S179422

Supreme Court Copy

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **EDDIE JASON LOWERY,** Defendant and Appellant.	Case No. S179422 Fourth Appellate District, Division Two, Case No. E047614 Riverside County Superior Court, Case No. INF062558

RESPONDENT'S MOTION FOR JUDICIAL NOTICE

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

Respondent respectfully moves this Court, pursuant to Evidence Code sections 452 and 459 and California Rules of Court, rules 8.252(a), and 8.520(g), to take judicial notice of the relevant legislative history of Penal

Code section 140. These relevant documents, which are appended to this motion, include the following:

Exhibit 1: Assem. Bill No. 2691, Stats. 1982 (1981-1982 Reg. Sess.) ch. 1100, as introduced;

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

Exhibit 3: Jud. Council of Cal., Admin. Off. Of Cts., Review and Analysis of Assem. Bill No. 2691, March 19, 1982, p. 2; and

Exhibit 4: Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2691 (1981-1982 Reg. Sess.) as amended April 13, 1982, p. 3.

Each of the attached exhibits is the proper subject of judicial notice under Evidence Code section 452. Subdivision (c) of that provision provides that judicial notice may be taken of "Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States."

Pursuant to this authority, it is appropriate to take judicial notice of these documents because they contain the legislative history of Penal Code section 140. (See *Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 742 [court took judicial notice of legislative history pertaining to Vehicle Code section 38503, including statement prepared by the Assembly's Committee on Transportation]; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, fn. 3 [court took judicial notice of committee reports and individual legislators' (including co-authors') comments from the Assembly and Senate committee bill files].)

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/ / /

CONCLUSION

For the reasons stated above, respondent respectfully requests that this Court take judicial notice of the documents attached in **Exhibits 1 through 4.**

Dated: July 22, 2010

Respectfully submitted,

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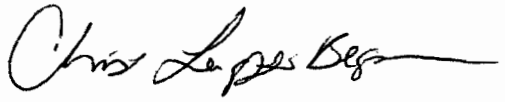

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ASSEMBLY BILL No. 2691

Introduced by Assemblyman Torres

February 18, 1982

An act to amend Section 1203.06 of, and to add Section 152 to, the Penal Code, relating to crimes.

LEGISLATIVE COUNSEL'S DIGEST

AB 2691, as introduced, Torres. Crimes.

Existing law does not specifically impose criminal penalties for willfully threatening to use force or violence upon the person of a witness to a crime, victim of a crime, or any other person or to damage or destroy the property of such person, because he or she has provided assistance or information to a law enforcement officer, or to a public prosecutor in a criminal action or juvenile court proceeding.

This bill would make such a threat punishable as a felony, as specified.

Existing law prohibits the granting of probation for various persons convicted of a crime.

This bill would prohibit the granting of probation to a person who personally uses a firearm during the commission of specified crimes relating to intimidation of witnesses or similar persons.

Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

However, this bill would provide that no appropriation is made and no reimbursement is required by this act for a

-pecified reason

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 152 is added to the Penal Code, to read:

152. Every person who willfully threatens to use force or violence upon the person of a witness to a crime or a victim of a crime or any other person, or to 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, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years.

SEC. 2. Section 1203.06 of the Penal Code is amended to read:

1203.06. Notwithstanding the provisions of Section 1203:

(a) Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following persons:

(1) Any person who personally used a firearm during the commission or attempted commission of any of the following crimes:

(i) Murder.

(ii) Assault with intent to commit murder, in violation of Section 217.

(iii) Robbery, in violation of Section 211.

(iv) Kidnapping, in violation of Section 207.

(v) Kidnapping for ransom, extortion, or robbery, in violation of Section 209.

(vi) Burglary of the first degree, as defined in Section 460.

(vii) Except as provided in Section 1203.065, rape in violation of subdivision (2) of Section 261.

(viii) Assault with intent to commit rape, the infamous

crime against nature, or robbery, in violation of Section 220.

(ix) Escape, in violation of Section 4530 or 4532.

(x) *A felony violation of Section 136.1, 137, or a violation of Section 152.*

(2) Any person previously convicted of a felony specified in subparagraphs (i) through (ix) of paragraph (1), who is convicted of a subsequent felony and who was personally armed with a firearm at any time during its commission or attempted commission or was unlawfully armed with a firearm at the time of his arrest for the subsequent felony.

(b) (1) The existence of any fact which would make a person ineligible for probation under subdivision (a) shall be alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(2) This subdivision does not prohibit the adjournment of criminal proceedings pursuant to Division 6 (commencing with Section 6000) of the Welfare and Institutions Code.

(3) As used in subdivision (a) "used a firearm" means to display a firearm in a menacing manner, to intentionally fire it, or to intentionally strike or hit a human being with it.

(4) As used in subdivision (a) "armed with a firearm" means to knowingly carry a firearm as a means of offense or defense.

SEC. 3. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.

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ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE
TERRY GOGGIN, CHAIRMAN

STATE CAPITOL, ROOM 2136
(916) 445-3268

DPAA

BILL NO. AB 2691
FISCAL W & M
URGENCY NO
HEARING DATE 3/22/82

BILL NO.: Assembly Bill 2691 (As introduced)

AUTHOR: Torres

SUBJECT: THREATS ON WITNESSES IN RETALIATION FOR TESTIMONY OR COOPERATING WITH LAW ENFORCEMENT: FELONY PENALTIES: MANDATORY NO PROBATION FOR WITNESS INTIMIDATION WITH FIREARMS

DIGEST:

Threats In Retaliation. Under current law, use of threats and force to prevent a witness from testifying or giving information to peace officers is punishable as a felony. Assault and battery is punishable as a misdemeanor; with significant injuries or if perpetrated by a force likely to produce great bodily injury (or a deadly weapon), it is a felony.

This bill would make it a ~~felony punishable by 2, 3 or 4 years~~ misdemeanor to threaten to use force or violence or to damage property because the person threatened provided assistance to law enforcement or prosecuting authorities. Bill provides witness intimidation motive for felony assault or battery is circumstance in aggravation for sentencing.

Mandatory No Probation. Under current law, any person who uses a firearm during the commission of specified felonies must be denied probation. Additionally, if the person has been previously convicted of a specified felony and is subsequently arrested while armed with a firearm for a new felony, he must be denied probation.

This bill would add to the list of specified felonies, felony witness intimidation and the new offense created by this bill. Anyone who commits such offense by use of a firearm shall be denied probation.

3. New Offense: Threats to Injure.

a. This bill would punish with felony penalties verbal threats. The penalty would be based upon the motive for the threats. Current law already covers threats to prevent cooperation or testimony, injuries for testifying, damaging property, et cetera. This bill would cover those situations where there was no threat prior to the cooperation or testimony and no injury to person or property after the testimony. Should verbal threats unaccompanied by action be criminally punished? As a felony?

b. Crime Based On Motive. Current law does not criminally punish the exercise of speech even if there are threats to injure another (unless the purpose of the threat has some extortion value, i.e., to cause the person to act in a specified manner). The threat to injure another's property or to assault another is not a crime. Society encourages a broad range of free speech before using the criminal law to prohibit the use of words.

This bill will criminally punish the verbal threats based upon the motive for making the threats. Motive normally should be considered in deciding the appropriate punishment; it should not be an element of a crime. A threat to injure another person or his property should not be criminal based on one motive versus another. A threat in response to a person giving information to police is no different than a threat based on racial prejudice or political difference. The person who receives the threat feels no safer regardless of the motive.

If force is actually used or if property is injured, these considerations are not present. Such activity should be criminalized and the motive should be considered in the court determining the appropriate penalty.

c. Serious vs. Other Threats. One problem with criminalizing the utterance of words is that the danger exists that people would be imprisoned even though they had no intent to actually carry out the threats and, in some cases, the person threatened never regarded the threats seriously. In 1977 the Legislature enacted the "Terrorist Threats" statute which never had been used to prosecute terrorists. In People v. Mirmirani, (1981) 30 Cal.3d 375, a person was prosecuted for threatening to "take the first born" of the arresting police officer in retaliation for causing a miscarriage of his wife. It was discovered that the wife never miscarried, but the defendant was still prosecuted. (The Supreme Court declared the statute to be unconstitutional based upon other challenges.)

Other prosecutions under this statute have been for crank letters to judges and for union activity of farm workers. Should a broad grant of prosecutorial authority be given under this bill?

d. Felony Penalties. The bill would punish by 2, 3 or 4 years in prison threats that if acted on may only be misdemeanors. Under the bill, threats to assault another or to injure property would be a felony, even though the actual assault or injury to property would be punished as a misdemeanor. Should the threat to commit a crime be punished more severely than the commission of the crime?

e. This provision is also contained in AB 2689 (Torres).

SOURCE: L. A. County District Attorney
L. A. County Board of Supervisors

SUPPORT: California Peace Officers' Association (AG.) C.D.A.A O.C.J.P.;

OPPOSITION: [redacted] A.C.L.U.

THE JUDICIAL COUNCIL OF CALIFORNIA

STATE BUILDING, 350 McALLISTER STREET, SAN FRANCISCO 94102

ADMINISTRATIVE OFFICE OF THE COURTS

TO: Senate Judiciary Committee
Assembly Criminal Justice Committee
Office of the Governor

FROM: Judicial Council

DATE: March 19, 1982

SUBJECT: Review and Analysis Pursuant to Penal Code Section 1170.6
Assembly Bill No. 2691 (As Introduced February 18, 1982)

This report is made in accordance with policies and principles approved by the Judicial Council and pursuant to authority delegated by the Judicial Council to the Administrative Director of the Courts.1/

The following review and analysis does not constitute a recommendation, favorable or unfavorable, with respect to the bill.2/

* * * * * * *

1/ Cal. Const., art. VI, § 6; Cal. Rules of Court, rule 990.

2/ Penal Code section 1170.6 does not appear to contemplate recommendations on proposed legislation by the Judicial Council. Compare Sen. Bill No. 42 of 1975-1976 as amended August 13, 1976, proposed Pen. Code, § 1170.7: "The Judicial Council shall . . . make recommendations. Such review and recommendations . . . ." with Pen. Code, § 1170.6 as enacted: "The Judicial Council shall . . . study and review . . . and shall report . . . its analysis . . . . Such review and analysis . . . ."

Pursuant to its constitutional authority, the Judicial Council may elect to make recommendations to the Legislature and Governor concerning proposed legislation. Those recommendations are not, however, embodied in reports prepared pursuant to Pen. Code, § 1170.6.

Bill Summary

This bill would:

1. Add a new section 152 to the Penal Code, to provide a penalty of two, three or four years in prison for threatening to use force against a person who has assisted law enforcement officials, or threatening to damage or destroy the property of a person who has furnished such assistance, because of their having given assistance to law enforcement officials.

2. Add to the list of crimes for which probation may not be granted, if a firearm was used in their commission (§ 1203.06), any felony violation of section 136.1 or 137, or a violation of section 152.

Analysis and Conclusions

Proposed section 152 is entirely consistent with the existing provisions of sections 136.1 and 137, which provide for a two, three or four year prison term for using threats of force to attempt to intimidate witnesses. Using such threats because a witness or victim has in fact assisted law enforcement officials is also an implicit threat to others who may provide such assistance in the future. It appears to be an offense of the same type and magnitude as violations of sections 136.1 and 137 by threats.

The proposed addition of these offenses relating to the intimidation of witnesses to the list of crimes for which probation may not be granted, if a firearm is used, is less clearly consistent with present law.

Existing law imposes two added sanctions on a person who uses a firearm in the commission of any felony (including the crimes in question): prison terms are lengthened by the enhancement provided for in section 12022.5; and the crime is a "violent felony" under section 667.5(c), a classification that has serious consequences for present sentencing and upon the person's record.

Conversely, the Legislature has generally made only

the most serious crimes ineligible for probation when accompanied by firearms use: murder, robbery, kidnapping, rape, escape, burglary in the first degree, and assaults with specified intent.

Although the seriousness of the crimes defined in sections 136.1, 137, and proposed 152 is clear, particularly if committed with use of a firearm, it is not clear that they are of the same magnitude as the crimes now listed in section 1203.06.

SENATE COMMITTEE ON JUDICIARY 1981-82 Regular Session

AB 2691 (Torres)
As Amended April 13
Penal Code
MRR

AB 2691

INTIMIDATION OF WITNESSES
PENALTIES

HISTORY

Source: Los Angeles County District Attorney; Los Angeles County Board of Supervisors

Prior Legislation: None

Support: CPOA

Opposition: No Known

Assembly floor vote: Ayes 66 - Noes 0.

KEY ISSUE

SHOULD IT BE A MISDEMEANOR WILLFULLY TO THREATEN TO USE FORCE AGAINST A PERSON OR HER PROPERTY BECAUSE SHE HAS ASSISTED LAW ENFORCEMENT IN A CRIMINAL OR JUVENILE COURT ACTION?

SHOULD THE MANDATORY NO-PROBATION PROVISION APPLY TO CONVICTIONS FOR FELONY WITNESS INTIMIDATION?

SHOULD THE FACT THAT A FELONY ASSAULT OR BATTERY WAS COMMITTED TO INTIMIDATE A WITNESS BE CONSIDERED A CIRCUMSTANCE IN AGGRAVATION OF THE CRIME?

(More)

AB 2691

PURPOSE

1. Existing law prescribes felony punishment for the use of threats and force to prevent a witness or crime victim from testifying or giving information to law enforcement.

   This bill would make it a misdemeanor to threaten to use force or violence upon a person or property because a witness, victim, or other person had assisted law enforcement in a criminal or juvenile court action.

2. Existing law specifies that any person convicted of certain felonies is not eligible for probation if a firearm was used in the offense or if the person had been convicted previously of a specified felony and is subsequently arrested for another felony while armed.

   This bill would add felony intimidation of victims or witnesses to that list.

3. Existing law provides that when a statute specifies three possible terms of imprisonment, the court shall impose the middle term unless there are circumstances in aggravation or mitigation of the crime.

   This bill would provide that the fact that a felony assault or battery was committed to intimidate a witness would be considered a circumstance in aggravation of the crime.

   The purpose of this bill is to create and increase penalties for intimidating crime victims and witnesses.

(More)

COMMENT

1. Threats to use force or violence: possible unconstitutionality

This bill would make it a misdemeanor willfully to threaten a person or her property because she had assisted law enforcement. Thus a person could be imprisoned in county jail for not exceeding six months or fined $500, or both for a verbal threat to harm a piece of property.

The crime created by this bill consists of pure speech--this is, it can be committed by words alone, without action or the intent to act. Therefore, its constitutionality must be judged by the strict standards required by the First Amendment. "[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.

In Watts the United States Supreme Court reversed a conviction brought under a statute making it a felony knowingly and willfully to threaten the President's life. The Court held that "political hyperbole" appropriate in the context of debate on public issues could not be punished.

A California case, People v. Rubin (1979) 96 Cal.App.3d 968, however, upheld a conviction for disturbing the peace by applying a somewhat loose standard to a threat that was unspecific in its target and unlikely to bring immediate injury. In so doing the appellate court rejected the notion that specific intent is an element in determining whether speech is protected and relied instead on

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an analysis of the words and attendant circumstances.

A more recent case is People v. Mirmirani (1980), 30 Cal.3d 375, in which the California Supreme Court struck down antiterrorist legislation making it a felony to threaten to commit certain crimes in order to achieve social or political goals. Although its decision was based on a finding that the phrase "social or political goals" is unconstitutionally vague, the Mirmirani Court's reliance on Watt is indicative of its concern about provisions, such as the one contained in AB 2691, that punish pure speech.

If this bill is enacted, it would certainly be subject to constitutional challenge.

SHOULD NOT THIS PROVISION BE LIMITED TO THREATS MADE WITH THE INTENTION OF PREVENTING THE PERSON FROM GIVING FURTHER ASSISTANCE TO LAW ENFORCEMENT?

4. No probation for intimidation with a firearm

This bill would add use of a firearm to accomplish felony victim or witness intimidation or bribery to the mandatory no-probation provision of existing law.

The following felonies are now included in that provision:

(a) Murder;

(b) Assault with intent to commit murder;

(c) Robbery;

(More)

(d) Kidnapping with force;

(e) Kidnapping for ransom, extortion, or robbery;

(f) First degree burglary;

(g) Rape;

(h) Assault with intent to commit rape, sodomy, robbery, or murder;

(i) Escape from state prison or local correctional facilities.

IS INCLUSION OF WITNESS INTIMIDATION IN THE NO-PROBATION PROVISION CONSISTENT WITH THE POLICY OF SINGLING OUT THE MOST SERIOUS AND VIOLENT FELONIES FOR MANDATORY SENTENCES?

3. Witness intimidation as an aggravating circumstance

Existing law provides that when a statute specifies three possible terms of imprisonment, the court shall impose the middle term unless there are circumstances in aggravation or mitigation of the crime.

The sentencing court must now consider defendant's prior history and record as well as facts relating to the commission of the crime in determining whether circumstances exist to justify imposing an upper or lower term of imprisonment.

This bill would specify that the fact that a felony assault or battery was committed to intimidate a witness or other person aiding law enforcement in a criminal or juvenile court

(More)

proceeding would be considered an aggravating circumstance.

Because the present penalties for felony assault and battery vary, the upper term that could be imposed under this bill would range from three years to five years, depending on how and against whom the crime was accomplished.

California Rule of Court 421 lists the following circumstances in aggravation:

(a) Facts relating to the crime:

1. Great violence or bodily harm;
2. Use of a weapon;
3. Particularly vulnerable victim;
4. Multiple victims;
5. Defendant was a leader of participants;
6. Defendant threatened witnesses;
7. Defendant could have been sentenced consecutively;
8. Premeditation was indicated;
9. Defendant involved minors;
10. Great monetary damage;
11. Large quantity of contraband;
12. Defendant in position of trust.

(b) Facts relating to the defendant:

1. Great danger to society;
2. Numerous or serious prior convictions;
3. Prior prison terms;
4. Defendant on probation or parole;
5. Unsatisfactory performance on probation or parole.

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Thus apparently, and especially in light of (a)6 above, a judge already has the discretion to impose the upper term as this bill would require.

4. Technical amendments

On page 2, line 16, strike out "assualt" and insert: assault

On page 3, line 39, after "his" insert: or her

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

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

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

On **July 26, 2010,** I served the attached ***RESPONDENT'S MOTION FOR JUDICIAL NOTICE*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

William D. Farber
Attorney at Law
P.O. Box 2026
San Rafael, CA 94912-2026
[Attorney for Appellant – 2 Copies]

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

The Honorable Rod Pacheco
Riverside County D.A.'s Office
4075 Main Street, First Floor
Riverside, CA 92501

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

Additionally, I electronically served a copy of the above-referenced document from Office of the Attorney General's electronic notification address **ADIEService@doj.ca.gov** on **July 26, 2010,** to the following entity at its electronic notification address:

Appellate Defenders, Inc.: 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 26, 2010,** at San Diego, California.

Loreen Blume
Declarant

Loreen Blume
Signature

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