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	)	

REPLY TO THE STATE'S RESPONSE TO DEFENDANTS' JOINT MOTION AND MEMORANDUM TO DISMISS THE CONSTITUTIONALLY VAGUE "TERRORISM" CHARGES IN THE ABOVE-ENTITLED INDICTMENT

Now come the defendants, BRIAN CHURCH, JARED CHASE AND BRENT BETTERLY, by their undersigned counsel and respectfully submit the following Reply to the State's Response to the Motion to Dismiss the "terrorism" counts in the above-entitled indictment (Counts One, Two, Three, and Six).

I. THE DEFENDANTS ARE ENTITLED TO MAKE A FACIAL CHALLENGE TO THE ILLINOIS TERRORISM STATUTE.

The defense has presented two separate legal theories, both recognized by the Illinois Supreme Court, in support of its right to make a facial challenge to the Illinois terrorism statute. First, the defendants argue that the terrorism statute impinges on or affects First Amendment protected activity, and thus the defense is entitled to challenge the statute on its face. *See e.g., People v. Jihan,* 127 Ill. 2d 379, 383 (1989) (Right to make facial challenge if "First Amendment concerns involved.").

Second, the defendants assert that the statute fails to contain a culpable mental state, and thus runs the risk of "potentially subjecting" innocent or non-terrorism conduct to punishment.

Therefore, the Illinois terrorism statute is not rationally related to the statute's purpose. *See e.g.*, *People v. Madrigal*, 241 Ill. 2d 463, 467 (2011).

Accepting for the purpose of argument the State's contention that the separated sections of the definitions of "terrorism" and "terrorist act" should be read together, neither section alone or combined sets forth a criminal mental state rationally related to the charge of terrorism. An examination of 5/29D-10(l) which enumerates nine (1-9) definitions of a "terrorist act," reveals that none of them specifically require, unlike almost all other Illinois criminal statutes, that the acts involved be done "without lawful authority" or without "lawful justification." *See e.g.*, Illinois murder, assault, battery and intimidation statutes. 720 ILCS 5/9-1, 5/12-3, 5/12-1, 5/12-6.

The failure to include a specific culpable mental state in the definition of "terrorist act," coupled with the lack of an element of force or violence, or other culpable mental state, in the terms "coerce" or "intimidate" in the definition of "terrorism" contained in 5/29D-14.9(A), allows for the statute to implicate protected First Amendment conduct, and to punish innocent or non-terrorism conduct not rationally related to the terrorism statute. In other words, reading the statutes together as the State proposes results in a statutory scheme that "clearly does not require criminal intent, criminal knowledge, or a criminal purpose in order to subject one to a felony conviction and punishment." *Madrigal*, 241 Ill. 2d at 470-71.

A. DEFENDANTS HAVE STANDING TO CHALLENGE THE FACIAL CONSTUTUTIONALITY OF THE ILLINOIS TERRORISM STATUTE.

The State contends that the defendants "do not have standing to raise a claim of facial vagueness on the basis that the statutes could implicate first amendment protections when their claim rests entirely on hypothetical scenarios that have no relationship to defendants' actual conduct." State Resp. at 8. This argument is directly contradicted by the well-established

authority cited in the defendants' motion and memorandum, which the State made no effort to address or distinguish. As set forth in *Madrigal*, a defendant may challenge the facial constitutionality of a criminal statute on Due Process grounds if that statute "*potentially* subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge." 241 Ill. 2d at 467 (emphasis added). The Illinois Supreme Court then cited no less than five of its other decisions that struck down criminal statutes based on the *potential* risk that the criminal statutes punished innocent conduct. *See Id.* at 467-68 (citing *People v. Carpenter*, 228 Ill. 2d 250 (2008); *People v. K.C. (In re K.C.)*, 186 Ill. 2d 542 (1999); *People v. Wright*, 194 Ill. 2d 1 (Ill. 2000); *People v. Zaremba*, 158 Ill. 2d 36 (1994); *People v. Wick*, 107 Ill. 2d 62, 64 (Ill. 1985).

Moreover, in discussing the constitutionality of the Identity Theft statute (720 ILCS 5/16G-15(a)(7)), the Illinois Supreme Court ran through a list of hypothetical scenarios which were unrelated to the defendant's actual conduct. In doing so, the Court showed how the statute could be used to potentially punish innocent conduct. This analysis by the Court using hypothetical scenarios unrelated to the actual conduct of a defendant clearly contradicts the State's argument that the defendants must show their actual conduct is innocent to establish "standing" to challenge the facial constitutionality of the terrorism statute. The State's argument is patently wrong and should be rejected.

B. THE TERRORISM STATUTE IMPLICATES AND POTENTIALLY SUBJECTS TO CRIMINAL PENALTY FIRST AMENDMENT CONDUCT.

The acts enumerated as 1-9 in 5/29D-10(l), in the absence of language providing that the acts be "without lawful authority," or "without lawful justification," or "in violation of State or Federal law," or specifying acts which in and of themselves are clearly criminal conduct, like murder or kidnapping, allow for the potential criminalization of First Amendment conduct. For

example, enumerated act (2), "any act that disables or destroys the usefulness or operation of any communications system," could well be used against First Amendment protestors who *en masse* phone or fax a public official about a policy, and who cause, as result of an overload, the communications system of the office of that public official to be temporarily disabled. Such an occurrence is not some fantastical speculation. *En masse* calls or fax-ins are a frequent form of political protest action and have caused disruption to public officials' communications systems in the past.[1] First Amendment actvities, done with the purpose of trying to "coerce," *i.e.*, pressure an official to change their policy, could well be the subject of a terrorism prosecution under the existing Illinois law.

Similarly, enumerated act (3), "any act or series of two 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 industry, by any class of business or by the federal 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," in the absence of a term such as "without lawful justification," or "without lawful authority," or "in violation of State or Federal law," could also be used to punish First Amendment protected acts of protest. In this cyber-age, political protest is often facilitated through the Internet. A political protest campaign that sends thousands of protest e-mails or other cyber communication could result in the temporary disablement of one of the enumerated entities' web sites or computer operations. Since the purpose of such action is to force a change in policy, this First Amendment activity could be construed as an attempt to "coerce" or pressure the e-mails' targets, and thus subject the senders

[1] *See e.g.*, "Tax Deal Opponents Shut Down White House Phones" (Article attached as Exhibit A); "Shutdown the [U.S. Capitol] Switchboard" (Article attached as Exhibit B).

to prosecution under the present Illinois terrorism law.[2] Even a boycott of a transportation company, akin to the Montgomery Bus Boycott, a seminal act of the Civil Rights Movement, could well be construed as an act that "disables . . . a facility used in or used in connection with ground transportation." *See* 5/29D-10(1)(4).[3]

Reviewing the other enumerated acts, which are not modified by the language of "without lawful authority" or "in violation of State or Federal law" one could also posit First Amendment activity that could fall under the definitions contained therein. The issue here is whether or not the law could implicate First Amendment activity, or create a "chilling effect" on the exercise of those fundamental rights, and thus allow for a facial challenge to the statute. It is beyond dispute that at least some of the acts enumerated in sub-sections 1-9 could affect or touch upon the exercise of First Amendment rights and thus a facial challenge to the statute must be permitted.

The State argues that in addition to reading the disparate sections of the statute defining "terrorism" and "terrorist act" together, the Court must also read into the law the legislative findings. The State cites no case for this far-reaching proposition that a statute's legislative findings can somehow cure clear deficiencies in the elements of a specific statute that fails to include a culpable mental state. While the Court can look to legislative findings in trying to discern the intent of the legislature, whatever the intent might have been in limiting the scope of the terrorism law, if the law itself fails to exclude the possibility of First Amendment chill by failing to include a sufficient culpable mental state, such legislative findings are of little importance.

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[2] *See, e.g.*, "House of Representatives' Web site overwhelmed" (Article attached as Exhibit C); City of Madison e-mail system overwhelmed by petition calling for action against police officer (Article attached as Exhibit D).
[3] *See, e.g.*, "Protestors call for Muni shutdown on Monday" (Article attached as Exhibit E).

Further, the legislative findings cited by the State that, "[a]n investigation may not be initiated or continued for activities protected by the First Amendment . . . ," says nothing about precluding a prosecution by the State, nor is it binding on the State, or any other law enforcement authority. The State argues that while the courts are required to "ascertain and give effect to the legislature's intent" it concedes that "the most reliable indicator of legislative intent is the plain and ordinary language of the statute." State's Resp. at 9.

Ironically, as will be discussed below, if the Court were to give credence to the legislative findings made when passing this law, it would also clearly see that the facts alleged in this case are a far cry from the statute's purpose, as stated in the findings, of attacking "the grave nature and global reach of terrorism."

C. THE STATUTE'S FAILURE TO REQUIRE A CULPABLE MENTAL STATE ALLOWS FOR THE POTENTIAL CRIMINALIZATION OF INNOCENT CONDUCT AND RENDERS IT UNREASONABLY RELATED TO THE STATUTE'S STATED PURPOSES.

A 2011 opinion by the Illinois Supreme Court makes it clear that a facial challenge to a statute is not only limited to one that impacts the First Amendment. In *People v. Madrigal*, the Illinois high court, relying on a line of cases it refers to as the "Carpenter-Wick line," held that facial challenges to statutes are permitted if the statute fails to contain a culpable mental state requirement, would criminalize innocent conduct, and is not reasonably related to the purpose of the statute. 241 Ill. 2d at 477. As argued above, the enumerated definitions of a "terrorist act" fail to require that such acts are in violation of State or Federal law, or as most Illinois criminal statutes include, "without lawful authority" or "without lawful justification."

The State's response cavalierly dismisses this argument stating that "[t]he Court in *Madrigal* did not contemplate a facial due process vagueness challenge, and its analysis is thus inapplicable." State's Resp. at 15. This however, was the very argument made by the State in

Madrigal and rejected by the Illinois Supreme Court. "Moreover, as previously noted, in addition to our own *Carpenter-Wick* line of precedent, courts in many other jurisdictions have avoided criminalizing innocent conduct by proceeding to strike down criminal statutes *as facially unconstitutional* where these statutes had the potential to punish innocent conduct." *Id.* at 478 (citations omitted, emphasis added).

Similarly, the State dismisses the most recent recognition by the Seventh Circuit of the United States Court of Appeals in *U.S. v. Jones* that the "[U.S.] Supreme Court regularly decides due-process vagueness claims without regard to the facts of the case." 689 F.3d 696 (7th Cir. 2012) (citations omitted).

> The 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' is impermissibly vague regardless of its application to the facts in the case. *Gougen,* 415 U.S. at 578. Such 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.' *Coates*, 402 U.S. at 614.

Jones, 689 F.3d at 703.

Here, the failure of the Illinois terrorism statute, either in its definitions of a "terrorist act" or in its use of the terms "intent to coerce or intimidate," to require that the acts or the intent be unlawful, renders the statute deficient in providing an ascertainable "standard of conduct." Under the U.S. Supreme Court cases, such a statute lacks a sufficient core and can be the subject of a facial challenge.

Indeed, the U.S. Supreme Court allowed a facial challenge to the Illinois gang loitering statute despite its finding that the law did not touch on First Amendment conduct. *See City of Chicago v. Morales*, 527 U.S. 41 (1999). Foreshadowing the Illinois Supreme Court's opinion in *Madrigal*, the U.S. Supreme Court in *Morales* held that "[w]hen vagueness permeates the text of

the law it is subject to a facial challenge." *Id.* at 56. ("It is established that a law fails to meet the requirement of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.")

The Illinois Supreme Court's opinion in *Madrigal* struck down the identity theft statute because some of its provisions could well punish innocent conduct, even though it found that the majority of its provisions were not constitutionally deficient. 241 Ill. 2d at 470. Similarly, in the case at bar, even if some of the "terrorist act" definitions in 5/29D-10(l) may be construed to have sufficient language to provide a culpable mental state, clearly some do not, and thus, as in *Madrigal*, the statute must be held invalid.

Also in *Madrigal*, the Illinois Supreme Court posits a series of hypothetical cases to show how the statute could criminalize innocent behavior. 241 Ill. 2d at 471-472. Contrary to the State's argument, when deciding whether a statute might punish innocent behavior, it is clearly appropriate to look at possible hypothetical applications of the statute.

In *Madrigal,* the Court also applies "a rational basis test," that is, whether the statute contains a reasonable means for preventing the targeted conduct.

> In *Carpenter*, we considered the facial constitutionality of a statute that banned false or secret compartments in automobiles. Because the statute in that case lacked a culpable mental state beyond both knowledge of the compartment's capacity to conceal and an intent to conceal, we held that the statute 'd[id] not contain a reasonable means of preventing the targeted conduct, and therefore it violate[d] due process.' Carpenter, 228 Ill. 2d at 269.

241 Ill. 2d at 468; *see also, People v. Wright*, 194 Ill. 2d 1, 25 (2000) (Statute violated due process because not reasonably related to statute's stated purpose).

As stated in the legislative findings, the purpose of the Illinois terrorism statute was to address "the grave nature and global reach of terrorism." But at the same time, Representative Fritchey worried 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. 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.* The Illinois statute however goes well beyond addressing global terrorism.

Here, the statute, which fails to contain clear requirements of culpable mental states, while at the same time containing vague language of "intent to coerce and intimidate a significant portion of the civilian population," not only allows for the criminalization of innocent conduct, but impermissibly allows terrorism charges to be used against acts, including criminal damage to property and politically motivated vandalism, which do not even remotely reach the seriousness and level of "the grave nature and global reach of terrorism." Such a vague statute that potentially allows for minor criminal acts to be prosecuted as terrorism does not pass the rational basis test and violates due process.

D. THE TERRORISM STAUTE IS UNCONSTITUTIONALLY VAGUE ON ITS FACE.

As argued in their opening memorandum, the defendants assert that the terms "coerce," "intimidate," and "significant portion of the civilian population," in the absence of clarifying language, are unconstitutionally vague. The State argues that vagueness challenges to the terms "coerce" and "intimidate" have been rejected. State's Resp. at 22. However, the State relies on two U.S. Court of Appeals cases from the Fifth Circuit which address only the term "coerce" and not the term "intimidate." Significantly, the U.S. Supreme Court has found in two cases that the term "coercion" (as well as "restraints" and "threats") is "non-specific and indeed vague" and should be interpreted with caution. *See DeBartolo Corp. v. Florida Gold Coast Bldg.*, 485 U.S. 568, 578 (1988); *NLRB v. Drivers, Chauffeurs, Helpers etc.*, 362 U.S. 274, 290 (1960). The use

of the term "coerce," unaccompanied by any other language, even when read in conjunction with the definitions of a "terrorist act," many of which lack a culpable mental state, is impermissibly vague.

While the State's brief is silent as to the term "intimidate," the Illinois statute which makes "intimidation" a crime states that "(a) person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he or she communicates to another, directly or indirectly by any means, a threat to perform *without lawful authority* any of the following acts." 720 ILCS 5/12-6 (emphasis added). Again, even when reading the definitions of terrorism and terrorist act together, the failure of the terrorism statute to require that the intent to intimidate be carried out without lawful authority, or with a threat of force or violence, or in violation of State or Federal law, renders it impermissibly vague and allows for the criminalization of innocent conduct.

The State argues that the failure of the defendants to offer an "alternative interpretation" of the words coerce and intimidate undercuts their arguments, while at the same time asserting that it was improper for the defendants to put forth hypotheticals to show how the terms could encompass innocent or non-terrorist conduct. Of course, to coerce or intimidate someone can be defined as pressuring someone to do something they do not wish to do. A labor strike is intended to pressure the bosses for better wages or working conditions; a boycott is designed to pressure a company to change their policies or practices; and a protest is designed to pressure a government entity or other organization to change their behavior. To coerce or intimidate without force or violence or the threat of force or violence is really just a form of pressure, and can encompass First Amendment protected conduct and other forms of innocent behavior. This is the fatal flaw in the Illinois statute.

Unlike the Oklahoma and Iowa statutes that specifically exclude First Amendment conduct in the text of the laws, and the New York and Federal statutes which specifically require a crime of force or violence or a violation of State or Federal law, the Illinois law does neither.

In their opening memorandum, the defendants also raise the claim that the phrase "a significant portion of the civilian population" is also unconstitutionally vague. The State's response is to assert that this phrase "includes words with commonly understood meanings that cannot be construed as vague when read within the context of the relevant statutes and the overall purpose of the legislation, which is to criminalize acts of violence and substantial damage, destruction and endangerment that could affect the public at large." State's Resp. at 24. No matter the context in which the phrase "significant portion of the civilian population" is read, the term is vague and subject to widely varying interpretations.

Putting aside the arguments made above that the statute fails to specify a culpable mental state, what constitutes "a significant portion of the civilian population" is undefined and clearly has no objective standard. The cases relied upon by the State are unavailing. *People v. Lewis,* 88 Ill. 2d 129 (1981), concerns the scope of mitigation in a death penalty case and the section of the statute allowing the defendant to show in mitigation that he did not have a "significant" criminal history. In holding that such a standard was allowable in the open-ended scope of death penalty mitigation, the Court in *Lewis* contrasted such a flexible standard with the more rigid requirement for aggravating factors. Aggravating factors "are necessary prerequisites without which the death penalty cannot be imposed," and that "because of their manifest importance, their scope must be more precisely marked than suggestions of mitigating factors which the jury may weigh in cases where the death sentence is a possibility." *Id.* at 145.

Here, we are faced with deciding whether someone should be found guilty of a terrorism charge, carrying a possible 40-year penalty of imprisonment, in part based on a decision whether or not there was an intent to coerce a "significant portion of the civilian population." Certainly, a statute with such severe consequences should not be open-ended and subjected to the arbitrary subjective application of an individual prosecutor, judge or juror. It is a fundamental principle of Due Process "that no [person] shall be held responsible for conduct which he could not reasonably understand to be proscribed." *U.S. v. Harris*, 347 U.S. 612, 617 (1954).

Similarly, the other case cited by the State concerns whether a municipal ordinance that applied only to a bookstore whose inventory was composed of a "substantial or significant portion" of sexually explicit materials. *See Chicago v. Scandia Books Inc.*, 102 Ill. App. 3d 292 (1st Dist. 1981). The Court found that "[t]he word, "substantial" as used in the definition of adult bookstores is not so indefinite as to render the Ordinance void and unenforceable." *Id.* at 297. Interestingly, the Court never mentions the word "significant," and whether or not that term was too vague. More importantly, however, it is a simple matter to determine whether a bookstore's inventory is substantially composed of sexually explicit material, and whether or not someone comes under the coverage of a municipal ordinance. It is entirely different for a trier of fact to determine whether the intention of a defendant was to coerce a significant portion of a civilian population, particularly in light of the fact that, as in this case, nothing ever happened to any member of the civilian population.

In the absence of any standards or criteria in the statute, the determination of what constitutes a significant portion of the civilian population is left up to the predilections and prejudices of prosecutors and individual jurors. Without any statutory guidance the terms are clearly vague and constitutionally problematic.

II. THE DEFENDANTS ARE ENTITLED TO HAVE THEIR "AS- APPLIED" CHALLENGE RULED ON PRE-TRIAL, AND GRANTED ON DUE PROCESS VAGUENESS GROUNDS.

The State argues that since there has been no fact-finding, an as-applied challenge cannot go forward. The implication in the State's argument is that the defendants should wait to the conclusion of the trial before the Court can rule on their as-applied challenge. This would require the defendants to stand trial on the terrorism charges along with the other charges, which would irreparably prejudice the defendants' right to a fair trial, even if the Court were to find at the end of the trial that the statute was unconstitutionally vague as applied to them.

It is beyond dispute that few terms have a greater inherent risk of prejudice than the term, "terrorism." *See, e.g., United States v. Amawi,* 541 F. Supp. 2d 945, 951 (N.D. Ohio 2008); *see also, United States v. Al- Moayad,* 545 F.3d 139, 166 (2d Cir. 2008). A recent decision by the Court of Appeals in New York shows that a trial with terrorism charges will spill-over and prejudice the other charges in the case. In *People v. Edgar Morales*, the New York highest court, in finding that a dispute between rival gang members was not appropriately charged under the New York state terrorism statute, reversed the convictions on the non-terrorism counts finding that there was irreparable spill-over and prejudice. N.Y. Ct of App. #186 (N.Y. 12/11/2012) (Unpublished Opinion attached as Exhibit F).

In fact, the cases cited by the State do not require that the defendants wait until the conclusion of trial to get a ruling on their as-applied challenge. In *People v. Greco,* 204 Ill. 2d 400, 416-417 (2003), the Court relies on the language in a civil case, *In re. R.C.* 195 Ill. 2d 291, 299-300 (2001) in which the Court remanded the case back to the trial court for further proceedings. Certainly, in a civil case the parties could make a pre-trial record through depositions to provide a factual basis for a court to make an as-applied determination.

Quoting from the language in *R.C.*, the court in *Greco* states that "[w]hile it is possible that specific future applications may engender concrete problems of constitutional dimension, it will be time enough to consider such problems when they arise. *R.C.*, 195 Ill 2d at 299-300." *Greco*, 204 Ill. 2d at 417. While the defendant in *Greco* could arguably wait until the conclusion of his trial before a determination as to whether the facts of his case show that the definition of a "special mobile equipment" is vague as applied to him, the defendants in the case at bar will be irreparably prejudiced by having to go to trial under an arguably vague terrorism statute. Here, the defendants' right to a fair trial cannot await another day.

Finally, in the third case cited by the State, *People v. Einoder*, 209 Ill. 2d 443 (2004), the Court simply finds that the defendants presented no evidence in support of their as applied challenge. Here, on the contrary, the defense is either prepared to present evidence, or stipulate for the purposes of the motion to the factual allegations presented by the State in its Response, supplemented by the State's meaningful answer to the defendants' Bill of Particulars.

The defendants are prepared to present evidence, if necessary, to show that the Illinois terrorism statute is unconstitutionally vague as applied to them. If necessary, there can be a pre-trial hearing, akin to a motion to suppress, during which the Court can hear evidence so that a factual record can be developed to rule on this as-applied challenge. Alternatively, the Court can require the State to provide a meaningful response to the defendants' Motion for a Bill of Particulars, filed on the same date as this Reply, which should also provide sufficient factual basis for the Court.

The Court can also look at the recitation of facts submitted by the State in its Response, and without conceding the truth of those allegations, it is clear that the application of those facts, *i.e.*, whether or not the defendants had the "intent to coerce or intimidate a significant portion of

the civilian population," depends upon the meaning of those vague terms in the Statute. Based entirely on the facts alleged by the State in their Response, without a definition in the statute as to the meaning of a "significant portion" of the civilian population, the application of the statute to the defendants, as to whether or not their intent was to affect a significant portion of the civilian population, is clearly vague and constitutionally impermissible.

Since, even according to the State's own factual recitation, the defendants never actually took any actions which actually coerced or intimidated anyone, let alone a significant portion of the civilian population, the application of the statute to their alleged conduct and supposed intentions is clearly vague. Even taking the defendants' statements, replete with bravado and puffery,[4] as evidence of their supposed intent, the ill-defined terms of the statute would never have put the defendants on notice that their intentions could constitute, "terrorism", *i.e.*, an intent to coerce or intimidate a significant portion of the civilian population.

As argued in defendants' opening memorandum, the State has seized upon a vague statute replete with undefined terms to convert a case of young men, at worst, intent on committing acts of criminal damage to property and politically motivated vandalism, into one of "terrorism." There was never any real mortar gun, assault rifles or any other firearm in the possession of any of the defendants, nor was there ever any articulated plan to use the alleged four bottles of gasoline. Certainly, the allegation that defendant Church had the fantastical idea to affix a note to an arrow to be shot at the Mayor's home does not constitute "terrorism" in anyway approaching the severity of the attacks of 9/11 nor does it carry any "grave nature and global reach," as stated in the statute's legislative findings. In fact, none of the State's

[4] While the First Amendment does not protect intentional acts of violence or destruction, *see* State's Resp. at 12-13, the conversations surreptitiously recorded by the undercover police in this case are merely the exercise of free speech and are protected by the First Amendment since they are not inciting the use of imminent force or violence. *See, e.g.*, *Bradenburg v. Ohio*, 395 U.S. 444, 447 (1969).

allegations as to the defendants' intent concerned the civilian population, let alone a significant portion of it.

In fact, the vagueness of the statute allows for this discriminatory and politically motivated application of the Illinois terrorism law to the defendants, the primary evil repeatedly recognized by the U.S Supreme Court of unconstitutionally vague statutes. This is precisely what happened in this case. The terrorism charges were politically motivated to create the impression that the anti-NATO demonstrators were violent and that the public should fear their protest.

The State has seven other serious felony counts under which to proceed against the defendants. Surely, those charges are sufficient and would avoid the unnecessary specter of a highly prejudicial and improper terrorism trial.

Dated: February 25, 2013

Respectfully submitted,

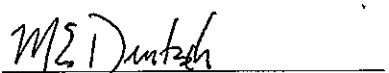

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Exhibit A

CQ Roll Call Feb. 20, 2013

Tax Deal Opponents Shut Down White House Phones

By Jennifer Bendery
Roll Call Staff
Dec. 7, 2010, 12:23 p.m.

Liberal activists angry about President Barack Obama's concession on tax cuts for upper-income Americans crashed two phone lines at the White House and are gearing up for another onslaught of calls to Senate Democratic leaders in an eleventh-hour push to kill the deal.

Supporters of the New York-based Agenda Project shut down two phone lines for most the day Monday in White House senior adviser Valerie Jarrett's office, according to the group's founder, Erica Payne. And even though Obama ultimately announced a bipartisan deal that extends tax cuts for the wealthy, Payne said her group, which boasts 10,000 supporters, has plans to push back every step of the way.

"We believe some fights are worth taking to the bitter end. Fighting the right battles makes you stronger, helps you identify the people who will fight with you — and identify the people who were never with you in the first place," she said.

A White House aide couldn't confirm details about phone lines being flooded, but noted, "They did lob a number of calls in."

The activists are now setting their sights on whom they see as the last possible naysayers on the deal: Senate Majority Leader Harry Reid (D-Nev.) and Senate Democratic Conference Vice Chairman Charles Schumer (N.Y.). They have "the ability to not take the deal," Payne said.

Liberal groups are also going after vulnerable Republicans. MoveOn.org is holding events Tuesday in three states outside the offices of Republican Senators who on Saturday voted against a bill to extend tax cuts for people making less than $250,000: Sens. Scott Brown (Mass.), Mark Kirk (Ill.) and Kay Bailey Hutchison (Texas).

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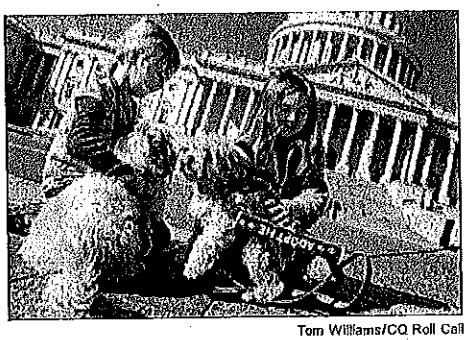


Tom Williams/CQ Roll Call

Josie Gurro, 8, of Capitol Hill, plays with Dallas, a Yorkshire and Silky Terrier mix who is up for adoption at the Washington Humane Society. Her sister Calin, 6, plays with Kenzie, owned by Jennifer Wright of the Humane Society.

More Multimedia

Today at a Glance

An overview of today's Congressional schedules.

Exhibit B

Peggy Walker
Compliance

VIEW ALL STORIES

Compliance in the HME industry can make or break an HME provider and its affects are felt by everyone. Peggy Walker shares news, tips and insight into this important topic.

RETURN TO BLOG HOME

Get your dialing fingers ready.... "Shutdown the Switchboard" is tomorrow.

Posted on: December 3rd, 2012 by John Gallagher No Comments

VGM is calling Dec. 4 "Shutdown the Switchboard Day!" Get ready to flood the phone lines on the Hill tomorrow in an effort to garner more H.R. 6490 cosponsors. We need all hands on deck for this one.

Here is what you need to do to "Shutdown the Switchboard" tomorrow:

1. **First thing in the morning (or as soon as possible), dial the U.S. Capitol Switchboard: 202.224.3121.**

2. Ask the operator to connect you to your representative's office. If you do not know who your representative is, the operator can connect you by using your ZIP Code.

3. Once connected to your representative's office, ask to speak to the Health Legislative Assistant (Health LA).

4. Politely request that your representative sign on to H.R. 6490.

-Below are some sample scripts.

For a representative who has not signed on:

"My name is (your name) and I'm from (your hometown). I own/work for (your company). I'm calling Representative (name) to ask for his/her support to replace the current DME bidding program with the industry supported Market Pricing Program. The current flawed program is causing serious access issues for Medicare recipients and is very harmful to small businesses. H.R. 6490 offers a sustainable alternative to the current program

Click to view Peggy Walker's forms and MAE tips

that over 240 experts have said is designed to fail. I urge Representative (name) to cosponsor this bill and urge House leadership to insure this bill is passed before the end of the year. Thank you."

For a representative who has signed on:

"My name is (your name) and I'm from (your hometown). I own/work for (your company). I wanted to thank Representative (name) for his/her support to replace the current DME bidding program with the industry supported Market Pricing Program by signing on to H.R. 6490. The current flawed program is causing serious access issues for Medicare recipients and is very harmful to small businesses. His/her support of this bill could save our business and help ensure that our patients receive the care they deserve. I now ask for Representative (name's) help to get the language of this bill included in an appropriate large bill before the end of this year. It is vital for my patients and my business. Thank you."

For a representative who was signed on to H.R. 1041:

"My name is (your name) and I'm from (your hometown). I own/work for (your company). I wanted to thank Representative (name) for his support of H.R. 1041, which would have repealed the DMEPOS Competitive Bidding Program. I would like to respectfully request that he/she sign on to H.R. 6490, which would replace the current bidding program with a program that is a sustainable alternative. Thank you."

Refer to the "Dear Colleague" letter sent late last last week from H.R. 1041 original sponsors, Reps. Glenn "GT" Thompson and Jason Altmire.

Click here for a list of H.R. 1041 cosponsors.

5. Once you, your staff, family, friends, etc. have made your calls, report the number of calls via the VGM DC Link website. Click on the feature message found on the homepage.

6. Log onto our video webinar from 11 am to 1 pm CST (12 pm to 2 pm EST/9 am to 11 am PST). John Gallagher will discuss H.R. 6490, its status and what it will take to move it forward. He will also be promoting friendly competition among the state associations to see which one makes the most number of calls per representatives in their jurisdictions. The state association with the most calls will get to send its executive director to the VGM Heartland Conference 2013. Registration, flight and hotel will be covered by VGM!

Log onto:

https://vgmservices.webex.com/vgmservices/onstage/g.php?t=a&d=742501258

Use the password:

hr6490

REGISTRATION IS NOT NECESSARY. Once you have logged into the site, be sure to dial in for the audio. The dial-in number will be available after you have logged in.

With only a few weeks left of the 112th Congressional session, it's "now or never" for H.R. 6490 to move forward. We need all of you to join in this effort!

If you have any questions or if you need more information, please contact Jamie Blomme: 800.642.6065 or jamie.blomme@vgm.com.

Leave a Reply

Your email address will not be published. Required fields are marked *

* Name

Exhibit C

updated 5:08 p.m. EDT, Tue September 30, 2008

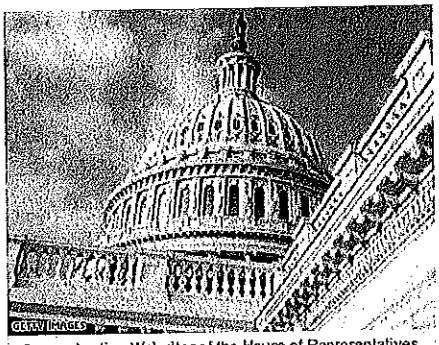
House of Representatives' Web site overwhelmed

STORY HIGHLIGHTS

- Web sites of the House of Representatives are overwhelmed with e-mails
- Administrators implement the "digital version of a traffic cop" to handle the overload
- "This is unprecedented," says a House spokesman
- Overload began Sunday as legislators said bailout agreement was posted online

Next Article in Politics »

WASHINGTON (CNN) -- The servers hosting the Web sites of the House of Representatives and its members have been overwhelmed with millions of e-mails in the past few days, forcing administrators to implement the "digital version of a traffic cop" to handle the overload.



Servers hosting Web sites of the House of Representatives have been flooded with millions of e-mails in recent days.

"This is unprecedented," said Jeff Ventura, communications director for the House's chief administrator.

The tidal waves of e-mails and page views began after negotiators announced Sunday that a deal had been reached on legislation to enact a $700 billion bailout of the country's financial system.

In making the announcement, legislators said the public could view the agreement at financialservices.house.gov.

"In a short period of time, lots of Web users were rushing to the digital doorway to get a copy of this thing," Ventura told CNN in a phone interview.

As millions of people tried to look at the details of the bailout plan, the House.gov system became overwhelmed and many people saw notices on their computer screens saying "this page does not appear." iReport.com: Do you support a bailout?

Don't Miss

- Senate leaders: Stop 'blame game' over bailout failure
- CNNMoney: Bush, lawmakers vow to carry on

Ventura compared the situation to the "old days, when you listened to a radio show and the 10th caller got a toaster. Then everyone calls the same 1-800 number at the same time and all you got was a busy signal."

"This was a massive digital busy signal," he said.

As more people gained access to the page and details of the bailout proposal were published in the news media, constituents then started to e-mail their representatives, Ventura explained.

"We know it's in the millions," he said of the number of e-mails that lawmakers in the House have been receiving. "But we haven't counted yet, because when you're about to get hit by a tidal wave, you don't count the drops of water in the wave."

After the House failed to pass the proposed deal Monday by a vote of 228-205, the e-mail volume surged again, Ventura said.

"Because there were so many e-mails, it was impacting even the presentation of House.gov," he explained.

"This morning, our engineers sounded the alarms ... and we have installed a digital version of a traffic cop. We enacted stopgaps that we planned for last night. We had hoped we didn't have to."

The office of the chief administrative officer of the House of Representatives issued a statement Tuesday saying: "This measure has become temporarily necessary to ensure that congressional Web sites are not completely disabled by the millions of e-mails flowing into the system. Engineers are working diligently to accommodate this enormous traffic flow and we appreciate your patience in this matter."

Now, when House.gov or individual members' sites begin to get overloaded, a message will come up on the computer screen saying, in effect, "try back later," Ventura said.

"This really tells us that the level of constituent engagement on this issue is extremely high," he added.

He said after the failed vote Monday and the initial backlash, the House's Web site administrators thought there would be a drop in Web traffic -- especially with the Rosh Hashanah holiday.

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1. Jessi Klein's presidential debate blog
2. Exascale: Faster than 50 million laptops
3. Russia mourns flood victims
4. Torres signs new Liverpool deal
5. Former Bush counselor tells tales

"We monitored the situation all night long, and technicians and engineers saw that we were facing the same demand as yesterday," Ventura said.

He predicted that traffic on those Web sites "would start to subside once there's some guidance on the marketplace and political landscape about what comes next."

Ventura said the House.gov Web site experienced a very high number of hits when the 9/11 commission released its final report on the September 11, 2001, terror attacks against the United States, but nothing like what the site has seen in the past few days. E-mail to a friend | Mixx it | Share

All About U.S. House of Representatives • Internet

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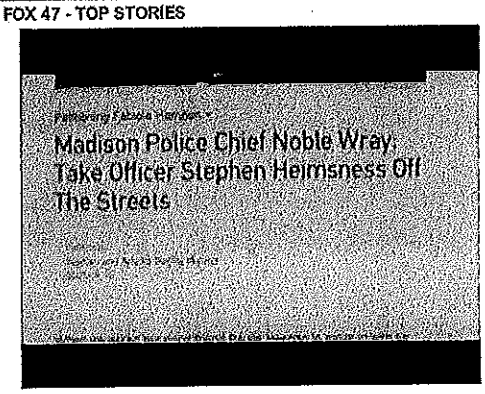
- Collins leaves Rice meeting with questions
- Political storm knocks Rice off path
- Bergen: GOP obsession with Benghazi makes no sense
- Obama to meet with Romney on Thursday

Exhibit D

FOX 47 - TOP STORIES



MADISON, Wis. - About 250,000 emails generated by an online petition overwhelmed the city of Madison's email system this week.

The emails were generated by a petition on the website change.org calling for Madison Police Chief Noble Wray to keep Officer Stephen Heimsness off the streets.

Heimsness was cleared of any wrongdoing after he shot and killed Paul Heenan, who was unarmed, on Madison's near east side on Nov. 9 while responding to what he thought was a burglary in progress.

It was later determined that Heenan, who was drunk, had entered a neighbor's house by mistake, prompting a 911 call of a reported break-in.

Heimsness remains on leave while three separate investigations of his conduct are under way.

The petition at change.org was set up by Heenan's roommates, according to the website.

"The petition has proven to be very popular. The change.org/paulie address has been visited by almost 90,000 people so far, and people have been leaving lots of thoughtful comments," said Nate Royko Maurer, one of Heenan's roommates.

The large number of messages, from all over the country, delayed or blocked the city from getting other emails.

City officials said emails from the petition are now being sent to a separate account to prevent disruptions to the city's email system. They said the ability for change.org users to share via email and social media is what generated the thousands of emails. For a time the city had to block emails coming from the petition site.

In a statement released by the mayor's IT staff, emails from the petition will now be sent to a separate account, which concerns petition organizers.

"We don't want to misrepresent to the people who have signed on that their voices are being heard when in fact they're being dumped into some junk mail account," Royko Maurer said. "These are petition signers who voluntarily left their thoughts, and the thoughts were forwarded on to email addresses for the mayor, for the chief of police, for members of the Police and Fire Commission."

Petition organizers said their intent was never to shut down the city's email system. They said they just hope to start a

VIDEO LIST
Jury selected in trial for mom accused of killing son, 3
Legislative committee wants audits of all foster care agencies
Madison Mayor open to changing reviews of officer-involved shootings
UW-Madison campus shooter strategy gets national attention
Voters brave wintry weather in court primary
Home sales up 18 percent in January
Police investigate three armed robberies

TONIGHT ON FOX 47
5:00pm Family Feud
5:30pm Big Bang Theory
6:00pm Two and a Half Men
6:30pm Big Bang Theory
7:00pm American Idol
9:00pm FOX 47 News at 9
9:35pm Everybody Loves Raymond
10:05pm Two and a Half Men
10:35pm Seinfeld
11:05pm The Simpsons
11:35pm 30 Rock

Complete FOX 47 Schedule

To FOX.com

AP NEWS VIDEO
Is Anne Hathaway Ready for the Oscars?

dialogue with the city to ensure the petition's comments make it to right people.

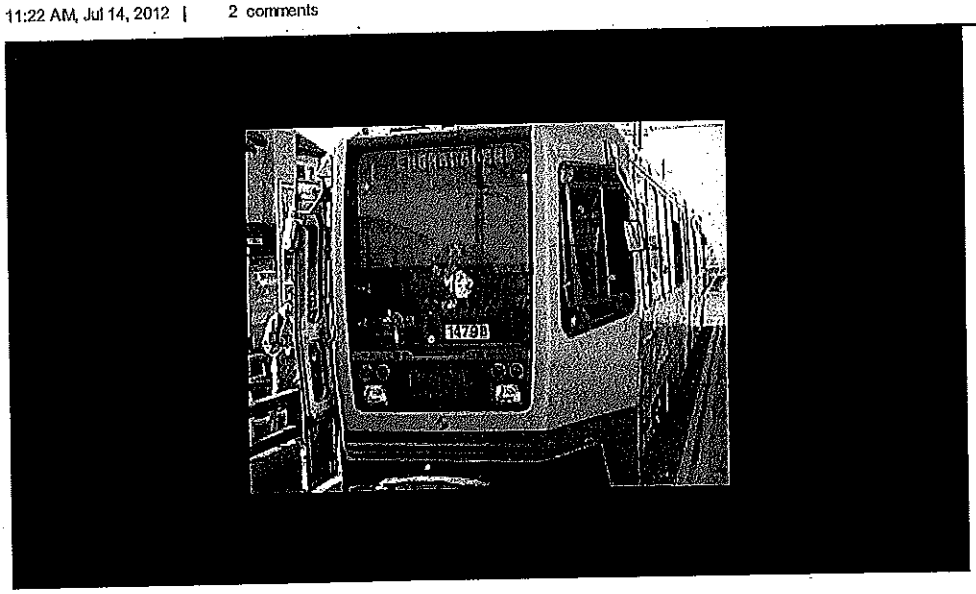
Organizers have plans to deliver a physical copy of the petition to the city in the near future.

Tuesday, February 5 2013, 10:21 PM CST

Exhibit E

Protesters call for Muni shutdown on Monday

11:22 AM, Jul 14, 2012 | 2 comments



The Associated Press

FILED UNDER

News

SAN FRANCISCO (AP) - Activists are calling for a shutdown of Muni lines Monday to mark the one-year anniversary of a police shooting in the Bayview District.

No specific time was set for the action on flyers being circulated by the "Ad Hoc Committee For a Muni Shut Down on July 16." However, a message from organizers indicated that supporters would gather at 5:30 a.m. at Third and Palou streets.

Muni officials would say only that they are aware of the event and will take it into consideration as they manage service throughout the day, San Francisco Municipal Transportation Agency spokeswoman Kristen Holland said.

San Francisco police will be on the scene to facilitate the first amendment rights of the protesters, provide traffic control and monitor the scene, as they do for any protest, said Officer Gordon Shyy.

"We'll have officers and supervisors on the scene and they'll assess the situation as it goes and make a decision on what our response will be it if does cause a major problem," Shyy said.

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Man dies 36 years after being shot during robbery

Turlock cheese factory set ablaze

Global Hawk support squadron deactivating at Beale AFB

The flyers calling for the shutdown cite the June 5 shooting of 15-year-old Derrick Gaines by South San Francisco police and the July 16, 2011 shooting of Kenneth Harding, Jr., 19, who died after an encounter with police conducting Muni fare inspections.

"We want free transit for all youth," organizers said in a message sent Thursday. "No youth should have to worry about losing his or her life for not having a $2 transit fare."

Protesters are also asking for federal charges against officers involved in Harding's shooting, the message read.
Police initially said Harding, a parolee who was wanted for questioning in connection with a Seattle homicide, was shot and killed by officers after he exchanged gunfire with police who tried to detain him for fare evasion.

However, investigators later said the gun that fired the fatal shot was not a police weapon, and it appeared Harding had shot himself.

Confusion and outrage arose over the death when no gun was discovered on Harding's body and videos circulated that showed him bleeding slowly to death on the pavement in front of a crowd.

Police said the weapon that fired the fatal shot was recovered after a search, and that amateur video showed someone removing the gun from his body immediately after the shooting.

The Monday protest is scheduled to be the last in a series of "Days of Action," according to flyers. Organizers say they are holding a "Community Speak Out" at 7 p.m. today at Muhhammad's Mosque 26 at 1709 Revere Ave., a free community hip-hop show on Saturday at City College of San
Francisco and a community feed on Sunday at Third and Palou streets from 10 a.m. to 2 p.m.

The Associated Press

Exhibit F

New York Law Journal

ALM Properties, Inc.
Page printed from: *New York Law Journal*

Back to Decision

The People v. Edgar Morales, No. 186

New York State Court of Appeals

No. 186

New York Law Journal

12-12-2012

Cite as: The People v. Edgar Morales, No. 186, NYLJ 1202581035138, at *1 (Ct. of App., Decided December 11, 2012)

Opinion by Judge Graffeo. Chief Judge Lippman and Judges Ciparick, Read, Smith and Pigott concur.

Decided December 11, 2012

Peter D. Coddington, for appellant-respondent.

Catherine M. Amirfar, for respondent-appellant.

Center on the Administration of Criminal Law, amicus curiae.

*1

VICTORIA A. GRAFFEO, J.:

Shortly after the horrendous attacks on September 11, 2001, the New York Legislature convened in special session to address the ramifications of these terrorist actions. Confronted with the tragic events of that infamous day, the Legislature recognized that "terrorism is a serious and deadly problem that

*2

disrupts public order and threatens individual safety both at home and around the world" (L 2001, ch 300, §4). It decided that New York laws needed to be "strengthened" with comprehensive legislation ensuring "that terrorists... are prosecuted and punished in state courts with appropriate severity" (id.).

The result was Penal Law article 490 and, among its provisions, was the new "crime of terrorism" (Penal Law §490.25). It occurs when a person "commits a specified offense" with the "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" (Penal Law §490.25 [1]). Specified offenses include many class A and violent felonies, as well as attempts to commit those crimes (see Penal Law §490.05 [3] [a], [b]). Article 490 does not, however, contain a statutory definition of "intent to intimidate or coerce a civilian population" (Penal Law §490.25 [1]). This appeal requires us to consider whether this phrase encompasses the acts perpetrated by defendant.

I

Defendant Edgar Morales was a member of a street gang known as the "St. James Boys" or "SJB" — apparently named for the vicinity of the Bronx where the SJB operated (running from Webster Avenue to University Avenue and from 204th Street to 170th Street). The SJB was originally formed to protect its

*3

members from other gangs and its primary objective was to be the most feared Mexican gang in the Bronx. The SJB allegedly targeted and assaulted individuals who belonged to rival confederations, extorted monies from a prostitution business and committed a series of robberies.

On the evening of August 17, 2002, several SJB members, including defendant, went to a christening party in the Bronx. They saw a man named Miguel who they thought belonged to a gang that was responsible for a friend's death. When Miguel refused to comply with their demand to leave the party, they planned to assault him after the festivities ended. Defendant took possession of a revolver from another SJB member, agreeing to shoot Miguel if it appeared that his cohorts were losing the battle.

Around midnight, a fight broke out between the SJB members and Miguel and his companions. During the melee, a SJB member directed defendant to shoot and he fired five bullets from the handgun. Three shots hit one of the rivals and paralyzed him. A 10-year-old girl was shot in the head and died. After the SJB members fled the scene, defendant handed the gun to a female member who later passed the weapon to another SJB member. Another SJB member threw the five spent shell casings into a sewer.

After the incident, the police obtained a videotape of the christening party and using still photographs from the video,

*4

they distributed photos of suspects to the media. Subsequently, several SJB members identified defendant as one of the individuals involved in the shooting. When he was questioned by the police, defendant admitted that he attended the party but denied being the shooter, claiming that he was merely the person who carried the weapon away from the scene. Additional evidence was gathered during the investigation, including four shell casings retrieved from a sewer.

The People subsequently secured a 70-count indictment against the SJB members. Defendant, along with certain accomplices, was charged with crimes of terrorism pursuant to Penal Law §490.25 predicated on: intentional murder in the second degree; manslaughter in the first degree; attempted murder in the second degree; gang assault in the first degree; and criminal possession of a weapon in the second degree. The underlying offenses were charged separately without the terrorism designations. Defendant and 19 others were also charged with conspiracy in the second degree based on a multitude of overt acts, including various assaults and homicides that occurred from mid-2001 to mid-2004.

During the trial, defendant challenged the sufficiency of the evidence supporting the terrorism charges. The defense argued that the activities of the SJB were "directed at rival gangs, almost exclusively" and there was "no real evidence, certainly not evidence sufficient to get to the jury on the

*5

element of acting with intent to intimidate or coerce a civilian population." The People maintained that the targeting of other gangs was covered by Penal Law article 490 and, in any event, there was adequate proof that the SJB engaged in acts intended to intimidate or coerce all Mexican-Americans in the pertinent geographical area.

Supreme Court denied the motion, concluding that the People had established a prima facie case of terrorism based on the five designated underlying offenses. The jury convicted defendant of three crimes of terrorism under Penal Law §490.25 premised on first-degree manslaughter, attempted second-degree murder and second-degree weapon possession, as well as second-degree conspiracy for agreeing to commit first-degree gang assault as a crime of terrorism. Defendant was sentenced to an aggregate prison term of 40 years to life.

The Appellate Division, First Department, held that there was insufficient evidence to prove an intent to intimidate or coerce a civilian population because the People established that defendant only engaged in gang-related street crimes, not terrorist acts (86 AD3d 147 [2011]). As a result, the Appellate Division modified by reducing the terrorism convictions to the three primary offenses and the conspiracy conviction was reduced from second degree to fourth degree. Defendant's other challenges — including his claim that the People's theory of terrorism unduly prejudiced the entire trial — were rejected as

*6

unpreserved or meritless.

A Judge of this Court granted leave to defendant and the People (17 NY3d 904 [2011]).

II

The People assert that the term "civilian population" as used in Penal Law article 490 embraces all of the Mexican-Americans who resided within the SJB's designated area, as well as the subset of rival Mexican-American gangs in the same vicinity. The prosecution asks us to reinstate the terrorism convictions, contending that there was sufficient evidence that defendant's actions after the party furthered the SJB's objective to intimidate or coerce other Mexican-American gangs in the Bronx and, as a result of those activities, the SJB intended to intimidate and coerce the entire Mexican-American community during the time period charged in the indictment. Defendant argues that neither the population of Mexican-Americans in the St. James Park neighborhood, nor the smaller category of rival gangs, can constitute a "civilian population" as a matter of law.

We begin by examining the text of article 490, which does not define the phrase "intent to intimidate or coerce a civilian population." We therefore give this language its "most natural and obvious meaning" (People v. Hedgeman, 70 NY2d 533, 537 [1987]) based on common sense and reasonableness (see e.g. People v. Ballman, 15 NY3d 68, 73-74 [2010]; People v. Gallagher, 69 NY2d 525, 530 [1987]) in the context of the purpose and history of the

*7

terrorism statutes (see e.g. People v. Sanchez, 13 NY3d 554, 565 [2009]). "Civilian population" could be read broadly to encompass a variety of communities depending on how the relevant "area" is defined and who lives within that territory.[1] Conceivably, it could range from the residents of a single apartment building to a neighborhood, city, county, state or even a country.

Like the Appellate Division, we find it unnecessary to precisely define the contours of the phrase "civilian population" for two reasons. First, even assuming that all of the Mexican-Americans in the St. James Park area may be considered a "civilian population," the evidence at trial failed to demonstrate that defendant and his fellow gang members committed the acts against Miguel and his companions with the conscious objective of intimidating every Mexican-American in the territory identified at trial. Rather, viewing the proof in the light most favorable to the People (see People v. Ramos, 19 NY3d 133, 136 [2012]), the prosecution demonstrated that defendant and his accomplices arranged the attack because of Miguel's assumed

*8

membership in a rival gang and his refusal to leave the party. We do not believe that this discrete criminal transaction against identified gang enemies was designed to intimidate or coerce the entire Mexican-American community in this Bronx neighborhood.

Second, while there is a valid line of reasoning and permissible inferences from which the jury could have concluded that one of defendant's possible goals for attacking Miguel was to intimidate or coerce another gang, there is no indication that

the Legislature enacted article 490 of the Penal Law with the intention of elevating gang-on-gang street violence to the status of terrorism as that concept is commonly understood. Specifically, the statutory language cannot be interpreted so broadly so as to cover individuals or groups who are not normally viewed as "terrorists" (see generally Hedgeman, 70 NY2d at 537) and the legislative findings in section 490.00 clearly demonstrate that the Legislature was not extending the reach of the new statute to crimes of this nature. This is apparent in the examples of terrorism cited in the legislative findings: (1) the September 11, 2001 attacks on the World Trade Center and the Pentagon; (2) the bombings of American embassies in Kenya and Tanzania in 1998; (3) the destruction of the Oklahoma City federal office building in 1995; (4) the mid-air bombing of Pan Am Flight number 103 in Lockerbie, Scotland in 1988; (5) the 1997 shooting from atop the Empire State Building; (6) the 1994 murder of Ari Halberstam on the Brooklyn Bridge; and (7) the bombing at

*9

the World Trade Center in 1993 (see Penal Law §490.00). The offenses committed by defendant and his associates after the christening party obviously are not comparable to these instances of terroristic acts.

We must also consider the sources that the Legislature consulted in drafting the new statutes. The definitional provisions of Penal Law article 490 were "drawn from the federal definition of 'international terrorism'" (William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law §490.10, at 299; see also Richard A. Greenberg et al., New York Criminal Law §39:1, at 1738 [3d ed 6 West's NY Prac Series 2007] [explaining that the Legislature was able to act six days after September 11th "because of the model provided by existing federal antiterrorism legislation"]). The federal antiterrorism statutes were designed to criminalize acts such as "the detonation of bombs in a metropolitan area" or "the deliberate assassination of persons to strike fear into others to deter them from exercising their rights"[2] — conduct that is not akin to the serious offenses charged in this case. Similarly, a statute extending federal jurisdiction to certain crimes committed against Americans abroad with the intent "to coerce, intimidate,

*10

or retaliate against... a civilian population" (18 USC §2332 [d]) was not meant to reach "normal street crime"[3] (see e.g. Linde v. Arab Bank, PLC, 384 F Supp 2d 571, 581 n 7 [ED NY 2005] ["drive-by shootings and other street crime," and "ordinary violent crimes... robberies or personal vendettas," do not satisfy the intent element of "international terrorism" under 18 USC §2331 (1)]).

If we were to apply a broad definition to "intent to intimidate or coerce a civilian population," the People could invoke the specter of "terrorism" every time a Blood assaults a Crip or an organized crime family orchestrates the murder of a rival syndicate's soldier. But the 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. History and experience have shown that it is impossible for us to anticipate every conceivable manner in which evil schemes can threaten our society. Because the Legislature was aware of the difficulty in defining or categorizing specific acts of terrorism, it incorporated a general definition of the crime (see generally People v. Garson, 6 NY3d 604, 612 [2006]; People v. Lang, 36 NY2d 366, 371 [1975]) and referenced seven notorious acts of terrorism that serve as guideposts for determining whether a

*11

future incident qualifies for this nefarious designation (see generally People v. Assi, 14 NY3d 335, 341 [2010]).

Considered in that context, and subject to possible exceptions that could arise if a criminal organization engages in terrorist activities, we conclude that the Legislature did not intend for the crime of terrorism to cover the illegal acts of a gang member committed for the purpose of coercing or intimidating adversaries. Therefore, the evidence in this case was insufficient to establish defendant's guilt beyond a reasonable doubt under Penal Law §490.25. Defendant's violent, criminal acts as a member of the SJB gang unquestionably resulted in tragic consequences — the needless death of a little girl and the paralysis of a young man — but they were not acts of terrorism within the meaning of Penal Law article 490.

III

On his cross appeal, defendant contends that he is entitled to a new trial on the underlying offenses specified in the terrorism counts because the theory of terrorism should not have been charged and the People were therefore permitted to

introduce otherwise inadmissible evidence that unduly prejudiced the jury's ability to fairly adjudicate his guilt or innocence. We agree.

"Whether an error in the proceedings relating to one count requires reversal of convictions on other jointly tried counts is a question that can only be resolved on a case-by-case

*12

basis" (People v. Baghai-Kermani, 84 NY2d 525, 532 [1994]). We must evaluate "the individual Facts of the case, the nature of the error and its potential for prejudicial impact on the over-all outcome" (People v. Concepcion, 17 NY3d 192, 196-197 [2011] [internal quotation marks and citation omitted]; see also People v. Doshi, 93 NY2d 499, 505 [1999]). Reversal is required if "there is a reasonable possibility that the jury's decision to convict on the tainted counts influenced its guilty verdict on the remaining counts in a meaningful way" (Doshi, 93 NY2d at 505 [internal quotation marks and citation omitted]; see also People v. Daly, 14 NY3d 848, 849 [2010]).

By proceeding on the terrorism theory, the People were able to introduce evidence about numerous alleged criminal acts committed by members of the SJB gang over the course of three years. Without the aura of terrorism looming over the case, the activities of defendant's associates in other contexts would have been largely, if not entirely, inadmissible. Based on the record, it is apparent that the volume of proof regarding unrelated assaults, murders and other offenses created a reasonable possibility that the jury's findings were prejudicially influenced. Hence, the spillover effect requires reversal and a new trial on the underlying offenses.[4]

* * *

Accordingly, on the People's appeal, the order should be affirmed. On defendant's appeal, the order should be reversed and a new trial ordered.

1. See American Heritage Dictionary 1366 (4th ed 2006) (defining "population" as "[t]he total number of inhabitants constituting a particular race, class, or group in a specified area"); New Oxford American Dictionary 1320 (2d ed 2005) ("a particular section, group or type of people... living in an area or country"); Webster's Third New International Dictionary 1766 (2002) ("a body of persons having some quality or characteristic in common and usu[ally] thought of as occupying a particular area").

2. These are set forth in the legislative history of the Foreign Intelligence Surveillance Act (FISA), as it was originally enacted (50 USC §1801 et seq.) (see S Rep 95-701, 95th Cong, 2d Sess at 30, reprinted in 1978 US Code Cong & Admin News at 3999).

3. See HR Conf Rep 783, 99th Cong, 2d Sess at 87, reprinted in 1986 US Code Cong & Admin News at 1960.

4. To the extent that defendant's remaining contentions must be addressed, we reject them because there was sufficient evidence to prove his guilt of the underlying specified offenses (see generally People v. Reome, 15 NY3d 188, 192 [2010]) and the record supports the suppression court's determinations that defendant's Payton and Miranda rights were not violated.

On the People's appeal, order affirmed. On the defendant's appeal, order reversed and a new trial ordered. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Ciparick, Read, Smith and Pigott concur.