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.	**No. S179422**

APPELLANT'S OPENING BRIEF ON THE MERITS

After Decision by the Court of Appeal,
Fourth Appellate District, Division Two, No. E047614
Riverside County Superior Court No. INF062558

THE HONORABLE JOHN G. EVANS, JUDGE

WILLIAM D. FARBER
Attorney at Law
State Bar No. 45121
P.O. Box 2026
San Rafael, CA 94912-2026

Telephone: (415) 472-7279

Attorney for Appellant Lowery

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ISSUE PRESENTED

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

STATEMENT OF THE PROCEEDINGS

Appellant was charged in a single-count information, filed in the Superior Court of California, Riverside County, 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). (1 CT 52.)

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

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.

After a jury trial, appellant was found guilty as charged. (1 CT 103-104, 106.) The trial court suspended imposition of sentence and placed appellant on formal probation for 3 years under various terms and conditions. (1 CT 185-186.)

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 was certified for publication. (See *People v. Lowery* (2009) 180 Cal.App.4th 630.)

Appellant's petition for review was granted by the Court on March 30, 2010.

STATEMENT OF PROCEDURAL AND EVIDENTIARY FACTS

A. Introduction

The charged crime in this case was based on statements made by appellant, who was in his home, to his wife, Veronica Lowery[2], who was then confined in the Riverside County Jail. During monitored and recorded telephone conversations, appellant made statements to Lowery that he was going to kill, blow up, or get Joseph Gorman who had testified against appellant and Lowery in a prior theft prosecution as a result of which Lowery, but not appellant, had been convicted.

Appellant never personally or directly threatened Gorman. He never approached or called Gorman. There was no evidence that appellant ever communicated these threats to Gorman directly or indirectly. There was no evidence that appellant ever acted on his threats or did any act that might be construed as an attempt to carry out his threats.

Before trial commenced, appellant argued that section 140, subdivision (a) contravened the First Amendment to the United States Constitution in that the statute failed to require proof of a specific intent to communicate proscribed threats or proof of an ability to carry out the threats. (See 1 RT 15.) The trial court overruled appellant's First Amendment objections. (See 1 RT 139-140.)

B. Prosecution Case

On June 25, 2007, 88-year-old Joseph Gorman hired appellant and Lowery

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[2]/ Veronica Lowery is also sometimes referred to as "Lowery" in this brief.

to do some house cleaning and other work in and around his mobilehome in Cathedral City. (1 RT 31-37, 51.) Appellant and Lowery cleaned Gorman's home the next day on June 26, 2007. While appellant and Lowery worked, Gorman left them alone in his house for several hours. (1 RT 38-39, 52.) When Gorman returned, appellant and Lowery left early, telling Gorman they had an emergency at home. (1 RT 39-40.)

Gorman told the jury he kept $250,000 in cash in plastic-wrapped bundles under a folding couch in his den. Nobody else knew about the money; Gorman had last counted it several months before appellant and his wife worked in his home. (1 RT 52-54, 60.) After appellant and Lowery left, Gorman discovered that his money was gone. Gorman believed that appellant and Lowery took all $250,000. He reported the theft to the Cathedral City Police Department. (1 RT 42-45.)

In April 2008, Gorman assisted law enforcement and testified against appellant and Lowery when they were separately prosecuted for theft in Riverside County Case No. INF059263. (1 RT 46, 65-68.) The prosecutor in that trial was Riverside County Deputy District Attorney Joanna Daniels. (1 RT 45-47, 65-67.) After separate trials, appellant was acquitted; Veronica Lowery was convicted. (1 RT 70, 74.)

Riverside County Sheriff's Sergeant Kenneth Reichle worked in the county jail as the investigation classification supervisor. (1 RT 76.) Reichle had firsthand knowledge of the telephone system in the Riverside County Jail which tracked and monitored all inmate calls. (1 RT 77-80.) Jail inmates were informed that their

telephone calls were being monitored and recorded. (1 RT 81-82.)

On June 27, 2008, Reichle was requested by the Riverside County District Attorney's Office to prepare a CD of recorded telephone calls previously made from jail by Veronica Lowery to appellant. (1 RT 86-87.) Reichle forwarded the request to the Technical Services Bureau of the Riverside County Jail. (1 RT 85-88.)

On July 2, 2008, Nicolas Minkler, a support technician employed by the Riverside County Sheriff's Technical Services Bureau received a request to provide copies of monitored and recorded jail telephone calls between appellant and Veronica Lowery. (1 RT 93-94.) Minkler prepared a CD and completed the request on July 7, 2008. On the same date, Minkler delivered the CD of the requested recorded telephone conversations to District Attorney investigator Mark Tate who was attempting to locate the money reported to have been taken in the theft at Joseph Gorman's mobilehome. (1 RT 96, 101-102.)

There were 18 monitored jail conversations on an 81-minute CD obtained by Mark Tate between Lowery, appellant, and male and female friends. (1 RT 103-104, 125.) The CD contained recorded telephone calls between August 2007 and June 2008. (1 RT 105.) Tate recognized appellant's voice in the calls. (1 RT 105-106, 124.) A condensed and redacted version of the telephone calls between Lowery and appellant was introduced into evidence and played for the jury as

People's Exhibit No. 1.[3] (1 RT 107-108, 120, 122-123.)

Among his recorded comments, appellant expressed anger that Gorman had accused him of taking $250,000. Appellant also accused his wife of lying about the amount of money taken and in reporting to authorities some allegations involving appellant and their children, telling her that he did not like "fucking liars." (See 1 RT 126, 133.) Appellant expressed anger to his wife that his children were taken from him and that his wife was in jail. (1 RT 127.) Despite being frequently advised that the telephone conversation was being monitored and recorded, among other statements, appellant made the following remarks to his wife on June 27, 2008:

> 1. I'm going down to Gorman's and I'm gonna gonna steal 250,000 dollars! I'm a blow his fucken head away! I will kill the fucken bastard that said I stole 250,000! I will do it. You know what? I stole 100,000 ... Listen! Listen! I stole 100,000 dollars! I burned it all! Okay?! Well, guess what I'm 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!
>
> 2. I'm gonna get mad at the Lawyer and the D.A. and, and Mr. Gorman, I'm gonna go down there and tell him "Look! You say my wife stole 250,000 ... you said I stole 250,000! Let's get the 250 thousand out of your house right now. ...
>
> (1 Supp CT 1-2.)

District Attorney investigator Tate interviewed appellant about the

[3]/ A transcript of the redacted June 27, 2008 telephone call appears at 1 Supp CT 1-2.)

statements he made during the monitored and recorded jail telephone conversations with his wife. According to Tate, appellant initially denied telling his wife that he was going to kill Gorman or that he was going to steal $250,000 from him. (1 RT 185.)

Tate checked for weapons registered to appellant and found that on January 28, 1993, a handgun had been registered to appellant. According to registration records (People's Exhibit No. 2), at the time of trial the weapon was still registered to appellant. However, other testimony at trial established that no weapons of any kind were found in a search of appellant's home. (1 RT 185-187.)

C. Defense Case

Appellant testified on his own behalf. During his testimony, the entire 81 minutes of recorded conversations was played for the jury as Defense Exhibit A. (1 RT 150-151.) Appellant acknowledged that his voice was heard on the June 27, 2008, monitored and recorded telephone conversation with his wife. (1 RT 144-145.) Appellant was home when he spoke with his wife who was in the Riverside County Jail at the time. (1 RT 145.) During other portions of the telephone conversation, appellant's wife told him that she had been sentenced to prison and would be sent soon to prison. She also told him that she had been ordered to pay as restitution the amount of $250,000 to Mr. Gorman. (1 RT 147.)

Appellant became angry when his wife told him she had been ordered to pay $250,000, because neither he nor his wife had taken that amount. (1 RT 148.)

When appellant made the statements about Mr. Gorman, he did not intend to carry out those threats. (1 RT 148.) Appellant made the statements in anger and out of frustration because his children had been taken away. He did not intend that any of his statements about killing or blowing up anyone be taken seriously. (1 RT 149-150, 175.) Indeed, after appellant made some of these statements, his wife told him that he should read his Bible. As a Christian, it was appellant's habit at his home in times of stress to turn to the Bible. (1 RT 152.)

Appellant acknowledged that he previously denied making the recorded statements when interviewed by law enforcement authorities. (1 RT 155.) Although 20 years in the past, appellant had owned a registered handgun, at the time of the conversations with his wife, he did not own or possess any weapons. (1 RT 155-158.) He acknowledged that he was angry when he spoke with his wife, because Joseph Gorman had lied in falsely accusing him of taking $250,000. (1 RT 175-176.)

D. Jury Instructions

At the conclusion of trial, the court instructed the jury in the language of CALCRIM No. 2624 as follows:

> The defendant is charged with threatening to use force against a witness in violation of Penal Code section 140(a).
>
> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. Joseph Gorman gave assistance or information to a law enforcement officer or public prosecutor in a criminal case; and

> 2. The defendant willfully threatened to use force or violence against Joseph Gorman or threatened to take, damage, or destroy the property of Joseph Gorman because he had given assistance of information.
>
> Someone commits an act willfully when he or she does it willingly or on purpose.
>
> * * *
>
> The People do not need to prove that the threat was communicated to Joseph Gorman or that he was aware of the threat.
>
> (1 CT 132.)

The jury was also instructed on general intent in the language of CALCRIM No. 250 as follows:

> The crimes or other allegations charged in this case requires proof of the union, or joint operation, of fact and wrongful intent.
>
> For you to find a person guilty of the crime in this case of Threatening a Witness after Testimony or Information Given, a violation of Penal Code section 140(a), as charged in Count 1, that person must not only commit the prohibited act or fail to do the required act, but must do so with the wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act. However, it is not required that he or she intends to break the law. The act required is explained in the instruction for that crime or allegation.
>
> (1 CT 125.)

E. Prosecutor's Closing Argument

In closing argument to the jury, the prosecutor stressed that there were only two elements to be proved -- that Joseph Gorman gave assistance or information to a law enforcement officer or public prosecutor in a criminal case and that

appellant willfully threatened to use force or violence against Mr. Gorman. (1 RT 200.) As further stated by the prosecutor: "And note the instruction; it says *the People do not have to prove that the threat was communicated to Mr. Gorman. Doesn't have to be proven. Or that he was aware of the treat. It doesn't say anything about the ability to carry it out or anything like that either. These are the only two elements that have to be proven, ...*" (1 RT 200 [italics added].)

In his final remarks, the prosecutor again stressed that there were only two elements to be proven in this case. The prosecutor urged the jury to hold appellant accountable: "*It doesn't matter whether he had the ability to carry it out or what he intended it to be taken as. ...* And the only mental state that I have to prove is that he [appellant] willfully, meaning he intentionally, made the statement. And with that, hold him accountable. Don't let him get away with it." (1 RT 214.)

I

BY FAILING TO REQUIRE SPECIFIC INTENT, APPARENT ABILITY TO CARRY OUT THREATS BY ANY MEANS, OR THEIR EQUIVALENT STATUTORY SAFEGUARDS, THE THREAT PROSCRIPTIONS OF PENAL CODE SECTION 140, SUBDIVISION (a) ARE CONSTITUTIONALLY OVERBROAD, AND AS APPLIED, IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

A. Standard of Review

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." (U.S. Const., 1st Amend.) This provision applies not only to Congress but also to the states because of its incorporation into the Fourteenth Amendment. (See *Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 876-877, 110 S.Ct. 1595, 108 L.Ed.2d 876.)

The level of scrutiny with which a restriction of free speech activity is reviewed depends upon whether it is a content-neutral regulation of the time, place, or manner of speech or restricts speech based upon its content. A content-based restriction is subjected to strict scrutiny. Strict scrutiny for purposes of the federal Constitution means that a content-based speech restriction must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." (*Arkansas Writers' Project, Inc. v. Ragland* (1987) 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209.) If a statute is content based, it is subject to the more

stringent strict scrutiny standard. (See *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 364-365, fn. omitted.)

When, as here, the definition of a crime embraces any conduct that causes or might cause harm, and the law is applied to speech whose communicative impact causes the relevant harm, the law is treated as content-based. (See *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 628, 104 S.Ct. 3244, 82 L.Ed.2d 462; see also *Krell v. Gray* (2005) 126 Cal.App.4th 1208, 1224.) Section 140, subdivision (a) is just such a law. Its prohibition applies to any conduct involving force or threats to use force or violence on a witness or crime victim because that person has provided assistance or information to law enforcement. Since it was applied in this case to appellant's speech, the statute must be treated as content-based to which the strict scrutiny standard of review applies.

B. Failing to Require a Specific Intent Element, Penal Code Section 140, Subdivision (a) Runs Afoul of this Court's First Amendment Jurisprudence after *Kelner*, as Well as Other State Appellate Decisions Interpreting *Kelner*

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. By virtue of the trial court's instructions in the language of CALCRIM Nos. 250 and 2624, the jury was informed that there were only two elements of the crime to be proved: (1) that Joseph Gorman gave assistance or information to a law enforcement officer or public prosecutor in a criminal case, and (2) that appellant willfully threatened to use force or violence against Mr.

Gorman.

In *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, the United States Court of Appeals for the Second Circuit analyzed the difference between protected speech and threats which could be punished criminally. The Court of Appeals in *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. (*Id.* at p. 1026.) In its opinion, the court 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 also held that "only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished." (*Id.* at p. 1027.)

This Court subsequently interpreted and applied *Kelner* in *In re M.S.* (1995) 10 Cal.4th 698 and *People v. Bolin* (1998) 18 Cal.4th 297. When *Bolin* and *In re M.S., supra*, are considered together, these cases signify 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, including such elements as specific intent or the likelihood of execution (immediacy). (See also *People v. Dunkle* (2005) 36 Cal.4th 861, 919 ["statute may constitutionally criminalize threats, even without a requirement of immediacy or imminence, if it includes a requirement of specific intent and present or apparent ability to carry

out the threat."]; see also *People v. Toledo* (2001) 26 Cal.4th 221, 227-228 [requisite elements of criminal threats include specific intent in addition to willfulness].)

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.) Relying on *Kelner*, from which the language of section 422 "was lifted almost verbatim" (*In re George T.* (2002) 102 Cal.App.4th 1422, 1441), the *Bolin* Court held that section 422 does not require an unconditional threat. (*People v. Bolin, supra*, 18 Cal.4th at p. 338.) As stated by the Court in *Bolin*: "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, italics added.)

Previously, in *In re M.S., supra,* 10 Cal.4th 698, this Court construed both sections 422.6 and 422.7. To save the statutes from constitutional infirmity and unconstitutional application to protected speech, the Court ruled that both sections 422.6 and 422.7 required proof of specific intent. As stated by the Court in *In re M.S.*, "[g]iven, 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." (*In re M.S., supra,* 10 Cal.4th 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.)

Other findings or decisions by the Court, and by other state appellate courts, in respect to comparable threat statutes, support appellant's argument in this case. For example, in *People v. Monterroso* (2004) 34 Cal.4th 743, quoting *In re M.S., supra*, 10 Cal.4th at page 714, and construing section 71, which provides in part that "[e]very person who, with intent to cause, attempts to cause, or causes, . . . any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out, is guilty of a public offense," the Court emphasized that as long as a threat reasonably appears to be a serious expression of intention to inflict bodily harm and its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out, a statute proscribing such threats is not unconstitutional for lacking a requirement of immediacy or imminence. (*Id.* at p. 776.) Similarly, in *People v. Jackson* (2009) 178 Cal.App.4th 590, the Court of

Appeal concluded that in order to support a conviction for attempted criminal threat in violation of sections 664 and 422, the jury must find that the defendant specifically intended to threaten to commit a crime resulting in death or great bodily injury. (*Id.* at p. 598.)

Prior to the Court's decision in *In re M.S.*, the Court of Appeal in *People v. Gudger* (1994) 29 Cal.App.4th 310 considered the constitutionality of section 76 which punishes "[e]very person who knowingly and willingly threats the life of, or threatens serious bodily harm to, any elected public official, . . . with the specific intent that the statement is to be taken as a threat, and the apparent ability to carry out that threat by any means . . . ." The court 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. (*Id.* at pp. 319-321.)

Of relevance to the constitutionality of section 140, subdivision (a), the court in *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.' [¶] 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; see also *People v. Barrios* (2008) 163 Cal.App.4th 270, 276-277 [interpreting § 76, subd. (c)(5) to impose requirement of specific intent coupled with apparent ability; "essence of a violation of section 76 is the making of a statement with the intent that it be taken as a threat, along with the apparent ability to carry out the threat, resulting in actual reasonable fear on the part of the victim"].)

In *People v. Falck* (1997) 52 Cal.App.4th 287, the Court of Appeal dealt with the constitutionality of the anti-stalking law and concluded that the statute is neither unconstitutionally vague nor unconstitutionally overbroad in violation of the First Amendment. (*Id.* at p. 297.). 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).

In contrast to statutes which have survived constitutional challenges, section 140, subdivision (a) does not require specific intent. Nor does the statute contain an element of immediacy or apparent ability to carry out the threats.

Unlike section 139, subdivision (c), which proscribes "credible threats" and defines such to be "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 were grafted, section 140, subdivision (a) at issue here does not contain either apparent ability, immediacy, or, most importantly, specific intent elements.

Contrary to *Kelner, In re M.S.*, and *Bolin*, 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, e.g., *In re M.S., supra*, 10 Cal. 4th at pp. 712-713.) In this case, section 140, subdivision (a) was not defined as a specific intent crime. Both the trial court's instructions and the prosecutor's argument failed to make clear, as this Court stressed in *In re M.S., supra*, 10 Cal.4th at p. 713, that "willfully threatened," as used in the statute to describe a punishable threat, "unequivocally defines a specific intent crime." Indeed, to the contrary, the trial court in this case instructed the jury that the crime is one of general intent with liability predicated simply on uttering a threat on purpose. Omitting both an immediacy requirement or, alternatively, and more importantly, specific intent, section 140, subdivision (a) thus fails to meet any of the constitutional concerns and defects expressed by the courts in *Kelner*, *In re M.S.*, and *Bolin*.

C. By Failing to Require a Constitutionally Necessary Specific Intent Element, Penal Code Section 140, Subdivision (a) also Conflicts with the First Amendment as Interpreted by the United States Supreme Court and the Courts of Appeals

Not all content-based restrictions on speech are unconstitutional. Certain categories of speech are of such low value and inflict such serious harm that they are outside the protection of the First Amendment. One such category is composed of true threats. As noted, for example, by the United States Court of Appeals in *United States v. Hanna* (9th Cir. 2002) 293 F.3d 1080, 1084, "the [United States Supreme] Court [has] left no doubt that true threats could be criminalized because they are not protected speech."

The Court of Appeal in the present case held that section 140, subdivision (a) does not violate the First Amendment and does not reach constitutionally protected speech because it only targets retaliatory or true threats beyond the scope constitutional protection. (Slip Opinion at p. 7.) While the court also acknowledged that true threats encompass statements where the speaker *means* to communicate a serious expression of *an intent* to commit an act of unlawful violence, nevertheless according to the court, the only requirement for a true threat is that the defendant intentionally or knowingly communicate the threat. (*Ibid.*)

In the present case, precisely because the crime defined by section 140, subdivision (a) lacks the constitutionally necessary mens rea element of intent, it violates the First Amendment. Some showing of intent -- more than mere willfulness -- is required of section 140, subdivision (a) in order for pure speech

punished by the statute to fall within the First Amendment exception to threats.

The United States Supreme Court has decided very few cases directly addressing the threat exception. For many years, its only significant pronouncement on the subject was its opinion in *Watts v. United States* (1969) 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664. The defendant in *Watts* had announced at a public rally against the Vietnam War in 1966 that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." (*Id.* at p. 706.) The defendant was convicted of violating 18 U.S.C. section 871, subdivision (a) which prohibits "knowingly and willfully mak[ing] any threat to take the life of or to inflict bodily harm upon the President of the United States." (*Id.* at p. 705.) The high court overturned the defendant's conviction, holding that First Amendment principles required it to construe the term "threat" in the statute to exclude the sort of political hyperbole the defendant had used. (*Id.* at pp. 707-708.) The Court declined to address, however, the question of what mens rea requirement the statute imposed. It did not explain whether intent to threaten is a necessary part of a constitutionally punishable threat. Nor did the Court address whether the statute created any constitutional problem by not criminalizing threats against other public officials or private persons; it appears those questions were not raised.

The United States Supreme Court revisited the topic of threats and the First Amendment in *Virginia v. Black* (2003) 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535, holding that it does not violate the United States Constitution for a state to prohibit burning a cross with the intent to intimidate. The statute involved

provided as follows:

> It shall be unlawful 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. . . . Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.
>
> (Va. Code Ann. § 18.2-424 (1996).)

In state-court proceedings, the Supreme Court of Virginia had consolidated the appeals of three people convicted under the statute and held the statute unconstitutional on its face on the grounds that, although it punishes speech within the general unprotected category of true threats, it "selectively chooses only cross burning because of its distinctive message." (*Black v. Virginia* (2001) 262 Va. 764, 553 S.E.2d 738, 744.)

The United States Supreme Court disagreed with the Virginia Supreme Court, holding that a state many single out "cross burnings done with the intent to intimidate" for punishment because "burning a cross is a particularly virulent form" of threat. (*Virginia v. Black, supra*, 538 U.S. at p. 363.) "Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm." (*Ibid.*)

At the same time, the high court placed great weight on the intent requirement. It offered this definition of unprotected "true threats" and

"intimidation":

> "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 additional 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.
>
> (*Id.* at pp. 358-360, italics added.)

While the Court of Appeal in the present case quoted the above passage for support (Slip Opinion at pp. 4-5), it failed to grasp the United States Supreme Court's insistence on intent to threaten as the sine qua non of a constitutionally punishable threat.

With the possible exception of Justice Thomas' dissent, all of the high court's opinions in *Black*, including Justice O'Connor's four-Justice plurality opinion, took the same view of the necessity of an intent element in order for a threat to be criminally punishable. Justice Scalia agreed that the Virginia statute was unconstitutional insofar as it failed to require the state to prove the defendant's intent. (*Virginia v. Black, supra,* 538 U.S. at p. 368 [Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part].) He

disagreed only with the Court's facial invalidation of the statute; instead, he would have permitted case-by-case challenges to convictions in which the prima facie provision operated to remove the state's burden to prove intent. (*Id.* at pp. 372-363.)

Justice Souter, joined by Justices Kennedy and Ginsburg, agreed that the prima facie evidence provision rendered the statute facially unconstitutional because if effectively eliminated the intent requirement. (*Id.* at p. 385 [Souter, J., concurring in the judgment in part and dissenting in part].) He disagreed only with the plurality's holding that the Virginia Supreme Court could on remand, apply a narrowing construction to the prima facie evidence provision and thus save the statute as a whole from facial un constitutionality. (*Id.* at p. 387.)

In *Black,* eight Justices (with the exception of Justice Thomas) thus agreed that specific intent to intimidate is necessary and that the government must prove it in order to secure a conviction. By virtue of *Black*, this Court should also find that the same principle governs in the present case.[4] Contrary to the Court of

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[4]/ See also Frederick Schauer, *Intentions, Conventions, and the First Amendment* (2003) 55 Sup.Ct. Rev. 197, 217 ["[I]t is plain that ... the *Black* majority ... believed that the First Amendment imposed upon Virginia a requirement that the threatener have specifically intended to intimidate"]; Roger C. Hartley, *Cross Burning -- Hate Speech as Free Speech*, (2004) 54 Catholic U.L.Rev. 1, 33 ["*Black* now confirms that proof of specific intent must be proved also in threat cases"]; Kenneth Karst, *Threats and Meaning: How the Facts Govern First Amendment Doctrine* (2006) 58 Stanford L.Rev. 1337, 1348 ["the threats exception to the First Amendment now appears to apply only to a speaker who has intended to threaten"].

In his law review article, UCLA law professor Karst, a leading constitutional and First Amendment authority, offered a jury instruction reflecting "a composite of statements from the Supreme Court's decision in *Black* and the

Appeal's opinion in this case, therefore, speech may be deemed unprotected by the First Amendment as a true threat only upon proof that the speaker intended the speech as a threat.

Rather than correctly interpret *Black*, the Court of Appeal in the present case relied on two pre-*Black* decisions -- *United States v. Velasquez* (7th Cir. 1985) 772 F.2d 1348 and *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists* (9th Cir. 2002) 290 F.3d 1058, 1075. (See Slip Opinion at pp. 5, 7.) While these decisions do not necessarily conflict with *Black,* they have been misread or misconstrued by the Court of Appeal in the present case to uphold the constitutionality of section 140, subdivision (a).

In the 1985 *Velasquez* decision involving the federal witness threat statute (18 U.S.C § 1513) that the Court of Appeal found comparable to section 140, the Court of Appeals for the Seventh Circuit actually articulated an element of specific intent in respect to true threats and incorporated a mens rea or specific intent element into the witness threat statute. As stated by the *Velasquez* court, "[t]hreats

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Ninth Circuit's *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists* (9th Cir. 2002) 290 F.3d 1058 decision, stressing that the instruction is "a fair representation of instructions that have earned approval of appellate courts." (Karst, *Threats and Meaning, supra,* 58 Stanford L.Rev. at p. 1349, fn. 59.)

Prof. Karst's instruction postulates specific intent as an essential element in threat cases and reads as follows: "A threat is a statement which a reasonable speaker should foresee would be interpreted, by those to whom the speaker communicates the message, to be a serious expression of intent to inflict bodily harm. The speaker need not intend to carry out the threat but must intend to threaten some person indicated by the message." (Karst, *Threats and Meaning, supra.*)

that are rhetorical rather than real are not punishable under statutes similar to [18 U.S.C.] section 1513 . . . . In any event, the cases provide amply protection for purely verbal excesses and do not require that statutes which forbid threats to injure a person or damage his property make an explicit exception for threats unlikely to be intended, or to be understood literally." (*Id.* at p. 1358.)

Other federal decisions around the time of *Velasquez* which also construed the same federal witness protection act, containing language comparable to section 140, subdivision (a), invariably stressed the required element of specific intent in witness threat cases. For example, in *United States v. Maggitt* (5th Cir. 1986) 784 F.2d 590, 593, the Court of Appeals noted that 18 U.S.C. section 1513 -- on which the Court of Appeal in this case draws sustenance -- "punishes only threats made with an intent to retaliate against a government witness." The Court of Appeals in *United States v. Carrier* (2d Cir. 1982) 672 F.2d 300, noted that the burden is on the government to prove a true threat. "Where statutes employ the word 'threat,' it is generally understood that the better course is to decide each case on its facts leaving the defendant's intent as a question for the jury." (*Id.* at p. 306.) In *United States v. Cummiskey* (3d Cir. 1984) 728 F.2d 200, the Court of Appeals noted that the witness protection act "defines an offense with three elements: (1) knowing engagement in conduct (2) either causing or threatening to cause bodily injury to another person (3) with the intent to retaliate for, inter alia, the attendance or testimony of a witness at an official proceeding." (*Id.* at p. 206.)

In the 2002 *Planned Parenthood* decision cited by the Court of Appeal in

the present case (Slip Opinion at p. 5), the Ninth Circuit Court of Appeals held that in order to determine whether a threat of force was made in violation of the Freedom of Access to Clinic Entrances Act (FACE), the alleged threat must be analyzed in light of the entire context of the threat and under all the circumstances, including prior violence by third parties. (*Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, supra,* 290 F.3d at p. 1077.)

In *Planned Parenthood*, physicians and health care clinics that provided women's health care services, including abortions, brought suit under FACE, claiming the defendants -- the American Coalition of Life Activists (ACLA) -- targeted them with threats. On appeal after a judgment in favor of the medical providers, the defendants argued that the First Amendment required reversal, because liability was premised on speech that constituted neither an incitement to imminent lawless action nor a true threat. (*Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, supra,* 290 F.3d at p. 1072.)

While affirming the judgment, the Court of Appeals noted that under the United States Supreme Court's opinion in *Brandenburg v. Ohio* (1969) 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430, "the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action." (*Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition*

of Life Activists, supra, 290 F.3d at p. 1071.) Not particularly apposite to the present case, the *Planned Parenthood* decision essentially concluded imminent lawless action is not an element of a true threat. (*Id.* at p. 1072.)

Recently, the Ninth Circuit Court of Appeals in *United States v. Cassel* (9th Cir. 2005) 408 F.3d 622, 630, discussed the *Planned Parenthood* decision, observing that "someone reading our decision in that case would think our holding was clear: no subjective intent to threaten is necessary. . . . Yet our opinion in *Planned Parenthood* also noted that the statute in question contained an explicit requirement of intent to threaten (or 'intent to intimidate'), and we cited *[United States v.] Gilbert* (9th Cir. 1987) 813 F.2d 1523] for the proposition that 'the requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech.' [Citation omitted.] Moreover, we observed that 'the requirement of intent to intimidate cures whatever risk there might be of overbreadth.' [Citation omitted.] And we wrote that the reasonable-person definition of a true threat, '*coupled with the statute's requirement of intent to intimidate*, comports with the First Amendment.'" The *Cassel* court concluded that "we are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a "true threat" only upon proof that the speaker subjectively intended the speech as a threat." (*Id* at p. 633.)

In *United States v. Stewart* (9th Cir. 2005) 420 F.3d 1007, the Court of Appeals discussed *Black*, *Planned Parenthood*, and *Cassel*, as well as the required elements of a true threat, including specific intent. The *Stewart* court noted Ninth

Circuit precedent had generally called for application of an objective (rather than subjective) test, that is, a statement is a true threat if 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." (*Id.* at pp. 1016-1017.)

The *Stewart* court further noted its earlier decision in *Cassel* suggested the objective test was no longer tenable in light of *Black* and that speech thus may be deemed unprotected by the First Amendment as a true threat only upon proof that the speaker subjectively intended the speech as a threat. (*United States v. Stewart, supra,* 420 F.3d at p. 1017.) The *Stewart* court concluded that in any event, whether an objective or subjective true threat definition applied, the statute at issue which proscribed threats satisfied the First Amendment, because it "*contains a specific intent element*: it punishes only threats made regarding enumerated officials with the intent to impede, intimidate, interfere with, or retaliate against such officials . . . . Thus, a conviction . . . could only be had upon proof that the speaker intended the speech to impede, intimidate, interfere with, or retaliate against the protected official." (*Id.* at p. 1017.) Further discussing the Ninth Circuit's prior decision, the *Stewart* court stressed that in *Cassel*, "[a]fter recognizing that 'intent to threaten is a constitutionally necessary element of a statute punishing threats,' we construed [the statute involved] to require such intent to save the statute from unconstitutionality." (*Id.* at p. 1018, fn. 7.)

Clearly and unequivocally requiring specific intent in true threat cases, both

Cassel and *Stewart* were ignored or overlooked by the Court of Appeal in this case in its opinion below. Contrary to the Court of Appeal's opinion in the present case, federal decisional law prior to *Black* actually incorporated some mens rea or specific intent element into comparable federal threat legislation. The only exception to the requirement of specific intent in threat statutes now appears to be threatening the President of the United States. In *United States v. Twine* (9th Cir. 1988) 853 F.2d 676, 680-681, for example, the Court of Appeals held that specific intent is required to impose criminal liability for threats against private individuals, but not for threats against the President, because "[a] threat against the President may cause substantial harm and is qualitatively different from a threat against a private citizen or other public official." As further stated in *Twine*, "[t]oday we hold that the showing of an intent to threaten . . . is a showing of specific intent." (*Id.* at p. 680; see also *United States v. Hanna, supra,* 293 F.3d at p. 1084; *Roy v. United States* (9th Cir. 1969) 416 F.2d 874, 877.)

In *Twine*, the Court of Appeals also held that because of the distinction between the President and private citizens, "it is clear that the general intent to threaten [the President] is not sufficient for a conviction under [other threat statutes]. These [latter statutes], concerned with private citizens and other public officials, logically require a showing of . . . specific intent to threaten." (*United States v. Twine, supra*, 853 F.2d at p. 681.)

As discussed in Subsection A, *supra*, criminal statutes penalizing pure speech, such as section 140, subdivision (a), must be scrutinized with particular

care. A law's overbreadth represents the failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference. (*In re Elias* (1988) 205 Cal.App.3d 166, 171.)

It is generally held that the Legislature will not be presumed to intend unconstitutional results. (*People v. Davenport* (1985) 41 Cal.3d 247, 264; see also *United States v. Delaware and Hudson Co.* (1909) 213 U.S. 366, 407-408, 29 S.Ct. 527, 53 L.Ed.2d 836.) Hence, statutes are assigned meaning consistent, rather than in conflict, with the requirements of the Constitution. Here, given the fundamental constitutional infirmities and the improper restrictions on the exercise of First Amendment freedoms, section 140, subdivision (a), as currently written, should be annulled (*People v. Mirmirani* (1981) 30 Cal.3d 375, 387-388, see also *California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 214; accord, *Fort v. Civil Service Commission* (1964) 61 Cal.2d 331, 339-340) or construed "to include a mens rea element even when none appears on the face of the statute." (*United States v. Cassel, supra*, 408 F.3d at p. 634; see also *Miller v. French* (2000) 530 U.S. 327, 336, 120 S.Ct. 2246, 147 L.Ed.2d 326 [instructing courts to avoid "constitutionally doubtful constructions"]; see also *People v. Kelly* (2010) 47 Cal.4th 1008, [as appropriate remedy, court may disapprove or disallow only the unconstitutional application of statute, thereby preserving constitutional application].)

CONCLUSION

Penal Code section 140, subdivision (a) does not require proof of specific intent and fails to specify that "willfully threatened," as used in the statute to describe a punishable threat, defines a specific intent crime. Omitting the essential element of specific intent or equivalent safeguards, section 140, subdivision (a) does not pass constitutional muster in violation of the First Amendment to the United States Constitution. Therefore, by reason of the foregoing, appellant Eddie J. Lowery respectfully requests that the judgment of the Court of Appeal, Fourth Appellate District, Division Two, affirming appellant's conviction on count 1 in violation of section 140, subdivision (a), be reversed.

DATED: June 24, 2010.

Respectfully submitted,

WILLIAM D. FARBER
Attorney at Law

Attorney for Appellant Lowery

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief on the Merits uses a 13-point Times New Roman font and contains 7,931 words.

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

DATED: June 24, 2010.

WILLIAM D. FARBER

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 June 24, 2010, I served the within **APPELLANT'S OPENING BRIEF ON THE MERITS** 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:

Gil Gonzalez
Deputy Attorney General
State of California
P.O. Box 85266
San Diego, CA 92186-5266

Hon. Rod Pacheco
District Attorney
Riverside County
4075 Main Street, First Floor
Riverside, CA 92501

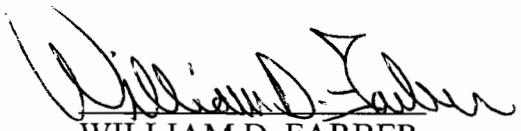
Clerk, Superior Court
Criminal Appeals
Riverside County
4100 Main Street
Riverside, CA 92501

Clerk, Court of Appeal
Fourth Appellate District
Division Two
3389 12th Street
Riverside, CA 92501

Appellate Defenders, Inc.
555 West Beech Street
Suite 300
San Diego, CA 92101-2939

Eddie J. Lowery
P.O. Box 3412
Landers, CA 92285

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 24, 2010, at Petaluma, California.



WILLIAM D. FARBER
Declarant