CRIMES OF INTIMIDATION

By
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I. PENAL CODE SECTION 422: CRIMINAL THREATS

A. Elements Defined in *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. (See generally *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13.)

B. Interface with First Amendment

1. Original Penal Code section 422 held void for vagueness in *People v. Mirimani* (1981) 30 Cal.3d 375. Court stated that a threat can be penalized consistent with First Amendment only if "'on its face and in the circumstances in which it is made [it] is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.'" (*Id*., at p. 388, quoting *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

2. Statutory language on element 3 comes from *Kelner*. "Hence, 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. Accordingly, in applying section 422, courts must be cautious that the statutory standard is not expanded beyond that which is constitutionally permissible." (*In re*

Ryan D. (2002) 100 Cal.App.4th 854, 861-862.)

3. Because courts are deciding where the line is to be drawn between speech which is criminally proscribable and speech which is constitutionally protected, independent review of record by appellate court is required, rather than traditional deferential substantial evidence test.

> (a) *Bose Corp. v. Consumers Union* (1984) 466 U.S. 485, 499: Referring to exceptions to First Amendment such as libel, fighting words, incitement to riot, obscenity and child pornography, court states: "In each of these cases the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts which have been deemed to have constitutional significance. In such cases, the court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited."
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> (b) *In re Ryan D., supra*, 100 Cal.App.4th at p. 862:
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> > [T]he statutory definition of the crime proscribed by section 422 is not subject to a simple checklist approach to determining the sufficiency of the evidence. Rather, it is necessary first to determine the facts and then balance the facts against each other to determine whether, viewed in their totality, the circumstances are sufficient to meet the requirement that the communication "convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat." This presents a mixed question of fact and law. In considering the issue, we will defer to the trial court's resolution of the historical facts by viewing the evidence in a light most favorable to the judgment. In determining whether the facts thus established are minimally sufficient to meet the statutory standard, we must exercise our independent judgment. (See *People v.*

Nesler (1997) 16 Cal.4th 561, 582; *People v. Louis* (1986) 42 Cal.3d 969, 984-988.)

4. Poetry or Painting Are More Expressive and Ambiguous and Thus More Likely to be Protected by First Amendment.

(a) *In re Ryan D.* notes that "As an expression of an idea or intention, a painting – even a graphically violent painting – is necessarily ambiguous because it may use symbolism, exaggeration, and make-believe." (100 Cal.App.4th at p. 857.)

(b) But see *In re George T.* (2002) 102 Cal.App.4th 1422, review granted, S111780, in which majority refused to accord any significance to fact communication was in form of poem, with title and byline, and was labeled "Dark Poetry," or that minor asked student to whom he gave poem if there was a poetry club at school.

Dissent quotes *McCollum v. CBS, Inc.* (1988) 202 Cal.App.3d 989, 1002: "Poetry is not intended to be and should not be read literally on its face, nor judged by a standard of prose oratory. Reasonable persons understand . . . poetic conventions as the figurative expressions which they are. No rational person would or could believe otherwise nor would they mistake . . . poetry for literal commands or directives to immediate action. To do so would indulge a fiction which neither common sense nor the First Amendment will permit."

C. Some principles that have developed in appellate review of section 422 cases.

1. Threat Need Not be Unconditional.

In *People v. Bolin* (1998) 18 Cal.4th 297, 338, court disapproved holding of *People v. Brown* (1993) 20 Cal.App.4th 1251 that a threat which is conditional in any respect is not covered by section 422. Approves *People v. Stainfield* (1995) 32 Cal.App.4th 1152, 1157: "The use of the word "so" indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be

sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim."

2. Nature of Relationship Between Threatener and Alleged Victim Can Establish Gravity of Purpose and Immediate Prospect of Execution.

(a) *People v. Garrett* (1994) 30 Cal.App.4th 962. Defendant's prior beating of wife gave his threat to put bullet in her head gravity and immediacy, as did her knowledge he had gun in house and had committed prior homicide.

(b) *People v. McCray* (1997) 58 Cal.App.4th 159. Past domestic violence evidence relevant to demonstrate ex wife in reasonable fear when defendant threatened to blow holes through her.

(c) *In re David L.* (1991) 234 Cal.App.3d 1655. Series of hostile encounters between minor and other student, culminating in student knocking minor down in fight, supported gravity and immediacy and reasonableness of students fear when minor threatened to shoot him.

3. Mere Words Are Not Determinative

(a) *In re Ricky T.* (2001) 87 Cal.App.4th 1132. Minor's threats to "get" teacher or "kick his ass" when teacher accidentally hit student with door showed no gravity of purpose. "Respondent relies too much on judging a threat solely on the words spoken. It is clear by case law that threats are judged in their context." (*Id*., at p. 1137.)

(b) *People v. Martinez* (1997) 53 Cal.App.4th 1218. Agrees that "I'm going to get you," "I'll get you," and "I'll get back to you" are insufficient standing alone to convey threat to commit crime resulting in death or gbi, but were sufficient given all surrounding circumstances.

4. Activity After Threat May Demonstrate Gravity of Purpose.

(a) *People v. Martinez, supra*, 53 Cal.App.4th 1218. Although words ambiguous, defendant's act of arson the next day at victim's workplace demonstrated his gravity of purpose. "Although section 422 does not require an intent to actually carry out the threatened crime, if the defendant does carry out his threat, his actions might demonstrate what he meant when he made the threat, thereby giving meaning to the words spoken." (*Id*., at pp. 1220-1221.)

(b) *People v. Butler* (2000) 85 Cal.App.4th 745. Hours after making threat, defendant invaded victim's home and committed assault with knife on occupant. "This conduct further showed that defendant specifically intended his statement to be interpreted as a threat." (*Id*., at p. 755.)

5. Absence of Surrounding Circumstances Can Demonstrate Lack of Gravity of Purpose, Immediacy.

In re Ricky T., supra, 87 Cal.App.4th at p. 1139: "If surrounding circumstances within the meaning of section 422 can show whether a terrorist threat was made, absence of circumstances can also show that a terrorist threat was not made within the meaning of section 422. Here, there was no evidence of any circumstances occurring after appellant's 'threats' which would further a finding of a terrorist threat." Accord: *In re Ryan D., supra*, 100 Cal.App.4th at p. 860.

D. Sufficiency of Evidence on Elements Other Than Gravity of Purpose and Immediate Prospect of Execution.

1. Specific Intent to Communicate Threat When Threat Not Made Directly.

(a) *In re David L., supra,* 234 Cal.App.4th 1655, 1659: "The kind of threat contemplated by section 422 may as readily be conveyed by the threatener through a third party as personally to the intended victim. Where the threat is conveyed through a third party intermediary, the specific intent element of the statute is implicated. Thus, if the threatener intended

the threat to be taken seriously by the victim he must necessarily have intended it to be conveyed . . . . The communication of the threat to a friend of the victim who was also witness to certain of the antecedent hostilities supports the inference the minor intended the friend act as intermediary to convey the threat to the victim."

(b) *In re Ryan D., supra*, 100 Cal.App.4th 854. Student was angry at female campus police officer who cited student for marijuana possession. A month later, student turns in an art project in a painting class. Minor's painting depicted person appearing to be the minor discharging a handgun at the back of the head of a female police officer with same badge number as one who cited him.

Court of Appeal held, despite minor's later admission that it was foreseeable that the painting would be shown to the officer, that the evidence was insufficient to support a finding that the minor specifically intended the painting would be shown to the officer.

(c) *People v. Felix* (2001) 92 Cal.App.4th 905. After being arrested for kidnapping his ex girlfriend and criminally threatening her fiancé, defendant told a jail psychologist that he was thinking of how he was going to kill his ex girlfriend once he was released. The jail psychologist called the ex girlfriend, who afterward said that the defendant was going to try to kill her.

Court of Appeal held that evidence was insufficient to show that defendant intended the psychologist to convey the threat. "[T]here was no evidence that Felix knew [the therapist] would disclose his statements to [his ex girlfriend] or that he wanted them to be revealed." (*Id*., at p. 913.)

2. Sustained Fear.

(a) "The phrase to 'cause[] that person to be in sustained fear for his or her own safety' has a

subjective and an objective component. A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*In re Ricky T., supra*, 87 Cal.App.4th at p. 1140.)

(b) "Sustained fear" defined in *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 as a period of time "that extends beyond what is momentary, fleeting, or transitory." (See CALJIC No. 9.94 (2004 ed.).)

(c) *In re Ricky T.* found insufficient evidence of sustained fear where teacher threatened sent minor to office without further incident. Distinguishes *Allen* as case where victim had knowledge of defendant's prior threatening conduct. *Ricky T.* "rejects respondent's suggestion that even momentary fear can support a finding of sustained fear . . . ." (87 Cal.App.4th at p. 1140.)

3. Threat Must be Verbal, in Writing, or by Means of an Electronic Communication Device, Mere Conduct Not Enough.

People v. Franz (2001) 88 Cal.App.3d 1426 held that mere conduct without a sound or writing does not violate statute. In *Franz*, defendant in apartment with ex girlfriend when police arrived to investigate domestic violence complaint made a "shush" sound while running his finger across his throat. Appellate court rejects AG argument that mere gestures can violate statute, but affirms due to evidence that defendant made "shush" sound. Also rejects concurring opinion in *People v. Mendoza* (1997) 59 Cal.App.4th 1333 that sending an informant a dead, tongueless rat would violate section 422.

II. PENAL CODE SECTION 71: THREATS TO PUBLIC EMPLOYEES AND SCHOOL OFFICIALS.

A. Text of Statute:

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 . . .

As used in this section, "directly communicated" includes, but is not limited to, a communication to the recipient of the threat by telephone, telegraph, or letter.

B. Elements Defined in *People v. Hopkins* (1983) 149 Cal.App.3d 36, 40:

"'(1) A threat to inflict an unlawful injury upon any person or property; (2) direct communication of the threat to a public officer or employee; (3) the intent to influence the performance of the officer or employee's official duties; and (4) the apparent ability to carry out the threat.' (63 Cal.Opps.Atty.Gen. 5, 7 (1980).)"

C. Direct Communication.

In *People v. Zendejas* (1987) 196 Cal.App.3d 367, a public transit agency manager sent a letter to an employee on medical leave, requesting proof of medical clearance to return to work, and threatening the worker with termination if he did not comply. The worker called and left a message on an answering machine for the manager, threatening to come down with a gun and blow his brains out. He later called the agency and spoke to a person who said he did not know the manager. The worker told him to give the manager the message that if the manager kept bothering him, he would take a gun and blow his brains out.

Court of Appeal held that this was sufficient evidence of direct communication of the threat. Says language meant to insure that message actually reached the public officer personally, rather than ruling out possible communication via intermediary.

D. Specific Intent to Influence the Performance of an Officer's or Employee's Official Duties.

In *People v. Tuilaepa* (1992) 4 Cal.4th 569, 590, D, while locked in cell, made sexual taunts and death threats to two female CYA employees, and when admonished by a male guard not to cut the seams of his pants, threatened to burn the pants and the guard's face. Supreme Court finds insufficient evidence that D harbored the

requisite intent to interfere with the performance of official duties. Says response to male guard's criticism "was obviously intended as an angry retort." (*Ibid*.)

In *People v. Hopkins, supra*, 149 Cal.App.3d 36, court reverses because although jury instructed in language of statute that D had to have intended to cause, attempted to cause, or caused interference with official duties, court also gave general intent instruction.

Also, threat must be related to interference with performance of legitimate duties. *People v. Zendejas, supra*, 196 Cal.App.3d at p. 378 stated that while the public official need not be engaged in a normal or customary duty, there must be proof that the duty intended to be interfered with was a legitimate duty.

E. Reasonably Appears That Such Threat Could Be Carried Out.

In *People v. Tuilaepa, supra*, 4 Cal.4th 569, Supreme Court also held evidence insufficient to create a reasonable belief that the threat would be carried out. Notes lack of evidence of any prior attacks on CYA guards, fact D locked in cell when he threatened the two women guards, and that recipients indicated they did not actually fear for their safety.

F. Under Accusatory Pleading Test, Section 71 Violation May Be a Lesser Included Offense of a Section 422 Violation.

In *In re Marcus T.* (2001) 89 Cal.App.4th 468, a minor threatened a uniformed officer of a school district who made him stop smoking on campus and was taking him to the school dean's office. The threat was to "fuck you up . . . take you out." The minor was charged with violating both section 71 and section 422. The appellate court holds that with exception of element that the minor had threatened to injure the officials "person and property," the section 71 violation was a lesser included offense of the section 422 violation. Appellate court remanded to Juvenile Court to permit it to strike the "and property" language from the section 602 petition to conform to proof, and to thereafter dismiss the section 71 violation as a lesser included offense. Subtext: Juvenile Court did not want minor to have two felonies because any felony thereafter could be tried in adult court under Prop. 21.

III. PENAL CODE SECTION 136.1: WITNESS DISSUASION

A. Text of Statute and Definition of Terms:

1. Section 136.1:

(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:
(1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.

(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is a witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Making any report of that victimization to any peace officer or state or local enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

(2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.

(3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

(c) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances.

(1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person.

(2) Where the act is in furtherance of a conspiracy.

(3) Where the act is committed by any person who has been convicted of any violation of this section, any predecessor law hereto or any federal statute or statute of any other state which if the act prosecuted was committed in this state, would be a violation of this section.

(4) Where the act is committed by any person for pecuniary gain or for any other consideration acting upon the request of any other person. All parties to such a transaction are guilty of a felony.

(d) Every person attempting the commission of any act described in subdivisions (a), (b), and (c) is guilty of the offense attempted without regard to success or failure to the attempt. The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this section.

(e) Nothing in this section precludes the imposition of an enhancement for great bodily injury where the injury inflicted is significant or substantial.

(f) The use of force during the commission of any offense described in subdivision (c) shall be considered a circumstance in aggravation of the crime in imposing a term of imprisonment under subdivision (b) of Section 1170.

2. Section 136:

As used in this chapter:

> (1) "Malice" means an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice.
> (2) "Witness" means any natural person, (i) having knowledge of the existence or nonexistence of facts relating to any crime, or (ii) whose declaration under oath is received or has been received as evidence for any purpose, or (iii) who has reported any crime to any peace officer, prosecutor, probation or parole officer, correctional officer or judicial officer, or (iv) who has been served with a subpoena issued under the authority of any court in the state, or of any other state or of the United States, or (v) who would be believed by any reasonable person to be an individual described in subparagraphs (i) to (iv), inclusive.
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> (3) "Victim" means any natural person with respect to whom there is reason to believe that any crime as defined under the laws of this state or any other state or of the United States is being or has been perpetrated or attempted to be perpetrated.

B. Attempts to Influence Testimony Do Not Come Within Section 136.1.

In *People v. Fernandez* (2003) 106 Cal.App.4th 943, defendant was prosecuted under section 136.1, subdivision (b)(1), for attempting to dissuade a victim from making a report to a judge, based on attempting to have witness feign lack of memory of offense at preliminary hearing. Court of Appeal holds that it would not construe "report to a judge" to include testimony, because section 137 specifically forbids efforts to change the content of a witness's testimony. Review of entire statutory scheme convinces court that when Legislature intends to penalize an effort to influence or prevent testimony, it does so explicitly. Would disrupt Legislature's calibrated punishment scheme to permit felony conviction under section 136.1, rather than misdemeanor conviction of section 137.

C. Section 136.1, subdivision (b) Limited to Pre-Arrest Efforts to Prevent or Dissuade.

In *People v. Hallock* (1989) 208 Cal.App.3d 595, information charged violation of section 136.1, subdivision (c)(1) for violation of subdivision (b), prevention of making report of victimization, by means of threat of force or violence, but jury instruction gave elements of subdivision (a), prevention of witness from testifying. Evidence was that after sexual assault, defendant had said "if you tell anybody anything that happened tonight. . . I'll blow your house up." Court of Appeal reverses for instructional error. Says threat not sufficiently broad to show violation of subdivision (a), could only reasonably have been directed toward prevention of reporting. Reverses because jury not instructed on specific elements of subdivision (b), nor did court give instruction which defined the "knowingly and maliciously" elements.

D. Watch Out For Potential Adverse Sentencing Consequences From Penal Code section 1170.15.

1. Text of Penal Code section 1170.15:

> Notwithstanding subdivision (a) of Section 1170.1 which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of section 136.1 for 137 and that was committed against the victim of, or a witness or potential witness with respect to, or a person who was about to give material information pertaining to, the first felony, or of a felony violation of Section 653f that was committed to dissuade a witness or potential witness to the first felony, the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed, and shall include the full term prescribed for any enhancements imposed for being armed with or using a dangerous or deadly weapon or a firearm, or for inflicting great bodily injury.

2. Problem: court imposes one-third of middle term for violation of section 136. Under section 1170.15, <u>if</u> consecutive term is imposed for section 136 committed on victim or witness or potential witness of any other felony count of conviction,

must be full middle term.

E. "Intimidation of Victims or Witnesses, In Violation of Section 136.1" Added to List of Serious Felonies Effective March 8, 2000, by Prop. 21. (See Section 1192.7, subdivision (c)(37).)

Potential issues: Does any violation of Penal Code section 136.1 qualify or must "intimidation" be alleged and proved to a jury?

What about subdivision (a), which states that "the fact that no person was . . . in fact intimidated . . . shall be no defense against any prosecution . . . ."?

F. If Single Threat Prohibited Under Both Section 136.1 and Section 422, Multiple Punishment is Precluded.

People v. Mendoza (1997) 59 Cal.App.4th 728, defendant threatened woman two days after she testified against his brother at a preliminary examination. Jury convicts defendant of violating both section 136.1 and 422. Appellate court rejects prosecution argument that single threat had dual objectives of retaliation for past testimony and dissuasion from testifying at brother's future trial. Says overall intent was to help brother, so multiple punishment is precluded.