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ISSUES TO DEVELOP AT TRIAL

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This month's issue suggests a constitutional challenge you can make by way of a motion to dismiss if your client is charged with second-degree harassment under Penal Law § 240.30(1)(a), a statute the Legislature revised in 2014 to meet constitutional objection and that, by our lights, still fails constitutional muster. The facial sufficiency challenge we propose is supported by U.S. Supreme Court authority and boils down to the statute's failure to require proof that the defendant made his utterances ***with the intent*** *to place the victim in fear of bodily injury.*

- **If your client is charged with second-degree aggravated harassment under Penal Law § 240.30(1)(a) (enacted in 2014), move to dismiss, in writing, within 45 days of arraignment on grounds that the statute is facially unconstitutional under the First Amendment.**

The Relevant Law: In *People v. Golb*, 23 N.Y.3d 455 (2014), the Court of Appeals struck down the former aggravated-harassment statute (second-degree), as facially unconstitutional. That statute punished "annoying" or "alarming" speech. *See* Former Penal Law § 240.30(1)(a).

In response to *Golb*, the Legislature enacted a new second-degree-harassment statute, which bans statements uttered with: (1) the "intent to harass"; and (2) actual or constructive knowledge that the statement will be perceived as a threat. Penal Law § 240.30(1)(a) (eff. July 23, 2014). The new statute does *not* require that the speaker intend the statement to be perceived as a threat. That, for purposes of your challenge, is the fatal constitutional flaw.[1]

In *Virginia v. Black,538 U.S. 343 (2004),* the Supreme Court considered whether a Virginia cross-burning statute—which contained a statutory presumption of an "intent to intimidate"—satisfied the First Amendment. 538 U.S. at 347-48; Va. Code Ann. § 18.2-423

[1] The full text of Penal Law § 240.30(1)(a) is:

A person is guilty of aggravated harassment in the second degree when:

1. With intent to harass another person, the actor either:

> (a) communicates, anonymously or otherwise, by telephone, by computer or any other electronic means, or by mail, or by transmitting or delivering any other form of communication, a threat to cause physical harm to, or unlawful harm to the property of, such person, or a member of such person's same family or household as defined in subdivision one of section 530.11 of the criminal procedure law, and the actor knows or reasonably should know that such communication will cause such person to reasonably fear harm to such person's physical safety or property, or to the physical safety or property of a member of such person's same family or household; or ....

(1996). In striking down the statute, the majority held that the Legislature can only target "true threats"—that is, statements made "with the *intent of placing the victim in fear of bodily harm or death*." 538 U.S. at 359-60 (majority) (emphasis added) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969) (*per curiam*)). The plurality thus struck down the statutory presumption because it allowed the jury to convict if it found that the cross burning was done with the purpose of creating anger or resentment (as might be the case at a public rally) rather than with the purpose of threatening or intimidating the victim (as might be the case if done on a neighbor's lawn). 538 U.S. at 366-67 (emphasis added); *see also id.* at 372-73 (Scalia, J.).

While federal courts have gone both ways,[2] no New York court has ever considered whether *Black* imposes a subjective-intent requirement. The time is ripe. To ensure that a New York court finally reaches this issue, file a *written* motion to dismiss within *45 days of arraignment.*

PRACTICE TIP:

Citing *Black*, argue that the omission of the subjective-intent requirement renders the statute facially unconstitutional under the First Amendment. Further, if a statute is facially unconstitutional, the specific facts of your case—that is, whether your client actually intended to instill a fear of violence—are completely irrelevant. But if you have a great intent defense, and your motion to dismiss is denied, and you proceed to trial, be sure to request a jury instruction on the issue. Argue that the First Amendment and Article I, § 8 *require* that the jury find an intent to intimidate.

There is also good news for your plea clients. If you move to dismiss, we can raise the issue on appeal notwithstanding any guilty plea and/or appeal waiver (at least in the First Department). *People v Pimentel*, 149 A.D.3d 505, 505 (1st Dept. 2017) (facial attacks cannot be waived by an appeal waiver). So, even if you know a plea is a certainty, be sure to file a motion to dismiss within 45 days of arraignment.

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[2] The Ninth and Tenth Circuits have expressly held that *Black* requires an intent to intimidate. *See United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014) ("Thus, we are facing a question of first impression in this circuit: Does the First Amendment, as construed in *Black,* require the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened? We conclude that it does."); *United States v. Bagdasarian*, 652 F.3d 1113, 1116-18 (9th Cir. 2011) (*Black* requires a subjective intent to threaten); *Cassel*, 408 F.3d at 630-33 (same; citing numerous law review articles in support of that reading) Six circuit courts have gone the other way. *United States v. Clemens*, 738 F.3d 1, 9-12 (1st Cir.2013) (on plain-error review); *United States v. Elonis*, 730 F.3d 321, 327-32 (3rd Cir.2013), *rev'd* 135 S.Ct. 2001 (2015) (holding that the federal threat statute requires a culpable mens rea without addressing any First Amendment issues); *United States v. White*, 670 F.3d 498, 506-12 (4th Cir.2012); *United States v. Jeffries*, 692 F.3d 473, 477-81 (6th Cir.2012); *United States v. Nicklas*, 713 F.3d 435, 438-40 (8th Cir.2013); *United States v. Martinez*, 736 F.3d 981, 986-88 (11th Cir.2013).

General Reminders:

- When you move to dismiss at the close of the People's case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss for failure to make out a prima facie case does not preserve a sufficiency issue for appeal.

- If you are litigating a 30.30 issue, state in your initial motion that you are entitled to a pre-trial hearing under People v. Allard and CPL § 210.45(5)(c). Do a reply even if you don't think the prosecution has rebutted your showing with conclusive proof.

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