Criminal Threat Cases
at a Glance

I. Look to the Statute, and then to the Corresponding Jury Instructions, to Define the Elements of the Offense, and Ensure that the Jury was Correctly Instructed

A. Identify the elements of the crime of making criminal threats

(1) Penal Code section 422, subdivision (a),[1] provides:

> Any person who **[1]** willfully threatens to commit a crime **[2]** which will result in death or great bodily injury to another person, **[3]** 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, **[4]** 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 **[5]** 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 [numbering for each element has been added].

(2) The following terms are defined in section 422, subdivisions (b) and (c):

> "Immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.
>
> "Electronic communication device" includes, but is not

[1]Section references are to the Penal Code unless otherwise noted, and the brackets have been added to identify each separate element of the offense defined..

limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

“Electronic communication” means:

. . . any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include--

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title [18 USCS § 3117]); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds; [18 U.S.C. § 2510, subs. (12)].

B. Compare the statute with the Jury Instruction

1. CALCRIM No. 1300

The defendant is charged [in Count _____] with having made a criminal threat [in violation of Penal Code section 422].

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.

Someone commits an act willfully when he or she does it willingly or on purpose.

In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances.

Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

Sustained fear means fear for a period of time that is more than momentary, fleeting, or transitory.

[An immediate ability to carry out the threat is not required.]

[An electronic communication device includes, but is not limited to: a telephone, cellular telephone, pager, computer, video recorder, or fax machine.]

[Immediate family means (a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers and sisters related by blood or marriage; or (c) any person who regularly lives in the other person's household [or who regularly lived there within the prior six months].]

II. Determine Whether the Evidence Is Sufficient to Support Each and Every Element of the Crime as Required by the Due Process Clause to the U.S. Constitution

A. Identify the standard of review

1. A sufficiency of the evidence challenge is evaluated under the substantial evidence test. *(People v. Wilson* (2010)186 Cal.App.4th 789, 805.)

B. Review the elements

1. Element 4: ". . . on its face and under the circumstances in which it is made, [the threat] 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 . . . .**"

(a) Consider the surrounding circumstances to determine if the threat is real and genuine. A threat should not be examined strictly on the words spoken.

(1) Surrounding circumstances can show whether a criminal threat was made; similarly, the absence of circumstances can also show that a terrorist threat was not made within the meaning of section 422.

(2) The statements that "I'm going to get you," and "I'm going to kick your ass," in the absence of surrounding circumstances showing this was a threat (such as a

show of physical violence), were insufficient to support this element. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137-1138.)

(b) Consider whether a vague statement is sufficient proof of a threat if the threat was carried out–even in an ineffectual way

(1) In *People v. Martinez* (1997) 53 Cal.App.4th 1212, the defendant threatened to blow up a woman's car and the next day it was found with charred paper in the opening to her gas tank and with the gas cap missing. The remarks "I'm going to get you," "I'll get back to you," and "I'll get you," while facially ambiguous, when considered with the circumstances, suggested more than a vague threat, and there was a clear prospect that the threat would be carried out. (*Martinez, supra,* 53 Cal.App.4th at p.1218.)

(c) Consider whether the fear was sustained--momentary fear is not enough

Evidence that the fear felt by the listener was merely fleeting or transitory, is not enough. The fear must be sustained.

(1) See *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137-1138, where a student became angry at a teacher who opened a door and accidentally hit the student with the door . The student cursed and stated he was going to get the teacher. While the student told the officer that he did not mean to sound threatening, he admitted getting in the teacher's face and saying he would "kick his ass." The teacher felt threatened, so he sent the student to the office. The student was suspended but the police were not called until a day later. There was insufficient evidence to support sustained fear on the part of the teacher.

(d) Consider whether the threat was unconditional

(1) *People v. Bolin* (1998) 18 Cal.4th 297, 338, reasoned that the threat of death or great bodily injury need not be absolutely unconditional, as long as the threat is "*so . . . unconditional* . . . as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution . . . ." (Section 422, italics added.)

(2) "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." (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157, as cited in *People v. Bolin* (1998), 18 Cal.4th 297, 340.

(3) A threat which may appear conditional based on words alone may not be illusory when considered in light of the surrounding circumstances. A seemingly conditional threat, which is made contingent on an act that is highly likely to occur, and under circumstances that indicate a gravity of purpose and immediate prospect of execution, is not conditional. (*Bolin, supra,* 18 Cal.4th at pp. 339-340.)

(4) In *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1433, the Third District Court of Appeal found that in order to determine whether a threat is "so" unconditional as to violate the statute, it must evaluate the surrounding circumstances. For example, threats made from a great distance may violate the statute if it was reasonable for the victim to fear that the perpetrator would follow through on the threats based on the long history of domestic violence between the parties. (*People v. Smith* (2009)178 Cal.App.4th 475, 481.)

(e) Consider the immediacy of the threat in context

(1) In *People v. Wilson, supra,* 186 Cal.App.4th at p. 805, a state prison inmate (Wilson) claimed that his threat to a correctional officer was just "trash talk" and that it is a regular occurrence; however, the communication was specific in terms of timing, described what Wilson intended to do ("blasting" the officer), and Wilson had committed similar acts in the past. While Wilson was under the complete control of the correctional facility, he was scheduled to be released in ten months and that was sufficiently immediate to satisfy this element. (*Wilson, supra,* 186 Cal. App. 4th at p. 815.)

III. Are there any unresolved state or federal constitutional challenges to the current version of the statute?

A. Determine whether the statute under which appellant was convicted is materially different from any predecessor statutes at issue in the case law

1. The current version of section 422 was enacted by the Legislature in 1988, and was revised in 1989, 1998, 2011, and 2011.

(a) The predecessor statute was found to be unconstitutionally vague under the California Constitution in *People v. Mirmirani* (1981) 30 Cal.3d 375. The high court described the predecessor statute as making it a felony to "'willfully threaten[] to commit a crime which will result in death or great bodily injury to another person, with *intent to terrorize another or with reckless disregard of the risk of terrorizing another*,' if such threats cause another person 'reasonably to be in sustained fear for his or her[] or their immediate family's safety.' (Italics added.) To 'terrorize' is defined by section 422.5 as '[creating] a climate of fear and intimidation by means of threats or violent action causing sustained fear for personal safety *in order to achieve social or political goals*.' (Italics added.)" (*People v. Mirmirani*, *supra*, 30 Cal.3d at p. 381.)

(b) Noting that greater precision is required to survive a void-for-vagueness challenge to a criminal statute that impacts First

Amendment rights, the court declared sections 422 and 422.5 unconstitutionally vague because the fear element was defined as "in order to achieve social or political goals." (*Id.* at pp. 384, 388.)

2. The revised statute

(a) In 1988, the reenacted statute eliminated the unconstitutionally vague language. (See *In re Ge. M.* (1991) 226 Cal. App.3d 1519, 1522.)

IV. Is the current statute unconstitutional as applied?

A. Identify the standard of review

(1) Independent appellate review of the record was endorsed in *Bose Corp. v. Consumers Union* (1984) 466 U.S. 485, 505, "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 speech will not be inhibited."

(2) *In re George T.* (2004) 33 Cal 4th 620, 632 also held that a reviewing court should make an independent examination of the record when a defendant raises a plausible First Amendment defense in a section 422 prosecution to ensure that a speaker's free speech rights have not been infringed. The appellate court exercises its independent judgment to determine whether the facts satisfy the rule of law. (*George T., supra,* 33 Cal.4th at p. 634.)

(a) The *George T.* case involved a student who showed his poetry to three girls. The one he had discussed poetry with the most was unconcerned, but another girl became fearful because of references in the "dark poetry." Ultimately, the police questioned George and he was charged with criminal threats. The poem concluded, "I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!" (*Id.* at p. 625.) In the full context and circumstances, there was no violation of section 422. If the protagonist says that he "can," that does not mean

"will." A statement that one has the potential or capacity to kill does not threaten to do so. (*Id*. at p. 636.)

(3) If the challenge on appeal is not raised as a First Amendment argument, then the independent standard of review is not applicable and the sufficiency of the evidence challenge is evaluated under the substantial evidence test. *(People v. Wilson, supra,*186 Cal.App.4th at p. 805.)

B. Consider whether the conduct underlying the criminal threat conviction can be distinguished from speech that is constitutionally protected

(1) *Watts v. United States* (1969) 394 U.S. 705, 707, found that whether a form of pure speech can be defined as criminal, must be considered with the commands of the First Amendment clearly in mind.

(a) At a rally in front of the Washington Monument, Watts stated his opposition to the draft by suggesting that if he had to carry a rifle he would want the President of the United States in his sights. The audience laughed. Taken in context, and regarding the expressly conditional nature of the statement, and the reaction of the listeners, it could not be interpreted as a violation of the statute that prohibits any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States." It was not a "true threat" but protected speech and Watts' conviction was reversed. (*Watts , supra*, 394 U.S. at pp. 706, 708.)

V. Was the jury instructed on any lesser included offenses supported by the evidence?

A. Is an attempted criminal threat a lesser included of the completed offense?

1. *People v. Toledo* (2001) 26 Cal. 4th 221, 230, recognized the crime of an attempted criminal threat based on Penal Code sections 422 and 664

(a) Penal Code section 664 defines the elements of an attempt to include the specific intent to commit the crime and some ineffectual act, beyond mere preparation, toward its completion.

(b) The court gave three examples of "some of the most common situations that would support a conviction of attempted criminal threat" (*People v. Toledo, supra,* 26 Cal.4th at p. 234):

(1) "[I]f 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 … ." (*Id.* at p. 231.)

(2) "[I]f 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 … ." (*Id.* at p. 231.)

(3) "[I]f 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 … ." (*Id.* at p. 231.)

(c) The facts were sufficient to support an attempted criminal threat in the *Toledo* case, where the defendant's threat to Joanne was, "You know, death is going to become you tonight. I am going to kill you." The statement evidenced the requisite intent and was the type of threat that satisfied the provisions of section 422 as it reasonably could have caused Joanne to be in sustained fear for her own safety. The reduction to the lesser offense in *Toledo*, however, was not because defendant's conduct fell short of that required by the statute, but because the threat did not frighten Joanne as the

defendant had intended. Joanne testified at trial that she was not frightened by defendant's statements, and the circumstances indicated that Joanne was not in fear. The appellate court upheld the jury verdict finding defendant guilty of an attempted criminal threat. (*Id.* at p. 235.)

(d) *People v. Jackson* (2009) 178 Cal.App.4th 590, reversed convictions for attempted criminal threats, based on instructional error

(1) The court instructed the jury on attempts and used the general language of attempts: to find defendant guilty the jury had to find that defendant intended to make a threat of violence and that he took a direct step toward acting on his intent.

(2) The court then referred the jury back to the instructions on the substantive offense.

(3) The instruction on the substantive offense included the reasonableness element as part of the result of the completed crime so that in deciding whether defendant had the intent necessary to support a conviction for an attempted criminal threat, the jury was not instructed to consider whether the intended threat reasonably could have caused sustained fear under the circumstances.
(*Jackson, supra,* 178 Cal.App.4th at 593, quoting *People v. Toledo* (2001) 26 Cal.4th 221, 231.)

2. Can another charge be a lesser included offense of criminal threats?

Consider whether Penal Code section 71, which prohibits threats against public officials and employees, is a lesser included offense of criminal threats

(a) The statutory elements of a violation of section 71 are:

(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.

(b) The purpose of section 71 is to prevent threatening communications to public officers or employees that are designed "to extort their action or inaction." (*People v. Zendejas* (1987) 196 Cal.App.3d 367, 376.)

(c) Under the statutory elements test, section 71 is not a lesser included offense of section 422, because a section 422 violation may be committed against any person, and does not require the specific intent to influence the performance of the public officer's duty, but rather only the intent that the statement be "taken as a threat, even if there is no intent of actually carrying it out." (*People v. Toledo, supra,* 26 Cal.4th at p. 227.) Therefore, a violation of section 422 can be committed without violating section 71, and section 71 is not a necessarily included lesser offense. (*People v. Chaney* (2005) 131 Cal.App.4th 253, 256-257.)

(d) Under the accusatory pleading test, look to the charging allegations of the accusatory pleading

(1) Does the charge include language describing the offense in such a way that if committed as alleged, a lesser offense was necessarily committed?

(2) Where a pleading describes the victim as a public officer and alleges the specific intent that the statement be taken as a threat necessarily encompass an allegation that the speaker intended to cause or attempted to cause the victim to do, or refrain from doing, an act in the performance of his or her duties? The *Chaney* court found it does not. (131 Cal.App.4th at p. 257.)

(3) But where the pleading alleged that the minor threatened a public officer and described the offenses in such a way that, if committed as specified, the conduct prohibited by section 422, encompassed the conduct prohibited by section 71, and the only element of section 71 that was not encompassed by section 422, was the threat itself, section 71 was not an LIO of section 422. But because the prosecution made no attempt to prove a threat to property, the appellate court found the juvenile court should have exercised its discretion to amend the complaint to conform to proof and, then should have stricken section 71 finding. (*In re Marcus T.* (2001) 89 Cal.App.4th 468.)

Caution: The California Supreme Court is critical of using the evidence to determine whether an offense is an LIO of another. It expressed this view before the appellate court decided *Marcus T.:*

"There are several practical reasons for not considering the evidence adduced at trial in determining whether one offense is necessarily included within another."

"Limiting consideration to the elements of the offenses and the language of the accusatory pleading informs a defendant, prior to trial, of what included offenses he or she must be prepared to defend against. If the foregoing determination were to be based upon the evidence adduced at trial, a defendant would not know for certain, until each party had rested its respective case, the full range of offenses of which the defendant might be convicted."

"Basing the determination of whether an offense is necessarily included within another offense solely upon the elements of the offenses and the language of the accusatory pleading promotes consistency in application of the rule precluding multiple convictions of necessarily included offenses, and eases the burden on both the trial courts and the reviewing courts in

applying that rule."

"Basing this determination upon the evidence would require trial courts to consider whether the particular manner in which the charged offense allegedly was committed created a sua sponte duty to instruct that the defendant also may have committed some other offense. In order to determine whether the trial court proceeded correctly, a reviewing court, in turn, would be required to scour the record to determine which additional offenses are established by the evidence underlying the charged offenses, rather than to look simply to the elements of the offenses and the language of the accusatory pleading."

People v. Ortega (1998) 19 Cal.4th 686, 698, cited with approval in *People v. Sanders* (2012) 55 Cal.4th 731, 739.)

B. Were the Jury Instructions Correct?

(1) Was a unanimity instruction requested?

(a) If the evidence shows more threats made than were charged, the prosecutor must either make an election, and if s/he fails to do so, the court must give a unanimity instruction. (". . . the evidence presented in this case established that appellant committed two acts of making terrorist threats, each of which could have been charged as a separate offense, yet the matter went to the jury on only one such offense. Because the prosecution's election was never clearly communicated to the jury, the trial court should have instructed on unanimity." *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539.)

(b) The failure to give a unanimity instruction in this context can be prejudicial. ("We cannot conclude that the instructional error was harmless by making a finding that 'disagreement by the jury is not reasonably probable' (*People v. Melendez, supra*, 224 Cal. App. 3d at p. 1430) because we cannot say that, beyond a reasonable doubt, each of the 12 jurors agreed

unanimously that the same act constituted the commitment of the crime. In fact, it is likely that the jury never considered the acts separately, as they were never instructed that they must do so. Accordingly, the conviction must be reversed." *People v. Melhado, supra,* 60 Cal.App.4th at p. 1539.)

VI. Is the Sentence Imposed Correct?

A. Is the offense a wobbler?

(1) A violation "shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (Pen. Code, § 422, subd. (a).)

(a) A misdemeanor may be punished by sentencing the defendant to a year or less in jail

(b) The sentencing triad for a felony which does not otherwise specify the length of the term in state prison is 16 months, two years, or three years. (Pen. Code § 18, subd. (a).)

B. Does Penal Code section 654 apply?

(1) If the threats were part of a course of conduct including other assaultive offenses against the same victim, consider the application of Penal Code section 654.

(2) Even if there is no LIO for section 422 under either test in a given case, where a defendant has been convicted of a violation of section 422 and violations of lesser related offenses based on the same conduct, such as violation of Penal Code sections 71 (threatening a public officer or employee or any officer or employee of any public or private educational institution), 76 (threatening a public official), 95.1 (threatening a juror after verdict), 139 (threatening a witness or victim after a conviction of a violent offense), or 140 (threatening a witness, victim or informant), the sentence for the lesser offense should be stayed under Penal Code section 654.