IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE GEORGE T., A Minor Coming Under the Juvenile Court Law.	S111780
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. GEORGE T., Defendant and Appellant.	(Court of Appeal No. H023080) (Santa Clara County Juvenile Court No. J122537)

BRIEF ON THE MERITS

AFTER AFFIRMANCE OF JUVENILE COURT FINDINGS BY THE COURT OF APPEAL, SIXTH APPELLATE DISTRICT

SIXTH DISTRICT APPELLATE PROGRAM

MICHAEL A. KRESSER
Executive Director
State Bar #66483
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050
(408) 241-6171

Attorneys for Appellant,
GEORGE T.

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ISSUE PRESENTED

WAS EVIDENCE THAT APPELLANT WROTE AND GAVE A POEM TO TWO FELLOW HIGH SCHOOL STUDENTS IN WHICH THE PROTAGONIST SAYS HE "CAN BE THE NEXT KID TO BRING GUNS TO KILL STUDENTS AT SCHOOL" INSUFFICIENT TO PROVE A VIOLATION OF PENAL CODE SECTION 422, RESULTING IN A VIOLATION OF APPELLANT'S RIGHTS UNDER THE STATE AND FEDERAL DUE PROCESS CLAUSES, AND HIS FIRST AMENDMENT RIGHTS TO FREE SPEECH AND EXPRESSION?

STATEMENT OF THE CASE

On March 20, 2001, the Santa Clara County District Attorney filed a petition under Welfare and Institutions Code section 602, alleging in count one

that appellant violated Penal Code section 422 as to Mary S., and in count two that appellant committed the same violation as to William R. (CT 2.) On March 29, 2001, the petition was amended to add a third count, alleging the same violation as to Erin S. (CT 38-40.) On March 21, 2001, appellant was ordered detained in Juvenile Hall. (CT 35.)

A trial on the petition was conducted on April 11, 18, 25 and 27, 2001. (CT 41, 49, 50, 51.) At the conclusion, the court found counts one and three of the petition true. (CT 51.)

On May 15, 2001, the minor was adjudged a ward of the court, and committed to Juvenile Hall for 100 additional days, with eligibility for release on electronic monitoring program after 30 days. (CT 89-92; RT 348-349.) He was also required to do 16 days on the Juvenile Court work program, and an 8 p.m. curfew was imposed. (*Id.*)

A timely notice of appeal was filed on May 25, 2001. (CT 100.)

The Sixth District Court of Appeal affirmed the Juvenile Court in an opinion issued October 23, 2002, and certified for publication. A timely petition for rehearing was denied on November 13, 2002, and the majority opinion was modified. This court granted review on January 15, 2003.

STATEMENT OF FACTS

A. Prosecution Case

Mary S. was a student at Santa Teresa High School on March 16, 2001. She was in an honors English class, which appellant had joined as a new student about ten days before. (RT 10-11.) The first day appellant came into the class, Mary S. approached him and was nice to him. (RT 19-20.) Between that day and March 16, she had spoken with him only about three times in class, always about what time it was. (RT 11, 22, 25-26.)

On Friday, March 16, a substitute was teaching. Toward the end of the

class, appellant moved from his seat two rows over into a vacant seat in a row adjoining Mary S.. (RT 18.) He approached her and said, "Is there a poetry club here?" (RT 25.) He then handed her three sheets of paper. One said, "These poems describe me and my feelings. Tell me if they describe you and your feelings." (RT 19.) The other two were poems. Mary S. read one of the two poems, which was labeled "Dark Poetry" and read as follows:

FACES

> Who are these faces around me? Where did they come from? They would probably become the next doctors or loirs [sic] or something. All really intelligent and ahead in their game. I wish I had a choice on what I want to be like they do. All so happy and vagrant. Each origonal [sic] in their own way. They make me want to puke. For 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!!
>
> By Julius aka Angel

Appellant did not look angry or show any apparent emotion when he handed them to her. (RT 14, 21.)

Mary S. became very frightened upon reading the poem. She found the statements that he was evil, dark, destructive and dangerous threatening, as well as the statement that he could be the next kid to bring guns to kill students at school. (RT 14-15.) When the poem said, "I can be the next kid," Mary S. took it to mean that appellant would be, because the poem said he was a dark, destructive and dangerous person. (RT 34.)

Mary S. handed all three pieces of paper back to appellant. (RT 20.) She left campus without talking to anyone at school because she was afraid for her life. (RT 28.) She got home at 2:45. (RT 29.) About 20 to 30 minutes

after getting home she told her parents about the poem. (*Ibid.*) Her father tried to call the school, but it was closed. (RT 31.) She told a friend named Chrissy about the poem, but never contacted the police. (RT 23, 30.)

The following day, Saturday, she e-mailed Mr. Rasmussen, the regular teacher of the honors English class, about the poem. (RT 23.) Mary S. remained frightened through the weekend and the following week, and was afraid to go to school. (RT 15.)

Later on the afternoon of March 16, around 2 p.m., appellant also gave the poem "Faces" to classmate Erin S. (RT 37, 43.) Erin S. was with her friend Natalie P. (RT 45.) Erin had met appellant about a week before, and had talked with him three or four times. (RT 43-44.) Appellant handed her a folded piece of paper and asked Erin to read the poem. (RT 45.) Appellant also handed Natalie a piece of paper. (RT 45.) Because she was late for her seventh period class, Erin pretended to read the paper to be polite, but did not actually do so. (RT 44-45.)

The following Monday, police were at the school, and a dean or vice principal asked Erin to come to his office, where he questioned her about the piece of paper. (RT 39.) It was still in her jacket pocket, as she had forgotten about it over the weekend. She read it and became very scared. She broke down crying, feeling it was a threat to her life. (RT 39-41.) She was still scared. (RT 41-42.)

William Rasmussen, the honors English class teacher at Santa Teresa High School, recalled appellant joining his class on Wednesday, March 7. The class was finishing up reading and critiquing the novel The Sun Also Rises by Ernest Hemingway. (RT 55.) The class was not involved in reading or writing poetry while appellant was a student. (RT 56.)

Late Saturday night, March 17, Rasmussen read an e-mail from Mary

S. The e-mail stated that the guy in the class called Julius gave her a poem which said that he's "going to be the next person to bring a gun to school and kill random people." (Petitioner's Exhibit 2.)

Rasmussen called Mary S. back on Sunday. (RT 65.) She told him what the poem said and that she was in fear. (RT 65.) Rasmussen did not dissect whether appellant said he "can" be the next school killer or "would." (*Ibid.*) Mary S. was very, very shaken during the call, and Rasmussen concluded this was a real threat. (*Ibid.*) During the call, Mary S. had said that appellant had followed her outside after class. (RT 66.) To get him away from her, she suggested that he take the poem to Miss Gonzalez, the poetry club adviser. (*Ibid.*)

Rasmussen had not actually read the poem until the day he testified, but considered it a threat to himself and students. (RT 61, 63.) He was still in fear for his safety and that of his students. (RT 61.)

Rasmussen had never previously had any negative experience with appellant, or felt threatened by him. They had had only a single one-on-one discussion that had lasted not more than five minutes. (RT 66-77.)

Rasmussen was familiar with the term "dark poetry." He defined it as "the concept of death and causing and inflicting of major bodily pain and suffering . . . There is something foreboding about it." (RT 67.)

Kathryn H. was also a student at Santa Teresa High School. Although she told Erin that appellant had made a death threat to her at school, that was false, and no such threat had ever been made. (RT 102-103.) Erin had told her in math class that appellant had said in a letter that he wanted to kill people at school. (RT 107.) Kathryn said that appellant was going to kill her. She was smiling and wasn't really serious, and did not think Erin was serious. (RT 100-107.) She guessed that she thought saying it would make her more

popular with Erin. (RT 109.) In fact, she had never even spoken with appellant. (RT 106.) They had once looked at each other for about ten seconds. (RT 100.)

B. Defense Case

Natalie P. was a student at Santa Teresa High School and met appellant twice. (RT 167-168.) She had meetings with him after school which lasted an hour to an hour and a half. (RT 168.) She feels she has gotten to know appellant pretty well.

She received a poem from appellant on March 16. (RT 168-169.) A portion of the poem was identified as Petitioner's Exhibit 6. He just wanted her to read the poem. They had previously discussed that he wrote poetry. The poem was entitled "Who Am I." The poem had a piece torn out of it. The portion that was readable stated: "Taken to a place that you hate. Your locked up and when your let out of your cage it is to perform. Not able to be yourself and always hiding & thinking would people like me if I behaved differently? by Julius AKA Angel."

Later, a police officer came to her house and asked her about the poem. (RT 170.) The officer was rude and threatening, and Natalie was not totally cooperative and truthful with the officer. (RT 184-185.) She told the officer that the poem was about water and dolphins, and it was, though the part that contained that was the missing piece of the poem. (RT 187-188.) Natalie had inadvertently included the poem with some other papers she was shredding. (RT 189.) Natalie admitting telling the officer that she thought it was a love poem, though it was not. (RT 190-191.)

Appellant testified that he was fifteen years old, and had been attending Santa Teresa High School before he was placed in custody. (RT 226-227.) He is interested in poetry, particularly as a way to describe emotions instead of

acting them out. (RT 227.)

He wrote the poem "Faces," Petitioner's Exhibit One. He also wrote a second poem "Faces in My Head" (People's Exhibit Five), which was his attempt to recreate the original one. This poem was never given to anyone, other than the police officer who searched him. (RT 229-230.)

The first poem, "Faces," was written on the afternoon of March 16, around 1:20 or 1:30. Appellant was having a bad day, because he had forgotten to ask his parents for lunch money and therefore did not eat lunch, and had been unable to find a picture he wanted in his backpack. (RT 233.) A whole bunch of thoughts came through his head, and he wrote down the thoughts he did not like as a way of getting them out of his head. (*Ibid.*)

The reference to killing people was a reference to a joke among appellant and his friends about the Columbine killings. They would say, "I'm going to be the next Columbine kid," strictly as a joke. (RT 233-234.) He did not intend the poem to be a threat, and was just trying to joke around. (RT 234.) He remembered that once during lunchtime, Erin, Nicole, appellant and some of appellant's friends had been sitting there and someone had said, "I'll probably be the next Columbine killer," and then said who present would be killed and who would not. That was a copy of a movie they had seen. (RT 234.) He thought that because Erin and Nicole were his friends, they would understand and think it was a joke. (*Ibid.*) Erin and Nicole had asked for a poem, and each had taken one from his hand. (RT 231.)

On cross-examination, appellant admitted that going up to a stranger and telling them he could be the next school shooter would be a threat. (RT 242.) Telling people he was dark, destructive, dangerous and evil would be frightening if they did not know him. (RT 242-243.) He also admitted having had difficulty with the school district. (RT 248.) He had been asked to leave

one school because he had urinated on a school wall. That was due to a bladder problem his doctor had diagnosed, and he had tried to urinate in a place no one would see him. (RT 249.) His mother had gotten a note from Kaiser confirming his bladder problem. (*Ibid.*) He had been asked to leave the second school because he had been caught plagiarizing material from the Internet. Although he had been required to complete a paper in two weeks that other students had three months to do, which he thought was wrong, he still felt shameful about the plagiarism. (RT 251.)

Appellant stated he had not given the poem to Mary S. (RT 260-262.) He also stated that he had written "Dark Poetry" at the top of "Faces" to let people know that it was an expression of feelings, a creative work, and not a threat to do anything. (RT 296.)

C. Juvenile Court's Ruling

The Juvenile Court judge made comments explaining his findings. The court relied on appellant's testimony that on the day he wrote the poem, "he was depressed because he had a bad day." (RT 316.) In discussing the "surrounding circumstantial evidence," the court stated: "Look, if he'd been in the poetry class and there has [sic] been discussions about dark poetry involving killing, shootings, destroying lives, that would have been a different situation. That would have been circumstances against it being – that would be innocent intent. But there's nothing to establish that at all . . . . There was nothing to establish that there was a relationship [with the two recipients]. There was nothing to establish that he was not serious. There was nothing to establish that it was an innocent – just a poetry exercise." (RT 316-317.)

D. Court of Appeal Ruling

1. Majority Opinion

The majority opinion found that appellant's poem was a threat to

commit a crime which will result in death or great bodily injury. (Maj. opn., at p. 13.) The majority supported its conclusion by noting that: "The statements were not made in the context of a poetry course or a poetry assignment, and the students had not been asked to show each other their writings." (*Ibid.*)

The majority further felt that "the history of the parties involved and the context in which the threats were made provide strong circumstantial evidence that Julius intended his words to be taken as a threat." (*Ibid.*) To support this conclusion, the majority cited the fact that appellant had been in the honors English class for only eight days, and barely knew Mary when he handed her his poem. (*Ibid.*) The majority found it significant that the class was not studying poetry, and that appellant approached Mary with a "serious blank face" when he handed her the poem. (*Ibid.*) The majority found guilty significance in appellant's note with the poem which said that the poem described him and his feelings.

The majority cited the lack of an ongoing relationship between appellant and either of the two girls he handed the poem to, the fact that these girls were not studying poetry or involved in the poetry club, and that appellant did not indicate he was joking as evidence that appellant intended his writing as a threat to be taken seriously. (Maj. opn., at p. 14.)

The majority believed that the fact that appellant had been asked to leave two schools due to behavior problems, and his belief he had been wronged or discriminated against by the school district, suggested that the poem was intended "as a threat to get back at the school district and its schools." (*Ibid.*) The majority also cited evidence that Kathryn, another student, had said appellant threatened her, finding her testimony "strongly suggested that she recanted her statements because she feared retaliation" from

appellant. (*Id.*, at p. 15.) It also said that the fact that appellant had "surreptitiously discovered" that the uncle he and his father were temporarily staying with had firearms and ammunition in his house "provide further evidence that Julius intended his writing to be taken as a threat." (*Ibid.*) The majority also found guilty significance in the fact that appellant testified that he and his friends "kind of joked" about the Columbine killings. (*Ibid.*)

The majority rejected appellant's claim that the writing and communication of the poem was within his First Amendment rights. It stated that the United States Supreme Court in *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503 had stated that speech between students that "would materially and substantially disrupt the work . . . of the school" was not protected. Relying on its earlier conclusion that the poem reasonably conveyed to students that their lives were in danger, the majority held that such communication reasonably could lead to "substantial disruption of or material inference [sic] with school activities." (*Id.*, at p. 16, quoting *Tinker, supra*, 393 U.S. at p. 514.)

The majority purported to distinguish the decision of the Third District Court of Appeal in *In re Ryan D.* (2002) 100 Cal.App.4th 854. The Third District, in a decision authored by Presiding Justice Scotland, reversed a Juvenile Court's finding that a minor had violated section 422 by painting a picture of the minor shooting a school police officer in the head, "blowing away pieces of her flesh and face." (*Id.*, at p. 857.) The officer depicted had previously cited the minor for possessing marijuana. The minor turned the painting in as a school art project. The art instructor found the painting scary and took it to the assistant principal's office. When the painting was shown to the officer, she was shocked and upset and felt the student was trying to make her afraid. The officer stayed away from school for several days. (*Id.*,

at pp. 858-859.) The minor when questioned admitted it was reasonable to expect that the officer would see his painting.

The Third District, while conceding that the minor's painting was "intemperate and demonstrated extremely poor judgment," found the evidence insufficient to establish that the minor intended to convey a threat, or that the painting conveyed a gravity of purpose and immediate prospect of execution of a threat to commit a crime resulting in death or great bodily injury. (*Id.*, at pp. 857-858.)

The majority's entire effort to distinguish *Ryan D.* was, after describing that case, to say: "By contrast, in the instant case, Julius did not write his alleged poems as part of a school assignment or turn them into his English teacher for a grade or credit. Instead, he directly handed his writings to his victims, and he warned them and their parents to 'watch' out because he could 'be the next kid to bring guns to kill students at school.'" (Maj. opn., at p. 18.)

The majority rejected appellant's argument that merely confessing in a poem the feeling of being capable of bringing guns to school and shooting students was not a sufficiently specific threat under the statute. "The fact that Julius' threat said he 'can' be the next student to bring guns to school and kill students rather than he 'will' be the next student to do so is not significant." (Maj. opn., at p. 20.) The majority apparently viewed the use of "can" to be a "condition" of a threat, and stated that only "those threats whose conditions preclude[] them from conveying a gravity of purpose and imminent prospect of execution" fall outside the statute and that, "Nothing in Julius' threat contained such conditions." (*Ibid.*)

2. The Dissenting Opinion

The dissenting opinion stated that appellant's poetry was protected under the First Amendment unless it was a "true threat" under First

Amendment jurisprudence. Citing *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027, the dissent stated that "only unequivocal, unconditional and specific expression of intention immediately to inflict injury may be punished." (Dis. opn., at p. 1.) The dissent found the evidence insufficient on three of the five elements of section 422: "that the minor intended to make a threat, that the purported threat was unequivocal, unconditional and communicated a gravity of purpose, and that the recipients of his poem reasonably feared for their safety." (*Ibid.*)

The dissenting justice noted that appellant was new to the school and knew few people. He wrote a poem and gave it to a classmate in his honors English class, along with a note that said the poem described him and his feelings, and asking if they described the recipient and her feelings. When the poem was given, appellant asked if there was a poetry club at the school. "The only reasonable conclusion from these words is that he meant to share his poem, and the feelings expressed, with a fellow student, perhaps to make a new friend based on a shared interest in poetry." (Dis. opn., at p. 3.) The dissent found the majority's inference of an intent to threaten unreasonable. The dissent reasoned that offering the poem to a student in an honors English class was significant, in that a student of that class would most likely be interested in poetry. As the dissent aptly noted: "If [appellant] intended to make a threat, he would have no interest in knowing what the recipient's feelings were or if they knew about a poetry club." (Dis. opn., at p. 3.)

The dissent criticized the majority's refusal to recognize the difference between saying that one <u>can</u> do something, and saying one <u>will</u> do something. The majority's equation of the two was inconsistent with the plain meaning of these words. Because the poem merely expressed capability, there was no unequivocal, unconditional, immediate or specific threat to convey a gravity

of purpose. (Dis. opn., at p. 4.) "No reasonable analysis could transform his expression of mere ability into an unequivocal, unconditional and immediate threat . . . ." (*Id.*, at p. 5.)

The dissent also noted that the style in which the poem was written was consistent with a recognized genre, dark poetry. Such poetry frequently addresses "topics such as loneliness, despair, abhorrence of society and social values and, of course, death." (*Ibid.*, at p. 5.) The violent imagery of such recognized American poets as Robert Lowell and Allen Ginsberg was compared to appellant's poem. (*Id.*, at pp. 5-6.)

The dissent noted the lack of surrounding circumstances to indicate that the poem was meant as a threat, and cited numerous other California cases to show that usually a hostile relationship between a threatener and a threatened person is present in section 422 cases. (Dis. opn., at pp. 6-7.)

The dissent termed the majority's efforts to distinguish *Ryan D.* unpersuasive. The circumstances in *Ryan D.* were seen as more serious, because a specific victim was identified, and one at whom the student was angry. (Dis. opn., at p. 8.)

Finally, the dissent noted that under the First Amendment, poetry is artistic expression not usually not to be read literally. The dissent quoted *McCollum v. CBS, Inc.* (1988) 202 Cal.App.3d 989, 1002, "[P]oetry . . . [is] not intended to be and should not be read literally on [its] face, nor judged by a standard of prose oratory. Reasonable persons understand . . . poetic conventions as the figurative expressions which they are. No rational person would or could believe otherwise nor would they mistake . . . poetry for literal commands or directives to immediate action. To do so would indulge a fiction which neither common sense nor the First Amendment will permit." (Dis. opn., at p. 9.)

ARGUMENT OF LAW

THE EVIDENCE WAS INSUFFICIENT TO PROVE APPELLANT COMMITTED A VIOLATION OF PENAL CODE SECTION 422, VIOLATING HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS AND HIS FIRST AMENDMENT RIGHTS TO FREE SPEECH AND EXPRESSION.

A. Standard of Review

In the Court of Appeal, appellant cited only the general test of sufficiency of the evidence applied to criminal convictions and juvenile delinquency proceedings under the state and federal due process clauses, while noting that the limitations in section 422 was to ensure that it did not violate the First Amendment. (AOB at pp. 8-12, citing *In re Roderick P.* (1972) 7 Cal.3d 801, 809; *People v. Johnson* (1980) 26 Cal.3d 557, 575-578; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020; *United States v. Watts* (1969) 394 U.S. 705.) The customary test of sufficiency of the evidence is: "An appellate court must review the whole record in the light most favorable to the judgment to determine if there is substantial evidence such that a reasonable trier of fact could find the elements of the crime beyond a reasonable doubt." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1136.) This was the standard cited and used by the majority below. (Maj. opn., at p. 12.)

Appellant believes that even under this somewhat deferential standard of review, the evidence was manifestly insufficient to support the Juvenile Court's findings of violation of Penal Code section 422. However, since the filing of the petition for review in this court, appellant has become aware of authority that the standard of review should be independent review in this

court, due to the question of whether application of state penal sanctions to appellant would violate freedom of speech protected by the First Amendment to the United States Constitution.[1]

The rule of independent appellate review of the factual record in cases claiming infringement of First Amendment rights has been repeatedly recognized by the United States Supreme Court. In*Edwards v. South Carolina* (1963) 372 U.S. 229, the state defendants questioned the sufficiency of the evidence to support findings they had committed "breach of the peace" by demonstrating against discrimination against blacks. The U.S. Supreme Court declined to pass on the sufficiency issue, accepting the state court's holding of sufficient evidence. However, it stated it had the duty to make "an independent examination of the whole record," and having done so, ruled that South Carolina had infringed the defendant's "constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances." (*Id.*, at p. 235.)

Similarly, in *Cox v. Louisiana* (1965) 379 U.S. 536, the U.S. Supreme Court overturned state convictions of breaching the peace, declining to rule on a sufficiency of the evidence claim, but stating that "our independent examination of the record, which we are required to make, shows no conduct which the state had a right to prohibit as a breach of the peace." (*Id.*, at p. 545.) The court held squarely that "appellant's freedom of speech and assembly, guaranteed to him by the First Amendment, as applied to the States by the Fourteenth Amendment, were denied by his conviction for disturbing the peace." (*Id.*, at p. 552.)

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1. Counsel for appellant gratefully acknowledges the source of the information, attorney Martin Kassman, who filed an amicus brief with this court in support of the petition for review on January 10, 2003.

More recently, the high court held: "[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.' (*New York Times Co. v. Sullivan*, 376 U.S. at 284-286)." (*Bose Corp. v. Consumers Union* (1984) 466 US. 485, 499.) In clarifying this rule, the high court explained as follows: "For the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." (466 U.S. at p. 501.)

The court went on to emphasize the critical importance of independent review in First Amendment free speech cases (*Id.*, at p. 504):

> This process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech.

After referencing the U.S. Supreme Court cases which have set out the limits of categories of unprotected speech, most of them state criminal cases such as *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568 (fighting words exception) and *Brandenburg v. Ohio* (1969) 395 U.S. 444 (incitement to imminent unlawful action) the court stated (466 U.S. at pp. 504-505):

> In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably

> narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas.

The court then noted it had exercised independent review of claims that state criminal convictions violated First Amendment rights in *Street v. New York* (1969) 394 U.S. 576 and *Hess v. Indiana* (1974) 414 U.S. 105.

This large body of U.S. Supreme Court precedent demonstrates that this court must exercise a standard of independent review, in which deference to the fact finder is extremely limited, to determine if application of the state's criminal trials statute in this case violated appellant's First Amendment rights.

B. The Court of Appeal Majority's Finding of Sufficient Evidence Was Based on a Reversal of the Proper Burden of Proof, on Unreasonable and Speculative Inference of Guilt, and on Ignoring Uncontroverted and Highly Exculpatory Evidence.

1. Introduction

The factual and legal analysis employed by both the Juvenile Court and the Court of Appeal was seriously flawed. Both the Juvenile Court and the Court of Appeal used a perceived absence of evidence of innocence to infer guilt, made highly speculative inferences from questionable facts, and ignored crucial exculpatory evidence in finding that appellant had violated Penal Code section 422 and that his speech was not protected by the First Amendment. Appellant proceeds to detail these errors.

2. The Court of Appeal's Reliance Upon Lack of Evidence of Innocence to Infer Guilt,

Reversing the Constitutionally Required Burden of Proof.

The Court of Appeal majority opinion quoted the Juvenile Court judge's statement of reasons for his verdict at length. (Maj. opn., at p. 11.) In the statement, the trial judge made the following comments: "There was nothing to establish that there was a relationship [between appellant and the recipients of the poem]. There was nothing to establish that he was not serious. There was nothing to establish that it was an innocent - just a poetry exercise." (*Ibid.*)

There is one glaring error in this approach, an error that in turn infected the majority opinion. The error is the placement of the burden on the defendant to prove innocence. From appellant's failure to prove innocence, guilt was inferred.

This mode of analysis is absolutely erroneous. The burden of proof in a criminal prosecution always remains with the prosecution, and the placement of any burden on the defendant to prove innocence violates the federal constitutional guarantee of due process. (*In re Winship* (1970) 397 U.S. 358, 364.) That guarantee applies equally to juveniles such as appellant when they are charged with violation of the criminal law. (*Id.*, at pp. 365-368.)

Despite this cardinal rule of placement of the burden of proof on the prosecution, the Court of Appeal majority opinion repeatedly invoked a lack of evidence of innocence to find substantive evidence of appellant's guilt. Thus, the majority opinion acknowledged that "'the parties' history can also be considered as one of the relevant circumstances.'" (Maj. opn., at p. 12, quoting from *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.) However, the majority did not acknowledge that *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1138, makes it clear that in looking at such relationships,

evidence of guilt may be reasonably implied from "any prior history of disagreements, or that either had previously quarreled, or addressed contentious, hostile, or offensive remarks to the other." It also did not note that in *Mendoza*, the relationship from which the intent to threaten could be inferred was the defendant's awareness that the victim had testified against a fellow gang member.

Instead, the majority, as did the trial court, said that a lack of a relationship between appellant and the alleged victims proved guilt. "The fact that there was no ongoing relationship between Julius and either Mary or Erin . . . [among other factors] provided evidence that Julius intended his writing as a threat to be taken seriously." (Maj. opn., at p. 14.) However, that type of reasoning is clearly inconsistent with both *Mendoza* and *Ricky T.*, in that these cases make clear that what is of probative value to prove guilt of an intent to threaten is a negative history or relationship between the parties.

The same approach is taken to the fact that appellant delivered his poems "without any accompanying indication that he was joking or that its words should not be taken seriously." (Maj. opn., at p. 14.) This was, like the lack of a relationship, deemed to be "evidence that Julius intended his writing as a threat to be taken seriously." (*Ibid.*) Once again, the failure of the evidence to prove innocence was erroneously treated as positive evidence of guilt.

The Juvenile Court's and Court of Appeal's use of a lack of evidence of innocence to infer guilt was an improper reversal of the burden of proof and violated appellant's federal constitutional rights, and led them to erroneously find substantial evidence to support the two section 422 changes.

3. The Majority Opinion Made Unreasonable and Speculative Inferences From the Evidence.

(a) The one sided presentation of the testimony of Kathryn H.

The majority opinion relied upon evidence that appellant had previously threatened to kill another female student, Kathryn H. (Maj. opn., at p. 15.) The majority opinion's treatment of Kathryn H.'s testimony was disturbingly one-sided. It claimed that Kathryn's recantation of her claim that appellant had threatened her was false and caused by fear of retaliation by appellant. The majority opinion never put forth Kathryn's full testimony: that she first claimed appellant had threatened her in response to Erin when Erin told her that appellant had said in a letter that he wanted to kill people at school. According to Kathryn's sworn trial testimony, Kathryn was smiling and was not serious when she said this, and did not think Erin was serious. (RT 106-107.) She guessed she thought that saying what she said to Erin would make her more popular with Erin. (RT 109.) According to her trial testimony, she and appellant have never even spoken to each other. (RT 106.) She had also previously told the District Attorney's office and its investigators, before the court hearing, that what she told Erin was a lie. (RT 111.) She also testified that one reason she was scared to come to court was because what she had told the DA about the threat wasn't true, and she did not want to say it in court. (RT 111.) She specifically denied being scared to come to court because she feared retaliation by appellant. (*Ibid.*)

None of this very plausible and reasonable explanation of the origin of her false claim about appellant was included in the majority opinion. Nor does the fact that Kathryn had previously told many people that her original story was false merit inclusion into the majority opinion. From the majority opinion, it seemed that the "recantation" had first and suddenly occurred at the jurisdictional hearing, due to appellant's menacing presence.

From its one-sided presentation, the majority opinion claimed Kathryn's "testimony strongly suggested that she recanted her statements because she feared retaliation from Julius." (Maj. opn., at p. 15.) This is simply not a reasonable treatment of the evidence.

(b) The unreasonable inference of guilt from evidence appellant and his friends had previously joked about the Columbine shootings.

The majority opinion stated that "the juvenile court could take into account the fact that Julius referred to killing in his writing because he and his friends 'kind of joke[d]' about the Columbine killings, saying, 'Oh, I'm going to be the next Columbine kid; I'm going to shoot everybody at the school.'" (Maj. opn., at p. 15.) There is no explanation about why previously joking about school killings would support an inference that a future reference was intended as a threat. Indeed, the inference is not merely speculative, but illogical and contrary to law. Under Evidence Code section 1101, it is permissible to infer a similar intent in similar circumstances, not a dissimilar intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) Not surprisingly, the inference made in the majority opinion was never mentioned or suggested by either party or the trial judge in the Juvenile Court.

(c) The unreasonable inference of guilt from appellant's belief that the school system treated him badly.

The majority opinion found a reasonable inference of guilt from evidence of appellant's prior difficulties in the school district. This is a strained and illogical inference. There is no indication that appellant had ever taken any kind of hostile action against the school district of any sort. While

appellant felt aggrieved by certain actions of the district and its teachers, the poem given to the students contained no expression of hostility toward the school in any way. The "fault" for the feelings of destructiveness the protagonist of the poem is experiencing is not placed on the school or any of its agents, but with the evil character of the poem's protagonist. Once again, the reviewing court has discerned a theory of guilt which somehow managed to escape mention by the quite zealous prosecutor in his argument or the trial court in its rather lengthy findings. The inference between appellant's difficulties in school to an intent to threaten is no more than a guess or surmise, and does not constitute substantial evidence. (*People v. Morris* (1988) 46 Cal.3d 1, 21; *Birt v. Superior Court* (1973) 34 Cal.App.3d 934, 938.)

(d) The unreasonable inference of guilt from appellant's knowledge that his uncle, with whom he and his father were staying temporarily, had guns in the house.

The majority opinion stated "The fact that Julius apparently had surreptitiously discovered there were two firearms and ammunition in his uncle's home where he was staying during the month in question provide further evidence that Julius intended his words to be taken as a threat." (Maj. opn. at p. 15.)

The evidence showed that the officer who arrested appellant at his uncle's house asked appellant if there were any guns in the house. (RT 130.) The officer said only that appellant "nodded." (RT 126, 130.) Appellant said he nodded his head side to side. (RT 275.) Appellant's uncle had two guns, a rifle that he kept in his bedroom closet, and a revolver in a locked steel brief

case inside some boxes in the garage. (RT 94-95.) The uncle kept his bedroom door locked when he was not at home. He had never seen appellant touching or possessing the guns. (RT 95.) He had never seen appellant looking around the house, never saw him inside his bedroom, or looking around the garage. (RT 96.)

Thus, the evidence did not suggest that appellant surreptitiously "discovered" the guns in the sense of knowing exactly where they were. The guns were secure in a locked gun box and in the closet of the bedroom his uncle locked when not present. At most, the evidence showed he somehow became aware that his uncle had weapons somewhere in the house without his uncle having told him.

From this weak evidentiary basis, the Court of Appeal majority made another speculative leap, that appellant's awareness of the presence of guns in his uncle's house proved he intended his words to be taken as a threat. The connection between appellant's knowledge that his uncle had guns in his residence and an intent to make a threat is obscure at best. Moreover, many households have guns in them. Does a resident's knowledge of that fact prove that any ambiguous statement made by that person and referencing guns is intended as a threat? Once again, speculation and surmise was misappraised as reasonable inference by the Court of Appeal majority.

(e) The majority's unreasonable reading of "I can be" to mean "I will be."

The protagonist of the poem "Faces" did not say "I will" be the next school shooter but only that "I can be." The Court of Appeal majority simply equated a statement of capability with a statement of intent. "The fact that Julius's threat said that he 'can' be the next student to bring guns to school and

kill students rather than he 'will' be the next student to do so is not significant." (Maj. opn., at p. 20.) This is ipse dixit at its purest. Section 422 requires a threat which on its face and the surrounding circumstances satisfies the statutory elements. The fact that someone says I "can" do something rather than I "will" do something is extremely important if not determinative in discerning whether the person intends to do a particular act. To say one has the capacity to do something is altogether different than saying one will do something. As the dissenting justice below correctly stated:

> The majority sees a true threat in these words, yet such a conclusion is inconsistent with both the plain meaning of the words used as well as the context in which they are used. *Can* is a word in day-to-day usage. *Can*, meaning to know how to or to be able to do, simply stated, expresses ability, not intent. A man says, I *can* build a house. It does not mean that he has done it, that he will do it or that he wants to do it. He just means in his opinion, he has the ability to do it. *You can* eat as much as you like, does not mean that you should or will eat anything. Notwithstanding, the majority sees no "significant" difference between *will* and *can*. [¶] . . . No reasonable analysis could transform his expression of mere ability into an unequivocal, unconditional and immediate threat; nor does his statement of ability convey a gravity of purpose and immediate prospect of execution of the threat. (Dis. opn., at pp. 4-5.)

4. The Highly Exculpatory Facts Not Mentioned in the Majority's Analysis of Whether the Evidence Was Substantial.

In its analysis of whether substantial evidence existed, the Court of Appeal majority failed to assess the import of several uncontradicted and highly exculpatory facts. In so doing, the majority failed to perform its duty of examining the whole record to determine whether there is sufficient evidence. As this court explained in *People v. Johnson, supra*, 26 Cal.3d at p.

577: "The court does not, however, limit its review to the evidence favorable to the respondent . . . . 'we must resolve the issue in the light of the whole record – i.e., the entire picture of the defendant present before the jury – and may not limit our appraisal to isolated bits of evidence selected by respondent . . . .'"

The dissenting opinion noted the many exculpatory facts not apprehended in the majority's analysis: e.g., (1) that appellant gave his poem to Mary S. with a note asking for her reaction to the poem; (2) that appellant when giving the poem asked her if there was a poetry club at school; and (3) that the poem was labeled "Dark Poetry" and was consistent with that genre. (Dis. opn., at pp. 3, 5.) As the dissent aptly noted, a request for a personal reaction to the poem and an inquiry as to whether there was a poetry club was utterly inconsistent with an intent to threaten. "If [appellant] intended to make a threat, he would have no interest in knowing what the recipient's feelings were or if they knew about a poetry club." (Dis. opn., at p. 3.)

Nor does the majority ever address the putting of the writing into the form of a poem, complete with title and by line, and his labeling of the poem as "Dark Poetry." There is no reasonable explanation other than that given by appellant: that it was to tell readers that, "Dark Poetry is really just an expression. It's creativity." (RT 296.) However, the majority's analysis chose to ignore such salient and uncontroverted exculpatory facts, and did not attempt to explain how a reasonable fact finder could ignore them.

C. The Evidence Was Insufficient to Sustain the Findings that Appellant Had Made Criminal Threats.

1. Proper Analysis of Sufficiency of the Evidence to Uphold a Finding

of Violation of Penal Code Section 422.

Much of the caselaw on proper analysis of the sufficiency of the evidence to establish a violation of Penal Code section 422 was recently summarized in *In re Ryan D.*, *supra*, 100 Cal.App.4th 854, 860:

> A judicial gloss has been placed upon the statutory elements of this offense. As we have noted, section 422 requires that the communication must be sufficient "on its face and under the circumstances in which it is made" to constitute a criminal threat. This means that the communication and the surrounding circumstances are to be considered together. "Thus, it is the circumstances under which the threat is made that give meaning to the actual words used. Even an ambiguous statement may be a basis for a violation of section 422." (*People v. Butler* (2000) 85 Cal.App.4th 745, 753; see also *People v. Jones* (1998) 67 Cal.App.4th 724, 727-728.)
>
> The circumstances surrounding a communication include such things as the prior relationship of the parties and the manner in which the communication was made. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137-1138.) Although an intent to carry out a threat is not required, the actions of the accused after making the communication may serve to give meaning to it. (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1220-1221.) And, just as affirmative conduct and circumstances can show that a criminal threat was made, the absence of circumstances that would be expected to accompany a threat may serve to dispel the claim that a communication was a criminal threat. (*In re Ricky T., supra*, 87 Cal.App.4th at p. 1139.)

As *Ryan D.* also made clear, "section 422 cannot be applied to constitutionally protected speech." (*Id.*, at p. 861.) After reviewing the history of the statute, the Court of Appeal stated that: "The standard set forth in section 422 is both the statutory definition of a crime and the constitutional standard for distinguishing between punishable threats and protected speech. Accordingly, in applying section 422, courts must be cautious to ensure that

the statutory standard is not expanded beyond that which is constitutionally permissible." (*Id.*, at pp. 861-862.)

Finally, the court noted the need to avoid conclusion on isolated facts instead of the whole record. (*Id.*, at p. 862):

> [T]he statutory definition of the crime proscribed by 422 is not subject to a simple checklist approach to determining the sufficiency of the evidence. Rather, it is necessary first to determine the facts and then balance the facts against each other to determine whether viewed in their totality, the circumstances are sufficient to meet the requirement that the communication "convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.

2. There Was Insufficient Evidence under the Circumstances to Establish Either an Intent to Threaten or That There Was a Threat Sufficiently Unequivocal, Unconditional, Immediate and Specific as to Convey a Gravity of Purpose and Immediate Prospect of Execution.

(a) The prior relationship of the parties.

As discussed earlier, the Court of Appeal majority dwelled on the lack of an "ongoing relationship" between appellant and the two recipients of the poem to infer that he intended to make a threat. (Maj. opn., at p. 14.) Yet there was a relationship between appellant and the recipients of the poem. The first recipient was in the same honors English class as appellant. She stated that she had approached appellant the first day appellant came into the class, and was nice to him. (RT 19-20.) They had talked maybe three times since then, just about the time, but the conversations were friendly. (RT 17, 25.)

She thought that the reason appellant was giving her the papers to read was because she had been nice to him. (RT 19-20.)

What is striking about this "relationship" or brief history of interactions between appellant and Mary S. is that they were marked by friendliness. Mary S. made an effort to be nice to appellant. Appellant had several friendly interactions with her thereafter, but was unable to get past asking what time it was. There was no history of anger by appellant toward her. She had never heard appellant say he was angry or upset at a student or teacher or make any statement about wanting to commit violent acts. (RT 22.) In short, there was no motive from their prior interactions to cause appellant to want to threaten Mary S.

The same is true of Erin, the second recipient. The majority opinion asserted, "Erin had no relationship with Julius; he was just a student at her school." (Maj. opn., at p. 14.) However, appellant had been introduced to Erin about a week before. (RT 43.) She had talked to him three or four times after that. (RT 44.) That worked out to about once per school day. Erin was with her friend Natalie when appellant gave them both a poem. (RT 45-46.) Natalie had had several meetings with appellant after school which lasted from an hour to an hour and a half, during which they discussed philosophy and astronomy. Natalie felt she knew appellant pretty well. (RT 168.) Thus, Erin was not someone unknown to appellant, or picked out at random. She was at least the friend of a friend, and someone appellant had spoken to fairly frequently during his brief time at the school. (RT 173.) Once again, there was no prior hostility or anger between appellant and Erin, and thus no apparent motive for appellant to want to scare Erin. He gave his poems to three people, all of whom he had previously been introduced to and had repeated conversations in his ten days at his new school.

There was nothing about appellant's prior relationship with the two recipients of his poem that would cause them to think he wanted to threaten them.

In re Ricky T. (2001) 87 Cal.App.4th 1132, 1133 indicated that negative prior relationships between a defendant and his alleged victim was a significant circumstance supporting a section 422 charge. In holding the evidence in that case insufficient, the *Ricky T.* court noted there was no evidence of "any prior disagreements, or that either had previously quarreled, or addressed contentious, hostile, or offensive remarks to each other." (*Ibid.*) The *Ricky T.* court noted the presence of such circumstances in many other cases finding sufficient evidence of a section 422, citing *People v. Martinez* (1997) 53 Cal.App.4th 1212 and *People v. Allen* (1995) 33 Cal.App.4th 1149 as cases in which the defendants and victims had a "stormy relationship," and *People v. McCray* (1997) 58 Cal.App.3d 159 as a case in which the defendant had previously been violent toward the victim.

(b) The manner in which the communication was made.

Appellant said nothing at all hostile when giving the poems to Mary and Erin. The paper he handed Mary with the poem said the poem described him and his feelings, and asked if they described Mary's. He asked her if there was a poetry club. The communication was labeled "Dark Poetry," and appeared in the format of a poem. The giving of the poem was not accompanied by any manifestation of anger or any negative emotion. Mary described his face as not "show[ing] any emotion, neither happy or sad or angry or upset . . . just a blank face." (RT 21.)

Appellant's giving of the poems to Erin was similarly non-threatening. Erin was with her friend Natalie, who had become quite interested in appellant.

Appellant merely handed a poem to each of the girls, and asked Erin to read the poem. (RT 45.) Erin opened the folded paper and pretended to read it to be polite, because she did not have time to read it and make it to her next class on time. She then stuck it in her jacket and forgot about it. (RT 38-39.)

Contrast this nonthreatening mode of delivery with those found to support a section 422 conviction. In *People v. Lepolo* (1997) 55 Cal.App.4th 85, 88-90, the defendant raised a machete over his head while saying, "I want that officer." In *People v. Butler* (2000) 85 Cal.App.4th 745, 749-755, the defendant with a group of four other gang members, surrounded a woman, called her a fucking bitch, said that his gang ruled the apartments the woman lived in, and told her to mind her own business or she would get hurt. In *People v. Martinez, supra,* 53 Cal.App.4th 1212, 1215, the defendant got "right in [the] face" of his girlfriend's supervisor who had told him to leave the worksite, and yelled and cussed at him, while threatening to "get" the supervisor.

Appellant simply gave two fellow students with whom he had at least some acquaintance a copy of his poem and asked them to read it. There was nothing threatening or intimidating in his manner whatsoever.

(c) Circumstances occurring after the alleged threat.

Several Court of Appeal cases have held that circumstances occurring after the alleged threat can be considered in determining the sufficiency of the evidence to suffer a section 422. Thus, in *People v. Martinez, supra,* 53 Cal.App.4th at pp. 1220-1221, the court stated that: "if the defendant does carry out his threat, his actions might demonstrate what he meant when he made the threat, thereby giving meaning to the words spoken." In *Martinez,* the threat was shortly followed by action: the arson of the victim's workplace.

There was no evidence of any action by appellant after delivery of the poems that demonstrated any intent to bring guns to school and kill students. He was not in possession of any guns when arrested. Although he knew there were guns in the house he was staying, their storage in a locked container and a closet in a locked bedroom strongly suggests he had no access to them, or had ever possessed them.

(d) The absence of threatening circumstances as proof no section 422 violation occurred.

In re Ryan D., supra, 100 Cal.App.4th 854 and *In re Ricky T., supra*, 87 Cal.App.4th 1132 both stand for the proposition that "just as affirmative conduct and circumstances can show that a criminal threat was made, the absence of circumstances that would be expected to accompany the threat may serve to dispel the claim that a communication was a criminal threat." (*In re Ryan D., supra*, 100 Cal.App.4th at p. 860, citing *In re Ricky T., supra*, 87 Cal.App.4th at p. 1139.)

This very basic principle of review was never acknowledged by the Court of Appeal majority opinion. The majority opinion did not acknowledge the lack of any prior disagreements or hostilities between appellant and the recipients of the poem. Instead, it demanded proof of some close friendly relationship, and inferred guilt from its absence. It did not acknowledge that appellant's mode of delivery was non-threatening. Instead, it expected some positive manifestation that appellant was "joking," and inferred guilt from its absence. It did not note that appellant took no further action against the poem's recipients, and instead claimed that appellant's mere knowledge his uncle had guns in the house "provide[d] further evidence that Julius intended his words to be taken as a threat." (Maj. opn., at p. 15.)

These errors led the majority to its erroneous conclusion that the evidence was sufficient to sustain the Juvenile Court's finding that appellant had violated Penal Code section 422.

D. Appellant's Writing and Distribution of His Poem Was Protected by the First Amendment.

1. Appellant's Poem is Protected Free Speech Unless it Comes within the Narrow Exception of a "True Threat."

Appellant's poem was a form of speech and expression generally protected by the First Amendment, unless it came within what has been called the "true threat" exception to the First Amendment as explained by the Wisconsin Supreme Court in *In the Interest of Douglas D.* (2001) 243 Wis. 2d 204; 626 NW 2d 725:

> [F]or purposes of First Amendment analysis, a "threat" is very different from a "true threat." "Threat" is a nebulous term that can describe anything from "an expression of an intention to inflict pain, injury, evil, or punishment" to any generalized "menace." The American Heritage Dictionary of the English Language 1868 (3d ed. 1992). Under such a broad definition, "threats" include protected and unprotected speech. Thus, states cannot enact general laws prohibiting all "threats" without infringing on some speech protected by the First Amendment. By contrast, "true threat" is a constitutional term of art used to describe a specific category of unprotected speech. State v. Perkins, 243 Wis. 2d 141, 626 N.W.2d 762 see also Watts, 394 U.S. at 707-08. This category, although often inclusive of speech or acts that fall within the broader definition of "threat," does not include protected speech.

The federal circuit courts have adopted somewhat different definitions of the "true threat" exception. They have been summed up most recently by *Doe v. Pulaski County Special School Dist.* (8th Cir. 2002 (en banc)) 306 F.3d 616, 622:

> The federal courts of appeals that have announced a test to parse true threats from protected speech essentially fall into two camps. See *United States v. Fulmer*, 108 F.3d 1486, 1490-91 (1st Cir. 1997) (describing the different circuit approaches to ascertaining a true threat). All the courts to have reached the issue have consistently adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm. *See id.* The views among the courts diverge, however, in determining from whose viewpoint the statement should be interpreted. Some ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient's shoes would view the alleged threat. [Citations omitted.]
>
> Our court is in the camp that views the nature of the alleged threat from the viewpoint of a reasonable recipient. In *United States v. Dinwiddie* , we emphasized the fact intensive nature of the true threat inquiry and held that a court must view the relevant facts to determine "whether the recipient of the alleged threat could reasonably conclude that it expresses 'a determination or intent to injure presently or in the future.'" [Citations omitted.] We also set forth in *Dinwiddie* a nonexhaustive list of factors relevant to how a reasonable recipient would view the purported threat. Those factors include: 1) the reaction of those who heard the alleged threat; 2) whether the threat was conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence. *Dinwiddie*, 76 F.3d at 925.

2. <u>Cases Applying the True Threat Exception in Similar Cases</u>.

There have been factually similar cases in which appellate courts have determined whether purported threats were "true threats" within the meaning

of the First Amendment. An examination of these cases shows that appellant's poem is protected by the First Amendment.

Thus, in *In re Ryan D., supra*, 100 Cal.App.4th 854, 863, the Court of Appeal gave great significance to the fact that the alleged threat was an artistic expression, a painting. "It has been said that a picture is worth a thousand words. But as the expression of an idea, a painting may make 'extensive use of symbolism, caricature, exaggeration, extravagance, fancy, and make believe.' [Citation.] A criminal threat, on the other hand, is a specific and narrow class of communication . . . . As an expression of intent, a painting – even a graphically violent one – is necessarily ambiguous. Therefore, standing alone, the minor's painting did not constitute a criminal threat."

This principle applies equally in this case. A poem is the expression of an idea. In this case, that idea was the alienation of a high school student, somewhat envious of his intelligent and organized peers, who are perceived as happy and vagrant, yet trying to pose as one, while expressing deep feelings of evil, and some identification with or understanding of how such feelings can provoke students to violence against other students. While the poem addressed dark themes, as a poem it cannot be reasonably construed as an unambiguous statement of intent.

In *In re Douglas D., supra*, 626 N.W.2d 725, an eighth grade student was given a creative writing assignment to complete in class. He was to begin a story, which would be passed on to other students to finish. Instead of doing the assignment, the student visited with friends and disrupted class. His teacher, Mrs. C., sent the student into the hall to complete his assignment. He returned at the end of class and handed in a story. The story was about "an old ugly woman" named Mrs. C. who "beat children sencless [sic]" and became a teacher. In the story, Mrs. C. kicked a student out of class and he didn't like

it. The next day the student concealed a machete in his coat, and when the teacher told him to shut up, he cut her head off. The story concluded with a substitute teacher opening a desk drawer and finding Mrs. C's head in it. The teacher believed this story was a threat to her that if she disciplined Douglas again, he would harm her. Douglas was found by a Juvenile Court to have violated a disorderly conduct statute.

The Wisconsin Supreme Court held that appellant's conduct was punishable under the disorderly conduct statute, but was protected by the First Amendment. The court recited some factors which should be considered in determining whether a communication was a true threat: "how the recipient and other listeners reacted to the alleged threat, whether the threat was conditional, whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim on other occasions, and whether the victim had reasons to believe that the maker of the threat had a propensity to engage in violence."

The *Douglas D.* court concluded that while the story was "crude and repugnant," it was nonetheless protected by the First Amendment. While the teacher had been frightened, and the story was conveyed directly to her, "there is no evidence that Douglas had threatened Mrs. C. in the past or that Mrs. C. believed Douglas had a propensity to engage in violence." The court also stated that both teacher and student also should expect some creative license in the context of a creative writing assignment, and noted the use of hyperbole and attempts at jest in the story.

The *Douglas D.* court further recognized that the story was a result of the minor's anger at being disciplined, that Mrs. C. was justifiably offended, and that the school appropriately disciplined the student. "However, a thirteen-year-old boy's impetuous writings do not necessarily fall from First

Amendment protection due to their offensive nature."

Other cases finding true threats by school age writers have involved very explicit and graphic threats made by boys whose girlfriends had rejected them. Thus, in *Doe v. Pulaski County Special School Dist., supra*, 306 F.3d 616, a boy who had been dropped for another over the summer vacation between seventh and eighth grade drafted "two violent, misogynic, and obscenity laden rants expressing a desire to molest, rape, and murder" the girl who dropped him. (*Id.*, at p. 617.) "The letters exhibit J.M.'s pronounced, contemptuous and depraved hate for K.G. J.M. referred to or described K.G. as a 'bitch,' 'slut,' 'ass,' and a 'whore' over 80 times in only four pages." (*Id.*, at p. 625. The letter spoke repeatedly of his wish to rape, sodomize and kill K.G., and contained two specific unconditional threats to hide under her bed and kill her with a knife. (*Ibid.*)

Similarly, in *Jones v. State* (2002) 347 Ark. 409, 64 S.W.3d 728, a fifteen year old boy had a three year friendship with a fifteen year old girl. After he had returned to the high school after a period of juvenile detention, he wrote her several notes and gave them to her. She refused to write back. This angered the boy, and he wrote a "rap song" and gave it to her. In this "rap song," the boy stated that the girl had rejected him, that he was angry and full of misery, that the girl had "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 . . . there's gonna be a 187 on your whole family . . . then you'll be six feet under, beside your sister, father, and mother. You'll be in hell, and I'll be in jail, but I won't give a fuck cuz we all know I've been there before . . ."

The Arkansas Supreme Court held that the "rap song" constituted a true threat and was not protected by the First Amendment. The court relied on the

fact that the communication indicated he was mad at the girl, that there were no conditions on his threats, that Jones had communicated it directly to the girl, and that the girl believed Jones had violent propensities because he had a criminal record. In the present case, there was no anger at the recipients, either before the poems were given or in the poem itself. There was no direct threat to kill or injure, just the poetic expression of a perceived capability to do so. Any "threat" was not directed specifically at the recipients. The recipients had never heard appellant speak of being violent or angry, and had no reason to believe he would actually carry out a school shooting.

In sum, the facts of the present case are much closer to the cases in which the communication was held to be protected by the First Amendment than those in which it was held unprotected.

CONCLUSION

For the foregoing reasons, this court should hold the evidence insufficient to sustain the Juvenile Court findings, and/or that appellant's conduct was protected by the First Amendment, and reverse the judgment of the Court of Appeal.

Dated: April 4, 2003

Respectfully submitted,

MICHAEL A. KRESSER
Attorney for Appellant,
GEORGE T.

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050.

On the date shown below, I served the within BRIEF ON THE MERITS to the following parties hereinafter named by:

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

Attorney General's Office
455 Golden Gate Avenue
Suite 11,000
San Francisco, CA 94102-7004
[Attorney for Respondent]

Court of Appeal
Sixth Appellate District
333 W. Santa Clara St.
#1060
San Jose, CA 95113

District Attorney's Office
70 W. Hedding St.
San Jose, CA 95110

Clerk of the Superior Court
Juvenile Division
840 Guadalupe Pkwy.
San Jose, CA 95110

George T.

I declare under penalty of perjury the foregoing is true and correct. Executed this ___ day of April, 2003, at Santa Clara, California.

Sue Yarbrough