IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
-vs-	)	12 CR 10985
	)	
BRIAN CHURCH	)	
JARED CHASE	)	
BRENT BETTERLY	)	

MEMORANDUM OF LAW IN SUPPORT OF
JOINT MOTION TO DISMISS THE CONSTITUTIONALLY
VAGUE TERRORISM CHARGES IN THE INDICTMENT

The defendants, BRIAN CHURCH, JARED CHASE and BRENT BETTERLY were arrested on Wednesday, May 16, 2012, at 1013 W. 32nd St, in Chicago, Illinois. However, they were disappeared for over three days and not brought to court until Saturday, May 19, 2012; the day before a massive non-violent demonstration was scheduled to protest a meeting of NATO officials in the City of Chicago.

At their hearing on May 19, 2012 the prosecution produced a three-page document entitled "PEOPLE'S FACTUAL PROFFER IN SUPPORT OF SETTING BOND," which it distributed to the summoned media, demonizing the defendants as "terrorists," "self-proclaimed anarchists," and "members of the 'Black Bloc' group," and detailing a series of alleged intended acts, none of which ever occurred. (*See* Exhibit A.) The prosecution asked for a bond of five million dollars cash, and the Court, on its own motion, reduced the bond to 10% of $1,500,000.00.

The defendants were denied a preliminary hearing, and on June 13, 2012, a Cook County grand jury returned an eleven-count indictment. Four of the counts, Counts 1, 2, 3 and 6, rely upon a statutory definition of "terrorism." *See* 720 ILCS 5/29D-14.9(A) and Count 1, charging

"material support for terrorism," also relies on the definition of "terrorist act,' contained in 720 ICLS 5/29D-10(L).

These "terrorism" definitions are contained in a statute hastily passed after, and no doubt in reaction to, the tragic events of September 11, 2001, which for the first time defined "terrorism" and "terrorist act" under Illinois law.[1] The defendants believe and the State has proclaimed that this case represents the first time charges have been brought in Illinois based on the material support for terrorism statute.

In the legislative history prior to the passage of the law, Representative John Fritchey noted his concern that "an act that may otherwise be considered an act of vandalism or criminal damage to property [may be] intentionally or unintentionally elevate[d] ... to ... terrorism." IL H.R. Tran., 2001 Reg. Sess. No. 77 (Nov. 29, 2001). (*See* Exhibit B.) Moreover, Representative Fritchey went on to point out that "if an act is truly a terrorist act, the federal authorities are going to be stepping in to prosecute that in response to a national threat." *Id.*

In the case at bar, although involved in the investigation from its very inception, as Chicago Police Department and State's Attorney Anita Alvarez acknowledged at a May 19,

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[1] The comments by Representative Ron Stephens during the floor debates regarding the terrorism statute evidence the haste, emotion, and the reluctance to discuss practical consequences of application that undergirded the discussion of the bill:

> [E]very freedom-loving person in the world was attacked on September 11th and we shouldn't send a mixed message. We should send a message that is strong and solid and dedicated to freedom and free thinking everywhere in the world, from New York to Afghanistan, from Troy to Chicago in every courthouse, no one will be put to death inappropriately because of the actions of this General Assembly. You know that. Don't argue that. Don't insult the dignity of the people who have paid the ultimate price and haven't even been able to bury their dead. For God sake, let's get on with this. We'll sort out the differences later, but we have to send a message now, Mr. Speaker and I hope someone would move the previous question.

IL H.R. Tran., 2001 Reg. Sess. No. 77 (Nov. 29, 2001).

2012, press conference, the federal authorities have declined to bring their own "terrorism" prosecution.[2]

The terrorism charges contained in the indictment are pled in the language of the statute without providing any specific allegations as to what the defendants are accused of doing. Count One charges the defendants with providing "material support for terrorism," which alleges that they provided material support, knowing that such support would be used for "committing terrorism as defined in 720 ILCS 5/29D-14.9(A)." Count Two charges the defendants with "conspiracy to commit terrorism in violation of 720 ILCS 5/29D-14.9(A)." Counts Three and Six charge the defendants with possession of an incendiary device, with the intent "to use such device to commit the offense of terrorism." Each one of these counts relies on the statutory definition of "terrorism" as an essential element of the charges.

The law defines the offense of "terrorism" as the following: "A person commits the offense of terrorism, when with the intent to intimidate or coerce a significant portion of a civilian population; he or she knowingly commits a terrorist act."[3] In a separate statutory section, "terrorist act" or "act of terrorism" are defined to include nine categories of acts, which are notably not specified to be unlawful or illegal under State or Federal law.

The defendants assert that the statutory definitions of terrorism contained in the Illinois statute, on its face, and as applied to the factual allegations against the defendants, are impermissibly vague and as such violate the U.S. and Illinois constitutional protections guaranteeing Due Process to those accused of criminal offenses.

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[2] At a press conference immediately following the defendants' first court appearance, States Attorney Alvarez stated that the state authorities "were in contact with our federal partners from the get-go," and Police Chief McCarthy stated that they were "working hand-in-glove with the FBI, the Secret Service and the Department of Homeland Security." *See* May 19, 2012, press conference, video of which is available at http://www.youtube.com/watch?v=gzPPYJ3xKI4&feature=related.

[3] The indictment charges that the defendants committed a terrorist act under 720 ILCS 5/29 D-10(I)(I).

Specifically, the defendants claim that the use of the terms intent to "intimidate and coerce" without requiring the use of force or violence in its definition and without excluding First Amendment activities or civil disobedience, and allowing for a lawful act to serve as a predicate for an "act of terrorism," impermissibly allows for the criminalization of constitutionally protected conduct. The vague statutory definitions also allow for arguably minor law violations, not reasonably related to the purported purpose of the statute, to be charged as terrorism. *See People v. Madrigal*, 241 Ill. 2d 463, 469 (2011).

In addition, the terms "significant portion" and "civilian population," particularly in a case which impacts First Amendment protected conduct, are not readily definable, and lack ordinary and popularly understood meanings. Thus, the defendants assert that the statutory definition of "terrorism," is so vague and standard-less, and sweeps up so much innocent and protected conduct, that, in fact, the Illinois legislature "has impermissibly delegated the legislative power to 'defin[e] crimes and fix [] penalties,'" to the police and prosecutors. *United States v. Jones*, 689 F.3d 696, 703 (7th Cir. 2012) (quoting *United States v. Evans,* 333 U.S. 483, 486 (1948)).

I. THE U.S. AND ILLINOIS CONSTITUTIONS GUARANTEE THE DUE PROCESS OF LAW TO AN ACCUSED AND REQUIRE THAT A CRIMINAL STATUTE PROVIDE DEFINITE WARNING OF PROSCRIBED CONDUCT AND DEFINITE STANDARDS FOR LAW ENFORCEMENT

The Illinois Supreme Court has repeatedly found that "[a] cornerstone of our jurisprudence is that no person shall be deprived of life, liberty or property without due process of law." *People v. Maness*, 191 Ill. 2d. 478,483 (2000); *see also*, *People v. Jihan*, 127 Ill. 2d 379,385 (1989); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (holding that "[i]t is a

basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); U.S. Const., amends. V, XVI; Ill. Const. of 1970, art I, sec. 2.

These state and federal constitutional protections have been held to require that the proscriptions of a criminal statute be clearly defined and provide "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jihan*, 191 Ill. 2d at 385 (quoting *People v. Haywood*, 118 Ill. 2d 263, 269 (1987)). A law is unconstitutionally vague when it lacks "terms susceptible of objective measurement." *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604 (1967).

"Due process requires that a statute give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108; *see also People v. Haywood*, 118 Ill. 2d 263, 269 (1987). Due Process also requires that a penal statue define the criminal offense with sufficient definiteness that ordinary people can understand and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Grayned*, 408 U.S. at 108-109; *Skilling v. United States*, __U.S.__, 130 S. Ct. 2896, 2927-28 (2010). In other words, definiteness is required "to avoid arbitrary and discriminatory enforcement and application by police officers, judges and juries." *Haywood*, 118 Ill. 2d at 269.

Further, the Constitution tolerates a lesser degree of vagueness in enactments "with criminal rather than civil penalties because the consequences of imprecision" are more severe. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, Inc. 455 U.S. 489, 498-99 (1982); *Winters v. New York*, 333 U.S. 507, 515 (1948); *People v. Gurell*, 98 Ill. 2d 194, 207 (1983) ("A criminal statute violates due process when it does not impart sufficient notice as to what conduct is forbidden.")

A. THE VOID FOR VAGUENESS DOCTRINE RESTS ON THE BASIC PRINCIPLE THAT A LAW IS UNCONSTITUTIONAL IF ITS PROHIBITIONS ARE NOT CLEARLY DEFINED

In *Grayned,* the United States Supreme Court clearly set out the critical Due Process rational underlying the requirement that laws must be clearly defined:

> Vague laws offend several important values. First, because we assume that man is free to steer between law and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

408 U.S at 108-109; *see also, Kolender*, 461 U.S. at 357; *Skilling,* 130 S. Ct. at 2927-28; *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

> What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved: but rather the indeterminacy of precisely what the fact is. Thus, we struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"- wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.
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> *United States v. Williams*, 553 U.S. 285, 306 (1985).

B. VAGUE LAWS ARE ALSO VOID AS THEY ALLOW FOR ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF SUCH LAWS BY POLICE, PROSECUTORS AND JURIES.

The United States Supreme Court also delineated a second important value in prohibiting vague laws in *Graynard,* stating:

> Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

408 U.S. at 109; *see also Kolender*, 461 U.S. at 357-58 (1983); *Skilling,* 130 S. Ct. at 2927-28; *Morales*, 527 U.S. at 56; *Bell v. Keating*, 697 F.3d 445, 455 (7th Cir 2012).

The Illinois Supreme Court has also recognized that vague criminal statutes allow for arbitrary and discriminatory law enforcement. When "the legislature fails to provide minimal guidelines to govern law enforcement, a criminal law 'may permit a standard-less sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *People v. Maness*, 191 Ill. 2d 478, 484 (2000) (citing *Kolender,* 461 U.S. at 358).

In fact, it is this prong of the void for vagueness doctrine that has been recognized as the most important. "[P]erhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimum guidelines to govern law enforcement." *Smith v. Goguen,* 415 U.S. 566, 574 (1974). In *Goguen*, the Supreme Court warned that a law fails to meet the requirements of Due Process if the statutory language is a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections," and further, that "[l]egislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Id.* at 575. That is exactly what the Illinois legislature has done in drafting an act proscribing "terrorism" that fails to provide sufficiently clear standards to law enforcement, prosecutors, and ultimately the trier of the facts, as to what behavior is illegal.

C. THE VOID FOR VAGUENESS DOCTRINE ALSO PROTECTS AGAINST CONDUCT WHICH POTENTIALLY IMPACTS AND CHILLS FIRST AMENDMENT PROTECTED ACTIVITY

The Supreme Court in *Graynard* recognized yet a third value protected by the void for vagueness principle:

> Third, but related, when a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.
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> 408 U.S. at 109. (internal citations omitted).

A vague law which potentially impacts the First Amendment may create a chilling effect on the conduct of those engaged in protests, demonstrations, peaceful occupations, labor strikes or boycotts, and thus unduly interfere with those who may wish to exercise their fundamental First Amendment constitutional rights. When a law is so vague that is fails to provide sufficient notice as to what conduct is prohibited, those who wish to engage in protected First Amendment activities may be deterred for fear that they will run afoul of the law. Similarly, a vague law can be improperly used by law enforcement to arrest and prosecute activists involved in protected conduct

II. THE ILLINOIS STATUTORY DEFINITION OF TERRORISM ON ITS FACE VIOLATES THE UNDERLYING DUE PROCESS PRINCIPLES OF DEFINITENESS, ALLOWS FOR ARBITRARY LAW ENFORCMENT, AND CHILLS FIRST AMENDMENTACTIVITIES

The Illinois statutory definition of terrorism in using the terms "intimidation and coercion" without definition, without specifically excluding protected activity and civil disobedience, and without requiring that such terms include acts of force or violence is impermissibly vague and threatens First Amendment protected conduct.

In addition, the terms "significant portion" and "civilian population" are two terms which are standardless and do not provide sufficiently definite warning as to the proscribed conduct. Neither phrase has "ordinary and popularly understood meanings." *People v. Schwartz*, 64 Ill. 2d 275, 280 (1976); *Farrand Coal Co. v. Halpin*, 10 Ill. 2d 507, 510 (1957).

As the U.S. Supreme Court stated, in invalidating the Illinois gang loitering statute on its face, "[i]t is established that a law fails to meet the requirements of the Due process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . ." Morales, 527 U.S. at 56, citing *Giaccio v. Pennsylvania*, 382 U.S. 399, 404-403 (1966). Here,

the statute fails to provide the kind of notice that would enable ordinary people to understand what conduct is prohibited.

Secondly, the statute's vagueness allows for its arbitrary enforcement, and impermissibly allows for the delegation of basic policy matters designated for the legislature to be placed in the hands of policemen, prosecutors, judges and juries.

A. THE CHALLENGED STATUTE IMPLICATES FIRST AMENDMENT CONDUCT AND THUS ENTITLES THE DEFENDANTS TO MAKE A FACIAL CHALLENGE TO THE STATUTE.

Illinois law allows a facial challenge to a statute that impacts First Amendment activity. *See, e.g., People v. Einoder*, 209 Ill. 2d 443, 448 (2004); *People v. Izzo*, 195 Ill. 2d 109, 112 (2001). Here, the statute at issue impacts First Amendment rights, and thus the defendants are entitled to make a challenge the statute on its face, as well as applied. The statute's vague undefined terms "intimidate and coerce," which fail to include an element of force or violence and the phrase a "significant portion of the civilian population," allow for the statute to be potentially used against, and inhibit those engaged in labor strikes, boycotts, peaceful occupations, sit-ins, and other forms of First Amendment political protests. Further, by failing to include in the definition of "terrorist act," the requirement of illegal conduct in violation of State or federal law, the potential that lawful acts can be designated as terrorism further threatens the First Amendment.

As the Supreme Court stated in *Grayned*:

> [W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Grayned, 408 U.S. at 109. (internal citations omitted).

The Illinois legislature recognized this potential for First Amendment impact in its legislative findings:

> An investigation may not be initiated or continued for activities protected by the First Amendment to the United States Constitution, including expressions of support or the provision of financial support for the nonviolent political, religious, philosophical, or ideological goals or beliefs of any person or group.
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> 720 ILCS 5/29-D-5.

It failed however, to include any protection against First Amendment impact in enacting the statutory definitions of terrorism. Nonetheless, it is evident that the Illinois legislature acknowledged that the enforcement of the terrorism statute could potentially impact First Amendment activity. Defendants are accordingly entitled to make a facial challenge to the statute. *See People v. Madrigal* 241 Ill. 2d 463, 478 (2011) (Citing *Staples v. United States*, 511 U.S. 600, 610 (1994), "Criminal Statues must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.").

B. THE STATUTE IS UNCONSTITUTIONALY VAGUE BECAUSE IT FAILS TO INCLUDE A SPECIFIC ELEMENT OF FORCE OR VIOLENCE IN DEFINING THE TERMS "COERCE" AND "INTIMIDATE," OR TO EXCLUDE FIRST AMENDMENT PROTECED ACTIVITY

While the Illinois law seeks to proscribe acts of terrorism that are intended to coerce or intimidate a significant portion of the civilian population, its failure to define the terms "coerce" or "intimidate," require an element of force or violence, or exclude from its scope First Amendment conduct or acts of civil disobedience, enables the statute to potentially sweep up innocent First Amendment conduct involving labor strikes and pickets, peaceful occupations, sit-ins, boycotts and other political demonstrations protected by the First Amendment.

It also potentially criminalizes as "terrorism" criminal damage to property, criminal trespass, disorderly conduct or other minor charges "not reasonably related" to the statutes stated purpose. *Madrigal*, 241 Ill. 2d at 469. "[T]he concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act." *People v. Morales*, No. 08439, 2012 WL 6115622 (N.Y. Ct. App. Dec. 11, 2012). (Holding that an attack by a gang on a rival gang did not constitute terrorism under New York statute).

In contrast to the Illinois law, the Oklahoma terrorism statute for example, requires an "act of violence "or "conduct intended to incite violence' "in order to coerce a civilian population or government into granting illegal political or economic demands, providing both the element of force and violence and specificity avoiding First Amendment activity.

> [A]n act of violence resulting in damage to property or personal injury perpetrated to coerce a civilian population or government into granting illegal political or economic demands; or conduct intended to incite violence in order to create apprehension of bodily injury or damage to property in order to coerce a civilian population or government into granting illegal political or economic demands.
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> Okla. Stat. tit. 21, § 1268.1 (8).

The clear potential that terrorism statutes may impact on First Amendment related activities has caused other states to ensure within the language of the statute that protected activity not be part of the statute's reach. For example, the Iowa statue provides that the "terms 'intimidate, 'coerce,' 'intimidation,' and 'coercion,' as used in this definition, are not to be construed to prohibit picketing, public demonstrations, and similar forms of expressing ideas or views regarding legitimate matters of public interest protected by the United Sates and Iowa constitutions." Iowa Code § 708A.1(3). The Oklahoma statute specifies that "[p]eaceful picketing or boycotts and other nonviolent action shall not be considered terrorism." Okla. Stat.

tit. 21, § 1268.1 (8), and the Nevada statute also states that, "coercion" "does not include an act of civil disobedience." Nev. Rev. Stat. § 202.4415 (2).

An examination of the federal domestic terrorism statute, illustrates a significant difference which underscores the constitutional deficiency in the Illinois statute. The federal definition of domestic terrorism under 18 USC § 2331 (5)(A)-(B) states, in relevant part, that "domestic terrorism" means activities that "involve acts dangerous to human life that are a violation of criminal laws of the United States or any state" and "appear to be intended" "to intimidate or coerce a civilian population." The federal statute specifies the necessary element in the definition of terrorism – "acts dangerous to human life that are a violation of criminal laws of the United States or any state.," - and then adds intent to intent to "intimidate or coerce." *Id.; see also*, N.Y. Penal Law § 490.25 Crime of Terrorism: ("A person is guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she commits a specified offense.")

In stark contrast to the Federal statute or the New York statute, the Illinois statute begins with the intent to intimidate or coerce, without requiring the use of force or violence, or acts dangerous to human life as an element to the definition. Nor does the definition of "terrorist act" or "act of terrorism" specify that the underlying act be in "violation of criminal laws of the United States or any state" or a "specified offense" as provided in the Federal and New York statutes.

The use of the terms coerce or intimidate, without any element of force or violence or language excluding First Amendment or other innocent or minor criminal conduct renders the Illinois statute impermissibly open-ended, with an unconstitutional sweep. The terms "coerce"

and "intimidate" allow for law enforcement to apply the terrorism definition to First Amendment protected conduct, as well as other conduct that clearly does not fall under any accepted understanding of terrorism.

C. THE STATUTORY LANGUAGE A "SIGNIFICANT PORTION OF THE CIVILIAN POPULATION" IS ALSO UNCONSTITUTIONALLY VAGUE ON ITS FACE

The statutory language which requires intent to coerce or intimidate "a significant portion of the civilian population" is also unconstitutionally vague on its face. These terms provide no specific standards for these undefined concepts, and thus provide an insufficiently definite warning when measured by a common understanding. It also allows law enforcement or a trier of fact to apply their own arbitrary idea of what constitutes a significant portion of the civilian population.

In using these non-defined terms the statute allows the law making power of the legislature to define crimes and fix penalties to be impermissibly delegated to the executive, police, prosecutors, and ultimately to the trier of fact. *See, Evans,* 333 U.S. at 486. What is significant portion of the civilian population to one person can be completely different to another.

In *City of Knoxville v. Entm't Res,* LLC, 166 S.W.3d 650 (Tenn. 2005), the Tennessee Supreme Court struck down an ordinance which applied to a bookstore if a "substantial or significant portion" of its stock and trade consisted of adult books. The court found that the phrase "substantial and significant portion of its stock and trade" was impermissibly vague:

> The ordinance gives no objective guidance to businesses regulated by the ordinance or officials charged with enforcement. 'Accordingly, it neither gives notice to ordinary people . . . nor sufficient guidance to law enforcement officials to prevent arbitrary law enforcement.' This type of vague, 'standardless' drafting is precisely what the Due

> Process clause prohibits, because it 'allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.' *S*

Id. at 656-657, citing *Goguen, 415 U.S. at 575; see also, 105 Floyd Rd., Inc. v. Crisp Cnty,* 613 S.E. 2d 632, 636 (Ga. 2005) (Holding "substantial business purpose" impermissibly vague.)

The term "significant portion of the civilian population," creates criminal liability based on "wholly subjective judgments, without statutory definitions, narrowing context or settled legal meanings." *Williams*, 553 U.S. at 306. How can someone be on notice as to what conduct violates a significant portion of the civilian population; and where are the standards in this language that limit the arbitrary enforcement of this terrorism law? At what at point does the intent to intimidate or coerce change from an insignificant portion of the population to a "significant" portion? What may be significant to one person may be insignificant to another. *People v. Morales*, 86 A.DT. 3d 147, 157 (1st Dep't 2011), aff'd in part, rev'd in part ("[T]he term 'to intimidate or coerce a civilian population,' . . . implies an intention to create a pervasively terrorizing effect on people living in a given area, directed either to all residents of the area or to all residents of the area who are members of some broadly defined class.").

Further, what is meant by a "portion" of the population, how is that concept applied? How does one interpret the term "civilian," what sectors are included or excluded in that term? These are all vague terms; "significant," "portion "civilian," 'population," and in the context of prosecuting someone for terrorism, al violate the values which underpin the void for vagueness doctrine.

In fact, several dictionary definitions indicate the natural meaning of "population" would be equivalent to at least a city or state. *See e.g., Webster's Ninth New Collegiate Dictionary* (9th ed. 1991) (defining population as "the

whole number of people or inhabitants in a country or region"). How that term is defined would be critical in deciding whether someone fell under the statutory terrorism statute, and the lack of definition allows law enforcement to arbitrarily apply such a statute.

In *City of Chicago v. Youkhana*, 277 Ill. App. 3d 101, 108 (1st Dist. 1995), the Illinois Appellate Court struck down a gang loitering statute as unconstitutional because it did not provide sufficient standards for law enforcement. There, the court noted that:

> [T]he Chicago police department is not a judicial agency and has no power to make a judicial determination of the meaning of an ordinance. . . . Although the department's general order provides standards for determining who is a gang member, the order does nothing to limit the complete discretion a police officer has in determining whether a person has "no apparent purpose" for remaining in one place. The ordinance and general order are also completely silent as to exactly how fast and how far the persons have to disperse in order to avoid arrest.

Id. at 112.

In *People v. McPherson*, 65 Ill. App 3d 772, 775 (4th Dist. 1978) the Illinois Appellate Court struck down a statute as vague and in violation of due process which made it a crime to have "small quantities" of drugs. *See also*, *City of Peoria v. McMorrow*, 87 Ill. App. 3d 524, 525 (3rd Dist. 1980) (Statute struck down as vague which prohibited the "visiting" of a gambling house).

The Illinois statute leaves that question of the meaning or purpose of the intent to intimidate or coerce a "significant portion" completely indefinite and therefore impermissibly vague. In addition, the phrase "civilian population" is also vague and not readily definable. While it is clear that the military and police are not part of the civilian population, are other state and government employees, *i.e.*, fire fighters or emergency medical technicians, civilian or not?

III. THE DEFENDANTS ARE ENTITLED TO MAKE A FACIAL VAGUENESS CHALLENGE TO THE TERRORISM STATUTE REGARDLESS OF WHETHER THE STATUTE IMPLICATES THE FIRST AMENDMENT RIGHTS

Although there is language in Illinois decisions that a facial vagueness challenge is only available if the statute implicates First Amendment rights, *see, e.g.*, *People v. Einoder*, 209 Ill. 2d 443, 448 (2004); *People v. Izzo*, 195 Ill. 2d 109, 112 (2001), the Illinois Supreme Court in *Madrigal*, 241 Ill. 2d at 479, upheld a facial challenge to the identity theft statute without finding that it impacted the First Amendment. In *Madrigal*, the court stated that, "this Court and courts of other jurisdictions have held that criminal statutes that potentially punish innocent conduct violate due process principles because they are not reasonably related to achieve their purposes." *Id.* at 469 (citing *Wright,* 194 Ill. 2d at 25.). Here, the vagueness of the terrorism statute arguable sweeps up, and criminalizes as "terrorism" innocent conduct, as well as relatively minor criminal acts, such as criminal damage to property, trespassing and disorderly conduct which are in no way reasonably related to achieve the statute's purpose.

In addition, the United States Supreme Court has also decided due-process facial vagueness claims without regard to the specific facts of the particular case. *See U.S. v. Jones*, 689, F.3d 696, 703 (7th Cir. 2012)("[t]he Supreme Court regularly decides due process vagueness claims without regard to the facts of the case); *see e.g. Morales*, 527 U.S. at 55-64; *Kolender*, 461 U.S. at 357-62; *Coates v City of Cincinnati*, 402 U.S. 611, 614 (1971); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81,89-91 (1921).

In a recent opinion by the U.S. Court of Appeals for the Seventh Circuit the Court, in interpreting this line of the U.S. Supreme Court cases which decide facial challenges, without regard to the specific facts of the case found that, "[t]he key point in this line of cases seems to be that a criminal statute that 'simply has no core' and lacks "any ascertainable standard for

inclusion and exclusion' [and] is impermissibly vague regardless of the application facts in the case." *Jones*, 689 F.3d at 703. (citing *Gougen,* 415 U.S. at 578.).

The *Jones* Court went on to state that, "[s]uch a statute is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.* at 703. (citing Coates 402 U.S. at 614).

The statute at issue here, which seeks to criminalize intent to coerce or intimidate a significant portion of the civilian population as "terrorism" similarly provides no ascertainable standard of conduct and allows law enforcement or a trier of fact to apply their own arbitrary idea to the terms "coerce" or "intimidate" and what constitutes a "significant portion of the civilian population."

The statute here allows the law making power of the legislature to define crimes and fix penalties to be impermissibly delegated to the executive and to the trier of fact. *See Evans,* 333 U.S. at 486. Seen in this context, the defendants challenge does not depend on the specific facts of their case, but rather on the complete lack of standards or definition of the terms coerce, intimidate, and significant portion of the civilian population, which allows for *ad hoc* and arbitrary determinations other than by the legislature empowered to make the laws and fix the penalties. The definition fails to provide a person, with sufficient specificity and notice to allow one of ordinary intelligence to know what conduct is prohibited. Further, the vague terms contained in the definition of terrorism allows for the arbitrary enforcement by police, prosecutors or a trier of fact.

The term "significant portion of the civilian population," creates criminal liability based on "wholly subjective judgments, without statutory definitions, narrowing context or settled legal

meanings." *Williams*, 553 U.S. at 306. How is one on notice as to what conduct is violates this definition of terrorism; and where are the standards in this language that limit the arbitrary enforcement of this terrorism law?

Particularly, in a case in which defendants are charged with the most serious and prejudicial of offenses–"terrorism"– with a penalty of up to 40 years– law enforcement or one even a juror is susceptible to conclude that the intent to intimidate or coerce even one person constitutes a "significant portion" of the civilian population. The potential for the arbitrary enforcement of such an indefinite standard is overwhelming.

IV. THE STATUTE IS ALSO VOID FOR VAGUENESS AS APPLIED TO THE ALLEGED CONDUCT OF THE DEFENDANTS

In addition to the claim that the statute is unconstitutionally vague on its face, the statute is also impermissibly vague as applied to the alleged acts of the defendants. Without requiring an element of force or violence to qualify the words "coerce" and "intimidate," and without specificity to the meaning of a "significant portion of the "civilian population," the defendants were never properly put on notice that their conduct in this case would violate the Illinois terrorism statute. Further, the vagueness of the statutory language, allowed the police and prosecution in this case to arbitrarily impose the terrorism charges for impermissible political purposes.

The indictment itself, which impermissibly alleges the terrorism counts solely in the language of the statute, fails to apprise the defendants of the acts for which they have been indicted and will be the subject of a later motion to dismiss, for these serious pleading defects. Furthermore, the allegations in the indictment are not proven facts and therefore do not provide a sufficient basis for this Court to make an "as applied" determination as the constitutionality of the statute.

However, even based on the discovery provided to the defense, which has also not been factually established as true, the statutory elements of "intent to coerce or intimidate a significant portion of the civilian population" is unconstitutionally vague as applied to the alleged conversations and activities of the defendants. Without specific definiteness, including a force or violence element in the definition of intent to coerce and intimidate, and a common understanding of the phrase "significant portion of the civilian population," the application of the statute to the defendants is highly problematic.

Even accepting the State's unproven discovery as true, the intent of the defendants was anything but clear, particularly in light of the statutory requirements that such intent must be to "coerce or intimidate a significant portion of the civilian population." The application of these statutory elements to the facts of this case is particularly vague and lacking in definiteness when most of the State's evidence is based on the defendants' idle chatter, laced with bravado, and abetted, encourages and egged on by the under-cover police agents.

Even the alleged creation of the four homemade beer bottles of gasoline, immediately prior to the defendants' arrests was instigated and facilitated by police agents. Beyond that, the mere creation or possession of four beer bottles of gasoline must still satisfy a specific, definite meaning of an "intent to coerce or intimidate a significant portion of the civilian population." Without a an accepted definition of the statutory terms, including an element of force and violence, and the requirement that the act violates State or federal law, the application of the statute to the defendant's alleged conduct lacks sufficient notice of the proscribed conduct and protection against arbitrary enforcement.

There is no clear evidence in the voluminous pages of discovery, including the secret recordings by the under-cover police agents, which manifests an intent by the defendants to

intimidate a significant portion of a civilian population, in the absence of a clear definition of what is meant by such terms.

Despite a more than two-week continuing effort by the undercover Chicago police officers posing as fellow members of Occupy [4] to entice and encourage the defendants to carry-out some criminal act, the defendants never did anything. Not even an act of vandalism or criminal damage to property was ever committed. It was only in desperation, after two weeks of nothing to show for their undercover infiltration of the defendants, and the untold resources expended to facilitate those efforts, that the police suggested at least some bottles of gasoline be put together. The defendants never discussed a specific plan of what to do with these bottles, let alone a plan to use them to intimidate or coerce a significant portion of the civilian population. In fact, the bottles were always in the possession of the under-cover police who suggested their own provocative ideas for how to use the bottles.

Moments after the bottles were made, the undercover police officers sent a pre-arranged signal and the police raided the home and arrested the defendants.[5] Failing to have anything to show for their undercover efforts, the police created and instigated the making of the gasoline bottles in order to at least have some reason to arrest the defendants and justify their operation. Without specificity as to what the legislature meant by "an intent to intimidate or coerce a significant portion of the civilian population" the defendants were not provided with even minimal notice that their speech and conduct would constitute "terrorism."

In addition, and perhaps more significantly, the vagueness of the statute enabled the prosecutor to act arbitrarily and discriminatorily in furtherance of improper political motivations

[4] The law enforcement program of spying and infiltrating "Occupy" was part of a national coordinated federal and state program to disrupt and neutralize the "Occupy" protests throughout the country and was in place for months prior to the events in May.

[5] Police officers also arrested six other people along with the defendants. These individuals were held in police custody for over 33 hours and released without charges.

in order to charge the defendants with highly prejudicial "terrorism" related crimes. The vague language of the statute allowed the prosecution, with great fanfare, including a press release and a request for 5 million dollar bail, and sensational allegations that never occurred, to proclaim the defendants as terrorists, on the eve of a massive non-violent anti-NATO demonstration.

The vagueness of the statute could well also allow a trier of fact to act arbitrarily and discriminatorily to convict the defendants under that same indefinite language. Without any concrete definitions the trier of fact will be left to her own predilections in construing the statutory terms. No limiting instructions can save defendants from such irremediable prejudice.

The conduct of the prosecution here underscores the recognized Due Process dangers of using vague statutes. Failing to bring the defendants to court for over three days, summoning the press when the defendants were finally brought to court on the eve of a mass non-violent anti-NATO demonstration, and then distributing a highly sensationalized "press release" under the guise of a factual proffer in support of seeking bail, is all evidence of an improper political motivation, which was facilitated by this vague terrorism statute. The prosecution used the vague statutory definition of terrorism to paint the anti-NATO protestors as violent terrorists, to discredit their demonstration and discourage people from marching on Sunday, and to justify their vast expenditure on law enforcement. The defendants were just pawns in this political operation and as a result of this vague and open-ended statute now languish in jail under exorbitant bail facing the most serious of charges.

The vagueness statutory language of the Illinois terrorism law "as applied" to the allegations of the State against the defendants violate their Due Process rights.

Dated: January 25, 2013

Respectfully submitted,

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Exhibit A

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS Plaintiff -vs- BRIAN CHURCH JARED CHASE BRENT BETTERLY Defendants	)	12MC1-_____

PEOPLE'S FACTUAL PROFFER
IN SUPPORT OF SETTING BOND

NOW COME the People of the State of Illinois, Plaintiff herein, through their attorney ANITA ALVAREZ, State's Attorney of Cook County, by her Assistant Matthew Thrun, and hereby present their factual proffer in support of setting bond.

I. Introduction:

Section 5/110-5 of the Illinois Code of Criminal Procedure sets forth criteria relevant to determining the amount of bail and conditions of release. 725 ILCS 5/110-5. The information used by the Court in its findings with regard to setting the amount of bail may be presented by way of written proffer based upon reliable information offered by the State. 725 ILCS 5/110-5.

Defendants Brian Church, Jared Chase, and Brent Betterly ("defendants") are each initially charged by way of criminal complaint for preliminary examination with the felony offenses of: (1) Material Support for Terrorism, in violation of 720 ILCS 5/29D-29.9 (a special class X felony punishable by 9 to 40 years in prison); (2) Conspiracy to Commit Terrorism, in violation of 720 ILCS 5/29D-14.9 and 5/8-2 (a class one felony punishable by 4 to 15 years in prison); and (3) Possession of Explosives or Explosive or Incendiary Devices, in violation of 720 ILCS 5/20-2 (a special class one felony punishable by 4 to 30 years in prison).

II. Defendants:

The defendant Brian Church ("CHURCH") is 22 years old and resides in Fort Lauderdale,

Florida. The defendant Jared Chase ("CHASE") is 27 years old and resides in Keene, New Hampshire. The defendant Brent Betterly ("BETTERLY") is 24 years old and told police that he resides in Massachusetts.

III. The Facts:

In conjunction with the assistance of federal and local authorities, the Cook County State's Attorney's Office (SAO) and the Chicago Police Department CPD have charged this matter as part an ongoing public safety investigation being conducted for the summit conference of the North Atlantic Treaty Organization ("NATO"). As to this particular case, the covert investigation began in early May 2012, and revealed the following:

The defendants CHURCH, CHASE and BETTERLY are self-proclaimed anarchists, and members of the "Black Bloc" group, who traveled together from Florida to the Chicago area in preparation for committing terrorist acts of violence and destruction directed against different targets in protest to the NATO Summit. Specifically, plans were made to destroy police cars and attack four CPD stations with destructive devices, in an effort to undermine the police response to the conspirators' other planned actions for the NATO Summit. Some of the proposed targets included the Campaign Headquarters of U.S. President Barack Obama, the personal residence of Chicago Mayor Rahm Emmanuel, and certain downtown financial institutions.

During the investigation, CHURCH stated that he wanted to recruit four groups of four coconspirators (for a total of sixteen people) to conduct the raids, and that reconnaissance had already been conducted at CPD Headquarters located at 3510 South Michigan Avenue for the purpose of a planned attack. As part of their efforts, the defendants also possessed and/or constructed improvised explosive-incendiary devices and various types of dangerous weapons (including a mortar gun, swords, hunting bow, throwing stars, and knives with brass-knuckle handles), as well as police counter-measures such as pre-positioned shields, assault vest, gas mask equipment and other gear to help hide their identity during their operations. At one point in the investigation, CHURCH stated that he also wanted to buy several assault rifles, and indicated that if a police officer was going to point a gun at him, then CHURCH would be "pointing one back" at the cop.

On May 8, 2012, as part of their pre-NATO Summit preparations, the defendants resided in an apartment, along with other individuals, located at the three-flat residence on 1013 West 32rd Street, Chicago Illinois. During the investigation, topics of conversation by the conspirators included committing acts of violence in other jurisdictions, planning escape routes, discussing and conducting late-night training sessions for engaging in combat with the police, and avoiding detection by law enforcement's use of electronic surveillance, FBI informants, and forensic evidence. In one conversation, a defendant stated that "the city doesn't know what it's in for" and that "after NATO, the city will never be the same" as before.

On May 16, 2012, CHURCH, CHASE, BETTERLY and others engaged in detailed conversations about the preparation of numerous incendiary devices known as "Molotov Cocktails" made out of empty beer bottles that were filled with gasoline and fitted with fusing. During these activities, CHASE obtained gasoline at the BP Gas Station located at 31st and

Halsted, and then returned to the safe house at 1013 West 32nd Street. Upon return, the defendants using gloves began to make the Molotov Cocktails and cut bandanas as timing devices. During construction, CHURCH and CHASE assisted in the preparation and BETTERLY gave instructions on how to properly assemble and use the Molotov Cocktails. While the Molotov Cocktails were being poured, CHURCH discussed the NATO Summit, the protests, and how the Molotov Cocktails would be used for violence and intimidating acts of destruction. At one point, CHURCH asked if others had ever seen a "cop on fire" and discussed throwing one of the Molotov Cocktails into the 9th District Police station. Upon completion of several of the devices, plans were then discussed to load the Molotov Cocktails into a car located near the residence.

Given the imminent threat to public safety (including the residents in other parts of the building), surveillance officers alerted SAO prosecutors involved in the covert investigation who immediately obtained a judicially-approved, no-knock search warrant for the target location. Thereafter, CPD officers executed the warrant and detained the subjects inside the residence. Along with the assistance of the Federal Bureau of Investigation and the U.S. Secret Service, the officers recovered and analyzed various items from the search, including weapons, four completed Molotov Cocktails, written plans for the assembly of pipe bombs, Chicago area map, computer equipment, recording devices, video cameras, cell phones, and an assault vest, among other items.

The investigation continues.

IV. Bond Recommendation:

Section 5/110-5 of the Illinois Code of Criminal Procedure sets forth criteria relevant to determining the amount of bail and conditions of release. 725 ILCS 5/110-5. In particular, the Court may consider the nature and circumstances of the charged offenses, and that the above-stated facts clearly demonstrate a threat to the safety of the community, the contemplated use of violence, and the possession of explosive devices. Based upon matters discussed herein, the People of the State of Illinois recommend that this Honorable court set a bond of five million dollars cash in this case as to each offender with a source of bail bond requirement.

Respectfully submitted,

ANITA ALVAREZ
STATE'S ATTORNEY OF COOK COUNTY

BY: MATTHEW THRUN
Assistant State's Attorney

Exhibit B

have a concern if I thought that we were really limiting constitutional rights under this legislation. In your opinion, what is from... came from the Senate, is this really going to restrict individual rights and liberties under the Constitution as far as you understand?"

Cross: "No."

Parke: "Well, how many votes did this Bill get out of the Senate?"

Cross: "55 'yes' votes."

Parke: "Were there any 'no' votes?"

Cross: "No."

Parke: "Ladies and Gentlemen, I rise in support of this legislation. I think it is much different than it was introduced in the Senate and I think it is a protection of civil liberties and individual rights are protected and I understand some of the people who have expressed their concerns about making sure that individual liberties are protected and I would ask that, if in fact, this legislation once in place that we started to see a trend of limiting individual liberties and rights that we would then come back and visit it and try and make it what the Sponsors and all of us would really want it to be. I'm gonna make the presumption that this legislation will do the job that we're hoping it will and I will rise in support of it."

Speaker Hartke: "Further discussion? The Chair recognizes the Gentleman from Cook, Representative Fritchey."

Fritchey: "Thank you, Speaker. Will the Sponsor yield?"

Speaker Hartke: "Sponsor will yield."

Fritchey: "Representative, it's a real direct question, I think. This obviously is being done in response to what is fairly termed a national crisis, correct?"

Cross: "Yes."

Fritchey: "I mean this sincerely, can you... give me a scenario, in which an act is committed that is a legitimate act of terrorism, that would be left in the hands of the state authorities rather than the federal authorities prosecuting under Federal Laws. What I'm concerned about is that we are gonna take an act that may otherwise be considered an act of vandalism or criminal damage to property and intentionally or unintentionally elevate that act to one of terrorism, when if an act is truly a terrorist act, the federal authorities are going to be stepping in to prosecute that in response to a national threat."

Cross: "John, let me go to your first and I frankly I didn't hear the second part of your question. But I... clearly I wouldn't quarrel with you that in most instances if... maybe in most, if not all, instances the Federal Government's probably gonna do the prosecuting. But the other part of this Bill or a large part of this Bill also goes to investigatory powers of... for law enforcement and I think for us to expect, given the magnitude of what appears to be the magnitude of this problem, Federal Government cannot investigate all of the potential activity going on of these cells, these potential terrorists or these terrorists around the country. This gives local law enforcement the AG's office and State Police, et cetera the ability if it's warranted to overhear or to do search warrants. Again, as I said earlier, this merely complements what's available at the federal level. I don't think anyone's suggesting that the State's Attorney of Sangamon County is gonna prosecute. Certainly they have the ability to, he or she, but is gonna do all the prosecuting. Most likely it will fall in the hands of the

Federal Government, but from a resource standpoint and a ability standpoint this gives local law enforcement the ability to work hand in hand with federal and I don't see why we would have a problem with that. And I hope that's responsive to your first question and John I didn't hear the second part."

Fritchey: "Well, it is responsive and I don't necessarily have a problem with this, but I'm really trying to flush this out a little bit more. If what we're looking at is giving state authorities the tools to be investigative assistants, that's one component of this legislation, but we also have a very broad component of this legislation which is punitive and deals with penalizing terrorist acts. It'd be one thing if we said we're gonna expand wiretapping abilities. We're gonna expand our ability to go after documents and assets so we can take this information and turn it over to the federal authorities to allow them to prosecute legitimate terrorist acts federally. But what we are creating a separate category of offenses, my concern... we're not just giving the State's Attorney's Office or the Attorney General's Office the tools to investigate we are potentially giving local law enforcement authorities another avenue that they can take a crime and elevate it from... not a justifiable crime, but as I said, a property damage crime, a vandalism crime, and for one reason or another decide for publicity reasons, for political reasons, for whatever it might be, to say I'm gonna prosecute a terrorist, when what that person did was bust out some windows in a building."

Cross: "Well, John, I mean we always have an issue in every piece of legislation this General Assembly discusses and debates. We end up giving prosecutors a great deal of discretion and