

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

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

12 CR 10985

FILED
MAY 22 2013
DOROTHY BROWN
CLERK OF CIRCUIT COURT

**SURREPLY TO THE STATE’S SURRESPONSE TO DEFENDANTS’
JOINT MOTION AND MEMORANDUM TO DISMISS THE “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 Surreply to the State’s Surrespouse to the Motion to Dismiss the “terrorism” counts in the above-entitled indictment (Counts One, Two, Three, and Six):

A. The Illinois Terrorism Statute Has the Grave Potential to Encompass Non-Criminal Conduct in Violation of Illinois Supreme Court Precedent.

The State’s “Surreply” (*sic* Surrespouse) attempts to distinguish the *Carpenter-Wick-Madrigal* line of Illinois Supreme Court cases, which allows facial challenges to statutes that potentially criminalize innocent conduct, holding that such statutes are not rationally related to their legislative purpose. Each of the six cases in this line analyzes a different statute, and presents hypothetical factual situations to show that the statute fails to include a culpable mental state and thus potentially encompasses non-criminal conduct.

The defendants similarly have shown through hypotheticals that the Illinois terrorism statute could encompass non-criminal conduct, including First Amendment protected advocacy,

because the statute's definitions of a "terrorist act" (the *actus reus* of the charges¹), fail to require a criminal intent, one of the two elemental components of any criminal charge. At common law, a crime required two elements: a criminal act ("*actus reus*") and an evil intention ("*mens rea*"). 21 Am. Jur. 2d, Criminal Law Sec. 81 (1965). Yet here, each definition of a terrorist act under 720 ILCS 5/29 D-10(L) omits language requiring that the acts be in violation of state or federal law or committed without legal justification or lawful authority.

The phrases "damage," "disable," or "destroy," do not, in and of themselves, convert the enumerated acts defined in 720 ILCS 5/29 D-10(L) into wrongful or criminal ones. Even the definition in 720 ILCS 5/29 D-10(L)(1) defining a terrorist act as one 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, without the qualifying phrase "without lawful authority or legal justification," does not state a crime of battery or murder, or any other crime under Illinois law.

Contrary to the State's argument, the failure of the "terrorist act" definitions to state criminal acts and require a culpable state of mind - *i.e.*, a criminal purpose, criminal intent, or criminal conduct - is not remedied by 720 ILCS 5/29 D-14.9, defining terrorism as committing a terrorist act "with the intent to coerce or intimidate a significant portion of a civilian population." The State's argument is inherently flawed because it defines the culpable mental state simply by

citing the statutory language from 720 ILCS 5/29 D-14.9. As defendants have argued, the language "with the intent to coerce or intimidate a significant portion of a civilian population" does not in and of itself establish a culpable mental state, as one can envision a number of potential scenarios where an intent to coerce or intimidate is not an unlawful mental state.

¹ *Actus reus* element of a crime is the "wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability." Black's Law Dictionary 37 (7th Ed. 1999).

Moreover, because the definitions contained in 720 ILCS 5/29 D-10(L)(1-9) do not constitute criminal acts, the words “intent to coerce or intimidate,” without requiring an intent to violate state or federal law or an intent to use force or violence, fail to provide the necessary *mens rea* required of any criminal statute. Lacking both an *actus reus* and a sufficient *mens rea*, the Illinois terrorism statute allows prosecutors to pursue terrorism charges for potential non-criminal and non-terrorist conduct. The statute therefore violates the Illinois and U.S. Constitutional protections of Due Process.

Terrorism is the most nefarious of criminal acts; its very name provokes a deep emotional reaction. An analysis of the sufficiency of the statute cannot be divorced from the inflammatory nature of this particular crime. With an abundance of potential prejudice on the line, factfinders need highly specific guidance to avoid the taint of “terror” creeping into deliberations and soiling a verdict which should be based on the evidence alone. As currently written, the Illinois terrorism statute leaves the factfinder to divine essential elements of the crime. The role of the factfinder is to find facts, not create law. Given the ever-present risk of convicting a defendant based upon the charges rather than the evidence, holes in this statute must be patched by the legislative branch, not the judicial. To guard against unconstitutional deprivations of liberty, Due Process demands that the terrorism statute contain the highest safeguards and the most specific guidance for factfinders, not the least.

The State’s central argument with regard to the profound discretion left to prosecutorial bodies by the absence of constitutionally sufficient statutory specificity appears to be: “trust us.” In oral argument, the State pointed to the lack of previous prosecutions as proof that the current prosecution comports with Due Process. The very reason that American jurisprudence depends on the necessary nexus of *actus reus* and *mens rea* is to limit the over-reach of

prosecutors, regardless of how well meaning they believe themselves to be. Countless innocent people have been wrongfully convicted on the misplaced earnestness of prosecutors. While discretion in charging clearly criminal conduct is certainly within the purview of the prosecutorial role, here we have a statute with overwhelming deficiencies that purports to charge the most serious of crimes. Surely, the Constitution offers a better answer than "trust us."

B. The Federal Statute Proscribing Domestic Terrorism and Most of the State Statutes Prohibiting Terrorism, Require that the Terrorist Act be in Violation of a State or Federal Law and Many Also Require that the Act Involve Force or Violence.

In contrast to the Illinois Terrorism Law, the Federal Domestic Terrorism Statute and most of the state terrorism statutes passed after 9/11 require that the terrorist act be in violation of state or federal law, and many require that the act involve force or violence. These statutes, attached hereto as Exhibit A, with the specific pertinent parts italicized, clearly delineate that a criminal act in violation of State and/or Federal law is an essential element to any terrorism charge. In addition to a criminal offense, many of the statutes also require that the criminal conduct be a crime of violence or dangerous to human life. For example, the Federal terrorism statute defines "domestic terrorism" as acts that are "dangerous to human life that are a violation of the criminal laws of the United States or of any State." Similarly, the Idaho, Michigan and South Carolina statutes require an act that is *both* in violation of the state criminal law and involves acts dangerous to human life.

The Illinois terrorism statute lacks the clear protections included in the federal and other state terrorism laws to ensure that non-terrorism, non-violent or even non-criminal conduct is not prosecuted as terrorism. Therefore, as further explained above, the Illinois terrorism statute violates Constitutional Due Process protections and is unconstitutional.

C. The State Erroneously Relies on *People v. Hollins*.

The only new case cited in the State's "surreply", *People v. Hollins*, 971 N.E.2d 504 (2012), is inapplicable to the instant case. The State relies on *Hollins* to argue that under the rational basis test a statute should be upheld if there is "any conceivable basis for finding a rational relationship to a legitimate legislative purpose." 971 N.E.2d at 515. In *Hollins*, however, the Court made an "as applied" determination, finding that defendant's conduct was not innocent, and therefore the rational relationship test would not apply. In making this "as applied" determination, the Illinois Supreme Court reaffirmed its holding and analysis in *Madrigal* upholding a facial challenge to a statute that had the potential to criminalize innocent conduct.

Here, as in *Madrigal*, the defendants have raised a facial challenge, asserting that the terrorism statute potentially punishes non-criminal and non-terrorist conduct, and therefore is not rationally related to the legislative purpose of punishing the grave problem of terrorism. Rather than supporting the State's position, the language of the Court in *Hollins* reaffirms the defendants' right to raise a facial challenge to the Illinois terrorism statute and the merits of that challenge.

D. The Illinois Appellate Decision in *Chicago v. Scandia* is Distinguishable and Not Binding on this Court.

The defendants have found only one Illinois Appellate Court case, *Chicago v. Scandia*, 102 Ill. App. 3d 292 (1st Dist. 1981), which in anyway addresses the issue of whether the terms "substantial" or "significant" are unconstitutionally vague. This thirty year-old case never addresses the word "significant," but only determines that the term "substantial" is not vague based on its ascertainable meaning in other statutory schemes. Therefore *Scandia* is not binding

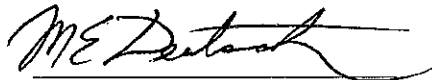
on this Court's determination of the vagueness of the term "significant" in the context of the Illinois Terrorism Statute.

In *Scandia*, the Court upheld a city Ordinance defining adult bookstores as those containing a substantial amount of sexually explicit material in its inventory. Obviously, when you are measuring a known factor - the total inventory of a bookstore - against the number of sexually explicit books, it is not a vague process to determine if the amount of sexually explicit material is substantial. "A significant portion of the civilian population," unlike the total inventory of a bookstore, is a completely undefined and limitless quantity. It is a far different and much more amorphous, open-ended process when a fact-finder has no initial benchmark by which to measure and is instead left to their own sensibilities to define the *mens rea* of a terrorism statute. The instant case presents a qualitatively different factual situation, where there is no fixed standard against which to measure what is a "significant portion of a civilian population." Thus *Scandia* is not binding on this Court.

WHEREFORE, the defendants respectfully request that the Court dismiss counts One, Two, Three and Six of the indictment which rely upon the Illinois terrorism statute, which is unconstitutional both on its face and as applied to this case.

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Respectfully submitted,



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Exhibit A

Federal Terrorism Statute (emphasis added)

18 U.S.C. § 2331(5)

The term “domestic terrorism” means activities that

- (A) involve *acts dangerous to human life that are a violation of the criminal laws of the United States or of any State*;
- (B) appear to be intended
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.

State Terrorism Statutes (emphasis added)

Alabama

Ala. Code § 13A-10-152(a)

A person is guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination, or kidnapping, he or she *commits a specified offense*.

Arizona

Ariz. Rev. Stat. Ann. § 13-2301(B) (12)

“Terrorism” means any felony, including *any completed or preparatory offense, that involves the use of a deadly weapon or a weapon of mass destruction or the intentional or knowing infliction of serious physical injury with the intent to either:*

- (a) Influence the policy or affect the conduct of this state or any of the political subdivisions, agencies or instrumentalities of this state;
- (b) Cause substantial damage to or substantial interruption of public communications, communication service providers, public transportation, common carriers, public utilities, public establishments or other public services.

Delaware

Del. Code Ann. tit. 11 § 9002 (5) (e)

“Crime” for purposes of this chapter shall mean . . . An act of terrorism, *as defined in 18 U.S.C. § 2331*, committed outside, or inside, the United States against a resident or domiciliary of this State.

Florida

Fla. Stat. § 775.30

As used in the Florida Criminal Code, the term “terrorism” means an activity that:

- (1) (a) *Involves a violent act or an act dangerous to human life which is a violation of the criminal laws of this state or of the United States; or (b) Involves a violation of § 815.06; and*
- (2) Is intended to: (a) Intimidate, injure, or coerce a civilian population; (b) Influence the policy of a government by intimidation or coercion; or (c) Affect the conduct of government through destruction of property assassination, murder, kidnapping, or aircraft piracy.

Georgia

Ga. Code Ann. § 16-4-10(a)

As used in this Code section, “*domestic terrorism*” means any violation of, or attempt to violate, the laws of this state or of the United States which:

- (1) *Is intended or reasonably likely to injure or kill not less than ten individuals as part of a single unlawful act or a series of unlawful acts which are interrelated by distinguishing characteristics; and*
- (2) (A) Is intended to intimidate the civilian population of this state, any of its political subdivision, or of the United States;
(B) Is intended to alter, change, or coerce the policy of the government of this state or any of its political subdivisions by intimidation or coercion; or
(C) Is intended to affect the conduct of the government of this state or any of its political subdivisions by use of destructive devices, assassination, or kidnapping.

Idaho

Idaho Code Ann. § 18-8102(5)

“Terrorism” means activities that:

- (a) Are a *violation of Idaho criminal law*; and
- (b) *Involve acts dangerous to human life* that are intended to:
 - (i) Intimidate or coerce a civilian population;
 - (ii) Influence the policy of a government by intimidation or coercion; or
 - (iii) Affect the conduct of a government by the use of weapons of mass destruction, as defined in section 18-3322, Idaho Code.

Indiana

Ind. Code § 35-31.5-2-329

“Terrorism” means the *unlawful use of force or violence or the unlawful threat of force or violence* to intimidate or coerce a government or all or part of the civilian population.

Iowa

Iowa Code § 708A.1(3)

“Terrorism” means an act intended to intimidate or coerce a civilian population, or to influence the policy of a unit of government by intimidation or coercion, or to affect the conduct of a unit of government, *by shooting, throwing, launching, discharging, or otherwise using a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by another person, or within an assembly of people. The terms “intimidate”, “coerce”, “intimidation”, and “coercion”, as used in this definition, are not to be construed to prohibit picketing, public demonstrations, and similar forms of expressing ideas or views regarding legitimate matters of public interest protected by the United States and Iowa constitutions.*

Louisiana

La. Rev. Stat. Ann. § 128.1(A)

Terrorism is the commission of any of the acts enumerated in this Subsection, when the offender has the intent to intimidate or coerce the civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by intimidation or coercion:

- (1) Intentional killing of a human being.
- (2) Intentional infliction of serious bodily injury upon a human being.
- (3) Kidnapping of a human being.
- (4) Aggravated arson upon any structure, watercraft, or moveable.
- (5) Intentional aggravated criminal damage to property.

Michigan

Mich. Comp. Laws § 750.543b(a)

“Act of terrorism” means a willful and deliberate act that is all of the following:

- (i) *An act that would be a violent felony under the laws of this state, whether or not committed in this state.*
- (ii) *An act that the person knows or has reason to know is dangerous to human life.*

- (iii) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of the government or a unit of government through intimidation or coercion.

Minnesota

Minn. Stat. § 609.714(1)

As used in this section, *a crime is committed to "further terrorism" if the crime is a felony and is a premeditated act involving violence to persons or property that is intended to:*

- (1) terrorize, intimidate, or coerce a considerable number of members of the public in addition to the direct victims of the act; and
- (2) significantly disrupt or interfere with the lawful exercise, operation, or conduct of government, lawful commerce, or the right of lawful assembly.

Missouri

Mo. Rev. Stat. § 595.010 (5)

A crime shall also include an act of terrorism, as defined in 18 U.S.C. § 2331, which has been committed outside of the United States against a resident of Missouri.

Nebraska

Neb. Rev. Stat. § 28-311.01(1)

A person commits terroristic threats if he or she *threatens to commit any crime of violence:*

- (a) With the intent to terrorize another;
- (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or
- (c) In reckless disregard of the risk of causing such terror or evacuation.

Nevada

Nev. Rev. Stat. § 202.4415

(1) *"Act of terrorism" means any act that involves the use or attempted use of sabotage, coercion or violence which is intended to:*

- (a) Cause great bodily harm or death to the general population; or
- (b) Cause substantial destruction, contamination or impairment of:
 - (1) Any building or infrastructure, communications, transportation, utilities or services; or
 - (2) Any natural resource or the environment.

(2) *As used in this section, "coercion" does not include an act of civil disobedience.*

New Jersey

N.J. Stat. Ann. § 2C: 38-2

(a) *A person is guilty of the crime of terrorism if he commits or attempts, conspires or threatens to commit any crime enumerated in the subsection c. of this section with the purpose:*

- (1) to promote an act of terror; or
- (2) to terrorize five or more persons; or
- (3) to influence the policy or affect the conduct of government by terror; or
- (4) to cause by an act of terror the impairment or interruption of public communications, public transportation, public or private buildings, common carriers, public utilities or other public services.

...

(c) The crimes encompassed by this section are: murder; aggravated manslaughter or manslaughter; vehicular homicide; aggravated assault; disarming a law enforcement officer; kidnapping; criminal restraint; robbery; carjacking; aggravated arson or arson; causing or risking widespread injury or damage; damage to nuclear plant with the purpose to cause or threat to cause the release of radiation; damage to nuclear plant resulting in death by radiation; damage to nuclear plant resulting in injury by radiation; producing or possession chemical weapons, biological agents or nuclear or radiological devices; burglary; possession of prohibited weapons and devices; possession of weapons for unlawful purposes; unlawful possession of weapons; weapons training for illegal activities; racketeering; and any other crime involving a risk of death or serious bodily injury to any person. (statutory citation to each crime omitted)

(d) "Terror" means the menace or fear of death or serious bodily injury. "Terrorize" means to convey the menace or fear of death or serious bodily injury by words or actions.

New York

N. Y. Penal Law § 490.05(1)

(1) "Act of terrorism":

(a) for purposes of this article *means an act or acts constituting a specified offense as defined in subdivision three of this section for which a person may be convicted in the criminal courts of this state pursuant to article twenty of the criminal procedure law, or an act or acts constituting an offense in any other jurisdiction within or outside the territorial boundaries of the United States which contains all of the essential elements of a specified offense, that is intended to:*

- (i) intimidate or coerce a civilian population;
- (ii) influence the policy of a unit of government by intimidation or coercion; or

- (iii) affect the conduct of a unit of government by murder, assassination or kidnapping; or
- (b) *for purposes of subparagraph (xiii) of paragraph (a) of subdivision one of section 125.27 of this chapter means activities that involve a violent act or acts dangerous to human life that are in violation of the criminal laws of this state and are intended to:*
 - (i) intimidate or coerce a civilian population;
 - (ii) influence the policy of a unit of government by intimidation or coercion; or
 - (iii) affect the conduct of a unit of government by murder, assassination or kidnapping.

...

(3)(a) *“Specified offense” for purposes of this article means a class A felony offense other than an offense as defined in article two hundred twenty, a violent felony offense, manslaughter in the second degree, criminal tampering in the first degree, identity theft in the second degree, identity theft in the first degree, unlawful possession of personal identification in the first degree, money laundering in support of terrorism in the fourth degree, money laundering in support of terrorism in the third degree, money laundering in support of terrorism in the second degree, money laundering in support of terrorism in the first degree, and includes an attempt or conspiracy to commit any such offense.*
 (statutory citation to each crime omitted)

North Carolina

N.C. Gen. Stat. § 14-10.1

(a) As used in this section, the term “act of violence” means a violation of [N.C. Gen. Stat. §§ 14 – 17]; a felony punishable pursuant to [N.C. Gen. Stat. §§ 14 – 18]; any felony offense in this Chapter that includes an assault, or use of violence or force against a person; any felony offense that includes either the threat or use of any explosive or incendiary device; or any offense that includes the threat or use of a nuclear, biological, or chemical weapon of mass destruction.

(b) A person is guilty of the separate offense of terrorism if the person commits an act of violence with the intent to do either of the following:

- (1) Intimidate the civilian population at large, or an identifiable group of the civilian population.
- (2) Influence, through intimidation, the conduct or activities of the government of the United States, a state, or any unit of local government.

Oklahoma

Okla. Stat. tit. 21 § 1268.1(8)

“Terrorism” means an *act of violence resulting in damage to property or personal injury* perpetrated to coerce a civilian population or government into granting *illegal political or economic demands*; or *conduct intended to incite violence in order to create apprehension of bodily injury or damage to property* in order to coerce a civilian population or government into granting *illegal political or economic demands*. *Peaceful picketing or boycotts and other nonviolent action shall not be considered terrorism.*

Pennsylvania

18 Pa. Const. Stat. § 2717

(a) General rule. A person is guilty of terrorism *if he commits a violent offense* intending to do any of the following:

- (1) Intimidate or coerce a civilian population.
- (2) Influence the policy of a government by intimidation or coercion.
- (3) Affect the conduct of a government.

...

(c) “Violent offense.” An offense under this part, including an attempt, conspiracy or solicitation to commit any such offense, which is *punishable by imprisonment of more than one year and involves an act dangerous to human life or property.*

South Carolina

S.C. Code Ann. § 16-23-710(18)

“Terrorism” includes activities that:

- (a) involve *acts dangerous to human life that are a violation of the criminal laws of this State*;
- (b) appear to be intended to:
 - (i) intimidate or coerce a civilian population;
 - (ii) influence the policy of a government by intimidation or coercion;or
 - (iii) affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (c) occur primarily within the territorial jurisdiction of this State.

South Dakota

S.D. Codified Laws § 22-8-12

Any person who commits a *crime of violence, as defined by subdivision 22-1-2(9), or an act dangerous to human life involving the use of any chemical, biological, radioactive material, or any explosive or destructive device, with the intent to do any of the following:*

- (1) Intimidate or coerce a civilian population;
 - (2) Influence the policy or conduct of any government or nation;
 - (3) Affect the conduct of any government or nation by assassination or kidnapping; or
 - (4) Substantially impair or interrupt public communications, public transportation, common carriers, public utilities, or other public services;
- is guilty of an act of terrorism.

Tennessee

Tenn. Code Ann. § 39-13-803(1)

“Act of terrorism” means an *act or acts constituting a violation of this part, any other offense under the laws of Tennessee, or an act or acts constituting an offense in any other jurisdiction within or outside the territorial boundaries of the United States that contains all of the elements constituting a violation of this part or is otherwise an offense under the laws of such jurisdiction* that is intended, directly or indirectly, to:

- (A) Intimidate or coerce a civilian population;
- (B) Influence the policy of a unit of government by intimidation or coercion; or
- (C) Affect the conduct of a unit of government by murder, assassination, torture, kidnapping, or mass destruction.

Utah

Utah Code Ann. § 76-5-107.3(1)

A person commits a threat of terrorism if the person *threatens to commit any offense involving bodily injury, death, or substantial property damage*, and:

- (a) (i) threatens the use of a weapon of mass destruction, as defined in Section 76-10-401; or
- (ii) threatens the use of a hoax weapon of mass destruction, as defined in Section 76-10-401; or
- (b) acts with intent to:
 - (i) intimidate or coerce a civilian population or to influence or affect the conduct of a government or a unit of government;
 - (ii) prevent or interrupt the occupation of a building or a portion of the building, a place to which the public has access, or a facility or vehicle or public transportation operated by a common carrier; or
 - (iii) cause action of any nature by an official or volunteer agency organized to deal with emergencies.

Utah Code Ann. § 63M-7-502(26)

“Offense” means a violation of the criminal code.

Vermont

Vt. Stat. Ann. tit. 13 § 5351(3)

“Crime” includes delinquent acts and an act of terrorism, as defined in Section 2331 of Title 18, United States Code, committed outside the United States against a resident of this state.

Virginia

Va. Code Ann. § 18.2-46.4

“Act of terrorism” means an act of violence as defined in clause (i) of subdivision A of § 19.2-297.1 committed with intent to

- (i) intimidate the civilian population at large; or
- (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation.