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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA DIVISION

PEOPLE OF THE STATE OF CALIFORNIA,	)Case No.: 1449328
	)
Plaintiff,	)**PEOPLE'S ~~NOTICE OF~~ MOTION TO REINSTATE THE COMPLAINT PURSUANT TO PENAL CODE SECTION 871.5**
vs.	)
ANTHONY RAY MURILLO	)
	)
Defendant.	)DATE: 4/2/14
	)MAGISTRATE:PATRICIA KELLY
	)DEPARTMENT 8
	)
	)***Judge and Department to Hear the Motion is to be Assigned***
	)

STATEMENT OF THE CASE

On October 29, 2013, Anthony Ray Murillo (hereinafter "the defendant") was charged with two felony counts of Penal Code section 140, for threatening two victims after they cooperated with law enforcement. The defendant was arraigned on November 1, 2013, and he entered a plea of not guilty. The case was assigned to the Honorable Judge Patricia Kelly, in Department 8.

A preliminary hearing was held on February 19, 2014, in front of Judge Kelly. After the preliminary hearing, the defense filed a brief, alleging an affirmative defense based upon the First Amendment. The defense requested to have arguments heard on March 12, 2014. The People filed their response on March 11, 2014, and argument on the motions was continued to March 19, 2014. On March 19, 2014, after reviewing the motions filed from both sides, and listening to arguments, Judge Kelly declined to hold the defendant to answer, and the defendant was discharged from the complaint

STATEMENT OF THE FACTS

In April 2012, Jane Doe No. 1 and Jane Doe No. 2 reported to the Santa Barbara County Sheriff's Department that they were raped by Shane Villalpando. (R.T. 7: 15-28; 8: 4-19.) Jane Doe No. 1 told Detective Matthew Fenske that she was raped by Shane Villalpando three times between January and February 2012. (R.T. 9: 16-22.) At the time, Jane Doe No. 1 was 14 and Shane Villalpando was 18. (R.T. 9: 13-22.) Jane Doe No. 2 told Detective Fenske she was raped by Shane Villalpando, and his friend B.C., on June 3, 2011. (R.T. 8: 6-8.) Shane Villalpando and B.C. provided Jane Doe No. 2 marijuana, and had sex with her against her will. (R.T. 8: 15-18.) Jane Doe No. 2 was 16 at the time. (R.T. 8: 3.) Neither Jane Doe No. 1 or Jane Doe No. 2 reported their rapes right away. (R.T. 8: 22-26; 9: 23-24.) It was only after they became aware of each other's similar circumstances that they found the strength between them to report the rape to law enforcement, to help ensure there wouldn't be any more victims. (R.T. 10:1-3.)

After being raped, Jane Doe No. 1 suffered depression, and considered attempting suicide. (R.T. 10: 12-14.) After being raped, Jane Doe No. 2 suffered depression, and also considered attempting suicide. (R.T. 10:16-21.) Both Jane Doe No. 1 and Jane Doe No. 2 suffered bullying and harassment. (R.T. 10: 16-21; R.T. 11:17-19.) Jane Doe No. 2 was harassed at school, on Facebook, and via text message. (R.T. 11: 22-24.) Both victims were so afraid or their safety that that they had to move out of the area and change schools. (R.T. 11:24-27.)

In June 2013, Shane Villalpando was prosecuted for the rape of Jane Doe No. 1. (R.T. 10: 19-21.) Detective Fenske was the investigating officer in the rape case, and was present in court throughout the trial. (R.T. 10: 23-28.) In June 2013, Shane Villalpando was convicted of three felony counts of unlawful sex with a minor against Jane Doe No. 1. (R.T. 11: 1-3.) Shane Villalpando pled guilty to an additional count of unlawful sex with a minor for the crime against Jane Doe No. 2. (R.T. 11:7-9.) Shane Villalpando was sentenced in July 2013. (R.T. 11:5.) Shane Villalpando was sentenced to one year in county jail, and he was placed on probation for period of five years' probation, and ordered to register as a sex offender for the duration of probation. (R.T. 11: 14-16.)

The defendant is one of Shane Villalpando's best friends. (R.T. 12: 22-28.) Jane Doe No. 1, Jane Doe No. 2, Shane Villalpando, and the defendant, all went to St. Josephs High School. (R.T. 13: 1-6.) On September 13, 2013, the defendant uploaded a song he wrote and sang onto www.reverbnation.com, titled "Moment for Life Remix." (R.T. 41: 21-24.) Reverbnation is an online website where you can upload your own music and make it available for free download. (R.T. 41: 21-24.)

The defendant uploaded his song onto his reverbnation account, located at http://www.reverbnation.com/anthonyray1993. (Exhibit 7; R.T. 48.). The defendant posted a link to his song on his two facebook accounts, [www.facebook.com/LiL.A.19XX; and www.facebook.com/anthony.ray.02] and his and twitter account. [www.twitter.com/ anthonymurillo2.] (R.T. 38: 8-11.) His websites were accessible to the public. On his reverbnation account he also posted photographs of himself, posing with what appears to be a shotgun or rifle. (R.T. 68: 6-7.)

On September 13, 2013, at www.facebook.com/Anthony.ray.02, the defendant wrote: "Posting a New Song tonight 'Moment for Life' remix for the homie Shane-o miss my nigga man be ready for it." (Page 1 of Exhibit 1; R.T. 38: 12-24; 39:9-22.) On that same account, he wrote another post, saying, "7pm tonight ill be posting the new song." (R.T. 39: 23-24.)

Then, on September 13, 2013, at www.facebook.com/Anthony.ray.02, he posted:

> "Here it is my new song "Moment for Life" remix for the homie Shane-o miss you G … IDC what people think hate it or hate me if want for doing what I did, but honestly fuck snitches!!! You know.
>
> http://www.reverbnation.com /anthonyray1993/song/18591551 - moment-for-life-remix"

(Page 2 and 3 of Exhibit 1; R.T. 40: 1-9.)

On September 13, 2013, at www.facebook.com/Anthony.ray.02, he posted:

> "Miss My nigga Shane, Moment For Life Remix…. Fuck snitches, and fuck The System
>
> http://www.reverbnation.com /anthonyray1993/song/18591551 - moment-for-life-remix"

(Page 2 and 3 of Exhibit 1: R.T. 40: 17-28; R.T. 41:1.)

The defendant also posted a link to his reverbnation account on his other Facebook account, www.facebook.com/LiL.A.19XX. (Exhibit 2.) This Facebook account is associated with his rap pseudonym, LiL A. (Exhibit 2; R.T. 41: 25-28; 42:1-4.)

> "Here it is my new song "Moment For Life" remix for the homie Shane-O miss you G.... IDC what people think hate it or hate me if want for doing what i did, but honestly fuck Snitches!!! You Know
>
> http://www.reverbnation.com/anthonyray1993/song/18591551-moment-for-life-remix"

(Page 2 of Exhibit 2; R.T. 41: 13-20.)

On September 14, 2013, at www.facebook.com/Anthony.ray.02, the defendant posted: " Fuck all scandalous hoes…" (R.T. 41- 19.)

On September 20, 2013, the defendant received a phone call from the former Dean of Students at St. Josephs, Mr. John Walker. Mr. Walker told Murillo that he should take

the song down. Defendant Murillo did not take the song down. Instead he continued to harass the victims on his Facebook and twitter accounts. (Exhibit 5: R.T. 43-47.)

On September 20, 2013 the defendant tweeted:

> **Anthony Murillo2**: Niggas threatening me to delete my song I did for Shane or I have something coming for me... What
>
> Baddboykilla: who
>
> **Anthonymurillo2:** the dean or students that got fired for it called me
>
> Baddboykilla: who the fuck is he? Tell him I said to such a dick if he has a problem.
>
> **Anthonymurrillo2**: said theres a threat in my song and I have something comin if I don't take it down ha ha. He threaten me dumb ass.
>
> Baddboykilla: tell him its freedom of speech and theres nothing he can do. 2 pac threatened everyone on Hit Em Up..
>
> **Anthonymurillo2**: I know hahah he sad a lot of people hate me for that… I said Only God can Judge me hahaah
>
> Baddboykilla: send me the link I wanna hear it now haha FTW nigga who cares let em hate
>
> [*after listening to the song Baddboykilla and the defendant harass the victims*]
>
> Baddboykilla: hahahaha u called her a cunt I laughed
>
> **Anthonymurillo2**: haha said their names too haha
>
> Baddboykilla: yea I heard! Tell that guy to suck a dick tho"

(Exhibit 5: R.T. 43-47.)

On September 22, 2013, the defendant visited Shane Villalpando in the Santa Barbara County Jail. (R.T. 14:7-9.) Defendant Murillo told Villalpando that people were calling him and telling him to take down the song. (R.T. 19-23.) Defendant Murillo said

that he wasn't going to do that. The defendant sang a part of the song for Villalpando and told him he would send him the lyrics (R.T. 6-8.) The defendant told Villalpando that when he posted the song he thought "fuck those bitches." (R.T. 16: 24-28.)

The defendant also told Villalpando about a recent incident where he was confronted by some people by McDonalds and he pulled an "air soft" gun, covered the tip, and threatened them. Defendant Murillo bragged that the next time it would be a real gun. (R.T. 17:12-16.)

In September 2013, Jane Doe No 2. saw the link to the defendants song on her Facebook news feed. (R.T. 32: 2-5.) When she first opened the link and listened to the song she thought, "Here we go again with the bullying." (R.T. 32: 7.) Jane Doe No. 2 was shocked and scared by what she heard. (R.T. 32: 7-9.) Jane Doe No 2. played the song several times to hear exactly what was said, and when she realized what the lyrics said, she became even more scared. (R.T. 32: 13-16.) After listening to the song, Jane Doe No. 2 was so afraid she considered calling the local campus police where she was living to ask for extra patrol. (R.T. 33: 12-19.)

The Magistrate's Ruling

On March 19, 2014, Judge Patricia Kelly held the following:

> "In this case it is clear that Jane Does 1 and 2 went through a traumatic experience that was substantiated by a jury finding and by a plea on the part of Mr. Villalpando, and Mr. Murillo, continuing his friendship with Mr. Villalpando, through his conversations on jail visits and his postings on his social media sites, puts those two women in the public's eye when that was never something that seemed to be their intent by the use of the pseudonyms during trial, even up to and including the pseudonyms used in the case currently facing Mr. Murillo.
>
> I understand that one of the young ladies may be choosing to do something more proactive because of her experience, but that doesn't make it Mr. Murillo's position to publish those names. And I know there's no crime against that, but I think it speaks to the purpose behind his intent.

> And I agree with the People that this is not a specific intent charge. And I, with all due respect to Mr. Makler, feel that the California Supreme Court does have a good grasp of what should be specific and general intent crimes.
>
> So looking at Penal Code section 140 as a general intent crime and reviewing the evidence before the court, I see that the People have met the elements for certain parts of the charge, but I don't see that this meets the element for the defendant willfully threatening to use force or violence against the individual Jane Doe 1 or Jane Doe 2.
>
> What I find is that it's a song that is harassing and utilizing a mindset that seems to be inapposite of the character letters supplied on the part of the defense and purposely published and publicized to bring those identifies to light when that's not at all what those individuals wanted. But I don't see that it rises to the proof requirement for a threat, so I will not issue a holding order as to the requested counts."

(R.T. 89: 1-28; 90:1-12.)

POINTS AND AUTHORITIES

I.

THE STANDARD OF REVIEW IS DE NOVO BECAUSE THE MAGISTRATE DID NOT MAKE FACTUAL FINDINGS AT THE PRELIMINARY HEARING

When an action has been dismissed by the magistrate, Peal Code section 871.5 allows the prosecution to seek review in the superior court and request reinstatement of the charges "under the same terms and conditions as when the defendant last appeared before the magistrate." (*People v. Dianda* (1986) 178 Cal.App.3d 174, 176–177; P.C.§ 871.5(a).) The prosecution may move for reinstatement under this section, however, only on the basis that "as a matter of law, the magistrate erroneously dismissed the action or a portion thereof." (P.C. § 871.5(b); *People v. Luna* (1983) 140 Cal.App.3d 788, 792.)

The superior court's review of a magistrate's dismissal for lack of sufficient cause under this section depends on the existence of factual findings. If the magistrate made express factual findings and dismissed the charges for lack of probable cause, the

superior court is bound by those findings if supported by substantial evidence. If the magistrate dismissed the charges without making factual findings, the superior court reviews the dismissal as a question of law. (*People v. Slaughter* (1984) 35 Cal.3d 629, 638–642.) The magistrate's order is reviewed to determine whether as a matter of law the evidentiary record discloses a rational basis for believing the defendant guilty of the charged offense. (*People v. Slaughter, supra,* 35 Cal.3d at pp. 642–643.) The superior court shall determine the motion based on the record of the preliminary hearing. (P.C.§ 871.5(c).) If the superior court determines that the magistrate's dismissal of the complaint was erroneous as a matter of the law, it may order the reinstatement of the charges. (P.C.§ 871.5(e).)

Case law analyzing Penal Code section 739 has helped explain the difference between factual findings and legal conclusions. This case law applies to Penal Code section 871.5. (*People v. Slaughter*, *supra*, 25 Cal. 3d 629.)

A factual finding exists when a magistrate dismisses a charge because of an express credibility finding. (*Jones v. Superior Court* (1971) 4 Cal 3d. 660.) *Jones v. Superior Court, supra,* 4 Cal.3d 660, involved a forcible rape case. After preliminary hearing, the magistrate found that the victim consented to intercourse with the defendants, and reduced the charge from forcible rape to statutory rape. The prosecutor filed the forcible rape charge anyway. On appeal, in its interpretation of section 739, the California Supreme Court held that the prosecution could not include a count of forcible rape in the information. Our high court explained:

> "[H]ad the magistrate herein found that Miss H. did *not* consent to intercourse with petitioners, *or made no finding on that issue,* the district attorney might properly have disputed the magistrate's characterization of the offense involved as 'statutory' rape, and included in the information a count for nonconsensual rape. However, since the magistrate found, as a matter of fact, that Miss H. consented to intercourse and that no acts of oral copulation or sodomy occurred, it follows that those offenses were not shown by the evidence to have been committed ... and should not have been included in the information." (*Id.*, at p. 666.) (Second italics added)

(Cited in *People v. Slaughter* at p. 639.)

However if a magistrate feels that evidence of a particular charge is "weak" then he has made a legal conclusion, and not factual finding. (*People v. Beagle* (1972) 6 Cal. 3d 441.) In *People v. Beagle*, *supra*, 6 Cal.3d 441, the magistrate dismissed a count charging the defendant with setting a fire at Lewin's Furniture Store, stating that the evidence was "too weak" because it failed to show motive. (*Id.* at p. 457.) The prosecutor filed an information which included the dismissed count, and defendant was convicted on the charge. On appeal, the high court stated that "[i]f the magistrate had found *as a matter of fact* that defendant had not started the Lewin's fire, the district attorney might well have been bound by his determination. [*Citing Jones v. Superior Court, supra,* 4 Cal.3d 660.] The district attorney, however, need not accept the magistrate's legal conclusion." (*People v. Beagle*, *supra*, 6 Cal.3d p. 457–458.) Since the magistrate made no express findings, the high court did not inquire whether substantial evidence might support a finding, but instead held that "the magistrate's ruling as to the Lewin's count was patently *erroneous as a matter of law*...." (*Id.* at p. 458, italics added.)

If a magistrate accepts the evidence, but reaches the legal conclusion that the evidence is insufficient to prove a particular charge, then he has made a legal conclusion and not a factual finding. (*Pizano v. Superior Court* (1978) 21 Cal.3d 128.) In *Pizano v. Superior Court* (1978) 21 Cal.3d 128, the victim of a robbery was killed when Pizano's codefendant used the victim as a shield from gunfire. The magistrate dismissed the murder charge against defendant on the ground that the prosecution had failed to prove malice. The high court's opinion noted that "an offense not named in the commitment order may not be added to the information if the magistrate made *factual findings* which are fatal to the asserted conclusion that the offense was committed .... When, however, the magistrate either expressly or impliedly accepts the evidence and simply reaches the ultimate *legal conclusion* that it does not provide probable cause ..., such conclusion is open to challenge by adding the offense to the information." (*Id.* at p. 133.) The high court then held that the magistrate's determination "was a legal conclusion, not a finding

of fact as that term is used in *Jones.* Therefore, the People were entitled to challenge his action by recharging the murder count." (*Id.* at pp. 133–134.)

Finally in *People v. Farley* (1971) 19 Cal.App.3d 215, the magistrate dismissed two counts charging sale of marijuana and LSD, saying that "after the hearsay is stricken, the evidence that goes to those is insufficient." (*Id.* at p. 219.) The prosecution nevertheless included those counts in the information. Affirming defendant's conviction, the Court of Appeal emphasized that "the magistrate did not make factual findings" (*Id.* at p. 221) and concluded that his ruling finding lack of probable cause was in error (*Id.* at pp. 221–222.)

In this case, the magistrate based its decision on a legal conclusion, and not a factual finding. The magistrate held that the evidence presented at the preliminary hearing did not meet "the element for the defendant *wilfully* threatening to use force or violence against the individual Jane Doe 1 or Jane Doe 2." (R.T. 89:26-28; 90: 1-3.) (emphasis added). The magistrate held that although the song was harassing, "it did not rise to the proof requirement for a threat." (R.T. 90: 10-12.) Similar to the *Pizano* case, the magistrate's finding in our case was based upon a legal conclusion, namely that the willful element was missing, and thus the standard of review is de novo. (*See Pizano, supra*, 21 Cal.3d 128.)

II.
THE MAGISTRATE'S RULING WAS INCORRECT AS A MATTER OF LAW

The defendant was charged in Counts 1 and 2 with violations of Penal Code section 140, for threatening two victims after they provided information to law enforcement.

Cal. Crim. 2624 defines Penal Code section 140 as follows:

1. A victim or witness gave assistance or information to a law enforcement officer in a criminal or juvenile case; and

2. The defendant willfully threatened to use force or violence against Jane Doe #1, because she had given that assistance or information

Penal Code section 140 is a general intent offense. (*People v. McDaniel* (1994) 22 Cal.App.4th 278, 283.) The statutory language includes no requirement that the defendant act with a specific intent to intimidate the particular victim (*People v. McDaniel* (1994) 22 Cal.App.4th 278, 284, 27 Cal.Rptr.2d 306) and does not even require that the threat be communicated to the victim (*People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842.)

Penal Code section 140(a) requires that a threat against a crime victim or witness be made "willfully." The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage. (P.C. §7(1); see also *People v. Lowery* (2011) 52 Cal.4th 419, 427, reversed and remanded on other grounds.)

Accordingly, a person who under section 140(a) "willfully" utters threatening language against a crime victim or witness could be found to have violated section 140(a) even if the person had no intention of carrying out the threat, as the mere use of the threatening language, without more, completes the crime. (*People v. Lowery, supra*, 52 Cal.4th 419, 427.) Section 140 applies 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" (*People v. Lowery,* 52 Cal.4th 419, 427, citing to *Virginia v. Black* (2003) 538 U.S. 343, 359.)

In *People v. Lowery*, Mr. Lowery made a telephone call to his incarcerated wife, and because his wife was incarcerated, the telephone call was recorded. During his conversation with his wife, Mr. Lowery said he would kill Joseph Gorman, an 88–year–old man who had accused the couple of stealing $250,000 from his mobile home and who had testified against them in court. (*Id.* at p. 421.)

Specifically, Mr. Lowery made the following statements on the jail call:

> *"I'm going down to Gorman's and I'm gonna steal 250,000 dollars! I'm a [sic] blow his fucken [sic] head away! I will kill the fucken [sic] bastard that said I stole 250,000! I will do it! You know what? I stole 100,000 dollars ... Listen! Listen! I stole 100,000 dollars! I burned it all! Okay?! Well, guess what I'm gonna do?! I'm gonna kill the bastard! And I'm gonna go down to Mr. Gorman's house, maybe this week, and I'm gonna blow his fucken [sic] head away!"*
>
> *"I'm not getting mad at you about it, I'm getting ... I'm gonna get mad at the Lawyer and the D.A. and, and Mr. Gorman, I'm gonna go down there and tell him, 'Look! You say my wife stole 250,000 ... you said I stole 250,000! Let's get the 250,000 out of your house right now!' Yeah, but he needed to take the 250,000 dollars off, because I'm gonna tell the ... the ... that blond-headed chic[k], uh ... that was uh ... the D.A..... I'm gonna kill her! And I'm gonna kill a lot of people! So I might do life in prison! We might be in the same prison!"*
>
> *"Listen! Okay, listen! You, you tell 'em that [your] husband's going down and get 250,000 dollars from that man, and then when he gets the 250,000 dollars, he's ... he's gonna kill anybody that steps in his way!!"*

(*Id.* at pp. 422-423.)

These statements by Mr. Lowery led to his prosecution under Penal Code section 140(a). At trial, defendant admitted making the statements but denied any intent to harm Mr. Gorman. (*Id.* at p. 423.) Mr. Lowery explained that he was simply expressing his anger over Mr. Gorman's false accusation that Mr. Lowery and his wife had stolen Gorman's $250,000 in cash and over the trial court's order that she pay that amount in restitution. (*Id.*)

A jury convicted the defendant of violating Penal Code section 140. On appeal, Mr. Lowery argued that because the statute lacked a specific intent requirement, it

infringed his right to free speech under the federal Constitution's First Amendment. (*Lowery, supra*, 52 Cal.4th at p. 421.) The court of appeal disagreed.

Noting that section 140(a) requires that a threat against a crime victim or witness be made "willfully," the California Supreme Court stated that, "a penal statute's use of the term 'willfully' to describe the intent with which an act is done ordinarily implies 'simply a purpose or willingness to commit the act,' not 'any intent to violate law, or to injure another....' " (*Lowery* at p. 427, quoting P.C. § 7(1).) Thus, the high court explained, "a person who under section 140(a) 'willfully' utters threatening language against a crime victim or witness could be found to have violated section 140(a) even if the person had no intention of carrying out the threat, as the mere use of the threatening language, without more, completes the crime." (*Lowery* at p. 427.) Citing *Black*, supra, 538 U.S. at page 359, the *Lowery* court concluded that, in order to "ensure the constitutionality of section 140(a)," that statute must be construed "as applying 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' [citation], rather than an expression of jest or frustration." (*Lowery, supra*, 52 Cal.4th at p. 427.) The high court then held that, "[s]o construed, section 140(a) does not violate the First Amendment." (*Ibid.*)

In D.C. v. R.R. (2010) 182. Cal. App. 4th 1190, 1199, a 15–year–old high school student "D.C." was pursuing a career in entertainment and maintained a Web site for that purpose. Several of his fellow students posted messages at the Web site, making derogatory comments about his perceived sexual orientation and threatening him with bodily harm. (*Id.*) The aggrieved student brought a civil suit against the author a threatening message. Specifically, the main comment at issue in the civil suit was posted by defendant R.R., which stated:

> "Hey [D.C.], I want to rip out your fucking heart and feed it to you. I heard your song while driving my kid to school and from that moment on I've ... wanted to kill you. If I ever see

> you I'm ... going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope you burn in hell.'

(*D.C. v. R.R, supra*, at p. 1199.)

In his defense, R.R. claimed his statements were protected by the First Amendment, and his "motivations in sending this email had nothing to do with any perception of D.C.'s sexual orientation, and certainly did not reflect an intention to do him physical harm." (*Id.* at p. 1206.) Defendant R.R. said that he "had no personal knowledge or belief about D.C.'s sexual orientation. No one ever told me he was gay." Defendant R.R. felt that his message was "fanciful, hyperbolic, jocular, and taunting and was motivated by D.C.'s pompous, self-aggrandizing, and narcissistic website—not his sexual orientation." (*Id.* at p. 1206.)

The California Court of Appeal found that under both the objective and subjective standard of First Amendment analysis, R.R.s statements fell outside of the First Amendment's protections, and constituted "true threats." (*Id.* at p. 1219.) Under the objective standard for true threats, the court began its analysis with the text of R.R's posted message. The court found that R.R.'s message was unequivocal, and determined that a serious expression of intent to inflict bodily harm was conveyed no less than three times by the phrases "rip out your fucking heart," "want[ ] to kill you," and "pound your head in with an ice pick." (*D.C. v. R.R, supra*, at p. 1219.)"That these words produce grotesque and exaggerated images does not lessen the gravity of the threat." (*Id.*) The court found that an intent to harm the recipient was also shown by use of the words "fuck you," "burn in hell," and "dick-riding penis lover," indicating that the author is angry. (*Id.*)

The court observed that R.R.s threat "was not merely a few words shouted during a brawl" rather, R.R.s threat's consisted of "a series of grammatically correct sentences composed at a computer keyboard over a period of at least several minutes." (*Id.*) Indeed, "even after the message was typed, the author still had to decide whether to send it. He placed his cursor over "send" and clicked the mouse or touchpad." (*Id.*) Thus, content of the message and its transmission show deliberation on the part of the author. (*Id.*)

In this case, the defendant threats "I*'m hunting down all these snitches...I will have your head just like a deer, it'll be hanging on my wall*" are not vague or ambiguous. These words certainly produce grotesque and exaggerated images, and as the court explained in the *R.R.* case, such shocking imagery does not lessen the gravity of the threat. (*D.C. v. R.R., supra* at p. 1219.) Like the threats in the *R.R.* case, the defendant's threats here mean exactly what they say. The threat "*go and get the feds cuz you're gonna end up dead, you'll be laying on that bed, cuz I'm coming for your head bitch*" is not ambiguous on its face. Moreover, like the threats in the *R.R. case*, the defendant's threats "*You're gonna end up dead...cuz I'm coming for your head bitch*" demonstrates a serious expression of intent to inflict bodily harm. The defendant's song was not an expression of mere jest or frustration. His lyrics were a true threat, aimed at the "snitches" who testified against his best friend. If the defendant made the statement "*You're gonna end up dead...cuz I'm coming for your head bitch*" via text message or email, the court would surely feel that the threats were true threats. The result shouldn't be any different merely because the threats are in a song. Here, the defendant *willfully* typed his threatening message, published his threats onto a public website, and then advertised his threats via Facebook and Twitter.

Similar to the *Lowery* case, the defendant threatened to kill a crime victim. The medium he chose to communicate his threat was a rap song. It's important to note that this case is not a referendum against rap music. The defendant is charged with violating PC 140 because he threatened to kill two rape victims in his lyrics. By naming two sexual assault victims by first and last name, calling them snitches for ratting out his best friend, and telling them that he's "*been hunting down all these snitches...*" and he'll "*have their head just like a deer...it'll be hanging on my wall*" and that they're "*gonna end up dead...cuz im coming for your head bitch"* the defendant communicated a serious expression of an intent to inflict bodily harm. The defendant shouldn't be given special treatment because he placed his threats in a song.

An inapposite case cited by the defendant in these proceedings is *George T., supra,* 33 Cal.4th 620. In that case, the Supreme Court considered "whether a high school

student made a criminal threat (PC 422) by giving two classmates a poem labeled 'Dark Poetry,' which recit[ed] in part, 'I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For 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. 624.) The court held that "the ambiguous nature of the poem, along with the circumstances surrounding its dissemination, fail[ed] to establish that the poem constituted a criminal threat." (*Ibid.*) The conviction was overturned because the threat was "not sufficiently unequivocal to convey to [the two students] an immediate prospect that minor would bring guns to school and shoot students." (*George T., supra*, 33 Cal.4th at pp. 637-638.) PC 422 requires that the threat be unequivocal and convey an immediate prosepect of execution. PC 140, however, does not require these elements, and as a result the holding of *George T.,* does not apply to the facts of our case.

However, it's interesting to note that the Supreme Court in *George T.,* stated in footnote 9 that:

> "Because line-drawing is inherently difficult when dealing with language and modes of expression, we decline amici curiae J.M. Coetzee et al.'s invitation to accord poems a 'very strong presumption' that they are not true threats. No bright-line rule may be drawn that adequately distinguishes a poem such as the one involved in the present case (or even poems of Plath, Lowell, and Berryman) from a 'poem' that conveys a threat, such as, 'Roses are red. Violets are blue. I'm going to kill you, and your family too.'"

Indeed, to give music blanket protection from the first amendment would lead to an absurd result. People could cloak their threats in "songs" and get away with threatening crime victims. In fact, courts in other jurisdictions have held that threats imbedded in rap songs can be "true threats." In *Jones v. State* (2002) 347 Ark. 409, a student, angry with his classmate, wrote her a violent rap song in which he mentioned her directly. The lyrics read, in part:

> "You gonna keep being a bitch, and I'm gonna click / You better run, bitch, cuz I can't control what I do. / I'll murder you before you can think twice, cut you up and use you for decoration to look nice. / I've

> had it up to here, bitch, there's gonna be a 187 on your whole family, trick. / Then you'll be just like me, with no home, no friends, no money. / You'll be six feet under, beside your sister, father and mother. (*Id.*)

Jones handed this poem to Ms. Arnold while in school. (*Id.*) On appeal, the Arkansas Supreme Court held that the rap song contained true threats. The defendant cannot shield himself under the First Amendment merely because his threats were placed in a rap song. Unprotected speech doesn't become protected merely because they rhyme. To extend blanket protection to music and poetry that fall within the category of unprotected speech would lead to an absurd result. The defendant can sing, rap, and write as much as he desires. But the moment he threatened to kill two known victims because they snitched on his friend, he communicated a serious expression of an intent to commit an act of unlawful violence upon them. By doing so, the defendant's statements were true threats under the law, and are not protected by the First Amendment.

III.

THE MOTION FOR REINSTATEMENT PURSUANT TO P.C. 871.5 MUST BE HEARD BY A DIFFERENT SUPERIOR COURT JUDGE

There are distinct roles of magistrates and trial court judges in the prosecution of felonies. (*People v. Richardson* (2007) 156 Cal.App.4h 574, 587; *People v. Garrido* (2005) 127 Cal.App.4th 359.) Procedures under this code that provide for superior court review of a challenged ruling or order made by a superior court judge or a magistrate shall be performed by a superior court judge other than the judge or magistrate who originally made the ruling or order, unless agreed to by the parties. (*Penal Code section 859c*). The People ask that the ruling on this motion be performed by another superior court judge.

CONCLUSION

In conclusion, the People ask the court to reinstate the complaint against the defendant.

DATED: April 1, 2014

Respectfully submitted,

JOYCE E. DUDLEY
DISTRICT ATTORNEY

By: _____
JENNIFER KARAPETIAN
Deputy District Attorney

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA BARBARA)

People v. Anthony Ray Murillo

Case No. 1449328

I am a citizen of the United States and a resident of Santa Barbara County, California. I am over the age of eighteen years, and not a party to the above-entitled action. My business address is the Office of the District Attorney, 312-D E. Cook Street, Santa Maria, CA 93454, Telephone: 805 346-7545.

On April 1, 2014 I served a true copy of the attached PEOPLE'S NOTICE OF MOTION TO REINSTATE THE COMPLAINT PURSUANT TO PENAL CODE SECTION 871.5, on Bill Makler, the attorney of record, by method(s) indicated below:

☐ **BY PERSONAL SERVICE:** By hand delivering a true copy thereof, at his office with his clerk therein or the person having charge thereof, at the address indicated below:

☐ **BY FIRST CLASS MAIL:** By placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the U.S. Post Office Box addressed as indicated below:

☐ **BY FACSIMILE TRANSMISSION:** By faxing a true copy thereof to the recipient at the facsimile number indicated below:

☒ **BY ELECTRONIC TRANSMISSION:** By e-mailing a true copy thereof to the recipient at the e-mail address indicated below:

☐ **BY WILL CALL:** By leaving a true copy thereof in the Clerk of the Court, "WILL CALL" folder, located at Santa Barbara Superior Court, [COURT ADDRESS LINE 1], [COURT CITY STATE ZIP].

Bill Makler
1114 State Street, Suite 252
Santa Barbara, CA 93101
Fax No.: (805)880-0400
bill@sbdefenselawyer.com; adriane@sbdefenselawyer.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 1, 2014 at Santa Maria, California.

Candice Culbertson 4/1/14

Candice Culbertson, Legal Office Professional II