In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

BEN CHANDLER, JR.,

Defendant and Appellant.

Case No. S207542

Fourth Appellate District, Division Two, Case No. E054154
Riverside County Superior Court, Case No. SWF027980
The Honorable Mark E. Johnson, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Does attempted criminal threat actually require circumstances such that the threat would reasonably cause sustained fear, or is it sufficient that the defendant intend the circumstances to be such that the threat would reasonably cause sustained fear?

SUMMARY OF ARGUMENT

The criminal threat statute of Penal Code section 422[1], makes it a crime to "willfully threaten to commit a crime which will result in death or great bodily injury to another person" under specified circumstances where the defendant specifically intend to threaten another and that the person is placed in actual fear, reasonable under the circumstances. In *People v. Toledo* (2001) 26 Cal.4th 221 (*Toledo*), this Court recognized an attempted criminal threat occurs when a defendant acts with the specific intent to make the very kind of threat to which section 422 applies. This Court explained the threat need not be completed, and occurs even when the threat is conveyed but the victim is not in actual fear he or she reasonably could have sustained, does not understand the threat, or does not even receive the threat. As shown below, this means a jury need only find the speaker intended to communicate what would reasonably cause fear.

In this case, "[f]or no apparent reason, defendant Ben Chandler, Jr., walked up to a female neighbor while swinging a golf club from side to side and yelled, 'Fuck you, bitch. I'm going to kill you.' The next day, likewise for no apparent reason, he walked up to another female neighbor and yelled, 'I'm going to kill you[,] bitch.'" (*People v. Chandler*, Slip Opn. (Opn.) at pp. 1-2.) The jury was told this was a completed criminal threat if among other specific circumstances, the victims were in actual and

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

reasonable sustained fear. But to determine if this was instead an attempted criminal threat, the jury only had to decide if Chandler intended to communicate a threat that would cause reasonable fear.

The instructions given in this case properly defined the attempted criminal threat offense. Further, the Constitution requires nothing more in order to proscribe attempted criminal threats, because the offense only targets true threats and does not infringe on protected speech under the First Amendment. Finally, if the instructions in this case were somehow deficient, the error was harmless because no reasonable jury would have concluded Chandler's threats were not the kind to have reasonably caused fear.

Chandler argues otherwise. He contends the First Amendment protects speech unless it is objectively viewed by a reasonable person as a threat, and says his position is supported by this Court's decision in *People v. Lowery* (2011) 52 Cal.4th 419 (*Lowery*). He seems to say that because a completed criminal threat requires a victim to be in actual and reasonable fear, the attempted criminal threat offense must require the same. That is, a person's intent to make a threat engendering fear is not enough - attempted criminal threat also requires a jury to find the victim was objectively and reasonably in fear. If this Court ruled otherwise, he says it would create an inequitable situation where a statement could be protected under the First Amendment and not be a criminal threat because it was not objectively seen as a threat, but an attempt to make that same statement would be punished as an attempted criminal threat merely because a defendant intended it to be taken as such.

Chandler manufactures a constitutional problem where one simply does not exist. He misunderstands the distinction between what is protected speech under the First Amendment and what may be criminalized under the true threat doctrine. And his argument is inconsistent with the

precedent of the United States Supreme Court and this Court. The First Amendment does not protect speech intended as a threat, nor does it protect speech objectively viewed as a threat. And here, the attempted criminal threat offense properly proscribes only speech communicated with specific intent a reasonable listener would understand it to be a threat. Consequently, for the attempted criminal threat offense, a jury need only be instructed it occurs where the speaker intended to communicate what would reasonably cause fear.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Chandler had a history of threatening behavior toward others. In 2006, he threatened a woman with a knife over a money dispute and in 2007, pleaded guilty to assault with a deadly weapon and dissuading a victim from reporting a crime. (3 RT 443, 450.) Here, Chandler engaged in a pattern of escalated threatening behavior toward two neighbors, Jaime Lopez and Deborah Alva. He specifically threatened to kill each of these women on January 29 and January 30, 2009.[2]

A. The Attempted Criminal Threats

Chandler lived on Pottery Lane in Lake Elsinore. (1 RT 129.) Jaime Lopez lived with her two children just around the corner on Scrivner Lane. (1 RT 114-115, 129.) In January of 2009, Chandler drove by Lopez, called her a bitch and said, "I know when you are alone." Chandler's comments scared her. (1 RT 117.) The next day he drove by again and said to her, "fuck you bitch." (1 RT 121-123.) Chandler would also walk up and down the middle of the street using profanity and laughing at her. (1 RT 125,

[2] The information listed the women as Jane Doe 1 and 2. (2 CT 224.) They were also each referred by the court's initial instructions as Jane Doe 1 and 2. (1 RT 102.) But the victims each testified under their names (see 1 RT 112; 2 RT 277), and were identified by name in the jury instructions and closing arguments (see 2 CT 261 and 3 RT 576).

127.) Around this time, "weird" things started to happen at Lopez's house, when her husband (then boyfriend) was not at the house and his car was not present in the driveway. (1 RT 126-127; 2 RT 197.) For example, a tennis ball was bounced off her windows and a pipe was thrown at and dented her front door. (1 RT 127.) Someone also would pound on her back windows and scream. (2 RT 192-193.) At the end of the month, someone threw nails all over the street in the cul-de-sac and on Lopez's driveway and spray-painted the word "fuck" on the street. (1 RT 128, 140-141; see also 2 RT 326-328 [neighbor Betty Huffman also called police about nails].) Lopez discussed these incidents with her neighbor and friend Deborah Alva. (1 RT 133.)

Alva's family spent Thanksgiving, Christmas, and New Years with Chandler and had considered him a friend. (2 RT 280.) But their friendship ended after a business dispute and because Chandler owed her money. (2 RT 281-282.)

On the early evening of January 29, Alva was on her porch and saw Chandler walking up the street screaming, "I'm going to kill you, you fucking bitch." He was looking directly at her swinging a golf club and walking toward her home. Alva responded to him, "bring it on" because she did not want to show he intimidated her. However, she was "afraid inside" and later went over to a friend's home. (2 RT 293-295.) Alva was concerned for her safety and thought Chandler might come up to her porch after she responded. (2 RT 312.) Alva had never seen Chandler with a golf club before. (2 RT 312.) She was afraid that Chandler would hurt her, but he eventually turned around and walked back to his home. (2 RT 295-296, 314.) Alva thought perhaps he was under the influence of drugs. (2 RT 297.) Alva's husband called the police. She turned on the house lights, slept in the living room and was unable to sleep the entire weekend. (2 RT 298.)

Lopez had also seen Chandler walking up the street that evening also carrying an object and shouting, "fuck you bitch, I'm going to kill you." (1 RT 141; 3 RT 365.) Likewise, Ms. Huffman had also seen Chandler walking and shouting that evening. (2 RT 329-333.)

That night, Lopez spent the night at Alva's house. Lopez and Alva both heard Chandler loudly singing a song from his front porch, shouting out the lyrics, "it always feels like someone's watching you, somebody's going to set you free." (1 RT 143; 2 RT 299, 311.)

The next day, January 30, Lopez was in her car and about to take her two children and Alva's son Daniel to Knotts Berry Farm. Chandler approached Lopez's car and threatened, "I'm going to kill you bitch." Lopez was frightened and drove away. (1 RT 131; 2 RT 250-254; 3 RT 359.) Lopez called the police within minutes. (2 RT 188.) In all, Lopez believed she called the police about seven different times because of Chandler's actions. (3 RT 215.) Eventually, Lopez moved out of the neighborhood because of Chandler. (2 RT 240-241.)

B. Defense

Chandler denied putting nails in the street or writing graffiti. (3 RT 401, 408.) He admitted walking on Scrivner and noted he took walks in the neighborhood every morning. (3 RT 402, 404.)

He claimed that on January 29, he was chipping golf balls in his back yard when he noticed a laser light on his chest. (3 RT 408-409.) He was alarmed because he had been shot at the week before. (3 RT 410.) Chandler said the light was coming from Alva and a group of people gathered at the top of Scrivner Lane. (3 RT 418.) He yelled, "stop pointing that fucking thing at me," and heard Alva laughing. (3 RT 419-420.) Chandler then swung his golf club at a tree and turned and went inside the house. (3 RT 421-422.)

Chandler denied knowing or ever seeing Lopez and never claimed to have fathered a child with her. (3 RT 401, 423.)

C. Procedural History

A Riverside County Superior Court jury found Chandler not guilty of two counts of stalking (§ 646.9, subd. (a)), and although it acquitted him of two counts of criminal threats (§ 422), found him guilty of the lesser offenses of attempted criminal threats (§ 422 and § 664). The court declared a mistrial as to a lesser offense of attempted stalking. (1 CT 277-278.) The court also found true two "strike" priors and two prior serious felony conviction enhancements, but later struck one. The court sentenced Chandler to 33 years in prison. (4 RT 696; 2 CT 305-306.)

On appeal Chandler claimed, inter alia, the trial court should have sua sponte instructed the jury that attempting to make a criminal threat, like the completed crime of a making a criminal threat, required it to determine whether it would be reasonable under the circumstances for the victim to be in sustained fear.

In a published decision, the court below held attempted criminal threat is committed so long as the defendant intend his threat would cause a victim reasonable fear, even if it would not be reasonable for the victim to be in fear under the circumstances. And, because speech intended as a threat cannot possibly have any chilling effect on protected speech, this would fall within the "true threat" exception of unprotected speech under the First Amendment.

The decision below disagreed with *People v. Jackson* (2009) 178 Cal.App.4th 590 (*Jackson*), which held to the contrary on both points.

(Opn. at pp. 6-21.) This Court granted Chandler's Petition for Review on February 13, 2013.[3]

ARGUMENT

I. ATTEMPTED CRIMINAL THREATS DO NOT INFRINGE ON THE FIRST AMENDMENT AND OCCUR IF A DEFENDANT INTENDS TO CONVEY A THREAT THAT WOULD REASONABLY CAUSE FEAR

Speech intended by the speaker to be taken as a threat or objectively viewed as threats by others, is not protected speech under the First Amendment and can properly be regulated under the "true threat" doctrine. In that vein, California's criminal threat statute appropriately proscribes speech a defendant specifically intend to be taken as a threat, which our Legislature deemed is one that rises to the level of one so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and immediate prospect of execution. And, it criminally punishes that conduct when it causes the person threatened to actually be in sustained fear, a fear reasonable under the circumstances.

Similarly, the attempted criminal threat offense punishes speech that is also deemed unprotected under the First Amendment. An attempted criminal threat occurs when the defendant intends the circumstances to be such that the threat he makes would reasonably cause sustained fear and

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[3] The Petition for Review posed whether "petitioner can be convicted of an attempted criminal threat based on his subjective intent, regardless of whether the uttered statement is viewed objectively as a threat?" Chandler apparently expanded the issue in his Brief on the Merits, asking "[c]onsistent with First Amendment protections, can appellant be convicted of an attempted criminal threat based only on his subjective intent, regardless of whether the uttered statement is viewed objectively as a threat? If the statement must, at a minimum, be viewed objectively as a threat, does instruction with the general concepts of attempt (CALCRIM No. 460) and the completed criminal threat (CALCRIM No. 1300) convey this required element?"

takes action toward that end, but the offense was not completed for reasons that might include the victim did not receive or understand the threat, or did not actually have reasonable fear. Consequently for the attempted criminal threat offense, a jury need only find the defendant intend the circumstances to be such that the threat would reasonably cause fear.

Against that backdrop, respondent first explains why the instructions given in this case properly defined the attempted criminal threat offense and there was no instructional error. Next, respondent will explain why the Constitution requires nothing more in order to proscribe attempted criminal threats under the true threat doctrine. And finally, if the instructions were found somehow to be deficient, the error was harmless because no reasonable jury would have concluded Chandler's threats were not the kind to have reasonably caused fear.

A. The Criminal Threat and Attempted Criminal Threat Offense Instruction Properly Defined the Elements of the Crimes

Chandler does not argue the jury was wrongly instructed on the elements of the completed criminal threat offense. But he does argue the attempted offense instructions were deficient because they only asked the jury to decide if he intended to communicate threats, yet did not ask the jury to decide if the victims had reasonable fear. Chandler's argument should be rejected. The instructions in this case adequately defined the attempted criminal threat offense.

A trial court has a sua sponte duty to instruct accurately on the elements of a criminal charge. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) An instruction that relieves the prosecution of its burden to prove every element beyond a reasonable doubt violates a defendant's due process rights under both federal and state Constitutions. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [113 S.Ct. 2078, 124 L.Ed.2d

182]; *People v. Flood* (1998) 18 Cal.4th 470, 479-480.) In that case, the court reviews jury instructions de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) The court considers jury instructions as a whole when determining their correctness. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) The inquiry is whether there is a reasonable likelihood that the jury applied the instruction in a way that violated the Constitution. (*People v. Frye* (1998) 18 Cal.4th 894, 95, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1112.)

As noted above, the crime of criminal threat is set forth in section 422.[4] In *People v. Toledo,* this Court explained that the statute encompasses both the intent of the speaker to communicate a threat that reasonably places a victim in fear, and an actual and reasonable fear on part of the victim. (*Toledo, supra,* 26 Cal.4th at pp. 227–228; *In re George T.*

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[4] Section 422 provides in relevant part: "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" is guilty of a crime, which is punishable alternatively as a misdemeanor or a felony.

(2004) 33 Cal.4th 620, 630.) Accordingly, the jury was instructed consistent with CALCRIM No. 1300 as follows:

> 1) The defendant willfully threatened to unlawfully kill or cause great bodily injury to the intended victims;
>
> 2) The defendant made the threat orally;
>
> 3) The defendant intended that his statement be understood as a threat and intended that it be communicated to the intended victims;
>
> 4) "The threat was so clear, immediate, unconditional, and specific that it communicated to" the intended victims "a serious intention and the immediate prospect that the threat would be carried out;"
>
> 5) The threat actually caused the intended victims sustained fear for safety; and
>
> 6) That fear was reasonable under the circumstances.

(1 CT 261; 3 RT 567-568.)

The court also provided CALCRIM No. 460, on attempted criminal threat. It provided that the prosecution show: (1) the defendant took a direct but ineffective step toward committing the criminal threats; and (2) the defendant intended to commit the criminal threats. After defining "direct step" and the concept of abandoning further efforts, the court further instructed that to decide if the defendant intended to commit the criminal threat, the jury should refer to the separate instruction given on that crime. (1 CT 262-263; 3 RT 570-571.)

The instructions properly informed the jury what needed to be proven for the criminal threat offense, and, what needed to be proven for the attempted criminal threat offense. Chandler's entire argument hinges on the premise that because his threat was communicated and received by his victims, the jury had to also find his victims had reasonable fear. This premise, however, is erroneous.

Attempted criminal threats occur when, a defendant specifically intends to threaten to commit a crime resulting in death or great bodily injury under circumstances that would reasonably cause the person to be in sustained fear, and, performs an act toward its commission. (*People v. Toledo, supra*, 26 Cal.4th at pp. 230–231.) Understandably and as discussed in more detail below, in many cases of attempted criminal threat the speaker conveys the threat but for some reason the victim does not actually suffer the sustained fear he reasonably could have sustained under the circumstances. (*Id.* at p. 234.) But those circumstances are not exclusive. An attempted criminal threat may still occur even when the intended victim does not actually receive the threat. (*Ibid.*)

Consequently, for attempted criminal threat purposes, there is no reason to treat the threat received by the victim any different than the one where the threat is not. Simply put, instructing the jury that it must additionally find the victims were in reasonable fear under the circumstances of this case would not have correctly stated the inchoate nature of the attempted criminal threat offense.

What Chandler is really complaining about is that his jury was not told that because his threat was communicated to and received by the victim, it could consider whether the victim's reasonableness of fear, or lack of fear, impacted how it determined his intent to communicate the threat. In other words, did he act with specific intent his words would be taken as a threat (i.e. convey gravity of purpose and an immediate prospect of execution) under the circumstances presented here? But such an instruction is really a "pinpoint" instruction that must be requested by the defense. "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case.... They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*People v. Rogers* (2006) 39

Cal.4th 826, 878, quoting *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [instruction relating evidence of intoxication to premeditation and deliberation does not involve a general principle of law as that term is used in cases imposing a sua sponte duty to instruct]; *People v. Anderson* (2011) 51 Cal.4th 989, 998 [defense of accident "raised to rebut the mental element of the crime or crimes with which the defendant was charged. Consequently, assuming the jury received complete and accurate instructions on the requisite mental element of the offense, the obligation of the trial court in each case to instruct on accident extended no further than to provide an appropriate pinpoint instruction upon request by the defense."].) Here, no such request was made, despite being invited by the trial court to do so. (3 RT 516-517, 553-554.) Accordingly, if the instruction Chandler seeks was appropriate, he forfeited his claim by not requesting it be given at trial. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.)

B. States May Punish Criminal Threats Without Infringing Upon Protected Speech Under the First Amendment

Chandler's threats to kill his victims were not type of protected speech embraced by the First Amendment, and at the very least constituted an attempted criminal threat. To better understand why the instructions adequately explained the attempted criminal threat offense, respondent briefly discusses why criminal threats constitute unprotected speech under the First Amendment.

Initially, respondent observes Chandler did not raise a First Amendment issue in the trial court and focused instead on whether the attempted criminal threat offense had been committed because his victims were not in reasonable fear. Nor did he raise it on appeal, and instead focused only on whether fear of a reasonable victim was an element of the

attempt offense. However, because it was addressed by the court below and now raised in this Court, respondent observes that whether the threats at issue are otherwise entitled to First Amendment protection is subject to independent review. (*In re George T.*, *supra*, 33 Cal.4th at pp. 630-634.)

The First Amendment states that "Congress shall make no law ... abridging the freedom of speech." (U.S. Const., 1st Amend.) This proscription, incorporated through the Fourteenth Amendment's due process clause, applies equally to the states. (*Virginia v. Black* (2003) 538 U.S. 343, 358 [123 S.Ct. 1536, 155 L.Ed.2d 535] (*Black*).) A "core purpose of the First Amendment 'is to allow "free trade in ideas"— even ideas that the overwhelming majority of people might find distasteful or discomforting.'" (*Black,* 538 U.S. at p. 358.)

Of course, not all speech rests in this protected market place of ideas and can instead be regulated consistent with the Constitution. (*Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 571–572 [62 S.Ct. 766, 86 L.Ed. 1031] ["There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."].) For example, Justice Holmes observed words like falsely shouting fire in a crowded theatre "create a clear and present danger," and are not afforded First Amendment protection. (*Schenck v. United States* (1919) 249 U.S. 47, 52 [39 S.Ct. 247, 249, 63 L.Ed. 470] [World War I era pamphlets denouncing the war effort and inciting draft resistance]). States may similarly regulate "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words— those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. (See, e.g., *Chaplinsky*, 315 U.S. at p. 574 [holding that words which are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace" are not protected speech].)

Also falling into the category of unprotected speech are "true threats." (*Black, supra*, 538 U.S. at p. 343.) True threats were first considered in *Watts v. United States* (1969) 394 U.S. 705 [89 S.Ct. 1399, 22 L.Ed.2d 664]. *Watts* involved a federal conviction under a statute prohibiting "'knowingly and willfully'" making a threat "'to take the life of or to inflict bodily injury upon the President of the United States.'" (*Id.* at p. 705, quoting 18 U.S.C. § 871(a).) The defendant asserted he was not going to respond to his draft notice, adding, "'If 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.) The Supreme Court observed that, "[w]hat is a threat must be distinguished from what is constitutionally protected speech." (*Id.* at p. 707.) The Supreme Court held the speech at issue was constitutionally protected, because it was "political hyperbole" and not a "true threat." (*Id.* at p. 708.) Consequently, mere hyperbole or political rhetoric may often involve figurative or colorful language, or even have threatening undertones, but it still constitutes protected speech.

Against this backdrop, this Court has occasionally addressed the constitutionality of our threat statutes and found them in accord with First Amendment jurisprudence. For example, in rejecting an over breath challenge to section 422.6, a hate crime statute that proscribes the willful interference with a person's civil rights or because sexual orientation, this Court affirmed, "the state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection." (*In re M.S.* (1995) 10 Cal.4th 698, 710.) As *In re M.S.* explained,

> Violence and threats of violence, by contrast, 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. (*R.A.V. v. St. Paul* (1992) 505 U.S. 377, 388 [120 L.Ed.2d 305, 321, 112 S.Ct. 2538].)

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

These types of threats are not afforded constitutional protection so long as it reasonably appears to be a serious expression of intention to inflict bodily harm under circumstances such that there is a reasonable tendency to produce fear in the victim the threat will be carried out. This is the case even if the threat lacks an immediacy requirement and is contingent on some future event. (*Id.* at p. 710.) In other words, "when a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection." (*Ibid.*) Moreover, "[p]roof of specific intent to carry out the threat is not constitutionally required, 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. 710.)

In *Toledo* this Court observed the criminal threat statute set forth in section 422 is also limited to true threats and "was drafted with the mandates of the First Amendment in mind ... to describe and limit the type of threat covered by the statute." (*Toledo, supra,* 26 Cal.4th at p. 229, citing *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)[5]

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[5] In *People v. Mirmirani* (1981) 30 Cal.3d 375, this Court held a former version of section 422, known then as "terrorist threats," to be unconstitutional for vagueness. The statute was repealed and the current version adopted with language incorporated from *Kelner, supra*, to properly describe and limit the type of true threats covered by the statute. For information purposes, "[t]he statute under which Kelner was convicted, 18 United States Code section 875(c), prohibited the 'transmi[ssion] in

(continued...)

Toledo considered whether attempted criminal threats constituted a crime and respondent will address that aspect of the decision below. But *Toledo* also confirmed that the criminal threat statute does not offend protected speech under the First Amendment. Instead, it criminalizes true threats – those where the speaker intend to communicate a threat that reasonably places a victim in fear, which are its face and under the circumstances, "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." (*Toledo, supra,* 26 Cal.4th at pp. 227–228.)

After this Court's issued the *Toledo* decision, the United States Supreme Court sought to define the true threat doctrine it had mentioned in *Watts* almost 35 years earlier. In the cross burning case of *Virginia v Black*, the Court addressed a type of "true threats," those designed to intimidate others. (*Black, supra,* 438 U.S. at p. 360.) Virginia law made it a crime "for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place." (*Id.* at p. 348.) The defendant argued the Virginia law was unconstitutional because it outlawed only certain kinds of content-based speech under the First Amendment, and claimed he had no intent to intimidate anyone when burning his cross. Notably, the Supreme Court recognized that states may ban cross burnings performed with the intent to intimidate without running afoul of the First Amendment. (*Id.* at p. 363.) The problem with the law, however, was that it provided the simple act of burning the cross was prima facie evidence of

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(...continued)
interstate commerce [of] any communication containing ... any threat to injure the person of another ....'" (*In re M.S., supra,* at fn. 4.)

intent to intimidate. (*Black, supra*, 538 U.S. at p. 367.) This is because such a provision compelled juries to convict in every cross-burning case; they would be required to find there existed intent to intimidate, regardless of the individual facts of each case. (*Id.* at p. 365 [rationale for court decision invalidating prima facie evidence provision].) As the Supreme Court explained,

> It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, "The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." Casper, Gerry, 55 Stan. L. Rev. 647, 649 (2002) (internal quotation marks omitted). The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

(*Black, supra*, 538 U.S. at p. 366-67.)

Although it found the Virginia cross-burning law infirm, the Supreme Court reaffirmed that "true threats" are a categorical exception to speech protected under the First Amendment. The Supreme Court denied this category of unprotected speech as follows:

> "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. [Citations.] The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protects 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." [Citation.] 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.

(*Black, supra*, 538 U.S. at pp. 359-360, emphasis added.)

Two aspects of the *Black* decision are of particular relevance here. First is the fundamental notion that serious expressions of threats of violence – whether intended by the speaker or perceived to be threats by the victim – are not entitled to protected speech status under the First Amendment. Second, threats are unprotected regardless of the speaker's intent to actually carry out the threat. Instead, a true threat occurs when the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. The Supreme Court's observation that a communication designed to convey "serious expression of intent to commit an act of unlawful violence" is unprotected speech, means that it can be regulated and proscribed for punishment. It is broader than what our Legislature and this Court have deemed necessary to constitute a criminal threat in California - the Constitution does not demand the threat be unequivocal, unconditional, immediate, or specific as to convey, nor, must there be gravity of purpose and an immediate prospect of execution. Instead, because the true threat doctrine seeks to protect against the disruptive fear engendered by the expression of threatened violence, there is no need someone actually be intimidated, much less that it be reasonable for someone to be intimidated under the circumstances. (*Black, supra*, 538 U.S. at p. 348.) In essence, the First Amendment permits thoughts and expression, even those others might not wish to tolerate, but does not afford a person the constitutional right to convey what are considered statements of violence and threats of harm to another.

C. The Intent to Threaten and the Reasonableness of the Victims Fear Following *Virginia v. Black*

As noted above, in *Black* the Supreme Court recognized Virginia could constitutionally prohibit threats made with the intent to intimidate, and a specific intent to actually carry out a threat was not required for a communication to constitute a true threat. Speech is unprotected if an objectively reasonable person would interpret the speech that is being communicated as a serious expression of an intent to cause a present or future harm. (*Black*, *supra*, 538 U.S. at p. 359.) The Supreme Court arguably established a baseline for constitutionally proscribable true threats, that is, whether an objective or reasonable person would find the speech communicated to be a serious expression of harm. But that is not to say, however, that this "objective listener test" is the exclusive means for punishing speech classified as a true threat. If a threat statute meets this constitutionally objective baseline, a defendant can still violate it when he subjectively intends to communicate a threat of violence or harm against another.

Nevertheless, many courts and commentators expressed concern the Supreme Court actually left unresolved the precise intent needed for the speaker, in order to ensure that speech is not protected and subject to regulation.[6] (See Crane, P. "*True Threats" and the Issue of Intent*, (2006) 92 Va. L. Rev. 1225.) Some federal courts interpreted *Black* to mean that

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[6] As one commentator explained, "An objective test defines a true threat as a communication that a reasonable person would find threatening. The test typically comes in one of three forms. The variations are based on whether the perspective of the test is that of a reasonable speaker, a reasonable listener, or a 'neutral' reasonable person." (Crane, at p. 1235.) The subjective test on the other hand is explained as, "the specific intent to carry out the threat test and the specific intent to threaten test." (*Id.* at p. 1236.)

in order for speech to constitute a true threat, the speaker must subjectively intend to threaten someone. In other words, although the speaker need not actually intend to carry out a threat, the speaker must subjectively intend the comments be interpreted as a true threat. (See *United States v. Cassel* (9th Cir. 2005) 408 F.3d 622 [statute criminalizing interference with federal land sale by intimidation].) Other federal courts interpret *Black* to require only the speaker knowingly intend to communicate to another person, without any subjective intent about that communication. Instead, the focus is on whether there was intent to communicate, and whether an objective or reasonable recipient would regard the communication as a serious expression of harm. (See *Porter v. Ascension Parish School Board* (5th Cir. 2004) 393 F.3d 608 [sketch depicting violent siege on school viewed objectively to cause fear].)

The Ninth Circuit has considerably muddied the waters. In *United States v. Stewart* (9th Cir. 2005) 420 F.3d 1007, the Ninth Circuit elaborated on the true threat doctrine in a case involving threats to kill a federal judge and examined whether the objective true threat, that is, whether "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 intent to harm or assault" had been called into question by *Black*. There, the Ninth Circuit remarked that precedent existed for using an objective test (i.e., whether a reasonable person would interpret what speaker communicates as a serious expression of intent to harm), but noted its prior decision in *Cassel* had suggested the objective test was no longer tenable after *Black*. The Ninth Circuit reasoned that *Black* requires the communication itself must be intentional and the speaker must intend for his language to threaten the victim. (*Stewart*, at p. 1017-1018.) Ultimately, the Ninth Circuit concluded it need not decide whether the objective or subjective true threat definition should apply, because

there, the evidence established the defendant's statement was a "true threat" under either definition. (*Id.* at p. 1018.)

The Sixth Circuit recently considered this question in *United States v. Jeffries* (6th Cir. 2012) 692 F.3d 473. There, it declined to impose a subjective intent requirement on the defendant where he disseminated a song with lyrics that communicated a threat to the family law judge who had presided over his custody hearing. The Sixth Circuit recognized the threat had to be "objectively real," that is, whether a reasonable person would have perceived the words as a threat, but rejected an instruction telling the jury the defendant could only be convicted if he subjectively intended to threaten the judge. (*Id.* at pp. 475, 478.) As *Jeffries* explained,

> *Black* does not work the sea change that Jeffries proposes. The case merely applies—it does not innovate—the principle that "[w]hat is a threat must be distinguished from what is constitutionally protected speech." ... It says nothing about imposing a subjective standard on other threat-prohibiting statutes, and indeed had no occasion to do so: the Virginia law itself required subjective "intent." The problem in *Black* thus did not turn on subjective versus objective standards for construing threats. It turned on overbreadth —that the statute lacked any standard at all. The prima facie evidence provision failed to distinguish true threats from constitutionally protected speech because it "ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate," and allowed convictions "based solely on the fact of cross burning itself."

(*Jeffries,* 692 F.3d at p. 479-80.)

Against this apparent conflict some might argue a speaker's intent to communicate a threat incorporates both a subjective component, that is, the speaker's intent to intimidate others, as well as an objective component, that is, would persons objectively believe the communication was designed to intimidate and cause fear. Our criminal threat statute incorporates both as well.

As this Court explained in *M.S.*, threats differ from otherwise protected ideas and "political hyperbole," because they are someone's expressions of intent to inflict evil onto another. Thus, for the hate crimes statute that proscribed willful interference with a person's civil rights or sexual orientation, this Court noted the speaker must have a serious expression of intention to inflict bodily harm under circumstances such that there is a reasonable tendency to produce fear in the victim the threat will be carried out. (*In re M.S., supra*, 10 Cal.4th at p. 710.) This Court reaffirmed this in the criminal threat context in *Toledo*. There, this Court observed a person must specifically intend to threaten to commit a crime resulting in death or great bodily injury and with intent the threat be taken under circumstances that would reasonably cause the person to be in sustained fear. (*Toledo, supra*, 26 Cal.4th at pp. 230-231.) And recently, when addressing the constitutionality of section 140, subdivision (a), the statute that proscribes willful threatening violence against a crime witness or victim, Justice Baxter observed that:

> The need to punish true threats—i.e., to "'protect[ ] individuals from the fear of violence' and 'from the disruption that fear engenders'" (*Black, supra*, 538 U.S. at p. 360, 123 S.Ct. 1536)—is triggered when a reasonable listener would understand the statements, in context, to be a serious expression of an intent to commit an act of unlawful violence. The fear of violence and the accompanying disruption such fear may cause is in no way diminished by the possibility that the speaker subjectively (and silently) did not intend to make a threat. And *Black* did not hold otherwise.

(*Lowery*, 52 Cal.4th at p. 430 [conc. Baxter, J.].)

Chandler now asks this Court to dive into the controversy, contending the attempted criminal threat offense requires this Court to resolve whether a person's subjective intent to communicate a threat is ever sufficient to constitute a proscribable crime, or if a threat must only be examined based on whether a reasonable victim would construe it to be a threat. He

suggests this Court ruled in *Lowery* the First Amendment protects speech unless it is objectively viewed by a reasonable person to be a threat. And because a completed criminal threat requires a victim to be in actual and reasonable fear, the attempted criminal threat offense must require the same. Otherwise, a statement could be protected under the First Amendment (and not be a criminal threat), while an attempt to make that same statement would be punished as an attempted criminal threat. In other words, even when a speaker intends to communicate a threat, it is still protected speech unless it is reasonably would cause fear; a fortiori, one cannot commit an attempted criminal threat merely if one intends to communicate the threat because it must also be one where a victim is reasonably in fear.

There is simply no need to consider these claims. The Constitution does not protect speech intended to be a threat any more than it protects speech objectively seen as a threat. As this Court observed in *Lowery*, "the high court did not hold that, to pass muster under the First Amendment, a statute such as the one at issue here must limit the prohibited threats to those made with the specific intent to intimidate a particular victim." (*Lowery, supra*, 52 Cal.4th at pp. 426-427.) Instead, 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." (*Virginia v. Black, supra*, at p. 359, 123 S.Ct. 1536, italics added.) Thus, the category of threats that can be punished by the criminal law without violating the First Amendment *includes but is not limited to* threatening statements made with the specific intent to intimidate.

(*Id.* at p. 427.)

The criminal threat statute and the attempted criminal threat offense at issue here suffer from no infirmities. The criminal threat statute penalizes threats made with specific intent to cause the requisite fear in the victim,

and, where the effect is that the victim is actually placed in reasonable fear. If a jury finds, for example, that a defendant lacked such specific intent, or that the victim lacked actual or reasonable fear under the circumstances, the defendant has not committed the completed crime of criminal threat. As shown below, the attempted criminal threat offense does not focus on the victim. Instead, the focus is on whether the defendant intended the circumstances to be such that the threat would reasonably cause sustained fear, not whether the threat reasonably caused sustained fear. The Constitution requires nothing more. And neither does this Court's decision in *Lowery*.

Lowery considered a statute that lacked any requirement the defendant act with a specific intent to intimidate the particular victim and did not even require the threat be communicated to the victim. (*Lowery, supra*, 52 Cal.4th at p. 426.) This Court construed it to proscribed only true threats, those "threatening statements that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat, namely, 'a serious expression of an intent to commit an act of unlawful violence'." (*Id.* at p. 427, citing *Black, supra*, 538 U.S. at p. 359.)

In *Lowery*, the defendant had not threatened the witness directly but instead did so in phone calls to his own wife, stating he was going to kill the witness. (*Lowery, supra*, 52 Cal.4th at pp. 422-423.) The defendant admitted making the threats, but claimed he did not really intend any threat and instead was "simply expressing his anger over [the witness's] false accusation...." (*Id.* at p. 423.) The defendant argued the statute was unconstitutional under the First Amendment, because it did not require any specific intent requirement to intimidate the victim or witness. (*Id.* at pp. 421 and 425.) This argument was supported by the Ninth Circuit's decision of *U.S. v. Bagdasarian* (9th Cir. 2011) 652 F.3d 1113, which held the true threat doctrine requires a defendant must have subjective intent to

intimidate. (*Lowery,* at p. 427, fn. 1; see also *id.* at p. 432 [conc. opn. of Baxter, J.].)

In *Bagdasarian*, the Ninth Circuit had considered the intent to threaten the President under *Watts* and *Black* and reasoned in dicta, that it is "not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death." Instead, the court found that a subjective intent analysis was required in every case to determine whether a statement constituted a true threat. (*Bagdasarian*, 652 F.3d at 1116, quoting *Black, supra*, 538 U.S. at p. 359).

But in *Lowery*, this Court disagreed with *Bagdasarian*. This Court recognized that in *Black*, a specific intent requirement ensured that the prohibited cross burning was limited to cross burning undertaken as a threat, but that statute was nevertheless unconstitutional because the prima facie provision meant there could be punishment merely for the expression of beliefs. (*Lowery, supra*, 52 Cal.4th at p. 426.) At issue in *Lowery* was whether *Black* meant that "any statute that criminally punishes threats must include an element of specific intent to intimidate the victim." (*Ibid.*)

Consistent with the principles expressed above, this Court found *Black* was not so narrow. As it did when it viewed threats in *M.S.* and again in *Toledo*, this Court reasoned that the type of true threats which may be criminally punished without violating the First Amendment are not limited to statements made with the specific intent to intimidate. Thus, that statute applied "only to those threatening statements that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat ...." (*Lowery, supra*, 52 Cal.4th at p. 427.)[7]

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[7] In *Lowery* this Court also rejected a claim that *Black* requires the speaker must intend to inflict the threatened harm immediately, or had the (continued...)

Given the Ninth Circuit's treatment of the issue, Justice Baxter wrote a separate concurrence in *Lowery* to more fully discuss that court's "mistaken belief that a 'true threat' requires something else, namely, proof that the speaker subjectively intended the statements be taken as a threat." (*Lowery*, *supra*, 52 Cal.4th at p. 428 [Conc. Baxter, J.].) Justice Baxter then explained that this Court was adopting the "objective standard" and rejected *Bagdasarian's* "subjective standard." (*Id.* at pp. 432-433 [conc. opn. of Baxter, J.] also at p. 431 [conc. Baxter, J.], quoting *New York ex rel. Spitzer v. Cain* (S.D.N.Y.2006) 418 F.Supp.2d 457, 479 ["The relevant intent is the intent to communicate a threat, not as defense counsel maintains, the intent to threaten"].)

Chandler tries to expand *Lowery* to contend an objective test is the *exclusive* means to measure whether one can be criminally punished for threats. In other words, one's subjective intent to intimidate or engender fear would never constitute a threat unless it is also objectively viewed as a threat. But *Lowery* did not suggest that an objectively-viewed threat is the exclusive basis for imposing criminal liability. Instead and consistent with what respondent observed above, *Lowery* construed a statute without any scienter requirement to nevertheless meet constitutional requirements by holding it applied to statements that a reasonable listener would understand to constitute a true threat. Although an objectively-viewed threat is sufficient to remove speech from the protections of the First Amendment, as noted above it does not follow that the Constitution requires as a

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(...continued)
apparent ability to do so. "Nothing the high court said there suggests that speech threatening bodily harm is entitled to First Amendment protection, and thus is immune from criminal prosecution, absent proof that the speaker intended to inflict the threatened harm immediately, or had the apparent ability to do so." (*Lowery*, *supra*, 52 Cal.4th at p. 428.)

necessary condition that the threat must be seen as threatening to a reasonable person. It does not follow that a defendant who subjectively intends to communicate actual threats of violence somehow engages in protected speech.

As the appellate court below found, speech subjectively intended as a threat can also be outlawed because "it presents the same risk of disruption as a literal threat." (Opn. at p. 19; see also *Black*, 538 U.S. at p. 360 [citing rationale for true threats doctrine as harm that threats of violence are apt to cause, both on a personal level and on a more general level in terms of undermining the safety that citizens feel as members of society].) One who intentionally makes a statement to be taken as a threat should not be afforded First Amendment protected speech status. As *Watts* explained, protected speech may use hyperbole or expressive metaphorical threats to make a point. But literal threats of violence are not based in metaphor or expression of idea. They are designed to engender fear, threaten harm, or violence on others. The Constitution does not protect a person's right to make threatening acts of violence toward another:

> Speech that a reasonable person would expect to be taken as a threat fails to function as metaphor; it presents the same risk of disruption as a literal threat. At the same time, however, speech that the speaker intends to be taken as a threat is not metaphor at all. Outlawing speech that is subjectively intended as a threat cannot possibly have any chilling effect on protected speech. (See *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 203 [prosecution for attempt to seduce minor; "the only chilling effect of section 288.2 is on pedophiles who intend that their statements will be acted upon by children. Given the intention with which they are made, such statements are not entitled to the extraordinary protection of the First Amendment"].)

(Opn. at p. 19.)

Consequently, threats to commit an act of violence receive no First Amendment protection, regardless of whether the speaker subjectively

intend the statement be taken as a threat or a victim objectively views the communication as a threat. Drawing a distinction between the two is not necessary in order to determine whether threatening speech lacks protection under the First Amendment purposes. Nor should there be one here for purpose of determining Chandler's criminal liability under a threat-prohibiting statute.

Alternatively, the court below assumed that even if the speaker's objective intent to intimidate were exclusive, meaning that a reasonable person must view it as a statement designed to engender fear, the state may still criminally punish - as an attempted criminal threat - those statements which are not reasonably viewed as threats. (Opn. at p. 20.) Respondent turns now to discussing the attempted criminal threat offense and why there is no need to separately prove the threat reasonably cause sustained fear, but only that the defendant intend to communicate a threat that would reasonably do so.

D. The Attempted Criminal Threat Offense Does Not Infringe on Protected Speech

As noted above, Chandler's effort to expand *Lowery* to preclude liability for attempted criminal threats - unless the effect of that threat is that it reasonably and actually intimidated the intended victim - is simply misguided. It places undue emphasis on an individual victim's perception, rather than on the culpability of the actor with the specific intent to communicate a threat a reasonable person would fear, who has taken steps necessary toward that end. Instead the inchoate attempted criminal threat offense merely asks whether the defendant intend the circumstances to be such that the threat would reasonably cause fear.

An attempt to commit a crime is comprised of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission. While a defendant must form the requisite criminal

intent, the defendant need not commit an element of the underlying offense.[8] (*People v. Medina* (2007) 41 Cal.4th 685, 694; Pen. Code, § 21a and § 664 [prescribing punishment].) Instead, there must be an "overt act [that] must go beyond mere preparation and show that the [perpetrator] is putting his or her plan into action; it need not be the last proximate or ultimate step toward commission of the crime or crimes ... nor need it satisfy any element of the crime." (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8, referring to *People v. Kipp* (1998) 18 Cal.4th 349, 376 and *People v. Dillon* (1983) 34 Cal.3d 441, 454.)

No bright line distinguishes when requisite conduct rises out of preparation and crosses into commencement of the criminal scheme that constitutes the required overt act. For example,

> "[w]here the intent to commit the crime is clearly shown, an act done toward the commission of the crime may be sufficient for an attempt even though that same act would be insufficient if the intent is not as clearly shown. [Citation.]" (*People v. Bonner* (2000) 80 Cal.App.4th 759, 764; *People v. Anzalone* (2006) 141 Cal.App.4th 380, 387.) "[T]he plainer the intent to commit the offense, the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement. [Citations.]" (*People v. Dillon [, supra,]* 34 Cal.3d [at p.] 455.) Thus, even '"slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common-sense administration of the law with

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[8] In cases where the attempted offense includes a particularized intent beyond that required by the completed offense, this Court remarked, "[t]he law of 'attempt' is complex and fraught with intricacies and doctrinal divergences," and "[a]s simple as it is to state the terminology for the law of attempt, it is not always clear in practice how to apply it." (*People v. Bailey* (2012) 54 Cal.4th 740, 753, citing *Moorman v. Thalacker* (8th Cir.1996) 83 F.3d 970, 974 and *Decker, supra,* 41 Cal.4th at p. 8 [addressing attempted offense of escape that included specific intent element, while the escape offense was a general intent crime].) Here, however, the attempted criminal threat shared the same specific intent to commit the criminal threat offense.

> subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime.' [Citations.]" (*People v. Memro* (1985) 38 Cal.3d 658, 698 (*Memro*); [*Decker, supra,*] 41 Cal.4th [at p.] 8-9.)

(*People v. Luna* (2009) 170 Cal.App.4th 535, 540, some brackets added, parallel citations omitted.)

Indeed, this Court has recognized that even in the context of attempted murder, while a mere equivocal statement of intent to kill not sufficient, only slights acts in furtherance of the crime are needed for it to be committed. (*People v. Miller* (1935) 2 Cal.2d 527, 531; see *Dillon, supra,* 34 Cal.3d at p. 452; *People v. Buffum* (1953) 40 Cal.2d 709, 718.) There need only be evidence of intent to commit the murder plus a direct but ineffectual act towards its commission -- a mere "appreciable fragment" of the crime. This is why one appellate court found sufficient evidence of attempted murder where the defendant came home, loaded his gun, pointed it at his girlfriend and said he was going to get "John," and was later found crouched near a garbage pail outside of John's home. (*People v. Morales* (1992) 5 Cal.App.4th 917, 926.)

This Court has recognized we may appropriately punish expressed intent to engage in violent or harmful conduct, when coupled with mere slight acts toward that end:

> "'[o]ne of the purposes of the criminal law is to protect society from those who intend to injure it. When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime.' [Citation.]" (*Toledo, supra*, 26 Cal.4th at pp. 229-230.)

(*Medina, supra,* 41 Cal.4th at p. 694, parallel citations and fn. omitted.) "Indeed, 'no public purpose is served by drawing fine distinctions between those who have managed to satisfy some element of the offense and those

who have not.'" (*Medina,* at p. 698, quoting *Dillon, supra,* 34 Cal.3d at p. 453.)

1. Attempted threats under *People v. Toledo*

Against this backdrop, in *Toledo* this Court addressed what is constitutionally necessary to punish an attempt to commit a criminal threat. This Court concluded the attempt offense is not unconstitutionally overbroad, because such an argument "misconceives the general circumstances to which the crime of attempted criminal threat ordinarily will apply." (*Toledo, supra,* 26 Cal.4th at p. 233.)

Toledo concerned a defendant and his wife who got in an argument on their drive home from her work. When they arrived home the dispute escalated. The defendant threw a telephone, tossed a chair, and punched a hole in a door. His wife told him she did not care if he destroyed their apartment and, to demonstrate, she picked up a lamp and dropped it to the floor. After the defendant told her, "'You know, death is going to become you tonight. I am going to kill you,'" the wife said she did not care and walked away. (*Id.* at p. 225.) The defendant then approached her holding scissors over his shoulder. He plunged the scissors towards her neck and she moved back. The defendant stopped the motion of the scissors before they touched the wife and said, "'You don't want to die tonight, do you? You're not worth going to jail for.'" (*Ibid.*) The wife left and went to a neighbor's apartment. She was crying, shaking, and appeared frightened. Later, the neighbor began to escort the wife back to her apartment. When the defendant saw them, he chased after his wife and screamed at her. The wife and the neighbor returned to the neighbor's apartment. They heard a loud noise, which was an iron hitting a wall and shattering into pieces. When questioned by an investigating officer, the wife said she was afraid the defendant was going to kill her. At trial, however, she "denied that she had entertained any fear of defendant on the evening in question." (*Ibid.*)

The defendant was charged with inter alia, criminal threat, and the jury was instructed on criminal threat as well as the lesser included offense of attempted criminal threat. The defendant maintained on appeal that attempted criminal threat was not a viable offense, because it was inconsistent with the legislative intent underlying the criminal threat statute, and there was a constitutional impediment either to recognizing the existence of such a crime, or imposing criminal liability for such an offense. (*Toledo*, *supra*; 26 Cal.4th at p. 227.)

This Court concluded the offense of attempted criminal threat was not overbroad, because it only punished speech where the defendant has engaged in all the conduct that would amount to a completed criminal threat, but by some fortuity out of the defendant's control prevented its completion. (*Id.* at pp. 233–235.) *Toledo* recognized that an attempted criminal threat occurs when a defendant specifically intends to threaten to commit a crime resulting in death or great bodily injury and with intent the threat be taken under circumstances that would reasonably cause the person to be in sustained fear, and, performs an act or takes steps toward its commission. (*Id.* at pp. 230–231.) Like the high court in *Black,* which did not require the victim to actually be intimidated, this Court reasoned the attempted criminal threat offense focuses only on the speaker's intent to convey a threat, even if the victim does not receive or understand it. So long as a reasonable listener would understand the statement to be a serious expression of intent to commit an act of unlawful violence, it is constitutes a true threat that is not protected speech, and under California law, an attempted criminal threat. *Toledo* explained:

> [T]he jury in this case properly could have found that defendant's threat to [wife]—"You know, death is going to become you tonight. I am going to kill you[ ]"—was made with the requisite intent and was the type of threat that satisfied the provisions of section 422 and reasonably could have caused

> [wife] to be in sustained fear for her own safety. At the same time, however, the jury might have entertained a reasonable doubt ... as to whether the threat actually caused [wife] to be in such fear. Thus, the jury evidently found defendant guilty only of attempted criminal threat rather than the completed crime of criminal threat, not because defendant's conduct fell short of that required by the criminal threat provision, *but simply because defendant's threat happened not to have as frightening an impact upon [wife] as defendant in fact had intended.* Under these circumstances, it is clear that defendant's conviction of attempted criminal threat was not based upon constitutionally protected speech.

(*Toledo*, *supra*, 26 Cal.4th at p. 235, emphasis added.)

Because the inchoate attempted threat does not require the completion of the criminal threat or its elements, including the need for the victim to actually suffer sustained fear, *Toledo* recognized there are a "variety of potential circumstances," "of some of the most common situations that would support a conviction of attempted criminal threat." (*Toledo, supra,* 26 Cal.4th at pp. 231, 234.) In these situations, "only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself." (*Id.* at p. 231.) The non-exclusive examples offered were:

> (1) "if a defendant takes all steps necessary to perpetrate the completed crime of criminal threat by means of a written threat, but the crime is not completed only because the written threat is intercepted before delivery to the threatened person, the defendant properly may be found guilty of attempted criminal threat."
>
> (2) "if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat, an attempted criminal threat also would occur."
>
> (3) "if a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not

> *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat."

(*Toledo, supra*, 26 Cal.4th at p. 231; italics in original.)

As explained by *Toledo*,

> [I]n most instances the crime of attempted criminal threat will involve circumstances in which the defendant in fact has engaged in *all* of the conduct that would support a conviction for criminal threat, but where the crime of criminal threat has not been completed only because of some fortuity outside the defendant's control or anticipation (for example, because the threat is intercepted or not understood, or because the victim for some reason does not actually suffer the sustained fear that he or she reasonably could have sustained under the circumstances). In each of these situations, a defendant who is convicted of attempted criminal threat will be held criminally responsible only for speech that clearly is not constitutionally protected, and thus it is evident that in these instances a conviction of attempted criminal threat will pose no constitutional problems.

(*Id.* at p. 234, first italics in original; see also *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 607 ["If a defendant, acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not actually cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat; in this situation, only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself."].)

2. *People v. Jackson's* misguided analysis

One circumstance not addressed in *Toledo* is when the intended victim is in actual fear, but that fear is considered unreasonable under the

circumstances. There was no need to addres this in *Toledo*. The effect on and the reasonableness of the intended victim's reaction may be relevant for the completed criminal threat. However, it is simply not an element to be proven for the attempted criminal threat offense. As noted above, the attempted threat criminal offense focuses on whether the defendant intends to communicate a threat that would reasonably cause fear.

The appellate court in *People v. Jackson* reached a different conclusion. In *Jackson*, the landlords asked the defendant to leave the apartment where he had been staying. He refused and threatened to get a rifle and "'blow'" the "'heads off'" of the two landlords. (*Jackson, supra*, 178 Cal.App.4th at p. 594.) The defendant was charged with two counts of criminal threats. The jury was instructed that attempted criminal threats were lesser included offenses and received the pattern instructions for attempt and the substantive offense. (*Id.* at pp. 593, 598–599.) The defendant was not convicted of the charged offenses, but was convicted of two counts of attempt as lesser included offenses. (*Id.* at p. 593.)

Jackson addressed the defendant's appellate arguments that the trial court erred by failing to instruct the jury sua sponte that, "in order to find him guilty of attempted criminal threat, it must find that 'it would have been reasonable for a person to have suffered sustained fear as a result of the threat under the circumstances of this case.'" (*Jackson, supra*, 178 Cal.App.4th at p. 595.) The People responded that when a defendant has done everything he needs to do to complete the crime of criminal threat, but did not achieve his intended result, he has committed an attempted criminal threat regardless of whether the intended threat reasonably could have caused the target to suffer sustained fear. (*Id.* at pp. 595–596.)

Jackson rejected the People's argument "because the Supreme Court's definition of the crime of attempted criminal threat expressly includes a reasonableness element," based on its interpretation of *Toledo*. (*Jackson,*

supra, 178 Cal.App.4th at p. 596.) *Jackson* held the jury instructions were erroneous because the reasonableness element was included only in the instruction which defined the substantive offense, not in the separate instruction on attempt. (*Id.* at pp. 599–600.) In other words, the "jury was not instructed to consider whether the intended threat reasonably could have caused sustained fear under the circumstances." (*Id.* at p. 599.) "By insisting that the intended threat be evaluated from the point of view of a reasonable person under the circumstances of the case, we can insure that punishment will apply only to speech that clearly falls outside First Amendment protection." (*Id.* at p. 598.)

Jackson held the instructional error was prejudicial because the jury must have found that the defendant made threats and intended them to be taken as threats, but also found "that one or both of the last two elements of the completed crime was missing, ..." (*Jackson, supra,* 178 Cal.App.4th at p. 600.) *Jackson* noted that the evidence would have supported findings that one or both elements were missing. (*Ibid.*) Thus, the jury could have concluded that the victims did not suffer sustained fear, i.e., the jury might not have believed the victims' testimony that they feared for their lives. Such a scenario would have supported a conviction of attempted criminal threats only upon a finding that a reasonable person could have suffered fear in those circumstances, something the jury was not asked to decide. (*Id.* at p. 600.) Alternatively, the jury could have concluded that the victims' fear was unreasonable under the circumstances, i.e., the victims were safely inside the house with a telephone to call the police while the defendant sat out front. This alternate scenario would have been legally insufficient to support an attempted criminal threat conviction. (*Ibid.*)

Jackson thus expanded on *Toledo* by affirmatively requiring the trial court to instruct the jury that, on a charge of attempted criminal threat, it must decide whether the "intended threat reasonably could have caused

sustained fear under the circumstances." (*Jackson, supra,* 178 Cal.App.4th at p. 599.) *Jackson* reversed the defendant's conviction because such an instruction was not given, and the jury could have concluded that defendant's statements could not have reasonably caused the victims to suffer sustained fear. (*Id.* at p. 600.)

The appellate court below rejected *Jackson's* reasoning and held "that the crime of attempting to make a criminal threat can be committed even if, under the actual circumstances, it would not be reasonable for the victim to be in fear ...." (Opn. at p. 3.) The reasoning of the court below is more solid and this Court should reject *Jackson.*[9]

Take for example an aggressor with a history of threatening gestures and words toward another, both of which have increased over time and he now appears emboldened late one night by circumstances of having followed the intended victim into an unprotected alley, with no one around and no chance of escape. The aggressor approaches and threatens to beat up the other, but the victim is wearing headphones and listening to music and does not hear the threat. Under those circumstances a jury could easily find an expressed intention to injure the victim, that the threat be seriously taken and with gravity of purpose and immediate prospect of execution. Clearly none of this constituted protected speech and it would be sufficient to constitute an attempted criminal threat under *Toledo*. Under *Jackson,* the attempted criminal threat offense also requires a separate finding based on the reaction of the victim, and, the reasonableness of the victim's fear. But even if the victim in this scenario heard the threat, a defendant who otherwise engages in all necessary steps is no less culpable for an attempted

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[9] Respondent also observes that prior to this case, only one published California decision had even referenced *Jackson,* and that was not even related to this holding. (See *People v. Wilson* (2010) 186 Cal.App.4th 789, 804.)

criminal threat, merely when the intended victim was not in fear or for some reason, the fear was found to be unreasonable.

The circumstances would be no different if the aggressor reached down and grabbed a feather on the ground, yielded it as a knife, and continued to approach with threats that he would stab the victim. The victim may be in fear of the aggressor, but not in any reasonable fear of being stabbed. Under *Jackson's* logic embraced by Chandler, this would not be an attempted criminal threat because there would be no reasonable fear. But this would lead to absurd results. The speech would not be constitutionally protected simply because the aggressor were mentally compromised and with that same intent believed the feather to be a knife, or, if the aggressor made the threat to beat up the victim and simply yielded the feather without also communicating a threat.

Respondent respectfully submits a defendant should not benefit from his choice to threaten with a specific object, rather than make a general threat. Nor should the victim's level of fear and response infect the question whether a defendant intended to communicate a threat to the victim and acted in furtherance of it. Culpability for an attempted threat turns on the defendant's intent and actions, not on how a particular victim processes the threat.

Of course, the attempted threat offense is judged in light of the criminal threat statute. The criminal threat statute proscribes a defendant's actions and behaviors, while also seeking to protect others from harm and the effect of that harm. Threats of violence are punishable not because of the victim's reaction, but because the State has an interest in protecting individuals from someone who creates the fear of violence, the disruption that fear engenders, and the possibility threatened violence will occur based on the conduct of the defendant. Punishment for a completed criminal threat focuses on a defendant's mens rea, as well as the victim's reaction.

Our Legislature rationally determined the elements for the completed criminal threat offense requires proof not just of a defendant's specific intent to threaten a crime resulting in injury or death that under the circumstances would convey to a reasonable person purpose and immediate prospect of execution, but also that the victim be in actual sustained fear, one that is reasonable under the circumstances.

The attempted criminal threat offense, however, is treated differently under the law. It does not require completion of the threat crime or even satisfaction of its elements. The attempt offense proscribes a defendant's intent to communicate a threat and any action toward that end, but the effect on the intended victim is not an element that must also be proven. Attempted criminal threat requires proof of a defendant's specific intent to threaten a crime resulting in injury or death that under the circumstances would convey purpose and immediate prospect of execution, that is, the defendant intends to convey what "reasonably could have" caused sustained fear. (*Toledo, supra*, 26 Cal.4th at p. 235.) Whether the threat is communicated to the intended victim, whether it is understood, whether the victim is placed in fear, or, whether the fear was reasonable, is not consequential. The defendant commits the attempt offense even in the absence of these factors.

Accordingly, while there may be an objective component as to whether a defendant intended a threat that "reasonably could have" caused sustained fear under the circumstances, it is disjointed and unwarranted to demand the same objective reasonableness component be required on part of the victim for the attempted criminal threat offense. Instead, jury need only find the speaker intend to communicate what would reasonably cause fear.

Relying on *Jackson*, Chandler's argument to the contrary seeks to engraft onto the attempt statute elements that must be proven to satisfy the

completed crime. But to do so would undermine *Toledo* and cause absurd results. "It is fundamental that legislation should be construed so as to harmonize its various elements without doing violence to its language or spirit." (*People v. Garcia* (1999) 21 Cal.4th 1, 6, citing *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788.) Chandler's logic does violence to the very purpose behind the law.

The obvious example is where one defendant would be culpable for an attempted criminal threat when made to a person who understood English, but that same defendant would be absolved of liability if the victim fortuitously did not. Yet an absured situation would be not punishing one defendant for taking all steps necessary to carry out an intended threat and harm another under circumstances that would engender fear but the victim did not actually suffer fear, while holding another culpable who did the essentially the same but that victim was in fear. Whether a victim unreasonably suffered actual fear should not be viewed any different. As *Toledo* explained, a person can be punished for an attempted criminal threat even if the victim does not hear or understand the threat. Consequently a defendant should be treated no different if his particular victim happened to hear and understand the threat, but did not have reasonable fear. This absurd result is neither contemplated in the statute nor countenanced in the law.

Chandler and *Jackson* misunderstand this Court's decision on attempted criminal threats in *Toledo*, and wrongly seek to engraft the reasonableness of the victim's fear for purpose of the completed criminal threat offense as an element onto the attempted criminal threat offense. To commit an attempted criminal threat, the prosecutor must prove the defendant took a direct but ineffective step toward committing the criminal threat, which by definition is one where he intended to convey a threat of death or great bodily injury that a reasonable victim would fear.

Reasonableness in that sense cannot be defeated simply by a fortuitous event over which the defendant has no control.

3. Attempted criminal threats in the context of protected speech

Finally, Chandler's position is inconsistent with *Black* and other Supreme Court cases that address criminal threats as unprotected speech. The court below considered the broader question of how the First Amendment and the protected speech doctrine apply to attempt offenses in general. The court noted,

> Would it be constitutional to convict a defendant of attempted criminal libel if the apparently libelous statement, unbeknownst to the defendant, was actually true? Or to convict a defendant of attempted possession of child pornography if the apparent child, unbeknownst to the defendant, was actually 18?

(Opn. at p. 20.)

In answering that question, the court below turned toward *U.S. v. Williams* (2008) 553 U.S. 285 [128 S.Ct. 1830, 170 L.Ed.2d 650], which in turn discussed *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234 [122 S.Ct. 1389, 152 L.Ed.2d 403].) In *Free Speech Coalition,* the Supreme Court held the government could not prophylactically ban "virtual images of children generated by a computer ... because the child-protection rationale for speech restriction does not apply to materials produced without children." (*Williams*, *supra*, at p. 289, quoting *Free Speech Coalition, supra,* 535 U.S. at p. 250.)[10] *Williams* involved a federal child pornography statute that was re-tinkered in the aftermath of the *Free*

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[10] While the true threat doctrine is not concerned with the same proscribable conduct as child pornography, both involve unprotected speech and because the latter cases often involve acts of effort to distribute but not actually complete the crimes, they are relevant to understanding the attempted criminal threat offense.

Speech Coalition decision. (*Williams, supra*, at p. 289.) There, the Eleventh Circuit had reversed the defendant's conviction for offering or requesting child pornography, including material depicting "virtual" children, as overbroad, in part because "it would be unconstitutional to punish someone for mistakenly distributing virtual child pornography as real child pornography." (*Id.* at pp. 292-293, 300.) But the Supreme Court ultimately disagreed and held one could be punished for offering or requesting even "virtual" child pornography:

> Offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the offeror is mistaken about the factual predicate of his offer. The pandering and solicitation made unlawful by the Act are sorts of inchoate crimes -acts looking toward the commission of another crime, the delivery of child pornography. As with other inchoate crimes-attempt and conspiracy, for example- impossibility of completing the crime because the facts were not as the defendant believed is not a defense.

(*U.S. v. Williams, supra,* 553 U.S. at p. 300; see also *People v. Cochran* (2002) 28 Cal.4th 396, 398-399 [acceptable to proscribe additional punishment for defendants who produce child pornography for commercial purpose rather than solely for personal use, in order to deter and punish production of pornography for purposes of exchanging it for other child pornography].)

Chandler's attempt to use *Williams* to reach a contrary conclusion is misguided. (BOM 42-43.) *Williams* required the material in question meet the statutory definition of pornography only to support a conviction for the distribution or possession of that material, because the target of that statute was preventing collection and dissemination of pornography. But that does not mean a victim must perceive the threat made as being a true threat and actually and reasonably cause fear in the criminal threat context, or the defendant's threat magically transforms into a protected speech, not

otherwise subject to punishment as an attempted criminal threat. As the court below reasoned,

> Thus, the Supreme Court indicated that it can be constitutional to punish even protected speech as an attempt to engage in unprotected speech, provided the speaker intended the speech to be unprotected and it is protected only fortuitously.
>
> *In sum, then, in California, an attempt to make a criminal threat is a crime, regardless of whether it was objectively reasonable, under the circumstances, for the victim to be in fear; this does not violate the First Amendment.* Accordingly, the trial court was not required to instruct the jury otherwise."

(Opn. at pp. 20-21; emphasis added.)

Chandler nevertheless maintains *Williams* actually supports his argument that there can only be an "objective" component in determining whether speech is protected, and that a speaker's intent is not sufficient to constitutionally proscribe speech. (BOM 42-43.) But that is not what *Williams* held. *Williams* recognized that distribution of child pornography may include both subjective and objective components, that is, a defendant may not be found to distribute pornography with the requisite scienter where another person believes the defendant held a subjective "belief" the material was child pornography, but the defendant did not so hold. But *Williams* also observed that the defendant could still be found to have violated the portion of the statute that criminalizes one's intent "to cause another to believe" it was child pornography. There was also an objective component, that is, an objective manifestation of belief the material was child pornography, which means an accompanying statement or action that would lead a reasonable person to understand the defendant believed he or she wished to promote, transfer, solicit or distribute child pornography. (*Williams, supra*, 553 U.S. at pp. 295-296.)

Williams concluded a person could be punished for offers to distribute or possess child pornography, even if the person did not possess actual

child pornography. The statute did not require actual possession but instead targeted the solicitation or advertising of what is depicted as child pornography. That is to say, it penalized speech accompanied by actions to engage in the transfer of child pornography to others. Thus, the impossibility of actually completing the crime (i.e., delivering child pornography) because the facts were not as the defendant believed them to be was still considered a criminal offense. (*Williams*, *supra*, 553 U.S. at pp. 292-293, 300.)

This defense of "impossibility" is often disparaged in the context of other kinds of attempted crimes. In *People v. Camodeca* (1959) 52 Cal.2d 142, this Court observed:

> When it is established that the defendant intended to commit a specific crime and that in carrying out that intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime. Although the law does not impose punishment for guilty intent alone, it does impose punishment when guilty intent is coupled with action that would result in a crime but for the intervention of some fact or circumstance unknown to the defendant. ... In the present case there was not a legal but only a factual impossibility of consummating the intended offense, i.e., the intended victim was not deceived.

(*Id.* at p. 147; see also Witkin, Cal. Crim. Law 4th (2012) Elements, § 65, p. 378 referring to *People v. Rojas* (1961) 55 Cal.2d 252, 257; *People v. Meyers* (1963) 213 Cal.App.2d 518, 520; *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1384 [defendant guilty of attempt to assist suicide in violation of Penal Code section 401 despite fact that, unknown to him, sleeping pills he gave victim were incapable of causing death].)

Witkin explains that "legal impossibility" is often distinguished from "factual impossibility," observing that in many instances the crime would have been committed except for inadequate means or circumstances. Under that scenario of factual impossibility, the attempt offense may still be

punishable. In contrast, other situations, like "shooting at a stump or mistakenly taking one's own coat or hat," are completed acts but would still not constitute murder or theft, regardless of a defendant's subjective intent to kill or to steal. In those situations, legal impossibility would be a complete defense to attempted murder or attempted theft. (Witkin, *supra*, at p. 378)[11]

Chandler draws upon the constitutional limits of overbreadth that were discussed above to now bootstrap it into the context of the criminal threat statute, maintaining one's subjective intent is never sufficient by itself. In other words, one cannot be criminally liable for making a true threat if a victim objectively does not find it to be a threat. (BOM 47-48.)

This argument fails to consider the distinction between speech at issue in child pornography cases, with that of the speech at issue in the true threat context. The constitutional limitation discussed in the child pornography context was needed to ensure a complete class of otherwise protected speech (possession of virtual pornography) would not disappear. (*Williams, supra*, 553 U.S. at p. 289 [provision held invalid in *Free Speech Coalition* because "the child-protection rationale for speech restriction does not apply to materials produced without children"] and at p. 320 (dissent, Souter J.) ["The second reason for treating child pornography differently follows from the first. If the deluded drug dealer is held liable for an attempt crime there is no risk of eliminating baking powder from trade in lawful commodities.... But if the Act can effectively eliminate the real-child requirement when a proposal relates to extant material, a class of

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[11] Witkin does note that, "[h]owever, it may be that the person who fired at the stump was already guilty of an attempt when he pointed the loaded gun in the general direction of an intended victim." (*Ibid.* referring to *People v. Lee* (1892) 95 Cal. 666.)

protected speech will disappear"].) But that is not a concern for purpose of the true threat doctrine.

Moreover and as discussed above, Chandler's reasoning utterly fails to account for the inchoate nature of the *attempted* criminal threat offense. Attempted criminal threats are based on a defendant's making of a threat he intended a victim would reasonably be in fear, not on whether a reasonably objective victim would have suffered fear under those circumstances.

Consider the illustration of a person inside of a bar acting aggressively and threatening to attack another, perhaps even stating he would follow the person outside and beat him up. Unbeknownst to the aggressor, the intended victim is an off-duty police officer and the bar happened to be hosting his retirement party, with the intended victim surrounded by his fellow officers. Under Chandler's logic, even if the aggressor subjectively believed he was making a threat, he engaged in protected speech and did nothing to warrant criminal liability, because the intended victim fortuitously was not in fear. The logic fails to account for the aggressor's own intent to convey a threat under circumstances he intended would reasonably cause sustained fear.

A similar circumstance arose in *State v. DeLoreto* (2003) 265 Conn. 145, 157 [827 A.2d 671]. There, the defendant confronted two police officers. In one incident, the defendant drove by an off-duty sergeant who was jogging, held up his middle finger and yelled, "Faggot, pig, I'll kick your ass." He continued to threaten that, "I'm going to own your house. I got a federal lawsuit against you for breaking into my house." The defendant followed the jogging officer and eventually stopped the car, jumped out, and made aggressive gestures while continuing to say, "I'm going to kick your ass." The defendant made obscene gestures to another police sergeant and also threatened, "I'm going to kick your punk ass" several times. (*Id.* at p. 155.) That the officers were armed and probably

would not have been harmed by the defendant was not enough to dispel the existence of a threat. In other words, the mere fact that the target of the threat may be able to defend himself against immediate attack does not mean the threat is not a "true threat" for First Amendment purposes. (*Id.* at p. 157, citing *Black, supra*, 538 U.S. 343 ["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. ... The speaker need not actually intend to carry out the threat."]; see also *In re M.S., supra,* 10 Cal.4th at p. 711 ["The [defendants] err, however, in assuming the First Amendment always requires the threatened harm be imminent for the threat to be constitutionally punishable. It does not."].)

In this vein, Chandler's threats to kill his victims were not protected speech. And as discussed above, nothing in California's substantive law compels any further limitations on this prohibited conduct. Further, they could properly be punished under the First Amendment as attempted criminal threats, so long as he intended the circumstances to be such that the threats would reasonably cause sustained fear.

Finally, Chandler maintains reversal is required because the jury was never asked to find if the victims were in sustained fear that was reasonable under the circumstances, for propose of the attempted criminal threat offense. (BOM 24.) But as shown above, the sustained fear requirement was thoroughly set out in CALCRIM No. 1300. It would have been clear to any juror that if the target of the threat was not in sustained fear, or if the sustained fear the target was unreasonable, the crime could at most be an attempt. Unless that conclusion would constitute error as a matter of law, "the court's instructions, when considered as a whole, properly guided the jury's consideration of the evidence. [Citation.]" (*People v. Rodrigues*

(1994) 8 Cal.4th 1060, 1142-1143.) Chandler failed to establish that such a conclusion was error.

E. Any Assumed Instructional Error Was Harmless

Even if the instructions were found somehow to be deficient, any error was harmless because no reasonable jury would have concluded that Chandler's threats were not the kind to have reasonably caused fear. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

If the jury determined that based on the evidence there was no immediacy or urgency conveyed by the threats or that the victims were not in sustained fear under these circumstances, it properly acquitted him of making criminal threats. But that did not mean Chandler did not complete and convey his intended threat and thus attempt to commit criminal threats. It only meant his actions to that end were not effective. As *Toledo* makes clear, in each of these cases, Chandler by mere unintended fortuity was prevented from actually perpetrating the completed offense. (*Toledo*, *supra*, 26 Cal.4th at p. 231.) Or as the court below explained, "the jury could find that defendant completed his intended action. That action did not constitute the completed crime, because he did not achieve his intended result-either the victims were not afraid, or their fear was not reasonable. Nevertheless, his action was still criminal." (Opn. at p. 25.)

That the jury concluded Chandler only committed attempted criminal threat was likely due to the fact it determined the victims were not in actual sustained fear when Chandler made his threats - the third example from *Toledo*. (Opn. at p. 22; see 2 RT 295 [Alva equivocating if she feared Chandler], 297 [Alva testified she felt Chandler was simply ranting and raving] and 312 [Alva testified she was afraid only if Chandler had walked onto her porch].) But according to Chandler, if the jury concluded the victims were not actually afraid, then under CALCRIM No. 1300 as

phrased, there would be no need to determine if that nonexistent fear was reasonable. The jury therefore would find him guilty of an attempted criminal threat without ever determining whether a reasonable person could have been in sustained fear from his threats. Alternatively, he suggests the same risk applies if the jury determined the victims were actually afraid, but the fear was unreasonable (an example not set forth in *Toledo*).

Despite Chandler's claims to the contrary, *Jackson* is distinguishable from the instant case. *Jackson* noted its jury may have found the defendant's statements — that he was going to blow off the landlords' heads — did not reasonably cause fear under the circumstances because they were "safely inside the house with a telephone to call the police while defendant sat out front," and characterized defendant's statements as merely "outlandish." (*Jackson, supra,* 178 Cal.App.4th at p. 600.) In contrast, Chandler's statements here were neither outlandish, nor made to victims in an isolated incident and without further actions that warranted concern.

The difference between intent to reasonably cause sustained fear and actually instilling such reasonable fear, is both ephemeral and narrow. This is not a case in which Chandler threatened a victim with a feather or some harmless object and conveyed words that no reasonable person would find threatening. His constant taunts of violence, the golf club that he swung while threatening to kill, his disruption of the victims' homes and his brazen approaches toward them, was more than sufficient to cause fear in any reasonable person. (Opn., at pp. 3-5.)

Chandler "had effectively done all that he needed to do to ensure that" his victims would fear him and his actions constituted an attempted criminal threat. (*Decker, supra,* 41 Cal.4th at p. 14 ["In this case, however, Decker had effectively done all that he needed to do to ensure that Donna and her friend be executed ... Accordingly, he should have been held to

answer to the charges of attempted murder."].) Therefore, omission of a jury instruction on whether a reasonable person could have been placed in sustained fear cannot be attributed to Chandler's conviction. (Opn., at p. 22; *People v. Flood, supra*, 18 Cal.4th at pp. 502–503.)

CONCLUSION

The instructions given in this case properly defined the attempted criminal threat offense. Further, the Constitution requires nothing more in order to proscribe attempted criminal threats under the true threat doctrine. Because threats intended to communicate harm toward others are not a type of protected speech, the attempted criminal threat offense only targets "true threats" and does not infringe on protected speech under First Amendment. Finally, if the instructions were found somehow to be deficient, the error was harmless because no reasonable jury would have concluded Chandler's threats were not the kind to have reasonably caused fear. Consequently, the judgment should be affirmed.

Dated: July 31, 2013

Respectfully submitted,

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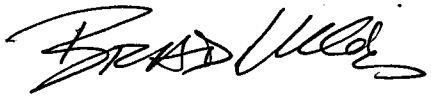

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 15,953 words.

Dated: July 31, 2013

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

Case Name: **People v. Ben Chandler** No.: **S207542**

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. 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 31, 2013, I served the attached **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 collection system at 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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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **July 31, 2013** to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

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 31, 2013, at San Diego, California.

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Declarant

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Signature

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