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)

REPLY 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.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (continued)

CASES

TABLE OF AUTHORITIES (continued)

CASES

CONSTITUTION

STATUTES

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)

I. FACTUAL ASSERTIONS IN THE ANSWER BRIEF THAT ARE NOT SUPPORTED BY THE RECORD.

Respondent makes several assertions of fact in his answer brief to bolster his case which are not supported by the record. Respondent states, "[Appellant] admitted the Faces poem would be taken as a threat if handed to a stranger who did not know he was kidding. (RT 242-243.)" (Answer brief at p. 7, see also p. 27.) Appellant made no such admission. Appellant was asked by the prosecutor if he were "to go up to a stranger, for instance, and tell them that you could be the next school shooter, if they didn't already know you, would be a threat?" (RT 242.) Appellant's affirmative response to this did not constitute an admission that if he handed the Faces poem to a stranger who did not know he was kidding, it would constitute a threat. The question

framed the hypothetical context, which was that appellant went up to a stranger and said only that he could be the next school shooter, so parents watch your children, cause I'm back. This is a vastly different factual context from handing a stranger the poem Faces, which consisted of many lines and thoughts preceding the "I can be the next school shooter" passage, and which had a title and byline and was labeled "Dark Poetry." Respondent's characterization of appellant's answer to the prosecutor's hypothetical as an admission that handing the poem Faces to a stranger would be threatening is simply a misrepresentation of the record.

Respondent further misstates the record by claiming, "He [appellant] wanted people to think that he could 'be the next Columbine kid.' (RT 298.)" (Answer brief, at pp. 26-27.) This too is a distortion of the record. At the cited portion of his testimony, appellant was asked to explain why he wrote the particular language in the poem. His testimony was as follows (RT 296-298):

> Q. Now, when you say, "For I am dark, destructive, and dangerous," what did you mean by that?
>
> A. Um, I remember – I remember something from reports from what this girl was saying, and she said that she was the three Ds. And that seemed kind of cool, I would say, to me. I mean, just – she said that she was dark, destructive, and dangerous, and that was a good thing to use in my poem. So I just put it in.
>
> Q. Did you mean that you were going to act in some dark, destructive, or dangerous way?
>
> A. No.
>
> Q. When you say, "I'm evil," why did you put that in that poem?
>
> A. Dark, destructive, and dangerous basically describes – describes evil, so why not?
>
> Q. And then it says, "For I can be the next kid to bring guns to kill students at school, so parents, watch your children."

A. "Because I'm back."
Q. "Because I'm back." Why did you put that in this poem?
A. Um, let's see. I can be the – can I just divide it up into sections?
Q. Sure. I want you to explain to this Court why you wrote that language in this poem.
A. Okay. "For I can be the next kid to bring guns to school and kill students." Well, I believe the San Diego killing was around this time. Right? Am I?
Q. You're answering the question.
A. Okay. I'm sorry. The San Diego killing was about right around this time. So since I put the three Ds – dark, destructive, and dangerous – and since I said, "I am evil," and since I was talking about people around me – faces – how I said, like, how they would make me want to – did I say that? – well, even if I didn't – yeah, I did say that. Okay. So, um, I said from all these things, it sounds like, for I can be the next Columbine kid, basically. So why not add that in? And so "Parents, watch your children, because I'm back," um, I just wanted to – kind of like a dangerous ending, like, a – um, just like ending a poem that would kind of get you, like – like, whoa, that's really something.
Q. Did you intend it to be a threat?
A. No, I didn't intend it to be a threat. It's a creative poem. It's just creativity. That's basically what it is.

Appellant was describing his creative process. He never stated that he wanted people to think he could be the next Columbine kid. His denial that he either intended to do anything like that or intended his poem as a threat was clear. Respondent's claim that appellant testified the he wanted people to think he could be the next Columbine kid is not supported by the record.

Respondent also relies on remarks by the trial judge which were not supported by the record. Respondent quotes the trial judge: "I think a very telling response of the minor was that anybody – including his own mother –

if she saw this poetry of his, would deem it to be a threat. She would be concerned about it. It would be something that would really, really affect her." (Answer Brief, at p. 9, fn. 4, citing RT 315.)

What appellant actually said was that the reason he wrote the words "Dark Poetry" at the top of the poem was, "Because if anybody was supposed to read the poem or let's say if my mom ever found my poem, or something of that nature, I would like them to know that it was dark poetry. Dark poetry is usually just an expression. It's creativity. It is not like you're actually going to do something like that, basically." (RT 296.)The court questioned appellant further about this point, asking appellant if he wrote the term "Dark Poetry" on the poem, "because you didn't want your mother, if she found it, to think your thoughts were threats, right?" (RT 304.) Appellant responded affirmatively. The court further asked, "You think she might have been afraid if she had read that poem?" Appellant responded: "She wouldn't really be afraid, but concerned about it." (RT 305.) Upon further redirect examination, appellant further explained, "She would probably ask me about that, but I don't know if she would have thought that I was really threatening people, like actually." (RT 306.)

None of this supports the trial court's findings that appellant said that his mother would deem it "to be a threat" or that it would "really, really affect her." (RT 315.) Not only did the court misstate appellant's testimony in a way favorable to the prosecution, but in so doing it missed the major point of it, which was that appellant wrote the words "Dark Poetry" specifically to inform people that the poem was not a threat. From testimony that appellant put the phrase "Dark Poetry" to insure that anybody who might read the poem, including his mother, would <u>not</u> take it as a threat, the court unreasonably

found that appellant testified that she would deem it to be a threat. To this inaccurate fact finding, the judge added an unreasonable inference: since appellant was concerned that if he did not put "Dark Poetry" on the poem, somebody might perceive it as a threat, the poem with the "Dark Poetry" label was intended to be a threat.

II. THIS COURT IS REQUIRED BY UNITED STATES SUPREME COURT PRECEDENT TO APPLY INDEPENDENT REVIEW TO DETERMINE WHETHER APPELLANT'S POEM WAS PROTECTED BY THE FIRST AMENDMENT.

Respondent claims that independent review of the First Amendment issue in this case is not required by United States Supreme Court precedent. He claims such independent review is applicable only to decide the constitutionality of statutes which are the subject of First Amendment challenge, and to defamation cases. (Answer brief, at pp. 14-26.) Respondent's claim ignores repeated and specific high court language to the contrary, which indicates that independent review is necessary to insure that the recognized exceptions to the First Amendment guarantee of free speech are properly limited so that protected expression will not be inhibited.

Finally, respondent claims that this court has applied the traditional deferential review standard in evaluating the sufficiency of the evidence to support criminal threat convictions. (Answer Brief, at p. 23.) However, the cases cited do not support that proposition at all.

The Third District Court of Appeal best defined the correct standard of review of Penal Code section 422 convictions in *In re Ryan D.* (2002) 100 Cal.App.4th 854, 862:

> [T]he statutory definition of the crime proscribed by section 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." This presents a mixed question of fact and law. In considering the issue, we will defer to the trial court's resolution of the historical facts by viewing the evidence in a light most favorable to the judgment. In determining whether the facts thus established are minimally sufficient to meet the statutory standard, we must exercise our independent judgment. (See *People v. Nesler* (1997) 16 Cal.4th 561, 582; *People v. Louis* (1986) 42 Cal.3d 969, 984-988.)

This approach does not differ from the typical substantial evidence review in the treatment of the facts, which are viewed in both tests in the light most favorable to this judgment. However, it differs dramatically in the second stage, which is application of the law to the facts. Under the traditional substantial evidence test, the appellate court affords substantial deference to the fact finders conclusion on the issue by asking only whether <u>any</u> rational fact finder could have found the legal elements satisfied beyond a reasonable doubt. (*People v. Rodriguez* (1990) 20 Cal.4th 1, 111; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.)

Under independent review, however, the appellate court exercises its independent judgment to determine whether the established facts meet the statutory and constitutional standard.

The reasons for this distinction in cases in which application of criminal statutes may punish conduct specifically protected by the First Amendment have been recited many times by the United States Supreme Court, in passages

respondent simply refuses to acknowledge.

In appellant's Brief on the Merits, he cited *Bose Corp. v. Consumers Union* (1984) 466 U.S. 485, 499. He quoted the passage in which the court surveyed its First Amendment jurisprudence, mentioning the categories of communication which have been defined as unprotected by the First Amendment, including libel, fighting words, incitement to riot, obscenity and child pornography. The court then stated: "In each of these cases 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 which 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 expressions 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." (*Id.*, at pp. 504-505.)

Notwithstanding this extremely clear and explicit assertion by the United States Supreme Court that independent review is necessary to determine if particular communications are or are not within an exception to the First Amendment, respondent claims that independent review is limited to claims challenging the facial validity of statutes and to libel cases. This remarkable proposition could only be put forth by ignoring the above quoted passage from *Bose*, which is what respondent has done.

Bose thoroughly explicated the fact of and need for independent appellate court review of determinations by judges or jurors that a particular expression was not within First Amendment protection, and thus either civilly or criminally sanctionable (*Bose, supra,* 466 U.S. at pp. 503-507):

> We have exercised independent judgment on the question whether particular remarks "were so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace,'" Street v New York, 394 US 576, 592, (1969), and on the analogous question whether advocacy is directed to inciting or producing imminent lawless action, Hess v Indiana, 414 US 105, 108-109, (1973) (per curiam); compare id., at 111, (Rehnquist, J., dissenting) ("The simple explanation for the result in this case is that the majority has interpreted the evidence differently from the courts below"); Edwards v South Carolina, 372 US 229, 235, (1963) (recognizing duty "to make an independent examination of the whole record"); Pennekamp v Florida, 328 US 331, 335, (1946) ("[W]e are compelled to examine for ourselves the statements in issue . . . to see whether or not they do carry a threat of clear and present danger . . . or whether they are of a character which the principles of the First Amendment . . . protect").
>
> Similarly, although under Miller v California, 413 US 15, (1973), the questions of what appeals to "prurient interest" and what is "patently offensive" under the community standard obscenity test are "essentially questions of fact," id., at 30, we expressly recognized the "ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," id., at 25. We have therefore rejected the contention that a jury finding of obscenity vel non is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings, holding that substantive constitutional limitations govern. In Jenkins v Georgia, 418 US 153, 159-161, (1974), based on an independent examination of the evidence–the exhibition of a motion picture–the Court held that the film in question "could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive

> way . . . ." Id., at 161. And in its recent opinion identifying a new category of unprotected expression–child pornography–the court expressly anticipated that an "independent examination" of the allegedly unprotected material may be necessary "to assure ourselves that the judgment . . . 'does not constitute a forbidden intrusion on the field of free expression.'" New York v Ferber, 458 US, at 774, n 28, (quoting New York Times Co. v Sullivan, 376 US, at 285).

Respondent's crabbed view of the reach of independent review in First Amendment cases is squarely at odds with United States Supreme Court precedent. As summarized in *Bose*, independent review has been applied to such First Amendment exceptions as whether particular remarks were within the "fighting words" exception, whether particular expressions were directed to inciting or producing imminent lawless action, and whether material is obscene or constitutes child pornography. In so doing, *Bose* (*id.*, at p. 506, fn. 25) quoted Justice Harlan's opinion in *Roth v. United States* (1957) 354 US 476, 497-498:

> The suppression of a particular writing or other tangible form of expression is, therefore, an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for itself whether the attacked expression is suppress[i]ble within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.

Indeed, *New York Times v. Sullivan* (1964) 376 US 254, 285, which respondent claims shows that independent review is limited to defamation cases, stated just the opposite:

> This court's duty is not limited to the elaboration of

> constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' Speiser v. Randall, 357 US 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' Pennekamp v Florida, 328 US 331, 335; see also One, Inc. v Olesen, 355 US 371; Sunshine Book Co. v Summerfield, 355 US 372. We must make an independent examination of the whole record,' Edwards v South Carolina, 372 US 229, 235 [9 L Ed 2d 697, 83 S Ct 680], so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." 376 US, at 285, 11 L Ed 2d 686, (footnote omitted).

The present case similarly is one where the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated, and one where this court must draw that line.

Respondent claims that "the Supreme Court subsequently made clear that the independent review employed in *Bose* was specific to the context of defamation cases," citing *Harte-Hanks Communications, Inc. v. Connaughton* (1989) 491 U.S. 657, 685-686. In his lengthy quotation from this case, respondent does note that he has omitted a footnote. (Answer brief at p. 20.) The footnote respondent omits, footnote 33, approvingly cites all the cases appellant relies on for the application of independent review to criminal cases in which First Amendment exceptions are involved. (*Harte-Hankes, supra*, 491 U.S. at p. 685, fn. 33, citing, inter alia, *Jenkins v. Georgia, supra*, 418 U.S.

153 (obscenity), *Hess v. Indiana, supra*, 414 U.S. 105 (incitement), *Street v. New York, supra*, 394 U.S. 576 (fighting words), *Edwards v. South Carolina, supra*, 372 U.S. 229 (peaceful assembly), *Pennekamp v. Florida, supra*, 328 U.S. 331 (clear and present danger to integrity of court). The footnote respondent omitted refutes his contention that *Harte-Hanks* made it clear that independent review was specific to defamation cases.

In addition to its misreading of U.S. Supreme Court precedent, respondent mistakenly claims that this court has applied the "traditional deferential-review standard in evaluating the sufficiency of the evidence to support the criminal threat conviction." (Answer brief, at p. 23.) The cases cited do not support his claim. The case of *In re M.S.* (1995) 10 Cal.4th 698 did not even concern a violation of Penal Code section 422. Rather, it considered challenges to Penal Code sections 422.6 and 422.7. The defendants in that case did not claim that their speech was protected by the First Amendment. Rather, they contended that the statute was constitutionally overbroad, a claim this court held they could raise "even though they do not claim they themselves were punished solely for their speech." (10 Cal.4th at p. 709.) Their sufficiency of evidence claim was limited to an alleged lack of required intent to interfere with the victim's enjoyment of a defined right because of a protected characteristic, and was not tied to a First Amendment claim in any way. (*Id.*, at p. 723.) Thus, there was no reason for this court to apply independent review.

In *People v. Toledo* (2001) 26 Cal.4th 221, also cited by respondent, the defendant had told his wife during a dispute that "You know, death is going to become you tonight. I am going to kill you." (*Id.*, at p. 225.) Soon after the statement, the defendant plunged a pair of scissors toward his wife's neck,

stopping them inches from her skin. (*Ibid.*)

The "principal issue" addressed by this Court in *Toledo* was "whether there is a crime of attempted criminal threat in California." (*Toledo, supra*, 26 Cal.4th at p. 227.) The court did state at the end of its opinion that "under these circumstances, it is clear that defendant's conviction of attempted criminal threat was not based upon constitutionally protected speech." (*Id.*, at p. 235.) The court's discussion of this point was brief, and did not state whether it was applying traditional substantial evidence review or independent review. In fact, the defendant in *Toledo* made no claim that application of the attempted criminal threat statute violated his First Amendment rights. As this court noted in footnote 8 of its opinion, the defendant had at oral argument conceded that the defendant had actually made a threat that satisfied the provisions of the criminal threat statute. (Cf. *People v. Bolin* (1998) 18 Cal.4th 297, 336-340 in which this court did not ultimately resolve a sufficiency claim due to lack of any prejudice from admission of the evidence in a capital case penalty phase trial.)

Thus, this court has never explicitly identified the standard of review it was employing in any section 422 case, or decided that as a contested issue. In the cases the court has considered, the defendants have not claimed that their speech was protected by the First Amendment, so as to trigger independent review. Thus, this court's precedent is not in conflict with the United States Supreme Court precedent requiring independent review in the present case.

III. THE COURT OF APPEAL'S FINDING THAT SUBSTANTIAL EVIDENCE SUPPORTED THE JUVENILE COURT'S FINDING WAS ERRONEOUS UNDER ANY STANDARD OF REVIEW.

A. Both the Court of Appeal Majority and Respondent Ignore the Expressive Content of the Poem.

Both the Court of Appeal majority and respondent here have failed to accord any recognition to the expressive content of the poem "Faces" which appellant wrote and handed to two classmates. They have persisted in treating the delivery of the poem as being identical to a person simply approaching a stranger and verbally saying only that, "I can be the next student to bring guns to kill students at school."

But appellant did not simply walk up to a stranger and say the allegedly threatening portion of the poem. He composed a poem, gave it a title and byline, and labeled it Dark Poetry. The poem began by asking questions and making observations about the students around him, the ones who appeared to be succeeding in school, "really intelligent and ahead in their game" who would probably become the next doctors or lawyers. That is followed by an expression of regret, perhaps tinged with jealousy, that the protagonist wished he had a choice on what he wanted to be, like they did. He then stated that they were happy and vagrant, each original in their own way. Then the poem turns dark, stating that these other students made the protagonist want to puke, for he is dark, destructive and dangerous. He proclaims that he is evil, though he slaps on his face of happiness. Then comes the statement "For I can be the next kid to bring guns to kill students at school. So Parents watch your children cuz I'm BACK!!"

The poem has substantial expressive content that is protected by the First Amendment. It addresses the topic of school shootings, by portraying the mentality of a disaffected student who feels the capability of committing such an act. It does so by employing typical poetic devices: imagery, rhetorical questions, alliteration and hyperbole. It contains language obviously not meant to be taken literally, such as the statement "I'm back," while appellant had obviously never previously committed a school shooting, as all known school shooters were either in custody or dead.

In *Levine v. Blaine School District* (9th Cir. 2002) 257 F.3d 981, the court dealt with a poem written by a school student entitled "Last Words" which portrayed a suicidal student mass murderer, describing in graphic terms his shooting of 28 students, and confessing to feelings he may strike again. The court recognized that the student "very well may have been using his poetry to explore the disturbing topic of school violence and chose to do so through the perspective of a suicidal mass murderer."

The Court of Appeal majority and respondent have ignored the teaching of *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 expression which they are. No rational person would or could believe otherwise nor would they mistake . . . poetry for literal commands or directions to immediate action. To do so would indulge a fiction which neither common sense nor the First Amendment would permit."

It has utterly escaped respondent and the Court of Appeal majority that "The hallmark of the protection of free speech is to allow 'free trade in ideas' – even ideas that the overwhelming majority of people might find distasteful

or discomforting. *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting); see also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.")" (*Virginia v. Black* (2003) __ U.S. __, __ [155 L.Ed.2d 535, 551].)

B. The Court of Appeal's Finding of Substantial Evidence to Support the Juvenile Court's Finding was Erroneous.

Respondent defends the majority opinion by stating that appellant acknowledged that the content of his Faces poem was threatening and would be viewed as such if given to anyone who did not have a relationship with him. (Answer, at pp. 27-28.) Respondent relies heavily on the passage in which the prosecutor asked if the language in the poem would be threatening if appellant went up to a stranger and spoke only those words. However, as explained above, these "admissions" of appellant relate to a totally different context than that presented by the facts of the present case.

From his faulty factual premise that appellant admitted that showing his poem to someone would be a threat if he had no relationship with that person, respondent then argues that appellant had "no relationship" with the recipients. (Answer brief, at p. 28.) Once again, uncontradicted facts in the record to the contrary are simply not acknowledged. Appellant was not a stranger to Mary S. She testified that they were in the same Honors English class. (RT 19-20.) She testified that she had approached appellant the first day he came into the class and had been nice to him. (RT 11, 19-20.) This was about ten days before she received the poem. (RT 11.) In between, they had spoken several

times, on "friendly terms," about what time it was during class. (RT 17, 25.) Respondent cites RT 236 and 261-262 for the proposition that "appellant readily agreed with Mary's assessment that they were not friends and did not know each other." (Answer brief, at p. 28.) First of all, Mary S. did not testify that they were not friends and did not know each other, so appellant could hardly readily agree with such non existent testimony from her. Second, at RT 261-262, appellant testified that there had been no hostility between them, and that everything between them had been pleasant.

With respect to Erin, respondent again refuses to acknowledge uncontradicted facts that belie his claim that there was no relationship between those two. Appellant had been introduced to Erin soon after he transferred to Santa Teresa High School. (RT 43.) She had talked to him three or four times in the ten days he had been there. (RT 44.) When appellant handed Erin the poem, she was with her friend Natalie. Natalie had said that appellant hung around "our hang-out spot" and that she and appellant had seen each other frequently on campus after school, to talk about subjects such as philosophy and astronomy. (RT 173, 180.) Appellant gave Natalie a poem at the same time he gave one to Erin. (RT 173-174.)

While these facts do not suggest that a particularly close relationship existed between appellant and either Mary or Erin, they certainly were not strangers. Nor were they people who had had any kind of negative interaction with appellant, of any kind. One was a person who had approached appellant and been nice to him, and with whom there was subsequent chit-chit as classmates. The other had been introduced to appellant, had spoken with him three or four times in a ten day period, and was with a friend of appellant when he gave them both a poem.

Respondent's central argument that there is substantial evidence of a section 422 violation is that appellant admitted the poem was a threat if handed to strangers, that the people he handed them to were strangers, and therefore the poem was a threat. Respondent's two factual predicates for this argument are not supported by the record.

IV. THE COURT OF APPEAL REVERSED THE CONSTITUTIONALLY REQUIRED BURDEN OF PROOF BY INFERRING GUILT FROM A PERCEIVED LACK OF EVIDENCE OF INNOCENCE.

In his Brief on the Merits, appellant pointed to two instances in the majority opinion in which guilt was inferred from a perceived lack of evidence of innocence. The first was the passage in which the majority asserted that "the fact that there was 'no ongoing relationship'" between appellant and the recipients of the poem, among other facts "provided evidence that Julius intended his writing as a threat to be taken seriously." (Maj. opn., at p. 14.) Appellant also pointed out the passage in which the court noted that the poems were delivered "without any accompanying indication that he was joking or that its words should not be taken seriously which was also deemed 'evidence that Julius intended his writing as a threat to be taken seriously." (*Ibid.*) Appellant pointed out that to use a perceived lack of evidence of innocence as positive evidence of guilt constituted a reversal of the constitutionally required burden of proof on the prosecution to prove guilt beyond a reasonable doubt.

Respondent contends that "the absence of any significant relationships between the threatener and the victims is highly relevant" and "strong circumstantial evidence of guilt," as was his "serious demeanor" and delivery of the poem "without any meaningful explanation." (Answer brief, at p. 33.)

Respondent's reasoning again proceeds from the factually unsupported

premise that appellant and the recipients were strangers and that the recipients here were "chosen at random," because in such circumstances "they have no reason to know why they are being targeted and have no ability to evaluate the seriousness or probability of the threat being carried out." (Answer brief at p. 32.) As pointed out above, Mary and Erin were not strangers, and had friendly contacts with appellant prior to his writing of the poem.

But beyond the unsupported factual premise, respondent cites no authority whatsoever for his claim that an absence of a "significant" relationship between an alleged threatener and an alleged victim is "strong circumstantial evidence of guilt." (Answer brief, at p. 33.) He concedes as he must that *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1138, found significant that there was "no evidence in this case to suggest that appellant and [the teacher he allegedly threatened] had any prior history of disagreements, or that either had previously quarreled, or addressed contentious, hostile, or offensive remarks to the other." However, respondent claims that "*In re Ricky T.* did not limit the circumstances justifying an inference of intent to threaten." (Answer brief, at p. 32.) However, after discussing the lack of any history of disagreements or quarrels, and the lack of any showing of physical force when the alleged threat was made, the *Ricky T.* court did say: "If surrounding circumstances within the meaning of section 422 can show whether a terrorist threat was made, absence of circumstances can also show that a terrorist threat was not made within the meaning of section 422." (*In re Ricky T., supra*, 87 Cal.App.4th at p. 1139.) The same point was made in *In re Ryan D., supra*, 100 Cal.App.4th at p. 860: "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 the present case, there was no history of disagreement or hostility between appellant and the recipients of the poem, nor any threatening demeanor when the poem was delivered. As *Ricky T.* held, the absence of such circumstances shows that a terrorist threat was not made. The Court of Appeal majority's contrary approach inferred guilt from the lack of such circumstances, and such inferences violated the cardinal rule that the burden of proof in juvenile delinquency proceedings always remains with the prosecution.

V. THE COURT OF APPEAL MADE INAPPROPRIATE FINDINGS OF FACT AND SPECULATIVE INFERENCES OF GUILT.

A. The One-Sided Rendition of Kathryn's Testimony.

As set forth in the Brief on the Merits, the Court of Appeal majority in its opinion failed to give a full and accurate account of the facts surrounding the testimony of Kathryn H. According to Kathryn's trial testimony, when Erin told Kathryn that appellant had said in a letter that he wanted to kill people in school, Kathryn then said, "Yeah, he was going to kill me." (RT 106.) Kathryn testified that she was smiling when she said it, was not serious, and didn't think Erin was serious. (RT 100-107.) She thought that saying what she did to Erin would make her more popular with Erin. (RT 109.) Before being called as a witness, she had told two District Attorney investigators that her statement to Erin was a lie. (RT 111.) Although under direct examination by the prosecutor she said she had told him that she feared retaliation from appellant (RT 105-106), under cross examination she said she

was scared to come to court because what she had first told the prosecutor wasn't true, and she didn't want to say it in court. (RT 111.) She denied being scared of getting hurt or fearing retaliation. (*Ibid.*) When Erin first told her she had given her name to the police, Kathryn told her what she had said was a lie. (RT 114.) The prosecution admitted in argument that, "Frankly, she's not a necessary witness." (RT 311.) The Juvenile Court, in its lengthy comments on the evidence, did not mention her testimony.

The majority opinion stated, "At the jurisdictional hearing, Kathryn recanted her prior statements regarding Julius' threat . . ." (Maj. opn., at p. 5.) There is no mention that Kathryn said that when she first said this to Erin, that she was smiling and not serious. There was no mention of Kathryn's motive of becoming more popular with Erin. There is no mention that Kathryn's recantation did not first occur at the jurisdictional hearing, as is implied, but had already been made to Erin, Kathryn's father, and two District Attorney investigators. There is no mention of her testimony that her fear of coming to court was because she felt trapped by her prior lies, and did not want to repeat them.

Having omitted all this evidence from its summary, the majority then stated that Kathryn's "testimony strongly suggested that she recanted her statements because she feared retaliation from Julius." (Maj. opn. at p. 15.) To the contrary, her <u>testimony</u> was that she had originally lied, for the all too probable reason of trying to be more popular, and had already told Erin, her father and District Attorney investigators she lied.

In short, there was no substantial evidence to support a finding that Kathryn's original statement to Erin was truthful, but her later numerous recantations and sworn trial testimony was false. Her original comment was

a flippant one, made in response to her friend Erin describing receipt of appellant's poem. It would be a remarkable coincidence if Kathryn had been threatened by appellant, but told no one until Erin told her about the poem. By time of argument, the prosecutor was conceding that Kathryn was not a necessary witness. The Juvenile Court did not think the evidence significant enough to comment on in its lengthy comments on the evidence and what was determinative to it. In these circumstances, there is not substantial evidence that appellant had threatened Kathryn.

B. The Court of Appeal Majority Made Unreasonable and Speculative Inferences From the Evidence

1. Respondent's Complaints of a "Piecemeal Approach."

Respondent begins his defense of the Court of Appeal majority's speculative inferences of guilt by asserting that appellant's "piecemeal approach of isolating individual facts is unjustified." (Answer brief, at p. 35.) Respondent's criticism is not well taken. Multiple instances of unsupported inferences of guilt must necessarily be addressed one at a time, and cannot be addressed simultaneously. Appellant recognized and encouraged the court "to avoid conclusion on isolated facts instead of the whole record." (Brief on the Merits, at p. 27, citing *In re Ryan D., supra*, 100 Cal.App.4th at p. 862.) Appellant did not, as respondent claims, "incorrectly suggest that each, standing alone, must establish his intent to threaten." (Answer brief at pp. 36-37.) However, appellant does believe that many of the inferences relied upon by the Court of Appeal majority were unreasonable, and thus should be rejected by this court.

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

Respondent searches vainly for a reasonable inference of guilt from the fact that appellant stated in his testimony that he and his friends had previously talked and joked about the Columbine killing. (Answer brief, at p. 35.) Appellant testified that he, Nicole, Erin and some other friends had been sitting at lunch one day when one of his friends stated he would be the next Columbine killer, and then picked out the people he would kill. (RT 235.) This was taken from a movie they had all seen. (*Ibid.*) Appellant explained that although he realized "it was sad," that he and his friends had joked around and laughed about the subject. (RT 233.) He also stated that he used that subject in his poem because "he was just trying to throw some creativity things from what I've heard, put them all together so you could, basically, throw it out of my head." (RT 234.)

From this evidence, respondent states that "appellant selected an image that he knew would strike the greatest fear in his fellow students." (Answer brief, at p. 35.) However, there is no logical connection between testimony that appellant and his friends joked, however inappropriately, about the subject, and respondent's conclusion that this shows that appellant selected the topic because he knew it would strike great fear in his fellow students. Generally, joking about a subject, even in a black humor vein, indicates that people are not traumatized by mere mention of the subject. Evidence that the topic was a matter of banter among students has no tendency in logic or reason to prove that appellant knew mentioning the subject would cause great fear.

3. The unreasonable inference of guilt from appellant's belief that the school had treated him badly.

The Court of Appeal majority drew an inference from evidence of prior difficulties appellant had with his school district that appellant "intended [the poem] as a threat to get back at the school district and its schools." (Maj. opn., at p. 14.)

Appellant pointed out that there was no evidence that appellant had ever taken any action of any kind against the school or school district. While the Court of Appeal majority spoke vaguely about appellant's prior "behavioral" problems, the incidents which caused the school travesties were plagiarism, and being caught urinating on campus. Neither offense was violent, particularly uncommon, or indicative of a hostility toward school authority. Appellant denied thinking that Santa Teresa High School had anything against him, because he had been there so briefly. (RT 280.) His mother thought that the school district was out to get her or him. (RT 293-294.) Mary S. had never heard appellant say he was angry or upset at a teacher or student. His Honors English teacher had never had any negative experience with appellant, or felt threatened by him. (RT 66-67.) There was nothing in the poem that manifested hostility toward the school district or any of its employees.

The inference from appellant's nonviolent problems at other schools to an intent by appellant to threaten the students to whom he gave the poem is highly speculative and unreasonable.

4. The unreasonable inference of guilt from his knowledge that his uncle had guns in the house in which appellant and his father were then staying.

Respondent once again takes liberties with the record by claiming appellant had "access to guns" which then "added to the overall context and supported the inference that his threat was intended to be real." (Answer brief, at p. 37.) The evidence did not show that appellant had "access" to guns, as explained in the Brief on the Merits, at page 23.

The evidence showed that when police came to his uncle's house to question and arrest appellant, they asked him if there were guns in the house, and he nodded yes. (RT 126-130.) Appellant's uncle testified that he kept a revolver in a locked steel briefcase inside some boxes in the garage, and a rifle in his bedroom closet. He kept his bedroom locked when he was not there. He had never seen appellant in his bedroom, or looking around the house or garage. (RT 96.)

The evidence at most showed a knowledge of the presence of guns in the house, and did not demonstrate that he ever touched them or would be able to in light of his uncle's safeguards.

Respondent refuses to acknowledge these facts and simply assumes the evidence showed access. Respondent then claims that evidence of access "supported the inference that his threat was intended to be real." (Answer brief, at p. 36.) However, respondent concedes here that evidence of an ability to carry out a threat is relevant and adds weight to the gravity of such a threat, "just as evidence of the absence of the ability to effectuate the threat is informative." (*Ibid.*) Since the evidence showed an absence of the ability of

appellant to effectuate the alleged threat, the Court of Appeal majority plainly made an erroneous inference of guilt from his mere knowledge of the presence of guns in the house in which he was temporarily residing.

5. The majority's unreasonable reading of "I can be" to mean "I will be."

The Court of Appeal majority said that the fact appellant said in his poem that "I can" be the next student rather than "I will" was "not significant." (Maj. opn., at p. 20.) Respondent dismisses appellant's arguments that the majority unreasonably equated the words as a "semantic" argument. (Answer brief, at p. 39.)

However, under the United States Supreme Court definition of a "true threat," the difference in meaning between the words "can" and "will" is obviously of great significance. The court stated in *Virginia v. Black* (2003) __ U.S. __ [155 L.Ed2d 535, 552): "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

As an expression of intent, saying you will do something is clear and unambiguous. Saying you can do something generally says little or nothing about whether you will or not. To accord no significance to the difference between those two words, as the Court of Appeal majority explicitly did, is simply unreasonable. The Court of Appeal majority glossed over the differences by referring to the fact that the case law has said that not all "conditions" to a threat render them unpunishable under section 422, and that "Nothing in Julius' threat contained such conditions." (Maj. opn., at p. 20.) But before the conditionality of a threat is considered, there first must be a

threat, that is a "serious expression of an intent to commit an act of unlawful violence." (*Virginia v. Black, supra,* __ U.S. __ at p. ___ [155 L.Ed.2d at p. 552.].)

Respondent claims that to differentiate between the meaning of "can" and "will" is "to parse the language of this threat so finely." (Answer brief, at p. 38.) We are told this is so because of the proximity of the poem to the Santee school shootings. "The timing of the note, with its overt inferences to the recent school shootings, essentially rendered moot the question of the literal meaning of the word 'can.'" (*Ibid.*) Once again, it bears mentioning that none of the prosecution witnesses, nor the trial prosecutor, nor the trial judge, nor the Court of Appeal majority found the timing of the note to be a fact even worthy of any mention. Yet because of it we are now urged to abandon the plain meaning of words, and treat "can" as the equivalent of "will." This is not legal reasoning, but an invitation to hysteria.

C. <u>The Highly Exculpatory Facts Not Mentioned in the Majority's analysis of Substantial Evidence.</u>

Respondent claims that the fact that the Court of Appeal majority did not mention several highly exculpatory facts in its analysis did not mean they ignored such facts, only that it found them "insignificant in relation to the evidence of guilt." (Answer brief, at p. 40.) However, those facts cannot reasonably be found to be insignificant.

As to the fact that appellant labeled his poem "Dark Poetry," respondent makes yet another factually unsupported argument. He claims that, "The Juvenile Court acting as a factfinder inferred the reason appellant labeled his writing 'Dark Poetry' was to avoid getting in trouble if an authority figure, such as his mother, came across the threatening missive (RT 304, 315.)."

(Answer brief, at p. 40.) As discussed previously, the Juvenile Court mistakenly found that appellant had said that anybody, including his mother would deem it to be a threat, when what he said was that he put the "Dark Poetry" on it so that anybody, including his mother, would know it was a creative exercise and not a threat. (RT 296, 304-305.) The Juvenile Court did not refer to the Dark Poetry label at all in his comments on the evidence, much less infer appellant put it on to avoid getting in trouble with his mother or authority figures.

It is inconceivable that someone wishing to make a threat would put "Dark Poetry" on it. That label says that the expression is artistic, not literal. Such a fact cannot be reasonably deemed "insignificant" on the issues of whether appellant intended to make a threat, or whether a reasonable recipient would view the poem as a threat.

As to the fact that appellant asked Mary if there was a poetry club at the high school, respondent states that a factfinder could infer that there was an "opening line" to gain Mary's attention and disarm her. (Answer brief, at p. 40.) However, such an inference is manifestly unreasonable in light of the additional fact that appellant wrote a note he gave to Mary S. with the poem, saying, "These poems describe me and my feelings. Tell me if they describe you and your feelings." Respondent offers no reasonable explanation consistent with guilt from that fact. A request for a response to the feelings he expressed in the poem is utterly inconsistent with an intent to threaten Mary S.

Respondent then faults appellant for not obtaining feedback about his poem from his recipients, as evidence of his lack of interest in such feedback. (Answer brief, at p. 41.) Respondent ignores the factual background, that

Mary S. immediately left campus after handing the poem back to appellant. Similarly, Erin grabbed the poem and pretended to read it before sticking it in her pocket and rushing off to a class she was late for. There was no reasonable opportunity for appellant at that time to obtain their feedback.

VI. THE EVIDENCE IS INSUFFICIENT TO SHOW A VIOLATION OF PENAL CODE SECTION 422 OR A "TRUE THREAT" WITHIN THE MEANING OF THE STATUTE AND THE FIRST AMENDMENT.

Respondent accuses appellant of "completely overlook[ing] the fact that appellant wrote his threatening missive 11 days after the Santee shooting." (Answer brief, at p. 41.) Appellant has a lot of company in so doing, since this allegedly earth shaking fact went without mention by any prosecution witness, the trial prosecutor, trial judge, the Attorney General in the briefing in the Court of Appeal, and both the majority and dissenting opinions in the Court of Appeal. However, now, according to the new appellate prosecutor, this fact somehow requires affirmance.

The cases respondent cites as support for his proposition school shootings have somehow abrogated the First Amendment rights of students do not so hold. In *Levine v. Blaine School District, supra,* 257 F.3d 981, 983, the passage respondent selectively and misleadingly quotes from, says the following:

> Given the knowledge the shootings at Columbine, Thurston and Santee high schools, among others, have imparted about the potential for school violence (as rare as these incidents may be when taken in context), we must take care when evaluating a student's First Amendment right of free expression against school officials' need to provide a safe school environment not to overreact in favor of either. Schools must be safe, but they are educational institutions after all, and speech – including

> creative writing and poetry – is an essential part of the educational fabric.

In *Levine,* a student wrote a poem entitled "Last Words," in which the protagonist spoke extensively and in graphic detail about having killed 28 fellow students in a school shooting, and feeling like he might strike again. He showed this poem to several fellow students, then turned it into his English teacher on a Friday afternoon, asking her to read it and tell him what she thought. The teacher was alarmed, and called the school counselor/psychologist. The student had previously told the counselor he thought about suicide. The student had also told the counselor that his dad had thrown a rock at him, the police had filed charges against his father, and that the student had moved out of his home and was now living temporarily with his sister, not his father. The counselor was also concerned that the student had recently broken up with his girlfriend and was stalking her. The student had also been disciplined at school for a fight, and for insubordination with a teacher. As a result, the school district "emergency expelled" the student, but rescinded the expulsion after 17 school days. (257 F.3d at pp. 984-986.)

This lead to a lawsuit alleging that the school district had violated the student's constitutional rights by expelling him and by putting "negative documentation" in the student's school file. The District court granted summary judgment in favor of the student. The Ninth Circuit reversed the ruling that the district violated the student's rights by "emergency expelling" him, but affirmed the District Court's injunction prohibiting the school district from placing or maintaining any negative documentation in the student's file.

The main difference between *Levine* and the present case is that in *Levine*, no criminal sanctions were involved whatsoever. The sole issue was

whether, in view of all the information known to the school district in addition to the poem, it acted reasonably in temporarily expelling the student. Even this was viewed as a "close case" by the *Levine* court. The court found that the expulsion was permissible because it was "not to punish James for the content of his poem, but to avert perceived potential harm." (257 F.3d at p. 983.)

But of course respondent's goal in the current litigation is to punish appellant for the contents of his poem, and he has already been punished in the form of several months of Juvenile Hall incarceration and subsequent years of probation. The Ninth Circuit held that any punishment of any kind for the student in the *Levine* case was impermissible, by upholding the District Court's injunction against placement or maintenance of any negative documentation in his school file.

Thus, examination of the *Levine* decision, beyond the highly edited snippets respondent quotes, make it clear that the fact of school shootings does not abrogate the First Amendment rights of students writing poetry and distributing it at school. Indeed, *Levine* notes the importance of the First Amendment rights of students who write poetry, and made it clear it would not tolerate any punishment based on the content of the poem. This, of course, is totally contrary to respondent's position, which is that invoking the image of school shootings in a writing is so threatening that it is a criminal threat.

CONCLUSION

Respondent offers a pastiche of fear mongering, factual misrepresentation and inapt analogy to support the Court of Appeal majority's opinion. After all the smoke and mirrors, certain crucial facts remain. Appellant wrote a poem. In it he expressed certain ideas about school violence and its origins. He labeled it "Dark Poetry." He gave it to two other students, with whom he had had previous positive contact in his brief time at the school. He did nothing threatening in the delivery of the poems. He asked one recipient if there was a poetry class and gave her a sheet of paper saying the poem described his feelings, and asking if it described hers. He had no history of violence or threats of violence. For this, he was found by the Juvenile Court to have committed two criminal offenses, now defined under California law as "serious felonies." (Pen. Code, § 1192.7, subd. (c)(38).)

Appellant was engaged in constitutionally protected activity. The evidence, when all circumstances are considered and independently reviewed, does not demonstrate beyond a reasonable doubt that appellant's poem violated Penal Code section 422, or that it was within the "true threat" exception to the First Amendment. The contrary conclusion of the Court of Appeal should be reversed.

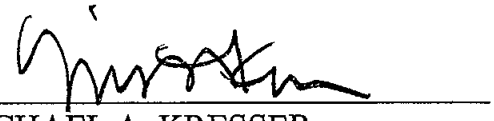
Dated: September 19, 2003

Respectfully submitted,

MICHAEL A. KRESSER
Attorney for Appellant,
GEORGE T.

CERTIFICATE OF COUNSEL

I certify that this brief contains 9311 words.



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 REPLY 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]

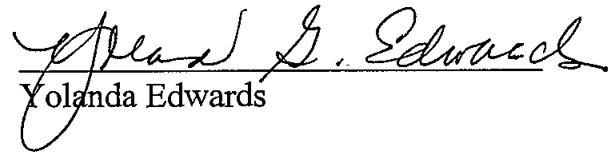
Court of Appeal
Sixth Appellate District
333 W. Santa Clara St., #1060
San Jose, CA 95113

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

Clerk of the Superior Court
Criminal Division
190 W. Hedding St.
San Jose, CA 95110

George Julius Theodule
7211 Via Bella
San Jose, CA 95139

I declare under penalty of perjury the foregoing is true and correct. Executed this 23rd day of September, 2003, at Santa Clara, California.



Yolanda Edwards