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COMMON ISSUES THAT ARISE IN APPEALS FROM CRIMINAL THREAT CONVICTIONS

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Introduction

While successful appellate challenges to criminal threat convictions are not legion, appeals from such convictions have the potential to present a wide variety of appellate issues. California's primary criminal threat statute, found at Penal Code section 422, contains at least five elements to examine for possible sufficiency claims. A number of these elements are constitutionally mandated in order to safeguard against the criminalization of protected speech, and, thus, criminal threat cases may present interesting and important First Amendment issues. Morever, criminal threat cases that do have constitutional dimensions merit independent review on appeal rather than the more deferential substantial evidence test to which the sufficiency of most criminal convictions is subjected by reviewing courts. Add in to the mix that criminal threat convictions are both wobblers and strikes, and it becomes clear that appeals from such convictions should draw close scrutiny (both due to the array of possible challenges and the severe consequences of felony criminal threat convictions). These materials are meant as a starting place for your research on appeals from criminal threat convcitions.

Penal Code section 422

Penal Code section 422 provides in pertinent part:

"Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (Pen. Code, § 422.)

The California Supreme Court has "divided the crime of criminal threat into five constituent elements that must be established to find that a defendant has committed this offense." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] 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 - which may be 'made verbally, in writing, or by means of an electronic communication device' - 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 'reasonabl[e]' under the circumstances." (*Ibid*.)

CALCRIM no. 1300

In formulating the pattern criminal threat jury instruction, the Judicial Council has broken down Penal Code section 422 into six elements (instead of the five elements identified by the California Supreme Court in *Toledo*). CALCRIM no. 1300 sets forth the elements of the offense as follows:

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> > 1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to <insert name of complaining witness or member[s] of complaining witness's immediate family>;
> >
> > 2. The defendant made the threat (orally/in writing/by electronic communication device);
> >
> > 3. The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to <insert name of complaining witness>];
> >
> > 4. The threat was so clear, immediate, unconditional, and specific that it communicated to <insert name of complaining witness> a serious intention and the immediate prospect that the threat would be carried out;
> >
> > 5. The threat actually caused <insert name of complaining witness> to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];

AND

6. 's <insert name of complaining witness> fear was reasonable under the circumstances.

Attempted Criminal Threat

In *People v. Toledo*, the California Supreme Court concluded that "a defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action. Furthermore, in view of the elements of the offense of criminal threat, a defendant acts with the specific intent to commit the offense of criminal threat only if he or she specifically intends to threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety." (*People v. Toledo*, *supra*, 26 Cal.4th at pp. 230-231.)

Toledo provided a number of examples of situations pursuant to which a person could be convicted of an attempted criminal threat:

- "if a defendant takes all steps necessary to perpetrate the completed crime of criminal threat by means of a written threat, but the crime is not completed only because the written threat is intercepted before delivery to the threatened person"

- "if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat"

- "if a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not actually cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear"

According to *Toledo*, "[i]n each of these situations, only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself." (*People v. Toledo*, *supra*, 26 Cal.4th at p. 231; see also *In re Sylvester C.* (2006) 137 Cal.App.4th 601.)

Because an attempted criminal threat is a lesser included offense of making a criminal threat, if the evidence at trial falls within any of the *Toledo* examples cited above, the trial court has a sua sponte duty to instruct the jury on the crime of attempted criminal threat, and failure to do so can be raised on appeal with or without an objection in the trial court.

Lesser Included Offenses (Other Than Attempts)

There is a split of authority as to whether threatening a public officer in violation of Penal Code section 71 is a lesser included offense of making a criminal threat in violation of Penal Code section 422. Penal Code section 71 sets forth the following offense:

> Every person who, with intent to cause, attempts to cause, or causes, any officer or employee of any public or private educational institution or 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 . . . .

In *In re Marcus T.* (2001) 89 Cal.App.4th 468, 470, Division Four of the Second District applied the accusatory pleadings test and concluded: "the threat against the public officer in violation of Penal Code section 71 was, on the facts of this case, a lesser and necessarily included crime of the terrorist threat in violation of Penal Code section 422." As a result, the minor could not have been found to have committed both offenses, as "[w]here two crimes are based upon the commission of the same act, and one is a lesser and necessarily included offense of the other, the perpetrator may not be found guilty of both." (*In re Marcus. T.*, *supra*, 89 Cal.App.4th at p. 471.)

On the other hand, in *People v. Chaney* (2005) 131 Cal.App.4th 253, Division One of the First District Court of Appeal disagreed with *Marcus T.* In *Chaney*, the Court of Appeal observed that "the third element of section 71, i.e., the specific intent to influence the performance of [the public officer's] duties, by causing or attempting to cause him 'to do, or refrain from doing, any act in the performance of his duties,' is not encompassed by the allegations of the accusatory pleading" charging the defendant with a violation of Penal Code section 422.

Despite this conflict, appellate practitioners will want to argue that Penal Code section 71 does (or, at least, can) amount to a lesser included offense of Penal Code section 422 under the accusatory pleadings test. Doing so, when the facts of a given case permit, creates at least two possible appellate claims: (1) that the defendant could not have been

convicted of both offenses and (2) the trial court should have instructed the jury on the lesser included offense (either because of a defense request or because of a sua sponte duty). Similar arguments should be considered (when appropriate) with respect to:

- Penal Code section 69, which criminalizes "attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law." (Pen. Code, § 69.)

- Penal Code section 76, which applies to any person "who knowingly and willingly threatens the life of, or threatens serious bodily harm to [certain public officials] 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 . . . ." (Pen. Code, § 76.)

- Penal Code section 653m, subdivision (a), which applies to any person "who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family . . . ." (Pen. Code, 653m, subd. (a).)

Note: "The definition of a lesser necessarily included offense is technical and relatively clear. Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117.) None of the above three bulleted offenses is necessarily a lesser included offense of Penal Code section 422 using the statutory elements test. Therefore, appellate counsel will want to apply the accusatory pleadings test. *Marcus T.*, *supra*, provides a good example of this approach.

Sufficiency of the Evidence

Standard of Review on Appeal

Generally, criminal threat convictions are reviewed for substantial evidence just like most other insufficiency claims on appeal. However, the presence of concomitant constitutional claims may necessitate a standard of review less deferential to the trier of fact than the substantial evidence standard. (*In re George T.* (2004) 33 Cal.4th 620, 633, citing *Bose Corp. v. Consumers Union of U.S., Inc.,* (1984) 466 U.S. 485, 514.) Criminal threat prosecutions may raise such constitutional concerns because they often pose a

threshold question of whether the communication at issue involves speech protected by the First Amendment. (*In re George T., supra*, 33 Cal.4th at p. 634.)

In effect, "the standard set forth in Section 422 is both the statutory definition of a crime and the constitutional standard for distinguishing between punishable threats and protected speech." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861-62.) Therefore, when presented with a sufficiency of the evidence challenge in a criminal threat case, the reviewing court should conduct an independent review of the record if "a defendant raises a plausible First Amendment defense to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat." (*In re. George T.*, *supra*, 33 Cal.4th at p. 632.) "Independent review is particularly important in the threats context because it is a type of speech that is subject to categorical exclusion from First Amendment protection . . . ." (*Id*. at p. 634.) For this reason, it is critical that the reviewing court independently determine whether the speech with which it is confronted comprises a threat or constitutionally protected speech. (*Ibid*.)

In *George T.*, the California Supreme Court applied this independent standard of review after a minor's poetry was found to be a criminal threat in violation of Penal Code section 422. *In re Ernesto H.* (2004) 125 Cal.App.4th 298, the Sixth District Court of Appeal applied the independent standard of review following a finding that a minor violated Penal Code section 71. Division Two of the First District Court of Appeal applied the independent standard of review in an unpublished criminal threat case involving a note passed from one student to another containing racist song lyrics that purported to be a Ku Klux Klan recruitment document. (*In re Ryan M.*, 2006 WL 2054071.)

Appellate counsel should carefully examine whether criminal threat cases raise plausible First Amendment defenses, and, if so, should argue that the sufficiency of the evidence should be subject independent review rather than the substantial evidence test.

Note, however, that independent review is not the same as de novo review. "Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue." (*In re George T.*, *supra*, 33 Cal.4th at p. 634.)

<u>The Threat Must Be to Commit a Crime That Will Result in Great Bodily Injury or Death</u>

In the criminal threat context, "great bodily injury" means: "significant or substantial physical injury. It is an injury that is greater than minor or moderate harm." (CALCRIM no. 1300; see also Pen. Code, § 12022.7, subd. (f); see also *People v. Maciel* (2003) 113

Cal.App.4th 679.)

Defendant Must Have the Specific Intent That the Communication Be Taken as a Threat

The specific intent determination requires examination of the alleged threat both on its face and in the context of its surrounding circumstances. (*In re Ryan D.*, *supra*, 100 Cal.App.4th at p. 863.)

Cases where the defendant's words and the surrounding circumstances were **insufficient** to support a finding that the defendant harbored the requisite specific intent:

- *In re Ryan D.* (2002) 100 Cal.App.4th 854
- *People v. Felix* (2001) 92 Cal.App.4th 905

Criminal threat offenses are specific intent crimes. Thus, the United States Supreme Court held in *Virginia v. Black* (2003) 538 U.S. 343 that while consideration of circumstances surrounding the burning of a cross may reveal an intent to engage in violent activities, cross burning itself does not per se constitute a threat. (*Id*. at p. 366.) The First Amendment requires consideration of "contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate." (*Ibid*.) Therefore, the *Black* Court held unconstitutional a Virginia statute providing that "burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." (*Id*. at pp. 347-48.) In light of the hateful facts at issue in *Black*, the case may be particularly useful when attacking a criminal threat conviction for lack of specific intent.

Cases where the defendant's words and the surrounding circumstances were **sufficient** to support a finding that the defendant harbored the requisite specific intent:

- *People v. Mosley* (2007)155 Cal.App.4th 313
- *People v. Gaut* (2002) 95 Cal.App.4th 1425
- *People v. Brooks* (1994) 26 Cal.App.4th 142

While the defendant must intend for the victim to perceive the communication as a threat, the defendant need not possess the specific intent to actually carry out the alleged threat. (*People v. Martinez* (1997) 53 Cal.App.4th 1212.) Nor does Penal Code section 422 require an immediate ability on the part of the defendant to carry out the alleged threat. (*People v. Lopez* (1999) 74 Cal.App.4th 675.) Moreover, Penal Code section 422 is violated if the threat is received and induces sustained fear - whether or not the threatener knows his threat has hit its mark. (*People v. Teal* (1998) 61 Cal.App.4th 277, 281.)

The Threat Must Be Sufficiently Unequivocal, Unconditional, Immediate, and Specific

In order for a threat to be subject to criminal prosecution it must "on its face and under the circumstances in which it [was] made [be] . . . 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 . . . ." (*In re George T.*, *supra*, 33 Cal.4th at p. 630.) To make this determination, the alleged threat should be considered within the context in which it was made. (*Id*. at pp. 637-38.) "This means that the communication and the surrounding circumstances are to be considered together." (*In re Ryan D., supra,* 100 Cal.App.4th at p. 860.) "Thus, it is the circumstances under which the threat is made that give meaning to the actual words used." (*People v. Butler* (2000) 85 Cal.App.4th 745, 753.)

Cases where the defendant's words and the surrounding circumstances were **insufficient** to support a finding the communication in question was 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:

- *In re George T.* (2004) 33 Cal.4th 620
- *In re Ricky T.* (2001) 87 Cal.App.4th 1132
- *In re Ryan M.*, 2006 WL 2054071 [unpublished]
- *People v. Bayan*, 2006 WL 3012925 [unpublished]

Cases where the defendant's words and the surrounding circumstances were **sufficient** to support a finding the communication in question was 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:

- *People v. Mosley* (2007)155 Cal.App.4th 313
- *People v. Gaut* (2002) 95 Cal.App.4th 1425
- *People v. Butler* (2000) 85 Cal.App.4th 745
- *People v. Mendoza* (1997) 59 Cal.App.4th 1333
- *People v. Lepolo* (1997) 55 Cal.App.4th 85

Victim Must Experience Sustained Fear, Reasonable Under the Circumstances

The victim of the alleged threat must actually experience sustained fear as a result of the alleged threat, and the sustained fear must also be reasonable under circumstances. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132.) Thus, there is a both a subjective and an objective fear component to Penal Code section 422. In this context, "sustained" means a period of

time that extends beyond what is momentary, fleeting, or transitory. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132; see also *People v. Allen* (1995) 33 Cal.App.4th 1149.) In addition, the victim's knowledge of the defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear. (*People v. Allen* (1995) 33 Cal.App.4th 1149; see also *People v. McCray* (1997) 58 Cal.App.4th 159 and *People v. Garrett* (1994) 30 Cal.App.4th 962.)

Cases where the evidence of the victim's subjective and/or objective fear were **insufficient** to support a violation of Penal Code section 422:

- *In re Sylvester C.* (2006) 137 Cal.App.4th 601
- *In re Ricky T.* (2001) 87 Cal.App.4th 1132
- *People v. Holzhauser*, 2006 WL 181688 [unpublished]
- *In re Matthew L.*, 2005 WL 914723 [unpublished]

Penal Code section 422 is violated if the threat is received and induces sustained fear - whether or not the threatener knows his threat has hit its mark. (*People v. Teal* (1998) 61 Cal.App.4th 277, 281.)

Cases where the evidence of the victim's subjective and objective fear were **sufficient** to support a violation of Penal Code section 422:

- *In re Ernesto H.* (2004) 125 Cal.App.4th 298
- *People v. Ortiz* (2002) 101 Cal.App.4th 410, 417
- *People v. Allen* (1995) 33 Cal.App.4th 1149

<u>Penal Code section 422 Requires More Than Mere Gestures by the Defendant</u>

In *People v. Franz* (2001) 88 Cal.App.4th 1426, the Third District Court of Appeal held that gestures unaccompanied by a written or verbal statement are insufficient to support a conviction under Penal Code section 422. However, in that case, the Court of Appeal found substantial evidence of a verbal statement (here, either a "shush" or a "sh") and affirmed the conviction in question. The Court of Appeal declined to rule whether a verbal statement must be an actual word to form the basis of a criminal threat conviction.

Failure to Instruct on Juror Unanimity

When evidence is presented to a jury that tends to prove more than one act that may constitute the crime charged, the jury must be given a unanimity instruction, or the prosecutor must elect the act on which to rely. (*People v. Napoles* (2002) 104

Cal.App.4th 108, 114.) If the evidence discloses a greater number of threats than those charged, the prosecutor must make an election of the events relied on in the charges. When no election is made, the jury must be given a unanimity instruction. (*People v. Butler* (2000) 85 Cal.App.4th 745, 755, fn. 4; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, 1539.)

While there is an apparent split of authority among California's intermediate appellate courts regarding the appropriate standard of harmless error for failure to instruct on juror unanimity, a number of cases have applied the federal *Chapman* harmless beyond a reasonable doubt standard rather than the state *Watson* standard. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-188 [applying *Chapman*]; *People v. Melhado*, *supra*, 60 Cal.App.4th at p. 1536 [applying *Chapman*]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 472 [applying *Chapman*]; but see *People v. Vargas* (2001) 91 Cal.App.4th 506, 562 [applying *Watson*]; *People v. Patrick* (1981) 126 Cal.App.3d 952, 967 [applying *Watson*].) The federal standard set out in *Chapman v. California* (1967) 386 U.S. 18 permits an appellate court to affirm only if the error is harmless beyond a reasonable doubt. Cases that have concluded that *Chapman* governs have determined that a nonunanimous verdict denies due process, violating the federal constitution, by effectively lowering the prosecution's burden of proof. Appellate attorneys raising a unanimity instruction issue should always argue for the application of *Chapman* on these grounds.

Criminal Threats are Both Wobblers and Strikes

Criminal threats may be charged as felonies or misdemeanors. (See Pen. Code, § 422 [where the offense is rendered punishable "by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison"].) At the same time, felony criminal threat convictions are considered strikes (see Pen. Code, § 1192.7, subd. (c)(38)) and may be used to enhance the defendant's sentence pursuant to Penal Code sections 667 and 1170.12. (See also *People v. Moore* (2004) 118 Cal.App.4th 74.) Because of the severe penal consequences of acquiring a felony criminal threat conviction, appellate counsel will want to take a long and hard look at renewing any motions that may have been made in the trial court to reduce a felony criminal threat conviction to a misdemeanor pursuant to Penal Code section 17, subdivision (b). The fact that a felony conviction under Penal Code section 422 constitutes a strike should also inform appellate counsel's decision whether to raise an insufficiency of the evidence claim on appeal.