Bronx County Clerk's Indictment No. 2210/04

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

—against—

EDGAR MORALES,

Defendant-Respondent.

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF DEFENDANT-RESPONDENT

NICHOLAS GOLDIN
DAVID B. EDWARDS
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
Telephone: (212) 455-2000
Facsimile: (212) 455-2502

Attorneys for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, the Center on the Administration of Criminal Law at New York University School of Law, states the following:

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PRELIMINARY STATEMENT

Terrorism and gang-related crime are not and have never been the same. Terrorists are a specific class of offenders who commit crimes in pursuit of political change and to impact the larger social order. By contrast, traditional street criminals are offenders who are motivated by personal gain and self interest. Just like its federal antecedent, the New York anti-terrorism statute is limited to acts of terrorism as terrorism has been traditionally defined and, therefore, does not reach acts of traditional street crime. No reasonable interpretation of this statute or its underlying policy supports its application to gang-related street crime. Accordingly, the Appellate Division correctly held that New York's anti-terrorism law cannot apply in this case.

The misapplication of New York's anti-terrorism statute carries significant practical consequences: it undercuts the government's ability to effectively combat both terrorism *and* gang violence. First, misapplication unnecessarily jeopardizes counter-terrorism efforts by lending credence to the argument that terrorism statutes are illegitimate, ineffective or both. This in turn risks diminishing public support for robust anti-terrorism enforcement in an era where such enforcement is critical. Second, misapplication disrupts the careful policy balance that New York has struck in order to reduce gang activity, which includes a deliberate mix of traditional criminal sanctions and gang prevention programs.

Moreover, the misapplication of New York's anti-terrorism statute in this case is unnecessary; New York prosecutors already have at their disposal an arsenal of general penal law statutes that effectively penalize gang-related conduct. There is no need to use anti-terrorism statutes to ensure that gang violence is appropriately punished. However, by shoehorning this case into New York's anti-terrorism statute, the People have only punished the same conduct twice, creating a redundancy not intended by anti-terrorism laws.

For these reasons, and as set forth below, we respectfully urge this Court to affirm the Appellate Division's reversal of the terrorism convictions in this case.

INTEREST OF AMICUS

Amicus curiae the Center on the Administration of Criminal Law (the "Center") respectfully submits this brief in support of Defendant-Respondent. The Center, based at New York University School of Law, is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and participation in the formulation of public policy. The Center's litigation program, which consists of filing briefs in support of both the government and defendants, seeks to bring the Center's empirical research and experience with criminal justice and prosecution practices to bear in important cases in state and federal courts throughout the United States. In general, the Center's litigation practice concentrates on cases in which exercises of

prosecutorial discretion raise significant substantive legal issues.

This appeal concerns the proper application of New York's anti-terrorism statute. The Center believes that the Appellate Division was correct in finding that New York's crime of terrorism statute does not apply to the traditional street crimes at issue in this case. The Center is interested in promoting the appropriate administration of criminal law both in New York and across the nation. Moreover, the Center has an interest in ensuring the legitimate, proper, and effective enforcement of terrorism statutes to guard against the inappropriate curtailment of terrorism enforcement in response to public perception of overbroad executive action.

ARGUMENT

I. TERRORISM IS DISTINCT FROM TRADITIONAL GANG-RELATED CRIME

Effective anti-terrorism statutes share certain hallmarks. First, they must be broad enough to encompass the varied and unpredictable actions of subversive, fanatical criminals. Second, they must necessarily be circumscribed enough to distinguish and exclude acts of mere criminality, such as traditional gang-related street crime. Indeed, failure to appropriately circumscribe the scope of anti-terrorism statutes sweeps a large swath of traditional criminal acts into the definition of terrorism. As shown below, the People's attempt to redefine terrorism to include traditional gang-related crime conflicts with well-settled and traditional definitions of what constitutes terrorism.

A. TERRORISM IS DRIVEN BY POLITICAL MOTIVATION

While the term "terrorism" itself eludes an exhaustive definition, *see, e.g.*, Alex Schmid, *Terrorism – The Definitional Problem*, 36 Case W. Res. J. Int'l L. 375, 395-403 (2004), this Court need not grapple with the complexities of such a definition in this case. Instead, this Court need only focus on the fact that the People's definition of terrorism is at odds with generally accepted and understood definitions of terrorism, which require a nexus with political, social, religious or ideological goals. *See, e.g.*, *Measures to Eliminate International Terrorism: Report of the Policy Working Group on the United Nations and Terrorism*, U.N. GA/SCOR, 57th Sess., Annex at para. 13, U.N. Doc A/57/273-S/2002/875 (2002) ("Without attempting a comprehensive definition of terrorism, it would be useful to delineate some broad characteristics of the phenomenon. Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality.").

It is widely accepted that terrorism is inherently political. *See, e.g.*, Bruce Hoffman, *Inside Terrorism* 2 (rev. ed. 2006). "'Political' in this regard encompasses not just traditional left-right politics but also what are frequently described as religious motivations or social issues." Paul R. Pillar, *Terrorism and*

U.S. Foreign Policy 14 (pbk. ed. 2003). Importantly "the lack of some kind of social or political agenda moves a case away from the [terrorism] paradigm. People who engage in terrorist-like violence simply for personal gain are generally seen to belong to a different class of attackers." Stephen Nathanson, *Prerequisites for Morally Credible Condemnations of Terrorism*, in *The Politics of Terror* 3, 11 (William Crotty ed., 2004). Thus, the "political motivation of terrorism separates it from ordinary crime." Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. Legis. 249, 271 (2004).

The recognition of terrorism as encompassing political motivation is played out in the numerous definitions of terrorism employed by the federal government, all of which recognize that political motivation separates terrorism as an offense that is qualitatively different from other categories of crimes. The United States Code's definition of "international terrorism" mirrors—indeed, is the model for—New York's definition. It defines "international terrorism" as "activities that . . . appear to be intended to intimidate or coerce a civilian population," "to influence the policy of a government by intimidation or coercion," or "to affect the conduct of a government." 18 U.S.C. § 2331. The FBI's definition notes that terrorism "includes the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof,

in furtherance of political or social objectives." 28 C.F.R. § 0.85. The Department of Defense shares largely the same approach, defining terrorism as "[t]he unlawful use of violence or threat of violence to instill fear and coerce governments or societies. Terrorism is often motivated by religious, political, or other ideological beliefs and committed in the pursuit of goals that are usually political." Dep't of Def., *Dictionary of Military and Associated Terms* 344 (Joint Publ'n 1-02, Nov. 8, 2010) (as amended through Nov. 15, 2011). The State Department's formulation consolidates even further, dispensing with the government/civilian distinction altogether stating that "the term 'terrorism' means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." 22 U.S.C. § 2656f(d)(2). These definitions show that whether terrorists intend to criminally influence or intimidate a unit of government or a civilian population, political motivation is necessary.

B. TERRORISM SEEKS TO IMPACT A BROAD SEGMENT OF SOCIETY

A criminal act intended to influence the policy or conduct of a particular "unit of government" is a self-defining act of terrorism with respect to the requirement for political motivation. But, where a criminal act is intended to "intimidate or coerce a civilian population," the actor's political motivation, and thus its classification as terrorism, is far from self-evident. For a "civilian population," political motivation is found where civilians are intimidated or

coerced as a proxy for their government and serve as a means to an end of a larger political impact. *See* Hoffman, *supra*, at 41 ("Through the publicity generated by their violence, terrorists seek to obtain the leverage, influence and power they otherwise lack to effect political change on either a local or international scale."). Accordingly, terrorism relating to a "civilian population" stems from the intent to intimidate or coerce a segment of society that is sufficiently broad enough to effect political change.

"Civilian population" is consistently undefined by the statutes that employ it. *See, e.g.*, 18 U.S.C. § 2331. As the Appellate Division noted, this lack of definition makes "civilian population" "literally susceptible to being applied to gang members of a particular ethnicity in a particular urban neighborhood or group of neighborhoods . . . ." *People v. Morales*, 86 A.D.3d 147, 156 (1st Dept 2011). But, while both gangs and terrorists may intend to intimidate civilians to achieve their goals, gangs remain "focused on the microlevel of pecuniary gain and personal relationships" whereas "[t]errorists' concerns are macroconcerns about changing a larger order." Pillar, *supra*, at 14. Ignoring this crucial distinction and accepting an overbroad interpretation of "civilian population" would allow nearly *any* violent crime with multiple victims or onlookers to be defined as terrorism, since they would involve intimidation or coercion of a group of people. *See Morales*, 86 A.D.3d at 155 n.8 (rejecting the People's literal reading of the statute

to hold that "civilian population" implies a larger scope or segment of society).

Defining a "civilian population" as any narrowly delineated group intimidated or coerced by a criminal act obviates the very reason for including a "civilian population" prong as distinct from, but parallel to, a "unit of government" prong in a terrorism statute. Terrorism statutes include "civilian population," or some similar catchall for society, to ensure that the statutes punish crimes not only focused on directly influencing the government, but also those crimes focused on committing attacks against civilians for broad based political effect. *See* Benjamin Netanyahu, *Fighting Terrorism* 8 (2d ed. 2001). "[T]errorists are out to terrorize the *public at large*, with the intent of compelling some kind of change of policy, or else as retribution for the government's failure to follow policies demanded by the terrorists . . . . Terrorism is the deliberate and systematic assault on civilians to inspire fear for political ends." *Id.* (emphasis added). The intent to intimidate or coerce a civilian population capitalizes on acts that provide "psychological and political advantages to the larger strategy of defeating the will and morale of the adversary," an intended scope of impact that is wholly absent from traditional street crime such as gang violence. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. Rev. 1, 3-27 (2005); *see* Hoffman, *supra*, at 40 ("Terrorism is specifically designed to have far-reaching

psychological effects . . . . to instill fear within, and thereby intimidate a *wider 'target audience'* . . . ." (emphasis added)). Thus, intimidating or coercing civilians is only terrorism when it serves as a conduit for a larger political impact.

The political motivation that drives terrorism dovetails with the argument that the "civilian population" requirement must encompass "a more pervasive intimidation of the community rather than a narrowly defined group of people" to constitute an act of terrorism. *Muhammad v. Virginia*, 269 Va. 451, 499 (2005). Indeed, the Appellate Division acknowledged this point when it held that "to decide this appeal, [this Court] need not define the minimum size of a 'civilian population' that may be the target of terrorism for the purposes of Penal law article 490. Rather, it suffices to observe that the term . . . implies an intention to create a pervasively terrorizing effect on people living in a given area . . . ." *Morales*, 86 A.D.3d at 157-58. This is because terrorism is not accomplished by intimidating or coercing narrowly defined groups of people; only by inducing "widespread fear and reaction among civilians" can terrorists "change the political, social or economic structures or policies of a perceived enemy state or territory . . . ." John Alan Cohan, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 Pace Int'l L. Rev. 77, 80-85 (2002).

C. THE CRIMINAL CONDUCT IN THIS CASE LACKS THE DEFINING CHARACTERISTICS OF TERRORISM

The conduct at issue in this case does not fall within the rubric of terrorism that New York's anti-terrorism statute is meant to combat. And in characterizing the actions in this case as "terrorism," the People have applied the statute in a manner that fundamentally conflicts with the aforementioned generally accepted principles of terrorism. First, the People have failed to show how the crimes at issue were politically motivated. In fact, the People have already conceded the lack of political motivation by describing the Saint James Boys' ("SJB") as being driven by an overarching desire to "maintain its status as the toughest Mexican gang in its area of the Bronx." Brief for Appellant at 10-12, *People v. Morales*, 86 A.D.3d 147 (1st Dept 2011); *see Morales*, 86 A.D.3d at 154 (stating that the SJB wanted to establish dominance over rival gangs and exact personal vendettas); Erika Martinez, *Bronx Soccer "Terror" Gang*, N.Y. Post, May 14, 2004, at 24 (describing the SJB as a group of teens and young adults originally assembled to play soccer that moved into crime and, according to NYPD Commissioner Ray Kelly, specialized in drunkenly crashing parties). While the acts committed by the SJB in pursuit of being the toughest Mexican gang in the Bronx are certainly worthy of prosecution and meaningful punishment, they have no nexus whatsoever with the political motivation underlying terrorism.

Second, the People's suggestion that a "civilian population" can be narrowly

defined as the members of a particular ethnic group in a particular neighborhood is plainly inconsistent with the requirement that a criminal intend to impact a broad segment of society to be considered a terrorist. *See, e.g.*, *Morales*, 86 A.D.3d at 158 n.11, 159-60 (seizing upon the People's definitional infirmity to reject the notion that the phrase "civilian population" could be "strech[ed] . . . to cover such a narrowly defined subcategory of individuals"). Regardless of whether this Court defines "civilian population" as (i) requiring criminal conduct directed at civilians as a conduit to force larger political change; or (ii) requiring the criminal conduct to be directed at a wide swath of society, the People have failed to show that the SJB intended to intimidate or coerce a civilian population as required by New York's anti-terrorism statute. The People offered no evidence that the SJB intended to intimidate or coerce anyone as a means to effect political change, nor have the People showed that SJB had an intent to intimidate or coerce a broad scope of society.

In short, the People's argument that Morales and the SJBs are "terrorists" is wholly unsupported by generally accepted principles of terrorism, and this Court should reject the attempt to take New York's anti-terrorism statute far afield from its purpose.

II. CONFLATING TERRORISM WITH TRADITIONAL GANG-RELATED CRIME ENDANGERS BOTH COUNTER-TERRORISM AND GANG PREVENTION EFFORTS

Conflating terrorism and mere criminality has real world risks: it jeopardizes the government's ability to enforce terrorism policy and could promote public perception that terrorism statutes are illegitimate and ineffective, which risks fostering an inappropriate curtailment of anti-terrorism enforcement. Furthermore, charging gang violence as crimes of terrorism disrupts New York's carefully tailored and historically successful approach to combating gang violence through traditional criminal sanctions and gang prevention programs.

A. CONFLATING TERRORISM WITH TRADITIONAL GANG-RELATED CRIME UNDERMINES THE EFFECTIVENESS AND LEGITIMACY OF COUNTER-TERRORISM EFFORTS

Distinguishing between the crime of terrorism and traditional street crime is important not only as an academic matter, but has practical implications for the government's ability to implement counter-terrorism strategies. The necessity of counter-terrorism efforts is generally acknowledged, but disagreement remains over the appropriate scope of terrorism enforcement. Wherever the merits lie in that debate, conflating terrorism and traditional street crime through the misapplication of New York's anti-terrorism statute will only unnecessarily fuel criticism of anti-terrorism policy, risk eroding the public's confidence in anti-terrorism laws, and potentially result in an inappropriate curtailment of state and

federal counter-terrorism policy because of this perceived ineffectiveness and illegitimacy.

First, should the People continue to misapply New York's anti-terrorism statute to prosecute gang violence, the statute will be susceptible to arguments that overbroad enforcement has rendered it ineffective by alienating and radicalizing the very community the statute aims to protect. *See* Matthew C. Waxman, *Administrative Detention of Terrorists:* Why *Detain, and Detain* Whom*?*, 3 J. Nat'l Security L. & Pol'y 1, 26-27 (2009) (arguing that terrorism laws must "target coercive policies (including military and law enforcement efforts) narrowly and precisely" because overbroad classification of terrorism and overzealous enforcement can create perverse effects). By treating gang members as terrorists, the People risks a self-fulfilling prophesy of radicalizing what is now mere criminality and turning public opinion against law enforcement. In particular, there is a risk that communities will come to resent their youths being treated like enemies of the state instead of criminals being brought to justice. *Cf. id.* (discussing how detention practices have sometimes resulted in fueling violence and drying up community informants); Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 Crim. L. Bull. 550 (2004) (claiming that overbroad counter-terrorism policy has labeled "large numbers of ordinary offenders and

immigrants as terrorist threats," "alienating them, their families and communities").

Second, the People's actions also leave New York's anti-terrorism statute susceptible to criticism that it is grossly over-inclusive and threatens arbitrary and oppressive outcomes. Jordan J. Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 Conn. L. Rev. 697, 703 (1987) (arguing that inappropriate, overbroad terrorism enforcement risks reducing respect for genuine legal authority, undermining the rule of law, and producing arbitrary or draconian results). By distorting the purpose of New York's anti-terrorism statute, the People risk fueling the perception that the statute is unfairly targeting certain community members, criminalizing innocuous acts and legitimate political dissent, and intruding into general criminal law. *See, e.g.*, C. Raj Kumar, *Global Responses to Terrorism and National Insecurity: Ensuring Security, Development and Human Rights*, 12 ILSA J. Int'l & Comp. L. 99, 103 (2005) (detailing "how both terrorism and global efforts to contain it violate human rights, undermine the rule-of-law, and systematically destabilize governments, societies and people"); Nathan H. Seltzer, *When History Matters Not: The Fourth Amendment in the Age of the Secret Search*, 40 Crim. L. Bull. 105 (2004) (arguing that there has been "an incremental but persistent expansion of law enforcement authority and discretion, which would alarm the Framers of the Bill of Rights").

Finally, the People's actions may provoke increased negative public perception of terrorism policy, which could result in an overreaction to a perceived threat of executive abuse. *See generally* Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 59-86 (2007) (discussing "security panic," overreaction to the threat of terrorist attacks, and "libertarian panic," overreaction to the threat of executive abuses). Applying the "terrorism" label to gang violence—conduct that is far removed from the paradigmatic acts that are at the heart of terrorism—legitimates the critique that counter-terrorism statutes are overly broad and arbitrary. Ultimately, in reacting to this and other perceived enforcement abuses, communities, legislatures, and courts may overcorrect by inappropriately curtailing terrorism enforcement and hampering the security benefits of government policies. *See id.* at 39 ("The real risk is that civil libertarian panic about the specter of authoritarianism will constrain government's ability to adopt cost-justified security measures."); Paul Rosenzweig, *Targeting Terrorists: The Counterrevolution*, 34 Wm. Mitchell L. Rev. 5083, 5083 (2008) ("There is a frequently repeated pattern where the pendulum swings back against post-9/11 security improvements to question not only those post-9/11 developments, but proven pre-9/11 practices."). In short, by attempting to increase public safety by enforcing anti-terrorism laws in an overbroad way, the government might inadvertently weaken its ability to protect.

Whether or not any of this criticism is valid, public perception that terrorism policy is ineffective and illegitimate will only increase in response to overbroad application of counter-terrorism laws. By overextending terrorism statutes to traditional criminal activity, prosecutors and courts fuel efforts to undermine the legitimacy and effectiveness of anti-terrorism laws generally and diminish public confidence in these statutes. Extending counter-terrorism laws to traditional criminal activity that is not terrorism risks undermining the perceived propriety of applying these laws to deter and punish the very acts of terrorism that they were clearly intended to address.

B. CONFLATING TERRORISM WITH TRADITIONAL GANG-RELATED CRIME UNDERMINES NEW YORK'S CAREFULLY BALANCED AND HISTORICALLY SUCCESSFUL APPROACH TO COMBATING GANG VIOLENCE

Applying the "terrorism" designation to traditional street crime also undermines the careful and proven balance New York has struck between traditional criminal sanctions and gang prevention programs to combat gang violence. This balance has enabled the arrest, indictment and conviction of gang members involved in violent crimes while simultaneously addressing the root causes of gang violence. The improper enforcement of the New York anti-terrorism statute against gangs disturbs this careful balance by elevating the perceived importance of gangs, reinforcing an "us versus them" mentality, and ultimately weakening an individual's capacity to live a gang- and crime-free life.

1. Gang Crime's Unique Nature Requires A Carefully Balanced Approach

New York has had a long history of gang activity; youth gangs in particular have been prevalent in New York as members of different immigrant groups arrived and settled in "economically deprived neighborhoods" where they "endured ethnic or religious discrimination." Fight Crime: Invest in Kids, *Caught in the Crossfire: Arresting Gang Violence by Investing in Kids* 6 (2004);[1] *see* Judith Greene & Kevin Pranis, Justice Policy Institute, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies* 15 (2007).[2] Gangs continue to be made up primarily of individuals under 25, and gangs tend to form in "lower-class, slum, ghetto, barrio, or working-class" communities. Office of Juvenile Justice & Delinquency Prevention, *Youth Gangs: An Overview - Demographic Characteristics*.[3]

In an effort to address the issues of youth, poverty and discrimination that drive gang creation and membership, many scholars, law enforcement personnel, and practitioners agree that gang prevention and intervention are best addressed through "collaborative approaches that unite the efforts of street mentors, the broader community, probation officers and law enforcement officers." Fight

[1] *Available at* http://www.nursefamilypartnership.org/assets/PDF/Journals-and-Reports/fight-crime-invest-in-kids-gangreport.
[2] *Available at* http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf.
[3] *Available at* http://www.ojjdp.gov/jjbulletin/9808/demographic.html.

Crime: Invest in Kids, *supra* at 25. Programs that have been successful at minimizing both gang participation and gang violence have focused on combining law enforcement supervision of identified gang members, increased education, vocational and extracurricular services, family intervention and support, and greater community support mechanisms. *See id.* at 10-15 (discussing successful anti-gang programs put into effect in Boston, Philadelphia, and Baton Rouge); Office of Juvenile Justice & Delinquency Prevention, *Youth Gangs: An Overview - Solutions* (recommending programs with "multiple components, incorporating prevention, social intervention, rehabilitation, suppression, and community mobilization approaches, supported by a management information system and rigorous program evaluation").[4]

New York has been particularly successful in implementing an effective attack on gang violence on multiple fronts by combining neighborhood-based prevention and intervention programs addressing the root causes of gang activity and criminal sanctions targeting criminal acts.

2. Criminal Sanctions

When intervention and prevention programs have not worked, New York prosecutors have utilized traditional criminal law to convict gang members for violent crimes. As a group, violent gangs have been effectively targeted using

[4] *Available at* http://www.ojjdp.gov/jjbulletin/9808/solutions.html.

traditional criminal law by individual district attorney's offices as well as state and federal task forces. *See infra* Section III.A. In addition, many crimes that have been traditionally addressed through the general penal code have been far less localized and have affected far larger populations than the targeted shooting incident at issue in this case. Yet prosecutors have not applied the counter-terrorism laws to these offenses. *See infra* Section III.A.

3. Gang Prevention and Intervention Programs

New York's successful use of traditional law enforcement efforts in abating gang violence is counterbalanced by a "dedicated commitment to [gang prevention and gang intervention programs] as the primary strategy to combat violence among street gang members." Greene & Pranis, *supra* at 15. This focus on emphasizing prevention and intervention programs as a necessary companion to criminal sanctions has "fostered a far more constructive, less counterproductive response to gang violence than the harsh law enforcement tactics employed by police to suppress gangs in other cities." *Id.*; *see also* Tom Jackman, *Social Programs to Combat Gangs Seen as More Effective than Police*, Wash. Post, July 18, 2007, at B03; Thomas A. Myers, Note, *The Unconstitutionality, Ineffectiveness, and Alternatives of Gang Injunctions*, 14 Mich. J. Race & L. 285, 301 (Spring 2009) ("The New York approach that focuses its resources on job training, mentoring, after-school activities, and recreational programs has made a significant dent in

gang violence.”).

The use of social programs began in 1947 with the establishment of the New York City Youth Board, which focused on providing job training, mentoring, after-school athletic activities and other recreational activities. Greene & Pranis, *supra* at 15. The success of the Youth Board led to the founding of community-based social service providers in other neighborhoods, such as the Lower Eastside Neighborhood Association and the Mobilization for Youth, whose efforts were enhanced by the receipt of federal funding. *Id*. at 16-17. While these programs have evolved over time, the approach remains largely the same: to address the underlying societal problems which can lead to gang violence.

While gang violence certainly remains a major criminal issue, it is important to recognize that New York’s balance of criminal sanctions and social programming has greatly minimized gang violence in the state, establishing it as an exemplar of the collaborative, multi-factor approach to the socioeconomic factors underlying gang creation and participation. Misapplication of the anti-terrorism statute may be intended to curb gang violence, but it may in fact have the opposite effect of entrenching gang activity. Specifically, treating gangs as terrorist groups may defeat attempts to reach out to troubled youth, elevate gangs’ importance, reinforce an “us versus them” mentality, solidify gang involvement, and weaken an individual’s capacity to live a gang- and crime-free life. *Cf*. Greene & Pranis,

supra at 68 (listing these, and other, counterproductive effects of targeting gang leaders and using harsh suppression tactics). If New York eschews its historically successful approach in favor of addressing gang violence as an act of terrorism, it risks disturbing a carefully crafted balance and severely hampering decades of work to address gang violence from multiple perspectives.

III. THE PEOPLE NEED NOT MISAPPLY NEW YORK'S ANTI-TERRORISM STATUTE BECAUSE AMPLE STATUTES ALREADY EXIST TO ADEQUATELY PUNISH GANG-RELATED CRIMES

It is unnecessary to misapply the New York anti-terrorism statute to address traditional street crime, even in the case of pernicious acts of gang violence. Historically, prosecutors in New York have been effective in using the General New York Penal Law ("Penal Law") to combat gang violence. The Penal Law provides an ample number of criminal offenses to address traditional street crime's conspiratorial, intimidating, and violent character. This wide range of available offenses ensures that charging traditional street crime using the Penal Law provides for substantial sentences that sufficiently punish gang violence. There is no need to stretch the terrorism laws beyond reasonable interpretation to reach a category of conduct that is already being investigated, prosecuted and punished with sufficient force.

A. NEW YORK PROSECUTORS HAVE HAD HISTORICAL SUCCESS USING TRADITIONAL ENFORCEMENT STRATEGIES TO COMBAT GANG ACTIVITY

State and federal prosecutors, including the Bronx County District Attorney's Office, have effectively addressed gang related crimes through traditional criminal law, obtaining numerous pleas and convictions carrying significant sentences. A small sample of the results of individual gang members' prosecutions by New York district attorney's offices illustrates that a wide range of violent gang activity is readily addressed through traditional law enforcement strategies, making misapplication of the anti-terrorism statute duplicative and unnecessary:

- In 2002, Anthony Bello, who hired hit men to kill rivals to his Blue Top Mob gang, pleaded guilty to murder and conspiracy charges and received a sentence of 22 years to life. *See* Case Summary, New York County District Attorney's Office – People v. Anthony Bello et al.[5]
- In 2006, Jomo Delesline, a Bronx Cripps gang member, received 25 years after being found guilty of three counts of attempted murder in the second degree for shooting three innocent bystanders he believed were rival Bloods gang members. *See* Press Release, Bronx County District Attorney's Office, Bronx Man is Sentenced to a Term of Twenty-Five Years Imprisonment for

[5] *Available at* http://manhattanda.client.tagonline.com/officeoverview/cases/trial.shtml.

the Mistaken Attempted Murders of Three Innocent Victims in a Gang-Related Shooting (Apr. 5, 2006).[6]

- In 2008, three members of the Latin Kings were found guilty of torturing and killing a man before dumping his body in a parking lot at Yankee Stadium, for which they faced sentences from 25 years to life to life without the possibility of parole. *See* Press Release, Bronx County District Attorney's Office, Three High Ranking Latin Kings Gang Members Convicted of Murder in the Torture Death of a Young Man Whose Body was Dumped by Yankee Stadium and Set on Fire (July 1, 2008).[7]

Local and federal prosecutors have also met with success when attacking gangs en masse, rolling up dozens, if not hundreds, of gang members in racketeering and conspiracy indictments:

- The New York County District Attorney's Office successfully convicted 42 Wild Cowboys' members on charges including fifty shootings and murders, conspiracy, felony drug sales, and witness tampering. *See* Case Summary, New York County District Attorney's Office – People v. 42 Members of Wild Cowboys Drug Gang.[8]
- The Queens County District Attorney's Office brought charges against more

[6] *Available at* http://bronxda.nyc.gov/information/2006/case25.htm.
[7] *Available at* http://bronxda.nyc.gov/information/2008/case35.htm.
[8] *Available at* http://manhattanda.client.tagonline.com/officeoverview/cases/trial.shtml.

than ninety gang members and associates in 2010, arresting at least 84 of them on murder, weapons, and drug charges. *See* Press Release, Queens County District Attorney, Sweeping Investigation of Queens Gang Members Results in Murder, Gun and Drug Charges against 90+ Individuals (Apr. 16, 2010).[9]

- The efforts of one Long Island local and federal law enforcement task force have led to the convictions of more than 120 MS-13 gang members, including more than a dozen leaders, on federal racketeering and murder charges, resulting in sentences ranging up to life terms. *See* Press Release, United States Attorney's Office, Eastern District of New York, Dep't of Justice, MS-13 Members Receive Significant Sentences for Gang Violence After Retrials (Dec. 11, 2009).[10]

Significantly, the Kings County District Attorney recently announced the indictments of 43 gang members who were engaged in attacks against a rival gang that overflowed into the community. *See* Press Release, Kings County District Attorney, Kings County District Attorney Charles J. Hynes, NYC Police Commissioner Raymond W. Kelly and NYC Special Narcotics Prosecutor Bridget

[9] *Available at* http://www.queensda.org/newpressreleases/2010/apr10.html.
[10] *Available at* http://www.justice.gov/usao/nye/pr/2009/2009dec11.html.

G. Brennan Announce Indictments of 43 Gang Members (Jan. 19, 2012).[11] The Kings County District Attorney noted that the gang members were "not tightly organized around drug or other money-making endeavors," but instead "they band together to control their turf, their block, or their building, and terrorize those who fail to recognize their control and fail to pay them respect." Joseph Goldstein, *43 in Two Warring Gangs Are Indicted in Brooklyn*, N.Y. Times, Jan. 19, 2011, at A22. Yet despite the District Attorney's colloquial use of "terrorize," and the striking similarity to this case, the indictments do not attempt to apply the terrorism enhancement and instead rely on the Penal Law's ample arsenal of murder, conspiracy, assault, reckless endangerment, and weapons charges to bring these traditional street criminals to justice. *See* Press Release, Kings County District Attorney, *supra*.

B. GANG ACTIVITY IS ALREADY PROPERLY AND ADEQUATELY ADDRESSED BY THE PENAL LAW

The traditional legal enforcement strategies effectively utilized by New York prosecutors are derived from the Penal Law, which provides a significant number of offenses to combat the structure of gangs, the effect gangs may have on their communities, and the injuries that may result from gang activity.

[11] *Available at* http://www.brooklynda.org/press_releases/2012/Press%20Releases%2001-12.htm#03.

1. Structural Offenses

By their very nature, gangs involve some level of coordinated criminal action. Accordingly, there are a number of crimes in the Penal Law to which gangs are structurally susceptible. As an initial matter, the conspiracy statutes, N.Y. Penal Law §§ 105.00-.35, are well suited to address the wide range of gang-related crime. Indeed, conspiracy, which seeks to prevent the evil of "concerted activity in furtherance of a criminal purpose," is tailor-made for the prosecution of gangs, "a group of persons who go about together or act in concert, especially for antisocial or criminal purposes." *Matter of Robinson v. Snyder*, 259 A.D.2d 280, 281-82 (1st Dept 1999). By broadly criminalizing the act of agreement between two or more persons to engage in or cause conduct constituting a crime, these statutes encompass virtually all gang-related criminal activity. In fact, evidence of gang membership itself can properly be used to provide the necessary background for conspiracy charges. *See People v. Faccio*, 33 A.D.3d 1041, 1042 (3d Dept 2006).

Moreover, the criminal solicitation offenses, N.Y. Penal Law §§ 100.00-.20, capture the hierarchical and planned efforts that characterize some gang activity. When a gang leader "solicits, requests, commands, importunes or otherwise attempts" to cause another gang member to engage in criminal conduct, that leader is exposed to solicitation liability. *See, e.g.*, N.Y. Penal Law § 100.13. Likewise,

by providing fellow gang members with "means or opportunity" for the commission of crimes, gang members violate the criminal facilitation statutes, N.Y. Penal Law §§ 115.00-.15, exposing themselves to further criminal liability. The criminal facilitation statutes extend the net of liability to gang affiliates whose acts of preparation are "so attenuated from the final stages that the role of the facilitator is only remotely related as a cause or contributor to the ultimate crime." *People v. Beaudet*, 32 N.Y.2d 371, 377 (1973).

Finally, depending on the level of a gang's sophistication and structure, enterprise corruption, N.Y. Penal Law § 460.20, provides prosecutors with a powerful tool with which to charge street gangs. This statute targets criminal enterprises consisting of "a group of persons sharing a common purpose of engaging in criminal conduct, . . . with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents." N.Y. Penal Law § 460.10. Thus, enterprise corruption addresses "the particular and cumulative harm posed by persons who band together in complex criminal organizations." *People v. Besser*, 96 N.Y.2d 136, 142 (2001). Descriptions of street gangs like the SJB indicate they are susceptible to prosecution under these statutes. *See* Brief for Defendant-Respondent at 21-22, *People v. Morales*, 86 A.D.3d 147 (1st Dept 2011); Brief for Appellant at 10-12, *People v. Morales*, 86 A.D.3d 147 (1st Dept 2011).

2. Offenses Against Public Order and Public Safety

Without resorting to the misapplication of the crime of terrorism, there are a host of basic offenses which prosecutors may utilize against the types of destabilizing activities that are harmful to the public which may be implicated in gang-related behavior. These offenses include menacing, N.Y. Penal Law §§ 120.13-.15; riot, N.Y. Penal Law §§ 240.05-.06; unlawful assembly, N.Y. Penal Law § 240.10; disorderly conduct, N.Y. Penal Law § 240.20; and harassment, N.Y. Penal Law §§ 240.25-.26.

The language defining many of these offenses demonstrates the legislature's intent to target activity that instills fear among the public in the offender's immediate surroundings both on an individual and group level. For instance, a "person is guilty of riot in the second degree when, simultaneously with four or more other persons, he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm." N.Y. Penal Law § 240.05. Indeed, the phrase "tumultuous and violent conduct" "is designed to connote frightening mob behavior involving ominous threats of injury, stone throwing or other such terrorizing acts." Donnino, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 240.05 (citation omitted).

Offenses against public safety—criminal possession of a weapon, N.Y. Penal Law §§ 265.00-.04, and criminal use of a firearm, N.Y. Penal Law

§§ 265.08-.09—add yet another layer of protection to the community.

3. Offenses Resulting In Injury

While the crimes discussed above combat the basic structure and intimidating nature of gangs, myriad substantive offenses concentrate on the underlying gang violence which results in physical harm. In addition to basic assault, N.Y. Penal Law §§ 120.00, .05, .10, there are provisions specifically targeting "gang assault," or the intentional infliction of serious physical injury by three or more people. N.Y. Penal Law §§ 120.06, .07. These provisions reflect the legislature's determination that "gang assaults pose a greater threat to public safety than assaults committed by individual actors," thus warranting enhanced penalties. *People v. Sanchez*, 13 N.Y.3d 554, 565 (2009) (citation omitted); *see* Abraham Abramovsky, *The Gang-Assault Statute in New York*, N.Y.L.J., Dec. 12, 1997, at 3, col. 1 (explaining that gang assault in the first degree is equivalent in sentence length to manslaughter in the first degree).

Finally, prosecutors have homicide offenses, N.Y. Penal Law §§ 125.00-.27, at their disposal. Indeed, the underlying crimes of which Morales was ultimately convicted, and which largely determined the length of his sentence, are manslaughter in the first degree and attempted murder in the second degree. Application of these statutes to Morales belies any argument that he could not have been prosecuted fully for the shooting of which he was charged.

C. THE GENERAL PENAL LAW ALREADY CONTAINS THE PROPER SENTENCING FOR GANG ACTIVITY GENERALLY AND FOR THIS CASE IN PARTICULAR

Certainly the sheer number of criminal offenses to which gangs are subject does not alone establish the adequacy of the Penal Law to address traditional street crime; attention must also be devoted to the resulting sentence. Admittedly, due to the nature of the terrorism enhancements (which raise the sentences for certain felonies one class level) sentences under the Penal Law will rarely be directly equivalent. However, discrepancies do not render traditional sentences inadequate. First, such discrepancies are natural and desirable. New York has determined that a crime of terrorism is despicable and dangerous on a level not found in the Penal Law and should be punished accordingly. The availability of a directly equivalent sentence for the underlying offense regardless of the perpetrator's motivation of terrorism would obviate any need for a crime of terrorism. Second, discrepancies dissipate as the crimes become more serious. For example, murder in the second degree while committing a sexual assault and aggravated murder result in sentences of life without parole with or without the terrorism enhancements. *See* N.Y. Penal Law § 70.00(3)(a)(i)(B); N.Y. Penal Law § 490.25(d). Finally, while not directly equivalent, Penal Law provides for significant and sufficient sentences for traditional street crime.

This case demonstrates the sufficiency of sentences under the Penal Law.

Morales received an aggregate term of 40 years to life for convictions of manslaughter in the first degree, attempted murder in the second degree, criminal possession of a weapon in the second degree, and conspiracy in the second degree, all but the last as a crime of terrorism. *See* Brief for Defendant-Respondent at 1, *People v. Morales*, 86 A.D.3d 147 (1st Dept 2011). Comparatively, under the Penal Law and without the terrorism enhancements, the Center believes the perpetrator of the crimes at issue in *Morales* could have received, at a minimum, an indeterminate sentence of 20 to 40 years and, at a maximum, a determinate sentence of 40 years. *See* N.Y. Penal Law § 70.30(1)(e)(v). This latter sentence is the result of charging the defendant with the additional felony of enterprise corruption, and imposing consecutive sentences where available.[12] The charges could have included four additional offenses with significant individual sentences (Table 1), but only enterprise corruption affects the overall sentence length because of lesser included offenses and concurrent sentence requirements.

[12] Conspiracy and enterprise corruption sentences may run consecutively. *See People v. A.S. Goldmen, Inc.*, 9 A.D.3d 283, 286 (1st Dept 2004) ("Defendant . . . was lawfully sentenced to consecutive terms for enterprise corruption itself, and for separately charged substantive crimes that were also pattern acts underlying the crime of enterprise corruption.") (citing *People v. Besser*, 96 N.Y.2d 136, 145 (2001)); *People v. Arroyo*, 93 N.Y.2d 990, 991 (1999) (holding that sentences for conspiracy and attempted murder may run consecutively).

Table 1 – Sentencing Ranges for Available Offenses in *Morales*[13]

Class of Felony	No Priors	Non-violent Predicate	Violent Predicate
B Violent[14] • Attempted murder in the second degree • Manslaughter in the first degree • Assault in the first degree • Criminal use of a firearm in the first degree	Min: 5 years Max: 25 years	Min: 8 years Max: 25 years	Min: 10 years Max: 25 years
B Non-violent[15] • Conspiracy in the second degree • Enterprise corruption	Min: 1-8.33 years Max: 3–25 years	Min: 4.5-12.5 years Max: 9–25 years	Min: 4.5-12.5 years Max: 9–25 years
C Violent[16] • Gang assault in the second degree • Criminal possession of a weapon in the second degree	Min: 3.5 years Max: 15 years	Min: 5 years Max: 15 years	Min: 7 years Max: 15 years

Thus, under the penal law, the perpetrator of the crimes at issue could have been sentenced to consecutive sentences of determinate terms between 5 and 25 years for the two homicide offenses and indeterminate terms of 1–8.33 to 3–25

[13] Constructed from N.Y. Penal Law §§ 70.00-70.06. A full chart covering the entirety of the offenses discussed in this section can be found in the appendix.
[14] Offense classifications are found at N.Y. Penal Law § 70.02(1)(a). Sentencing ranges for these offenses are found at: N.Y. Penal Law §§ 70.02(3)(a), 70.04(3)(a), 70.06(6)(a).
[15] Offense classifications are found at: N.Y. Penal Law §§ 105.15 (conspiracy in the second degree), 460.20 (enterprise corruption). Sentencing ranges for these offenses are found at: N.Y. Penal Law §§ 70.00(2), 70.00(3), 70.06(3)(b), 70.06(4)(b).
[16] Offense classifications are found at N.Y. Penal Law § 70.02(1)(b). Sentencing ranges for these offenses are found at: N.Y. Penal Law §§ 70.02(3)(b), 70.04(3)(b), 70.06(6)(b).

years for both enterprise corruption and conspiracy in the second degree. Together, these sentences result in a possible aggregate maximum term ranging from 12 to 56 years, depending on the trial court's ultimate sentencing decision. *See* N.Y. Penal Law § 70.30(1)(d). Other sentencing provisions cap the maximum at a 40 year determinative sentence. *See* N.Y. Penal Law § 70.30(1)(e)(v).

Therefore, the legislature has provided ample criminal offenses and significant sentencing ranges for just these situations. Resorting to misapplying New York's anti-terrorism statute is thus unnecessary.

CONCLUSION

For the foregoing reasons, this Court should affirm the holding of the Appellate Division reversing the terrorism convictions in this case.

Respectfully Submitted,

By: _____

NICHOLAS GOLDIN
DAVID B. EDWARDS
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

Attorneys for Amicus Curiae

APPENDIX

Class of Felony	No Priors	Non-violent Predicate	Violent Predicate
A-I[17, 18] • Murder in the first degree • Murder in the second degree • Conspiracy in the first degree	Min: 15–25 years Max: Life	Min: 15–25 years Max: Life	Min: 15–25 years Max: Life
B Violent[19] • Attempted murder in the second degree • Manslaughter in the first degree • Assault in the first degree • Gang assault in the first degree • Criminal possession of a weapon in the first degree • Criminal use of a firearm in the first degree	Min: 5 years Max: 25 years	Min: 8 years Max: 25 years	Min: 10 years Max: 25 years
B Non-violent[20] • Conspiracy in the second degree • Criminal facilitation in the first degree • Enterprise corruption	Min: 1–8.33 years Max: 3–25 years	Min: 4.5–12.5 years Max: 9–25 years	Min: 4.5–12.5 years Max: 9–25 years

[17] N.Y. Penal Law § 70.00(3)(a)(i) increases mandatory minimum ranges for specific Class A-I felonies: murder in the first degree when sentence not death or life without parole (20-25 years); murder in the second degree by a non-minor while committing a sexual assault against one younger than 14 years of age or aggravated murder (life without parole); and attempted murder in the first degree or attempted aggravated murder (20-40 years).

[18] Offense classifications are found at: N.Y. Penal Law §§ 125.27 (murder in the first degree), 125.25 (murder in the second degree), 105.17 (conspiracy in the first degree). Sentencing ranges for these offenses are found at N.Y. Penal Law § 70.00(3)(a)(i).

[19] Offense classifications are found at N.Y. Penal Law § 70.02(1)(a). Sentencing ranges for these offenses are found at: N.Y. Penal Law §§ 70.00(3)(a)(i), 70.04(3)(a), 70.06(6)(a).

[20] Offense classifications are found at: N.Y. Penal Law §§ 105.15 (conspiracy in the second degree), 115.08 (criminal facilitation in the first degree), 460.20 (enterprise corruption). Sentencing ranges for these offenses are found at: N.Y. Penal Law §§ 70.00(2), 70.00(3), 70.06(3)(b), 70.06(4)(b).

C Violent[21] • Attempt to commit any class B violent felony • Gang assault in the second degree • Criminal possession of a weapon in the second degree • Criminal use of a firearm in the second degree	Min: 3.5 years Max: 15 years	Min: 5 years Max: 15 years	Min: 7 years Max: 15 years
C Non-violent[22] • Attempted conspiracy in the second degree. • Criminal solicitation in the first degree • Criminal facilitation in the second degree	Min: None[23] Max: 3–15 years	Min: 3–7.5 years Max: 6–15 years	Min: 3–7.5 years Max: 6–15 years
D Violent[24] • Attempt to commit any class C violent felony • Assault in the second degree • Criminal possession of a weapon in the third degree	Min: 2 years Max: 7 years	Min: 3 years Max: 7 years	Min: 5 years Max: 7 years

[21] Offense classifications are found at N.Y. Penal Law § 70.02(1)(b). Sentencing ranges for these offenses are found at: N.Y. Penal Law §§ 70.02(3)(b), 70.04(3)(b), 70.06(6)(b).

[22] Offense classifications are found at: N.Y. Penal Law §§ 110.05(4), 105.15 (attempted conspiracy in the second degree), 100.13 (criminal solicitation in the first degree), 115.05 (criminal facilitation in the second degree). Sentencing ranges for these offenses are found at: N.Y. Penal Law §§ 70.00(2)(c), 70.06(3)(c), 70.06(4)(b).

[23] Attempt to commit conspiracy in the second degree must be punished with imprisonment with a minimum period of one year. All other Non-Violent Class C Felonies listed do not mandate a prison sentence. *See* N.Y. Penal Law §§ 60.01, 60.05(4), 70.00(3)(b).

[24] Offense classifications are found at N.Y. Penal Law § 70.02(1)(c). Sentencing ranges for these offenses are found at: N.Y. Penal Law §§ 70.02(3)(c), 70.04(3)(c), 70.06(6)(c). For criminal possession of the weapon in the third degree, courts may impose an alternative definite sentence of imprisonment of no less than one year. *See* N.Y. Penal Law § 70.02(2)(c).

D Non-violent[25] • Conspiracy in the third degree • Criminal solicitation in the second degree	Min: None[26] Max: 3–7 years	Min: 2–3.5 years Max: 4–7 years	Min: 2–3.5 years Max: 4–7 years
E Violent[27] • Attempted criminal possession of a weapon in the third degree	Min: 1.5 years[28] Max: 4 years	Min: 2 years Max: 4 years	Min: 3 years Max: 4 years
E Non-Violent[29] • Conspiracy in the fourth degree • Criminal solicitation in the third degree • Criminal facilitation in the third degree • Menacing in the first degree • Riot in the first degree	Min: None[30] Max: 3–4 years	Min: 1.5–2 years Max: 3–4 years	Min: 1.5–2 years Max: 3–4 years

[25] Offense classifications are found at: N.Y. Penal Law §§ 105.13 (conspiracy in the third degree), 100.10 (criminal solicitation in the second degree). Sentencing ranges for these offenses are found at: N.Y. Penal Law §§ 70.00(2)(d), 70.06(3)(d), 70.06(4)(b).
[26] *See* N.Y. Penal Law §§ 60.01, 60.05(5).
[27] Offense classifications are found at N.Y. Penal Law § 70.02(1)(d). Sentencing ranges for these offenses are found at: N.Y. Penal Law §§ 70.02(3)(d), 70.04(3)(d), 70.06(3)(d).
[28] N.Y. Penal Law § 70.02(3)(d). Alternatively, courts may impose definite sentence of no less than 1 year. *See* N.Y. Penal Law § 70.02(2)(c).
[29] Offense classifications are found at: N.Y. Penal Law §§ 105.10 (conspiracy in the fourth degree), 100.08 (criminal solicitation in the third degree), 115.01(criminal facilitation in the third degree), 120.13 (menacing in the first degree), 240.06 (riot in the first degree). Sentencing ranges for these offenses are found at: N.Y. Penal Law §§ 70.00(2)(e), 70.06(3)(e), 70.06(4)(b).
[30] *See* N.Y. Penal Law §§ 60.01, 60.05.