IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Appellant,	)	Case No. S223763
vs.	)	
MARIO ALBERTO GONZALEZ,	)	
Defendant and Respondent.	)	

Fourth Appellate District, Division Two, Case No. E059859
Riverside County Superior Court, Case No. INF1300854
Honorable William S. Lebov, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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By appointment of the California Supreme Court

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RESPONDENT'S OPENING BRIEF ON THE MERITS

QUESTION PRESENTED FOR REVIEW

Can a criminal threat be committed by mere gesture alone and without the exchange of any words, oral or written, between the two parties?

INTRODUCTION

Mario Gonzalez, defendant and respondent herein, never said a word. He never uttered a sound or made any verbal noise whatsoever. Despite this fact, he was charged by way of information with five counts of criminal threats, all because he pointed his finger to the sky – not toward any person – and allegedly simulated a gun with his hand as he drove out of a parking lot.

Mr. Gonzalez filed a motion pursuant to Penal Code section 995[1] asking the trial court to set aside the information on the grounds no evidence was presented that he verbally threatened anyone. The trial court granted his motion and dismissed all counts of criminal threats.

The Court of Appeal reversed the trial court's order, concluding that notwithstanding the language of section 422, the crime of criminal threats encompasses nonverbal gestures.

The appellate court's decision was in error. Section 422, subdivision (a) requires that a criminal threat be made "verbally, in writing, or by means of an electronic communication device." Mr. Gonzalez made no such threat. He urges this Court to overrule the opinion of the Court of Appeal below and find that a criminal threat cannot be committed by mere gesture alone.

STATEMENT OF THE CASE

An information filed on June 17, 2013 charged defendant, Mario Gonzalez, with five felony counts of making criminal threats [Counts 1 through 5], in violation of section 422, two misdemeanor counts of challenging another person to fight in a public place [Counts 6 and 7], in violation of section 415, subdivision (I), and one misdemeanor count of disobeying the terms of an injunction [Count 8], in violation of section 166, subdivision (a), subsection (10). (CT: 112-117.) The information further

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[1] All further references are to the Penal Code unless otherwise stated.

alleged that Counts 1 through 7 were committed for the benefit of a criminal street gang, in violation of section 186.22, and that petitioner suffered three prior felony convictions as prior prison terms, within the meaning of section 667.5, subdivision (b), and a prior serious and violent felony conviction within the meaning of sections 667, subdivision (c) and (e)(1) and 1170.12, subdivision (c)(1). (CT: 112-117.)

On August 9, 2013 Mr. Gonzalez filed a Motion to Set Aside the Information pursuant to section 995. (CT: 122-130.) His motion was based in large part on *People v. Franz* (2001) 88 Cal.App.4th 1426, 1442 in which the Third District Court of Appeal held section 422 requires a criminal threat to be "'made verbally,' i.e., that defendant orally made some noise or sound that was capable of conveying meaning." On August 23, 2013 the court granted the motion and dismissed counts 1 through 7. (CT: 147; RT: 7.) Thereafter, Mr. Gonzalez pled guilty to Count 8. (CT: 149; RT:9.)

Appellant appealed, arguing, among other things, that the ruling in *Franz* was both inapplicable to the case at hand and flawed. The Court of Appeal agreed and reversed the trial court's order setting aside counts 1 through 7. (*People v. Gonzalez* (2014) 232 Cal.App.4th 151.) On March 18 2005, this Court granted review of the issue described above.

STATEMENT OF RELEVANT FACTS

On March 24, 2013, John Doe #1, an officer with the Cathedral City Police Department, met his girlfriend, Jane Doe #1, and three other co-workers and friends,

John Doe #2, Jane Doe #2, and Jane Doe #3, at Restaurant Tapatio in Indio. (RT: 25, 26, 31.) While eating, both John Doe #1 and #2 recognized another restaurant patron, Michelle Franco ("Franco"), who was seated with some male Hispanics. (RT: 28, 41.) John Doe #1 walked to the restroom and smiled at Franco as he passed her table. (RT: 29.) She smirked back. (RT: 29.)

When John Doe #1 returned to his table, he noticed that a couple of the males eating with Franco were staring at him. (RT: 29.) The males looked at John Doe #1 and his table in an "intimidating way." (RT: 47.) John Doe #1 continued to watch the table and eventually saw Franco and the males leave the restaurant. (RT: 31.) As they left, the males continued to stare in his direction. (RT: 31.) John Doe #1 stared back. (RT: 32.)

John Doe #1 watched through the restaurant window and saw the two males enter a white, Ford Excursion that was parked in the restaurant's lot. (RT: 32.) The car backed out of its space, toward the vehicle of John Doe #1. (RT: 32, 64.)[2] John Doe #1 thought the occupants of the Excursion possibly recognized his car or were checking license plates to see what car he drove. (RT: 34.) The excursion then pulled forward and out of the lot. (RT: 31.) As it passed by the front window, the right, front passenger, later identified as Mario Gonzalez ("Mr. Gonzalez"), made a Jackson Terrace gang sign with his hand. (RT: 37, 38.) He also pointed his finger in the air

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[2]. Video surveillance from the restaurant camera clearly showed that the Excursion did not reverse or "circle" the parking lot, as John Doe #1claimed. (RT: 64.)

toward the ceiling, allegedly simulating a gun. (RT: 33, 39, 41-42.) John Doe #1 and John Doe #2 both saw this gesture and feared for the safety of themselves and their friends and coworkers. (RT: 33, 41-42.) Jane Does #1, #2, and #3 did not see any gesture made by Mr. Gonzalez. (RT: 48, 51, 52.)

John Doe #1 next spotted the Excursion on Indio Boulevard in front of the restaurant. (RT: 35.) John Doe #1 and John Doe #2 saw the driver, later identified as Antonio Franco, simulate a gun with his hand and point it in his direction. (RT: 35.) The driver also made a slashing sign across his neck. (RT: 35.) These actions again scared both John Doe #1 and John Doe #2. (RT: 36, 42.)

No words were ever exchanged – orally or written – between the two groups. (RT: 76.)

ARGUMENT

I.

A CRIMINAL THREAT CANNOT BE COMMITTED BY A MERE GESTURE ALONE AND WITHOUT THE EXCHANGE OF ANY WORDS, ORAL OR WRITTEN, BETWEEN THE TWO PARTIES.

The facts of the present case are undisputed. Mr. Gonzalez said not a word and uttered not a sound to any of the alleged victims. The language of section 422 clearly and unambiguously requires that a threatening statement be made either orally, in writing, or by electronic communication. A simple gesture will not suffice. Because

Mr. Gonzalez said nothing, he did not commit and could not have committed any criminal threat.

Moreover, even if the statutory language is ambiguous, Mr. Gonzalez still did not commit any criminal threat. The legislative history of section 422, as well as the wording of related statutes, demonstrates a criminal threat cannot be committed by gesture alone.

A. General Principles of Statutory Construction.

The basic principles of statutory construction are well established. The primary goal of a reviewing court is to ascertain the intent of the enacting body and thereby adopt the construction that best effectuates the purpose of the law. (See, e.g., *People v. Albillar* (2010) 51 Cal.4th 47, 55; *City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919.) In doing so, the court will "first examine the words of the statute, 'giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent.'" (*City of Santa Monica v. Gonzalez, supra,* 43 Cal.4th at p. 919.) Thereafter, "[i]f the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*People v. Albillar, supra*, 51 Cal.4th at p. 55, quoting *People v. Traylor* (2009) 46 Cal.4th 1205, 1212.)

Where, however, an ambiguity exists, the courts may resort to legislative history and other extrinsic evidence and principles of statutory construction in an attempt to resolve the ambiguity:

> [I]f the terms of the statute provide no definitive answer, then courts may resort to extrinsic sources, including the objects to be achieved. . . .When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. . . Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.

(*County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 442 (citations omitted).)

There is no rule of strict construction of penal statutes in California. (Pen. Code, § 4; *People v. Bamberg* (2009) 175 Cal.App.4th 618, 627.) However, the rule of lenity will apply in case of ambiguity. (*People v. Avery* (2002) 27 Cal.4th 49, 57 ["....when a statute is capable of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant."].)

B. Section 422 is Not Ambiguous.

Section 422, subdivision (a) provides:

> Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the ***statement, made verbally, in writing, or by means of an electronic communication device***, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person

> reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison. (Emphasis added.)

Section 422, therefore, punishes only those threatening statements "made verbally, in writing, or by means of an electronic communication device." (Pen. Code,§422, subd. (a).)

Following routine rules of grammatical construction, the word "verbally" found in the statute is an adverb modifying the verb "made." "An adverb is a word or set of words that modifies verbs, adjectives, or other adverbs." (The Blue Book of Grammar and Punctuation, "*adverb,*" <http://www.grammarbook.com/grammar/ adjAdv.asp>.) Generally speaking, an adverb answers who, when, where, how, or to what extent. (*Ibid.*) With regard to section 422, the words following "statement" describe "how" the statement must be made. The statement must be made "verbally, in writing, or by means of an electronic communication device." Thus, "how" a statement must be made is unambiguous. Conduct alone is not included.

Moreover, the word "verbally" as used in section 422 is not in and of itself ambiguous. The word "verbal" is derived from the Latin *verbalis*, meaning "word." (Oxford Dictionary, "*verbal,*" <http://www.oxforddictionaries.com/us /definition/american_english/verbal>.) The common understanding of the word "verbal" is "of, relating to, or consisting of words." (Merriam-Webster Dictionary,

"verbal," <http://www.merriam-webster.com/dictionary/verbal>.) Not a single definition of the word verbal listed in the Merriam Webster online dictionary pertains to conduct. (*Ibid.,* [Full definition of the word "verbal" includes: of, relating to, or consisting of words, of, relating to, or involving words rather than meaning or substance, consisting of or using words only and not involving action, of, relating to, or formed from a verb, spoken rather than written, verbatim, word-for-word, of or relating to facility in the use and comprehension of words].) Indeed, one definition provided ("consisting of words only and not involving action") specifically excludes conduct. (*Ibid.*)

Numerous additional dictionaries provide similar definitions of the word "verbal." For example, Dictionary.com defines "verbal" as "of or relating to words," "consisting of or in the form of words," and "expressed in spoken words; oral rather than written." (Dictionary.com, "*verbal,"* <http://dictionary.reference.com/browse/verbal>.) Likewise, The Free Dictionary defines "verbal" as "expressed in spoken rather than written words; oral." (The Free Dictionary, "*verbal,"* <http://www.thefreedictionary. com/verbal>.)

By comparison, the common understanding of the word "conduct" is "the way that a person behaves in a particular place or situation." (Merriam-Webster Dictionary, "*conduct,* <http://www.merriam-webster.com/dictionary/conduct>; see

also Online Dictionary, *"conduct,"* <http://dictionary.reference.com/browse/conduct> ["Conduct" means personal behavior; way of acting; bearing or deportment].)

The words the Legislature chooses to include in a statute are "the best indicators of its intent." (*Hale v. Superior Court* (2014) 225 Cal.App.4th 268, 275, citing *People v. Ramirez* (2010) 184 Cal.App.4th 1233, 1238.) Here, the Legislature chose to use the words "verbally," "in writing," and "by means of an electronic communication device" to modify and explain how a threatening statement must be made. Thus, looking to the plain language of the statute, section 422 is unambiguous and prohibits threatening statements made by the oral expression or words, the written expression of words, or words otherwise communicated through electronic communication device and not by conduct alone.

C. Even if the Words of the Statute Are Ambiguous, the Legislative History of Section 422, as Well as the Language of Related Statutes, Demonstrates That Conduct Alone Cannot Violate the Statute.

When the language of a statue is "susceptible of more than one reasonable interpretation," courts must look to a "variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*People v. Jefferson* (1999) 21 Cal.4th 86, 94.) Looking to the legislative history of section 422, the statutes plain language, and the language as comparted with that of similar statutes, the Court of Appeal's opinion in

the instant case, allowing for the punishment of non-auditory conduct, is simply not supported.

The requirement that a criminal threat be made orally or in writing was added by amendment to section 422 in 1998. (Sen. Bill No. 1796 (1997-1998 Reg. Sess.) §3; Stats. 1998, ch. 825, §3.) The purpose of the amendment was to "clarify that [section 422] applies to threatening *statements made verbally, in writing, or by means of an electronic communication device*." (*Ibid.*, emphasis added.) Prior to the amendment, the statute simply prohibited any "statement" made to be taken as a threat. (*Ibid.*) A "statement" is not necessarily limited to verbal or written communications. For example, as defined by Evidence Code section 225, a "statement" means any "oral or written verbal expression" *or* "nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." As explained fully above, by adding the modifying language "verbally, in writing, or by means of an electronic communication device" after the word "statement" in its 1998 amendment, the legislature made clear its intent to criminalize only those threatening statements made orally, in writing, or by electronic communication and not any nonverbal statement or gesture.

The 1998 amendment to section 422 has considerable significance. Generally speaking, "a substantial change in the language of a statute ... by an amendment indicates an intention to change its meaning." (*Mosk v. Superior Court* (1979) 25

Cal.3d 474, 493.) Moreover, "it is presumed the Legislature made changes in wording and phraseology deliberately . . . and intended different meanings when using different words." (*In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 938, internal citations omitted.) The change in language in the criminal threats statute was not subtle. To the contrary, the change was significant. By changing the specific language of the statute and by using words to modify what type of statement would violate the statute – namely statements made verbally, in writing, or by means of electronic communication device – the Legislature indicated its intention to change the definition of statement as applied to the criminal threats statute. The Legislature made clear with this amendment that the definition of statement no longer applied to nonverbal conduct.

People v. Franz, supra, 88 Cal.App.4th 1426 is currently the only published opinion addressing whether a criminal threat can be committed by mere gesture alone. *Franz* concluded it cannot.

That facts of *Franz* were as follows: Defendant followed his former girlfriend home, gained entry to her house, and assaulted her. He also assaulted two friends who were with her. Upon breaking away from defendant, the girlfriend called 911 and the police arrived. An officer interviewed the two friends while defendant, who was not in custody, stood behind. As the witnesses spoke to the officer, defendant looked directly at them, made hand gestures and said "shush," shook his head, and ran his

hand across his throat. After the police left, defendant told the friends not to say a word. He was convicted of making criminal threats against each of the two friends. (*People v. Franz, supra,* 88 Cal.App.4th at pp. 1436-1437.)

On appeal, defendant argued his convictions for criminal threats had to be reversed because insufficient evidence was presented that he made a verbal statement. The *Franz* court was called upon to determine whether nonverbal conduct could support a conviction for criminal threats under section 422. After reviewing dictionary definitions of the word "verbal," related statutes, the definition of "statement" in the Evidence Code, and even the effect of sign language, *Franz* concluded that conduct alone could not support a conviction under section 422. To the contrary, *Franz* held section 422 requires a criminal threat to be "'made verbally,' i.e., that defendant *orally made some noise or sound* that was capable of conveying meaning." (*People v. Franz, supra,* 88 Cal.App.4th at p. 1442, emphasis added.) *Franz* continued, "gestures, unaccompanied by verbal sound, do not qualify as verbal statements under section 422" and could not alone support a defendant's conviction for making a criminal threat. (*Id.*, at p. 1439.)

In reaching its holding, the *Franz* court first considered, then rejected, various definitions of the word "verbal." (*People v. Franz, supra,* 88 Cal.App.4th at p. 1440.) Because of the differing dictionary definitions of the word "verbal," *Franz* found the language of section 422 was ambiguous and turned to "other aids of interpretation"

outside the dictionary definitions. (*Ibid.*)[3] For example, *Franz* reviewed other statutes, including section 646.9, subd. (g) (the "stalking" statute), and concluded the Legislature knew how "to make a statute applicable to nonverbal communication," and the omission "of any reference to 'conduct' in section 422 suggests the Legislature did not intend for communicative conduct to be penalized in that statute." (*People v. Franz, supra*, 88 Cal.App.4th at p. 1440.) *Franz* acknowledged that Evidence Code 225 defined a "[s]tatement" to include nonverbal conduct intended "as a substitute for oral or written verbal expression." (*Id.*, at p. 1441.) However, *Franz* held this definition of "statement" in the Evidence Code did not apply to the interpretation of section 422 for the following reason:

> [W]hile it is true that Evidence Code section 225 provides that a "statement" may mean nonverbal conduct, it is equally true that the Evidence Code applies, "[e]xcept as otherwise provided by statute...." Here, as pertinent, section 422 expressly provides that the "statement" must be "made verbally." The Penal Code definition controls. Indeed, because Evidence Code section 225 expressly refers to "nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression," the Evidence Code statute further demonstrates that the Legislature knows how to define nonverbal conduct, as a means of communication, when it wants to. (*Ibid.*)

Franz reviewed the entirety of the record and ultimately held defendant's conviction was supported by substantial evidence. *Franz* found defendant's "shushing" noise, heard by at least one of the witnesses, "constitute[d] substantial

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[3] Despite the contrary holding in *Franz*, respondent submits, for the reasons discussed above, that the language in section 422 is not ambiguous.

evidence of a verbal 'statement,' the import of which was amplified by the throat-slashing gesture to constitute a threat to kill if the victim talked to the police." (*Franz, supra*, 88 Cal.App.4th at p. 1446.)

The Court of Appeal in the present case disagreed with the analysis in *Franz*. In doing so, the court relied heavily on a single statement made by the Legislature in enacting the 1988 amendment which read: "'It is the intent of this act to clarify that electronic communications are included in the actions that can constitute the crimes of harassment and stalking. *It is not the intent of the Legislature, by adopting of this act, to restrict in any way the types of conduct or actions that can constitute harassment or stalking.*' (Sen. Bill No. 1796 (1997-1998 Reg. Sess.) Stats 1998, ch. 825, § 1, italics added.)" (Slip Opn., p. 11.) Based on this single statement, the court concluded that since nonverbal conduct apparently constituted a criminal threat prior to the 1988 amendment that it still constituted a threat after the amendment, despite the Legislature's intent to clarify that a "statement," for purposes of section 422, was a threat made "verbally, in writing, or by means of an electronic communication device," and not simply a gesture. (Sen. Bill No. 1796 (1997-1998 Reg. Sess.) Stats 1998, ch. 825, § 1.)

The Court of Appeal's analysis is flawed for several reasons. First, as stated in *Franz*, the Legislature knows how to specifically penalize conduct. *(People v. Franz, supra*, 88 Cal.App.4th at p. 1440.) In fact, the Legislature has specifically penalized

nonverbal conduct in not only the criminal stalking statute, as pointed out in *Franz*, but also in code section 76 which punishes criminal threats made to public officials. Section 76, subdivision (a) provides:

> Every person who knowingly and willingly threatens the life of, or threatens serious bodily harm to, any elected public official, county public defender, county clerk, exempt appointee of the Governor, judge, or Deputy Commissioner of the Board of Prison Terms, or the staff, immediate family, or immediate family of the staff of any elected public official, county public defender, county clerk, exempt appointee of the Governor, judge, or Deputy Commissioner of the Board of Prison Terms, with the specific intent that the statement is to be taken as a threat, and the apparent ability to carry out that threat by any means, is guilty of a public offense...

Section 76, subdivision (b)(5) defines "threat" as "a verbal or written threat or a threat implied by a pattern of *conduct* or a combination of verbal or written statements and *conduct* made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family." (Emphasis added.) Therefore, if the Legislature intended for section 422 to cover nonverbal conduct they certainly knew how penalize such conduct. Moreover, "it is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes." (*In re Marriage of Corman* (1997) 59 Cal.App.4th 1492, 1499, quoting *In re Jose A.* (1992) 5 Cal.App.4th 697, 701–702, 7 Cal.Rptr.2d 44.) Thus, by

failing to specifically include nonverbal conduct in their amendment to section 422 while specifically including nonverbal conduct in both the stalking statute and in section 76 – a similar if not nearly identical statute – the Legislature demonstrated it intended *not* to criminalize mere conduct as opposed to oral or written statements.

In addition, Senate Bill 1796 added language to four different statutes in an effort to penalize cyberbullying: civil stalking, criminal stalking, criminal harassing phone calls, and criminal threats. (See Sen. Bill No. 1796 (1997-1998 Reg. Sess.) §3; Stats. 1998, ch. 825 §1.) Prior to the amendment, the two stalking statutes and the criminal harassment statute already contained language that expressly penalized non-verbal conduct. (Sen. Bill No. 1796 (1997-1998 Reg. Sess.) §3; Stats. 1998, ch. 825 §§2, 4, 5.) The Legislature's statement that it was not trying to restrict the types of conduct that could constitute *stalking* or *harassment* appears to apply only to the stalking and harassment statutes that already specifically penalized nonverbal conduct, and not to the criminal threats statute which did not. To the contrary, the Legislature did something very different when it amended section 422. Instead of just adding language that would punish cyberbullying as it had in the stalking and harassment statutes, the Legislature completely redefined statement to mean a threat that is made verbally, in writing, or by electronic communication device. (Sen. Bill No. 1796 (1997-1998 Reg. Sess.) §3; Stats. 1998, ch. 825 §3.) As stated above, such change was substantial and evidenced the Legislature's intent to alter the meaning of the

statute. (*Mosk v. Superior Court, supra,* 25 Cal.3d at p. 493.) The Court of Appeal's analysis of the Legislative history, is, therefore, flawed and should be overruled.

D. If the Statute is Ambiguous, Any Ambiguity Should be Construed in Respondent's Favor Under the Rule of Lenity.

As discussed above, Mr. Gonzalez submits the language used in section 422 is not ambiguous. However, if the language is ambiguous, any ambiguity must be construed in his favor under the rule of lenity. The fact that the statute excludes conduct is an issue for the Legislature, and not the courts, to correct.

It is the Legislature's prerogative to define crimes and set punishments for crimes. (*People v. Albritton* (1998) 67 Cal.App.4th 647, 660.)

Ambiguities in penal statutes must be resolved in favor of the defendant, because the "touchstone" of the rule of lenity "is statutory ambiguity." (*Bifulco v. United States* (1980) 447 U.S. 381, 387 [100 S. Ct. 2247, 65 L. Ed. 2d 205].)

"When language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstances of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute. [Citations.]" (*People v. Overstreet* (1986) 42 Cal.3d 891, 896.) This rule has "constitutional underpinnings." (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.) "Under the separation of power doctrine, the rule serves to protect the legislature's exclusive authority to define

crimes from judicial encroachment. As a matter of fundamental due process the rule helps to ensure that citizens are given fair warning of conduct punishable as a crime." (*Ibid.*)

"Strict construction of penal statutes protects the individual against arbitrary discretion by officials and judges and guards against judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them. Strict construction also prevents judicial interpretation from changing the legal consequences of acts completed prior to the decision and thus aids in meeting the requirement that a defendant have a fair warning of the consequences of his acts reflected in the constitutional prohibition against ex post facto laws. [Citations.]" (*People v. Overstreet, supra,* 43 Cal.3d at p. 896.)

The Court of Appeal found that it would be absurd to "interpret the language of section 422 to exclude non-verbal and threatening gestures." (Slip. Opn., p. 13.) In rare cases, the literal meaning of certain words in a statute may be thrown out to avoid absurd results. (*California School Employees Assn. v. Governing Bd. of South Orange County Community College Dist.* (2004) 124 Cal.App.4th 574, 588.) However, "this approach is reserved for 'extreme cases' where the absurdity is patent." (*Ibid.*) Courts must exercise caution, however, "using the 'absurd result' rule; otherwise, the

judiciary risks acting as a 'super-Legislature' by rewriting statutes to find an unexpressed legislative intent." (*Ibid.*)

Here, excluding non-verbal gestures would not lead to patently absurd results for one simple reason: a gesture alone fails to convey a single meaning. Generally speaking, words or sounds must accompany a gesture in order to give the gesture a particular meaning. Indeed, examining the gesture made in the present case, it appears that interpreting section 422 to include nonverbal gestures would lead to more absurd results than excluding them.

The crime of criminal threats is a specific intent crime. Thus, to violate section 422, not only must a defendant threaten to kill or cause great bodily injury to another, the defendant must do so with the specific intent that the statement be taken as a threat. (CALCRIM 1300.) Making a gesture unaccompanied by words simply cannot satisfy the elements of this crime.

In the present case, the gesture made by Mr. Gonzalez was a "finger gun." He made his hand in the shape of a gun and pointed his finger to the sky. This gesture in and of itself does not carry one specific meaning and is instead susceptible to various interpretations. A quick Google search reveals that the making of a "finger gun" can be used to mean something as innocuous as "hello" or "I understand." (Online Urban Dictionary, *Finger Guns*, <http://www.urbandictionary.com/define.php?term=finger+guns>.) It can also mean, "I am so bored I want to be put out

of my misery" or "I'm flirting with you." (*Ibid.*) In some instances, the making of a "finger gun" can mean "I want to harm you." (Yahoo Answers, *What does a finger gun and peace sign hand gesture mean?* <https://answers.yahoo.com/question/index?qid=20130407203119AAQBP91>.) Thus, since this gesture alone fails to necessarily convey a threat of death or great bodily injury, its exclusion from the criminal threats statute would not and does not lead to absurd results. As stated above, the law requires a specific threat of death or great bodily injury. A gesture alone fails to convey such a threat.

The present case does not present an "extreme case" requiring the court to "violate the separation of powers of government." (*Unzueta v. Ocean View School Dist.*, (1992) 6 Cal.App.4th 1689, 1698.) The fact that the legislature did not include gestures or conduct as a way to violate section 422 does not make the law absurd. "Each time the judiciary utilizes the 'absurd result' rule, a little piece is stripped from the written rule of law and confidence in legislative enactments is lessened." (*Id.*, at p. 1699.) Such result should not be allowed in the present case.

Should the Legislature agree that excluding "conduct" from the criminal threats statute was not what it intended, it can take appropriate steps to remedy the statute. "'Courts must take a statute as they find it, and if its operation results in inequality or hardship in some cases, the remedy therefore lies with the legislative authority.'" (*Unzueta v. Ocean View School Dist.*, *supra*, 6 Cal.App.4th at p. 1697.) Further, to

the extent section 422 is ambiguous, leaving the remedy to the Legislature is consistent with the rule that appellant is entitled to the benefit of every reasonable doubt as to the true interpretation of the words or the construction of the statute. (*People v. Overstreet, supra,* 42 Cal.3d at p. 896.) Any other result leads to the "judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them." (*Ibid.*)

In the present case, any ambiguity in the statute must be construed in Mr. Gonzalez favor.

CONCLUSION

For the reasons set forth above, respondent, Mario Gonzalez, respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: June 16, 2015

Respectfully submitted,

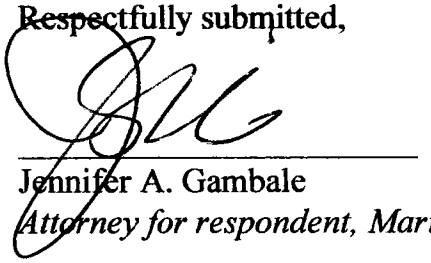
Jennifer A. Gambale
Attorney for respondent, Mario Gonzalez

WORD COUNT CERTIFICATE

I hereby certify, under penalty of perjury, the attached Petition for Review contains 5,683 words, as determined by the computer program used to prepare this document.

Dated: June 16, 2015

Respectfully submitted,



Jennifer A. Gambale
Attorney for respondent, Mario Gonzalez

PROOF OF SERVICE BY MAIL

I, JENNIFER A. GAMBALE, declare as follows:

I am over the age of 18 years and not a party to this action. My business address is 111 Pacifica, Suite 120, Irvine CA 92618. On June 16, 2015, I served the attached RESPONDENT'S OPENING BRIEF ON THE MERITS (CASE # S223763) by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail, with postage thereon fully prepaid.

Clerk of the Superior Court
Riverside County
Larsen Justice Center
46-200 Oasis Street
Indio, CA 92201
Attn: Hon. William S. Lebov

Aimee J. Larsen
78-365 Highway 111, Suite 392
La Quinta, CA 92253

Office of the District Attorney
3960 Orange Street
Riverside, CA 92501
Attn: Kelli Catlett

Clerk, Court of Appeal
Fourth Appellate District
Division Two
3389 Twelfth Street
Riverside, CA 92501

A Copy was also sent to Mario Gonzalez

I declare under penalty of perjury of the laws of the state of California that the foregoing is true and correct. Executed this 16th day of June, 2015.

JENNIFER A. GAMBALE

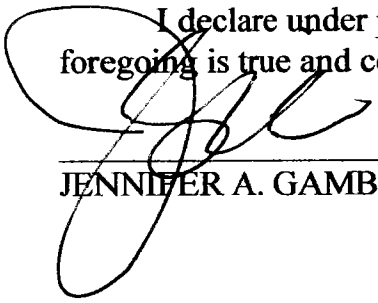
PROOF OF ELECTRONIC SERVICE

Furthermore, I, Jennifer Gambale, declare that on June 16, 2015, at approximately 8:00 a.m., I electronically served from my electronic notification address RESPONDENT'S OPENING BRIEF ON THE MERITS (CASE # S223763) to the following entities and electronic notification addresses and that the transmissions were reported as complete and without error:

APPELLATE DEFENDERS INC, e-service-criminal@adi-sandiego.com

OFFICE OF THE ATTORNEY GENERAL, ADIEService@doj.ca.gov

I declare under penalty of perjury of the laws of the state of California that the foregoing is true and correct. Executed this 16th day of June, 2015.



JENNIFER A. GAMBALE