

**IN THE
INDIANA SUPREME COURT**

CAUSE NO. 25A-CR-02601

MYKAL JAMES ALAN GEROU
Appellant,

v.

STATE OF INDIANA
Appellee.

Appeal from the:
Jefferson Superior Court

Trial Court No.: 39D01-2406-F5-000873

Before the Honorable:
Blaine Goode, Judge.

APPELLANT'S CORRECTED RESPONSE TO PETITION TO TRANSFER

R. Patrick Magrath
26467-53
West Sixth Law, LLP
Attorneys for APPELLANT
One West Sixth Street
Madison, IN 47250
(812) 273-5230

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	3
<u>QUESTION PRESENTED</u>	4
<u>STATEMENT OF CASE</u>	5
<u>ARGUMENT</u>	8
<u>CONCLUSION</u>	16
<u>WORD COUNT CERTIFICATE</u>	17
<u>CERTIFICATE OF SERVICE</u>	17

TABLE OF AUTHORITIES

Cases

<i>Alvey v. State</i> , 10 N.E.3d 1031, 1033 (Ind. Ct. App.).....	12
<i>Cutchin v. Beard</i> , 171 N.E.3d 991, 997 (Ind. 2021).....	11
<i>ESPN, Inc. v. Univ. of Notre Dame Police Dept.</i> , 62 N.E.3d 1192, 1195 (Ind. 2016)	11
<i>Fix v. State</i> , 186 N.E.3d 1134, 1139 (Ind. 2022)	11
<i>Gerou v. State</i> , __N.E.3d__, No. 25A-CR-2601, slip op. at 1 (Ind. Ct. App. June 5, 2026).....	7
<i>Morales v. Rust</i> , 228 N.E.3d 1025, 1054 (Ind. 2024).....	11
<i>Pabey v. Pastrick</i> , 816 N.E.2d 1138, 1148 (Ind. 2004)	11

Ind.

Statutes

<u>Ind. Code Sec. 1-1-4-1(1)</u>	11
<u>Ind. Code Sec. 35-31.5-2-144(a)</u>	15
<u>Ind. Code Sec. 35-31.5-2-329</u>	4, 10,12, 13, 14, 15
<u>Ind. Code Sec. 35-45-2-1</u>	10
<u>Ind. Code Sec. 35-45-2-1(b)(2)</u>	13
<u>Ind. Code Sec. 35-42-2-1(b)(2)(B)</u>	13
<u>Ind. Code Sec. 35-42-2-1(b)(2)(C)</u>	14

QUESTION PRESENTED

Whether the Court of Appeals correctly held that the Department of Child Services is a "governmental entity" rather than "a government" under I.C. § 35-31.5-2-329, preserving the distinct statutory definitions enacted by the General Assembly and avoiding an overbroad reading that elevates routine misdemeanor intimidation into Level 5 felony terrorism.

STATEMENT OF CASE

Alexa Bischoff is an attorney who was appointed to represent Gerou in the CHINS case. (Tr. Vol.2 pp.150-152). On June 24, 2024, Bischoff spoke with Gerou on the telephone to discuss the upcoming hearing. (Tr. Vol.2 pp.152). Ordinarily, such conversations are confidential and subject to attorney-client privilege. (Tr. Vol.2 pp.159). Gerou was angry at Cornett, the DCS attorney, and the Buxton. (Tr. Vol.2 pp.153). Gerou made statements such as if you take my child I will kill you. If you come between me and my family, you will die. People are going to die. I will kill people. I always have a gun. (Tr. Vol.2 pp.153). Gerou stated if Cornett testified the way he expected her to she would pay for it. (Tr. Vol.2 pp.154). Gerou did not ask Bischoff to relay any of his statements to other people. (Tr. Vol.2 pp.159). Gerou did not make any threats about Bischoff or her place of work. (Tr. Vol.2 pp.160).

A family team meeting occurred on June 20, 2024. (Tr. Vol.2 pp.114). Gerou stated, "mess with baby bear, you're going to die." (Tr. Vol.2 pp.115). The statement was made during a time when the parents had an open platform to speak about their feelings. (Tr. Vol.2 pp.125). Buxton advised Gerou to watch his words. (Tr. Vol.2 pp.125). Buxton interpreted this statement as a threat against the Department and herself. (Tr. Vol.2 pp.115). Buxton was not highly concerned because the meeting was in a well-populated public building and Gerou did not appear to be armed with any weapons. (Tr. Vol.2 pp.116). Buxton was not placed in fear as a result of Gerou's statement. (Tr. Vol.2 pp.124). Buxton did not report the statement to law enforcement. (Tr. Vol.2 pp.124).

Stacey Cornett is a psychotherapist. (Tr. Vol.2 pp.88). She was employed with Encompass Healthcare and provided consultation and assessment services regarding parent-child bonds. (Tr. Vol.2 pp.88). Cornett performed assessments for the Department of Child Services.

(Tr. Vol.2 pp.89-90). Cornett conducted such an assessment with Mykal Gerou. (Tr. Vol.2 pp.90-91). Gerou stated he had rights under the Second Amendment and a right to carry a concealed firearm. (Tr. Vol.2 pp.93). Cornett asked Gerou to take his firearm to his vehicle; Gerou did not admit or deny that he had a firearm, but Cornett believed he did because he patted his hip. (Tr. Vol.2 pp.94). Gerou stated he had a right protect his children from kidnappers. (Tr. Vol.2 pp.94). Gerou stated Cornett should give him a fair report and complained that he had not had fair reports issued in the past. (Tr. Vol.2 pp.95). Two (2) to three (3) weeks after the assessment she received a phone call from attorney Alexa Bischoff. (Tr. Vol.2 pp.100). Then, Cornett felt threatened. (Tr. Vol.2 pp.95).

On June 27, 2024, the State of Indiana charged Mykal Gerou as follows: count 1, attempted obstruction of justice as a level 6 felony; count 2, intimidation as a level 5 felony; count 3, intimidation as a level 6 felony; count 4, intimidation as a level 6 felony; and count 5, intimidation as a level 6 felony. (App. Vol.2 pp.35-39). The State alleged that between April 1, 2024, and June 26, 2024, Gerou attempted to intimidate Stacey Cornett into not testifying in a legal proceeding by stating he had a firearm and the right to shoot people who kept him from his child. The State further alleged that between April 1, 2024, and June 26, 2024, Gerou told Alexa Bischoff that if Department of Child Services employees hurt or took away his child he would kill them. The State further alleged that on June 20, 2024, Gerou threatened to have his dog attack Janet Daugherty. Finally, the State alleged that on June 20, 2024, Gerou told Mary Buxton he would kill her if she messed with his child. On July 24, 2025, the State filed a Motion to Amend the Information; the only justification offered was that the amendment did not prejudice Gerou's substantial rights. (App. Vol.2 pp.178). The State sought amended charges as follows: count 1, intimidation as a level 5 felony; count 2, intimidation as a level 5 felony; count 3,

intimidation as a level 6 felony; count 4, intimidation as a level 5 felony; and count 5, intimidation as a level 5 felony. (App. Vol.2 pp.179-182).

The trial court commenced a jury trial on August 19, 2025. (Tr. Vol.2 pp.61). The jury returned a verdict of guilty on count 1, count 2, count 3, count 4, and count 5. (Tr. Vol.2 pp.203). On September 16, 2025, the trial court held a sentencing hearing. (Tr. Vol.2 pp.207). The trial court determined that each count of the charging information, except for count 2 and count 5, were separate incidents and did not constitute a single episode of criminal conduct. (Tr. Vol.2 pp.248). The trial court sentenced Gerou to an aggregate sentence of twelve (12) years with one (1) year suspended. (Tr. Vol.2 pp.249-250).

Gerou appealed. On June 5, 2026, the Court of Appeals issued an Opinion. *Gerou v. State*, __N.E.3d__, No. 25A-CR-2601, slip op. at 1 (Ind. Ct. App. June 5, 2026). The Court reversed Gerou's convictions for Count 1 (DCS-Bischoff), Count 4 (DCS-Buxton), and Count 5 (DCS-Cornett) and remanded with instructions that they be reduced to class A misdemeanors. (slip op. at 22). The Court determined that the State failed to prove that Gerou unlawfully threatened force or violence to intimidate or coerce a government. (slip op. at 15). The Court reasoned the DCS is a governmental entity, not a "government" as that term is used in the terrorism definition statute. The Court pointed out that because our General Assembly defined "governmental entity" but chose not to use that term in the terrorism statute, we must assume that they intended a different meaning for "government." (slip op. at 14).

On July 20, 2026, the State sought transfer. Gerou now timely files his Response on August 10, 2026, being the first business day following the weekend deadline.

ARGUMENT

Count 1, alleged Gerou communicated a threat to Bischoff, his attorney, regarding the Department of Child Services. Ordinarily, such conversations are confidential and subject to attorney-client privilege. (Tr. Vol.2 pp.159). Gerou did not ask Bischoff to relay any of his statements to other people. (Tr. Vol.2 pp.159). The evidence was not sufficient to sustain a conviction where Gerou did not intend for his statements to be conveyed to the alleged victims.

There is no evidence that Gerou knew or had good reason to believe that his statements to his attorney, made during an attorney-client communication, would be conveyed to the Department of Child Services. On the contrary, the sole evidence is that Gerou was communicating with his attorney regarding the ongoing case and upcoming hearing and was expressing his dissatisfaction and frustration. Gerou not only reasonably anticipated his communications would be kept confidential; under the ordinary rules he was justified in that belief.

Count 4, alleged Gerou communicated a threat to Buxton that if she messed with his baby she would be killed which it further alleged was a terroristic threat against the Department of Child Services. Gerou made his statements in circumstances where he was encouraged to speak about his feelings regarding the case. He only made the statement to Buxton; it was communicated personally and did not include other individuals. Assuming the statement was considered a threat, there was no evidence the statement was terroristic as there was no evidence Gerou intended or knew his statement would be construed as involving the whole Department.

A family team meeting occurred on June 20, 2024. (Tr. Vol.2 pp.114). Gerou stated, "mess with baby bear, you're going to die." (Tr. Vol.2 pp.115). The statement was made during a time when the parents had an open platform to speak about their feelings. (Tr. Vol.2 pp.125).

Buxton advised Gerou to watch his words. (Tr. Vol.2 pp.125). Buxton was not highly concerned because the meeting was in a well-populated public building and Gerou did not appear to be armed with any weapons. (Tr. Vol.2 pp.116). Buxton was not placed in fear as a result of Gerou's statement. (Tr. Vol.2 pp.124). Buxton did not report the statement to law enforcement. (Tr. Vol.2 pp.124).

Assuming Gerou's statement was a threat directed at Buxton; the offense was a class A misdemeanor unless it was "terroristic." The application of "terrorism" in this context appears to be a novel issue. To satisfy the "terror" element, the State was required to prove the threat was made against "a government." While the Department of Child Services is certainly an office of the State of Indiana, it is not in and of itself a "government." More importantly, the only evidence was that Gerou made a statement to Buxton about Buxton's involvement with Gerou's child. There was no evidence that Gerou intended his statement to apply to the entire Department or that he knew or had reason to believe his statement would be construed as being with regard to the entire Department. Thus, the evidence does not support the finding that Gerou's statement was terroristic intimidation. Count 4 should be reduced to a class A misdemeanor.

Count 5, alleged Gerou communicated a threat to Cornett regarding the Department of Child Services. Gerou was meeting with Cornett as a service provider specifically in the field of mental health. Cornett is a psychotherapist. (Tr. Vol.2 pp.88). Similar to the relationship between an attorney and client, communications between psychotherapists and their patients is entitled to confidentiality and privilege. Because Gerou did not know or have reason to believe Cornett would reconvey his statements to alleged intended victims, there was insufficient evidence to support an intimidation conviction.

Here, Gerou was meeting with a psychotherapist to discuss what, if any, mental health services he may be in need of. Gerou would have reasonably assumed that he was permitted to speak his mind about his feelings and concerns in the context of receiving an assessment. There is no evidence that Gerou knew that Cornett would reconvey Gerou's statements regarding his frustration with the system. There was no evidence that Cornett told Gerou that she would be repeating his statements or that what he said during his meeting with her was anything other than confidential. Thus, there is no evidence that Gerou knew or had reason to believe Cornett would repeat his statements. The evidence was insufficient to support a conviction for intimidation.

Each of these counts was charged as a level 5 felony under Ind. Code Secs. 35-45-2-1 and 35-31.5-2-329.

Ind. Code Sec. 35-45-2-1 provides in relevant part:

(a) A person who communicates a threat with the intent:

- ...
(4) that another person be placed in fear that the threat will be carried out,
if the threat is a threat described in:
 - (A) subsection (c)(1) through (c)(5); or
 - (B) subsection (c)(7) through (c)(8);

...
commits intimidation, a Class A misdemeanor.

(b) However, the offense is a:

...
(2) Level 5 felony if:

- ...
(C) the threat is:
 - (i) to commit terrorism; or
 - (ii) made in furtherance of an act of terrorism.

Ind. Code Sec. 35-31.5-2-329 provides:

"Terrorism" means the unlawful use of force or violence or the unlawful threat of force or violence to:

- (1) intimidate or coerce:
 - (A) a government; or
 - (B) all or part of the civilian population; or

(2) affect the conduct of a government by use of a weapon of mass destruction, assassination, or kidnapping.

The State concedes the Court of Appeals applied the proper legal standards. (Petition at 12). The State agrees that the canons of statutory construction require the Court to “give effect to every word and ‘eschew those [interpretations] that treat some words as duplicative or meaningless.’” *Cutchin v. Beard*, 171 N.E.3d 991, 997 (Ind. 2021) (alteration in original) (quoting *Estabrook v. Mazak Corp.*, 140 N.E.3d 830, 836 (Ind. 2020)). Likewise, we “assume that the language employed in a statute was used intentionally.” *Pabey v. Pastrick*, 816 N.E.2d 1138, 1148 (Ind. 2004) (citing *Burks v. Bolerjack*, 427 N.E.2d 887, 890 (Ind. 1981)).” (slip op. at 12-13, Petition at 12-13). The State also agreed that the Court is to “give the undefined words and phrases used “their plain, or ordinary and usual,” meaning. I.C. § 1-1-4-1(1); *see also Morales v. Rust*, 228 N.E.3d 1025, 1054 (Ind. 2024) (quoting *ESPN, Inc. v. Univ. of Notre Dame Police Dept.*, 62 N.E.3d 1192, 1195 (Ind. 2016)) (“When interpreting words in a statute, this Court’s ‘first task’ is to assign words their ‘plain meaning’”), *reh’g denied* (Apr. 22, 2024), *cert. denied*, 145 S. Ct. 177 (2024). “The meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases.” *ESPN*, 62 N.E.3d at 1198 (quoting *600 Land, Inc. v. Metro. Bd. of Zoning Appeals of Marion Cnty.*, 889 N.E.2d 305, 311 (Ind. 2008)).” (slip op. at 13, Petition at 13).

However, what is noticeably absent from the State’s Petition and argument regarding statutory construction is the Rule of Lenity. The Court of Appeals also properly noted that in criminal cases reviewing Court’s apply the rule of lenity, “which “requires us to construe a penal statute strictly against the State while resolving any ambiguities in favor of the defendant.”” *Fix v. State*, 186 N.E.3d 1134, 1139 (Ind. 2022) (citing *Meredith v. State*, 906 N.E.2d 867, 872 (Ind. 2009)).” (slip op. at 13). It is only when “the language in a statute is ambiguous or uncertain, [the

Court] may look not only to the language, but also to the nature and subject matter of the act and the object to be accomplished thereby in ascertaining the legislative intent.” *Alvey v. State*, 10 N.E.3d 1031, 1033 (Ind. Ct. App.), aff'd on reh'g, 15 N.E.3d 72 (Ind. Ct. App. 2014). Thus, when the language of the statute is ambiguous, the Court may look to the other factors in determining legislative intent, and in a criminal matter the resolution of that ambiguity must be strictly construed in favor of the defendant and against the State.

The State's Petition is replete with admissions that the language of Ind. Code Sec. 35-31.5-2-329 is ambiguous. The State argues that the “context of the intimidation statute” it was unlikely the legislature intended government to refer to the actual governing entities such as the State of Indiana or the United States. (Petition at 15-16). The State further argues the statute should be interpreted in accordance with the statute's underlying and policies and goals.” (Petition at 16). The State argues the result is “contrary to the underlying policies of the terrorism statute and creates ‘absurdity, hardship, or injustice’ which does not ‘favor public convenience.’” (Petition at 17). The State argues the Court should have interpreted the statute with a consciousness of the “broader implications because this definition of ‘terrorism’ is not limited to the intimidation statute.” (Petition at 17).

Each of the forgoing arguments raised by the State are premised on the fact that the language of the statute is ambiguous. Our General Assembly used the word “government.” The State explicitly argues the term “government” should not be read “to mean something other than ‘governmental entity’” (Petition at 16). Yet, the General Assembly, having the definition of “governmental entity” in hand, did not use it. Thus, an ambiguity in the language of the statute is apparent, opening the door for the investigation into legislative intent. What is missing from the

State's analysis is that in this context, a criminal prosecution, that ambiguity should be resolved strictly in favor of the defendant and against the State.

Moreover, the State's argument proves too much. The State argues a "government only exists in the world through its constituent entities and the people who act on their behalf – its agencies, officers, courts, and employees." (Petition at 17). The persons whom the State identifies as part of this protected group are "three individuals who worked for DCS and played a primary role in the outcome of his CHINS: the case manager, the service provider, and his appointed counsel." (Petition at 17). The natural conclusion of the State's argument is that the terrorism statute should apply to any threat to any agent, officer, courts or employee of any government or governmental entity.

On the face of the intimidation statute, it is clear that distinguished between threats in furtherance of terrorism and threats against certain agents, officers, courts or employees of any government or governmental entity. Ind. Code Sec. 35-45-2-1(b)(2) not only makes threats in further of terrorism a level 5 felony, but it also makes a threat a level 5 felony if:

- (B) the subject of the threat or the person to whom the threat is communicated:
 - (i) is a judicial officer or bailiff of any court; or
 - (ii) is a prosecuting attorney or a deputy prosecuting attorney;
- And the threat relates to the persons status as a judicial officer, bailiff, prosecuting attorney or deputy prosecuting attorney, or is made in connection with the official duties of the judicial officer, bailiff, prosecuting attorney or deputy prosecuting attorney...

The definition the State would have the Court adopt under Ind. Code Sec. 35-42-2-1(b)(2)(C) and Ind. Code Sec. 35-31.5-2-329, any "agency, officers, courts, and employees" of a government or governmental entity, would completely swallow up the category defined in Ind. Code Sec. 35-42-2-1(b)(2)(B), judicial officers, bailiffs, prosecuting attorneys, and deputy prosecuting attorneys, and render that section meaningless.

Additionally, the definition the State would have the Court adopt under Ind. Code Sec. (b)(2)(C) would cover an incredible number of individuals if every agent and employee of a government or governmental entity is included. By the State's definition a person who intimidates a municipal sanitary worker for throwing their trash can in the road commits a level 5 act of terrorism.

What's worse, the definition advocated by the State would include every government or governmental entity employee regardless of whether they were involved in their official capacity. Ind. Code Sec. 35-31.5-2-329 defines terrorism as any unlawful threat of force or violence to intimidate a government. It is not limited to threats against a government for official conduct or while in the course of legal duty. Thus, by the State's definition one person unlawfully threatening to beat up another person in bar goes from a class A misdemeanor to a level 5 felony if it turns out that the person threatened is the janitor for the County Health Department.

Nor does is the State's definition limited only to government and governmental entity employees, it also includes their agents. Indeed, the State explicitly includes in its definition the counselor who the DCS referred Gerou to and the attorney who was appointed to represent Gerou. Any person who conducts any action on behalf of or at the direction of a government or governmental entity is an "agent" of the government in some form or another. Even confidential informants who assist law enforcement are considered "agents." As stated above, the terrorism statute does not limit acts of terrorism to acts taken in response to official action or legal duties. By the State's definition any act of intimidation against an engineer who has a contract to build a shed for the City, or a company who does data processing for the State Board of Accounts, or the

contractor who supplies toilet paper to the State House, is an act of terrorism, even if that person is not involved in their official duties.

The State complains that the Court of Appeals decision leads to absurd consequences, but it is the definition advocated by the State that leads immediately to such overbreadth that it makes other parts of the same statute meaningless and substantially increase the legal penalty for conduct that has nothing to do with the intent of the terrorism statute. The terrorism statute makes it an act of terror to affect the government by use of weapons of mass destruction, assassination, or kidnapping. The terrorism statute makes it an act of terrorism to intimidate or coerce the civilian population. It defies logic to believe that the General Assembly decided to include as a third category any minimal threat of violence against any employee or agent of the government or governmental entity even if entirely unrelated to their role.

Our General Assembly has made its ability to define abundantly clear. Ind. Code Sec. 35-31.5-2-329 defines "terrorism." In the exact same chapter Ind. Code Sec. 35-31.5-2-144(a) defines "governmental entity." No where in the definitions chapter does our General Assembly provide a definition for "government." Had the General Assembly intended the terrorism statute to cover all "governmental entities" then it would have included that in the definition of terrorism. The State would have the Court create a definition for "government" that is even broader than the supplied definition of "governmental entities." So broad that it would swallow up other parts of the intimidation statute and grow the terrorism statute well beyond the scope outlined by its other sections. In short, the terrorism statute contains an ambiguity which must be resolved in favor of Gerou and against the State. This Court should reject the State's invitation to create a definition that makes minimal threats against the least agent of a government or governmental entity a level 5 act of terrorism.

CONCLUSION

For each of the foregoing reasons, the Appellant, Mykal Gerou, respectfully requests the Court deny the State's Petition for Transfer.

Respectfully submitted,

West Sixth Law, LLP

s/ Patrick Magrath

R. Patrick Magrath 26467-53

Attorney for Appellant

One West Sixth Street

Madison, Indiana 47250

(812) 273-5230 Fax (812) 273-6844

WORD COUNT CERTIFICATE

I verify the foregoing Brief in Response contains no more than 4,200 words as determined by reliance on the word count feature of Microsoft Word.

s/ Patrick Magrath

R. Patrick Magrath

CERTIFICATE OF SERVICE

I, R. Patrick Magrath, hereby certify that on the 10th day of August 2026, I served a copy of o Appellant Mykal Gerou's Response to Petition for Transfer on the following by electronic filing:

I further certify that on the 14th day of August, 2026, I served a copy of the foregoing on the following by electronic filing:

Kelly A. Loy
Section Chief, Criminal Appeals
Attorney General of Indiana
IGCS, 5th Floor
302 West Washington Street
Indianapolis, Indiana 46204-2794

s/ Patrick Magrath

R. Patrick Magrath