the question presented is taken from appellant's petition for review. (Appellant's Pet. For Review, 1.)

On appeal, appellant challenged the constitutionality of Penal Code[2] section 140, subdivision (a), claiming as written and as applied to the facts of his case, it is constitutionally overbroad in violation of the First Amendment of the United States Constitution. The Court of Appeal rejected appellant's claim because section 140, subdivision (a), only targets retaliatory threats which are not protected by the First Amendment.

This Court granted appellant's petition for review to determine whether section 140, subdivision (a), is unconstitutionally overbroad because it does not explicitly require specific intent to threaten and apparent ability to carry out the threat. However, as the Court of Appeal properly found, section 140, subdivision (a), only targets retaliatory threats and therefore cannot reach constitutionally protected speech.

The United States Supreme Court has found that speech that falls into the category of "true threats" is not protected by the First Amendment. "True threats" encompass serious expressions of intention to inflict bodily harm. "True threats" are not protected speech because threats of physical violence fall outside the scope of the protected values of persuasion, dialogue and free exchange of ideas and beliefs that are protected by the First Amendment. The narrow scope of Penal Code section 140, subdivision (a), takes the proscribed language out of the realm of the protected marketplace of ideas. Accordingly, the statute is not unconstitutionally overbroad on its face or as applied in this case.

STATEMENT OF THE CASE

On November 6, 2008, a Riverside County jury convicted appellant of one count of willfully and unlawfully threatening to use force and violence upon another person and threatening to take, damage, and destroy property

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[2] All further statutory references are to the Penal Code unless otherwise noted.

of another person because a witness, victim, and other person had provided assistance and information to a law enforcement officer, and to a public prosecutor in court, in violation of Penal Code section 140, subdivision (a). (CT 106.)

On January 23, 2009, appellant was granted probation for a period of three years, with various terms and conditions, including local commitment for 365 days, but with credit for 292 days served. (CT 185.)

On appeal, appellant claimed Penal Code section 140, subdivision (a), as written and as applied to the facts of his case, is constitutionally overbroad in violation of the First Amendment of the United States Constitution because it does not require the specific intent to carry out the threats, nor proof of an ability to carry out the threats. (AOB 10-24.) The Court of Appeal, Fourth Appellate District, Division Two, rejected appellant's contention in a published opinion and affirmed the judgment. The Court of Appeal held that there was not a risk section 140, subdivision (a), could reach constitutionally protected speech because it limits criminal liability to threats of force or violence against a witness or victim of a crime because the witness or victim provided assistance or information to a law enforcement officer or public prosecutor in a criminal proceeding. (Slip Opn. at 4-7.) In so holding, the Court of Appeal compared section 140, subdivision (a), to a similar federal statute, 18 U.S.C. § 1513, and relied on the Seventh Circuit's decision in *United States v. Velasquez* (7th Cir. 1985) 772 F.2d 1348, which rejected an overbreadth challenge to the federal statute. (Slip. Opn. at 7-9.)

Thereafter, appellant petitioned for review. On March 30, 2010, this Court summarily granted appellant's petition for review to decide whether Penal Code section 140, subdivision (a), is constitutionally overbroad in violation of the First Amendment of the United States Constitution.

STATEMENT OF FACTS

On June 26, 2007, 88-year-old Joseph Gorman hired appellant and appellant's wife, Veronica Lowery, to clean and do "handy work" inside Gorman's mobile home. (RT 37-38.) Veronica went right to work in Mr. Gorman's living room. (RT 38.) Meanwhile, Mr. Gorman discussed repairs and remodeling he needed done with appellant, who told Mr. Gorman he could perform this type of handyman work. (RT 38.) At approximately 10:00 a.m. that day, while appellant and Veronica[3] were working inside Mr. Gorman's home, Mr. Gorman went to Home Depot to price some materials that were needed for repairing his floors. (RT 38.) During Mr. Gorman's absence, appellant and Veronica were alone in Mr. Gorman's mobile home. (RT 38.)

Four and a half hours later, at approximately 2:30 p.m., Mr. Gorman returned home. (RT 39.) Appellant and Veronica were preparing to leave Mr. Gorman's house at that time, even though the house was "in a mess" except for the living room. (RT 39, 41.) The kitchen was in disarray, and so was the den. (RT 39, 41.) There "was stuff laying around the house," including rags, and Veronica's vacuum cleaner which was laying on the couch. (RT 41.) Mr. Gorman asked, "Are you coming back?" (RT 39.) Mr. Gorman had expected appellant and Veronica to work until 4:00 or 5:00 p.m., and he wanted to know if they were going to return the next day. (RT 39-40.) He noticed that appellant and Veronica were "acting very funny." (RT 39-40.) They told Mr. Gorman that they had a family emergency and had to go home. (RT 39.) They then left. (RT 42.)

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[3] Since appellant and Veronica Lowery share the same last name, Veronica Lowery is referred to by her first name in order to avoid confusion.

After appellant and Veronica were gone, Mr. Gorman noticed that his heavy folding couch had been moved. (RT 42.) Mr. Gorman kept $250,000 cash, wrapped in plastic bundles, inside the folding couch. (RT 42-43.) When the couch was closed, the money could not be seen. (RT 43.) When Mr. Gorman opened the couch, he discovered that all his money was gone. (RT 43.) He immediately called the police and reported the missing money. (RT 43-45.) Appellant and Veronica were the only people that had been in Mr. Gorman's home in 19 years. (RT 44.)

Veronica Lowery and appellant were tried separately for the theft of Mr. Gorman's money. (RT 46.) Mr. Gorman testified for the prosecution at both trials. (RT 46.) He assisted Deputy District Attorney Joanne Daniels with both trials, and gave her all the information he had. (RT 46-47.) Veronica was convicted of theft from an elderly person. (RT 66.) The amount taken in the theft was determined by Mr. Gorman's information, and from profit and loss statements. (RT 69.) At sentencing, Veronica was ordered to repay $250,000 to Mr. Gorman. (RT 75.) Appellant was not convicted of the theft. (RT 70.)

While Veronica was in Riverside County Jail, she called appellant several times. (RT 103, 120.) The jail monitored and recorded all telephone calls involving inmates. (RT 79-81.) At the beginning of each call, the jail's telephone system played a pre-recorded statement that warned individuals their conversation was being recorded. (RT 81.) Thereafter, the warning replayed itself periodically to remind individuals they were being recorded. (RT 81.)

A one-and-a-half-minute condensed and redacted recording of several longer telephone calls lasting approximately 81 minutes between Veronica and appellant was played for the jury and admitted into evidence. (RT 122-130.) The jury was given a transcript of the recording. (See Supp. CT 1-2.) The recording contained the following statements:

EDDIE: I'm going down to Gorman's and I'm gonna steal 250,000 dollars! I'm a [*sic*] blow his fucken head away! I will kill the fucken bastard that said I stole 250,000. I will do it! You know what? I stole 100,000 dollars . . . Listen! Listen! I stole 100,000 dollars! I burned it all! Okay?! I'm gonna kill the bastard! And I'm gonna go down to Mr. Gorman's house, maybe this week, and I'm gonna blow his fucken head away!

OPERATOR [recording]: This call is from an inmate at a correctional facility. If you call, or dial additional digits, this call may be disconnected. This call may be monitored and recorded at any time. This call is from an inmate at a correctional facility. If you attempt a 3-way call or dial additional digits, this call may be disconnected. This call may be monitored and recorded at any time.

EDDIE: I'm not getting mad at you about it, I'm getting . . . I'm gonna get mad at the Lawyer and the D.A. and, and Mr. Gorman, I'm gonna go down there and tell him "Look! You say my wife stole 250,000 . . . you said I stole 250,000! Let's get the 250,000 out of your house right now!" Yeah, but he needed to take the 250,000 dollars off, because I'm gonna tell the . . . the . . . that blond-headed chic, uh . . . that was uh . . . the D.A. . . . . I'm gonna kill her! And I'm gonna kill a lot of people! So I might do life in prison! We might be in the same prison!

EDDIE: Listen! Okay Listen! You, you tell 'em that my husband's going down and get 250,000 dollars from that man, and then when he get's the 250,000 dollars, he's . . . he's gonna kill anybody that steps in his way!!

[END OF TRACK 1, DURATION: 1:31]

In other recorded conversations, appellant expressed anger over the fact that Mr. Gorman had accused him of taking his money. (RT 126-127.) Appellant also told Veronica that she had lied about the $250,000, and this was one of the reasons appellant was making threats, because he didn't like "effing liars." (RT 126, 128, 133.) Appellant expressed he was upset about Mr. Gorman's testimony during the trials indicating that he (appellant) took money from Mr. Gorman. (RT 127.) Appellant was upset that his children

were taken from him. (RT 127.) And, he was upset that his wife was in jail. (RT 127.)

DEFENSE

Appellant testified in his own behalf. He admitted being the person talking on the recordings. (RT 144.) He said he made the statements because he was angry. (RT 149.) He testified that neither he nor his wife took $250,000. (RT 148.) Appellant said his recorded statement admitting the theft of $100,000 was only made to help his wife avoid a sentencing enhancement. (RT 158.) Appellant said he did not intend for his threats to be taken seriously. (RT 149.) He admitted that he was the registered owner of a gun at one time, but claimed to have sold the gun 20 years earlier. (RT 156-157.)

ARGUMENT

I. PENAL CODE SECTION 140, SUBDIVISION(A) PUNISHES ONLY RETALIATORY THREATS OF VIOLENCE, WHICH, BY THEIR VERY NATURE, ARE TRUE THREATS AND NOT SUBJECT TO FIRST AMENDMENT PROTECTION

Appellant contends Penal Code section 140, subdivision (a), is constitutionally overbroad because it lacks two elements: (1) specific intent the statement be taken as a threat; and (2) the apparently ability to carry out the threat. (AOBM 11-30.) Appellant is wrong. Penal Code section 140, subdivision (a), prohibits threats to retaliate forcibly against victims, witnesses, and informants who assist the government. The statute is not unconstitutionally overbroad because such threats, by their very nature, are true threats and not the type of "political hyperbole" subject to First Amendment protection. This is true even in the case of a hypothetical defendant who lacks the specific intent and apparent ability to carry out a threat. Accordingly, the statute is not unconstitutionally overbroad on its face. Further, the statute is not overbroad as applied in this case because

appellant's threats to kill or harm Mr. Gorman expressed a serious intention to commit an unlawful act of violence against Gorman and as such, fell within the true threats exception to the First Amendment.

A. Penal Code Section 140, Subdivision (a)

Penal Code section 140, subdivision (a), states:

> (a) Except as provided in Section 139, every person who willfully uses force or threatens to use force or violence upon the person of a witness to, or a victim of, a crime or any other person, or to take, damage, or destroy any property of any witness, victim, or any other person, because the witness, victim, or other person has provided any assistance or information to a law enforcement officer, or to a public prosecutor in a criminal proceeding or juvenile court proceeding, shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years.

"The obvious intent of the statute is to preserve and protect witnesses." (*People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842.) "Protection of witnesses does not require that the witness be personally aware of the threat involving force or violence." (*Ibid.*) Therefore, the threats need not be communicated to the witness/victim in order to violate section 140. (*Id.* at pp. 841-842.)

Furthermore, section 140 is a general intent crime and does not require a specific intent to actually carry out the threats. (*People v. McDaniel* (1994) 22 Cal.App.4th 278, 282-284.) In *McDaniel,* the Second District Court of Appeal described the difference between a specific intent and a general intent crime:

> [I]f the end in view is simply a proscribed act, the intent required is only a general one because no further acts or future consequences are envisioned from the illegal act. [Citations.] Conversely, when the end in view looks to a further consequence of the act, the intent is specific. [Citations.]

(*Id.* at pp. 283-284.)

The *McDaniel* court noted that certain statutes that criminalize threats, such as Penal Code section 139 [threat to use force or violence upon witnesses, victims, or their immediate families] and section 136.1 [intimidation of witness and victims] proscribe statements that are intended to create or achieve a future or additional consequence and thus, are specific intent crimes. (*People v. McDaniel, supra,* 22 Cal.App.4th at p. 284.)

> The acts proscribed in section 140, to the contrary, take place *because* the witness, or informant has provided information or assistance to a law enforcement officer. The statute is retrospective rather than prospective and proscribes acts which are retaliatory rather than acts to intimidate. It defines only a description of the particular act of threatening to use force or violence . . . without reference to an intent to do a further act or achieve a future consequence. Consequently, section 140 is a general intent crime . . .

(*Ibid.,* original italics.)

The Legislature enacted this provision in 1982 as part of the Gang Anti-Terrorism Act.[4] The bill was proposed because existing law did not "specifically impose criminal penalties for willfully threatening to use force or violence upon the person or to damage or destroy the property of such person, because he or she has provided assistance or information to a law enforcement officer, or to a public prosecutor in a criminal action or juvenile court proceeding." (Stats. 1982, ch. 1100 (Assem. Bill No. 2691), sec. 1.)[5] The bill explained that existing law covered threats made to prevent cooperation or testimony; this bill would cover those situations where there is no threat or injury to a person or property until after the

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[4] Penal Code section 140 was originally enacted as section 152.

[5] Respondent has requested by separate motion that this Court take judicial notice of various portions of the legislative history of Penal Code section 140.

testimony. (Assem. Com. on Criminal Justice, Rep. on Assem. Bill No. 2691 (1981-1982 Reg. Sess.) as introduced February 18, 1982, p. 2.)

The Judicial Council observed that the proposed law was consistent with the existing provisions of sections 136.1 and 137, which make it a crime to use threats of force to attempt to intimidate witnesses. (Jud. Council of Cal., Admin. Off. Of Cts., Review and Analysis of Assem. Bill No. 2691, March 19, 1982, p. 2.) Threatening someone because he or she has assisted law enforcement officials is also "an implicit threat to others who may provide such assistance in the future." (*Ibid.*)

In reviewing this legislation, the Senate Committee on the Judiciary noted that this crime could be committed by pure speech and, citing *Watts v. United States* (1969) 394 U.S. 705 [89 S.Ct. 1399, 22 L.Ed.2d 664], "its constitutionality must be judged by the strict standards of the First Amendment." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2691 (1981-1982 Reg. Sess.) as amended April 13, 1982, p. 3.) The Senate Committee commented that in *People v. Rubin* (1979) 96 Cal.App.3d 968, 976, the appellate court rejected the idea that specific intent is an element in determining whether speech is protected, and instead the proper analysis is to look at the words and attendant circumstances. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2691 (1981-1982 Reg. Sess.) as amended April 13, 1982, pp. 3-4.) The Senate Committee further commented that in *People v. Mirmirani* (1981) 30 Cal.3d 375, the Court struck down a statute making it a felony to threaten to commit certain crimes in order to achieve social or political goals. The Senate Committee acknowledged that the *Mirmirani* Court struck down the provision because it was unconstitutionally vague, but believed the Court's reliance on *Watts,* (see *Mirmirani, supra,* at p. 383), showed the Court's concern with provisions that punish pure speech. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2691 (1981-1982 Reg. Sess.) as amended April 13, 1982, p. 4.)

Here, the jury was instructed with CALCRIM No. 2624, which tracks the language of section 140, subdivision (a):

> The defendant is charged with threatening to use force against a witness in violation of Penal Code section 140(a). To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. Joseph Gorman gave assistance or information to a law enforcement officer or public prosecutor in a criminal case; and
>
> 2. The defendant willfully threatened to use force or violence against Joseph Gorman or threatened to take, damage, or destroy the property of Joseph Gorman because he had given assistance or information.
>
> Someone commits an act willfully when he or she does it willingly or on purpose.
>
> A lawyer employed by the district attorney's office to prosecute cases is a public prosecutor.
>
> The People do not need to prove that the threat was communicated to Joseph Gorman or that he was aware of the threat.

(RT 197-198; CT 132.)

The court also instructed the jury on general intent as follows:

> The crimes or other allegations charged in this case require proof of the union or joint operation of act and wrongful intent. For you to find a person guilty of the crime in this case of threatening a witness after testimony or information given, a violation of Penal Code section 140(a) as charged in count one, that person must not only commit the prohibited act or fail to do the required act, but must do so with wrongful intent.
>
> A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for the crime or allegation.

(RT 195; CT 125; CALCRIM No. 250.)

B. "True Threats" Are Not Protected By The First Amendment

As both the United States Supreme Court and California Supreme Court have explained, to succeed in a constitutional challenge based on asserted overbreadth, the defendant must demonstrate that the statute inhibits a substantial amount of speech protected by the First Amendment. (*New York v. Ferber* (1982) 458 U.S. 747, 768-769 [102 S.Ct. 3348, 73 L.Ed.2d 1113]; *In re M.S.* (1995) 10 Cal.4th 698, 710.) Thus, as the United States Supreme Court has stressed, the overbreadth doctrine is "strong medicine" to be employed only "sparingly," and comes into play only when, measured in relation to a statute's constitutionally permissible sweep, "the overbreadth of a statute [is] not only . . . real, but substantial as well." (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 613, 615 [93 S.Ct. 2908, 37 L.Ed.2d 830]; *People v. Toledo* (2001) 26 Cal.4th 221, 234; *In re M.S., supra,* 10 Cal.4th at p. 710.) A statute is not constitutionally invalid on overbreadth grounds simply because it is possible to conceive of one or a few impermissible applications; rather, such invalidity occurs only if the statutory provision inhibits a substantial amount of protected speech. (*Houston v. Hill* (1987) 482 U.S. 451, 458 [107 S.Ct. 2502, 96 L.Ed.2d 398]; *People v. Toledo, supra,* 26 Cal.4th at pp. 234-235.)

As concerns criminal threats, a state may penalize them, even those consisting of pure speech, so long as the pertinent statute singles out threats falling outside the scope of the First Amendment's protection for punishment. (*In re M.S., supra,* 10 Cal.4th at p. 710, citing *Watts v. United States, supra,* 394 U.S. at pp. 706-708; *People v. Toledo, supra,* 26 Cal.4th at p. 233.) In this regard, it is important to recall that the First Amendment's aim is to protect expression that in some way engages in public dialogue, i.e., "communication in which the participants seek to persuade, or are persuaded; communication which is about changing or

maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs . . ." (*In re M.S., supra,* 10 Cal.4th at p. 710, quoting *Shackelford v. Shirley* (5th Cir. 1991) 948 F.2d 935, 938; *People v. Toledo, supra,* 26 Cal.4th at p. 233.) Thus, as the speech at issue strays from the protected values of persuasion, dialogue and free exchange of ideas and beliefs, and moves toward willful threats to perform illegal acts, the state is afforded great latitude in regulating such expression. (*In re M.S., supra,* 10 Cal.4th at p. 710; *Shackelford v. Shirley, supra,* 948 F.2d at p. 938; *People v. Toledo, supra,* 26 Cal.4th at p. 233.)

Accordingly, "true threats" of physical violence are not protected by the First Amendment. (*Virginia v. Black* (2003) 538 U.S. 343, 359 [123 S.Ct. 1536, 155 L.Ed.2d 535]; *In re M.S., supra,* 10 Cal.4th at p. 714.)

> [T]hey are punishable because of the state's interest in protecting individuals from the fear of violence, the disruption fear engenders and the possibility the threatened violence will occur. [Citation.] As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm [citation], and its circumstances are such that there is a reasonable tendency to produce in the victim a fear the threat will be carried out [citation], the fact that the threat may be contingent on some future event . . . does not cloak it in constitutional protection.

(*In re M.S., supra,* 10 Cal.4th at p.714.)

"A true threat occurs when a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict bodily harm." (*In re Steven S.* (1994) 25 Cal.App.4th 598, 607-608; accord, *In re M.S., supra,* 10 Cal.4th at p. 710; *United States v. Orozco-Santillan* (9th Cir. 1990) 903 F.2d 1262, 1265-1266, overruled on other grounds in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists* (9th Cir. 2002) 290 F.3d 1058, 1066-1070.) "[P]roof of specific intent to carry out the threat is not constitutionally compelled." (*People v. Fisher* (1993) 12 Cal.App.4th 1556, 1559.) "The

only intent requirement is that the offender intentionally or knowingly made a communication that a reasonable person would construe as a threat." (*In re Steven S., supra,* at p. 608.) The substantive limits on the right of free speech are not fixed by the speaker's moral culpability, but by the competing civil rights of his audience, including the right not to be placed in fear of life, limb, and property. That is why a threat may be punishable under the First Amendment although the speaker has no intention of carrying it out. (See *United States v. Fuller* (7th Cir. 2004) 387 F.3d 643, 648; *United States v. Orozco-Santillan, supra,* 903 F.2d at p. 1266, fn. 3.) Further, a threat need not be communicated to the proposed victim to be criminally actionable. (See *United States v. Stewart* (9th Cir. 2005) 420 F.3d 1007, 1016 [finding that under a federal statute that criminalizes threatening enumerated officials, "receipt of the threat only by a third party is sufficient," where threat was communicated to fellow inmate]; *United States v. Chase* (9th Cir. 2003) 340 F.3d 978, 980 [affirming conviction for threatening a federal law enforcement officer when threat was made to a telephone operator at the defendant's psychiatrist's office]; *United States v. Martin* (10th Cir. 1998) 163 F.3d 1212, 1216 [holding that threats made to a third party, the defendant's associate, were sufficient to sustain conviction for threatening a law enforcement officer].)

The "true threats" exception had its origins in *Watts v. United States, supra,* 394 U.S. 705. The defendant in *Watts* was convicted of "knowingly and willfully ... [making] any threat to take the life of or to inflict bodily harm upon the President of the United States ...." (*Id.* at p. 705, quoting 18 USC § 871(a).) Watts was convicted based on his statement at a rally against the Vietnam War that, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." (*Id.* at p. 706.) In examining the statute, the Supreme Court first noted that it was constitutional on its face.

"Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." (*Watts v. United States, supra,* 394 U.S. at p. 707.) In overturning the defendant's conviction, the Court held that the threat must be construed in the light of First Amendment principles that encouraged uninhibited debate on public issues. In this light, Watt's statement was not a true threat, but rather was a "kind of political hyperbole." (*Id.* at p. 708.) Because the Court determined that the defendant's statement was not a threat, it did not address the *mens rea* requirement necessary to proscribe a threat consistent with the First Amendment.

The United States Supreme Court returned to the issue of threats and the First Amendment in *Virginia v. Black, supra,* 538 U.S. 343. In *Black,* the Court addressed the constitutionality of a Virginia statute that made it unlawful to burn a cross with the intent to intimidate any person or group of persons. (*Id.* at p. 348.) In examining the constitutionality of the statute, the Court noted that "true threats" may be banned consistent with the First Amendment. (*Id.* at p. 359.)

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. (See *Watts v. United States, supra*, at p. 708 ("political hyperbole" is not a true threat); *R.A.V. v. City of St. Paul, supra,* 505 U.S. at p. 388.) The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect [s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." (*Ibid.*) Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a

> speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

(*Virginia v. Black, supra,* 538 U.S. at 359-360.)

The Court then concluded that a "ban on cross burning carried out with the intent to intimidate is . . . proscribable under the First Amendment." (*Virginia v. Black, supra,* 538 U.S. at p. 363.) Nevertheless, a plurality of the Court determined that the statute was facially invalid because it stated that the burning of a cross was prima facie evidence of an intent to intimidate a person or group of persons. (See *id.* at p. 365.)

Since the decision in *Black,* only a few courts have addressed whether the definition of "true threats" provided in *Black* introduced an intent element into the First Amendment analysis of true threats. In *United States v. Cassel* (9th Cir. 2005) 408 F.3d 622, the court addressed the facial validity of a statute that punished "[w]hoever, by intimidation ... hinders, prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of federal land at public sale." (*Id.* at p. 626, quoting 18 USC § 1860.) The court in *Cassel* first surveyed the case law involving the threat exception to the First Amendment, and noted it was not entirely clear or consistent. (*Id.* at pp. 628-630.) It then turned to the decision in *Black.* The court in *Cassel* examined the definition of "true threats" and "intimidation" stated by the Supreme Court in *Black* and found that the Supreme Court had laid great weight on the intent requirement:

> The clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment. First, the definition requires that 'the speaker means to communicate . . . an intent to commit an act of unlawful violence.' A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim.

(*Id.* at p. 631, original italics.)

The court concluded that, based on the decision in *Black,* it was "bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." (*United States v. Cassel,* 408 F.3d at p. 633.) The Ninth Circuit rejected Cassel's contention that the statute at issue was facially unconstitutional because it failed to require specific intent. (*Id.* at p. 634.) The court construed the statute to require the necessary element of intent to threaten. (*Ibid.*) However, because the jury had been improperly instructed regarding intent and the record was insufficient to support a conclusion that the error was harmless beyond a reasonable doubt, the court in Cassel reversed the defendant's conviction. (*Id.* at pp. 635-636, 638.)

Less than two months after *Cassel* was decided, the Ninth Circuit, in *United States v. Romo* (9th Cir. 2005) 413 F.3d 1044, applied the objective definition of true threats to determine whether the defendant's statement was a "true threat." Romo was convicted for threatening the President in violation of 18 U.S.C. § 871(a) based on a letter he wrote saying someone should put a bullet in the President's head. (*Id.* at pp. 1045-1046.) On appeal, Romo challenged the sufficiency of the evidence supporting his conviction. (*Id.* at p. 1050.) The Ninth Circuit stated,

> To obtain a conviction under 18 U.S.C. §871(a), the government must prove that a statement is a true threat, which has been defined as a statement, written or oral, [made] in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President.

(*Romo* at p. 1051, citations omitted.)

In a footnote, the court said the recent decision in *Cassel,* i.e. holding that "speech may be deemed unprotected by the First Amendment as a 'true

threat' only upon proof that the speaker subjectively intended the speech as a threat," did not change the court's view. (*Romo, supra,* at p. 1051, fn. 6.) The court said the *Cassel* court did not address whether statutes such as the challenged presidential threats statute required intent. (*Ibid.*) "Because *Romo* has not raised First Amendment issues and *Cassel* does not alter the analysis of presidential threats, we employ the decades-old approach to analyzing threats under 18 U.S.C. § 871(a)." (*Ibid.*)

A little over a month later, in *United States v. Stewart* , *supra,* 420 F.3d 1007, the Ninth Circuit expounded on the "true threat" doctrine. The defendant was convicted of threatening to murder a federal judge in violation of 18 U.S.C. § 115(a)(1)(B). The court discussed *Black* and *Cassel's* interpretation of *Black,* noting that *Cassel* did not address what effect the holding had on other statutes that the court had previously held do not require subjective intent. (*United States v. Stewart, supra,* 420 F.3d at p. 1017.) The Ninth Circuit also observed that in *Orozco-Santillan,* a case decided before *Black,* the court held the objective true threat test was the proper analysis. (*Ibid.*) The Stewart court explained that the statute at issue contained a specific intent element, i.e. "with the intent to impede, intimidate, interfere with, or retaliate against . . .," so it appeared to subsume the subjective "true threat" definition. (*Ibid.*) The court ultimately found the statements at issue were "true threats" under either the objective or subjective standard, and not protected speech. (*Id.* at p. 1019.)

In *Fogel v. Collins* (9th Cir. 2008) 531 F.3d 824, a case involving a civil suit against officers for violating Fogel's First Amendment rights, the Ninth Circuit analyzed whether statements such as "I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST" and "PULL ME OVER! PLEASE, I DARE YA," written on the outside of Fogel's van constituted "true threats." (*Id.* at pp. 827-830.) The court began by noting the Ninth Circuit "has thus far avoided deciding whether to use an objective

or subjective standard in determining whether there has been a 'true threat.'" (*Fogel, supra,* at p. 831.) The court noted that until *Black,* courts used an objective standard, i.e. whether it is reasonably foreseeable to the speaker that the listener will interpret the communication as a threat, or whether a reasonable person would foresee the communication would be interpreted by the listener as a threat. (*Ibid.*) The *Fogel* court acknowledged that after *Black,* the court in *Cassel* applied a subjective standard, i.e., that a "true threat" required a finding that "the speaker subjectively intended the speech as a threat." (*Ibid.*)

Citing *Stewart,* the court said that subsequent cases have applied both an objective and subjective standard. (*Fogel, supra,* at p. 831.) The *Fogel* court applied both standards to the messages on Fogel's van and found: (1) a reasonable person would not foresee the statements would be interpreted as serious expressions of an intent to cause harm, and (2) Fogel did not intend his statements to threaten serious harm to anyone. (*Id.* at pp. 831-832.)

In *United States v. Parr* (7th Cir. 2008) 545 F.3d 491, the Seventh Circuit addressed the uncertainty regarding whether *Black* imposed a specific intent requirement into the definition of "true threats." Parr challenged his conviction for threatening to use a weapon of mass destruction against a federal government building (18 U.S.C. § 2332a(a)(3)), which was based on statements he made to a fellow inmate. Parr claimed his statements were protected by the First Amendment. (*Id.* at pp. 493-496.) The *Parr* court discussed the discord among the federal courts regarding whether *Black* changed the test for true threats. (*Id.* at pp. 499-500 & fn. 2.)

> It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black;* the plurality's discussion of threat doctrine was very brief. It is more likely, however, that an entirely objective definition is no longer tenable. See *Cassel,*

> 408 F.3d at 631-33. But whether the Court meant to retire the objective "reasonable person" approach or to add a subjective intent requirement to the prevailing test for true threats is unclear.

(*Parr, supra,* at p. 500.)

The court ultimately said it did not need to resolve the issue because the trial court had instructed the jury it could only convict Parr if he "intended his statement to be understood" as a threat. (*Ibid.*)

Other courts have continued to apply an objective standard for true threats even after the decision in Black, but without specifically addressing the issue. (See *Porter v. Ascension Parish School Bd.* (5th Cir. 2004) 393 F.3d 608, 616 ["Speech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as 'a serious expression of an intent to cause a present or future harm.'"] (citations omitted); *Washington v. Johnston* (2006) 156 Wash.2d 355, 361, 127 P.3d 707 [noting that Washington follows an objective standard for determining what constitutes a true threat]; *Citizens Publishing Co. v. Miller* (2005) 210 Ariz. 513, 520; 115 P.3d 107 [stating that "true threats" are "those statements made 'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of [a person];'"] *State v. Deloreto* (2003) 265 Conn. 145, 156; 827 A.2d 671; see also *Cassel, supra,* 408 F.3d at p. 633 fn. 10 [noting that "no other circuit has squarely addressed the question whether *Black* requires the government to prove the defendant's intent."].)

Respondent is aware of only one court other than the court in *Cassel* that has directly addressed whether the decision in *Black* imposed an intent element on true threats. In *New York ex rel Spitzer v. Cain* (S.D.N.Y. 2006) 418 F.Supp.2d 457, 479, the court rejected the defendant's argument that

the decision in *Black* imposed an intent element on the First Amendment analysis of true threats. Despite its conclusion that *Black* did not impose an intent requirement, the *Spitzer* court concluded that the statements at issue would be threats under any standard, whether objective or subjective. (*Id.* at pp. 479-480.)

C. Penal Code Section 140, Subdivision (a) Is Not Unconstitutionally Overbroad Because It Only Targets "True Threats"

Here, as the Court of Appeal properly found, because Penal Code section 140, subdivision (a), limits criminal liability to threats of force or violence against a witness to or a victim of a crime *because* the witness or victim provided assistance or information to a law enforcement officer, or to a public prosecutor in a criminal proceeding, there is no risk it could reach constitutionally protected speech. (Slip Opn. at p. 7.) Thus, because the crime applies only to speech that is not constitutionally protected, the overbreadth doctrine does not apply. (See *People v. Toledo, supra,* 26 Cal.4th at p. 235.)

Unlike the speech at issue in *Watts* and *Black,* the speech punished by section 140, subdivision (a), i.e., retaliatory threats, has no political or social value. Rather, this statute's prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." (See *R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 388; *Virginia v. Black, supra,* 538 U.S. at pp. 359-360.)

When, as here, an objectively reasonable person would foresee the statements would be interpreted as a serious expression of intent "to inflict evil, injury, or damage on another," such threat - - i.e., a "true threat" - - falls outside of and enjoys no protection under the First Amendment. (*United States v. Orozco-Santillan, supra,* 903 F.2d at pp. 1265-1266;

People v. Toledo, supra, 26 Cal.4th at p. 233; *In re. M.S., supra,* 10 Cal.4th at p. 710.) As stated above,

> [threats of violence] fall outside the protection of the First Amendment because they coerce by unlawful conduct, rather than persuade by expression, and thus play no part in the 'marketplace of ideas.' As such, they are punishable because of the state's interest in protecting individuals from the fear of violence, the disruption fear engenders and the possibility the threatened violence will occur.

(*In re. M.S., supra,* 10 Cal.4th at p. 71, citing *R.A.V. v. St. Paul*, *supra,* 505 U.S. at p. 388.)

Penal Code section 140, subdivision (a), does not run afoul of the First Amendment because it narrowly targets threats of bodily harm upon another in retaliation for aiding or assisting law enforcement or a public prosecutor. As the United States Supreme Court held, such threats are not protected under the First Amendment because they "protect individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." (*Virginia v. Black, supra,* 538 U.S. at p. 360; accord *In re M.S., supra,* 10 Cal.4th at p. 714.) Further, threats that fall within the ambit of section 140, subdivision (a), such as threatening to "kill the fucken [*sic*] bastard that said I stole 250,000," add nothing to the protected marketplace of ideas; rather, such speech falls outside of the scope of protected values of persuasion, dialogue and free exchange of ideas and beliefs that are protected by the First Amendment. In addition, such threats are not constitutionally protected because they are likely to "light the fuse" and encourage others to carry out the threat.

"A central purpose of a statute making retaliation a criminal offense is to encourage a certain class of citizens to perform vital public duties without fear of retribution." (58 Am.Jur.2d (2010) Obstructing Justice, § 49, pp. 930-931, citing *Rudolph v. State* (Tex.App. San Antonio 2001) 70

S.W.3d 177.) This is exactly what Penal Code section 140, subdivision (a), does. Threats of retaliation not only harm the victim but they also harm society by causing others to fear what may happen if they assist in a criminal proceeding. The government has a substantial interest in protecting witnesses and preventing a defendant from following through with these types of threats. As the Judicial Council of California stated when analyzing the proposed law, this type of retaliation threat is also an implicit threat to future witnesses or other people who assist or give information to law enforcement or public prosecutors. (Jud. Council of Cal., Admin. Off. Of Cts., Review and Analysis of Assem. Bill No. 2691, March 19, 1982, p. 2.)

Moreover, threats of retaliation require the police or other officials to take action to protect the threatened witness. For example in this case, after appellant threatened to kill Gorman, the police had a duty to protect Gorman and take the necessary steps to assure his safety. Thus, irrespective of whether appellant subjectively intended to threaten Gorman, the societal harm was complete as soon as appellant communicated the threat.

Appellant reads a case from the Second Circuit Federal Court of Appeals, *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, as requiring both specific intent and an immediacy requirement to render any speech prohibited. (AOBM 12-13.) However, neither *Kelner* nor the subsequent California cases cited by appellant impose a requirement that a statute contain the elements of specific intent and apparent ability in order to comply with the constitutional mandates of the First Amendment.

In *Kelner,* during a television interview the defendant threatened to assassinate Yasser Arafat and was convicted of causing to be transmitted in interstate commerce a communication containing a "threat to injure the person of another." (*Id.* at pp. 1020-1021.) On appeal, the defendant

claimed there must be evidence of specific intent to carry out the threat and a statement unambiguously constituting a threat on Arafat's life to except the statement from First Amendment protection. (*Kelner, supra,* 534 F.2d at p. 1024.)

The Second Circuit disagreed: "it cannot be said as a matter of law that appellant was stating only ideas." (*Kelner, supra,* at p. 1025.) The court found that because the jury found the defendant guilty after being instructed that "mere political hyperbole or expression of opinion or discussion does not constitute a threat," and that if the statements were "no more than an indignant or extreme method of stating political opposition to Arafat or the PLO," the jury could have found no threat was made, and that the defendant made a genuine threat to kill and not just a political statement. (*Ibid.*)

The court relied on *Watts* in finding the word "threat" excluded "statements which are, when taken in context, not 'true threats' because they are conditional or made in jest." (*Kelner, supra,* 534 F.2d at p. 1026 quoting *Watts v. United States, supra,* 394 U.S. at p. 708.) The court concluded a "true threat" could be proscribed constitutionally regardless of the existence or lack of a specific intent to carry out the threat, "[s]o long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, and immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." (*Id.* at p. 1027.)

Appellant argues that *In re. M.S., supra,* 10 Cal.4th 698, and *People v. Bolin* (1998) 18 Cal.4th 297, read together, interpose a specific intent and immediacy requirement into the definition of "true threats." (AOBM 13-15.) Not so. Rather, both of these cases suggest that *Kelner's* exact wording is not a mandatory prerequisite to finding a true threat if other

elements of the statute in question provide assurance that a defendant's statement was in fact a "true threat."

In *In re M.S., supra,* 10 Cal.4th 698, this Court analyzed *Kelner* and *Watts,* while examining the constitutionality of Penal Code section 422.6, a hate crime statute used there to prosecute two minors who had threatened gay men because of their sexual orientation. At that time, section 422.6, subdivision (a), made it a crime to, by force or threat of force, willfully threaten any other person in the free exercise of his rights because of the person's sexual orientation or other characteristics, such as race or religion. Subdivision (c) of section 422.6 provided that no violation of subdivision (a) can occur by speech alone, unless the speech threatened violence against a specific person and the defendant had the "apparent ability to carry out the threat." (*In re M.S., supra,* 10 Cal.4th at pp. 706-707.)

The defendants in *In re M.S.* claimed section 422.6 improperly criminalized speech outside the limited, unprotected category of true threats. (*In re M.S., supra,* 10 Cal.4th at pp. 709-710.) They claimed "the First Amendment always requires the threatened harm to be imminent for the threat to be constitutionally punishable," and that the statute's "apparent ability" element was not enough. (*Id.* at p. 711.) This Court rejected their claim and held that the First Amendment does not require the threatened harm to be imminent to punish the threat, and found the defendants' reading of *Kelner* "overly expansive." (*Id.* at p. 711.) The Court further observed the federal Constitution did not require a specific intent to carry out the threat, "so long as circumstances demonstrate the threats 'are so unambiguous and have such immediacy that they convincingly *express* an *intention* of being carried out." (*Id.* at p. 712, quoting *United States v. Kelner, supra,* 534 F.2d at p. 1027, original italics.)

In *In re M.S.,* the Court concluded that *Kelner* did not require every valid statute punishing threats to contain the element of "immediacy or

imminence," and because *Kelner* involved a statute that did not require the specific intent to carry out the threat, *Kelner* used the immediacy requirement to restrict the statute's reach to true threats. (*In re M.S., supra,* 10 Cal.4th at p. 712.) The Court also said the *Kelner* court found the requisite immediacy in the fact the defendant professed the "present ability" to carry out the threat. (*Ibid.*) Because subdivision (c) of section 422.6 contained an "apparent ability" element, it was consistent with *Kelner*. (*Ibid.*) "Apparent ability" to carry out the threat means the threat "would reasonably tend to induce fear in the victim," even if the victim does not actually experience the fear; it is an objective rather than a subjective test. (*Id.* at p. 715.)

The Court also found that unlike the statute at issue in *Kelner*, section 422.6 expressly requires a threat be "willful," i.e. proof the defendant had the specific intent by means of the threats to interfere with the victim's legally protected rights, thus protecting against its misapplication to protected speech. (*In re M.S., supra,* 10 Cal.4th at pp. 712-713.) Thus, the concerns that led the *Kelner* court to impose the immediacy requirement were satisfied. (*Id.* at pp. 713-174.)

In *Bolin,* the defendant wrote a letter saying he would kill the addressee if that person did not do certain things and refrain from doing other things. (*People v. Bolin, supra,* 18 Cal.4th at p. 336, fn. 11.) The defendant claimed the letter did not violate Penal Code section 422 as a matter of law because it did not contain an unconditional threat. (*Id.* at p. 337.) This Court interpreted *Kelner* and *Watts* to hold that section 422 does not require an unconditional threat. (*Id.* at p. 338.)

The Court explained that when the Legislature revised section 422, it incorporated the *Kelner* language, and that language was then incorporated into CALJIC No. 9.94. (*Bolin, supra,* 18 Cal.4th at p. 338.) The *Bolin* Court observed, "As the *Kelner* court understood this analysis, the [United

States] Supreme Court was not adopting a bright line test based on the use of conditional language but simply illustrating the general principle that punishable true threats must express an intention of being carried out." (*Bolin, supra,* at p. 339.)

Thus, read together, *In re M.S.* and *Bolin* demonstrate there is no "bright line" test to determine whether a statute's language targets only "true threats." Rather, the focus is on whether the statute is "narrowly directed against only those threats that truly pose a danger to society." (*In re M.S., supra,* 10 Cal.4th at p. 710.) Thus, "specific intent or ability to carry out the threat is not an essential element" of the definition of "true threat." (See *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, supra,* 290 F.3d at p. 1076, fn. 9.)

In addition, the other California cases relied on by appellant to support his argument (AOBM 13-17), are inapposite because they deal with statutes prohibiting threats that are intended to create or achieve a future or additional consequence. (See *People v. Dunkle* (2005) 36 Cal.4th 861 [First Amendment challenge to Penal Code section 71, prohibiting threatening public officers, employees, and school officials]; *People v. Monterroso* (2004) 34 Cal.4th 743 [First Amendment challenge to Penal Code section 71, prohibiting threatening public officers, employees, and school officials]; *People v. Jackson* (2009) 178 Cal.App.4th 590 [challenge to instruction regarding crime of attempted criminal threat]; *People v. Barrios* (2008) 163 Cal.App.4th 270 [instructional challenge to CALCRIM No. 2650, which tracks the language of Penal Code section 76, threatening certain public officials]; *People v. Falck* (1997) 52 Cal.App.4th 287 [First Amendment challenge to Penal Code section 646.9, the anti-stalking law]; *People v. Gudger* (1994) 29 Cal.App.4th 310 [First Amendment challenge to Penal Code section 76, threatening certain public officials].) As stated above, Penal Code section 140, subdivision (a), targets retaliatory threats,

i.e. threats made with the intent to retaliate, and thus, by its very language is limited to "true threats."

Further, contrary to appellant's contention (AOBM 22-24), the Court of Appeal in this case correctly interpreted *Black.* In *Black,* the Court explained that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (*Virginia v. Black, supra,* 538 U.S. at p. 359.) Accordingly, the relevant intent is the general intent to communicate a "serious expression of an intent to commit an act of unlawful violence," i.e., to communicate a "true threat." Whether the speaker communicated the "true threat" with the specific intent to cause the person to whom the threat was communicated to feel threatened is irrelevant to determining whether the communication was a "true threat."

A reading of *Black* that transforms "means to communicate" into "subjectively intended to threaten" would require "communicate" to carry much more weight than can reasonably be accorded to the basic understanding of that word. It is a much more reasonable conclusion that "means to communicate" simply reiterates the requirement that the defendant intended to communicate or convey the statement. Further, there is nothing in *Black* to indicate the Supreme Court intended to overrule the objective standard adopted by a majority of the circuit courts and impose a subjective test. (See *United States v. D'Amario* (D.N.J. 2006) 461 F.Supp.2d 298, 302.)

United States v. Velasquez (7th Cir. 1985) 772 F.2d 1348, relied on by the Court of Appeal, is instructive in demonstrating why the speech proscribed under section 140, subdivision (a), is not protected under the First Amendment. Velasquez and other defendants were convicted of several crimes including unlawful retaliation against government

informants, in violation of 18 U.S.C. § 1513.[6] This charge was based on a threat to kill two government informants because they "snitched" on a suspected narcotics racketeer. (*Velasquez, supra,* at p. 1350.) The defendants claimed the statute violated the First Amendment because it punished "idle threats," i.e. the only intent required was the "intent to retaliate," which the defendants claimed was vague. (*Id.* at pp. 1356-1357.)

The Seventh Circuit rejected the defendant's First Amendment challenge to the statute:

> Government cannot be effective if it cannot punish people who intimidate witnesses or informants by threatening to hurt them or damage their property, and no form of words would be significantly clearer than that employed in this statute. The First Amendment is remotely if at all involved. A threat to break a person's knees or pulverize his automobile as punishment for his having given information to the government is a statement of intention rather than an idea or opinion and is not part of the marketplace of ideas.

(*Id.* at p. 1357.)

The court further explained,

> Cases that express concern with the constitutionality of general statutes punishing threats or intimidation do so because of the potential application of such statutes to 'threats' that contain ideas or advocacy, such as a 'threat' to picket an organization if it does not yield to a demand to take some social or political action. [Citations.] The statute at issue in this case is not a prohibition of threats generally and hence does not exploit the ambiguity of such words as threats, intimidate, and coerce; the statute is confined to threats to retaliate forcibly against

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[6] Subdivision (a)(2) of 18 U.S.C. § 1513 read, "Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for . . . any information relating to the commission or possible commission of a Federal offense," is guilty of a felony. Subdivision (a)(1) was the same but applied to protecting witnesses. (*United States v. Velasquez, supra,* 772 F.2d at p. 1356.)

> government witnesses and informants. The statute's limited scope takes it out of the realm of social or political conflict where threats to engage in behavior that may be unlawful may nevertheless be part of the marketplace of ideas, broadly conceived to embrace the rough competition that is so much a staple of political discourse. [Citations.]

(*Velasquez, supra,* 772 F.2d at p. 1357)

The court said that it does not make a difference whether the speaker intends to carry out the threat. (*Velasquez, supra,* 772 F.2d at p. 1357.) Noting that most threats are bluffs, the court held that,

> if the bluff succeeds in intimidating the threatened person, or at least . . . is intended to succeed, it ought to be punished, to prevent putting government informants in fear for their personal safety or their property. And a bluff has no more to do with the marketplace of ideas than a serious threat.

(*Ibid.*)

The *Velasquez* court also pointed out that "it would be impossible to draft a statute that would exclude every hypothetical prosecution that the legal imagination can conjure up." (*Id.* at pp. 1357-1358.) Further, cases such as *Watts* and *United States v. Barcley* (8th Cir. 1971) 452 F.2d 930, "do not suggest that a statute is unconstitutional if it fails to distinguish between the rhetorical and the real." (*Velasquez, supra,* at p. 1358.)

Here, Penal Code section 140, subdivision (a), limits the scope of prohibited speech because the threat must be made against a person protected by the statute for retributive or retaliatory purposes. In other words, the speaker must have the intent to retaliate. Specific intent is not required to prohibit threats of violence. Threats of violence are not protected by the First Amendment because such speech serves none of the purposes of the First Amendment: it does not express ideas or opinions, and it is not part of the marketplace of ideas in which there is dialogue. (*United States v. Velasquez, supra,* 772 F.2d at pp. 1356-1357.) Moreover, the

government has an interest in "reducing the climate of violence to which true threats of injury necessarily contribute." (See *United States v. Kelner, supra,* 534 F.2d at p. 1026.) Such a threat of violence is no more an idea, opinion, or part of a dialogue in the marketplace of ideas than if it had been made with specific intent. Either way, the threat is devoid of constitutional protection by the First Amendment.

In *People v. Carrera* (1989) 49 Cal.3d 291, this Court rejected a challenge to an instruction based on Penal Code section 140's predecessor, section 152. There, the defendant claimed the instruction violated his constitutional right to freedom of speech because it failed to instruct the jury "that speech may constitute a crime only if there is 'clear and present danger' that such speech will lead to illegal activity." (*Id.* at p. 342.) This Court agreed with the People's response that the defendant's "threat to kill Jones, which he had communicated to Jones, under the factual setting, clearly cannot be equated to the mere political hyperbole protected under the First Amendment," citing *Watts.* (*Ibid.*) Likewise here, the speech targeted under Penal Code section 140, subdivision (a), cannot be equated to the type of political hyperbole or marketplace of ideas that is protected by the First Amendment. Rather, this statute is "narrowly directed against only those threats that truly pose a danger to society." (*In re M.S., supra,* 10 Cal.4th at p. 710.)

Without elaboration, appellant also claims section 140, subdivision (a), is constitutionally invalid as applied to him. (AOBM 11.) This contention fails. Here, there can be no doubt that appellant "intentionally or knowingly communicate[d] . . . threat[s]" to kill Mr. Gorman over his anger that Mr. Gorman testified against him and accused him of stealing $250,000 and over the fact that his wife had been convicted due to Mr. Gorman's accusations and/or testimony. (*Planned Parenthood, supra,* 290 F.3d at 1075.) Appellant's many threats to kill or harm Mr. Gorman, and

his statements that he was "gonna go down to Mr. Gorman's house," and "blow his fucken head away" were not mere "political hyperbole." (*Watts v. United States, supra,* 394 U.S. at p. 707.) Rather, they were "true threats" because they were "serious expression[s] of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (*Virginia v. Black,* 538 U.S. at pp. 358-59.) Accordingly, appellant's conviction for violating Penal Code section 140, subdivision (a), must remain intact as it is not in violation of the First Amendment either facially or as applied to appellant.

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks that the decision of the Court of Appeal be affirmed.

Dated: July 22, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 10,290 words.

Dated: July 22, 2010

EDMUND G. BROWN JR.
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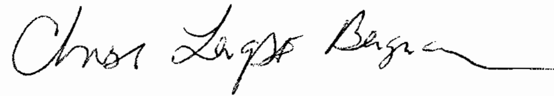

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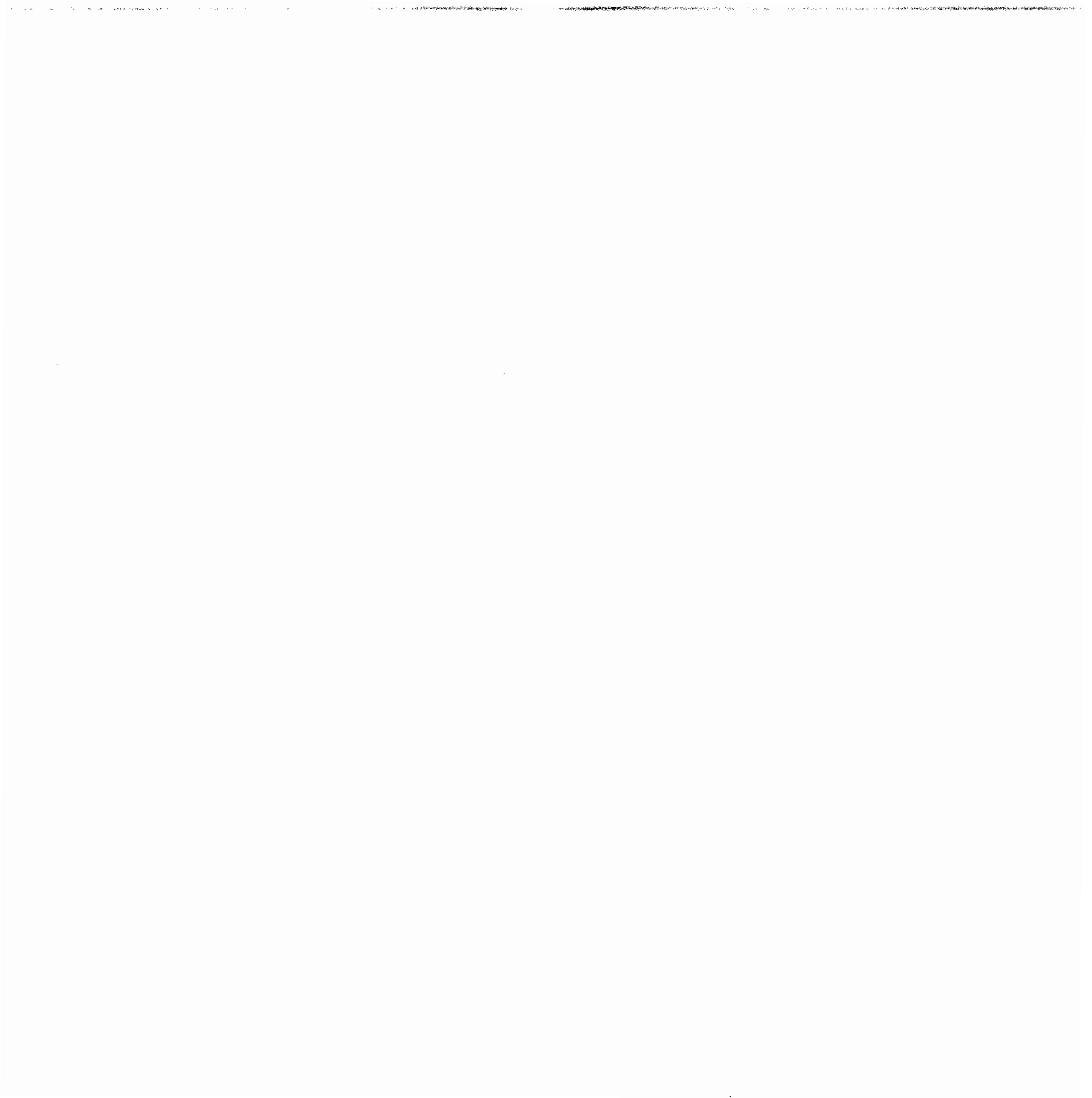

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Eddie Jason Lowery** No.: **S179422**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **July 23, 2010,** I served the attached ***RESPONDENT'S ANSWER BRIEF ON THE MERITS*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Additionally, I electronically served a copy of the above-referenced document from Office of the Attorney General's electronic notification address **ADIEService@doj.ca.gov** on **July 23, 2010,** to the following entity at its electronic notification address:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 23, 2010,** at San Diego, California.

Loreen Blume
Declarant

Loreen Blume
Signature

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