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DAR-18738

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPREME JUDICIAL COURT

APPEALS COURT

NO. 2009-P-1268

COMMONWEALTH OF MASSACHUSETTS

v.

KENNETH HAMILTON

APPLICATION FOR DIRECT APPELLATE REVIEW

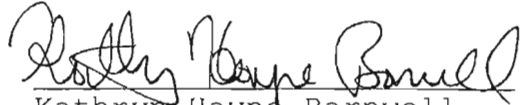
Now comes the defendant in the above-entitled case and moves this Honorable Court, pursuant to Mass. R. App. P. 11, for direct appellate review of his appeal. The grounds for this application are set forth in the accompanying memorandum.

The defendant filed his brief in the Appeals Court on March 8, 2010. The Commonwealth's brief is due on July 19, 2010.

Respectfully Submitted,

KENNETH HAMILTON

By his attorney,



Kathryn Hayne Barnwell

BBO#: 667952

203 Washington Street, #236

Salem, MA 01970

(978) 745-5465

Dated: March 25, 2010

Certificate of Service

I hereby certify that on March 25, 2010, I served two copies of the foregoing "Application for Direct Appellate Review" by mailing, first-class postage paid to: ADA James Sahakian, Middlesex County District Attorney's Office, Appellate Division, 15 Commonwealth Avenue, Woburn, MA 01801.



Kathryn Hayne Barnwell

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX, ss.

APPEALS COURT
NO. 2009-P-1268

COMMONWEALTH OF MASSACHUSETTS

v.

KENNETH HAMILTON

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR
DIRECT APPELLATE REVIEW

Now comes the defendant in the above-entitled case and requests direct appellate review of his appeal pursuant to Mass. R. App. P. 11.

STATEMENT OF PRIOR PROCEEDINGS

Kenneth Hamilton appealed his convictions from the Somerville District Court for intimidation of a witness, in violation of G.L. c. 268 § 13B and threat to commit a crime, in violation of G.L. c. 275 § 2. (Record Appendix (R.A.) 1-3; Trial Transcript (Tr.) II:84-86).

On June 6, 2008, the district court (Walker, J.) heard Hamilton's motion to dismiss and orally denied it. (Motion to Dismiss Transcript (Mot. Tr.) I: 28).¹ On August 22,

¹ Citations to the trial transcript shall include a reference to the trial day followed by a colon and the page

2008, the district court (Flynn, J.) held a status hearing. (Mot. Tr. II:4). From November 4 to November 5, 2008, the case was tried before a jury (LaMothe, J. presiding). The district court denied Hamilton's motion for required findings of not guilty on both counts. (Tr. I:129,132, R.A. 31). The jury found Hamilton guilty on both counts. (Tr. II:84-86). The district court sentenced Hamilton to six months in the House of Corrections for the threat to commit a crime count and eighteen months in the House of Corrections for the intimidation of a witness count, concurrent with the first count. (Tr. II:96). Hamilton timely filed a notice of appeal. (R.A. 37). Hamilton filed his brief in the Appeals Court on March 8, 2010.

SHORT STATEMENT OF FACTS RELEVANT TO THE APPEAL

At the motion to dismiss hearing and later, at a status hearing, defense counsel stated her concern that the complaint did not identify the correct victim on the threat to commit a crime count. (Mot. Tr. I:6, II:4-5). The police report alleges that on January 2, 2008, Hamilton left a voice-mail message on his former Probation Officer's ("P.O.") work phone and impliedly threatened sexual assault

number(s). Citations to the pre-trial motion transcripts shall be designated as "Mot. Tr." and include the same references.

against P.O.'s daughter.² (R.A. 4-5; Mot. Tr. I:5-6). The police report and complaint, however, both name P.O. as the victim. (R.A. 1-5). Defense counsel argued that because the alleged threat was against the daughter rather than P.O., the threat complaint should designate the victim as P.O.'s daughter. (Mot. Tr. I:5-6). The ADA stated that she would do some research on this issue and would later have the complaint "amended or affirmed." (Mot. Tr. I:6). The complaint was never amended.

Defense counsel moved primarily to dismiss on the intimidation of a witness charge. (R.A. 16-19). Defense counsel argued that G.L.c. 268, § 13B requires, as an element of the crime, that the defendant be interfering with or obstructing an open or ongoing criminal proceeding at which the witness would testify. (Mot. Tr. I:7-9). Because there was no probable cause to believe that there was an open or ongoing criminal proceeding at which P.O. would testify against Hamilton, defense counsel argued that the complaint must be dismissed. (Mot. Tr. I:9). By contrast, the ADA argued that the Commonwealth was not

²The district court granted two protective orders prohibiting Hamilton from seeing the name and any other personal information of the complaining witness and family members. (R.A. 14-15). As a result, undersigned counsel will refer to the complaining witness as "P.O." out of an abundance of caution.

required to show that Hamilton was attempting to interfere with a specific criminal proceeding. (Mot. Tr. I:15-16). Rather, she argued that the "case, the system - the judicial system - was not over when [Hamilton] got out of jail in January...The proceedings as a whole, when looked at globally, were not done." (Id.). She also argued that the word, "punish," in § 13B should be interpreted as encompassing conduct designed to retaliate against a witness for testimony in a past criminal proceeding. (Mot. Tr. I:14-15). Because P.O. had testified against Hamilton at a prior surrender proceeding, which resulted in his incarceration, the ADA argued, there was probable cause to support the complaint. (Mot. Tr. I:15-16).

The district court orally denied Hamilton's motion to dismiss. (Mot. Tr. I:19-20). Although the district court never reviewed an unredacted copy of the complaint or police report, it stated that there was probable cause for the complaint to issue. (Mot. Tr. I:24,27-29). The district court's oral findings are attached to this application.

The Commonwealth offered the following evidence at trial. On January 3, 2008, Detective Mark Clavette spoke with his supervisor, Sergeant DiSimone about a message placed on P.O.'s machine. (Tr. I:68-69). On January 7,

2008, Clavette spoke with P.O. and P.O.'s supervisor about the message at the Cambridge District Court. (Tr. I:69).

P.O. then played the message for Clavette from her

voicemail. (Id.) The following recording was introduced:

RECORDING: Message received January 2, 2008, at 11:23 a.m.

HAMILTON: Hello, [P.O.], this is Kenneth Hamilton. I'm giving you a call because back in March, you violated me on probation and I was put to jail at Billerica House of Correction and I was released on December 21. On my return, I noticed that you had cashed a check that I had written out for \$90 on March 7. At that time, I was incarcerated and I then believe that the judge, whatever his name is, said that I did not - he waived all my fees because I was going to the House of Correction. I'm calling because I spoke to the Clerk's office and I informed them of this and I want my \$90 returned to me and, you know, I'd really love to say I thank you for sending me to where I was, you know, on February 28 when I had been and I had spoken to Scott Mattson in your offices and while awaiting for word, you actually brought your daughter into the courthouse so I want to thank you for sending me where I was because as you know, there are very much predators there and I'm not a predator but I was able to talk about your beautiful daughter. Anyway, have a wonderful evening, okay? And my number here you can reach me is 8-5-7-8-6-9-8-7 - 8-4-7-1- -- 8-7-4-1. Thank you very much. Bye-bye.

(Tr. I:73-74).

This recording was the only exhibit admitted at trial.

(See Tr. I:3). After hearing this recording, Clavette

testified that he "found probable cause and reason to

obtain the arrest warrant for [these charges]." (Tr.

I:81). Clavette believed that P.O.'s daughter could be sexually assaulted although he did not consider the message to constitute an explicit threat against P.O. or her daughter. (Tr. I:82-83). Clavette's impression was that Hamilton was on probation when he wrote the complaint. (Tr. I:86-87). As a result of his investigation, Clavette believed that either Hamilton's probation or his parole was revoked. (Tr. I:88).

P.O. testified that she was a probation officer in the Cambridge District Court. (Tr. I:89). She had a 7-year old daughter. (Tr. I:90). On February 28, 2007, she was assigned to Hamilton for "risk/need" supervision. (Tr. I:95). She testified that Hamilton was on probation for assault and battery on a person over 60, assault and battery on a police officer and disorderly conduct. (Tr. I:96). After meeting with P.O., Hamilton signed the probation contract. (Tr. I:98). Although "technically," Hamilton's case was still her case if Hamilton violated, another probation officer, Officer Brennan, thereafter handled Hamilton's day-to-day supervision in Roxbury. (Tr. I:99).

On March 2, 2007, Hamilton allegedly violated a term of his probation and he was placed under arrest on March 6, 2007. (Tr. I:100). On March 28, 2007, Hamilton and P.O.

appeared for a final surrender hearing in the Cambridge District Court. (Id.) P.O. recommended to the judge that his probation be revoked. (Id.) Hamilton was then committed for one year to the House of Corrections. (Tr. I:101). P.O. testified that "we [probation officers] have nothing to do after - once the defendant is committed." (Id.)

On January 3, 2008, P.O. listened to the voicemail left by Hamilton. (Tr. I:102). After hearing the message, P.O. was upset and was worried about the safety of her daughter. (Tr. I:104). Specifically, she was concerned that "something sexual" would happen to her. (Tr. I:106). According to P.O., Hamilton's tone on the voicemail and what she knew about Hamilton led her to believe that Hamilton had the ability to carry out the threat. (Tr. I:106-107). P.O. later forwarded this message to her supervisor. (Tr. I:108).

P.O. confirmed that Hamilton was no longer on probation after he was surrendered and sent to the House of Correction on March 28, 2007. (Tr. I:118). She also confirmed that Hamilton no longer had a duty to report to probation. (Id.) On January 2, 2008, P.O. was not supervising Hamilton or investigating Hamilton. (Tr. I:118-119).

The Commonwealth presented no evidence that Hamilton was subject to a criminal trial or other criminal proceeding at the time he left the message. (See Tr. I:2-144). Nor was there evidence that Hamilton was subject to a criminal investigation or grand jury proceeding. (See Id.) Rather, when Hamilton made the call, Hamilton had just served his sentence for a probation violation and had been released from Billerica House of Correction. (Tr. I:73). There was no evidence that he had violated any of the terms of his parole before placing the call to P.O. (See Tr. I:2-144).

ISSUES OF LAW RAISED BY THE APPEAL³

1. Whether the current Intimidation of a Witness statute, G.L. c. 268, § 13B, requires that the alleged intimidation be directed towards an open or ongoing criminal proceeding. Whether the Commonwealth failed to establish probable cause to support the complaint under G.L.c. 268, § 13B where it provided no evidence that Hamilton was interfering with an open or ongoing criminal proceeding when he allegedly intimidated his former probation officer.

2. Whether G.L. c. 268, § 13B violates the Fourteenth Amendment and Article 12 right to due process, *per se* and as applied to Hamilton, because it is both vague and overbroad.

3. Whether the Commonwealth presented insufficient evidence that Hamilton committed a third-party threat because it failed to designate the correct victim (or "target") of the threat in the complaint or at trial. Whether the Commonwealth, as a result, presented

³ Hamilton also briefed the following issue: "Whether other errors at trial, such as the admission of prior bad acts evidence without proper authentication, the admission of witness testimony as to the ultimate issue and the allowance of Hamilton's probation file in the courtroom, unfairly prejudiced Hamilton and violated his right to due process."

insufficient evidence that Hamilton intended that the alleged threat be conveyed to the "target" or that Hamilton intended injury upon the recipient of the alleged threat other than the recipient's "emotional distress."

STATEMENT REGARDING PRESERVATION OF ISSUES PRESENTED

1. Defense counsel filed and argued this issue in a motion to dismiss prior to trial. Defense counsel also argued the issue in her request for jury instructions and in her motion for required finding of not guilty.
2. Defense counsel filed a motion to dismiss, requested jury instructions prior to trial, and filed a motion for a required finding of not guilty.
3. Defense counsel raised this issue at the motion to dismiss and status hearings. She also filed a motion in limine on this issue and argued it to the district court prior to trial. Defense counsel also filed and argued a motion for a required finding of not guilty on this count.

ARGUMENT

I. The Current Intimidation Of A Witness Statute, G.L. c. 268, § 13B, Requires That The Alleged Intimidation Be Directed Towards An Open Or Ongoing Criminal Proceeding. The Commonwealth Failed To Provide Probable Cause Or Sufficient Evidence That Hamilton Was Subject To An Open Or Ongoing Criminal Proceeding When The Alleged Conduct Occurred.

The Commonwealth failed to establish probable cause to support the complaint under G.L. c. 268, § 13B because it failed to present any evidence that Hamilton was interfering with or obstructing an open or ongoing criminal proceeding. The complaint and attached police report allege that on January 3, 2008, Hamilton left P.O. a voice-mail message, which threatened sexual assault against P.O.'s daughter. (R.A. 1-4). However, these documents do not allege that Hamilton was subject to a pending criminal proceeding or criminal investigation. This Court has recently made clear that the current statute requires that the Commonwealth prove that the defendant specifically intended to affect a criminal proceeding. Commonwealth v. Gallant, 453 Mass. 535 (2009). Because the Commonwealth failed to provide any evidence to support the criminal proceeding element, the complaint did not show that Hamilton had committed an offense. Therefore, the complaint under § 13B should have been dismissed. See Commonwealth v. DiBennadetto, 436 Mass. 310, 313 (2002) ("a

motion to dismiss will lie for a failure to present sufficient evidence to the clerk-magistrate (or judge)."). The Commonwealth also provided insufficient evidence at trial that Hamilton was subject to a criminal proceeding or a criminal investigation at the time he placed the call to P.O. (See Tr. I:130-132).

§ 13B reads in relevant part:

Whoever, directly or indirectly, willfully . . . threatens . . . a probation officer . . . with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby with a criminal investigation, grand jury proceeding, trial or other criminal proceeding of any type shall be punished by imprisonment for not more than 2 ½ years in a jail or house of correction or not more than 10 years in a state prison, or by a fine of not less than \$1,000 nor more than \$5,000.

The statute was amended effective March 30, 2006 to include a probation officer within the class of eligible persons to whom this statute applies. See § 13B(1)(a-c)(iii.).

Although the amended statute broadens the scope of potential witnesses, the required elements remain essentially the same as those under the previous statute.

The Commonwealth must still prove that:

(1) the target of the alleged intimidation was a witness in a stage of a criminal proceeding, (2) the defendant wilfully endeavored or tried to influence the target, (3) the defendant did so by means of intimidation, force, or threats of force, and (4) the defendant did so with the purpose of influencing the complainant as a witness.

Commonwealth v. Conley, 34 Mass. App. Ct. 50, 53 (1993).

"In establishing this scheme [under 13B], the Legislature apparently intended to proscribe a very broad range of misconduct *when aimed at affecting the course of an ongoing proceeding.*" Commonwealth v. Cathy C., 64 Mass. App. Ct. 471, 472 (2005) (emphasis added). Here, the Commonwealth presented no evidence that Hamilton intended his voice-mail message to make P.O. "reluctant to testify or to give truthful evidence in investigatory or judicial proceedings." Commonwealth v. McCreary, 45 Mass. App. Ct. 797, 799 (1998). Because P.O. had no potential testimony to influence, Hamilton could not have intimidated P.O. in her role as a "witness." In amending the statute in 2006, the legislature continued to require either that "a case is pending in the courts (witness branch) or [that] a person has information of a criminal violation that can support a future prosecution (furnishing branch)." Commonwealth v. Eason, 2008 Mass. App. Unpub. LEXIS 247 at *2 n.1 (Dec. 9, 2008). The Commonwealth showed neither prong. Therefore, Hamilton's conduct did not fall under § 13B.

Contrary to the Commonwealth's assertion in the district court, the word, "punish," in § 13B does not vitiate the statute's explicit requirement that there be a pending or future criminal proceeding at which the witness could potentially testify or provide evidence. § 13B(1)(c)

defines the witness function as relating to "a criminal investigation...trial or other criminal proceeding of any type." Because the witness function only arises where a criminal proceeding is open or ongoing, the legislature intended that § 13B not cover any past or "closed" criminal proceedings. At *minimum*, a criminal proceeding is "closed" when the criminal defendant no longer has the constitutional or statutory right to counsel. See Commonwealth v. Woods, 427 Mass. 169 (1998) (post-probation evaluation is not a "criminal proceeding."). Hamilton's parole status did not afford him the right to counsel because no criminal proceeding or prosecution was pending against him. See Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

Criminal statutes must be strictly construed in favor of the defendant. Commonwealth v. Wotan, 422 Mass. 740, 742 (1996). "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971). The word, "punish" in § 13B appears in the following string of verbs: "impede, obstruct, delay, harm, punish or otherwise interfere." The word, "otherwise," strongly suggests that "punish" should be treated interchangeably with "interfere" as well as the preceding verbs. After "punish or otherwise

interfere" come the words, "trial or other criminal proceeding of any type." Therefore, the context of "punish" within this particular section and the statute as a whole contemplates interference with a pending or ongoing criminal proceeding. Although § 13B is inartfully drafted, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909).

II. Alternatively, G.L.c. 268, § 13B Is Unconstitutionally Vague And Overbroad.

A statute is unconstitutionally vague and violates due process of the 14th Amendment and Article 12 if it prohibits conduct in terms "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." Commonwealth v. Casey, 42 Mass. App. Ct. 512, 514 (1997). A statute is unconstitutionally overly broad if it prohibits conduct otherwise constitutionally protected. Id. at 516; see Commonwealth v. Ora, 451 Mass. 125, 128 (2008).

A. G.L.c. 268, § 13B Is Unconstitutionally Vague.

G.L.c. 268, § 13B is unconstitutionally vague for two reasons.

First, the fact that the district court, the attorneys and the jurors displayed vastly differing understandings of § 13B proves the vagueness of the statute. The jury heard two very different crimes under § 13B. On its closing, the Commonwealth argued that the elements of § 13B were as follows: "The Commonwealth has to show you that the defendant threatened or made efforts to intimidate or harass. That's one element. A probation officer. That's second. With the intent to harm or punish them. The third element. The Commonwealth has proven all three of those [inaudible]." (Tr. II:33-34). By contrast, the district court instructed the jury on the elements of § 13B by reading from § 13B almost verbatim. (Tr. II:43).

Throughout deliberations, the district court received five jury questions regarding the elements of intimidation of a witness. (Tr. I:48,60,68-69; R.A. 32,34-36). The district court then read the third element of §13B to the jury four times and answered their more specific questions. (Tr. II:64-65,79-81). The district court even admitted: "...I think this is a badly written statute." (Tr. II:51). Hamilton could not have understood anymore than the

district court what conduct § 13B proscribes. "No one may be required to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). Where "a criminal statute... delegates to a jury the fixing of the test or standard, it is lacking in due process, unconstitutional, and void." Cline v. Frink Dairy Co., 274 U.S. 445, 448 (1927).

Second, one can only guess whether the legislature intended "punish" to refer to the proceeding itself or the witness. It is legally and factually impossible to "punish" an "investigation or criminal proceeding." However, the statute reads as if this were possible. The Reporter's Notes to the statute do nothing to clarify this problem. The legislature also did not clarify which definition of "punish" applies to § 13B. "Punish" has two definitions: "to inflict a penalty...in retribution or retaliation" and "to deal with roughly or harshly." See <http://www.merriam-webster.com/dictionary/punish>. Although to "retaliate" refers to punishment for past conduct, to "deal with roughly or harshly" refers to punishment in the broader sense. An individual could then punish another for conduct in the past, present or future. The legislature never clarified which definition of "punish" it sought to

apply and how "punish" should be applied in § 13B. Thus, it is entirely unclear what conduct § 13B proscribes. Because §13B is "so indefinite that it encourages arbitrary and erratic arrests and convictions," it is void for vagueness. Colautti v. Franklin, 439 U.S. 379, 390 (1979).

B. G.L.c. 268, § 13B Is Unconstitutionally Overbroad.

Finally, G.L.c. 268, § 13B is unconstitutionally overbroad because its time range as to "past" testimony is unlimited and its scope as to "criminal proceeding" is unrestrained. First, if § 13B applies to "retaliation" against "past" testimony, then an individual will be placed in jeopardy of arrest and conviction even if she "intimidates" the former witness 20 or 30 years into perpetuity from the time that the actual testimony was given. Second, according to the Commonwealth's claim, a "criminal proceeding" may never be over against a defendant under this statute. As applied to this case, Hamilton's words on the voice-mail message were insufficient to establish a threat. See infra at pp. 19-20. The First Amendment and Articles 16 and 19 thus protect these words. However, if § 13B can proscribe the use of these words because they refer to a proceeding that occurred 9 months ago, then § 13B is unconstitutionally overbroad and void on

that ground. See Commonwealth v. A Juvenile, 368 Mass. 580, 587-593 (1975).

III. The Commonwealth Presented Insufficient Evidence That Hamilton Committed A Third-Party Threat.

The Commonwealth must provide "evidence that the person making the threat either communicated it to the person targeted or intended that it be communicated to the person targeted so as to cause fear or apprehension in the victim." Commonwealth v. Maiden, 61 Mass. App. Ct. 433, 434 (2004). Where the "target" of the threat differs from the recipient of that threat, the "target" is the correct victim to designate in the complaint and throughout trial. See Commonwealth v. Kerns, 449 Mass. 641, 653 (2007) (there must be "an intent to put the victim in imminent fear"). Here, the complaint alleged that the recipient of the threat, P.O., was the victim instead of the actual target of the threat, P.O.'s daughter. The Commonwealth never amended the complaint.

At trial, the Commonwealth played for the jury the voice-mail recording, which contained statements about "predators" and P.O.'s daughter. (Tr. I:73-74). The recording was admitted as the only exhibit at trial. The Commonwealth provided no evidence that (1) P.O. communicated the threat to her daughter; (2) that Hamilton

intended for P.O. to convey the threat to her daughter⁴; or (3) that the threatened injury against the named victim, P.O., was anything other than "emotional distress." (See Tr. I:30-31).

The Commonwealth must prove that the defendant communicated an intent to injure the target and that the injury, if carried out, would constitute a crime. Commonwealth v. Sholley, 432 Mass. 721, 727 (2000). The threatened injury here would only comprise a crime against P.O.'s daughter, not P.O. herself. The alleged injury against P.O. is emotional distress, which is not cognizable as a crime. See Commonwealth v. Gorassi, 432 Mass. 244, 248 (2000) (an "attempt to do psychological harm" is not cognizable as assault). Thus, P.O.'s emotional distress is immaterial as to whether the threat occurred.

The Commonwealth failed to designate the correct victim; failed to show that Hamilton intended the alleged threat to reach its intended victim; and failed to show that Hamilton intended injury upon P.O. other than her "emotional distress." Therefore, it failed to provide sufficient evidence that Hamilton committed the crime of threatening to commit a crime.

⁴ The district court also omitted this element in its jury instructions. (See Tr. II:46-47).

STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW
IS APPROPRIATE

This is a case of first impression and presents a novel question of law of such public interest that justice requires its final determination by this Court. It involves whether the current Intimidation of a Witness statute, G.L. c. 268 § 13B, continues to require that the alleged intimidation be aimed at affecting an open or ongoing criminal proceeding. It also involves whether the addition of the word, "punish," in the statute can be interpreted as encompassing conduct that is in retaliation for a witness's prior testimony at a closed criminal proceeding. No appellate court in the Commonwealth has yet examined whether the legislature intended this interpretation when it amended the statute in 2006. This case presents an excellent opportunity for this Court to provide the proper interpretation of § 13B as it did in Commonwealth v. Gallant, 453 Mass. 535 (2009). This Court should consider, in the alternative, whether § 13B is unconstitutionally vague and overbroad.

Finally, this case presents an equally novel and important issue about whether the Commonwealth has presented insufficient evidence of a third-party threat

where it fails to designate the correct, alleged victim (or "target") in the complaint or at trial.

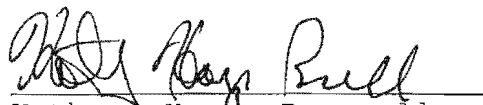
CONCLUSION

This Court should grant Direct Appellate Review.

Respectfully Submitted,

KENNETH HAMILTON

By his attorney,



Kathryn Hayne Barnwell

BBO#: 667952

203 Washington Street, #236

Salem, MA 01970

(978) 745-5465

Dated: March 25, 2010

Certificate of Service

I hereby certify that on March 25, 2010, I served two copies of the foregoing "Memorandum of Law In Support of Application for Direct Appellate Review" by mailing, first-class postage paid to: ADA James Sahakian, Middlesex County District Attorney's Office, Appellate Division, 15 Commonwealth Avenue, Woburn, MA 01801.



Kathryn Hayne Barnwell

CRIMINAL DOCKET	DOCKET NUMBER 0852CR000102	NO. OF COUNTS 2	Trial Court of Massachusetts District Court Department
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DEPENDANT NAME AND ADDRESS Kenneth G Hamilton 14 Neillian Crescent Jamaica Plain, MA 02130	DOB 12/09/1962	GENDER Male	COURT NAME & ADDRESS Cambridge District Court 40 Thomdike Street Cambridge, MA 02141
	DATE COMPLAINT ISSUED 01/09/2008		
	PRECOMPLAINT ARREST DATE		INTERPRETER REQUIRED

COUNT	CODE	OFFENSE DESCRIPTION	OFFENSE DATE
1	275/2	THREAT TO COMMIT CRIME c275 §2	01/03/2008
2	268/13B/A	WITNESS, INTIMIDATE c268 §13B	01/03/2008

WARRANT ISSUED

DEFENSE ATTORNEY J. Ellis	OFFENSE CITY/TOWN Cambridge	POLICE DEPARTMENT CAMBRIDGE PD
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DATE & JUDGE	DOCKET ENTRY	DATE & JUDGE	FEES IMPOSED
JAN 10 2008 Lamothe	<input checked="" type="checkbox"/> Attorney appointed (SJC R. 3:10) <input type="checkbox"/> Atty denied & Defl. Advised per 211 D §2A <input type="checkbox"/> Waiver of Counsel found after colloquy	1/10/08 Lamothe, J.	Counsel Fee (211D § 2A(2)) \$ 150 <input type="checkbox"/> WAIVED Counsel Contribution (211D § 2) \$ <input type="checkbox"/> WAIVED
JAN 10 2008 Lamothe	Terms of release set: <input type="checkbox"/> PR <input checked="" type="checkbox"/> Bail 1000 cash <input checked="" type="checkbox"/> See Docket for special condition <input type="checkbox"/> Held (276 §58A)		Default Warrant Fee (276 § 30(1)) \$ <input type="checkbox"/> WAIVED Default Warrant Arrest Fee (276 § 30 (2)) \$ <input type="checkbox"/> WAIVED
JAN 10 2008 Lamothe	Arraigned and advised: <input type="checkbox"/> Potential of bail revocation (276 §58) <input checked="" type="checkbox"/> Right to bail to review (276 §58) <input type="checkbox"/> Right to drug exam (111E § 10)		Probation Supervision Fee (276 § 87A) \$ <input type="checkbox"/> WAIVED Bail Order Forfeited
	Advised of right to jury trial <input type="checkbox"/> Waiver of jury found after colloquy <input type="checkbox"/> Does not waive	1/10/08	BEFORE COURT UNDER ARREST
	Advised of trial rights as pro se (Dist. Ct. Supp.R.4)	2/5/08	WARRANT REMOVED MCL Pre-Trial Conf Report - filed
	Advised of right of appeal to Appeals Ct. (M.R. Crim P.R. 28)	2-5-08	Δ's Motion to Transfer Case - filed heard + Allowed

SCHEDULING HISTORY			
NO.	SCHEDULED DATE	EVENT	RESULT
1	1/10/08	ARR/DRH	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd 1000 cash Bail stay away w/ secure family no contact Lamothe
2	2-5-08	PT	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd
3	3/6/08	Status	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd Curtin, J
4	APR 17 2008	Status	<input type="checkbox"/> Held <input checked="" type="checkbox"/> Cont'd 5-1-08 11am & 1pm SINGH DADA BILL
5	5-1-08	Status	<input type="checkbox"/> Held <input checked="" type="checkbox"/> Cont'd 6-6-08 9am M FLYAN
6	JUL 25 2008	Status	<input type="checkbox"/> Held <input checked="" type="checkbox"/> Cont'd 8-22-08 9am STATUS FLYAN
7	11-4-08	MOTION	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd LAMOthe, J 2nd 10:28-11:12
8	11-4-08	JURY	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd LAMOthe, J 2nd 11:43-
9	11-4-08	JURY	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd LA MOthe, J 2nd 8:33
10	11-5-08	JURY	<input type="checkbox"/> Held <input type="checkbox"/> Cont'd Lamothe, J 2nd 8:56

APPROVED ABBREVIATIONS
 ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review
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CRIMINAL DOCKET - OFFENSES		DEFENDANT NAME Kenneth G Hamilton		DOCKET NUMBER 0852CR000102		
COUNT / OFFENSE 1 THREAT TO COMMIT CRIME c275 §2			DISPOSITION DATE AND JUDGE NOV - 5 2008 Lamothe			
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input checked="" type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
		HEAD INJURY ASMT	RESTITUTION	VW ASSESSMENT <i>waived</i>	BATTERER'S FEE	OTHER
		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by: 6 mo. Hoc conc w/2 all fees waived				
FINDING <input checked="" type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE	DATE	
COUNT / OFFENSE 2 WITNESS, INTIMIDATE c268 §13B			DISPOSITION DATE AND JUDGE NOV - 5 2008 Lamothe			
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input checked="" type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
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FINDING <input checked="" type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE	DATE	
COUNT / OFFENSE			DISPOSITION DATE AND JUDGE			
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FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE	DATE	

CRIMINAL DOCKET		DOCKET NUMBER	NO. OF COUNTS	Trial Court of Massachusetts District Court Department		
DEFENDANT NAME AND ADDRESS Kenneth G Hamilton 14 Neillian Crescent Jamaica Plain, MA 02130		DOB 12/09/1962	GENDER Male	COURT NAME & ADDRESS Somerville District Court 175 Fellsway Somerville, MA 02145		
		DATE COMPLAINT ISSUED 02/25/2008	INTERPRETER REQUIRED			
		PRECOMPLAINT ARREST DATE 01/03/2008				
FIRST FIVE OFFENSE COUNTS						
COUNT	CODE	OFFENSE DESCRIPTION	OFFENSE DATE			
1	275/2	THREAT TO COMMIT CRIME c275 §2	01/03/2008			
2	268/13B/A	WITNESS, INTIMIDATE c268 §13B	01/03/2008			
DEFENSE ATTORNEY <i>Eltis</i>		OFFENSE CITY/TOWN Cambridge	POLICE DEPARTMENT CAMBRIDGE PD			
DATE & JUDGE	DOCKET ENTRY		DATE & JUDGE	FEES IMPOSED		
	<input type="checkbox"/> Attorney appointed (SJC R. 3:10) <input type="checkbox"/> Atty denied & Deft. Advised per 211 D §2A <input type="checkbox"/> Waiver of Counsel found after colloquy			Counsel Fee (211D § 2A(2)) \$ <input type="checkbox"/> WAIVED		
	Terms of release set: <input type="checkbox"/> PR <input checked="" type="checkbox"/> Bail <i>\$1,000.00</i> <input type="checkbox"/> See Docket for special condition <input type="checkbox"/> Held (276 §58A)			Counsel Contribution (211D § 2) \$ <input type="checkbox"/> WAIVED		
	Arraigned and advised: <input type="checkbox"/> Potential of bail revocation (276 §58) <input type="checkbox"/> Right to bail to review (276 §58) <input type="checkbox"/> Right to drug exam (111E § 10)			Default Warrant Fee (276 § 30(1)) \$ <input type="checkbox"/> WAIVED		
	Advised of right to jury trial <input type="checkbox"/> Waiver of jury found after colloquy <input type="checkbox"/> Does not waive			Default Warrant Arrest Fee (276 § 30 (2)) \$ <input type="checkbox"/> WAIVED		
	Advised of trial rights as pro se (Dist. Ct. Supp.R.4)			Probation Supervision Fee (276 § 87A) \$ <input type="checkbox"/> WAIVED		
	Advised of right of appeal to Appeals Ct. (M.R. Crim P.R. 26)			Bail Order Forfeited		
<i>11-4-08 Lamothe</i>				<i>Sen 15 Reg 30 Ret 11-10-08 #0015</i>		
SCHEDULING HISTORY						
NO.	SCHEDULED DATE	EVENT	RESULT		JUDGE	TAPE START/STOP
1	03/06/2008	Status Review	<input checked="" type="checkbox"/> Held	<input checked="" type="checkbox"/> Cont'd	<i>3-19-08 9AM PT</i>	<i>Walker - same bail</i>
2	<i>3-19-08</i>	<i>BTR</i>	<input checked="" type="checkbox"/> Held	<input type="checkbox"/> Cont'd	<i>4-7-08 9AM CLE</i>	<i>Flynn - same bail</i>
3	<i>6-6-08</i>	<i>MOT</i>	<input type="checkbox"/> Held	<input checked="" type="checkbox"/> Cont'd	<i>7-25-08 9AM CLE</i>	<i>Walker</i>
4	<i>7-25-08</i>	<i>Status</i>	<input type="checkbox"/> Held	<input checked="" type="checkbox"/> Cont'd	<i>8-22-08 9AM Status</i>	<i>Flynn</i>
5	<i>8-22-08</i>	<i>Status</i>	<input checked="" type="checkbox"/> Held	<input checked="" type="checkbox"/> Cont'd	<i>11-4-08 9AM JTR</i>	<i>Flynn</i>
6	<i>11-4-08</i>	<i>Motion</i>	<input type="checkbox"/> Held	<input type="checkbox"/> Cont'd	<i>Lamothe</i>	<i>and 10:28 - 11:12</i>
7	<i>11-4-08</i>	<i>Jury</i>	<input type="checkbox"/> Held	<input type="checkbox"/> Cont'd	<i>Lamothe</i>	<i>and 11:43</i>
8	<i>11-4-08</i>	<i>Jury</i>	<input type="checkbox"/> Held	<input type="checkbox"/> Cont'd	<i>Lamothe</i>	<i>and 8:56</i>
9			<input type="checkbox"/> Held	<input type="checkbox"/> Cont'd		<i>and 10:21</i>
10			<input type="checkbox"/> Held	<input type="checkbox"/> Cont'd		<i>and 11:45</i>
APPROVED ABBREVIATIONS						
ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review						<i>3:16 4:52 P.M.</i>
SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate						
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A TRUE COPY ATTEST:		CLERK-MAGISTRATE / ASST CLERK		TOTAL NO. OF PAGES	ON (DATE)	
		<i>X</i>				

CRIMINAL DOCKET - OFFENSES		DEFENDANT NAME Kenneth G Hamilton		DOCKET NUMBER 0810CR000388		
COUNT / OFFENSE 1 THREAT TO COMMIT CRIME c275 §2			DISPOSITION DATE AND JUDGE 11-5-08 Lamothé			
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input checked="" type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
		HEAD INJURY ASMT	RESTITUTION	V/W ASSESSMENT waived	BATTERER'S FEE	OTHER
FINDING <input checked="" type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:		6 mo. Hof C conc w/o. all fees waived		
FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE		DATE		
COUNT / OFFENSE 2 WITNESS, INTIMIDATE c268 §13B			DISPOSITION DATE AND JUDGE 11-5-08 Lamothé			
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CRIMINAL DOCKET	DEFENDANT NAME	DOCKET NUMBER
DOCKET ENTRIES	Kenneth G Hamilton	0810CR000388

DATE	DOCKET ENTRIES
2-26-08	Case transferred from Cambridge District Court (Conolly). Prior docket # 0852CR102. See original docket sheet for prior docket entries. All parties satisfied 11:50
MAR 6 2008	WARRANT - DEF/STRAIGHT NO BOND FLYNN
3-6-08	Warrant was brought to Cambridge instead of Dorchester - 5-3-11-08 9:00 AM
3-19-08	Δ not transported. Reused - Flynn
3-19-08	Motion For Protective Order allowed - Flynn
6-3-08	Motion to Dismiss filed
6-3-08	Memorandum In Support of defendant's Motion to dismiss filed
JUN 6 2008	3RD SESSION 10:37 AM → 11:05 AM
9-8-08	MOTION TO ADVANCE & continue 9-8-08 9:30 AM
11-4-08	Motion for jury instructions filed by Δ and Crown. after hearing Court will instruct on model Jury Instructions
11-4-08	Motion for Required finding of Not Guilty - Denied, Lammie, Δ right of Appeal given to Δ
12-31-08	Δ's notes of appeal filed.
2-3-09	Motion for appellate counsel allowed
2-25-09	Notice of assignment of counsel atty. Kathryn Hayne Baswell filed
3-3-09	Notice of appearance atty. Kathryn Hayne Baswell filed.

APPROVED ABBREVIATIONS
ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review
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Volume: I
Pages: 30
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS

Suffolk County, ss.

SOMERVILLE DISTRICT COURT
0810-CR-0388

COMMONWEALTH

v.

KENNETH HAMILTON

Before: Neil Walker

June 6, 2008
Somerville District Court
175 Fellsway
Somerville, MA 02145

APPEARANCES:

Anne Paruti, Assistant District Attorney
For the Commonwealth
Jacqueline Ellis, Attorney at Law
For the Defendant

MOTION TO DISMISS

CAMBRIDGE TRANSCRIPTIONS
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Cambridge, MA 02139
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1 her fearful of testifying, or try to influence the content
2 of what she might say. There was no proceeding.

3 At best, I believe the Commonwealth has threats
4 possibly against her seven-year-old daughter in this case;
5 but they have not met the elements of intimidation of a
6 witness and their interpretation -- what they're asking to
7 do just goes way beyond what I believe is the legislative
8 intent. There have been changes in the statute; but what
9 hasn't changed is that there need to be an active
10 proceeding, and the defendant needs to be trying to
11 influence a witness in that proceeding.

12 THE COURT: Thank you.

13 MS. PARUTI: Thank you, Your Honor.

14 THE COURT: The jury instructions, as proposed
15 both in the District Court and in the Superior Court, are
16 not law because the law constantly changes, not only by
17 statute but also by case law. There are two cases
18 specifically that have come down that suggest that, first,
19 there are different forms of intimidation; and one of those
20 forms of intimidation is literally harassing or otherwise
21 performing some action or actions that would put the
22 potential witness in a position where that witness feels
23 that she or he is being intimidated as a result of the
24 actions of the defendant against members of her family or,
25 again, even in -- I believe there was the Robinson case,

1 which is fairly close, where the -- pictures were taken,
2 and the pictures were taken without anything else. And I
3 think that case, in and of itself, suggests that that is
4 intimidation. With that in mind, the motion to dismiss is
5 denied.

6 MS. ELLIS: Your Honor, if I may, I did review
7 the Robinson case.

8 THE COURT: Yes.

9 MS. ELLIS: And my interpretation of that finding
10 was that the picture was enough for the intimidation, and
11 that person was a witness.

12 THE COURT: Right.

13 MS. ELLIS: Ms. Seoane or her daughter are not
14 witnesses.

15 THE COURT: Who were the witnesses?

16 MS. ELLIS: That's still required by the statute.
17 Who was --

18 THE COURT: Who was the victim, and who were the
19 witnesses? I mean, everything's redacted that in front of
20 me. So I -- I'm going on the assumption that the
21 witnesses, in fact, the probation officer --

22 MS. ELLIS: But she's not a witness to anything,
23 nor was she a witness at the time.

24 MS. PARUTI: I think --

25 MS. ELLIS: There was no open proceeding.

1 MS. PARUTI: I think she's arguing that she's not
2 a witness in the way that the statute contemplates it.

3 THE COURT: Right.

4 MS. PARUTI: But I would respond to that by
5 saying that she's a probation officer who's the target of
6 the threats and is specifically noticed by the statute --

7 THE COURT: Right.

8 MS. PARUTI: -- as --

9 THE COURT: That's my understanding --

10 MS. PARUTI: Right.

11 THE COURT: -- of what the nature of the
12 complaint is, as it stands, and the nature of the -- the
13 intimidation was against the daughter.

14 MS. PARUTI: I think --

15 MS. ELLIS: Yes, the intimidation, Your Honor, I
16 would agree --

17 THE COURT: In other words, there was an email --

18 MS. PARUTI: There was --

19 MS. ELLIS: It was --

20 MS. PARUTI: -- a telephone message left saying
21 --

22 THE COURT: Or a telephone message.

23 MS. PARUTI: -- to the Ms. -- to the probation
24 officer impliedly -- or this is what the government will
25 prove at trial --

1 THE COURT: Right.

2 MS. PARUTI: -- impliedly threatening that, in
3 retribution for her sending him jail, he will harm her --

4 THE COURT: Mm-hm.

5 MS. PARUTI: -- seven-year-old or her young
6 daughter. As it stands now, Ms. Seoane, the probation
7 officer, is named as the victim in the complaint as it
8 issued.

9 MS. ELLIS: Judge, the question I was raising,
10 because I did review the Robinson case --

11 THE COURT: Right.

12 MS. ELLIS: -- and that dealt with what's enough
13 to be a threat, and that court decided that taking -- I
14 think it was cell phone photograph --

15 THE COURT: Right.

16 MS. ELLIS: -- of a witness and saying or doing
17 nothing more was enough to be a threat; but that person in
18 Robinson that they were photographing was a witness who had
19 -- had declared their intent to testify and give
20 information against the defendant. We don't have -- we
21 don't have a circumstance here where, when this call was
22 made, there was any proceeding in which Ms. Seoane or her
23 daughter, whomever is the victim, could give any
24 information against the defendant because there was none;
25 and that's something that's remained despite the -- despite

1 the changes to the statute, it's remained clear that this
2 is to protect witnesses -- people who are going to
3 information in a criminal proceeding -- from threats.

4 THE COURT: The essence of the statute and that
5 hasn't changed, and the essence of all of the cases that
6 are quoted is fear; and if, in fact, that can be
7 interpreted as fear, then it's intimidation. That is a
8 question, obviously, of fact that has to be determined by
9 the trier of fact. That is not a question of law, nor is
10 it a subject to a motion to dismiss.

11 MS. ELLIS: I understand, Your Honor. Even
12 conceding the threat --

13 THE COURT: Hm.

14 MS. ELLIS: -- the threat has to be to a witness.
15 That's remained -- and Ms. Seoane is not a witness against
16 -- was not, at the time he placed the call, there was no --
17 he's charged with threat to commit a crime.

18 THE COURT: Mm-hm.

19 MS. ELLIS: And I'm not challenging that, but he
20 was not a witness.

21 THE COURT: Am I misinterpreting the facts?

22 MS. ELLIS: She was not a witness.

23 MS. PARUTI: I don't --

24 MS. ELLIS: I would ask the Court to perhaps
25 review the police reports and to --

1 THE COURT: Well, the police reports are all
2 redacted. I don't know who is.

3 MS. ELLIS: I have an unredacted report, Your
4 Honor; but my point -- and I'm not sure if I'm making it,
5 and you don't agree, or if I'm just not making it.

6 THE COURT: No, I'm not --

7 MS. ELLIS: But there is no --

8 THE COURT: You know, I'm under the impression
9 that it is the probation officer --

10 MS. PARUTI: Who violated him.

11 THE COURT: -- who -- okay, violated this
12 defendant. As a result of the violation, then he made, you
13 know, either phone calls or emails to the probation officer
14 --

15 MS. ELLIS: Yes, the call was made.

16 THE COURT: -- who's -- right. And it was the
17 daughter that was the recipient of --

18 MS. PARUTI: It was -- if I can clarify, Your
19 Honor, the actual message is left on the probation
20 officer's voice mail.

21 THE COURT: Right.

22 MS. PARUTI: And it says, you know, just
23 basically, had gotten out of --

24 THE COURT: Right.

25 MS. PARUTI: -- out of jail --

1 THE COURT: Right.

2 MS. PARUTI: -- and he said --

3 THE COURT: Right.

4 MS. PARUTI: -- well, on good time.

5 THE COURT: Right.

6 MS. PARUTI: Part of his sentence was still
7 pending. But he said, you know, thank you -- and, I mean,
8 this is factual determination.

9 THE COURT: Right.

10 MS. PARUTI: But assuming that it's taken as a
11 threat, the actual content says, "Thank you for sending me
12 to jail. I'm really happy you sent me to that place. By
13 the way" -- and he talks about money matters, but then he
14 says, "By the way, you know, I'm not a predator; but I did
15 have the opportunity" -- oh, and you know, he was violated
16 --

17 THE COURT: Right.

18 MS. PARUTI: "I saw you and your lovely daughter
19 in your office."

20 THE COURT: Right.

21 MS. PARUTI: And said, "You know I'm not a
22 predator, but I did have the opportunity to meet and
23 discuss your daughter with a number of predators in jail.
24 So thank you for sending me there." That is the content of
25 the message that was taken as a threat. Actually, that's

1 what we have here. And I think, Your Honor, I mean,
2 obviously she is a probation officer who is involved in the
3 whole process of this defendant's case, and he left the
4 threatening message.

5 THE COURT: The question that -- again, on the
6 motion to dismiss and the question to be answered,
7 obviously, is as to whether or not there was probable cause
8 and enough evidence to, again, issue the complaint. There
9 is enough evidence to issue the complaint. The question is
10 whether or not there's enough evidence to convict.

11 MS. PARUTI: That's right.

12 MS. ELLIS: Your Honor, I believe there's -- I
13 would concede the light most favorable.

14 THE COURT: Right.

15 MS. ELLIS: That's a threat. Even giving them
16 that that's the threat --

17 THE COURT: Different standard, different
18 standard.

19 MS. ELLIS: That's threat to commit a crime and
20 that's --

21 THE COURT: There's a different standard. We're
22 talking trial, guilt beyond a reasonable doubt as opposed
23 to probable cause for the issuance of the complaint. What
24 is necessary in order for the complaint to issue? It's
25 not, again, guilt beyond a reasonable doubt; and it's not

1 all facts have to be introduced to issue the complaint.
2 The question is, is there enough evidence presented to the
3 magistrate or judge, whoever it might be, to issue the
4 complaint? Now, the evidence as it stands, as I understand
5 it, there is probable cause for the issuance of the
6 complaint. Is it enough to withstand the burden that's
7 placed on the Commonwealth? That's another question.

8 MS. ELLIS: Your Honor, I just point -- one
9 question.

10 THE COURT: Sure.

11 MS. ELLIS: So your finding is that, absent any
12 evidence of an active criminal proceeding, the Commonwealth
13 has met -- that there's evidence to charge him with
14 intimidation of a witness. The statute, in and of itself
15 --

16 THE COURT: My --

17 MS. ELLIS: -- says there has to be a criminal
18 proceeding.

19 THE COURT: My -- my ruling is, first the motion
20 to dismiss, as indicated and as it suggests, is denied.
21 There is probable cause for the complaint. Now, the
22 question to be resolved at some point is, based on those
23 facts, is there enough to convict. That's an altogether
24 different question.

25 MS. ELLIS: I understand what you're saying, Your

1 Honor.

2 THE COURT: Right.

3 MS. ELLIS: I'd prefer to not have him be exposed
4 before a jury for a charge that I don't see how they're
5 going to rightly pursue.

6 THE COURT: Again, I have no idea as to what
7 other evidence, if any, the Commonwealth intends to
8 introduce. If, as the case stands, there's a serious
9 question as to whether or not the case would even go to the
10 jury, only because of the standard the Commonwealth has to
11 uphold; and that, again, as we all know, is guilt beyond a
12 reasonable doubt. Big difference between that and probable
13 cause for the issuance of a complaint. There is probable
14 cause for the issuance of the complaint. Now, let's leave
15 it up to the trier of fact to determine whether or not
16 there's enough evidence to convict.

17 Okay. The motion to dismiss is denied. And what date
18 would you like, Ms. Ellis?

19 MS. ELLIS: I would request a status date --

20 THE COURT: Sure.

21 MS. ELLIS: -- to see what modifications the
22 Commonwealth may make to the complaint and reserve my right
23 on count one to file a motion to dismiss on that, depending
24 on --

25 THE COURT: Sure.

1 MS. ELLIS: -- the modifications that they may
2 make. Actually, July 25, if that's available?

3 THE COURT: Sure, July 25.

4 THE CLERK: At this time, after hearing, the
5 motion as stands is denied. Matter will stand continued
6 until July 25, the year 2008, nine o'clock in the morning.
7 Court releasing you on the same terms and conditions. You
8 may step back.

9 MS. ELLIS: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MS. PARUTI: Thank you, Your Honor.

12 *(Adjourned at 11:04 a.m.)*

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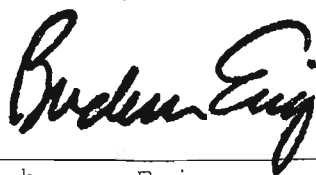
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C E R T I F I C A T E

I, Buchanan Ewing, do hereby certify that the foregoing transcript is a true and accurate record of the aforementioned matter prepared to the best of our knowledge, skill, and ability.



Buchanan Ewing
Notary Public No. 17610 DNP
CAMBRIDGE TRANSCRIPTIONS

4/11/09
Date