Via Federal Express

September 25, 2015

The Honorable Tani Cantil-Sakauye, Chief Justice
The Honorable Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

Re: *People v. Murillo,* No. S228704
Amici Curiae Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices,

Pursuant to California Rule of Court 8.500(g), please accept this letter in support of the Petition for Review in *People v. Murillo*, No. S228704, 238 Cal. App. 4th 1122 (2015). The American Civil Liberties Union Foundation of Southern California ("ACLU SoCal") and the Electronic Frontier Foundation ("EFF") have a strong interest in the First Amendment concerns at stake in this case, and we submit this letter in the hope that it may assist the Court.

This case involves the felony prosecution, under California Penal Code Section 140(a),[1] of a young aspiring rapper for the lyrics of a song published through social media. As such, it implicates not only constitutional protections for speech communicated through art, but also what it means to communicate in our age of rapidly advancing technology.

The Court of Appeal's opinion warrants review, for at least two reasons. First, in the absence of clear precedent, it articulated a *mens rea* for threatening speech that is in tension with general criminal law principles and First Amendment jurisprudence. Noting that the term "willfully" in Section 140 "'implies simply a purpose or willingness to commit the act,'" it concluded that "[S]ection 140 requires a general intent and not a specific intent" to threaten. 238 Cal. App. 4th at 1127, 1128 (citation omitted). But absent from the opinion is any consideration of whether, in order to "willfully" commit the act of threatening a crime victim, the speaker must know that his speech conveys a threat—with the result that, under the Court of Appeal's rule, individuals harboring merely a general intent to communicate may be tried and convicted of a felony. This is in tension with the general principle that a criminal defendant must at least know the facts of his conduct constituting the offense, as well as with precedent regarding criminal sanctions for speech.

Second, in overturning the decisions of both the magistrate and the trial court to find that a reasonable listener would understand the lyrics as a threat, the Court of Appeal disregarded—against the weight of California authority—the musical context of the words as well as other important contextual factors.

Particularly in combination, these holdings create a dangerous precedent for the freedom of artistic expression in California. If left to stand, the Court of Appeal's analysis risks exposing legions of artists and others to the possibility of criminal sanction for artistic speech that they did

[1] All further statutory references are to the California Penal Code, unless otherwise noted.

not know would or intend to be interpreted as threatening, with the likely result that many would choose to self-censor rather than accept the risk of prosecution. This result contravenes decades of First Amendment jurisprudence directing that the freedom of speech, to be truly protected, requires a certain amount of "breathing space."[2] This Court's review is therefore necessary to settle the important legal question of the *mens rea* required for prosecution under Section 140 and articulate the proper analytical framework for assessing "true threats" in the context of art.

First, the dangerously low *mens rea* applied by the Court of Appeal highlights a gap in California law: the precise *mens rea* necessary for imposing criminal sanctions on purportedly threatening speech. Section 140 itself merely states that threats must be "willful." The Court of Appeal, failing even to consider whether the term "willful" indicates that a defendant must *know* his speech will convey a threat, held that Section 140 requires a *mens rea* of only general intent. It did not grapple with the question of whether this approach is consistent with either the First Amendment or the general approach to determining the *mens rea* necessary to impose criminal penalties, but instead relied on the plain text of the statute and this Court's holding in *People v. Lowery*[3] that the objective "reasonable listener" test is sufficient, regardless of the speaker's intent. *See* 238 Cal. App. 4th at 1127, 1128.

Contrary to the Court of Appeal's opinion, this Court's decision in *Lowery* did not decide what *mens rea* is required for Section 140 to be enforced consistently with the United States ("U.S.") Constitution. Although the *Lowery* Court declared that proof of *specific intent to intimidate* is not necessary,[4] that does not mean that no *mens rea* above general intent is required. A range of possible intents exists between specific intent and a general intent merely to communicate, and nearly every attempt at artistic expression will satisfy the latter. Whether constitutional application of Section 140 requires something more than the most general of intents—for example, knowledge that one's speech will or even could convey a threat—therefore remains an open question.

This issue is particularly worthy of review because the Court of Appeal's approach is out of step with traditional principles of criminal law, specifically with regard to speech. The U.S. Supreme Court has repeatedly indicated that something more than general intent *to communicate* is necessary for criminal sanctions on speech to avoid running afoul of the First Amendment.[5] Most recently in *Elonis v. United States*, evaluating a federal criminal threats statute, the Court reiterated the traditional *mens rea* principle that "a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime."[6] This principle suggests that an individual should only be subjected to criminal sanctions for speech he knows to convey a threat.

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[2] *See, e.g., Gertz v. Welch*, 418 U.S. 323, 342 (1974) (the U.S. Supreme Court "ha[s] been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise"); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."); *Cantwell v. Conn.*, 310 U.S. 296, 311 (1940).
[3] 52 Cal. 4th 419 (2011).
[4] *Id.* at 426–27.
[5] *See, e.g., Virginia v. Black*, 538 U.S. 343 (2003); *Watts v. United States*, 394 U.S. 705, 708 (1969).
[6] 135 S. Ct. 2001, 2009 (quoting *Staples v. United States*, 511 U.S. 600, 605 (1994)) (citation omitted); *see also id.* at 2009–12 (collecting cases that traditional principles of *mens rea* require at least knowledge).

Indeed, this Court, when evaluating a different criminal threats statute in *People v. Chandler*, required "proof that the defendant had a subjective intent to threaten" "[t]o avoid substantial First Amendment concerns associated with criminalizing speech."[7] Because the criminal threats statute at issue in *Chandler* explicitly required an intent for the statements to convey a threat,[8] however, it remains unclear to lower courts whether anything more than general intent is constitutionally required with regard to Section 140.

The necessity of providing "breathing space" for protected speech also weighs in favor of requiring more than a general intent to communicate. Justice Alito noted as much in his separate opinion in *Elonis*, observing that criminal sanctions, "if not limited to threats made with the intent to harm, will chill statements that do not qualify as true threats, *e.g.*, statements that may be literally threatening but are plainly not meant to be taken seriously."[9] Also chilled—likely more so due to the greater risk of misinterpretation—will be statements that are less obviously facetious, including a great wealth of artistic expression. For example, many songs in the style of "gangsta rap,"[10] as well as adolescent poetry such as that in *In re George T.*,[11] could constitute prohibited threats under the standard applied by the Court of Appeal. Such repression is antithetical to robust protection of freedom of speech.

Second, the severely flawed analysis conducted by the Court of Appeal demonstrates the need for this Court to clarify which contextual factors must be considered when evaluating whether speech—particularly artistic speech—constitutes a "true threat." This Court in *Lowery* explained that to be consistent with the First Amendment, Section 140 must apply "only to those threatening statements that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat, namely, 'a serious expression of an intent to commit an act of unlawful violence,' rather than an expression of jest or frustration."[12] *Chandler* further emphasized that the First Amendment requires "'objective indicators of [the speech's] threatening nature'" before criminal sanctions may be imposed.[13]

In evaluating whether speech, in context, constitutes an objective true threat, California appellate courts have inconsistently considered factors such as the directness of the communication,[14] the realistic nature of the purported threat,[15] and—perhaps most important for this case—whether the speech took the form of artistic expression. Indeed, in *In re George T.*, this Court dismissed a

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[7] 60 Cal. 4th 508, 525 (2014).
[8] *See* Cal. Pen. Code §§ 422(a), 21a.
[9] *Elonis*, *supra* note 6 at 2017 (concurring and dissenting opinion, Alito, J.).
[10] As noted in the Petition for Review, "gangsta rap" has been defined as a style of rap music featuring aggressive, often misogynistic lyrics, typically centering on gang violence. *See Estate of Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1025 (9th Cir. 2008).
[11] In *In re George T.*, 33 Cal. 4th 620 (2004), this Court rejected the prosecution, under Section 422, of a minor student who handed classmates a "dark" poem in which he discussed bringing a gun to school and shooting them.
[12] *Lowery*, *supra* note 3 at 427 (citation omitted).
[13] *Chandler*, *supra* note 7 at 522 (quoting *Lowery*, 52 Cal. 4th at 432 (concurring opinion of Baxter, J.)).
[14] *Compare Chandler*, *supra* note 7 at 526 (considering, in the context of a Section 422 prosecution for criminal threats, that the threats were made explicitly and face-to-face, while on the street where the victims lived) *with People v. McLaughlin*, 46 Cal. App. 4th 836, 842 (1996) ("[S]ection 140 prohibits the threats it describes, whether or not the threats are communicated to the victim.").
[15] *Compare People v. Jackson*, 178 Cal. App. 4th 590, 600 (2009) (observing, in the context of a Section 422 criminal threats prosecution, that the "outlandish" nature of the purported threat could undermine the objective reasonableness of believing it was a true threat) *with Lowery*, 52 Cal. 4th at 428 (section 140(a) does not require that the defendant has the apparent ability to carry out the threat).

criminal threats charge against a minor student in large part because the purportedly threatening speech was contained in a poem, observing that "[i]n general, '[r]easonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are,' which means they 'are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory.'"[16] As the Court observed in another setting, "[t]o do so would indulge a fiction which neither common sense nor the First Amendment will permit."[17] For speech taking the form of art, then, evaluating contextual factors becomes particularly crucial. Yet the Court of Appeal dismissed the artistic context of the petitioner's speech as essentially irrelevant.

In the absence of a clear framework for considering contextual factors for artistic speech under Section 140, the Court of Appeal chose to largely ignore the fact that the speech was only communicated through song. Its "review of the undisputed factual circumstances" focuses on the face-value meaning of the words contained in the lyrics, as well as the facts that the victims were named in the lyrics and that one of several photos of the petitioner includes a shotgun. 238 Cal. App. 4th at 1129. However, it omits entirely from the analysis the facts that the petitioner simply published the song online through social media along with all of his other songs rather than communicating it directly to either victim; that no evidence exists of the *written* lyrics ever being published; and that the victim who spoke with law enforcement did not request additional protection. *Id.*

In this era of widespread digital expression, subjecting individuals to criminal charges on such scattershot analysis risks severely chilling the speech of other aspiring artists, as well as others engaged in casual online communication. While one might argue that the Court of Appeal's relatively cursory examination could suffice given the preliminary stage of the proceedings, it is important to note that this decision reversed both the magistrate's and the trial court's determinations that charges should not be brought in these circumstances. If left to stand, other magistrates and trial courts will be bound to look to this opinion for guidance. At stake, therefore, is not merely the prosecution of a single artist over a single song, but the specter of prosecution—with all of its financial, social, and other costs—for a host of others. This Court's review is necessary to clarify the contextual factors that should be considered for purportedly threatening artistic speech, to ensure that no more speech than necessary is repressed.

For the foregoing reasons, we respectfully support the petitioner's request for review in *People v. Murillo,* No. S228704, 238 Cal. App. 4th 1122 (2015).

Respectfully submitted,

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[16] *In re George T., supra* note 11, at 636-637 (quoting *McCollum v. CBS*, 202 Cal. App. 3d 989, 1002 (1988)).
[17] *McCollum*, 202 Cal. App. 3d at 1002.

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PROOF OF SERVICE

I, Li Chia, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; and my business address is 1313 West Eighth Street, Los Angeles, California 90017. On September 25, 2015, I served the foregoing:

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW

to each of the persons named below at the addresses shown, in the manner described below:

Attorney General - Los Angeles Office 300 S. Spring Street, Suite 5000 Los Angeles, CA 90013 Marguerite Clipper Charles Santa Barbara County District Attorney 1112 Santa Barbara Street Santa Barbara, CA 93101	The People: Plaintiff and Appellant
David Andrew Andreasen P.O. Box 30520 Santa Barbara, CA 93130-0520 William Carlos Makler Law Ofcs. of William C. Makler, P.C. 1114 State Street, Suite 252 Santa Barbara, CA 93101	Anthony Murillo: Defendant and Respondent
Clerk Court of Appeal of the State of California Second Appellate District, Division 6 Court Place 200 East Santa Clara Street Ventura, CA 93001	
Clerk Santa Barbara County Superior Court – Main Hon. Rick Brown 118 E. Figueroa Street Santa Barbara, CA 93101	

X **BY FIRST CLASS MAIL - I caused such envelope(s) fully prepaid with U.S. Postage to be deposited with the United States Postal Service this same day at Los Angeles, California.**

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on the 25th of September 2015, at Los Angeles, California.

Li Chia