IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CRIMINAL DIVISION

The People of the State of Illinois, Respondent, v. BRIAN CHURCH, JARED CHASE, BRENT BETTERLY, Defendants.	Case No. 12 CR 10985 Honorable Thaddeus L. Wilson, Judge Presiding

ORDER ON DEFENDANT'S MOTION TO DISMISS COUNTS I, II, III, AND VI AS UNCONSTITUTIONAL

The Defendants, Brian Church, Jared Chase and Brent Betterly (hereinafter the "Defendants"), are before this Court pursuant to indictment filed in the Circuit Court of Cook County, and seek to dismiss counts one, two, three and six of the above entitled cause. Defendants assert that these four counts, which arise under Illinois law, 720 ILCS 5/29D-5 *et seq.*, must be dismissed because the statute is unconstitutional. Specifically, Defendants claim that the Terrorism Act under which these counts arise is unconstitutionally vague on its face and as-applied to the facts of this case.

On June 13, 2012, a grand jury returned a general indictment, and the State filed the indictment in the Circuit Court of Cook County. In relevant part:

- Count one charged the Defendants with providing "material support for terrorism," under 720 ILCS 5/29D-29.9(a).
- Count two charged Defendants with "conspiracy to commit terrorism" under 720 ILCS 5/29D-14.9(A).

- Counts three and six charged Defendants with possession of an incendiary device with the intent to "commit the offense of terrorism."

Each of these counts incorporates the statutory definition of "terrorism" and "terrorist act" as defined in 720 ILCS 5/29D-14.9(A) and 720 ILCS 5/29D-10(L)(1), respectively. The parties to this litigation represented that this is the first time charges have been brought in Illinois based on the Terrorism Act.[1]

ANALYSIS

The parties in this case extensively briefed the issues before this Court. These briefs advanced the many constitutional arguments for and against the ultimate issue of the constitutionality of the Illinois Terrorism Act. On March 19, 2013, this Court heard arguments from both parties. This Court has reached its decision based on the exceptional arguments and advocacy of all parties to this litigation.

Because this is a challenge to the statute at the trial court level, the facts surrounding the Defendants' indictment were not adduced via evidentiary hearings prior to this order. Therefore, this Court will proceed based on the representations of the Defendants' conduct, the allegations contained in the Indictment, and the Amended Bill of Particulars. Defendants are presumed innocent until proven guilty and will be afforded all due process and constitutional rights under the laws of the State of Illinois and the United States. Any discussion in this opinion of the alleged facts in this case as applied to the Illinois Terrorism Act are purely for purposes of demonstration.

[1] The Terrorism Act was invoked in the State of Illinois on at least one prior occasion in the Madison County case *People v. Oduwole*, No. 07-CF-1648. In that case, the defendant was indicted on charges of making a terrorist threat, in violation of section 29D-20. He was initially convicted on the charge and he appealed his conviction alleging that the statute was unconstitutional. On appeal the court determined that the State failed to sustain their burden of proof, and reversed his conviction and sentence on the terrorism charge without addressing the constitutionality of the statute. *People v. Oduwole*, 2013 IL App (5th) 120039.

The Defendants challenge the statutory definition of "terrorism" found in 5/29D-14.9(A) of the Code. Terrorism under the Act is defined as:

> "Terrorism. (a) A person commits the offense of terrorism when, with the intent to intimidate or coerce a significant portion of the civilian population:
> (1) he or she knowingly commits a terrorist act as defined in Section 29D-10(1) of this Code [720 ILCS 5/29D-10(1)] with this State; or
> (2) he or she, while outside this State, knowingly commits a terrorist act as defined in Section 29D-10(1) of this Code that takes effect within this State or produces substantial detrimental effects within this State."

"Terrorist Act" is defined in section 5/29D-10 of the Code as:

> (l) "Terrorist act" or "act of terrorism" means: (1) any act that is intended to cause or create a risk and does cause or create a risk of death or great bodily harm to one or more persons; (2) any act that disables or destroys the usefulness or operation of any communications system; (3) any act or any series of 2 or more acts committed in furtherance of a single intention, scheme, or design that disables or destroys the usefulness or operation of a computer network, computers, computer programs, or data used by any industry, by any class of business, or by 5 or more businesses or by the federal government, State government, any unit of local government, a public utility, a manufacturer of pharmaceuticals, a national defense contractor, or a manufacturer of chemical or biological products used in or in connection with agricultural production; (4) any act that disables or causes substantial damage to or destruction of any structure or facility used in or used in connection with ground, air, or water transportation; the production or distribution of electricity, gas, oil, or other fuel (except for acts that occur inadvertently and as the result of operation of the facility that produces or distributes electricity, gas, oil, or other fuel); the treatment of sewage or the treatment or distribution of water; or controlling the flow of any body of water; (5) any act that causes substantial damage to or destruction of livestock or to crops or a series of 2 or more acts committed in furtherance of a single intention, scheme, or design which, in the aggregate, causes substantial damage to or destruction of livestock or crops; (6) any act that causes substantial damage to or destruction of any hospital or any building or facility used by the federal government, State government, any unit of local government or by a national defense contractor or by a public utility, a manufacturer of pharmaceuticals, a manufacturer of chemical or biological products used in or in connection with agricultural production or the storage or processing of agricultural products or the preparation of agricultural products for food or food products intended for resale or for feed for livestock; (7) any act that causes substantial damage to any building containing 5 or more businesses of any type or to any building in which 10 or more people reside; (8) endangering the food supply; or (9) endangering the water supply.

Here Defendants are raising two challenges to the statute. Defendants first attack the Act on its face, arguing that it is unconstitutionally vague and overbroad such that the statute potentially criminalizes wholly innocent conduct and conduct protected under the *first amendment*. Next, Defendants raise an "as-applied" challenge, arguing that the Act is unconstitutional as applied to the facts of their case. The constitutional challenges to the Act rely on the statutory definitions or "terrorism" and "terrorist acts" as reproduced above. Each of the challenges will be discussed in turn.

I. Facial Constitutional Challenge

The Defendants bear the burden of persuasion in their constitutional challenge and must rebut a strong presumption that the Illinois Terrorism Act is constitutional. All statutes are presumptively constitutional, and the party challenging the validity of the statute bears the burden of rebutting that presumption. *People v. Butler*, 375 Ill. App. 3d 269 (1st Dist. 2007), quoting *People v. Greco*, 204 Ill. 2d 400 (2003). Where reasonably possible, a statute must be construed to uphold its validity and constitutionality. *Id.* quoting *Greco* 204 Ill. 2d at 406.

The basis of Defendants' challenge is that the Act is vague and not comprehensible. The ambiguity, according to Defendants, may ensnare too much conduct, and is therefore overbroad. In this vein, Defendants argue that the lack of a culpable mental state allows for the arbitrary and capricious enforcement of the law and also that the failure to sufficiently define the terms allows for criminalization of constitutionally protected conduct.

A. Vagueness

The law is well settled, due process requires that an individual cannot be held to have violated a statute unless he could reasonably be expected to understand that his particular conduct was proscribed. The due process vagueness standard comprises three elements. First,

the statute must not be so vague that men of common intelligence must necessarily guess at its meaning or application. *People v. Garrison*, 82 Ill. 2d 444, 453 (1980), quoting *Smith v. Goguen*, 415 U.S. 566 (1974). Second, the Statute must provide sufficiently definite standards for law-enforcement officers and triers of fact that its application does not depend merely on their private conceptions. *Garrison,* 82 Ill. 2d at 453. Finally, if the statute implicates *first amendment* expressive rights, it must not be so vague as to chill their free exercise. *Id.* at 453. "A statute is void for vagueness if it reaches a substantial amount of constitutionally protected conduct." *City of Chicago v. Poo Bah Enterprises, Inc.*, 224 Ill. 2d 390 (2006). The Defendants assert that the statute touches on *first amendment* rights.

Section 29D-14.9 defines the offense of terrorism. It states "(a) A person commits the offense of terrorism when, with the intent to intimidate or coerce a significant portion of a civilian population..." Defendants challenge the vagueness of several of the terms. Specifically, Defendants take issue with the words "coerce or intimidate" and "significant portion of the civilian population". Here, contrary to Defendants' assertions, the challenged terms in the Terrorism Act are not vague.

i. Coerce and Intimidate

The word "coerce" is not uncommon in the law. Black's Law Dictionary defines "coerce" as: Compelled to compliance; constrained to obedience or submission in a vigorous or forcible manner. *Black's Law Dictionary*, 258 (6th Ed.). The definition of the similar word "coercion" includes the language "compelling by force or arms or threat." *Id.* [2]

Nor is the term "coerce" foreign in Illinois legislative action. Illinois law frequently uses the term to describe conduct that is illegal. In fact, "coerce" appears no fewer than 45 statutes to define proscribed conduct. See *e.g.*, Beer Industry Fairness Act, 815 ILCS 720/5; Intimidation,

[2] Importantly, the legally understood definition of "coerce" includes an element of force.

720 ILCS 5/12-6.4; Sexual Exploitation of a Child, 720 ILCS 5/11-9.1; *etc.* The term "coerce" has a very definite and ascertainable meaning and the legislature's decision to use this word in the statue does not appear to be errant.

This Court strongly disagrees that the word lacks any commonly understood meaning. The term "coerce" is sufficiently definite that due process is not offended because people of ordinary intelligence are expected to understand its meaning. Therefore, the term is not so vague that it would permit arbitrary or capricious enforcement of the law.

Similarly, the word "intimidate" is well defined as "unlawful coercion; extortion; duress, putting in fear." *Black's Law Dictionary*, 821-822 (6th Ed.). The term "intimidate" is common in legislation in Illinois and is used in no fewer than 23 statues. See *e.g.*, Cross Burning, 720 ILCS 5/12-7.6; Unlawful Attempt to Collect Compensated Debt Against Crime Victim, 720 ILCS 5/17-5.5; Endangerment, 720 ILCS 5/12-4.4a; *etc.* It appears to this Court that the term "intimidate" is equally well defined. Further, the word "intimidate", perhaps to a greater extent than the word "coerce", has a popularly understood meaning that coincides with the legal definition. The word "intimidate" is sufficiently clear for people of common intelligence to understand the conduct proscribed. The term is sufficiently understood so enforcement of the law would not require an officer of the law to assert his own private conceptions.

These terms are not unconstitutionally vague, but have definite meanings in a legal context. Therefore, it appears to this Court that the words "coerce" and "intimidate" are sufficiently exact to avoid any due process challenges for vagueness.

ii. Significant Portion of the Civilian Population

Defendants challenge the phrase "significant portion of the civilian population" as being too indefinite in this Act. Unlike the terms "coerce" and "intimidate" discussed above, the understanding of this phrase requires a discussion of the context in which it is placed by the legislature. This phrase can be broken down into two challenged terms, "significant portion" and "civilian population". Defendants challenge each term independently as well as jointly.

While Defendants challenge each term independently, this Court must consider the context of the challenged terms. "Courts are to construe the details of an act in conformity with its dominating purpose." *In re K.M.*, 274 Ill. App. 3d 189 (1st Dist. 1995) (citations omitted). "The provisions of an act emphasizing a particular purpose are to be liberally construed to the end that such a purpose be effectuated." *Id.*

At this point, it is important to examine the legislative intent in enacting the Illinois Terrorism Act. This is because a court considers not only the language used, but also the legislative objective and the evil the statute is designed to remedy when considering a vagueness challenge to a statute. *Greco*, at 416, quoting *In re R.C.*, 195 Ill. 2d at 299.

In this case, the legislature made it simple to find the motivation for the legislation. When the legislature codified their intent in 720 ILCS 5/29D-5 (West 2012), they stated:

> The devastating consequences of the barbaric attacks on the World Trade Center and the Pentagon on September 11, 2001 underscore the compelling need for legislation that is specifically designed to combat the evils of terrorism. Terrorism is inconsistent with civilized society and cannot be tolerated.
>
> A comprehensive State law is urgently needed to complement federal laws in the fight against terrorism and to better protect all citizens against terrorist acts. Accordingly, the legislature finds that our laws must be strengthened to ensure that terrorists, as well as those who solicit or provide financial and other support to terrorists, are prosecuted and punished in State courts with appropriate severity. The legislature further finds that due to the grave nature and global reach of terrorism that a comprehensive law encompassing State criminal statutes and

strong civil remedies is needed.

> 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.

The legislature framed the law well. The term "terrorism" is adeptly placed in context by the specific reference to the terrorist attacks on September 11, 2001. The events of September 11th had a profound impact on each citizen of the United States in shaping the definition of "terrorism" and what a "terrorist act" is intended to accomplish. The attack on New York City was merely the beginning of the Country's growing awareness of terrorism. Since 2001, this Country has been in an ongoing "war on terror" that has brought to light through ever increasing media coverage the many facets of terrorism, domestic and international.

The Defendants are charged under the Terrorism Act for conduct that was planned and funded within the United States for purposes of attacking alleged targets in the city of Chicago during the NATO Summit. The allegations in this case fall within the common understanding of "domestic terrorism". The concept of domestic terrorism is not any more remote in contemporary society than the "international terrorism" U.S. citizens were exposed to in September 2001. In fact, over the course of the last several decades domestic terrorism within this Country's borders has come to the forefront of the collective conscience through the highly visible attacks of the Unibomber *circa* 1978, the Oklahoma City Building bombing in 1995, the Centennial Olympic Park bombing in 1996, and the anthrax scare in 2001, to name a few. There are many more such examples globally. As stated by the legislature, it was their intent in enacting this bill to protect against such evils and create legislation intended to punish those who wish to do harm to the freedom enjoyed by the citizens of Illinois.

This Court acknowledges that the scope of the effect of terrorism is not easily definable and that the phrase "significant portion of the civilian population" is more open ended than definitions in most criminal statutes. But unlike most criminal statutes, a quantitative measure of the victims of terrorism is not easily articulated. In fact, the parties to this litigation have been vocal about the lack of "alternative interpretations" that could more clearly define the intent of the legislature. This Court does not fault the parties for not proposing alternative language to define terrorism to match the intent of the legislatrue. This failure, however, is indicative of the linguistic difficulty in defining "terrorism". It is, perhaps, for this reason that the legislature chose to codify the "legislative findings" in 720 ILCS 5/29D-5 (West 2012).

Defendants cite *City of Knoxville v. Entertainment Resources, LLC.*, 166 S.W. 3d at 650 in support of their assertion that the term "significant" lacks valid meaning. In *City of Knoxville*, the Tennessee Supreme Court found that the phrase "substantial or significant portion" was unconstitutionally vague in the context of a city ordinance regulating the location of "adult" businesses. It has been argued before this court that the term "significant" and "substantial" suffer the same constitutional infirmities in Illinois.

The definition of "significant" in the Terrorism Act is not similar to the definition of "significant" or "substantial" in the "adult bookstore" examples. In the "adult bookstore" examples the Court was called upon to determine the meaning of "substantial" within the context of a quantifiable number of published titles for sale within the confines of a store. Unlike the "adult bookstore" cases, terrorism does not operate in a closed universe. Further, unlike the "adult bookstore" examples, the criminal statute was not enacted for purposes of regulating business, but rather the Terrorism Act seeks to proscribe actual criminal conduct.

It is important to remember at this point that the Court must consider the evil the statute

is designed to remedy when considering a vagueness challenge. *Greco*, at 416. The nature of the criminal act of "terrorism" is critical in understanding the Act. It is inherently difficult to measure and precisely define unknown variables in criminal legislation (*i.e.* the requisite number of victims for an act to qualify as terrorism). As stated, the use of the word "significant" in the context of the Terrorism Act is not the same as it is in the "adult bookstore" examples. However, these dissimilarities do not automatically render the statute incomprehensible or unconstitutionaly vague. This is due to the nature of the crime the Legislature is attempting to define.

The straightforward goal of terrorism is to broadcast a message of fear to as many citizens as possible. According to the rules of contemporary media distribution, the more outrageous the target or conduct, the larger the audience. The target of terrorism may include political, governmental, or societal structures, but the message is always one that is targeted to a larger audience, the civilian population. Could one place a number on the lives affected by the terrorist attacks in September 2001? Is it possible to clearly define with sufficient language the personal impact and fear instilled by the Oklahoma City Bombing for purposes of proscribing that conduct for future generations?

Rather, the context of the term "significant portion of the civilian population" read in conjunction with the statute in its entirety is what makes it sufficiently definite. Within the context of "terrorism" and "terrorist act" this relatively amorphous phrase gives the *mens rea* a very specific, real, and understandable definition.

As society has learned, terrorism is most terrifying when it is focused on a highly visible target because it is the terrorists' intent to intimidate or coerce the populace. The scope and reach of that fear depends on many factors such as the intended target, the scope of destruction,

and the media attention focused on those terrorist attacks (*i.e.* the distribution of the fear-inducing conduct through the media). Is setting fire to a building necessarily terrorism? Probably not. What if that building is located at 1600 Pennsylvania Ave. in Washington, D.C.? The point is, what may be simple arson in one scenario may be terrorism in a different context. It is this fluidity that the Legislature has attempted to capture. While it is not simple to define terrorism, there is little doubt that the definition is popularly understood. In the context of the term "terrorism" the phrase "significant portion of the civilian population" takes on more meaning than it does standing alone.

The Terrorism Act provides context for the phrase "significant portion", however this term is not vague even when it is removed from this context. The term "significant" is common in everyday usage. In one respect it has been defined as: important; of a noticeably or measurably large amount; probably caused by something other than mere chance. *Webster's 9th ed.* One legal thesaurus listing for the term "significant" indicates: "central (*essential*), consequential (*substantial*), considerable, constructive (*creative*), critical (*crucial*), decisive, determinative, indispensable, key, major, material (*important*), momentous, necessary (*required*), notable, noteworthy, outstanding (*prominent*), paramount, prominent, remarkable, salient, special, strategic, substantial, unusual, valuable. *Legal Thesaurus, William C. Burton, 2nd Ed. MacMillan.* It is an adverb that is not foreign to our legal lexicon.[3]

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[3] See, *Smith v. Phillips*, 455 U.S. 209 (selection procedures that exclude significant portions of the population, and thus increase the risk of bias, are invalid); *Northern Ill. Home Builders Ass'n v. County of DuPage*, 251 Ill.App. 3d 494 (1993) (significant population increases); *Marconi v. Chi. Heights Police Pension Bd.*, 361 Ill. App. 3d 1 (significant population of African-Americans); *People v. Lewis*, 88 Ill. 2d 129 (statutory phrase "no significant history of prior criminal activity . . . need not be construed to be vague and overly broad); *Gridley v. State Farm Mut. Auto. Ins. Co.*, 217 Ill. 2d 158 (significant portion of the proof); *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302 (significant portions of their property); *Russell Stewart Oil Co. v. State*, 124 Ill. 2d 116 (significant portion of out-of-State producers); *Board of Trade v. Dow Jones & Co.*, 98 Ill. 2d 109 (significant portion of the overall stock market); *Schwalbach v. Millikin Kappa Signa Corp.*, 363 Ill. App. 3d 926 (significant portion of the population); § 720 ILCS 5/12-7.3. Illinois Stalking statute (emotional distress is defined as "significant mental

In *Lewis*, the defendants argued before the Illinois Supreme Court that the statutory phrase "no significant history of prior criminal activity," was impermissibly vague. *People v. Lewis*, 88 Ill. 2d 129 (1981). The Illinois Supreme Court held: "[w]hile the 'no significant history of prior criminal activity' phrase can, perhaps, be construed or applied by courts so as to render it overly broad, there is no reason to assume it will be. Even in the case of an aggravating factor, the Supreme Court has refused to invalidate language which need not be construed to be vague and overly broad. *Id.*, citing *Gregg v. Georgia*, 428 U.S. 153 (1976). Likewise, this Court sees no need find the Illinois Terrorism Act unconstitutional due to the alleged ambiguities in the words "coerce" or "intimidate" or by the phrase "significant portion of the civilian population."

Defendants contend that the Act's ambiguity is fatal. However, a statute is not unconstitutionally vague simply because one can conjure up a hypothetical dispute over the meaning of some of the act's terms. *Greco*, 204 Ill. 2d at 416 (2003), quoting *Gem Electronics of Monmouth Inc. v. Department of Revenue*, 183 Ill. 2d 470 (1998). In interpreting this law, this Court should presume that the legislature did not intend an absurdity, inconvenience or injustice. See *Illinois Crime Investigating Comm'n v. Buccieri*, 36 Ill. 2d 556 (1967).

In the context of the Terrorism Act, the phrase "significant portion of the civilian population" is not so vague as to violate due process. It is sufficiently understood by a person of

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suffering, anxiety or alarm."); *Central Ill. Pub. Serv. Co. v. Illinois Commerce Comm'n*, 243 Ill. App. 3d 421 (definition of the term significant addition; *Grigoleit, Inc. v. Board of Trustees of Sanitary Dist.*, 233 Ill. App. 3d 606 (significant industrial user); *Garner v. Department of Employment Sec.*, 269 Ill. App. 3d 370 (actual, significant and concrete injury); *People v. Carroll*, 258 Ill. App. 3d 371 (definition of significant relationship); *People v. Price*, 375 Ill. App. 3d 684 (significant contacts); *VonHoldt v. Barba & Barba Constr., Inc.*, 175 Ill. 2d 426 (significant addition); *Castaneda v. Illinois Human Rights Com.*, 132 Ill. 2d 304 (significant impact); *Orenic v. Illinois State Labor Relations Bd.*, 127 Ill. 2d 453 (significant control over employees); *Dep't of Cent. Mgmt. Servs. v. Ill. Labor Rels. Bd.*, 2012 IL App (4th) 110209 (significant allotment of employee time); *People v. Morris*, 394 Ill. App. 3d 678 (significant figures); *Sage Info. Servs. v. King*, 391 Ill. App. 3d 1023 (significant subset); *Lombard Historical Comm'n v. Lombard*, 366 Ill. App. 3d 715 (significant building or site); *Burd v. Industrial Com.*, 207 Ill. App. 3d 371 (significant other); *Hill v. Walker*, 241 Ill. 2d 479 (2011) (significant risk of increased punishment); *People v. Wear*, 229 Ill. 2d 545 (significant risk).

ordinary intelligence. It is not so vague as to permit arbitrary or capricious enforcement. Therefore, the Terrorism Act is not unconstitutionally vague due to the ambiguities alleged by the defendants as to the words "coerce" or "intimidate" or by the phrase "significant portion of the civilian population."

B. Overbreadth

As a general rule, when a defendant challenges the constitutionality of a statute for vagueness, a defendant may not avoid his prosecution because a similar prosecution of other individuals under the same statute might violate their constitutional rights. *Garrison*, 82 Ill. 2d at 449. The overbreadth doctrine is an exception to this rule. It allows a defendant to challenge the validity of a statute on its face when the mere existence of the statute may inhibit the exercise of expressive or associational rights protected by the *first amendment* even though those rights do not protect the activities of the defendant. In Illinois, the overbreadth doctrine has also been construed to apply when statutes are written so broadly that they do not rationally accomplish the goal of the legislation or criminalize wholly innocent conduct. See *People v. Madrigal*, 241 Ill. 2d 463 (2011). Here, the Defendants argue that they may challenge the statute under both exceptions to the general rule.

In both exceptions, Defendants must demonstrate that the law is entirely unenforceable. "In a facial challenge, the challenger must establish that under no set of circumstances is the act valid." *Greco*, 204 Ill. 2d at 407. The doctrine of overbreadth is designed to protect *first amendment* freedom of expression from laws written so broadly that the fear of punishment might discourage people from taking advantage of the freedom. *People v. Bailey*, 167 Ill. 2d 210, 226 (1995). The doctrine is used sparingly; therefore, to result in a statute's invalidation, the overbreadth must be real and substantial. *Bailey*, 167 Ill. 2d at 226. Stated differently, "in

order to succeed in a facial vagueness challenge, as opposed to an as-applied challenge, the vagueness must permeate the text of such a law." *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).

i. Madrigal/Carpenter/Wick

In Illinois, a defendant may assert a facial challenge when statutes are written so broadly that they do not rationally accomplish the goal of the legislation and/or criminalize wholly innocent conduct. See *Madrigal*, 241 Ill. 2d 463. This is an exception to the general rule that restricts vagueness challenges to the facts of the defendant's case. These overbreadth challenges stem from a relatively new line of authority that has been referred to in pleadings and in arguments as the "*Madrigal-Carpenter-Wick*" line.[4] For the reasons discussed below, Defendants have failed to demonstrate that the Terrorism Act suffers from the same constitutional defects as the statutes in this line of case-law.

In *Madrigal*, the defendant challenged his prosecution under the Illinois identity theft statute. That statute did not require criminal intent, criminal knowledge, or a criminal purpose in order to subject a person to felony conviction and punishment. *Madrigal*, 241 Ill. 2d at 470-71. The statute "require[d] only that a person knowingly use any 'personal identification information or personal identification document of another for the purpose of gaining access to any record of the actions taken, communications made or received, or other activities or transactions of that person, without the prior express permission of that person.'" *Id.* at 471. Personal identifying information could mean ordinary information such as a person's name or address. As a result, the statute at issue would have potentially punished as a felony a wide array of wholly innocent conduct, such as doing a Google search by entering a person's name. The Supreme Court

[4] While there are additional cases within this line of authority, this Court will limit the discussion to the three most oft-cited cases to define the legal challenge. *See e.g. People v. Hollins*, 361 Ill. Dec. 402 (2012); *People v. Williams*, 235 Ill. 2d 178 (2009); *People v. Wright*, 194 Ill. 2d 1 (2000).

reasoned that because the subsection potentially punished a significant amount of wholly innocent conduct not related to the statute's purpose, it was not a rational way of addressing the issue of identity theft. Therefore, the statute was facially invalid.

Likewise, the Supreme Court decision in *Carpenter* discussed a situation where the legislative intent did not bear a rational relationship to the actual statute, which potentially criminalized wholly innocent conduct. *People v. Carpenter*, 228 Ill. 2d 250 (2008). The challenged statute in *Carpenter* made it illegal to possess or own a vehicle with "a false or hidden compartment." The challenged legislation did not require a criminal purpose, and thus mere knowledge that the vehicle possessed a hidden compartment was sufficient for prosecution under the felony statute. Moreover, the definition of "hidden compartment" was not well defined. Therefore, one who merely purchased a vehicle with a "hidden compartment", and who knew of the compartment, would be subject to felony prosecution.[5] The Supreme Court reasoned that "if the intent of the legislature was to punish those who conceal firearms or contraband in false or secret compartments, it would seem that the rational approach might have been to punish—via an additional felony offense—those who actually did that." *Carpenter*, 228 Ill. 2d at 276. Therefore, since the statute was written in such a way as to proscribe wholly innocent conduct and it was not a rational means of addressing the alleged problem, the Supreme Court found the statute to be facially invalid.

Finally, in *Wick* the Supreme Court found that the aggravated arson statute was unconstitutional. *People v. Wick*, 107 Ill. 2d 62 (1985). The defendant in *Wick* set fire to his place of business in order to obtain the insurance proceeds. One of the responding firemen received out-patient treatment for injuries he sustained in fighting the blaze. Prosecutors charged the defendant under the aggravated-arson statute, which provided only that "a person knowingly

[5] For both defendants in *Carpenter* the compartment was merely an evacuated airbag chamber.

damages a building by fire and a fireman or policeman is injured at the scene as a result of the fire." *Wick*, 107 Ill. 2d at 64. Therefore, a defendant could be prosecuted as a class X felon under the statute if he knowingly started a fire in a building (even for lawful purposes such as warmth or cooking) and that fire later burns out of control (through no fault of the individual who started the fire) and a firefighter is injured as a result. This absurd result was equally confusing where the supposed lesser-included-offense of arson required a criminal intent. The Supreme Court reasoned that "because aggravated arson *** does not require an unlawful purpose in setting a fire *** the statute as presently constituted sweeps too broadly by punishing innocent as well as culpable conduct." *Id.* At 65.

In each of these three cases the statutes were drafted too broadly and clearly swept up conduct that is not inherently criminal. Even though the offending conduct was not performed with criminal intent, the individual would be subject to felony prosecution because the culpable mental state was mere knowledge without any defined criminal intent. In essence, these laws created a sort of "strict liability" for the proscribed conduct, and the statutes proscribed conduct that was not uncommon. As previously stated, a statute violates due process if it potentially subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge. See *Madrigal*, 241 Ill. 2d 463. In each of these three cases the defendants were facing felony prosecution for wholly innocent conduct.

In each of the three cases the doctrine of overbreadth resulted in invalidation of the unconstitutional criminal statutes based on the real threat the statutes posed to individuals engaged in non-criminal conduct. "The doctrine is used sparingly; therefore, to result in a statute's invalidation, the overbreadth must be real and substantial." *People v. Bailey*, 167 Ill. 2d 210, 226 (1995)(overruled on other grounds). In each case, common acts such as performing a

Google search, lighting a fire, or owning a car with an evacuated air-bag compartment subjected an individual who may not have any criminal intent to prosecution under a felony statute. The effect of the language of these three challenged statutes in these cases was to sweep up wholly innocent conduct that was not merely remote or speculative, but was in fact real and obvious.

Defendants argue in the case at bar that the Terrorism Act suffers from similar insufficiencies, and urges this Court to follow the *Madrigal-Carpenter-Wick* precedent. Defendants liken the Act to the other statutes because the Act does not have written into it a culpable mental state. That is, the statute does not expressly require criminal intent or purpose. Defendants argue that the statute fails to require an element of force or violence.

Defendants are asserting that the failure to include the words "without lawful authority" or to require an element of force or violence is absolutely fatal. It would seem to this Court that Defendants are asserting that the *Madrigal* decision stands for a bright-line rule of statutory interpretation. This is simply not true. There are situations where the failure of the legislature to include this limiting language is not fatal.

ii. Bailey

On occasion, the failure of the legislature to include a culpable mental state is not fatal to a criminal statute because the statute prohibits conduct that is *malum in se*.[6] The Supreme Court has interpreted statutes to "require the prohibited conduct be performed 'without lawful authority' even though those words were not used in the statute." *Madrigal*, 241 Ill. 2d at 475, quoting *People v. Bailey*, 167 Ill. 2d 210 (1995).[7]

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[6] *Malum in se:* A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law. *Black's Law Dictionary*, 959 (6th Ed.)(citing *Grindstaff v. State*, 214 Tenn. 58).

[7] Bailey was overruled on proportionate penalties issues unrelated to those issues raised in this Motion. See *People v. Sharpe*, 216 Ill. 2d 481 (2005).

In *Bailey*, the defendant was charged under the Illinois stalking statute. The challenged statute stated that a person committed the offense of stalking "when he or she transmits to another person a threat with the intent to place that person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint, and in furtherance of the threat knowingly does any one or more of the following acts on at least 2 separate occasions." *Bailey*, 167 Ill. 2d at 222. The second part of the statute then required that the defendant follow "the person, other than within the residence of the defendant," or place "the person under surveillance by remaining present outside" any one of a number of locations specified in the statute. *Id.* The defendant launched a facial challenge to the statute because it did not include language requiring the conduct be done "without lawful authority" or "against the laws of the State".

The Supreme Court in *Bailey* read the stalking statute as if it contained the language "without lawful authority". The Supreme Court reasoned that they "interpret the [stalking] statutes as proscribing only conduct performed 'without lawful authority.'" *Bailey*, 167 Ill. 2d at 224. This construction of the statutes is not strained. *Id.* Rather, it accords with the legislature's intent in enacting the statutes to prevent violent attacks by allowing the police to act before the victim was actually injured and to prevent the terror produced by harassing actions. *Id.*, at 225.

The Supreme Court reasoned that "reading in" the culpable mental state served important rules of statutory interpretation; (1) that a statute is presumed constitutional; (2) a court has the duty to affirm a statute's authority where possible; and (3) an interpretation that renders the statute valid is always presumed to have been intended by the legislature. *Id.* Further, the Supreme court differentiated *Bailey* from *Wick* stating "We do not believe threatening a person with the requisite intent and in furtherance of the threat follow or place a person under surveillance without lawful authority proscribes any 'innocent conduct.'" *Id.*

The proposition in *Bailey*, that the court can read in the words "without lawful authority" is entirely fact-driven. The *Carpenter* court noted that the holding in Bailey was limited. *Carpenter*, 228 Ill. 2d at 272. However, the facts of the constitutional challenge in *Bailey* are entirely analogous to the case at bar. Sections 5/29D-14.9A and 5/29D-10 of the Code punish a person for the offense of terrorism when he, with intent to intimidate or coerce a significant portion of the civilian population, knowingly commits any act which creates a threat of death or great bodily harm, or acts of damage and destruction to communication systems, computer systems, *etc.* This proscribed conduct is clearly unlawful and does not implicate constitutionally protected action.

The Terrorism Act, unlike those statutes challenged in the *Madrigal* line, does not subject wholly innocent conduct to prosecution due to its lack of a limiting phrase such as "without lawful authority". Rather, like the stalking statute challenged in *Bailey*, the Terrorism Act only prohibits conduct that is *malum in se*. Since the Terrorism Act, 720 ILCS 5/29D-5 *et seq.*, does not make unlawful a substantial amount of constitutionally protected conduct, it does not suffer from those defects articulated by the Supreme Court in the *Madrigal* line of precedent. Therefore, Defendants' facial challenge pursuant to the rationale of the *Madrigal-Carpenter-Wick* line of precedent must be rejected.

As in *Bailey*, it is questionable whether it is necessary to read the phrase "without lawful authority" into the Terrorist Act where the statute does not punish any innocent conduct as written, as it already contains "a requirement of 'knowing' conduct in furtherance of a clearly culpable objective." See *e.g. Carpenter*, 228 Ill. 2d at 272. However, to the extent that such a "reading in" cures any alleged infirmities in the statute, this Court will do so. Therefore, this

Court will read the Terrorism Act, Section 29D-14.9, as if it proscribes only unlawful conduct, to wit:

> "(1) he or she knowingly commits a terrorist act, **without lawful authority,** as defined in Section 29D-10(1) of this Code [720 ILCS 5/29D-10] within this State; or
>
> (2) he or she, while outside this State, knowingly commits a terrorist act, **without lawful authority,** as defined in Section 29D-10(1) of this Code that takes effect within this State or produces substantial detrimental effects within this State.[8]

iii. First Amendment

The hypothetical acts discussed by the Defendants (*i.e.* boycotts, political demonstrations, pickets, *etc.*) are beyond the scope of conduct for which defendants were indicted. However, they argue that these *first amendment* protected activities may be impacted by the Terrorism Act. Therefore, they argue that a facial challenge is proper. "In *first amendment* cases *** a party may argue ***that the statute is unconstitutional on its face because it might be vague as applied to someone else." *People v. Jihan*, 127 Ill. 2d 379, 386 (1989), quoting *Garrison*, 82 Ill. 2d at 454. Therefore, this Court must determine whether the statute does, indeed, touch on *first amendment* rights to determine whether Defendants may properly bring a *first amendment* facial challenge.

This Court does not believe that the Defendants have demonstrated that this statute touches on *first amendment* protected conduct. When construing a statute, this Court is required to ascertain and give effect to the legislature's intent, and the most reliable indicator of the legislative intent is the plain and ordinary language of the statute. *People v. Burpo*, 164 Ill. 2d 261, 264 (1995). Statutes are viewed as a whole, and the words and phrases in the statute should

[8] Now the absurdity of requiring the words "without lawful authority" is glaring.

be construed in light of other relevant statutory provisions and not in isolation. *People v. Gutman*, 355 Ill. Dec. 207 (2011). As previously discussed above, the terms that Defendants challenge are not vague. This Court believes that, when read in its entirety, the wording of the Terrorism Act is not so broad as to encroach on *first amendment* freedoms.

The Terrorism Act criminalizes "terrorism" and "terrorist acts" and requires that those acts be performed with the intent to "intimidate or coerce a significant portion of the civilian population." 720 ILCS 5/29D-14.9(1) (West 2012). "Terrorism" and "terrorist act" are defined as one of nine specific acts, and includes conduct such as; (1) [an] act that is intended to cause or create a risk and does cause or create a risk of death or great bodily harm to one or more persons; (2) [an] act that disables or destroys the usefulness or operation of any communications system; (3) [an] act or any series of 2 or more acts committed in furtherance of a single intention, scheme, or design that disables or destroys the usefulness or operation of a computer network, *etc.* 720 ILCS 5/29D-10 (West 2012). Read in its entirety, the statute clearly requires that an individual intend that his conduct "intimidate or coerce" more than a single individual ("a significant portion of the civilian population") and knowingly commit one or more of the acts enumerated in the definition of "terrorism", Section 5/29D-10. The conduct that defines the act of "terrorism" is not innocuous and is not protected by the *first amendment*. This conduct clearly establishes a level of culpability that exceeds the constitutional protections of the *first amendment*.

The Defendants argue that there may in fact be situations where the Terrorism Act may criminalize *first amendment* protected speech even in light of the definition of "terrorism". For example, Defendants argue that *en mass* call-ins or fax-ins are a frequent form of protected political protest action. Under the second example of "terrorism" announced in 720 ILCS

5/29D-10, Defendants argue that these "call-ins" or "fax-ins" could constitute an "act that disables or destroys the usefulness or operation of any communications system" and therefore the political protestors would be subject to prosecution under the terrorism statute. As a second example, Defendants argue that political protest campaigns that send thousands of protest emails and other electronic communications to a political figure, thus disabling his website or computer operations, would also be illegal as "terrorism" under the statute.

This Court disagrees. These hypothetical scenarios fail to take into account the intent of the legislature, the commonly understood definition of "terrorism" and the requirement that the perpetrator of the crime have the intent "to intimidate or coerce a significant portion of the civilian population." Read in its entirety, the statute accounts for only criminal conduct that would not include these protected activities proposed by the Defendants. In fact, the Defendants' examples demonstrate how the statute is worded in such a way as to offer sufficient protection of these constitutionally permissible political protest activities.

Under a plain reading of the statute, *en mass* "call-ins" or "fax-ins" would never be subject to prosecution since the perpetrators do not intend to "intimidate or coerce a significant portion of the civilian population." Rather, these protestors are targeting a specific individual or political figure with the intent to impact his decision-making. This is conduct that could not be mistaken for "terrorism" as is commonly understood. In order for a prosecutor to bring charges under these hypothetical scenarios she would be forced to reach an absurd conclusion completely ignoring the plain language of the Act in its entirety, taking the terms "intent to intimidate or coerce" out of context. This Court does not believe that the statute could reasonably be interpreted in such a way. When looking at hypothetical situations, the Supreme Court has held that this Court should presume that the legislature acted in view of the Constitution and did not

to intend a violation of its provisions or the enactment of a void law. Similarly, this Court must presume that the legislature did not intend absurdity, inconvenience or injustice. See *Illinois Crime Investigating Comm'n v. Buccieri*, 36 Ill. 2d 556 (1967). This hypothetical conduct is merely political speech. Under no rational reading of the Terrorism Act would such constitutionally protected conduct be subject to criminalization. Rather, the statute seeks to criminalize actual acts of terrorism.

A "terrorist act" is defined with words such as "death or great bodily harm", "disables or destroys", "disables or causes substantial damage or destruction", or "disables or endangers" the state's food or water supply. Under no scenario would conduct falling within these definitions be protected under the *first amendment*. "The *first amendment* cannot be construed to protect intentional threats or acts of violence or destruction." *NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).*

Defendants raised the scenario of Dr. Sweets during oral arguments, and they propose that he would be subject to prosecution under the challenged Act for his heroic actions. Dr. Sweets was an African American who lived in Detroit shortly after the turn of the 20th Century. He purchased a home in a desirable neighborhood and moved his family into the suburbs. Shortly after moving in, Dr. Sweets began receiving threats. The neighbors in his predominantly white community would constantly walk past his home, stopping and staring at the occupants, hurling insults, and generally making life difficult. Dr. Sweets refused to give into the pressures to move because he believed that he needed to take a stand against such racist activity for the benefit of African American homeowners across the city. One night, a large crowd gathered around his home and began to close in. It was apparent that the family was under attack when rocks began flying, followed by gunshots. Dr. Sweets grabbed his shotgun and faced the crowd,

returning the gun-fire. When the police arrived they discovered that one young man had been killed. The Sweets family was arrested and Dr. Sweets was charged with homicide.

Under this scenario, Defendants argue that Dr. Sweets would be subject to prosecution under the Terrorism Act since he, by firing his shotgun, committed an act that he knew "would cause or create a risk" and he did "cause or create a risk of death or great bodily harm to one or more persons," and he did so with the "intent to intimidate or coerce a significant portion of the civilian population" (the community mob surrounding his house).

This Court disagrees with the Defendants' ultimate conclusion. Even if an overzealous prosecutor were to bring charges against Dr. Sweets under the Terrorism Act, there is nothing in the statute that would prevent him from asserting any of his legal defenses such as self defense, defense of others (his family), or defense of property (his home). Further, the issue of Dr. Sweets' ultimate intent, that is whether he intended to "coerce or intimidate a significant portion of the civilian population", is arguable at best since it is likely that Dr. Sweets' intent was not to "intimidate or coerce", but rather protect his home and family. Regardless, the issue of Dr. Sweets' intent would be one for the finder of fact. The State would still be required to prove each element of an offense arising under the Terrorism Act beyond a reasonable doubt at trial. As in the case at bar, the State would still have to convince a jury that Dr. Sweets' intent was criminal.

Moreover, such an interpretation would be impossible under this Court's reading of the Act. As previously discussed, this Court will "read in" the words "without lawful authority" pursuant to *People v. Bailey*. Therefore, lawful conduct will never be swept up in this statute. Since the conduct that is subject to this statute is *malum in se* AND this Court will "read in" the

phrase "without lawful authority", Defendants' assertion that the Terrorist Act may impact first amendment protected conduct is simply unfounded.

Since the statue does not impinge upon *first amendment* protected speech, the Defendants may not raise a facial challenge to the statute by way of hypothetical scenarios that do not relate to the actual allegations in their case. Therefore, Defendant's facial challenge to the statute based on *first amendment* overbreadth fails.[9]

Facial Challenge Conclusion

In the case at bar, the Terrorism statute is constitutional on its face. In enacting the terrorism statute, the Illinois Legislature sought to "[strengthen our laws] to ensure that terrorists, as well as those who solicit or provide financial and other support to terrorists, are prosecuted and punished in State courts with appropriate severity. The legislature further finds that due to the grave nature and global reach of terrorism that a comprehensive law encompassing State criminal statutes and strong civil remedies is needed." 720 ILCS 5/29D-5 (West 2012). According to the discussion in this order, it does not appear to this Court that the legislature has enacted legislation that improperly criminalizes constitutionally protected conduct. Nor does the statute criminalize wholly innocent conduct. Therefore it appears to this Court that the challenged statute is a reasonable means to accomplish the goals of the legislature, which is to enact legislation that cracks down on terrorism. The Defendants are properly charged under the valid laws of Illinois. The State will be permitted to proceed with this prosecution under the Act.

[9] On March 19, 2013, this Court heard oral arguments on Defendant's motion. Defendant did not raise the first amendment issue at that time. The State argued, on rebuttal, that the Defense had abandoned this argument. The Defense did not address the State's allegation. Therefore, it appears that Defendants have, to some extent, abandoned this challenge.

II. As-Applied Constitutional Challenge

Next Defendants urge this Court to consider the challenged counts of the indictment as unconstitutional as applied to them.

A. Assuming Factual Allegations as True

In order to consider their "as-applied" challenge, Defendants ask this Court to consider the factual allegations as asserted by the State as true, for purposes of this motion only. In that regard, the State alleges that the Defendants are self-proclaimed anarchists who travelled together from Florida to Chicago for the NATO Summit. The State alleges, inter alia, that the Defendants individually, in concert with each other, and in furtherance of a common cause, planned, prepared and committed certain acts, to wit:

> Defendants planned to commit acts of violence and destruction in the City of Chicago during NATO - - specifically, they intended to destroy police cars and attack Chicago police and police stations, the campaign headquarters of President Barack Obama, the personal residence of Mayor Emmanuel, and certain downtown financial institutions. Defendants intended to carry-out their plan with the use of Molotov cocktails. Defendant Church stated that the Chase Bank at 21 S. Clark Street in Chicago would be his first target. Defendant Church also expressed as intent to attack four Chicago police district stations to damage as many police vehicles as possible by slashing tires, breaking windows, and "tagging" the vehicles. Defendant Church stated that "the city doesn't know what it's in for, and after NATO, the city will never be the same." Defendant Church also expressed a plan to make smoke bombs to throw during NATO. Defendant Church stated that he was proficient in archery and planned to affix a note to the end of an arrow that he would then shoot into the home of Mayor Emanuel. Defendant Church indicated that he intended to purchase three assault rifles and a long rifle, stating "if a cop is going to be pointing an AR at me, I'll be pointing one back at him." Defendant Chase stated that he intended to commit acts of violence during NATO with certain homemade weapons. Defendant Chase stated that his group was in possession of M-60 fireworks that could be placed in glass bottles that would ultimately explode and that gasoline could be added to the bottles with the fireworks. Defendant Church stated that he was in possession of a bow with ten arrows and some swords that he was storing in a guitar case. Defendant Chase stated that he wanted to throw homemade Molotov cocktails at the police during NATO. Defendant Chase stated that he and Defendant Church wanted to destroy the windows of President Obama's campaign headquarters and stated that they were in possession of slingshots capable of such destruction. In the presence of Defendants Chase and Betterly, Defendant Church possessed

various weapons including a bow with ten arrows and stated that the group had built a homemade mortar. Defendant Church stated that he would make a Molotov cocktail by filling a beer bottle with gasoline, soaking a piece of cloth, and then lighting the cloth on fire. Defendant Church stated that he built a mortar gun with PVC pipe and filled it with bottle rockets. Defendant Church, Chase and Betterly discussed the process for making Molotov cocktails. Defendant Chase obtained a gasoline container from Defendant Church's vehicle and walked to a nearby gas station where he purchased gasoline. Defendants Church, Chase and Betterly constructed Molotov cocktails using beer bottles. Defendant Church gave instructions on cutting a bandana in strips for use as fuses for the Molotov cocktails. Defendant Betterly cautioned that gasoline should not be poured directly on the cloth; that the cloth should be soaked in the bottles. Defendant Chase poured gasoline into the bottles and then turned the bottles over so the strips could be soaked. The fabric in the bottles was knotted for the purpose of sealing the bottles. Defendant Church gave instructions to store the Molotov cocktails in the trunk of his car. Defendant Church asked a believed co-conspirator if she was "ready to see a police officer on fire." Defendants were arrested when Chicago police officers executed a judicially-approved "no-knock" search warrant at an apartment used by the Defendants. During the search of the apartment, officers recovered various items, including weapons, four completed Molotov cocktails, maps of the Chicago area, computer equipment, recording devices, video cameras, cell phones, and an assault vest, among other items.[10]

The Defendants do not maintain that they complied with the requirements of the Illinois Terrorism Act but, rather, contend that the Act is unconstitutionally vague as applied to their

[10] An indictment must allege all the facts necessary to constitute the crime charged, and likewise an indictment alleging facts not constituting the offense is insufficient. People v. Rife, 18 Ill. App. 3d 602, 310 N.E.2d 179 (4 Dist. 1974). So long as the statutory language used describes specific conduct, then there is no need for the charge to specify the exact means by which the conduct was carried out; if the defendant desires additional specificity, he or she can move for a bill of particulars pursuant to 725 ILCS 5/111-6. People v. Wisslead, 108 Ill. 2d 389 (1985). An indictment which charges an offense in the language of the statute is deemed sufficient when the words of the statute so far particularize the offense that, by their use alone, an accused is apprised with reasonable certainty of the precise offense with which he or she is charged. People v. Dickerson, 61 Ill. 2d 580, 338 N.E.2d 184 (1975); People v. Tyler, 45 Ill. App. 3d 111, 3 Ill. Dec. 830, 359 N.E.2d 240 (4 Dist. 1977); People v. Lutz, 73 Ill. 2d 204, 22 Ill. Dec. 695, 383 N.E.2d 171 (1978); People v. Testa, 114 Ill. App. 3d 695, 70 Ill. Dec. 290, 449 N.E.2d 164 (1 Dist. 1983); People v. Shelby, 123 Ill. App. 3d 153, 78 Ill. Dec. 642, 462 N.E.2d 761 (1 Dist. 1984); People v. Dungy, 122 Ill. App. 3d 314, 77 Ill. Dec. 862, 461 N.E.2d 485 (1 Dist 1984). Undoubtedly the people are confined in a criminal case to proof of the allegations set forth in the bill of particulars. McDonald v. The People, 126 Ill. 150.

conduct in this case. Specifically, Defendants argue that the language "with the intent to intimidate or coerce a significant portion of a civilian population" is vague and ambiguous with respect to their conduct, because an ordinary person could not ascertain whether his conduct constituted involvement in terrorism or other commonly charged felonies with less severe penalties. Defendants argue further that, because the statutes at issue do not include the qualifying phrases: "without lawful authority or legal justification" they fail to include a culpable mental state as required for a non-strict liability statute and thus did not provide a clear standard as to whether they were involved in terrorism.

In response, the State submits that the language "with the intent to intimidate or coerce a significant portion of a civilian population" is not vague when applied to defendants' conduct. The State argues that a person of ordinary intelligence would know that the conduct alleged if carried out would intimidate or coerce a significant portion of a civilian population and would constitute terrorism.

In an "as-applied" challenge, the party challenging the statute contends that the application of the statute in the particular context in which the challenger has acted, or in which he proposes to act, would be unconstitutional. An "as-applied" challenge requires a party to show that the statute violates the constitution as the statute applies to him. *People v. Garvin*, 219 Ill. 2d 104, 117 (2006). If a statute is unconstitutional as applied, the State may continue to enforce the statute in circumstances where it is not unconstitutional.

"In cases that do not involve first amendment freedoms, due process is satisfied if: (1) the statute's prohibitions are sufficiently definite, when measured by common understanding and practices, to give a person of ordinary intelligence fair warning as to what conduct is prohibited, and (2) the statute provides sufficiently definite standards for law enforcement officers and triers

of fact that its application does not depend merely on their private conceptions." *Wilson*, 214 Ill. 2d at 399, citing *People v. Falbe*, 189 Ill. 2d 635, 639-40 (2000). The proscription of a criminal statute must be clearly defined and provide a sufficiently definite warning of the prohibited conduct as measured by common understanding and practices. See *Jihan*, 127 Ill. 2d 379 (1989). A criminal statute must be definite so that a person of ordinary intelligence will have a reasonable opportunity to know what conduct is prohibited. *Id.* at 385. If the defendant's conduct clearly falls within the statute's proscriptions, prosecuting him does not offend due process even though the statute might be vague as to other conduct in other circumstances. *Wilson*, 214 Ill. 2d at 399.

Applying the two-part analysis outlined above, this Court cannot agree with Defendants' contention that the statutory language, "with the intent to intimidate or coerce a significant portion of a civilian population," is unconstitutionally vague as-applied to their situation. Additionally, given the Court's ruling regarding Defendants' facial challenge this Court cannot agree that the failure to include the phrase "without lawful authority or legal justification" denies the Defendants an affirmative defense to conduct otherwise permitted under the Criminal Code.

First, the language is definite enough, when measured by common understanding and practices, to afford a person of ordinary intelligence in Defendants' position with fair warning of his duties. Where statutory terms are not defined in the statute, they are given their ordinary and popularly understood meanings. *People v. Bailey*, 167 Ill. 2d 210, 229, 657 N.E.2d 953, 212 Ill. Dec. 608 (1995). As noted above, the plain and ordinary meaning of "with the intent to intimidate or coerce a significant portion of a civilian population," is not vague or overbroad. A reasonable person of ordinary intelligence in Defendants' position would have concluded that he

was engaging in conduct that, if carried out, would "intimidate or coerce a significant portion of a civilian population".

Molotov cocktails are inherently dangerous. A Molotov cocktail is "so inherently dangerous to human life that it constitutes a hazard to society, and is considered contraband per se. *People v. Davis*, 50 Ill. App. 3d 163, 170 (3d Dist. 1977) citing *People v. Theobald*, 43 Ill. App. 3d 897, 900 (3d Dist. 1976) and Section 24-1(a)(7). Indeed, it is included on the list of weapons that are unlawful for the private citizen to possess anywhere at anytime. *Id.*, citing 720 ILCS 5/24-1(a)(7). Furthermore, throwing Molotov cocktails during public protest marches, setting off bombs at high traffic public buildings and banks, shooting bows and arrows in the streets of a major metropolis or crippling and disabling the police department that citizens expect to come save and protect them would certainly strike panic and fear into the crowd and in a "significant portion of a civilian population," if not all of said society.

Second, as applied to the facts of this case, the Illinois Terrorism Act provides sufficiently definite standards for law enforcement and triers of fact such that its application does not depend only on their private conceptions. During the course of this investigation, police arrested no fewer than 45 others in conjunction with protests during the NATO Summit. The alleged conduct of those individuals did not result in them also being charged with terrorism related charges.

Illinois' Terrorism Act in no way works to quash or severely punish anyone whose aim and intent is massive civil disobedience, except where such intent is for the unlawful purpose of striking fear in a significant portion of the civilian community. The conduct as alleged and attributed to the Defendants, if proven, had no lawful justification or purpose and went well beyond garden variety misdemeanor and felony charges commonly associated with protests. The

conduct of the Defendants, as alleged, fits squarely within the stated legislative findings and purpose of the Terrorism Act.

In fact, this Court recognizes that protest is an integral aspect of civil progression. It has been said,

> "[T]here is nothing wrong with a traffic law which says you have to stop for a red light. But when a fire is raging, the fire truck goes right through that red light. . . Or when a [person] is bleeding to death, the ambulance goes through those red lights at top speed. . .
>
> Disinherited people all over the world are bleeding to death from deep social and economic wounds. They need brigades of ambulance drivers who will have to ignore the red lights of the present system until the emergency is solved. Massive civil disobedience is a strategy for social change which is at least as forceful as an ambulance with its siren on full."
>
> *- Rev. Martin Luther King, Jr., The Trumpet of Conscience.*
>
> "To accept passively an unjust system is to cooperate with that system . . . Non-cooperation with evil is as much an obligation as is cooperation with good. Violence often brings about momentary results. . . But. . . It solves no social problem: it merely creates new and more complicated ones."
>
> *- Dr. Martin Luther King, Jr., Stride Toward Freedom (Harper: 1958) pp. 212-217.*
>
> "The alternative to violence is nonviolent resistance. . . this is not a method for cowards; it does resist. The nonviolent resister is just as strongly opposed to the evil against which he protests as is the person who uses violence. . . nonviolent resistance does not seek to defeat or humiliate the opponent, but to win his friendship and understanding. . . the attack is directed against forces of evil rather than against persons who are caught in those forces. . . nonviolent resistance . . avoids not only external physical violence but also internal violence of spirit. At the center of nonviolence stands the principle of love."
>
> *- Dr. Martin Luther King, Jr., Christian Century (Feb. 6, 1957) p. 165-167, reprinted in A Last Testament of Hope, The Essential Writings and Speeches of Martin Luther King, Jr. ed. James M. Washington (Harper San Francisco, 1991) p. 7-8.*

Such protest has formed a solid backbone of the Civil Rights movements in this Country as well as peaceful protests across the globe. The power of peaceful protest is uncontested. However, there is no place in peaceful protest nor massive civil disobedience for Molotov cocktails.

Consequently, for the reasons stated above, prosecuting the Defendants under Illinois' Terrorism Act does not offend due process on vagueness grounds. Accordingly, this Court finds that the Defendants have failed to establish that the statute is unconstitutional as-applied to their alleged conduct in this case. If the Defendants have a valid affirmative defense that they wish to assert, there is nothing in the statute that would prevent them from doing so.

B. Ripeness

Despite the analysis on the **"assumed facts"** outlined above, a court is not capable of making an "as-applied" determination of unconstitutionality when there has been no evidentiary hearing and no findings of fact. *In re The Parentage of John M.*, 212 Ill. 2d 253 (2004), citing *Reno v. Flores*, 507 U.S. 292, 300-01 (1993). When there are no findings or evidentiary record, the constitutional challenge must be facial. *Id.* Without an evidentiary record, any finding that a statute is unconstitutional "as applied" is premature. See *In re R.C.*, 195 Ill. 2d at 299-300; see also *Desnick v. Department of Professional Regulation*, 171 Ill. 2d 1233 (1996).

As-Applied Challenge Conclusion

The trier of fact has the responsibility to assess the credibility of the witnesses and the weight to be given the testimony, to resolve inconsistencies and conflicts in the evidence, and to draw reasonable inferences from the evidence. People v. Oduwole, 2013 IL App (5th) 120039. Reaching the merits of a constitutional "as-applied" challenge without the presentment or consideration of any evidence creates constitutional due process concerns. *In re The Parentage of John M.*, 212 Ill. 2d 253 (2004). Therefore, a formal ruling on the Defendants' "as-applied" constitutional challenge is denied without prejudice to the Defendants reasserting the claim at the conclusion of the State's case.

CONCLUSION

Based on the foregoing discussion, this Court finds the Illinois Terrorism Act, 720 ILCS 5/29D-5 *et seq.* is constitutional on its face. Therefore, "Defendants' Joint Motion To Dismiss Counts One, Two, Three, and Six of the Above Entitled Indictment Which Are Based Upon the Unconstitutionally Vague Statutory Definition of 'Terrorism' and 'Terrorist Act'" is hereby DENIED. Defendants as-applied challenge is DENIED without prejudice.

DATED: March 27, 2013

ENTERED: 1976

Hon. Thaddeus L. Wilson
Circuit Court of Cook County
Criminal Division

ENTERED
JUDGE THADDEUS L. WILSON-1976
MAR 27 2013
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK