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Trials & TRIBULATIONS

Gang activity does not fall within terrorism statute

As a direct result of the Sept 11, 2001, terror attacks, the New York State Legislature convened a special session within six weeks of the attacks to address criminal ramifications for terrorist acts. The Legislature decided that it needed to strengthen the current laws to ensure “that terrorists ... are prosecuted and punished in state courts with appropriate severity,” L. 2001, c. 300, § 4.

The resulting Penal Law Article provides penalties for those who provide material support for terrorism, engage in terroristic threats, engage in terrorism, and render criminal assistance to a terrorist, Penal Law §§ 490.10 – 490.30. Since Section 490 can expand the scope of admissible evidence, the question became whether this statute, created to address previously unimaginable acts of coordinated terrorism, would be stretched to affect other types of criminal prosecutions.

The “crime of terrorism” 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). Surprisingly, there was no definition in Article 490 regarding the “intent to intimidate or coerce a civilian population.”

The first case prosecuted under the “crime of terrorism” theory recently made its way up to the New York State Court of Appeals. In *People v. Morales*, __ NY3d __, 2012 WL 6115622 (Dec. 11, 2012), the court addressed whether criminal gang activity can be prosecuted under Article 490. In an unanimous decision, the court determined that the Bronx District Attorney’s Office improperly employed Article 490 against Edgar Morales, a member of the street gang known as the “St. James Boys” (SJB), *Id.* at *8.

The court found that Article 490, which permitted the introduction of evidence tying Morales to years of criminal activities by other members of the SJB, was unrelated to the specific offense at issue and caused “undue prejudice” to *Morales*, *Id.*

Facts

On the evening of Aug. 17, 2002, SJB members, including Morales, went to a party in the Bronx attended by a rival gang,

Id. at *3. A fight erupted between the two gangs, and Morales shot at the rival gang. Three bullets hit one of the rival gang members, paralyzing him, *Id.* A young bystander, a 10-year-old girl, was shot in the head and died.



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Morales, along with other accomplices, was charged with the crimes of terrorism, predicated on intentional and attempted murder, manslaughter, gang assault and criminal possession of a weapon. These underlying offenses were also charged separately without the terrorism designation. Morales was also charged, along with other SJB members, with conspiracy, based upon a number of overt acts committed by the SJB between 2001 and 2004 involving multiple assaults and homicides.

At his trial, Morales challenged the sufficiency of the evidence regarding the terrorism charges and argued that the SJB activities were “directed at rival gangs, almost exclusively and there was no real evidence, certainly not evidence sufficient to get to the jury on the element of acting with intent to intimidate or coerce a civilian population,” *Id.* at *4.

The people maintained that targeting a rival gang fell within Article 490 and there was adequate proof that the SJB engaged in acts intended to intimidate or coerce all Mexican-Americans in the geographical area of the gang, *Id.* The trial court denied Morales’ motion and found that the people had established a prima facie case of terrorism based upon the underlying offenses. Ultimately, Morales was convicted of three crimes of terrorism, premised on the underlying convictions for murder and weapons possession. Morales was also convicted of conspiracy for agreeing to commit gang assault as a “crime of terrorism” and sentenced to an aggregate prison term of 40 years to life, *Id.*

The Appellate Division, First Department reversed the terrorism convictions, finding that there was insufficient evidence to prove an intent to intimidate or coerce a civilian population, as the people only established that Morales engaged in gang-related street activities and not terrorist acts, *People v. Morales*, 86 AD3d 147 (1st Dept. 2011).

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Therefore, the First Department reduced the three terrorism convictions to their underlying offenses of murder and weapons possession, and reduced the conspiracy conviction. However, the First Department rejected, as unpreserved or meritless, Morales' contention that the terrorism theory unduly prejudiced his trial.

Decision

Before the Court of Appeals, the people argued that the terrorism convictions should be reinstated. The people contended that Morales' actions at the party, furthered by the SJB's objective to intimidate or coerce other Mexican-American gangs in the Bronx, and coupled with the SJB's goal of intimidating and coercing the entire Mexican-American community in the Bronx during a three-year period, was sufficient to convict under Article 490. Morales argued that neither the population of Mexican-Americans in the neighborhood, nor the smaller category of rival gangs, constituted a "civilian population" as a matter of law.

The court first examined the text of Article 490, in particular, the phrase "intent to intimidate or coerce a civilian population," because it lacked any definition in Article 490. The court gave the phrase its "most natural and obvious meaning based on common sense and reasonableness," and found that "civilian population" could "encompass a variety of communities depending on how the relevant area is defined and who lives within the territory," *Id.* at *4. The definition could range "from residents of a single apartment building to a neighborhood, city, county, state, or even a country," *Id.*

The court found it unnecessary to specifically define "civilian population" for two reasons. First, the evidence at trial failed to demonstrate that Morales and his fellow gang members committed acts against rival gangs, "with the conscious objective of intimidating every Mexican-American in the territory identified at trial," *Id.* at *5. The court reasoned that Morales and his accomplices arranged the attack because of the attendance of the rival gang at the party and did 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," *Id.*

Second, although some permissible inferences could be inferred from the fact that one of the goals in the attack 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 the concept is commonly understood," *Id.*

The Court of Appeals refused to interpret the statutory language of Article 490 to cover individuals or groups who are not normally viewed as "terrorists," *Id.* The court reviewed the leg-

islative findings for specific examples of terrorism, such as the Sept 11 attacks; the bombing of the American Embassy in Kenya and Tanzania in 1998; the destruction of the Oklahoma City Federal Office Building in 1995; the mid-air bombing of Pan Am Flight 103 in Lockerbie, Scotland, in 1998; and the bombing of the World Trade Center in 1993.

Comparing and contrasting Morales' offenses to the examples of terrorism cited by the Legislature, the court found that Morales' actions were not comparable to acts of terrorism. The court was leery of broadening the definition of terrorism, as prosecutors could potentially invoke the specter of terrorism every time a gang or organized crime family orchestrates the murder of a rival member.

The court wrote, "[t]he concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act ... [T]he Legislature was aware of the difficulty in defining or categorizing specific acts of terrorism[;] it incorporated a general definition of the crime and referenced [several] notorious acts of terrorism that serve as guideposts for determining whether a future incident qualifies for this nefarious designation," *Id.* at *6.

Since the Legislature did not intend for the crime of terrorism to cover illegal gang activity committed against other gang members, the evidence at trial was insufficient to establish Morales' guilt beyond a reasonable doubt.

Contrary to the Appellate Division, the court found that the introduction of evidence to support the terrorism theory unfairly prejudiced Morales' trial. The court held that "by proceeding on the terrorism theory, the people were able to introduce evidence about numerous alleged criminal acts committed by members of the SJB over the course of three years," *Id.*

The court reasoned that since the people were permitted to introduce evidence and activities of Morales and his associates, which would have been otherwise inadmissible, it was "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."

The legislative findings accompanying Article 490 focus exclusively on terrorist attacks perpetrated by individuals seeking to achieve political goals. Thus the statute appears aimed at political terror, not gang violence. As the *Morales* case demonstrates, advancing an overly-broad interpretation of the statute trivializes the aim of the statute, and risks tainting the entire prosecution.

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