IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Appellant,<br><br>v.<br><br>MARIO GONZALEZ,<br>Defendant and Respondent. | S223763 |

Fourth Appellate District, Division Two, No. E059859
Riverside County Superior Court No. INF1300854
The Honorable William S. Lebov, Judge



# ANSWER BRIEF ON THE MERITS

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**TO: THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:**

## INTRODUCTION

If only it were as simple as a single gesture without any context as respondent claims. In truth, respondent's gesture was actually a prolonged course of conduct that escalated over several minutes, involved multiple gestures, and clearly communicated his non-audible verbal threat to harm the victims in this case.

The threatening behavior began while respondent and the victims, several of whom were off-duty Cathedral City police officers, were all eating at a restaurant. One of the officers recognized a female member of respondent's party as someone he knew from high school and smiled at her. Unfortunately, it was not until after he smiled that the officer became aware of respondent's menacing stare and realized he bore gang tattoos, easily identifying respondent as a member of the criminal street gang known as Jackson Terrace. Respondent then solidified both his affiliation with the

street gang and his anger towards the smiling officer by standing up from the table while continuing to glare at the officers and flashing Jackson Terrace gang symbols with his hands as he exited the restaurant.

Not yet satisfied that he had made his point to the officers, respondent circled the parking lot and stopped at one of the officer's cars. He then looked back through the window of the restaurant, and glared again at the table of off-duty officers. While continuing his hard stare at the victim officers, respondent and his colleague made more gang signs, followed by gun gestures and throat slashing motions. Everyone in the party of officers, including one civilian and a police dispatcher, were immediately fearful for their safety. One victim was so frightened that she put her head down and left the restaurant out of a back entrance to avoid harm.

Ultimately, respondent was located, arrested, and charged with five counts of violating of Penal Code section 422,[1] making criminal threats, as a result of his actions. Respondent was held to answer following preliminary hearing, but the charges were later dismissed when the trial court granted respondent's section 995 motion to set aside the information. The People appealed.

Below, the People argued that respondent's non-audible conduct does meet the definition of verbal, and thus, the communication requirement of section 422. The People further argued that such application falls squarely within the legislative intent behind the prohibition on making criminal threats, which is aimed at criminalizing the intimidation of witnesses and the public. The Court of Appeal agreed with the People's argument and reversed the trial court's dismissal of the charges based on its determination that while respondent's actions were

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

nonverbal, respondent did effectively communicate a statement and could be held accountable for a violation of section 422 based on a review of the legislative intent and applicable rules of statutory construction.

Indeed, when the entirety of respondent's behavior is analyzed, respondent's actions were undoubtedly threatening. Respondent's gestures communicated his anger, identified his victims and articulated his intent simultaneously to all five victims leaving each and every one in fear for their lives. Thus, the non-audible threat to the victims was sufficient to satisfy the communication requirement of section 422, in furtherance of the underlying legislative intent and settled rules of statutory construction. Accordingly, this Court should interpret section 422 to include non-audible behavior, or behavior without the inclusion of any noise, to suffice for a violation of section 422 if a threat is adequately communicated.

To require an additional audible noise to qualify respondent's threatening communication as criminal threats, such that the mere addition of a "shh," a "boo," or a simple guttural growl, to serve as the lynchpin of the determination of criminality would create an absurd result and defeat the intent of the Legislature in enacting section 422. In addition to the obvious incongruity that would result from making a nominal sound the crux of a criminal threat prosecution, such a finding would also cause an absurd result because it would result in the unilateral disqualification of the non-hearing as victims of such threats, including the non-hearing, those who have suffered hearing loss from a traumatic event and the hard of hearing elderly population. This is patently unfair and an unjustifiably absurd result.

## STATEMENT OF FACTS

Several off-duty Cathedral City police officers were eating dinner in a restaurant when one officer, John Doe 1, got up from the table to use the restroom. On his way to the restroom, John Doe 1 recognized a female patron and smiled at her. She smirked back. As he approached the table, John Doe 1 realized the female, whom he knew from high school, was sitting with several male Hispanic adults, all of whom had tattoos and one of whom was respondent.

When John Doe 1 left the restroom and returned to his seat, he realized the male Hispanic adults at the table were staring at him in a "confrontational way." (CT 29.) John Doe 1 then realized that at least one of the men had a "JT" tattoo on his hand. Due to both his professional and personal experience, John Doe 1 knew a "JT" tattoo to stand for Jackson Terrace, a criminal street gang. (CT 31-32.) After John Doe 1 noticed the tattoo, the males got up from their table and continued to stare at John Doe 1 and his party as they were leaving the restaurant. Upon exiting the restaurant, the Hispanic males got into a white Ford Excursion with respondent in the front passenger seat. Respondent and his group immediately drove by the front of the restaurant where John Doe 1 was sitting at a table by the window with several fellow off-duty officers. Respondent looked at John Doe 1 and his colleagues and then threw up the "JT" gang sign for Jackson Terrace criminal street gang. (CT 27-28, 32-33.) John Doe 1 was familiar with the sign because of his professional experience with Jackson Terrace and because he grew up in Indio and was exposed to the gang during his childhood. John Doe 1 was immediately fearful for his own safety, as well as the safety of those around him in the restaurant. (CT 33.)

The vehicle in which respondent was riding drove over to John Doe 1's car in the parking lot, easily identifiable because of the commemorative

bumper sticker for fallen Cathedral City Police Officer Jermaine Gibson, and stopped near the car for about one minute. (CT 34.) After locating John Doe 1's car, respondent and his group left the parking lot, driving around to the front of the restaurant where they again stopped the car. From the middle of the street, respondent and his group looked toward John Doe 1 and his colleagues at the table by the window and again made the "JT" gang hand symbol. In addition to flashing the "JT" gang symbol with their hands, respondent and the driver of the car simulated guns with their hands and each then made a slashing motion across their necks. (CT 35.) John Doe 1 knew that flashing the "JT" gang sign in that context had the intended meaning of identifying the location as Jackson Terrace territory, and understood the flashing of the gang's sign coupled with the totality of the previous conduct, and followed by gesturing a gun and slashing of the throat to be a threat to him and his fellow officers at the table. (CT 35-36.)

John Doe 1's fellow officers, John Doe 2 and Jane Doe 1, also immediately recognized respondent and his party as gang members because of their visible and identifiable tattoos and because of the gang symbols they subsequently directed at the officers. As a result, all three officers understood the actions by respondent, specifically the repeated flashing of the gang symbol and the purposeful staring in combination with the shooting and throat slashing hand gestures directed at them, to be threats which caused them to be fearful for their imminent safety. (CT 43, 47-49.)

In addition to the three officers, there were two other people with John Doe 1 at the time of the incident. Jane Doe 2, a police dispatcher, and Jane Doe 3, a civilian. Both Jane Does 2 and 3 witnessed the exchange with John Doe 1 and respondent. Both became afraid and uncomfortable when respondent and his party began staring at their table. (CT 49-53.) Like the officers, both Jane Does 2 and 3 understood the actions of respondent directed at their party, specifically the repeated flashing of the

gang symbol, and the purposeful staring in combination with the shooting and throat slashing hand gestures directed at members of their party, to be threats, which caused both of them to be fearful for their safety. (CT 52-54.) In fact, Jane Doe 3 was so afraid, she left the restaurant because she felt that something was going to happen to her. (CT 54.)

While there was no audible sound heard, at preliminary hearing the magistrate determined that the elements of section 422 had been met because the victim officers, whom respondent recognized as police officers, and whom respondent knew to be familiar with gang signs and their meaning, effectively communicated his threat with gun and throat slashing gestures, causing the victims to fear immediate harm from respondent. (CT 106.)

## STATEMENT OF THE CASE

On April 11, 2013, the People filed a felony complaint against respondent alleging five counts of violating of section 422 (criminal threats), all of which included allegations of violations of section 186.22, subdivision (b)(1)(B) (the defendant had the specific intent to promote, further and assist in criminal conduct by gang members), and one count alleging a violation of section 166, subdivision (a)(10) (disobeying the terms of an injunction). The People also alleged that respondent had suffered a prior serious felony conviction in Riverside County Superior Court case no. INF043901 for violating section 192, subdivision (a), (voluntary manslaughter). Further, it was alleged that respondent suffered three prior offenses with state prison sentences (§ 667.5, subd. (b)). (CT 1-3.) Respondent was arraigned that same day and entered pleas of not guilty to all charges and denied all special allegations. (CT 4.)

On June 4 and 5, 2013, after several continuances, a preliminary hearing was held and respondent was held to answer on all charges alleged in the complaint. (CT 16-19.)

On June 17, 2013, the People filed an information alleging all of the charges and allegations previously alleged in the felony complaint, as well as two additional counts for misdemeanor violations of section 415, subdivision (1) (challenging another to fight in a public place). These counts also contained special allegations for violations of section 186.22, subdivision (d) (the defendant had the specific intent to promote, further and assist in criminal conduct by gang members). (CT 112-117.) On June 18, 2013, respondent was arraigned on the information and entered pleas of not guilty to all charges and denied all special allegations. (CT 120.)

On August 9, 2013, respondent filed a motion to set aside the information and dismiss all counts alleging violations of sections 422 and 415. (CT 122.) On August 21, 2013, the People filed an opposition to respondent's motion. (CT 132.) On August 23, 2013, the court heard and granted respondent's motion dismissing counts 1 through 7; i.e., all of the counts charging violations of sections 422 and 415 and the related allegations. (CT 147.) That same day, respondent pleaded guilty to count 8, a violation of section 166, subdivision (a)(10) (disobeying the terms of an injunction). (CT 148.)

The People filed a timely notice of appeal on October 22, 2013, in the Court of Appeal, Fourth Appellate District, Division Two. On December 9, 2014, the Court of Appeal reversed the judgment in a published opinion by Justice Richli, holding that the trial court erred in granting respondent's motion to dismiss the five counts of criminal threats. The Court of Appeal found that it is permissible to prosecute a violation of section 422 without any audible noise, ultimately concluding that while respondent's conduct was not verbal, it did constitute a statement and this violated the intent behind section 422. (Slip Opn., pp. 13-14.)

This Court thereafter granted review.

## ARGUMENT

### I
### SECTION 422'S USE OF THE TERM VERBAL DOES NOT REQUIRE AN AUDIBLE NOISE TO CONSTITUTE THE COMMUNICATION OF A CRIMINAL THREAT

#### A. The Historical Evolution Of Section 422

In 1988, section 422 was added to the Penal Code, as part of the California Street Terrorism Enforcement and Prevention Act (STEP Act), by Senate Bill No. 1555. (Stats.1988, ch. 1256, § 4; §§ 186.20 to 186.27.) The 1988 version of section 422 stated in relevant part:

> Any Person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the *statement* is to be taken as a threat, even if there is not intent of actually carrying it out, which, on its face and under the circumstances in which it is made is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution...[would be in violation of the statute].

This section was added to the STEP Act specifically to enable prosecutors to target the promulgation of gang violence by and through intimidation of the public by gang members. The STEP Act recognizes that one of the intrinsic problems in the prosecution of gang crimes is the intimidation of witnesses and the public. Such intimidation is crucial to the success of all gang crimes because it helps to prevent witnesses from coming forward and victims from reporting the crimes in the first instance. In enacting section 422 to deter this type of violence, "the Legislature declared that every person has the right to be protected from fear and intimidation. This act was in response to the growing number and severity of threats against peaceful citizens." (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1221.)

In an effort to adapt the law to changes in technology, section 422 was further amended to its present form in 1998 to include the prohibition against the use of an "electronic communication device."

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

(Emphasis added.) In adopting the 1998 amendment, the Legislature did not include a definition of the newly included term "verbal."

### B. The Plain Language Of Section 422 Does Not Require Any Sound

It is well established California law that when interpreting statutory language, the court's primary task is to determine and give effect to the Legislature's intent. (*People v. Arias* (2008) 45 Cal.4th 169, 177.) The first step to statutory interpretation is to "examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent." (*Whaley v. Sony Computer Entertainment America, Inc.*

(2004) 121 Cal.App.4th 479, 484-485.) The court must "presume the Legislature meant what it said, and the plain meaning of the statute governs." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 761.) Unless a statute includes a specifically defined meaning, "a court looks to the plain meaning of a word as understood by the ordinary person." (*Hammond v. Agran* (1999) 76 Cal.App.4th 1181, 1189; accord *People v. Massicot* (2002) 97 Cal.App.4th 920, 925-926.) The words used in the statute should be construed in context and an interpretation that leads to absurd results or renders words surplusage is to be avoided. (*People v. Loeun* (1997) 17 Cal.4th 1, 9.)

If the statutory language is clear and unambiguous, that meaning controls and there is no need for further inquiry. (*People v. Bojorquez* (2010) 183 Cal.App.4th 407, 418.) "Where the statute is clear, courts will not 'interpret away clear language in favor of an ambiguity that does not exist.'" (*People v. Loeun*, *supra*, 17 Cal.4th at p. 9.) Only if the statutory language is ambiguous may the court look outside the text to the statute's purpose and legislative history. (*Id.* at p. 1082; *People v. Arias*, *supra*, 45 Cal.4th at p. 177.)

> If ... the language supports more than one reasonable construction, we may consider "a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." Using these extrinsic aids, "we select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an

> interpretation that would lead to absurd consequences."

(*People v. Bojorquez*, *supra*, at p. 419, citations omitted.)

In light of the rules of statutory construction, the terms "statement" and "verbal," as used in section 422, have their common everyday meaning because they are not elsewhere defined in this Code section. According to Webster's 9th New Collegiate Dictionary, the common everyday meaning of the word "statement" includes, "an opinion or message conveyed indirectly or usu. Nonverbally." (Webster's 9th New Collegiate Dictionary (9th ed. 1991) at p. 1151, col. 2.) Merriam Webster's Collegiate Dictionary defines the word "verbal" as "consisting of words." (Merriam Webster's Collegiate Dictionary (10th ed. 1999) at p. 1311, col. 2.) Neither of these definitions includes any sound requirement.

Moreover, the plain language of section 422 does not include any requirement that either a statement or a verbal communication have an element of sound. Interestingly, respondent first concedes that the definition of "statement" encompasses conduct, and then asserts that because section 422 expressly states it applies to "statements, made verbally" physical conduct lacking sound is incapable of communicating a verbal statement. (OBM pp. 9-11.) Then, respondent concedes that "urban dictionary" defines the gesture of using "finger guns" as communicating words, and while the People disagree that a shooting weapon indicates "hello," or equates to "a flirtation," if it is communicative and relays those words then we do agree that it is a statement made verbally. (OBM pp. 20-21.) Despite this clear example of verbal communication, respondent goes on to claim that words must be spoken as though such a requirement equates to the need for noise. (OBM p. 9.) However, a word can be spoken without sound.

Millions of Americans do this each and every day through the use of American Sign Language, or merely by mouthing words they do not want others to hear when communicating with a select individual. Indeed, the American Sign Language Dictionary defines thousands of words made via hand sign which constitute verbal displays of language. Significantly, the American Sign Language Dictionary defines the term "gun" by the very hand sign used by respondent in threatening the lives of the victims in this case.[2] (American Sign Language Dict. (1st ed. 1998) at p. 196.) Thus, there is no requirement that a verbal statement be inclusive of audible sounds. To include such a requirement as respondent suggests would add an element to the statute never contemplated or intended by the Legislature.

### C. Even If This Court Determines Verbal Is An Ambiguous Term, The Legislative History Behind Section 422 Demonstrates An Intent To Include Non-Audible Communicative Behavior

The legislative intent behind both the original enactment of section 422 and the STEP Act in 1988 and the legislative intent behind the adoption of the 1998 amendment, clearly articulate that the purpose of the statutory scheme is to prevent the intimidation of witnesses and the public. The 1998 amendment did not change this original intent, instead the Legislature sought to amend section 422 to include electronic communication devices, in keeping with technological advancements and *not* to restrict the pre-amendment language of the section. (Sen. Bill No. 1796 (1997-1998 Reg. Sess.) Stats 1998, ch. 825, § 1, italics added.)

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[2] The sign for gun is described as, "[Demonstrates pulling back the hammer on a pointed gun] With the index finger of the right *L hand* pointing forward in front of the right side of the body, palm facing left, wiggle the thumb up and down with a repeated movement." (American Sign Language Dict. at p. 196.)

Prior to the 1998 amendment, section 422 simply included the term *statement*. Thus, since the term statement was the qualifier for conduct violative of section 422 prior to the 1998 amendment, and the Legislature did not intend to decriminalize statements but merely to ensure verbal, written and electronic communications were encompassed by the statute, a mere statement is still sufficient to violate section 422. Indeed, the Legislature expressly stated the sole purpose of the bill was to add to and not reduce the actions punishable by this statute. To that end, the digest in the bill analysis provided to the Legislature in preparation for the vote to enact the 1998 amendments expressly states, "[t]his bill would *add* threats or annoying communications made by electronic communication, such as through the Internet, to *existing* statutes prohibiting threats or annoying communications *by other means*." (Sen. Bill No. 1796 (1997-1998 Reg. Sess.) Stats 1998 Senate Floor Bill Analysis 8/23/1998.) Any analysis of the usage of the term verbal should take this intent into consideration.

Respondent inappropriately asks this Court not to apply the intent of this legislative history to its analysis of section 422, but instead to conduct a comparative analysis of the history behind an amendment to section 76, threats against public officials, and apply that to interpret section 422. The basis of respondent's argument is that, although section 76 was not amended in SB 1796, it was amended in 1998 and included a definition of the term "threat" which specifically criminalizes threatening conduct. This request is nonsensical because mere conduct is not at issue here.

It has consistently been the People's position that respondent's actions constituted verbal communication, made up of gestures, which when viewed in context, formed a verbal communication. As such, the People assert that verbal communication can be effectuated without the emission of sound, not that mere conduct is the equivalent of communication. Consequently, respondent's arguments regarding the

inclusion or exclusion of criminal conduct in section 422 as compared to section 76 are irrelevant. The People are not asking this Court to find that a pattern of conduct alone violates section 422. While conduct alone, such as stalking, i.e. following someone around and watching them would violate the stalking statutes and section 76, it would not communicate a threat as required by section 422. This is why the People are not asking this Court to include conduct in section 422; rather, the People are seeking affirmation that communication in the form of non-auditory gestures can be a criminal threat.

### D. Respondent's reliance on *People v. Franz*, Is Misplaced

Prior to this case, the only published decisions which discuss the "verbal" requirement of the statute even tangentially were *People v. Mendoza* (1997) 59 Cal.App.4th 1333, and *People v. Franz* (2001) 88 Cal.App.4th 1426. The concurring opinion in *People v. Mendoza* (1997) 59 Cal.App.4th 1333, stated that "section 422 does not require the threat be literal or even verbal. Sending a government informant a dead, tongueless rat may well violate section 422." (*Franz, supra,* 88 Cal.App.4th at p. 1347.) The Court of Appeal here correctly determined that the comments in the concurring opinion in *Mendoza* are significant because of the stated legislative intent in the 1998 amendment that the purpose was to add threats by electronic communication devices and not to restrict the pre-amendment language in anyway. As a result, the Court of Appeal here appropriately held that while "the statement made in *Mendoza, supra,* 49 Cal.App.4th 1333, was in a concurring opinion, it makes sense." (Slip Opn. p. 12.) "[I]f the communication, by whatever means, was intended to convey and did convey an unequivocal, unconditional, immediate, and specific threat of great bodily injury or death, the statute has been violated." (*Ibid.* citing *Mendoza, supra,* 49 Cal.App.4th at p. 1347.)

The only other published decision addressing the term verbal in section 422, *People v. Franz*, *supra*, 88 Cal.App.4th 1426, conducted a flawed statutory analysis and reached an illogical conclusion. In *Franz*, the defendant, who had a long history of domestic violence with the victim, was convicted of a violation of section 422. The conviction was a result of Franz making a slashing motion across his throat and a shushing sound communicating to the victim that if she talked to the police officer (who was present when the threat was made) he would harm her. While the predominate issue in the *Franz* case was whether or not the presence of the officer affected the defendant's ability to carry out the threat immediately as required by the elements of section 422, the *Franz* court also analyzed whether or not the shushing sound the defendant made when slicing his hand across his throat was sufficient to satisfy the verbal statement requirement of section 422. Ultimately, the *Franz* Court stated in dicta that a slashing motion across one's neck was not, *by itself*, a threat sufficient to establish a violation of section 422, but that slashing accompanied by the shushing sound was sufficient to satisfy the requisite elements. (*People v. Franz, supra,* 88 Cal.App.4th at p. 1442.)

In so doing, the *Franz* Court seemingly found that in enacting the 1998 amendment to section 422 the Legislature intended to create an auditory requirement for the threat to satisfy the statute. To achieve this end, the *Franz* Court conducted a brief statutory construction analysis and determined that there was an auditory requirement within the elements of section 422. Then, based on the false premise that the 1998 amendment added a sound element to section 422, the *Franz* Court dismissed the analysis by the Court in *Mendoza*, and opined that a non-auditory statement alone was no longer sufficient to violate the statute.

In conducting its flawed analysis, the court acknowledged and rejected the well-established definition of statement in Evidence Code

section 225,[3] which includes conduct intended to replace verbal communication as sufficient to supplant the need for auditory verbal utterances. Rather than analyzing the interplay between Evidence Code section 225 and section 422, addressing the legislative intent underlying the enactment of the 1998 amendment to section 422, or evaluating the common definition of a verbal statement, the *Franz* court merely opined that the existence of Evidence Code section 225 demonstrated that the Legislature could have included this definition of "verbal communication" in section 422 had it so desired. (*Franz, supra*, 88 Cal.App.4th at pp. 1441-1442.)

Oddly, this analysis disregards not only the legislative intent behind the enactment of section 422, but the rule of statutory construction which states that there is a duty to harmonize all statutes giving effect to all parts of all statutes whenever possible. (*People v. Superior Court (Cooper)* (2003) 114 Cal.App.4th 713, 720.) In its treatment of Evidence Code section 225, the *Franz* court failed to harmonize the statutes, resulting in a flawed analysis which failed to consider the situation such as that presented here where there is clear communication of an imminent threat through contextualized verbal conduct without an auditory component.

Furthermore, the *Franz* court also neglected to address the legislative intent and public policy underlying the enactment of the STEP Act in deterring gang violence as it applies to section 422. Instead, the *Franz* court determined that a comparative analysis between section 422 and the stalking statute was appropriate because they were simultaneously enacted in 1988. To that end, the *Franz* court determined that because the Legislature added the term "conduct" to the stalking statute but did not

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[3] Evidence Code section 225 provides: "Statement" means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression."

include "conduct" in section 422, conduct alone is insufficient to violate section 422. Inexplicably, this led the *Franz* court to draw the conclusion that some auditory noise must accompany an act to enable prosecution under section 422. (*Franz, supra,* 88 Cal.App.4th at p. 1440.)

This Court should reject this analysis as the Court of Appeal rejected it in the instant case. It is erroneous to compare the stalking statute to section 422 because, '"[t]he actus reus prohibited by law for these crimes are different; therefore, statutory language describing the prohibited conduct would naturally prohibit different forms of physical action.'" (Slip Opn., p. 10-11, quoting Greer & Modell, *When a Threat is Not a Threat: Why Persons Who Are Deaf or Hard of Hearing Are Left Unprotected by California Penal Code Section 422 and How the Courts Could Rectify It* (2011) 45 Val. U. L.Rev 1297, 1304.) However, as respondent conceded below, since the initial enactment of present day section 422, the statute has been amended to expand its scope. Thus, this Court must also look to the legislative intent behind the 1998 amendment of section 422 to interpret its meaning. (Slip Opn., p. 11.)[4] And the Legislature's intent, "in adopting the 1998 amendment, made clear that the intent of the amendment was to include electronic communications, not to restrict the pre-amendment language of section 422." (Slip Opn., p. 13.)

Consequently, the *Franz* Court's absurd conclusion that some noise, such as "shh" is a required component of a section 422 violation is not supported by the statute or its legislative history. Rather, even if this Court finds that the term "verbal" in section 422 is ambiguous, as both the *Franz* Court and the Court of Appeal did, the legislative history indicates that

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[4] Throughout the appellate court's opinion they incorrectly refer to the 1998 amendment as the 1988 amendment.

"verbal" was intended to be inclusive of statements and communicative actions. (*Franz* at p. 1440; Slip Opn., p. 10.)

The *Franz* Court's myopic analysis and limited rationale was correctly rejected by the Court of Appeal. This rationale should likewise be rejected by this Court in favor of a more in-depth and comprehensive analysis; and one that follows the rules of statutory construction. One which, like that of the Court of Appeal below, considers the underlying legislative purpose of section 422 to encompass all forms of statements however communicated to fully protect society against the evils the STEP Act was intended to cure.

### E. Respondent's Assertion That Section 422 Has A Noise Element Leads To Absurd Results

It is only logical that an act of intimidation, such as this one, where the conduct of respondent includes meaningful hand signs accompanied by intentionally intimidating conduct does equate to a verbal statement, i.e. words and the expression of an idea taken together to communicate an intended action. It would be ludicrous to deny such conclusion in favor of implementing some nonspecific auditory requirement, where two identical acts, one without sound and one with a nonspecific noise, are treated differently not because of the content of the threat but because of the emission of some sound.

To create such an auditory component as an element of section 422 would result not only in the disenfranchisement of the non-hearing but would also create a loophole allowing criminal conduct to flourish and threats upon the general public to escalate in situations, such as the one presented here, where the communication of the threat was unequivocal and incited the requisite fear in the victims, but was silent.

The end result being that another defendant who commits the exact same conduct as respondent and emits a yell, a whoop, or a shush, be held accountable for a violation of section 422, while respondent escapes criminal liability simply because of the lack of any sound made during the course of identical conduct which brought forth no additional depth to the otherwise non-auditory fully communicated threat.

Although, respondent alleges that to allow a gesture as a violation of section 422 would necessarily result in ambiguity due to the multiple interpretations a gesture carries, this concern is misplaced. (OBM at pp. 19-20.) In reality, it is the context that communicates a threat from a gesture and this would necessarily be considered by the jury to appropriately determine the intent behind the action. This is no different than the analysis jurors conduct every day to interpret the meaning of words, after all, context is often the key to determining intent.

Significantly, this concept of looking to the circumstances surrounding a defendant's conduct in conjunction with the threat to determine if it satisfies the elements of section 422, is not new. In *People v. Wilson* (2010) 186 Cal.App.4th 789, the court determined that, "'[a] communication that is ambiguous on its face may nonetheless be found to be a criminal threat if the surrounding circumstances clarify the communication's meaning. [Citation.]' (*In Re George T.* (2004) 33 Cal.4th 620, 635.) In determining whether conditional, vague, or ambiguous language constitutes a violation of section 422, the trier of fact may consider 'the defendant's mannerisms, affect, and actions involved in making the threat as well as subsequent actions taken by the defendant.' (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013 (*Solis* ).)" (*People v. Wilson*, *supra*, 186 Cal.App.4th at pp. 807-808.)

Furthermore, in analyzing the legislative usage of certain words, the objective to be achieved, as well as the evil to be prevented, by the

legislation or enactment are prime considerations. (*People v. Heston* (1992) 1 Cal.App.4th 471, 476.) Moreover, a practical construction must be given to the language used by the draftsmen, "lest their purposes be too easily nullified by over-refined inquiries into the meaning of words." (*People v. Fair* (1967) 254 Cal.App.2d 890, 892-893.) Nor should the courts be eager to find ambiguity due to extraneous matters. (*People v. Mixon* (1990) 225 Cal.App.3d 1471, 1481.)

Consequently, this Court must reconcile the verbal communication requirement of section 422 with the "settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' [Citations.] ... Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' " (*People v. Pieters* (1991) 52 Cal.3d 894, 898–899; see *People v. Ledesma* (1997) 16 Cal.4th 90, 95.)

Here, there can be nothing other than an absurd result from finding that all of the elements of section 422 have been satisfied by respondent's conduct except the utterance of some audible sound. To do so would make a "whoop," a "shh" or another minor utterance the crux of a criminal prosecution in which such a minor noise provides no insight into intent, does not aid in the communication of the threat, and gives no context to a defendant's behavior. Such an outcome would be nothing short of ludicrous.

### F. The Rule of Lenity Is Inapplicable

Finally, respondent claims that this Court must interpret section 422 in his favor pursuant to the rule of lenity. (OBM at p. 18.) However, the rule of lenity applies only when "the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule." (*People v. Avery* (2002) 27 Cal.4th 49, 58.) Moreover, it is well established California law that "an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*Ibid.*) As addressed extensively above, there is a contrary legislative intent here that makes it impossible to disregard the intended criminalization of conduct communicating a threat towards a member of the public. To do otherwise would be to ignore the extensive legislative history of the entire STEP Act.

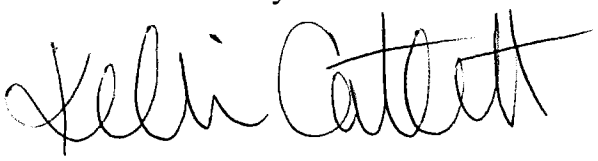
## CONCLUSION

It is clear that neither the plain language of the statute nor the Legislature intended to include an additional sound requirement for establishing a violation of section 422. Therefore, the People respectfully request that this Court affirm the finding of the Court of Appeal and ultimately remand this matter for reinstatement of the felony charges and further proceedings through and including trial.

Dated: August 14, 2015

Respectfully submitted,

MICHAEL A. HESTRIN
District Attorney
Riverside County



KELLI M. CATLETT
Supervising Deputy District Attorney

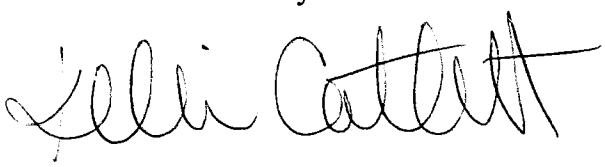
## CERTIFICATE OF WORD COUNT
## CASE NO. S223763

The text of the **ANSWER BRIEF ON THE MERITS** consists of 5,992 words as counted by the Microsoft Word program used to generate the **ANSWER BRIEF ON THE MERITS.**

Executed on August 14, 2015.

Respectfully submitted,

MICHAEL A. HESTRIN
District Attorney



KELLI M. CATLETT
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**PROOF OF SERVICE BY MAIL**
**CASE NO. S223763**

I, the undersigned, say: I am a resident of or employed in the County of Riverside, over the age of 18 years and not a party to the within action or proceeding; that my residence or business address is 3960 Orange Street, Riverside, California 92501.

That on August 14, 2015, I served a copy of the paper to which this proof of service by mail is attached, **RESPONDENT'S ANSWER BRIEF ON THE MERITS**, by depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Postal Service mailbox, in the City of Riverside, State of California, addressed as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on August 14, 2015, at Riverside, California.

**DECLARANT**