

**STATE OF MICHIGAN
IN THE WAYNE COUNTY CIRCUIT COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

NHERU GOWAN LITTLETON,

Defendant.

Case No. 16-009247-01-FH

Hon. Vonda R. Evans

16-009247-01-FH

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**AMICUS CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN**

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[It is a] constitutional requirement that, in the face of verbal challenges to police action, officers and municipalities must respond with restraint. We are mindful that the preservation of liberty depends in part upon the maintenance of social order. But the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.

City of Houston v Hill, 482 US 451, 471-72 (1987)

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Michigan (“ACLU”) is the Michigan affiliate of a nationwide, nonpartisan organization with over one million members dedicated to protecting the rights guaranteed by the United States Constitution. The ACLU has long been committed to protecting the right to freedom of speech protected by the First Amendment. Even when speech is extremely unpopular, offensive or disturbing, the ACLU strenuously opposes government efforts to suppress or penalize it. If the government has discretion to punish speech it doesn’t like, none of us truly enjoys the freedom of speech.

ACLU briefs are particularly important in free speech cases because, unlike a party whose speech is at issue, the ACLU has no particular interest in supporting or agreeing with the ideas expressed. Rather, the ACLU’s interest is that of supporting the guarantees of the First Amendment so that the freedom of expression remains protected for all of us. To that end, the ACLU has filed numerous lawsuits and amicus curiae briefs supporting First Amendment rights, including in cases where the ACLU in no way endorses or celebrates the content of the speech itself. See, e.g., *Bible Believers v Wayne Co*, 805 F3d 228 (CA 6, 2015) (en banc) (anti-Islam speech); *Coleman v Ann Arbor Transp Auth*, 904 F Supp 2d 670 (ED Mich, 2012) (anti-Israel speech); *Barber v Dearborn Pub Schs*, 286 F Supp 2d 847 (ED Mich, 2003) (anti-Bush speech).

In this case, the prosecution of defendant Nheru Gowan Littleton raises serious First Amendment concerns because he is being criminally prosecuted for pure speech. To be clear, Mr. Littleton’s speech was shocking and wrong. But, as explained below, it does not fall within the “true threats” category of unprotected speech and therefore cannot form the basis of a criminal prosecution. The ACLU believes that, given its expertise on First Amendment issues and the nature of this case, this amicus curiae brief will be of assistance to the Court.

BACKGROUND AND FACTS

The role of race in policing has long been a topic of vigorous debate in our country. Discussion on this topic is sometimes sober and introspective, but as with all controversial issues it can also include emotionally charged rhetoric fueled by anger and mistrust. This is especially the case in the immediate aftermath of highly publicized violent assaults that capture national attention, which is what gave rise to the instant prosecution.

The most recent chapter in our national saga of racialized police violence began when a white police officer shot an unarmed black man, Michael Brown, in Ferguson, Missouri in 2014. This tragic event elevated the visibility of the burgeoning Black Lives Matter movement, which organized demonstrations and other calls to action in response to the senseless deaths of Brown and numerous other African Americans by police or while in police custody. Eventually, a strong backlash to Black Lives Matter also emerged, with right-wing political pundits and some elected officials arguing that the movement encouraged anti-police sentiment and even made policing itself more dangerous.

Racial tension over police violence reached an apex in July 2016, when Alton Sterling and Philando Castile were fatally shot by police officers in Baton Rouge and Minnesota,

respectively. Days later, a man who was apparently angry about those shootings opened fire on police officers in Dallas during a protest there.

In Detroit, there was no anti-police violence. But Chief of Police James Craig held a press conference announcing that his officers were arresting four men for anti-police *speech*.¹ Among the individuals arrested was Mr. Littleton, who allegedly posted to Facebook:

All lives can't matter until Black Lives matter!!! Kill all white cops!!!

There is no evidence that Mr. Littleton intended to commit any violent act, nor did he take any steps toward that end.

After reviewing the cases, Wayne County Prosecutor Kym Worthy declined to prosecute Mr. Littleton.² Worthy acknowledged that his statements were disturbing, but concluded that they were not a “true threat” as required for criminal prosecution under Michigan law and the First Amendment.

Dissatisfied with Prosecutor Worthy’s decision, Chief Craig appealed to the attorney general’s office. A few weeks later Bill Schuette held a joint press conference with Chief Craig to announce that his office would directly prosecute Mr. Littleton for the Facebook posts.³ Craig stated, “I’ve made a commitment to the men and women of the Detroit Police Department.” Schuette said, “This is a fight worth fighting, we cannot allow it to be open season on police.”

¹ See Stafford, *4 Arrested After Threatening on Social Media to Kill Detroit Police*, Detroit Free Press (July 11, 2016), attached as Exhibit A.

² See Worthy, *Three Facebook Warrants Denied for Insufficient Evidence*, Press Release (August 30, 2016), pp 6-8, attached as Exhibit B.

³ See Schuette, *Detroit Police Jointly Announce Criminal Charges Following Threats to the Lives of Police Officers*, Press Release (October 5, 2016), attached as Exhibit C.

His office charged Mr. Littleton with making a “terrorist threat,” a 20-year felony. See MCL 750.543m.

ARGUMENT

Mr. Littleton is facing criminal punishment for pure speech. Such a prosecution must be subjected to the highest level of judicial scrutiny, for “as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v American Civil Liberties Union*, 535 US 564, 573 (2002). Unquestionably, Mr. Littleton’s Facebook comments are offensive, outrageous, and disturbing. But, as argued below, the First Amendment provides the highest level of protection for even the most unpleasantly sharp attacks on government, including the police, on matters of public controversy and concern. The “true threats” exception to the First Amendment is a narrow one that cannot be used to criminalize political hyperbole or caustic and inartful expressions of dissent. Similarly, the abstract advocacy of violence, without more, is not a threat, and is protected speech. Applying these standards here, Mr. Littleton’s Facebook posts were protected speech, not true threats. Accordingly, this prosecution should be dismissed.

I. THE FIRST AMENDMENT PROTECTS THE EXPRESSION OF IDEAS THAT ARE DEEPLY UNPOPULAR, PROFOUNDLY DISTURBING, AND STIR PEOPLE TO ANGER.

In examining whether Mr. Littleton’s speech is a threat that violates MCL 750.543m, it is important first to review the strong protection that nearly all speech enjoys under the First Amendment—including, and in fact especially, speech that is disturbing, outrageous or extreme. As the United States Supreme Court summarized in *Texas v Johnson*, 491 US 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.” Put another way in *Virginia v Black*, 538 US 343, 358 (2003): “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.”

The Court has accordingly recognized that the freedom of speech “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger.” *Terminiello v City of Chicago*, 337 US 1, 4 (1949). Protected speech may “have profound unsettling effects.” *Id.* Indeed, since “a principal function of free speech under our system of government is to invite dispute,” *id.*, “in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.” *Boos v Barry*, 485 US 312, 322 (1988).

Of particular relevance here, “Speech critical of the exercise of the State’s power lies at the very center of the First Amendment.” *Gentile v State Bar of Nevada*, 501 US 1030, 1034 (1991). It “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co v Sullivan*, 376 US 254, 270 (1964). This includes, necessarily, statements that are highly disturbing to, and about, police officers: “The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” *City of Houston v Hill*, 482 US 451, 462-63 (1987).

Similarly, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v Myers*, 461 US 138, 145 (1983). Public issues are those that relate “to any matter of political, social, or other concern to the community,” including a “subject of legitimate news interest.” *Snyder v Phelps*, 562 US 443, 453 (2011). “The arguably inappropriate or controversial character of a statement is irrelevant to

the question whether it deals with a matter of public concern” and is thus “entitled to special protection.” *Id.* “Messages [that] may fall short of refined social or political commentary” are protected, *id.* at 454, even if they are “outrageous,” “upsetting,” or “arouse contempt,” *id.* at 458.

Applying these standards, there is a strong presumption that punishing Mr. Littleton for his Facebook statements would be unconstitutional. Undeniably, his speech was distasteful, profoundly unsettling, and stirred people to anger; it was caustic, unpleasant, and outrageous. But these are all reasons why, as a legal matter, the speech must be protected, not criminalized. Moreover, it is entitled to special protection because it was an attack on police power, situated in the context of an intense social and political controversy surrounding violence by and against police, the Black Lives Matter movement, and race relations. The fact that his commentary was crude, hot-tempered, unsophisticated, upsetting, and completely inappropriate cannot matter for First Amendment purposes; it is speech on a public issue and therefore “occupies the highest rung of the hierarchy of First Amendment values.” *Connick, supra*, 461 US at 145.

II. MR. LITTLETON’S SPEECH WAS NOT A “TRUE THREAT.”

The state nonetheless argues that Mr. Littleton may be punished because his speech was a “threat” against the lives of police officers in violation of MCL 750.543m. But in order for MCL 750.543m to be applied constitutionally, “the First Amendment requires that the term ‘threat’ be limited to a *narrow class* of historically unprotected communications called ‘true threats.’” *Elonis v United States*, 135 S Ct 2001, 2018-19 (2015) (Thomas, J., dissenting) (emphasis added). Accordingly, the Michigan Court of Appeals has construed MCL 750.543m as prohibiting *only* “true threats” because “statutes that criminalize pure speech must be interpreted with the commands of the First Amendment clearly in mind.” *People v Osantowski*, 274 Mich App 593, 601-04 (2007). As explained below, Mr. Littleton’s speech was not a “true threat.”

“‘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.” *Virginia v Black*, 538 US 343, 359 (2003). The speaker need not actually intend to carry out the threat. *Id.* But crude or offensive hyperbole uttered in the broader context of contentious political debate is not a “true threat.” See *Watts v United States*, 394 US 705, 708 (1969) (per curiam).

Watts is the leading Supreme Court case on “true threats.” In that case, a man protesting the draft during the Vietnam War had been convicted of threatening the life of the President of the United States after declaring at a public rally, “***If they ever make me carry a rifle, the first man I want in my sights is L.B.J.***” *Id.* at 706. The Supreme Court reversed the conviction. Recognizing that the defendant was merely “indulg[ing]” in “political hyperbole,” the Court held that the statement, considered in context, was not a “true threat.” *Id.* at 708. Noting that the “language of the political arena . . . is often vituperative, abusive, and inexact,” the Court held that the statement in question was no more than “a kind of very crude offensive method of stating a political opposition to the President.” *Id.*

Following *Watts*, appellate courts have narrowly construed the “true threats” exception to the First Amendment. For example, in *Citizen Publishing Co v Miller*, 115 P3d 107 (Ariz, 2005), a newspaper published a statement that “***we should proceed to the closest mosque and execute five of the first Muslims we encounter.***” *Id.* at 109. Needless to say, the statement was highly disturbing, and publishing it was irresponsible. But the Arizona Supreme Court held that it was not a “true threat.” First, it “arose in the context of a discussion about a central political issue of the day: the conduct of the war in Iraq.” *Id.* at 115. Second, it appeared in “a public arena dedicated to political speech,” and “speech that is part of this sort of public discourse is far less

likely to be a true threat than statements contained in private communications or in face-to-face confrontations.” *Id.* And third, the statement was ambiguous as to who would be the perpetrator, who would be the victim, and when (if ever) the allegedly threatened act would occur. *Id.* Therefore, a reasonable person would not understand it to be a “*serious* expression of an intent to commit an act of unlawful violence to a *particular* individual or group of individuals.” *Id.* (emphasis added).

Another important case is *United States v Bagdasarian*, 652 F.3d 1113 (CA 9, 2011). The defendant had been convicted of threatening the life of President Obama after he posted “***Re: Obama, fk the [n-word], he will have a 50 cal in the head soon***” and “***shoot the nig***” on an online message board. *Id.* at 1115. But the Ninth Circuit reversed the conviction, finding that even these violent, racist statements were not “true threats.” The court acknowledged that the statements were “alarming and dangerous,” *id.* at 1120, and “particularly repugnant because they directly encourage violence,” *id.* at 1115. However, the first statement was merely a prediction that someone would shoot Obama, and the second statement merely encouraged others to do so. *Id.* at 1119. They did not “convey the notion that Bagdasarian himself had plans” to carry out an assassination; at most, they “expressed an imperative that some unknown third party should take violent action.” *Id.* at 1122. Both were completely inappropriate “expressions of rage or frustration,” *id.* at 1119, but, as with the L.B.J. statement in *Watts*, they were not “true threats.”

These authorities yield the inescapable conclusion that, in this case, Mr. Littleton’s Facebook posts were not “true threats.” As in the cases above, Mr. Littleton’s comments arose in the context of a “central political issue of the day,” the public controversy over police shootings; his statement even includes explicit reference to “black lives matter.” Additionally, it was not a “private communication” or a “face-to-face confrontation,” but rather online postings on

Facebook, where overheated political tirades are extraordinarily common and “language of the political arena . . . is often vituperative, abusive, and inexact.” Further, Mr. Littleton did not “convey the notion that [he] himself had plans” to commit any violent act; at most, his statement vaguely encouraged others to do so. Nor does the speech specify any *particular* individual or groups of individuals, when they will be harmed, how, or by whom. In sum, and taken in context as they must be, Mr. Littleton’s statements are properly read as “expressions of rage or frustration,” and “a kind of very crude offensive method of stating a political opposition” to the state of policing in our country, not as a statement “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.”

III. ABSTRACT ADVOCACY OF VIOLENCE IS NOT A THREAT AND IS PROTECTED BY THE FIRST AMENDMENT.

As noted above, Mr. Littleton did not say or imply that he or anyone with whom he was associated would commit an act of unlawful violence. At most, and if not recognized as sheer hyperbole, his statement can be read only as advocating violence by others.

There are two independent reasons why such speech cannot legally give rise to the instant prosecution. First, threatening to commit violence and advocating that others do so are two distinct types of acts, and only the former is made unlawful by MCL 750.543m. In *People v Osantowski*, 274 Mich App 593, 603-04 (2007), the Michigan Court of Appeals expressly held that MCL 750.543m prohibits *only* true threats. Thus, this case is like *Bagdasarian, supra*, where the court held that “incitement,” or “exhortations to others,” simply do not qualify as an offense under the federal statute that criminalizes only “true threats.” See *id.*, 652 F.3d at 1119, 1123. Accordingly, Mr. Littleton cannot be prosecuted for “true threats” on the theory that his speech incited or encouraged others to commit acts of violence.

Second, even if MCL 750.543m could somehow be read as criminalizing incitement in addition to true threats, Mr. Littleton's speech does not qualify as incitement and is therefore protected by the First Amendment. The Supreme Court "has made clear . . . that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment." *NAACP v Claiborne Hardware Co*, 458 US 886, 927 (1982). To fall outside the protections of the First Amendment, it must be proved that "such advocacy is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action." *Brandenburg v Ohio*, 395 US 444, 447 (1969) (per curiam).

The requirements of this *Brandenburg* test are almost never met. In *NAACP v Claiborne Hardware Co*, *supra*, an official of the NAACP giving a speech during a boycott said "if we catch any of you going into any of them racist stores, we're going to break your damn neck." The Supreme Court rejected the argument that this speech was punishable as incitement, holding that it was protected under the *Brandenburg* standard because it was "highly charged political rhetoric lying at the core of the First Amendment." *Id.* at 926-27.

Similarly, in *Hess v Indiana*, 414 US 105 (1973) (per curiam), police were clearing the street of demonstrators when the defendant yelled, "we'll take the fucking street later" or "we'll take the fucking street again." The Supreme Court held that this statement did not satisfy *Brandenburg* requirements because "advocacy of illegal action at some indefinite future time" is constitutionally protected. *Id.* at 108.

Recall as well *Citizen Publishing Co*, *supra*, the case in which a newspaper that published a statement encouraging readers to "proceed to the closest mosque and execute . . . Muslims." *Id.*, 115 P3d at 109. In addition to holding that the statement was not a true threat, the court separately held that the statement "falls far short of unprotected incitement." *Id.* at 113. The court

condemned the statement as reprehensible and acknowledged that it caused fear in the Muslim community. *Id.* But because the statement was made in a newspaper, “not before an angry mob,” it neither advocated, nor was it likely to directly result in, *imminent* lawless action as required by *Brandenburg. Id.*

Applying the *Brandenburg* test here, Mr. Littleton’s speech was likewise protected speech, not incitement. As in *NAACP v Claiborne*, the violence of Mr. Littleton’s speech was “highly charged political rhetoric lying at the core of the First Amendment.” Posted to Facebook for others to read online, the speech was not “directed to inciting or producing *imminent* lawless action”; at most, it was “mere advocacy” of violence in the abstract, “at some indefinite future time.” Nor can it be said that the speech was “*likely* to incite” imminent violence, as it was written on Mr. Littleton’s Facebook page, not shouted “before an angry mob.” Although it is always *possible* that someone will foolishly decide to carry out a specific violent act inspired by having read an online statement encouraging violence in the abstract, the *Brandenburg* standard requires a good deal more. So long as the First Amendment recognizes a distinction between advocacy and incitement, Mr. Littleton’s speech “falls far short” of the latter and is therefore protected.

CONCLUSION

For the reasons set forth above, Mr. Littleton’s speech is protected by the First Amendment. Accordingly, this prosecution should be dismissed.

Respectfully submitted,

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Dated: February 6, 2017

INDEX OF EXHIBITS

- Exhibit A: *Stafford, 4 Arrested After Threatening on Social Media to Kill Detroit Police*, Detroit Free Press (July 11, 2016).
- Exhibit B: *Worthy, Three Facebook Warrants Denied for Insufficient Evidence*, Press Release (August 30, 2016).
- Exhibit C: *Schuetz, Detroit Police Jointly Announce Criminal Charges Following Threats to the Lives of Police Officers*, Press Release (October 5, 2016).

Exhibit A

4 arrested after threatening on social media to kill Detroit police

Katrease Stafford, Detroit Free Press

Published 1:35 p.m. ET July 11, 2016 | Updated 3:02 p.m. ET July 11, 2016



(Photo: Salwan Georges, Detroit Free Press)

Four men were arrested this weekend after they allegedly made threats on social media to kill Detroit police officers.

Chief James Craig said at a Monday news conference that the threats were made on the heels of a painful week that saw the nation outraged by the killing of two black men by police in questionable shootings in Louisiana and Minnesota and five officers killed by a sniper during a protest in Dallas.

"We have made four arrests and are in the process of submitting a warrant request to the prosecutor's office for a felony in making a threat against killing a police officer," Craig said. "There are a lot of issues here. First of all, I believe that when you make a threat like that in today's environment like that, that's a problem for me. And for

us in leadership positions, we have to provide unwavering support for men and women who run into danger, not away from danger."

According to the Detroit News (<http://www.detroitnews.com/story/news/local/detroit-city/2016/07/11/detroit-police-arrest-four-threats-cops/86930930/>), one of the men allegedly said, "All lives can't matter until black lives matter. Kill all white cops." The News also reported that another man praised the Dallas shooter, saying, "He inspired me to do the exact same thing." Craig said all four men are from Detroit.

Craig said he's reached out to Michigan Attorney General Bill Schuette and the Wayne County Prosecutor's Office to discuss the incident.

"We're very concerned," Craig said. "Any violence directed at any police officer is a reprehensible crime. I think law enforcement officers across this country, when you become aware of a threat to kill a police officer, there should be a timely response to that. We've gone out and quickly identified and arrested these suspects."

Craig said two of the men were later released, but two remain in custody on non-related misdemeanor warrants.

"Our police officers are concerned," Craig said. "I take it serious and it's important to me as the leader of this great department to lead the way in saying that we're not going to tolerate a threat to kill a police officer."

In Minnesota and Louisiana, African-American men were shot dead by police officers in encounters partially captured on video. And in Dallas, five officers were killed during a Black Lives Matter protest by a man who said he was upset over recent police shootings. The man was not part of Black Lives Matter, which strongly condemned the shooter's actions.

- **Rochelle Riley:** [Philando Castile's girlfriend opens our eyes all the way in final moment \(/story/news/columnists/rochelle-riley/2016/07/07/philando-castile-shooting-diamond-reynolds/86828734/\)](/story/news/columnists/rochelle-riley/2016/07/07/philando-castile-shooting-diamond-reynolds/86828734/)
- **Stephen Henderson:** [Police shootings of black men: Haven't we seen enough? \(/story/opinion/columnists/stephen-henderson/2016/07/07/black-police-shootings-philando-castile/86820262/\)](/story/opinion/columnists/stephen-henderson/2016/07/07/black-police-shootings-philando-castile/86820262/)
- **Related:** [Black Lives Matter activist released in Baton Rouge \(/story/news/nation/2016/07/10/black-lives-matter-activist-deray-mckesson-arrested-baton-rouge/86915268/\)](/story/news/nation/2016/07/10/black-lives-matter-activist-deray-mckesson-arrested-baton-rouge/86915268/)
- **Related:** [Black boys learn how to fear police as survival skill \(/story/news/nation/2016/07/10/black-boys-learning-fear-police/86929072/\)](/story/news/nation/2016/07/10/black-boys-learning-fear-police/86929072/)

In Minnesota, Philando Castile's [girlfriend live-streamed the aftermath of his shooting \(/story/news/nation/2016/07/07/facebook-live-minnesota-shooting/86796288/\)](/story/news/nation/2016/07/07/facebook-live-minnesota-shooting/86796288/) by a suburban Minneapolis police officer. Castile, 32, was shot after telling a St. Anthony police officer that he had a gun and was licensed to carry, his girlfriend said in the video.

Castile's death was the second fatal police shooting of a black man in as many days. Alton Sterling, 37, was shot and killed outside a Baton Rouge, La., convenience store where he was selling CDs.

In cities across the country, people of all races took to the streets to protest the killings in an atmosphere still tense from similar incidents in Ferguson, Mo.; Baltimore and New York in the past year.

President Barack Obama called the Dallas attack "vicious" and said there needs to be trust between police and communities. Obama also has said there are biases in the criminal justice system that need to be rooted out.

Craig said his department has been made aware of additional threats made in "outside areas" against police, and he's contacted other law enforcement agencies to deal with those matters.

"This has touched everyone in our profession," Craig said.

Contact Katrease Stafford: 313-223-4759 or kstafford@freepress.com

Read or Share this story: <http://on.freep.com/29IzKZy>

Exhibit B



KYM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY

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Press Release
August 30, 2016
Eight Pages

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For Immediate Release

Three Facebook Warrants Denied for Insufficient Evidence

July 8, 2016 Facebook Threat Case with 28-year-old Detroit Male Suspect

FACTS

On July 8, 2016, the Facebook account of a 28-year-old man was investigated by the Detroit Police Department. This account is listed under the name of a male suspect, and DPD determined that the page contained threatening statements. On July 9, 2016, DPD arrested a suspect for an unrelated traffic warrant. Police officers questioned him while he was in custody at the Detroit Detention Center (DDC), without giving Miranda warnings.

On July 15, 2016, DPD presented a warrant request that included: a short investigator's report, one police report that is nine sentences long, a criminal history reflecting one conviction for driving with a suspended license, a screenshot of a Facebook page under the suspect's name and the video of the interrogation. The screenshot of the man's Facebook page contained a picture of Micah Johnson, the suspect in the Dallas, TX mass shooting. Underneath the picture, there are three comments. The first comment under the picture states, "He is my hero...he inspired me to do the exact same thing." The second comment states, "I feel you...it's a few niggas I got to knock off...then I'm done killing blacks." And the third comment states, "I hope I never cross path of racist cops again." During interrogation, the man admitted he posted messages on his Facebook page, but explained that "I was joking to my pops", and "I was thinking maybe I shouldn't have said that shit."

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During the interview, one of the officers said to the man, "This is America. You can say whatever you want. You just have to make sure you say the right thing." At the end of the interrogation, the officer appeared satisfied that there was no threat and said, "I don't think you are going to be out killing police officers." The man replied, "No."

ANALYSIS

There is no Admissible Evidence to Prove the Suspect Committed a Crime

Before considering terrorism, or other crimes, it is important to first consider what evidence is admissible. At this point, we have insufficient evidence to establish that it was, in fact, the suspect who made the three statements on Facebook. The only evidence presented in the warrant package are the suspect's admissions during interrogation. His admissions are inadmissible evidence due to the fact he was in custody and interrogated without Miranda Rights given.

There is no other evidence that the screenshot is linked to his account, or that the suspect typed the statements. We cannot prove that it was actually the suspect who typed the three statements.

Do the three statements violate any Criminal Statute?

The most serious crime to consider is terrorism, MCL 750.543m. The elements of this offense are: (1) a threat, (2) to commit an act, (3) (a) that would be a violent felony, (b) that the person knows or has reason to know is dangerous to human life, and (c) that is intended to intimidate or coerce a civilian population or affect the conduct of government or unit of government.

The suspect's first statement is directly underneath a photograph of the Dallas shooter, Micah Johnson. The statement reads "He's my hero...he inspired me to do the exact same thing." The terrorism statute only prohibits "true" threats. *People v. Osantowski*, 274 Mich App 593, 602-603 (2007). The Court held that true threats "encompass those statements where the speaker means to communicate a serious expression of the intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 602, quoting *Virginia v Black*, 538 US 343, 359 (2003).

The statement in this case is vague, and it is unclear if it is a true threat. It is unclear who the speaker intends as the target of the message. The statement does not communicate what the unlawful act of violence the speaker is communicating. The statement does not specify what "the exact same thing" means. The statement could be read to mean that he was inspired in the past, but does not have a current intent to carry out a violent act. There

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are too many questions that arise in connection with the statements; therefore it fails to communicate a true threat to a particular individual or group of individuals.

The terrorism statute also requires that a defendant must have intended to intimidate or coerce a civilian population or unit of government. The officers conducting the interrogation stated to the man, "I don't think you are going to be out killing police officers", and he replied "No." Officers also asked the man what he meant by the statement "he inspired me," and he replied that he was just joking with his father. He further stated that after the statements were made on Facebook, "I was thinking maybe I shouldn't have said that shit."

The second statement on Facebook to be analyzed is "I feel you ... it's a few niggas I got to knock off... then I'm done killing blacks." While this statement does communicate a violent act, it fails to communicate a true threat to a particular individual or group of individuals. This statement is too vague, and we cannot prove with the language "a few niggas" that he intended to communicate intent to commit an unlawful act of violence against a particular individual or group of individuals.

The third statement on the suspect's Facebook page states "I hope I never cross path of racist cops again." This statement is vague and fails to communicate a threat of unlawful violence to a particular individual or group of individuals. In fact, it can be interpreted to mean that the suspect hopes to never meet a racist police officer.

In addition to the Terrorism Statute, the following criminal offenses were also considered: Unlawful Posting of Message with Aggravating Circumstances, False Report or Threat of Terrorism, and Unlawful Posting of Message. All of these statutes require that we prove that the suspect was the one who made the threat or posted the message. Because Miranda warnings were not given, we are unable to use the suspect's admissions as evidence and are unable to prove this element of the above criminal offenses.

Is there venue in Wayne County?

No. The law requires that the threat must have been made in Wayne County, *People v Houthoofd*, 487 Mich 568 (2010). There is no evidence that establishes that the statements on Facebook were made in Wayne County. We do not have evidence from Facebook, or otherwise, that proves the suspect was in Wayne County at the time the Facebook posts were made.

CONCLUSION

There is insufficient evidence that: the suspect posted messages on Facebook; that the messages were a true threat and were communicated as an expression of intent to commit an act of unlawful violence to a particular individual, or group of individuals; and we lack evidence to establish venue. The warrant is denied because there is insufficient evidence to charge the suspect with a crime that can be proven beyond a reasonable doubt.

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July 8, 2016 Facebook Threat Case with 33-year-old Detroit Male Suspect

FACTS

On July 8, 2016 a 33-year-old man made is alleged to have made three posts to his Facebook account. All of the posts appeared to be screen shots from other sources.

The first post is a video of the Dallas shooting, and the man comments, "This needs to happen more often...until the ppl are free from government terrorism."

The second post is a picture of a man firing into a police car, and the man states, "Let's get it," followed by handgun emojis.

The third post is a picture from the Black Panthers, and the man states, "cause I am loaded and I am ready," with handgun emojis.

It is unclear whether these three posts were posted at the same time or separately. The third post is the only one indicating that the man had any weapons. None of the posts target a specific person or group.

On or about July 10, 2016, the man was arrested and incarcerated for traffic warrants. Two officers interviewed him at the Detroit Detention Center (DDC) without giving him his *Miranda* rights. In the taped interview, the man said he didn't intend to do anything, or act on these posts. He said he had no access to firearms and that he removed the three posts shortly after he put them on Facebook because he realized it was a stupid thing to do.

He further explained that he knows he is not supposed to be around firearms because he is a felon and he makes it a point not to be around people who carry firearms. His prior record consists of theft offenses.

One of the officers told him during the interview, "It is a free country and you can say what you want to say unless you have traffic warrants. Then instead of coming to you now we.... can lock you up for warrants and talk to you here."

ANALYSIS

There is no Admissible Evidence to Prove the Suspect Committed a Crime

Before considering terrorism, or other crimes, it is important to first consider what evidence is admissible. At this point, we have insufficient evidence to establish that it was, in fact, the suspect who made the three posts on Facebook. The suspect's admissions during interrogation are the only evidence presented in the warrant request. His statements are inadmissible evidence due to the fact he was in custody, and interrogated without *Miranda* Rights given.

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There is no other evidence that the posts are linked to his account, or that the suspect typed them. We cannot prove that it was actually the suspect who typed the three posts.

Is there venue in Wayne County?

No. The law requires that the threat must have been made in Wayne County, *People v Houthoofd*, 487 Mich 568 (2010). There is no evidence that establishes that the posts on Facebook were made in Wayne County. We do not have evidence from Facebook, or otherwise, that proves the suspect was in Wayne County at the time the Facebook posts were made.

Does the Statement violate a Criminal Statute?

It is important to note that even if there were venue, the case could not be charged under Michigan's terrorism statute. A person is guilty of making a terrorist threat if he threatens to commit to an act of terrorism. MCL.543m (1)(a). An act of terrorism is an act that would be a violent felony under the laws of Michigan, that the person knows or has reason to know is dangerous to human life, and that is intended to intimidate or coerce a civilian population or affect the conduct of government or unit of government through intimidation or Coercion. MCL 750.543b (a).

Accordingly, the elements of the offense are: (1) a threat, (2) to commit an act, (3) (a) that would be a violent felony, (b) that the person knows or has reason to know is dangerous to human life, and (c) that is intended to intimidate or coerce a civilian population or affect the conduct of government or a unit of government.

Only "true" threats are prohibited under the statute. In *People v. Osantowski*, 274 Mich App 593, 602-603 (2007), the Court of Appeals construed the statute as limited to true threats so as not to infringe on First Amendment protections. True threats, the Court explained, "encompass those statements where the speaker means to communicate a serious expression of the intent to commit an act of unlawful violence to a particular individual or group of individuals" *Id.* at 602 quoting *Virginia v. Black*, 538 US 343 (2003). An individual need not actually intend to carry out the threat, but must have the general intent to communicate a true threat. *Id.* at 602 & 605.

Since the defendant's statements are not admissible in this case, there must be other evidence presented to show that he was the one who posted the statements. In this case there is no other evidence.

The statements must be true threats, where the suspects intent to commit an unlawful act of violence. There are few facts supporting the charge of Threats of Terrorism. Stating that he is loaded and ready is notice, however, showing approval of what happened in Dallas is not a threat. He did not do anything in addition to the posts that would indicate there is a plan of

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action. In fact, even before he was interviewed, he removed the posts voluntarily. Finally, there is no evidence that the defendant owns or has access to firearms.

CONCLUSION

The statements of the suspect are inadmissible in court because the police failed to give him Miranda Rights when he was in custody. There is no other evidence to prove he made the posts on his Facebook account. There is no proof of venue in Wayne County. The posts fail to rise to the level of a threat of terrorism and the warrant must be denied.

July 9, 2016 Facebook Threat Case with 40-year-old Detroit Male Suspect

FACTS

A post made on the Facebook page of a 40- year- old Detroit man on July 9th, 2016 stated: "All lives can't matter until Black Lives Matter!!!! Kill all white cops!!!!" This statement also had a KRON 4 News video attached. KRON is a news station out of San Francisco and the video was related to the protests about the Dallas murders of police officers. An anonymous witness saw this on Facebook and forwarded it to a friend at the Dearborn Police Department who, in turn, passed it on to the Detroit Police Department.

Detroit Police officers went to the 40-year-old man's home, and a second home registered to his wife. No contact was made with anyone at either home.

On July 21, 2016, a search warrant was authorized for Facebook records of the man before and after the post in question. This was necessary to assist in identifying the IP address used when posting. This could also possibly provide circumstantial evidence as to who was posting the message. Subsequently, the WCPO returned the warrant request to the Detroit Police Department requesting the Facebook records and further investigation.

During the week of August 16, 2016, the DPD returned the requested information. The man was read his rights and voluntarily gave a statement to the police. In the statement he indicated that he was at a resort in Puerto Rico and was highly intoxicated when he posted the statement and that he had no intention on acting on the statement.

ANALYSIS

Is there venue in Wayne County?

No. This case cannot be charged by the Wayne County Prosecutor's Office because there is no venue. The law requires that the threat be made in Wayne County, *People v. Houthoofd*, 487 Mich 568 (2010). In this case the man was in Puerto Rico when he wrote

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the Facebook post; there are travel receipts and other evidence to prove that he was not in Wayne County and was not in Michigan when he posted the statement in question. Therefore under state law he cannot be charged for lack of venue.

Does the Statement violate a Criminal Statute?

It is important to note that even if there were venue, the case could not be charged under Michigan's terrorism statute. A person is guilty of making a terrorist threat if he threatens to commit to an act of terrorism. MCL.543m (1) (a). An act of terrorism is an act that would be a violent felony under the laws of Michigan, that the person knows or has reason to know is dangerous to human life, and that is intended to intimidate or coerce a civilian population or affect the conduct of government or unit of government through intimidation or coercion. MCL 750.543b (a).

Accordingly, the elements of the offense are: (1) a threat, (2) to commit an act, (3) (a) that would be a violent felony, (b) that the person knows or has reason to know is dangerous to human life, and (c) that is intended to intimidate or coerce a civilian population or affect the conduct of government or a unit of government.

Only "true" threats are prohibited under the statute. *In People v. Osantowski*, 274 Mich App 593, 602-603 (2007), the Court of Appeals construed the statute as limited to true threats so as not to infringe on First Amendment protections. True threats, the Court explained, "encompass those statements where the speaker means to communicate a serious expression of the intent to commit an act of unlawful violence to a particular individual or group of individuals" *Id.* at 602 quoting *Virginia v. Black*, 538 US 343 (2003). An individual need not actually intend to carry out the threat, but must have the general intent to communicate a true threat. *Id.* at 602 & 605.

The statement posted in this case, "All lives can't matter until Black Lives Matter!!!! Kill all white cops" is vague. *People v. Osantowski*, 274 Mich App 593, 602,603 (2007) requires that true threats "encompass those statements where the speaker means to communicate a serious expression of intent to commit an unlawful act of violence to a particular individual or group of individuals." He did not indicate *that he* was the one who was going to kill all white cops, and never said that his Facebook friends should kill all white cops. Further, he did not indicate when all white officers should be killed or which white officers should be killed. There is no evidence the suspect took any action himself, or did anything to facilitate the killing of white officers.

The terrorism statute also requires he must have intended to coerce a civilian population or affect the conduct of government or unit of government. He never communicated the statement to others. He also doesn't indicate which department he is talking about and which white officers.

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CONCLUSION

We do not have venue and furthermore, we lack evidence that the message was a “true threat” as required by the terrorism statute. Therefore, the warrant must be denied.

July 7, 2016 Facebook Threat Case with 44-year-old Detroit Male Suspect

On July 15, 2016 the warrant request was received and it was returned for further investigation on July 16, 2016. This case continues to be investigated by DPD.

Statement of Wayne County Prosecutor Kym L. Worthy

The postings on Facebook are disturbing, especially since they are directed at the police who place their lives on the line each day to protect the public. However, in order to have a case we can prosecute, we must be able to prove it beyond a reasonable doubt in court.

These cases are very serious and the police investigation must be equally serious and thorough. DPD has many fine investigators, but the work in the four Facebook cases was substandard. When this happens, we must request further investigation. We cannot fly by the seat of our pants in charging cases. The police are trained to know when they must give Miranda rights, and they are aware that a viable case is not possible with Miranda violations and no other evidence. If any other agency wants to review these cases and issue charges based on their current status, that is their decision. We must be able to prove our cases lawfully. We will follow the law even when we detest the allegations.

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Exhibit C



Attorney General Bill Schuette Press Release

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FOR IMMEDIATE RELEASE

October 5, 2016

Schuette, Detroit Police Jointly Announce Criminal Charges Following Threats to the Lives of Police Officers

DETROIT – Michigan Attorney General Bill Schuette and Detroit Police Chief James Craig jointly announced criminal charges today against Nheru Gowan Littleton, 40, of Detroit, as a result of social media posts that threatened the lives of police officers. Littleton is being charged with multiple felonies, including making a terrorist towards the lives of police officers.

The threats were allegedly posted on social media by Littleton on July 8-9, 2016 and included the following: “F– them racist a– white cops!!! Kill them ALL!!! Black Lives Matter!!! Black people should start killing all white cops just like they are killing us!!! Then and only then will this s– stop!! Why you ask? Because white people will be dropping like flies!!!”

“Threatening the life of a police officer is a threat against our entire community. We take these threats very seriously,” said Chief Craig. “I’ve made a commitment to the men and women of the Detroit Police Department, I will not ignore those who threaten their safety. I refuse to let threats against officers go without a response.”

“A threat to law enforcement officers is a threat to us all,” said Schuette. “The men and women who stand between mothers and children and those that want to do harm should be able to do their job without the fear of an unprovoked attack. This is a fight worth fighting, we cannot allow it to be open season on police.”

“Every day we put our lives on the line, defending those that can’t always defend themselves.” said Mark Diaz, Detroit Police Officers Association President. “The threats we face every day are real. And in this time of heightened emotion, we have to consider the threats made to law enforcement as real, credible threats.”

Charges Against Littleton

Littleton has been charged with the following crimes in the 33rd District Court in Trenton:

- Making Terroristic Threat (MCL 750.543m), 20-year felony
- Using a Computer to Commit a Crime (MCL 752.796), 20-year felony

Social Media Posts Threatening the Lives of Police Officers

Between July 8-9, 2016, Littleton allegedly posted numerous direct threats to law enforcement officers on social media. With more than 500 Facebook friends, Littleton’s post received attention and were reported to the Dearborn Police Department by a Michigan resident.

The Dearborn Police Department then issued a Law Enforcement Information Network message to all area law enforcement agencies indicating that a significant threat had been made to the lives of police officers.

The suspect had described himself as a “Former Killing Machine at United States Marine Corps” on social media, and has a valid Concealed Pistol License and owns a Smith and Wesson .45 caliber firearm.

Detroit Police Chief James Craig brought the case to Schuette for review after law enforcement agencies in multiple counties responded to the threats. Upon learning of the threats, more than a dozen police officers from multiple police agencies searched for Littleton.

On July 7, 2016, a day before Littleton made his threats, the Federal Bureau of Investigation sent a nationwide bulletin to law enforcement warning of online messaging that could inspire attacks against police.

The threats allegedly posted by Littleton include the following:

7/8/16: “To those sniper’s in Texas, I commend your bravery and actions!!! #blacklivesmatter.”

7/8/16: “All lives can’t matter until Black Lives matter!!!! Kill all white cops!!!”

7/8/16: “Kill all white cops!!!”

7/8/16: "Kill all white cops!!!"

7/8/16: "F- that!!! Nobody called for prayer after Alton Sterling got shot to death!!! F- them police!!!!"

7/8/16: "Yes!!! #blacklivesmatter #purgeoncops"

7/8/16: "Why isn't that white man shot dead!!! #wakeupblackpeople #itsnotagame"

7/8/16: If these racist a- white cops want to PURGE on Black Lives!!! Then let's PURGE on these racist a- white cops!!! I'm sick of this s-!!! If you don't like what I said, UNFRIEND ME!!!! #rugonberue"

7/9/16: "F- them racist a- white cops!!! Kill them ALL!!! Black Lives Matter!!! Black people should start killing all white cops just like they killing us!!! Then and only then will this s- top!!! Why you ask? Because white people will be dropping like flies!!!"

Law Enforcement Threats in Detroit, Nationally on the Rise

Detroit law enforcement officers have been the subject of numerous threats in recent weeks. During the funeral of Detroit Police Captain Kenneth Steil, a threat was made to blow up the funeral, which would take the lives of many law enforcement officers and their family members. "Maybe I should drop a bomb on tha building to get rid of the rest of y'all," the suspect posted on social media. He has been charged with using the Internet to make a threat.

Nationally, law enforcement officers have come under attack in New York City and Dallas. On December 20, 2014, Ismaaiyl Brinsley posted a picture of a gun on Instagram with the caption: "I'm Putting Wings on Pigs Today. They Take 1 of Ours..... Let's Take 2 Of Theirs #ShootThePolice #RIPerivGardner #RIPMikeBrown. This May Be My Final Post" followed by ten gunshot emojis and a gun emoji and "I'm Putting Pigs In A Blanket." About two hours later, Brinsley shot and killed two New York Police Department officers in Brooklyn as they sat in their patrol car. New York Police Officers were recently informed that all uniformed law enforcement officers shall arrive and remain on post together and that all meals and personal breaks will be taken in pairs.

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