Supreme Court Copy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **EDDIE JASON LOWERY,** Defendant and Appellant.	**S 179422** **Supreme Court No. _____**

JAN 22 2010

PETITION FOR REVIEW

Appeal from the Superior Court of California
County of Riverside
Superior Court No. INF062558

THE HONORABLE JOHN G. EVANS, JUDGE

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By appointment of the
Court of Appeal under the
Appellate Defenders, Inc.
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PETITION FOR REVIEW

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Appellant Eddie Jason Lowery petitions this Honorable Court for review of the judgment of the Court of Appeal, Fourth Appellate District, Division Two, affirming his conviction of one count of threatening a victim or witness who provided assistance to law enforcement in a criminal court proceeding in violation of Penal Code section 140, subdivision (a).[1]

ISSUE PRESENTED

Pursuant to California Rules of Court, rule 8.500(b)(1), appellant Lowery petitions for review to secure uniformity of decision and to settle an important question of statewide and constitutional law:

1. Whether the threat proscriptions of section 140, subdivision (a) are

[1]/ Subsequent undesignated statutory references are to the Penal Code.

constitutionally overbroad in violation of the First Amendment to the United States Constitution by failing to require specific intent, apparent ability to carry out threats, or their statutory equivalents.

The Court of Appeal's decision rejecting appellant's overbreath challenge to section 140, subdivision (a) conflicts with *People v. Gudger* (1994) 29 Cal.App.4th 310 which considered the constitutionality of comparable section 76 proscribing threats to public officials. Unlike section 140, subdivision (a), section 76 contains "two critical elements which combine to satisfy the requirement that only true threats, and not political hyperbole, joking expressions of frustration, or other innocuous and constitutionally protected speech, are punished. The language of section 76 requires, in pertinent part, (1) 'the specific intent that the statement is to be taken as a threat' and (2) 'the apparent ability to carry out that threat by any means.' [P] Although there is no requirement in section 76 of specific intent to execute the threat, the statute requires the defendant to have the specific intent that the statement be taken as a threat and also to have the apparent ability to carry it out, requirements which convey a sense of immediacy and the reality of potential danger and sufficiently proscribe only true threats, meaning threats which 'convincingly express an intention of being carried out.'" (*People v. Gudger, supra*, 29 Cal.App.4th at pp. 320-321.)

Section 140, subdivision (a) does not require specific intent. Nor does the statute contain an element of immediacy or imminence. The requirement of section 140, subdivision (a) that a threat be "willful" was not construed by the

Court of Appeal in the present case as a burden on the People to prove appellant had the specific intent by means of threats to interfere with the victim's legally protected rights, thus protecting against its misapplication to protected speech. The Court of Appeal's decision in the present case is incompatible and in conflict with the Court of Appeal's decision in *Gudger*.

Section 140, subdivision (a) fails to specify that "willfully threatened," as used in the statute to describe a punishable threat, defines a specific intent crime. In conflict with *People v. Gudger, supra*, and omitting both an immediacy requirement or, alternatively and more importantly, specific intent, section 140, subdivision (a) does not pass constitutional muster in violation of the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

In a single count information, appellant was charged with threatening to use force and violence upon another person and threatening to take, damage, and destroy property of another person because a witness, victim, and other person had provided assistance and information to a law enforcement officer and to a public prosecutor in a criminal court proceeding in violation of section 140, subdivision (a). After a jury trial, appellant was found guilty as charged. The trial court suspended imposition of sentence and placed appellant on formal probation for 3 years under various terms and conditions.

On appeal, the Court of Appeal, Fourth Appellate District, Division Two, in an opinion filed December 21, 2009, per Ramirez, P.J., with McKinster and King, JJ., concurring, rejected appellant's challenge to section 140, subdivision (a) and affirmed the judgment of conviction. The Court of Appeal's opinion has been certified for publication. (See *People v. Lowery* (2009) 2009 DJDAR 17782.) A copy of the court's slip opinion is attached to this petition as Appendix A.

STATEMENT OF FACTS

For purposes of this petition, generally, the facts have been summarized by the Court of Appeal in its opinion. (Slip Opinion at pp. 2-3; *People v. Lowery, supra*, 2009 DJDAR at p. 17782.)

I

THE PETITION FOR REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE THREAT PROSCRIPTIONS OF SECTION 140, SUBDIVISION (a) ARE CONSTITUTIONALLY OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, BY FAILING TO REQUIRE SPECIFIC INTENT, APPARENT ABILITY TO CARRY OUT THREATS BY ANY MEANS, OR THEIR EQUIVALENT STATUTORY SAFEGUARDS

Appellant's crime in violation of section 140, subdivision (a) consisted of statements made by him to his wife during monitored and recorded telephone conversations. At the time, appellant was home and his wife was confined in the Riverside County Jail.

Appellant argued prior to trial that section 140, subdivision (a) violated the First Amendment to the United States Constitution in that the statute did not require proof of a specific intent to communicate proscribed threats or proof of an ability to carry out the threats. The trial court overruled appellant's First Amendment objections

Section 140, subdivision (a) provides as follows:

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

The First Amendment of the United States Constitution is a fundamental constitutional right. It guarantees the freedom of speech and expression. That guarantee is not without limitation however. For example, language which incites imminent lawless action, (*Brandenburg v. Ohio* (1969) 395 U.S. 444, 448) or language which constitutes a "true threat" are not protected by the First Amendment. (*United States v Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.) The overbreadth doctrine provides that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." (*NAACP v. Alabama* (1964) 377 U.S. 288, 307.) The overbreadth doctrine applies to facial attacks based on the freedom of speech. (*Garcetti v. Superior Court* (1996) 49 Cal.App.4th 1533, 1544-1545.)

Generally, a threat is an "expression of an intent to inflict evil, injury, or damage on another." (*United States v. Orozco-Santillan* (9th Cir. 1990) 903 F.2d 1262, 1265.) 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. (*Id.* at pp. 1265-1266; *In re Steven S.* (1994) 25 Cal.App.4th 598, 607; *Wurtz v. Risley* (9th Cir. 1983) 719 F.2d 1438, 1441 ["It is true that threats have traditionally been punishable without violation of the [F]irst [A]mendment, but implicit in the nature of such punishable threats is a reasonable tendency to produce in the victim a fear that the threat will be carried out."]; see also *NAACP v. Claiborne Hardware Co.*

(1982) 458 U.S. 1245 [involving public speeches advocating violence].)

In *People v. Toledo* (2001) 26 Cal.4th 221, 227, this Court made clear in the context of criminal threats proscribed by section 422 that not all threats are criminal. The threat crime defined by section 140, subdivision (a) in the present case consists of pure speech. As charged and prosecuted, appellant's crime was predicated on words alone, without action or an intent to act. Unlike section 422 which proscribes criminal threats and which requires proof of five distinct elements,[2] or section 139, for example, which proscribes "credible threats" against witnesses or victims of crime and which defines "a credible threat" as a threat made with the intent and the apparent ability to carry out the threat so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family, there is no similar "credible threat" or immediacy requirement contained in section 140.

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[2]/ As noted by the Court in *In re George T.* (2004) 33 Cal.4th 620, quoting *People v. Toledo, supra*, 26 Cal.4th at pp. 227-228, section 422 requires the prosecution must prove (1) that the defendant willfully threatened to commit a crime which will result in death or great bodily injury to another person; (2) that the defendant made the threat with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out; (3) that the threat was on its face and under the circumstances in which it was made, 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; (4) that the threat actually caused the person threatened to be in sustained fear for his or her own safety or for his or her immediate family's safety; and (5) that the threatened person's fear was reasonable under the circumstances. In his concurring opinion in *In re George T.*, for example, Justice Baxter appropriately and succinctly noted that "[t]o convict one of the felony offense of making a criminal threat, the prosecution must prove several technical and stringent elements. (*Id.* at p. 640.)

Because section 140 regulates pure speech, the strict standards required by the First Amendment must be applied in analyzing appellant's constitutional challenge. "[A] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind." (*Watts v. United States* (1969) 394 U.S. 705, 707.) While the Legislature can constitutionally penalize certain kinds of threats, such a statute must be narrowly interpreted to avoid penalizing protected speech. (*Rogers v. United States* (1975) 422 U.S. 35, 41-48; *Watts v. United States, supra*, 394 U.S. at pp. 707-708; *United States v. Kelner, supra,* 534 F.2d at pp. 1024-1027.)

The case of *United States v. Kelner, supra*, is the seminal case on the criminal punishment of pure speech. In *Kelner*, the United States Court of Appeals for the Second Circuit analyzed the difference between protected speech and threats which could be punished criminally. *Kelner* considered those circumstances under which an unequivocal threat, which has not ripened into an overt act, is punishable under the First Amendment, even though it may also involve elements of expression. (*United States v. Kelner, supra*, 534 F.2d at p. 1026.) That case defined punishable, or "true threats" as "those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected 'vehement, ... '." (*Ibid.*) The court continued that "only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished." (*Id.* at p. 1027.)

The Court in *Kelner* found guidance from *Watts v. United States, supra,* 394 U.S. 705. In *Watts*, the defendant, while participating in a political rally, said he would ignore a draft notice and that, if the government made him carry a rifle, the first person he wanted to get his sights on was President Lyndon B. Johnson. (*Id.* at p.706.) The United States Supreme Court reversed the conviction because, under the facts, the statement was not a "true threat" but mere political hyperbole. (*Id.* at p. 708.) *Kelner* found that, as in *Watts*, only true threats were punishable, and excluded threats, which in context, were conditional and made in jest. (*United States v. Kelner, supra*, 534 F.2d at p.1026.)

Kelner is of particular relevance to the present case and statute in that the court there construed a statute, like section 140, subdivision (a), lacking any requirement of specific intent. In order to restrict the statute's application to true threats, as *Watts v. United States* made clear the Constitution mandates, *Kelner* imposed an immediacy requirement which is lacking in section 140.

This Court interpreted *Kelner* in *People v. Bolin* (1998) 18 Cal.4th 297 and in *In re M.S.* (1995) 10 Cal.4th 698. Both cases suggest that, as a constitutional matter, a fact determination based on *Kelner's* precise wording is not a necessary prerequisite to finding a true threat, if other elements of the statute in question provide assurance that a defendant's statement was in fact a true threat which necessarily includes the elements of specific intent and likelihood of execution.

In *Bolin*, the defendant wrote a letter stating he would kill the addressee if the addressee did not do certain things and stop doing other things. (*People v.*

Bolin, supra, 18 Cal.4th at p. 336, fn. 11.) The defendant claimed that, because his letter did not contain an unconditional threat, it did not violate section 422 as a matter of law. (*Id.* at p. 337.) The Court interpreted *Kelner* and *Watts* to hold that section 422 does not require an unconditional threat. (*People v. Bolin, supra*, 18 Cal.4th at p. 338.) After discussing *Watts*, the Court in *Bolin* said: "As the *Kelner* court understood this analysis, the [United States] Supreme Court was not adopting a bright line test based on the use of conditional language but simply illustrating the general principle that punishable true threats must express an intention of being carried out." (*People v. Bolin, supra*, 18 Cal.4th at p. 339.)

More on point, in *In re M.S., supra,* 10 Cal.4th 698, a petition under Welfare and Institutions Code section 602 was filed against two minors alleging, inter alia, interference with the victims' civil rights, a misdemeanor in violation of Penal Code section 422.6. That felony charge against the minors, as were the others, was joined with an enhancement allegation that the offenses had been committed because of the victims' sexual orientation (§ 422.7). The juvenile court found true all of the charges and enhancing allegations against both minors. The Court of Appeal affirmed the juvenile court's findings, rejecting the minors' constitutional challenges to sections 422.6 and 422.7.

This Court remanded the matter to the juvenile court in respect to a sentencing issue. In all other respects, the Court affirmed the judgment of the Court of Appeal. The Court held that section 422.6 was not unconstitutionally overbroad or vague, rejecting the argument that it is insufficiently specific as to

the victims who must be threatened. It also rejected the contention that the statute was overbroad by failing to require that a punishable threat be unconditional and imminent.

However, to save the statutes from constitutional infirmity and unconstitutional application to protected speech, the Court ruled that both section 422.6 and 422.7 which simply proscribed "willful" threats, required proof of specific intent. As stated by the Court: "Given, therefore, the specific intent requirements in the two California statutes at issue in this case, the concerns are absent that motivated the *Kelner* court to insist on evidence of the threat's imminence or immediacy, in prosecutions under a federal statute lacking such a mens rea requirement, and we decline to infer such a requirement." (*Id.* at pp. 713-714.) In addition, as a further constitutional protection against conviction based on speech alone, the Court held the prosecution must prove not only that the speech itself threatened violence but that the defendant had the apparent ability to carry out the threat. (*Id.* at p. 715.)

Prior to the Court's decision in *In re M.S.*, the Court of Appeal in *People v. Gudger, supra,* 29 Cal.App.4th 310 considered the constitutionality of section 76 that proscribed threats to public officials. Unlike section 140, subdivision (a) at issue in the present case, section 76 explicitly contains the elements of specific intent and apparent ability.

The Court of Appeal in *Gudger* concluded that even under a more expansive interpretation of *Kelner* than this Court permitted in *In re M.S.*, section

76 was sufficient to pass constitutional muster. Of relevance to the constitutionality of section 140, subdivision (a), *Gudger* held: "The language in section 76 contains two critical elements which combine to satisfy the requirement that only true threats, and not political hyperbole, joking expressions of frustration, or other innocuous and constitutionally protected speech, are punished. The language of section 76 requires, in pertinent part, (1) 'the specific intent that the statement is to be taken as a threat' and (2) 'the apparent ability to carry out that threat by any means.' [P] Although there is no requirement in section 76 of specific intent to execute the threat, the statute requires the defendant to have the specific intent that the statement be taken as a threat and also to have the apparent ability to carry it out, requirements which convey a sense of immediacy and the reality of potential danger and sufficiently proscribe only true threats, meaning threats which 'convincingly express an intention of being carried out.'" (*People v. Gudger, supra*, 29 Cal.App.4th at pp. 320-321.)

In addition to sections 76 (at issue in *Gudger*), 422 (criminal threats), and 422.6 and 422.7 (at issue in *In re M.S.*), other provisions of the Penal Code which also punish threats uniformly require specific intent and/or apparent ability. (See, for example, sections 95.1 [threatening juror] and 646.9 [stalking])

In *People v. Falck* (1997) 52 Cal.App.4th 287, 295, the Court of Appeal dealt with the constitutionality of the antistalking law. The *Falc*k court held: "The language of section 646.9 requires, in pertinent part, (1) the intent to place the victim in reasonable fear of his or her safety, and (2) the making of a 'credible

threat.' ... By these requirements section 646.9 limited its application to only such threats as pose a danger to society and thus are unprotected by the First Amendment." (*Id.* at pp. 296-297.) Both of these elements are missing from section 140, subdivision (a).

Section 140, subdivision (a) does not require the specific intent to carry out the threats. Nor does the statute contain an element of immediacy or imminence. Unlike section 139, subdivision (c) proscribing "credible threats" and which defines such a threat as "a threat made with the intent and the apparent ability to carry out the threat," or section 422.6 as involved in *In re M.S.* onto which both specific intent and immediacy elements have been grafted, section 140, subdivision (a) does not contain either specific intent or "apparent ability" elements.

Contrary to both *Kelner* and *In re M.S.*, the requirement of section 140, subdivision (a) that a threat be "willful" has not been construed as a burden on the People to prove the defendant had the specific intent by means of the threats to interfere with the victim's legally protected rights, thus protecting against its misapplication to protected speech. (See *In re M.S., supra*, 10 Cal.4th at pp. 712-713.) Hence, on its face and as applied to appellant in this case[3], section 140, subdivision (a) fails to meet any of the constitutional concerns and defects expressed by the courts in *Watts*, *Kelner*, or *In re M.S.*

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[3]/ An "as applied" challenge is ripe when the particular, challenged application of a statute has been established by conviction. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1085 [discussing both facial and as applied challenges].)

CONCLUSION

Criminal statutes, such as section 140, subdivision (a), must be scrutinized with particular care. A provision that makes unlawful constitutionally protected conduct may be held facially invalid even if it also has legitimate application. As Justice Black explained in *Terminiello v. Chicago* (1948) 337 U.S. 1, 4-5: "[A] function of free speech under our system of government is to invite dispute. ... Speech is often provocative and challenging. ... There is no room under our Constitution for a more restrictive view."

By reason of the foregoing, therefore, appellant Eddie Jason Lowery respectfully requests that the petition for review be granted and the judgment of the Court of Appeal be reversed.

DATED: January 12, 2010.

Respectfully, submitted,

WILLIAM D. FARBER
Attorney at Law

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening brief uses a 13-point Times New Roman font and contains 3,576 words.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: January 12, 2010.

WILLIAM D. FARBER

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDDIE JASON LOWERY, Defendant and Appellant.	E047614 (Super.Ct.No. INF062558) OPINION

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Gil Gonzalez, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Eddie Jason Lowery appeals his jury conviction for a single count of threatening a victim or witness who provided assistance to law

enforcement in a criminal court proceeding. (Pen. Code, § 140, subd. (a).)[1] He contends his conviction should be reversed because section 140, subdivision (a), as written and as applied to the facts of his case, is constitutionally overbroad in violation of the First Amendment of the United States Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

In a prior case (case No. INF059263), defendant and his wife were accused of stealing $250,000 in cash from 88-year-old Joseph Gorman. Gorman hired defendant and his wife to do housecleaning and some other work in and around his mobilehome on June 26, 2007. Gorman left defendant and his wife alone in the home for several hours. After they left, Gorman discovered he was missing $250,000 in cash he kept hidden in his home. Defendant and his wife were separately prosecuted for the theft. They were tried separately, and Gorman testified against them. Defendant was acquitted, but his wife was convicted of the theft and ordered to repay $250,000 to Gorman in restitution.

While attempting to locate the money taken from Gorman, an investigator obtained access to numerous tape recorded conversations between defendant and his wife while the wife was in jail during the period of August 2007 through January 2008.[2] In the course of these conversations, defendant made a number of statements that served as the basis for the charge in this case. For example, defendant said, "Well, guess what I'm

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

[2] The Riverside County jail system tracks and monitors all calls to and from inmates. Inmates are informed that their telephone calls are being monitored and recorded.

gonna do? I'm gonna kill the bastard. And I'm gonna go down to Mr. Gorman's house, maybe this week, and I'm gonna blow his fucken' head away." During trial, the jury heard a portion of the taped conversations and was also given a transcript. A registration records check revealed defendant owned a handgun as of January 28, 1993.

Defendant testified in his own defense and said he no longer owned a gun, did not intend to carry out the threats, and did not mean any of his statements about killing or blowing people up to be taken seriously. He indicated he made the statements because he was angry and because he believed he had been falsely accused by Gorman. During cross-examination, defendant was impeached with a prior conviction for cashing a stolen check with a forged signature in 1994.

The jury found defendant guilty as charged. The trial court granted defendant formal probation for a period of three years subject to various terms and conditions, including spending 365 days in jail.

DISCUSSION

Defendant contends section 140, subdivision (a), is constitutionally overbroad because it lacks two elements: (1) that defendant specifically intend the statement be taken as a threat; and (2) that defendant have the apparent ability to carry out the threat.[3]

Our review of the constitutionality of a statute is de novo. "[U]nless a higher court has upheld the constitutionality of a statute, it is the obligation of the trial and appellate

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[3] Defendant also objected to section 140, subdivision (a), on the same constitutional grounds prior to trial. However, the trial court rejected the argument and concluded the statements defendant made in the tape recorded conversations were not protected by the First Amendment.

courts to independently measure legislative enactments against the Constitution and, in appropriate cases, to declare such enactments unconstitutional. [Citation.]" (*People v. Superior Court* (*Mudge*) (1997) 54 Cal.App.4th 407, 411.)

"As the United States Supreme Court has explained, the overbreadth doctrine is 'strong medicine' to be employed 'sparingly,' and comes into play only when, measured in relation to a statute's constitutionally permissible sweep, 'the overbreadth of a statute [is] not only . . . real, but substantial as well.' [Citation.] A statute may not be found constitutionally invalid on overbreadth grounds simply because it is possible to conceive of one or a few impermissible applications; such invalidity occurs only if the provision inhibits a substantial amount of protected speech. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 234-235.) Thus, an overbreadth challenge based on the First Amendment must fail unless it can be shown that the statute in question reaches a substantial amount of constitutionally protected speech.

"The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law . . . abridging the freedom of speech.' The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting. [Citations.] . . . [¶] The protections afforded by the First Amendment, however, are not absolute, . . ." (*Virginia v. Black* (2003) 538 U.S. 343, 358.) The First Amendment does not preclude a state from banning a "true threat." (*Id.* at p. 359.)

A true threat is not protected by the First Amendment "however communicated." (*Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 773.) " '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." (*Virginia v. Black*, *supra*, 538 U.S. at pp. 359-360.) In sum, "the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat." (*Planned Parenthood v. American Coalition* (2002) 290 F.3d 1058, 1075.)

Section 140, subdivision (a), states in part as follows: "[E]very person who willfully uses force or threatens to use force or violence upon the person of a witness to, or a victim of, a crime or any other person, or to take, damage, or destroy any property of any witness, victim, or any other person, because the witness, victim, or other person has provided any assistance or information to a law enforcement officer, or to a public prosecutor in a criminal proceeding or juvenile court proceeding, shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years." "The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit

the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." (§ 7, subd. (1).)

"The obvious intent [of section 140] is to preserve and protect witnesses. Protection of witnesses does not require that the witness be personally aware of the threat involving force or violence. . . . [S]ection 140 prohibits the threats it descries, whether or not the threats are communicated to the potential victim." (*People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842.)

As defendant contends, section 140, subdivision (a), does not require proof of a specific intent. (*People v. McDaniel* (1994) 22 Cal.App.4th 278, 284 (*McDaniel*).) As the appellate court in *McDaniel* explained, section 140, subdivision (a), is different from some other similar statutes that criminalize threats but do require proof of a specific intent. For example, section 136.1, subdivision (a)(1), prohibits anyone from "[k]nowingly and maliciously" preventing or dissuading "any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." "Unless the defendant's acts or statements are intended to affect or influence a potential witness's or victim's testimony or acts, no crime has been committed under this section. [Citation.] Since the definition refers to a defendant's intent to achieve some further or additional consequence, section 136.1 is a specific intent crime. [Citation.] [¶] The acts proscribed in section 140, to the contrary, take place *because* the witness, or informant has provided information or assistance to a law enforcement officer. The statute is retrospective rather than prospective and proscribes acts which are retaliatory rather than acts to intimidate. It defines only a description of the particular act of threatening to use

force or violence . . . without reference to an intent to do a further act or achieve a future consequence. Consequently, section 140 is a general intent crime . . . ." (*McDaniel*, at p. 284.)

Here, defendant does not even argue how section 140, subdivision (a), reaches a substantial amount of constitutionally protected speech. He simply contends it is overly broad because it does not include all of the elements in similar statutes, which prohibit different types of threats. This case is distinguishable from those defendant relies upon because section 140, subdivision (a), targets retaliatory threats. Defendant has not cited, and we could not locate, any controlling authority that requires a statute criminalizing retaliatory threats against victims or witnesses of a crime to include the elements of specific intent and apparent ability to carry out the threat.

In our view, there is no risk section 140, subdivision (a), could reach constitutionally protected speech. This is because section 140, subdivision (a), limits criminal liability to threats of force or violence against a witness to or a victim of a crime *because* the witness or victim provided assistance or information to a law enforcement officer, or to a public prosecutor in a criminal proceeding. In reaching our conclusion, we are persuaded by the Seventh Circuit's decision in *United States v. Velasquez* (1985) 772 F.2d 1348 (*Velasquez*), which rejected an overbreadth challenge to a provision in a

federal statute (18 U.S.C. § 1513), which is very similar to Penal Code section 140, subdivision (a).[4]

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

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

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[4] In pertinent part, subdivision (b) of United States Code section 1513 states as follows: "Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for--

"(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

"(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer; or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."

exploit the ambiguity of such words as threat, intimidate, and coerce; the statute is confined to threats to retaliate forcibly against government witnesses and informants. The statute's limited scope takes it out of the realm of social or political conflict where threats to engage in behavior that may be unlawful may nevertheless be part of the marketplace of ideas, broadly conceived to embrace the rough competition that is so much a staple of political discourse. [Citations.]

"It also can make no difference whether the threatener intends to carry out the threat. [Citation.] The argument that if there is no intent to carry through, the threat is a pure exercise in freedom of speech is purely verbal and misconceives the nature of threats. When making a threat one hopes not to have to carry it out; one hopes that the threat itself will be efficacious. Most threats, indeed, are bluffs. But if the bluff succeeds in intimidating the threatened person, or at least (as the words 'intent to retaliate' require the government to show) is intended to succeed, it ought to be punished, to prevent putting government informants in fear for their personal safety or their property. And a bluff has no more to do with the marketplace of ideas than a serious threat." (*Velasquez*, *supra*, 772 F.2d at p. 1357.)

Based on the foregoing, we reject defendant's overbreadth challenge to section 140, subdivision (a). Section 140, subdivision (a), does not regulate speech protected by the First Amendment and does not violate the First Amendment as applied in defendant's case. As a result, the trial court properly overruled defendant's First Amendment objections to section 140, subdivision (a).

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.

PROOF OF SERVICE

People v. Lowery
Court of Appeal No. E047614

I, William D. Farber, declare under penalty of perjury that I am counsel of record for defendant and appellant Eddie J. Lowery in this case, and further that my business address is William D. Farber, Attorney at Law, P.O. Box 2026, San Rafael, CA 94912-2026. On January 12, 2010, I served the within **PETITION FOR REVIEW** by depositing copies each in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service, at Petaluma, California, addressed respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 12, 2010, at Petaluma, California.

WILLIAM D. FARBER
Declarant