5-12-0039

IN THE APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit
	) of Illinois Madison County
	) Court 07-CF-1648
Plaintiff-Appellee,	)
	) Honorable Judge Tognarelli
VS.	) Circuit Judge Presiding
	)
OLUTOSIN ODUWOLE,	)
	)
Defendant-Appellant.	)

BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

On October 24, 2011, following a jury trial, Appellant Olutosin Oduwole was convicted of attempting to make a terrorist threat and unauthorized possession or storage of weapons. (R1321-1322.) Oduwole moved for a judgment of acquittal or in the alternative for a new trial (R1338-1345), which the trial court denied (R1346). Oduwole now appeals his conviction of attempting to make a terrorist threat. (A38-A40.) No questions are raised on the pleadings, but Oduwole does challenge the constitutionality of the statutes under which he was charged, both facially and as applied to him.

ISSUES PRESENTED FOR REVIEW

I. Whether Oduwole's conviction of attempting to make a terrorist threat, which is based upon private speech that was never communicated to another person, violates the First Amendment to the U.S. Constitution and Article I, Section 4 of the Illinois Constitution

II. Whether the crime of attempting to make a terrorist threat as applied to the circumstances of Oduwole's case is unconstitutionally vague in violation of due process because it fails to provide ordinary people notice that their private writings may lead to terrorism charges and because it allows for arbitrary and discriminatory enforcement by the police

III. Whether the statutes of conviction, as construed by the trial court to apply to Oduwole's private written rap lyrics, are unconstitutionally overbroad and unconstitutionally vague

IV. Whether the state presented evidence sufficient to convict Oduwole of attempting to make a terrorist threat, given that it conceded that Oduwole never communicated any threat to any person and failed to prove that Oduwole intended to make a terrorist threat or took any substantial step toward making such a threat

V. Whether the warrantless search of Oduwole's vehicle by police who were investigating him violated the Fourth Amendment, requiring suppression of the principal evidence used against Oduwole at trial

VI. Whether the trial court erred by allowing the State to present repeatedly prejudicial and irrelevant evidence of guns that Oduwole had never possessed and a Movie Maker file that he had previously deleted from his computer, in violation of Illinois Rule of Evidence 403

JURISDICTIONAL STATEMENT

This is an appeal from an amended judgment of conviction entered on December 21, 2011, and filed on January 5, 2012. (A12-A13.) Oduwole filed a Notice of Appeal on January 19, 2012. (A38-A40.) This Court has jurisdiction over this appeal pursuant to Article VI, Section 6 of the Illinois Constitution and Supreme Court Rules 602 *et seq*.

STATUTORY PROVISIONS INVOLVED

720 ILCS 5/29D-20—Making a terrorist threat: Text reprinted in Appendix.

720 ILCS 5/8-4—Attempt: Text reprinted in Appendix.

Illinois Rule of Evidence 403—Exlcusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time: Text reprinted in Appendix.

Constitution of the State of Illinois, Article I, Bill of Rights, Section 4, Freedom of Speech: Text reprinted in Appendix.

U.S. Constitution, First Amendment, Freedom of Speech: Text Reprinted in Appendix.

U.S. Constitution, Fourth Amendment, Searches and Seizures: Text Reprinted in Appendix.

U.S. Constitution, Fifth Amendment, Due Process: Text Reprinted in Appendix.

U.S. Constitution, Fourteenth Amendment, Due Process: Text Reprinted in Appendix.

STATEMENT OF FACTS

Oduwole was born in Missouri to Nigerian parents. Beginning in 2005, he attended Southern Illinois University at Edwardsville (SIUE) (C568), and while there became an active member of the campus community. He was very involved in his fraternity, Iota Phi Theta (C569), and was engaged in its community-service mission (R1098 – 1100; C644). But Oduwole's main passion was rap music. (R1098-1107.) He had written lyrics for thousands of rap songs and had recorded and promoted a number of them through a classmate named Marsell Doyle. (R967.) As an aspiring "gangsta

rapper"—a genre of rap music popular throughout the United States today—he often wrote songs that included lyrics about women, guns, and violence, and he identified with the West Coast, which are all characteristic features of gangsta rap music. (R1161, 1164-1167.) These features of gangsta rap lyrics distinguish that genre of rap music from other genres, such as political rap music or conscious rap music. (R1166.) And this sort of subject matter pervades gangsta rap music; though it is distasteful to some, these features are often included in gangsta rap songs to demand respect from other rappers and to help sell albums. (R1168-1171.)

Oduwole's interest in gangsta rap was artistic. In all other respects he was a peaceful person, and he was viewed that way by both friends and professors at the university. (C576-613; R898.) According to friends and fellow rappers, Oduwole—like most successful musicians—created lyrics constantly, scribbling them wherever and whenever inspiration struck. (R1101-1102.) He would use scrap paper, napkins, notebooks, and computer programs to record his song ideas. (R1131-40.) Similarly, Oduwole drew inspiration for his lyrics from everywhere—from television shows to current events to his own relationships. (R1104.) One evening Oduwole and his friend, Thomas Phillips, were watching an episode of *Law and Order* that dealt with a person who had sent a ransom note demanding money in order to avert something bad happening to a character on the show. (R1106.) Oduwole told Phillips that he thought that this would make a good topic for a rap composition or a skit to accompany a rap song. (R1106-07.)

Another of Oduwole's interests was buying and selling guns on the internet. These transactions were legal and above board, as Oduwole had a firearms owner

identification card and used a federal firearms licensee to facilitate his transfer of guns from his internet transactions. (R717; 733-34.) He also legally possessed his own handgun, although he never registered it with SIUE, which was a misdemeanor violation of Illinois law. (R593.) Federal Agents, in coordination with the Wood River Police Department and the SIUE campus police, began investigating in mid-July 2007 Oduwole's possible purchases and sale of guns. (08/09/2007 Grand Jury Tr. 10; 08/22/2008 Suppression Hr'g Tr. 17-18; R709-716.) Through this investigation, officers learned that Oduwole had ordered four other guns but had not received them from the federal firearms licensee. (R644-49; R733-34.) In fact, Oduwole never possessed any of these four weapons. (R733-734.)

Around the same time, Oduwole began the process of moving to a new apartment on the SIUE campus. (R776.) As he was transferring a carload of belongings across campus, Oduwole's car ran out of gas. He pulled the car to the side of the road, locked it, and left it there. (R1108.) Meanwhile, Wood River police, who had now been investigating Oduwole for a number of days, happened upon the car and checked its plates. (R768; R852-853.) When the Wood River police discovered that the car belonged to Oduwole—the very person they were investigating in connection with the weapons sale—they notified SIUE campus officers, who in turn sent out a safety alert to all SIUE officers and began to monitor Oduwole's car closely to gather evidence of activity "going on" around the car. (08/22/2008 Suppression Hr'g Tr. 67-71.)

Under SIUE policy, a car may be deemed abandoned and towed and inventoried if it remains unattended for 24 hours. (08/09/2007 Grand Jury Tr. 12.) Instead of towing Oduwole's car after that period of time, the SIUE police waited 48 hours so they would

have time to continue their surveillance "to monitor any activity around that vehicle." (08/09/2007 Grand Jury Tr. 68.) The car was not towed until July 20, 2007. (08/22/2008 Suppression Hr'g Tr. 43.)

Officers were dispatched to search the car in advance of the tow. (08/22/2008 Suppression Hr'g Tr. 5, 44-45.) Officer Todd Schmidt was tasked with this job. (08/22/2008 Suppression Hr'g Tr. 5-6.) After forcing entry into the locked car, Schmidt testified that he began to inventory the car's contents. (08/22/2008 Suppression Hr'g Tr. 8-9, 37.) Schmidt's search, however, turned to gathering evidence when Schmidt noticed bullets in the center console of the car. (08/22/2008 Suppression Hr'g Tr. 25-26.) Schmidt also noticed a crumpled piece of paper shoved between the center console and the driver's seat. (08/22/2008 Suppression Hr'g Tr. 10, 27.) He picked it up and saw that it was a piece of paper advertising asthma inhalers. (08/22/2008 Suppression Hr'g Tr. 10-11.) He determined quickly that the paper was not of medical significance. (08/22/2008 Suppression Hr'g Tr. 11-13.) Nonetheless, he continued to read, concluding immediately that what was written on the front page of the paper did not make sense to him. (08/22/2008 Suppression Hr'g Tr. 11-13, 34.) He flipped the paper over and read on. (08/22/2008 Suppression Hr'g Tr. 11-13, 34-35.) That sheet of paper read in its entirety as follows:

> [Front Side of Paper]
> let them booty cheeks hop, so (3x)
> Pop it mami pop it (3x)
> I'ma do it like this daddy (3x)
>
> make it roll like a rim girl
> Pop it mami pop it (3x)
> I'ma do it like this daddy (3x)
>
> hold me w/ cha hands put it down

on a player till you feel it in my
pants, pop a hand stand maybe I'll trick
a couple grand, you first you do me, now
do it for my man, now do it for da
fan, now do it do it do it do it,

"follow that thang to da ground when
she drop it."

[Back Side of Paper]
I lead she a follower,
I'm single ~~and~~ I'm not wit her, but she
gott a throat deeper than a Sword
Swallower/

glock to the head of
SEND $2 to . . . . paypal account
if this account doesn't reach $50,000 in the next
7 days then a murderous rampage similar to the
VT shooting will occur at another ~~prestigious~~
highly populated university. THIS IS NOT A JOKE!

(A16-A17.) After reading this paper, Schmidt showed it to his supervisor, Marty Tieman, who was also on the scene. (08/22/2008 Suppression Hr'g Tr. 51-52.) In addition, he set it down next to the bullets and photographed the note and the bullets together. (R752.) Both the bullets and the note were promptly put into evidence. (08/22/2008 Suppression Hr'g Tr. 26-27.)

Based on the discovery of the paper in the car, officers immediately sought an arrest warrant for Oduwole. (*Id.* at 72.) The SIUE campus housing office directed them to Oduwole's address and several officers arrived to arrest him. (08/09/2007 Grand Jury Tr. 17.) Present at Oduwole's arrest was his friend Thomas Phillips, who accompanied officers to the police station and submitted to an interview. Phillips told the officers of the *Law and Order* genesis of the paper found in Oduwole's car. (R1123.) The interviewing officer, Rick Weissenborn, testified that he did not remember this

conversation; and because Weissenborn did not electronically record his interview with Phillips, he could not adequately refresh his recollection on the matter. (R1237.)

In the wake of Oduwole's arrest, SIUE and Wood River police held a press conference where they displayed versions of weapons that Oduwole had purportedly bought or sold on the internet—weapons that he had never possessed. (R845-846.) Oduwole was charged in a two-count indictment with Attempt Making a Terrorist Threat (Count I) and Unlawful Possession of Storage of Weapons in a Public Supported Building (Count II) (C23), and the police continued their investigation. They seized as evidence thousands of pages of notebooks found in Oduwole's apartment, along with three computers. (R938, 1000.) They discovered that the vast majority of these notes related to rap lyrics and were otherwise irrelevant to their investigation. (R923-32.) They interviewed faculty and acquaintances, who stated that Oduwole was never violent or aggressive. (R894-98.) They discovered—as the State later conceded repeatedly (*see, e.g.*, C23, 194, 243, 430; 08/22/2008 Suppression Hr'g Tr. 60; R873, 877)—that there was no evidence that Oduwole had communicated to any other person the piece of paper found in his car containing rap lyrics, which the police had construed as a threat (C243).

The case proceeded to trial on October 18, 2011. (R206.) Although Oduwole had never possessed any of the guns, the trial court allowed the prosecution to display and allowed the witnesses to handle models of the firearms that had been involved in Oduwole's internet transactions. (R673, 712-13, 960-61, 1204-16, 1263-1304.) In fact, along with the handwritten paper found in Oduwole's car, these guns became a centerpiece of the State's case: they were referenced no less than 41 times during the presentation of evidence and many more times during open and closing arguments.

(R626, 627, 659-61, 670, 673-75, 679, 701, 712-716, 727, 733, 924, 960-61, 1204-06, 1263-65, 1301, 1303-04.) Then in the midst of trial, on October 20, a computer analyst hired by the State discovered for the first time the remains of a Movie Maker file. (R1006.) Oduwole had independently deleted the file from the computer before the time that he was arrested and his computers were seized as evidence. (R1000.) This previously deleted file contained language similar to that included on the sheet of rap lyrics that had been discovered in Oduwole's car. (R994-1000.) Over defense objection, the trial court admitted the Movie Maker file in the State's case-in-chief, and the State played what video remained twice during the trial. (A62.)

The defense then presented expert testimony from Dr. Charis Kubrin, a Professor of Criminal Law and Society and the University of California Irvine. Dr. Kubrin specializes in "the intersection of music, culture and social identity" (R1153), and has conducted extensive empirical analysis focusing on rap music and its genres (R1152-55; R1226). Dr. Kubrin analyzed the piece of paper found in the car and portions of the notebooks that police seized from Oduwole's apartment. (R1157-59.) Based on her analyses of those materials, she opined that the piece of paper "represented the formative stages of a rap song." (R1159.) She noted in particular four ways in which the piece of paper and notebooks converged with her research on rap music. First, the violent imagery and glorification of guns and violence is a hallmark of gangsta rap music, and was abundantly present in Oduwole's materials. (R1164-72.) Second, she found the phrase "THIS IS NOT A JOKE" contained on the piece of paper emblematic of the "warnings or cautionary statements" common in gangsta rap music. (R1175-79.) Third, she found that the "freestyle" recording of ideas, found both on the scrap of paper and in

the notebooks, represented a particular stage of lyrical development in the rap genre. (R1181-85.) Finally, Kubrin noted that skits known as "intros" or "outros" commonly are appended to rap lyrics, and that the final six lines of text in Oduwole's rap lyrics fit within that category. (R1190-93.)

At the close of evidence, the defense moved for acquittal. Although the trial court noted that this case was "difficult, ambiguous, and puzzling" (A63), it denied the motion (A64). The jury returned a guilty verdict and the trial court sentenced Oduwole to five years' imprisonment. This appeal followed. (A38-A40.)

SUMMARY OF ARGUMENT

Each issue in this troubling case invokes two vitally important tenets of our constitutional system of government: (1) the sanctity of personal privacy, un-communicated thought, and protected artistic expression; and (2) the avoidance of unfettered arresting and prosecutorial discretion. The investigation and prosecution of Oduwole, along with the trial court's interpretation of the statutes of conviction, demonstrate that virtually no private expression would be immune from prosecution as an attempted terrorist threat. Private expression, contemplation, and writings are constitutionally protected under the First Amendment. Yet the way that the criminal law was used in this case to prosecute Oduwole's private and un-communicated thoughts, vests the police with the unlimited power to investigate and arrest unsuspecting persons in an unprecedented way, in violation of due process. And with such power would come an inevitable chilling of speech and thought, as people—unsure whether their private thoughts could subject them to incarceration as putative terrorists—would opt not to express them. As discussed below, the only interpretation of this criminal law that would

save it from unconstitutionality—one that the circuit court did not adopt—is one that requires proof that a defendant communicated his private thoughts to her target audience.

The other errors in this case likewise touch on these themes of unfettered investigation and prosecution, and the intersection of protected private artistic expression with the proscribed realm of communicated true threats. The piece of paper that became the centerpiece of this case was discovered only through the work of police who, in violation of the Fourth Amendment, engaged in a pretextual inventory search in their efforts to uncover evidence in their investigation of Oduwole. And Oduwole's conviction was the product of the State's irrelevant and prejudicial evidence, which the circuit court admitted over defense objection. As shown below, these efforts were ultimately insufficient because no rational juror could find the State's evidence proved Oduwole guilty beyond a reasonable doubt and because the State conceded that it did not prove the threshold element to any attempted terrorist threat: communication. For these reasons, this Court should vacate Oduwole's conviction and enter judgment in his favor or, at a minimum, reverse and remand for a new trial.

ARGUMENT

I. ODUWOLE'S CONVICTION VIOLATES THE FIRST AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 4 OF THE ILLINOIS CONSTITUTION

Oduwole stands convicted of attempting to make a terrorist threat based on a piece of paper containing rap lyrics that police found tucked away next to the center console of his car. The sheet of rap lyrics was never communicated to any person, as the State conceded repeatedly. (*See, e.g.*, C23, 194, 243, 430; 08/22/2008 Suppression Hr'g Tr. 60; R873, 877.) Therefore, this speech is not a "true threat" and cannot be punished

without violating the First Amendment to the U.S. Constitution and Article I, Section 4 of the Illinois Constitution.

Oduwole's rap lyrics were private thoughts, hastily scribbled down with pen and paper. Whether viewed as artistic expressions or simply as private writings, the piece of paper found in Oduwole's car was speech protected by the U.S. Constitution and the Illinois Constitution. Yet the State's case and Oduwole's conviction of attempting to make a terrorist threat are based on the speech contained on this piece of paper. This approach is one that our constitutional system of government flatly prohibits. Oduwole's conviction is an unconscionable and unprecedented violation of the right to free speech guaranteed by the U.S. Constitution and the Illinois Constitution. His conviction and sentence should be vacated, and a judgment of acquittal should be entered in his favor.

A. The Constitution prohibits the prosecution of speech and private thoughts

The First Amendment to the U.S. Constitution generally prohibits the States from proscribing and punishing speech. *Virginia v. Black*, 538 U.S. 343, 358 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Cantwell v. Connecticut*, 310 U.S. 296, 309-11 (1940); *Whitney v. California*, 274 U.S. 357, 373-75 (1927) (Brandeis, J., concurring). Illinois, too, protects speech expansively. ILL. CONST. art. I § 4 (stating that that "[a]ll persons may speak, write and publish freely"); *see also American Civil Liberties Union v. City of Chicago*, 13 Ill. App. 2d 278, 286 (1st Dist. 1957) (stating that "[f]reedom of expression is the rule, limitations upon it the exception.").

This protection of speech extends to artistic expression, such as the rap lyrics found in Oduwole's car.[1] *National Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) ("It goes without saying that artistic expression lies within this First Amendment protection"); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (noting that "[m]usic is one of the oldest forms of human expression."); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (remarking that examples of painting, music, and poetry are "unquestionably shielded"); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973).

First Amendment protection extends equally to private thoughts memorialized on pen and paper. *See* Suzanne M. Berger, *Searches of Private Papers: Incorporating First Amendment Principles Into the Determination of Objective Reasonableness*, 51 FORDHAM L. REV. 967, 978-79 (1983) (noting that "[i]ndividuals [must] have some sanctuary where private reflections and inspirations may be created or recorded without fear that the state will broadcast them" otherwise "the values served by the first amendment are unquestionably eroded.") (internal citations and quotations omitted). The First Amendment places such private writings, self-reflections, personal diaries, and the like off limits from government regulation. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); *Massachusetts v. Oakes*, 491 U.S. 576, 592 (1989) (Brennan, J., dissenting) (discussing the right of Americans to keep private thoughts on paper and in

[1] The officers who discovered the handwritten notes in Oduwole's car testified at trial that they recognized the writing as rap lyrics immediately after finding them. (Grand Jury Tr. 14) ("On the front of that piece of paper—it was about five-by-seven size—was handwriting. *It appeared to be some sort of rap lyrics.*") (emphasis added); (R880) (remarking that the note found in the car was "similar to rap music").

diaries); Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 884 (1995). As the Supreme Court stated in *Ashcroft v. Free Speech Coalition*:

> First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

535 U.S. 234, 253 (2002). Reflecting the same concern, the Illinois Supreme Court has noted that the First Amendment "prohibits the government from premising legislation on the desirability of controlling a person's private thoughts." *People v. Woodrum*, 223 Ill.2d 286, 304 (2006). Unless a person communicates his or her private, written thoughts in a manner that removes them from constitutional protection, the Constitution prohibits the States from punishing criminally those thoughts. *Id.* at 304-05 (citing *Doe v. City of Lafayette*, 377 F.3d 757, 765 (7th Cir. 2004), for the proposition that the government is simply not permitted to "regulate mere thought without conduct"). Whether the State chooses to view the handwritten words found in Oduwole's car as artistic expression (as they actually are) or as private written thoughts, the piece of paper is protected speech under both the U.S. Constitution and the Illinois Constitution.

B. Oduwole's conviction is unconstitutional because his handwritten words were never communicated to another person

The only way that private, handwritten words on a piece of paper could leave the protected waters of the First Amendment is if they were a "true threat," one of the "well-defined and narrowly limited classes of speech" that the States may punish without violating the constitutional protections just discussed. *See Virginia v. Black*, 538 U.S. at 359 (deciding that the States can ban a so-called "true threat"). But private speech is only

a true threat if it is actually communicated in some form to another person—either to its intended recipient or to a third party.

The Supreme Court in *Virginia v. Black* defined the category of "true threats" as encompassing "those statements when the speaker means *to communicate* a serious intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359 (emphasis added). It is no exaggeration to say that in each and every published decision in which American courts have found that speech can be punished as a "true threat," the threat at issue has been communicated to a victim or to a third party. In *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004), for example, the Fifth Circuit applied *Virginia v. Black* and held that if a speaker does not "intend[] to communicate a potential threat," then it is not a "true threat." *Id.* at 616-17. There a student had made a drawing depicting a violent event, but he had left that drawing in his closet and had not communicated it to another person. *Id.* at 611-12. The court explained the requirement that speech must be communicated in order to be a "true threat":

> [T]o lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person. Importantly, whether a speaker intended to communicate a potential threat is a threshold issue, and a finding of no intent to communicate obviates the need to assess whether the speech constitutes a "true threat."

Id. at 616-17 (citations omitted). Stressing the fundamental principle discussed above—that "[p]rivate writings . . .enjoy the protection of the First Amendment"—the court stated, "[f]or such writings to lose their First Amendment protection, something more than their accidental an unintentional exposure to public scrutiny must take place." *Id.* at 617-18.

Every court to consider the issue has followed this rule. *Doe v. Pulaski County Special School District*, 306 F.3d 616, 624-25 (8th Cir. 2002) (holding that a "speaker must have intentionally or knowingly communicated the statement in question to someone before he or she may be punished or disciplined for it" and denying first amendment protection to student who wrote violent letters, discussed them with his intended target, and shared them with a friend); *see also United States v. White*, 670 F.3d 498, 508-09 (4th Cir. 2012) (interpreting *Virginia v. Black* to require communication and proof that the speaker intended to communicate a threat before punishment can be imposed); *United States v. Wolff*, 370 F. App'x 888, 892 (10th Cir. 2010) (interpreting *Virginia v. Black* to require communication of the purported threat); *United States v. D'Amario*, 330 F. App'x 409, 413 (3d Cir. 2009) (defining an utterance as a "true threat" where "the defendant intentionally *make[s] a statement* . . . wherein a reasonable person would foresee that the statement would be interpreted *by those to whom the maker communicates the statement* as a serious expression of an intention to inflict bodily harm") (emphases added); *United States v. Parr*, 545 F.3d 491, 497-98 (7th Cir. 2008) (deciding that the threat must be communicated either to the intended victim or to some third party); *Fogel v. Collins*, 531 F.3d 824, 830 (9th Cir. 2008) (finding that speech constituting a "true threat" is "communicated directly to the subject of the threat" and that "speech not directed at specific individuals" is protected speech and not a true threat); *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) (stating that only intentional threats communicated to another are punishable consistent with the First Amendment); *United States v. Fuller*, 387 F.3d 643, 646 (7th Cir. 2004) (defining a true threat as a statement that would be interpreted *by those to whom the maker communicates the*

statement as a serious expression of an intention to inflict bodily harm); *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 206 n.8 (2d Cir. 2004) ("To the extent that . . . a message of intimidation *would be conveyed*, it might constitute a 'true threat,' and would therefore not be protected by the First Amendment.") (emphasis added); *United States v. Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003) (deciding that the determination whether a statement is a "true threat" is based upon whether a reasonable person to whom that statement was made would interpret the statement as a threat); *Jones v. State*, 64 S.W.3d 728, 736-37 (Ark. 2002) (finding that rap lyrics are a true threat only if they are communicated to the victim named in the song); *People v. Lowery*, 257 P.3d 72, 81 (Cal. 2011) (interpreting *Virginia v. Black* to require evidence of communication and an intent to communicate before speech can be punished—"[t]he relevant intent remains the intent to communicate, not the intent to threaten").[2] The State will not be able

[2] *See also United States v. Vaksman*, 2012 WL 892436, at *1 (9th Cir. Mar. 16, 2012) ("true threat" because threat sent by email); *United States v. Mabie*, 663 F.3d 322, 326-27 (8th Cir. 2011) ("true threat" because letters mailed to intended victims); *United States v. McDonald*, 444 F. App'x 710, 711-13 (4th Cir. 2011) ("true threat" because death threats communicated during recorded telephone conversations with family members); *United States v. Amel*, 585 F.3d 182, 183-85 (4th Cir. 2009) ("true threat" because threat to harm FBI agents communicated in telephone message); *United States v. Villanueva*, 315 F. App'x 845, 847-48 (11th Cir. 2009) ("true threat" because messages containing threats posted on internet); *United States v. Cope*, 283 F. App'x 384, 386-89 (6th Cir. 2008) ("true threat" because speaker communicated to fellow inmate that he planned to solicit murder of Assistant United States Attorney); *United States v. Bly*, 510 F.3d 453, 457-59 (4th Cir. 2007) ("true threat" because shooting range targets were mailed to intended victim); *United States v. Magleby*, 420 F.3d 1136, 1138-39 (10th Cir. 2005) ("true threat" because cross burned outside home of interracial couple); *United States v. Stewart*, 420 F.3d 10071010-12, 1016-19 (9th Cir. 2005) ("true threat" because speaker communicated to fellow inmate that he wanted to murder federal judge); *Hodson v. State*, 2009 WL 1424492, at *1 (Nev. Jan. 8, 2009) ("true threat" because perpetrator said to another person that he was going to blow up their car); *State v. Cook*, 947 A.2d 307, 314-18 (Conn. 2008) (not a "true threat" because although defendant physically threatened violence by brandishing a wooden table leg at neighbor, jury could have convicted on the basis of protected conduct); *State v. Curtis*, 748 N.W.2d 709, 711 (N.D. 2008) ("true

to point the Court to a single case in which uncommunicated speech was deemed a "true threat" and punished criminally consistently with the First Amendment. This is because no such case exists.

The State repeatedly conceded that Oduwole's protected speech was not communicated to any other person. (C23) (initial indictment showing that note was not communicated); (C430) (superseding indictment stating explicitly that the note was first discovered in Oduwole's car); (C194) (stating in that Oduwole's lyrics were never communicated); (C243) (stating "The state acknowledges that the threat was not communicated"); (08/22/2008 Suppression Hr'g Tr. 60) (relating an officer's testimony that Oduwole's notes were not communicated to any person); (R873) (officer's testimony at trial that "there was no indication that [Oduwole] was going to communicate" the lyrics to any other person); (R877) (acknowledging that the only "evidence" the State had that Oduwole's lyrics were communicated was that they were written down in the first place). These concessions by the State that Oduwole never communicated his written words to any other person means that the conviction cannot be salvaged under the narrow "true threat" exception. The handwritten words formed the basis of the entire terrorist threat case against Oduwole: they were read to the grand jury and were cited as the motivation for Oduwole's arrest (08/09/2007 Grand Jury Tr. 15-16); they are the only thing listed in the indictments handed down that has anything to do with a threat (C23, 430); they are listed three separate times in the superseding indictment as the basis of the

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threat" because faxes demanding payment and containing threatening statements sent to attorney); *Austad v. South. Dakota. Bd. Of Pardons and Paroles*, 719 N.W.2d 760, 762-67 (S.D. 2006) ("true threat" because journal containing descriptions of violence submitted to prison mental health staff); *State v DeLoreto*, 827 A.2d 671, 679-85 (Conn. 2003) ("true threat" because statements made directly to police officer).

alleged terrorist threat (C430); and the references to Oduwole's words so pervade the trial transcript that citations would fill dozens of pages. Oduwole's conviction based on protected free speech must be vacated and judgment entered in his favor.

II. ODUWOLE'S CONVICTION VIOLATES DUE PROCESS

The crime of attempting to make a terrorist threat is unconstitutionally vague as applied to the facts of Oduwole's case, which is an independent reason that this Court should vacate his conviction and enter judgment in his favor.

The U.S. and Illinois Supreme Courts have stated in no uncertain terms that criminal laws may be unconstitutionally vague in violation of due process if: (1) the crime of conviction fails to provide notice that would enable ordinary people to understand what conduct it prohibits; or (2) the crime of conviction is construed in a manner that allows for arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also City of Chicago v. Morales*, 177 Ill.2d 440, 449 (1997), *aff'd*, *City of Chicago v. Morales*, 527 U.S. 41 (1999). "Rigorous adherence to [these] requirements is especially important "[w]hen speech is involved," as the U.S. Supreme Court reaffirmed only a few weeks ago. *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *see also id.* (stating courts must "ensure that ambiguity does not chill protected speech"); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (holding that where a criminal law "interferes with the right of free speech . . . a more stringent vagueness test should apply").

Oduwole's conviction is unconstitutional in violation of due process for both of these independent reasons. First, Oduwole's conviction of attempting to make a terrorist threat, based on private handwritten words found in his car, demonstrates that an ordinary

person could not possibly have notice of what sort of conduct is punishable under this criminal law. Second, the details of Oduwole's arrest and prosecution epitomize the dangers of arbitrary, unchecked, and over-zealous law enforcement and show that the use of the statute here violated his fundamental right to due process. If allowed to stand, Oduwole's conviction will signal to Illinois police and prosecutors that they alone possess the power and authority to decide if and when to criminalize a person's private thoughts and writings.

A. Oduwole's conviction demonstrates that the crime of attempting to make a terrorist threat does not provide ordinary citizens notice of what conduct is criminal

Ordinary people need to know what conduct is criminally proscribed so that they can ensure that they are acting within the bounds of the law. *Morales*, 527 U.S. at 58; *see also Morales*, 177 Ill.2d at 450 ("'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'") (quoting *Lanzetta v. State of N.J.*, 306 U.S. 451, 453 (1939)). No ordinary person would ever expect that her private thoughts, her diary, or her musings or artistic creations would lead her to be branded an attempted terrorist and incarcerated for five years. Yet that is precisely what happened to Oduwole, and his due process rights were violated as a result.

It is clear that Oduwole was a prolific rap lyricist, writing his ideas down anywhere and at any time. It is also undisputed that Oduwole at some point scribbled gangsta rap lyrics on a piece of notepaper depicting an asthma-inhaler—lyrics referencing women, guns, money, and violence—and then crumpled up that paper and discarded it in his car. Police came to possess this piece of paper during their

investigation of Oduwole. And the piece of paper became the basis of Oduwole's conviction and five-year sentence for attempting to make a terrorist threat.

The way that the crime of conviction has been applied in Oduwole's case suggests no limit about what private and uncommunicated speech or thoughts might be subject to prosecution. The crime of conviction does not provide private citizens with any guidance about how to conform their actions to avoid purportedly criminal conduct. As the law has been applied, those who write violent content, whatever the form, do so at their own peril. This lack of notice renders Oduwole's conviction unconstitutional in violation of due process.

B. Oduwole's conviction illustrates that the crime of attempting to make a terrorist threat permits arbitrary and discriminatory enforcement by law enforcement officers

The second and more important aspect of the constitutional vagueness doctrine is the requirement that a criminal law must adequately define a criminal offense in a manner that does not encourage arbitrary or discriminatory enforcement. *Kolender*, 461 U.S. at 357-58; *Morales*, 177 Ill.2d at 456. This requirement is imposed so that criminal laws will not permit "a standardless sweep that allows police, prosecutors, and juries to pursue their personal predilections." *Kolendar*, 461 U.S. at 358 (internal quotations and alternations omitted). The Supreme Court has warned that where a law permits or encourages arbitrary or discriminatory enforcement, "[i]t furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)). Once again, this due-process prohibition of arbitrary or discriminatory enforcement is

heightened where First Amendment rights are implicated. *See Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 (1965) (criticizing statutes that allow the "potential for arbitrarily suppression First Amendment liberties").

Oduwole was arrested, charged, and convicted of attempting to make a terrorist threat based on a private, uncommunicated, handwritten sheet of paper found in his car, which *police officers then decided* was a threat. In conjunction with local prosecutors, the police determined that this handwritten paper should form the basis of charges of attempting to make a terrorist threat. These decisions were made with unfettered discretion—without any objective evidence that a threat was communicated, and without any other objective criteria with which to distinguish a person's personal and private writings from terrorist threats. The police and prosecutors enjoyed complete discretion to decide whether Oduwole had committed the crime of attempting to make a terrorist threat. A criminal law applied in this manner cannot survive constitutional scrutiny. *Morales*, 177 Ill.2d at 457 (finding criminal law like this, which vests "unfettered discretion in the police to determine whether a suspect's conduct as violated the [law]," is unconstitutional because "it entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat . . . and confers on police a virtually unrestrained power to arrest and charge persons with a violation.") (internal alterations, citations, and quotations omitted) (citing *Smith v. Goguen*, 415 U.S. 566, 120 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974); *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring)).

As the crime of attempting to make a terrorist threat has been construed and applied in Oduwole's case, there is nothing in the laws written by the Illinois legislature

that establishes the necessary "minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358. With no such guidelines in the law, Oduwole's crime of conviction is unconstitutional as applied to his case. *Morales*, 527 U.S. at 60. Under this construction of the crime, the police are allowed to gather writings and other personal expression and then determine that those writings are actually terroristic threats, even if there is only minimal written content that a reasonable person would consider threatening. Indeed, anyone who ever wrote anything violent down on paper—whether an idea for a chapter of a novel, lyrics to a song, a script for a play or firm, or perhaps even a draft section of a legal brief describing violent actions—might become the subject of a criminal prosecution for attempting to make a terrorist threat. The Constitution will not countenance a criminal regime placed entirely in the hands of police and prosecutors without legislative oversight. Because the crime of attempting to make a terrorist threat violates Oduwole's right to due process as applied to his case, this Court should vacate his conviction and enter judgment in his favor.

III. THE STATUTES OF CONVICTION, AS CONSTRUED, ARE UNCONSTITUTIONALY OVERBROAD AND VAGUE

The statutes of conviction in Oduwole's case comprising the crime of attempting to make a terrorist threat, as construed by the trial court, are also facially unconstitutional.[3] The statutes of conviction are both overbroad, in violation of the First Amendment, and unconstitutionally vague, in violation of due process. The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First

[3] Although this Court need not reach Oduwole's facial challenges given the ample evidence of as-applied violations, *see Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (noting that constitutional challenges can begin and end with the conclusion that the Constitution has been violated as applied to the facts at issue), the facial invalidity of these statutes serves as another basis on which to overturn Oduwole's conviction.

Amendment rights, if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 611–616 (1973). In addition, even if an enactment does not reach a substantial amount of constitutionally protected First Amendment conduct, it may be impermissibly vague if it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender*, 461 U.S. at 358. This Court can salvage the criminal laws at issue only by adopting a reading of the offense of attempting to make a terrorist threat that is more narrow than that used by the trial court and does not permit a conviction based on uncommunicated and private writings.

Oduwole has been convicted of an attempt crime, which requires proof that, "with intent to commit a specific offence, [he did] any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4. Specifically, he has been convicted of attempting to make a terrorist threat, a crime that Illinois law defines as follows:

> A person is guilty of making a terrorist threat when, with the intent to intimidate or coerce a significant portion of a civilian population, he or she in any manner *knowingly threatens to commit or threatens to cause the commission of a terrorist act* as defined in Section 29D-10(1) *and thereby causes a reasonable expectation or fear* of the imminent commission of a terrorist act as defined in Section 29D-10(1) or of another terrorist act as defined in Section 29D-10(1)

720 ILCS 5/29D-20 (emphases added). As discussed, the State conceded that the threat to which it pointed—the handwritten lyrics found in Oduwole's car—had not been communicated to any person. *See supra* at 17. Nonetheless, the trial court construed the statute not to require the communication of any threat, and thus permitted Oduwole's conviction on the basis of private and uncommunicated writings.

As the trial court construed the statute (and as the State now argues it should be construed), a conviction is permitted even when the purported threat has never been communicated to any other person. Interpreted this way, the crimes of conviction reach vast amounts of speech protected by the First Amendment. As discussed above, *see supra* at 13, only "true threats" can be punished consistent with the First Amendment, and a threat is not a "true threat" unless it is communicated. By the trial court's reading of the statute, any uncommunicated writing could form the basis of a criminal conviction. Second, as described in detail above, *see supra* at 19, the trial court's reading of the statute does not provide notice to any ordinary person about which private musings might be criminal and which might not. Instead, it leaves the decision whether uncommunicated writings are a crime to the police without any legislative guidelines. Such a reading renders the statute unconstitutionally overbroad in violation of the First Amendment and unconstitutionally vague in violation of due process.

This Court need not decide that the statutes of conviction are facially invalid if it imposes a construction of those statutes that is different that the trial court's and that passes constitutional muster. Indeed, courts endeavor to construe statutes in a way to avoid constitutional problems. *See Morales*, 177 Ill.2d at 448 ("Statutes are presumed constitutional and it is the court's duty to construe a legislative enactment so as to affirm its constitutionally and validity, if it is reasonably susceptible to such a construction."); *see also Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010) (reading statute in limited fashion to avoid striking it down as unconstitutional); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (concluding that the state courts had limited the statute in such a way that it did not violate the First Amendment); *Hooper v. California*, 155 U.S. 648,

657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").

The trial court's reading of 720 ILCS 5/29D-20 is the first time of which Oduwole is aware that a court has interpreted this statute, and the proper construction of 720 ILCS 5/29D-20 is certainly a question of first impression for this Court. Given that this Court is writing on a blank slate, it has the opportunity to provide a proper reading of the law that would pass constitutional scrutiny and adhere to statutory language and legislative intent. *See* 720 ILCS 5/29D-5 (legislative findings that under the terrorism statute, an "investigation may not be initiated or continued for activities protected by the First Amendment to the United States Constitution.").

The statute as written requires proof that the perpetrator "knowingly threaten[ed] to commit . . . a terrorist act," and also that the knowing threat "cause[d] a reasonable expectation or fear" on the part of the audience who received the threat. 720 ILCS 5/29-D20. Contrary to the trial court's conclusion, this statute can be read easily to require actual communication of a threat to another person. The crime of attempting to make a terrorist threat, properly construed, would require evidence that the defendant either communicated the threat to its intended victim (a completed threat) or that he took action to communicate the threat to an intended victim but communicated it to a third party instead (an attempted threat). Accordingly, unlike the ordinance that the Illinois Supreme Court considered in *Morales*, 177 Ill.2d at 458 (holding that a law was "not reasonably susceptible to a limiting construction"), the crime of conviction here can be read in a manner that would not violate the U.S. Constitution or the Illinois Constitution.

Requiring actual communication as an element of the crime would render the statutes of conviction constitutional. Such a construction would also require Oduwole's unconstitutional conviction based on uncommunicated private speech to be overturned. Short of such a limiting construction, however, the crime of attempting to make a terrorist threat as construed by the trial court is unconstitutionally overbroad and vague, and Oduwole's conviction must be reversed on that ground as well.

IV. THE EVIDENCE WAS INSUFFICIENT TO PROVE ODUWOLE GUILTY BEYOND A REASONABLE DOUBT OF ATTEMPT MAKING A TERRORIST THREAT

The State charged Oduwole with an attempt crime, specifically "attempting to make a terrorist threat." *See* 720 ILCS 5/8-4; 720 ILCS 5/29D-20; *see also supra* at 23 (setting out the statutory language). To prove him guilty, the State was required to prove beyond a reasonable doubt that Oduwole intended to commit the offense of making a terrorist threat, and also that he took a substantial step toward making a terrorist threat. The State failed to present evidence sufficient to convict Oduwole of this crime because it failed to establish the fundamental threshold fact necessary to succeed on either element of its case: that Oduwole made a threat or took any step toward making a threat. Because of this complete failure of proof, Oduwole's conviction must be reversed.

This Court reviews challenges to the sufficiency of the evidence by considering whether, "viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Wheeler*, 226 Ill.2d 92, 114 (2007) (internal citations, quotations, and emphasis omitted). "[A] conviction will be reversed where the evidence is so unreasonable,

improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *Id.* at 115.

A. Without evidence of communication, the State cannot prove that Oduwole was guilty of attempting to make a terrorist threat

Communication to a target audience is the *sine qua non* of the crime of attempt making a terrorist threat. Thus, the State was required to prove it as an element of its case. Yet it wholly failed to do so, a fact the State readily concedes. *See supra* at 17 (providing record citations of this concession). Although the crime of attempt with which Oduwole was charged has its own statutory elements of intent and substantial step, the State also needed to prove the element of communication from the underlying substantive offense in order to establish the threat. Communication is the sole touchstone by which one may gauge whether the statutory elements of intent and substantial step were satisfied. *Cf. Stansberry v. State*, 954 N.E.2d 507, 512 (Ind. Ct. App. 2011) (finding that the defendant could not be convicted of "attempted resisting law enforcement" when the state offered only proof that the defendant acted with force, but no evidence that that he resisted, obstructed, or interfered with the officers, as the substantive offense required). That is, the State cannot establish the defendant's intent unless there is an object of that intent, which in this case is a threat.

In criminal law, a threat is a very particular type of conduct, where the perpetrator communicates to the victim that she will take an additional harmful action in the future. *Black's Law Dictionary* at 1480 (6th ed. 1990) (defining threat as "a communicated intent to inflict physical or other harm on any person or on property. A declaration of an intention to injury another."); *see also* Illinois Pattern Instructions, Criminal, No. 13.33F (defining threat as "a menace, *however communicated*") (emphasis supplied). Thus, as a

threshold matter, this Court must distinguish between conduct in furtherance of a *threat* and conduct in furtherance of *other types of criminal activity*. To that end, the State offered only two pieces of evidence to support its contention that Oduwole had attempted to make a *threat*: (1) the sheet of lyrics discovered under the center console of Oduwole's car; and (2) a Movie Maker file that Oduwole had deleted from his computer. Among all of the evidence presented, these are the only two things that could conceivably be conduct relating to a threat, versus conduct related to some other type of criminal activity.[4]

But neither of these things was evidence that Oduwole made a threat or that he had attempted to make a threat because, quite simply, an action (or an activity, writing, or statement) only becomes a threat once it has been communicated in some manner. Communication is the absolute prerequisite to proving either a completed threat or an attempted threat. A completed threat is conduct by which the perpetrator communicates to the *intended victim* that additional harmful action will occur in the future; an attempted threat is the same conduct communicated in a way that it *does not* reach the victim but instead reaches a *third party*.

The paradigmatic examples of attempted threats all include, at a minimum, an act by which the person attempting to threaten communicates his or her message to *some person*, even if the communication does not ultimately reach its intended audience. Alec Walen, *Criminal Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should be Used Instead of Long-Term Preventive*

[4] The State introduced evidence that Oduwole had bought and sold guns on the internet. (R644.) But that is not evidence that suggests anything about a threat. The same is true of the State's evidence that Oduwole opened a PayPal account. (R1084.)

Detention, 101 J. CRIM. L. & CRIMINOLOGY 803, 803 & n.2 (2011) (describing the "paradigmatic kind of threat" as one "in which the person making the threat tries to communicate the threat to one or more victims") (citing Corpus Juris Secundum on Threats, 86 C.J.S. THREATS § 3 (2010)). One example is the person who writes the threatening message and sends it in the mail to the intended victim, only to have a postal carrier intercept the message and deliver it to the police. The message has not reached its intended recipient, but it has been communicated and so the attempted threat has occurred. The same would be true, for example, if a prisoner made a threatening phone call from the jailhouse phone to a witness who will testify in his case, only to discover that the person on the other end of the call is a police officer rather than the witness. In that case, too, the message does not reach the victim, but it has been communicated to someone and so the attempted threat is complete. A third example would be the employee who writes a threatening email to her coworkers and hits the send button, only to have the email intercepted by her corporate office technology department before it reaches the inboxes of its intended recipients. In each of these examples—whether the communication ultimately reaches the intended victim or the perpetrator attempts to communicate the message to the victim but fails, communicating the threat instead to a third party—there is some communication that occurs. That communication is what distinguishes a threat or attempted threat from a mere private musing.

The fact that there was no evidence of communication in this case shows that the State failed to meet its burden of proof. The State did not offer any evidence of communication. Indeed, the State conceded that it could and did not prove communication, and it went further to say that there was in fact no communication of

either of the pieces of evidence—the sheet of paper and the Movie Maker file—that it advanced in support of its case that Oduwole had attempted to make a terrorist threat. *See supra* at17. Without evidence of communication, the State's case necessarily falters, the evidence is insufficient to demonstrate attempt to make a terrorist threat, and Oduwole's conviction must be reversed.[5]

B. The State failed to introduce sufficient proof of intent

Oduwole's conviction likewise warrants reversal based on the State's failure to prove beyond a reasonable doubt that he intended to make a terrorist threat, an element of any attempt crime. 720 ILCS 5/8-4 ("[A] person commits an attempt when, with the intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense.").

Again, the lack of any evidence of communication of any threat is fatal to the State's case. Attempt is a specific-intent crime. *People v. Holmes*, 254 Ill. App. 3d 271, 276 (1st Dist. 1993). Accordingly, the State bore the burden of proving that Oduwole intended to coerce a specific target via a knowing threat, instilling fear as a result. 720 ILCS 5/29D-20; *People v. Delk*, 36 Ill. App. 3d 1027, 1041-42 (5th Dist. 1976) (linking the intent to the specific elements of the underlying statute). First, the State cannot establish any intent on the part of Oduwole to coerce a significant portion of the population without evidence that a threat was to be directed to some population. Yet there is no identified audience in Oduwole's case. More importantly, a defendant cannot intend to knowingly threaten without at least some step toward communication of a threat

[5] The constitutional arguments and the insufficiency claim are tightly linked. Just as communication was a required element in the State's burden of proof, it also is the only construction of the crime "attempt making a terrorist threat" that will save it from facial invalidity. *See supra* at 22-26.

because a threat by definition must be a "communicated intent." *Black's Law Dictionary* at 1480 (6th ed. 1990). Finally, the State cannot prove that a defendant intended to "cause[] a reasonable expectation or fear of the imminent commission of a terrorist act" if no message was ever communicated.

Lack of communication aside, by the end of its case, the State was able to offer only four paltry and random snippets and unsupported inferences in support of its burden of proving Oduwole's intent: (1) that Oduwole participated in weapons sales on the internet (R1267) (prosecutor stating, "We know that this was a situation where there were dangerous weapons involved, and this shows the intent of this defendant"); (R1302-03) (prosecutor stating, "[Y]ou don't buy those weapons . . . without that intent"); (2) Oduwole's rap lyrics found in his car and the fragmented Movie Maker file found deleted from one of his computers after the trial was in progress (R1302-03) (prosecutor remarking that "you don't create this note . . . you don't create that movie maker file without that intent"); (3) PayPal accounts (R1302-03) ("You don't set up a PayPal Account [in others' names] without that intent"); and (4) the State's wholly unsubstantiated claim that Oduwole intended to commit this crime because he was poor (R1267) (prosecutor asserting, "[W]e know he was broke because his car ran out of gas on campus. He didn't have five bucks to even throw in his—his car to get gas. That's another reason why he may need money in this matter.").

With respect to the handwritten paper and the Movie Maker file, un-communicated speech is neither direct evidence of intent, *People v. Walter*, 349 Ill. App. 3d 142, 147 (2d Dist. 2004) ("[H]ope and fantasy do not equal intent, . . . [T]he mere *possibility* of completing an offense is not proof of intent to commit the offense."), nor

circumstantial evidence of intent, given that there are ample other explanations of why an aspiring rap artist (or anyone for that matter) might have possessed these things privately, *see id.* (finding that in encouraging sexual banter with a minor, the defendant was leading "both [the girl] and himself on," and though his conduct was "pathetic, inappropriate and ill-advised . . . it [fell] short of demonstrating an actual intent").

The weapons also have no direct or circumstantial value when it comes to proving whether Oduwole intended to make a threat. A criminal threat is a promise to commit some future harmful act to a victim or (in the case of attempt) to a third party. *See supra* at 27-29. Weapons imply action; they were of no use in proving a promise. The weapons might (at best) show an attempt to commit a terrorist *act*, not an attempt to make some *threat*. In any event, the weapons were legally ordered and never even possessed. (R645-49) (testimony that Oduwole obtained a firearms owner identification card for the weapons he ordered); (R733-34) (admission by officer that Oduwole never possessed the weapons) (R875) (testimony from officer that Oduwole never possessed the guns he ordered). Such attenuated evidentiary links cannot satisfy the State's burden.

Similarly, the State's claim that "you don't set up a PayPal Account [in others' names] without that intent" is simply wrong. There are many reasons why one would set up a PayPal account and select a pseudonym as a username. Millions of people have them. Thus, the State cannot satisfy its burden with such blanket pronouncements; the fact that there are, in fact, many legitimate explanations for the evidence that the State offered to prove intent undermines the qualitative weight of that evidence. No reasonable juror could find that the PayPal accounts establish Oduwole's guilt beyond a reasonable doubt.

Finally, the State surmised at closing argument, without any evidentiary support, that Oduwole was poor and therefore intended to extort money from some group of people. (R1267.) This inference was pure speculation that should not have been allowed. *People v. Harris*, 132 Ill.2d 366, 391 (1989) (recognizing that a court may strike speculative arguments). Indeed, the inference is flatly contradicted by the record, which shows that Oduwole was affluent enough to own a number of computers. (R924.) Finally, this inference to the jury was particularly egregious given State's knowledge that Oduwole's family has, in the State's own words, "considerable financial resources" (State Objection to Renewed Motion for Bond Pending Appeal ¶ 11B), and had met a significant bond (C31-32) (Oduwole's father posted $100,000 bond).

To prove that Oduwole intended to commit the crime of making a terrorist threat, the State had to prove actual or attempted communication. Yet the State offered no such evidence. And the evidence it did offer as proof of his intent was completely irrelevant and could not provide even a circumstantial basis for conviction.

C. The State failed to introduce sufficient proof of a substantial step

The State also failed to prove any substantial step toward the carrying out of any threat. *People v. Smith*, 148 Ill.2d 454, 461-64 (1992); *Delk*, 36 Ill. App. 3d at 1041; MODEL PENAL CODE 5.01(2) ("Conduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose."). A substantial step "must be something that makes it reasonably clear that had the defendant not been interrupted or made a mistake he would have completed the crime," *United States v. Sanchez*, 615 F.3d 836, 844 (7th Cir. 2010) (internal quotation marks and alterations omitted), and such a step is determined in light of the facts and circumstance of the case,

Smith, 148 Ill.2d at 459; *People v. Grathler*, 368 Ill. App. 3d 802, 809 (5th Dist. 2006). Substantial steps are those that occur after "preparation ends and actual execution of a criminal act begins[.]" *Id.* at 809.

Mere preparation is not sufficient. *Smith*, 148 Ill.2d at 459. This Court has found the *Model Penal Code* ("MPC") examples helpful in this regard. *Smith*, 148 Ill.2d at 461-62; *Grathler*, 368 Ill. App. 3d at 809-10. And the MPC examples are particularly instructive here for they show that the State did not meet its burden of proving a substantial step, for two reasons. First, there was no discernible target audience, which the Illinois Supreme Court has held essential to finding a substantial step. *Smith*, 148 Ill.2d at 462-64 (quoting the MPC advisement of a "specific contemplated victim" and stating that the existence of an "identified, settled target enabled the fact finder to conclude beyond a reasonable doubt that the defendant had gone beyond preparation and achieved dangerous proximity of success") (internal citations and quotations omitted). Second, in order to qualify as a substantial step, the evidence at issue should have no other legitimate uses than for the commission of the underlying offense. *Id.* at 461-62, 464; MPC 5.01(2).

During closing arguments, the State summarized seven pieces of evidence that it claimed fulfilled the substantial-step requirement: (1) the writing on the piece of paper in the car (R1262); (2) the fact that this piece of paper was left in a car on a university campus (R1261); (3) the piece of paper was found near live rounds of ammunition (R1261-62); (4) that Oduwole had PayPal accounts under others' names (R1262; 1265); (5) the deleted Movie Maker file (R1269; 1300); (6) Oduwole's possession of a handgun

(R1263); and (7) his ordering four other weapons (R1263). None of this evidence, taken individually or together, satisfies the State's burden.

First, the State's labeling as a substantial step the paper's location on campus "near" ammunition borders on fanciful. The State cannot seriously contend that Oduwole deliberately ran out of gas on campus in the hopes that the police would search his car, discover the crumpled paper near the console and the bullets for his legally owned firearm, along with all the other move-related effluvia therein.

With respect to actual paper found in the car and the Movie Maker file, communication is critical because without it, there is no conceivable way that this evidence could be interpreted as a substantial step under any of the standards that this Court applies. That is, without communication the State could not prove the there was a target audience or that Oduwole's rap lyrics serve no other legitimate purpose. Without evidence of communication, the State cannot even prove mere preparation, let alone a substantial step. Thus, the fact that Oduwole *deleted* the Movie Maker file from the computer further undermines any finding of a substantial step because, rather than taking affirmative action towards the purported crime, he actually took a step in the opposite direction. (R1060.)

The fundamental problem with the State's approach of characterizing speech as a substantial step was aptly summarized by the Seventh Circuit: "Treating speech…as the 'substantial step' would abolish any requirement of a substantial step. It would imply that if *X* says to *Y* 'I'm planning to rob a bank' *X* has committed the crime of attempted bank robbery[.]" *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008). Evidence of a substantial step in this case is even more attenuated than in *Gladish*, for Oduwole did not

even convey his speech to anyone else. Because these items were un-communicated, deleted, or carelessly discarded in Oduwole's car, and because they have completely innocent explanations—such as the fact that they are without question private and protected free speech—the paper in the car and the Movie Maker file fall well outside the realm of proof of a substantial step.

As for the weapons and PayPal accounts, they are both irrelevant to the inquiry and insufficient to establish the State's substantial-step burden. First, they serve many "lawful purpose[s]" and are not items that are "specifically designed" to make terrorist threats. *See Smith*, 148 Ill.2d at 461-62 (citing with approval MPC 5.01(2) definitions of acts that constitute substantial steps in an attempt crime, which include "possession of materials to be employed in the commission of the crime, which are specifically designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances"). And, again, even if this evidence were relevant, it could only be characterized mere preparation, not a substantial step.

The State's acknowledged failure to prove communication means that it did not prove Oduwole guilty beyond a reasonable doubt of attempt making a terrorist threat. And the collection of evidence that it presented as proof intent and of a substantial step—primarily weapons and PayPal accounts—are irrelevant to the charged crime and insufficient to sustain his conviction. For these reasons, this Court should vacate his conviction.

V. THE WARRANTLESS SEARCH OF ODUWOLE'S AUTOMOBILE VIOLATED THE FOURTH AMENDMENT, AND THE CIRCUIT COURT SHOULD HAVE SUPPRESSED ALL MATERIALS DISCOVERED IN CONNECTION WITH THIS ILLEGAL SEARCH

SIUE police discovered the handwritten piece of paper that formed the basis of the State's case during a warrantless search of Oduwole's car. In response, Oduwole twice moved the trial court to suppress those lyrics and other materials found in his car on Fourth Amendment grounds. (C35-40, 362-373.) The trial court denied both motions, characterizing the officers' warrantless search as an inventory search—an exception to the warrant requirement. (C57; R74.)

This decision was error.[6] The search conducted by SIUE police was not a permissible inventory search, but rather was a pretextual one designed to enable the officers to engage in a warrantless investigatory search to gather evidence as part of an ongoing investigation of Oduwole. The method by which the search was conducted, along with its timing, lays bare the officers' true purpose. And even if the officers' actions could conceivably be painted as an inventory search, the officers exceeded the carefully limited scope of such a search by reading Oduwole's private writings in detail. These serious Fourth Amendment errors pertain to evidence that was the heart of the State's case and require reversal of Oduwole's conviction.

A. The warrantless search of Oduwole's car was not a valid inventory search

Two of the three requirements for a valid inventory search are missing from this case. Thus, the search of Oduwole's car was "*per se* unreasonable under the Fourth Amendment." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). In order for a warrantless search of a vehicle to qualify as a valid inventory search, the State must show: (1) that the

[6] This Court reviews the circuit court's denial of a motion to suppress *de novo*, deferring to the lower court's factual findings. *People v. Cosby*, 231 Ill.2d 262, 271 (2008). Because no operative facts are disputed here—indeed, Oduwole bases his argument on testimony provided by officers who testified in the State's case—this Court reviews the issue *de novo*. *People v. Nash*, 409 Ill. App. 3d 342, 355-56 (2d Dist. 2011).

original impoundment of the car was lawful; (2) that the inventory search was not mere pretext for an investigatory search; and (3) that the purpose of the inventory search was to protect the owner's property and to protect the police from claims of theft or other danger. *People v. Hundley*, 156 Ill.2d 135, 138 (1993); *see also id.* ("An inventory search is a judicially created exception to the warrant requirement of the fourth amendment.") (citing *Colorado v. Bertine*, 479 U.S. 367 (1987), *Illinois v. Lafayette*, 462 U.S. 640 (1983), and *South Dakota v. Opperman*, 428 U.S. 364 (1976)). The first of these requirements was ostensibly satisfied in this case because the police ordered the tow of Oduwole's car after the 24-hour waiting period set out in their towing policy. But the latter two requirements are demonstrably absent.

1. The SIUE police search was nothing more than a pretext for an warrantless investigatory search

The so-called "inventory search" at issue here was nothing more than a warrantless investigatory search for two reasons. First, the authorities had already targeted Oduwole as the subject of an investigation well before they searched his car; and, second, during the time in which they waited to search the car, the officers purposefully used the car as a surveillance point in furtherance of their criminal investigation. This sequence of events, the undisputed facts in the record, and the testimony of SIUE officers leave no doubt that the search in question was simply a pretext for an investigatory search of Oduwole's vehicle performed to advance ongoing efforts by law enforcement to connect Oduwole to a crime.

Turning to the first evidence of pretext, it is undisputed that there was a multi-agency investigation of Oduwole in full swing days before the search of Oduwole's car took place. On Monday, July 16, 2007, Weissenborn of the SIUE campus police learned

that the neighboring Wood River police and the ATF were investigating Oduwole. (08/09/2007 Grand Jury Tr. 67.) Weissenborn ensured that the SIUE police promptly joined in the investigation. (08/22/2008 Suppression Hr'g Tr. 66-67.) On the same day, he issued a safety alert, explaining the nature of the investigation to SIUE officers, listing Oduwole's address and vehicle information, and advising his colleagues to use caution if they encountered Oduwole. (*Id.* at 33, People's Exhibit 12.) In fact, SIUE police first learned of Oduwole's car because, on July 18, two days after the SIUE police became part of the joint investigation, Wood River authorities told Weissenborn that they had spotted the car on the SIUE campus (08/22/2008 Suppression Hr'g Tr. 67), a fact that Weissenborn confirmed that very same day *(Id.* at. 67; R852-853).

Second, not only was there an existing investigation, the SIUE police actively utilized Oduwole's car as a surveillance point as part of that investigation. As Weissenborn stated:

> I let my officers know just keep an eye on the car. Should they see somebody around the car, go ahead and stop and identify who may be there and jot it down for the investigators from Wood River and Alcohol, Tobacco and Firearms.

(08/22/2008 Suppression Hr'g Tr. 68); (*Id.* at 67) (Weissenborn acknowledging that the officers were "watching [Mr. Oduwole's car] for the possibility of criminal activity" and planned to gather information for Wood River and the ATF).

The State cannot plausibly suggest that the search conducted by the SIUE police on July 20, 2007—after they had investigated Oduwole for a number of days and had used his car as a surveillance point in their investigation—was nothing more than an unrelated administrative impoundment and inventory search of his car. *See People v. Wetherbe*, 122 Ill. App. 3d 654, 659 (2d Dist. 1984) (stating that "an inventory cannot be

undertaken for a simply investigatory purpose or other improper motive" and deciding that a search was not an inventory search when an investigatory motive was obvious); *People v. Dennison*, 61 Ill. App. 3d 473, 479 (5th Dist. 1978) ("Where the purpose of the search is exploratory in nature it will be deemed illegal and the evidence so found must be excluded."). The police searched the car to further their investigation of Oduwole and so they were required to obtain a warrant before they did so. They did not obtain a warrant. The officers' warrantless search violated the Fourth Amendment and the materials found in Oduwole's car should have been suppressed.

2. The search that the SIUE police conducted was not motivated by any of the permissible purposes that underlie and justify inventory searches

A second prerequisite for a valid inventory search is also absent in this case: the purpose of the search of Oduwole's car was categorically different from those recognized purposes that justify inventory searches. This is a separate, sufficient reason for finding that the search of Oduwole's car does not fit within the inventory-search exception to the Fourth Amendment's warrant requirement.

For an inventory search to be valid, the law requires that "the purpose of the inventory search must be to protect the owner's property and the police from claims of lost, stolen, or vandalized property, and to guard the police from danger[.]" *People v. Clark*, 394 Ill. App. 3d 344, 348 (1st Dist. 2009); *see also Opperman*, 428 U.S. at 375-76 & n.10. The search of Oduwole's car, however, was not supported by any of those valid purposes. On the contrary, details about the search demonstrate that it had only one purpose: to gather evidence in support of the ongoing investigation.

First, Schmidt—the SIUE officer who performed the search—claimed initially that he was carrying out a standard tow and search when he found Oduwole's car. (08/22/2008 Suppression Hr'g Tr. 5.) But the record is clear that Schmidt knew "prior to the tow" that "there [was] an investigation going on regarding the owner of this vehicle"; Tieman, one of Schmidt's commanding officers, told him as much. (*Id.* at 46-47); (*id.* at 22-23) (relating Schmidt's testimony that "prior to entering the vehicle, [he was] aware of information with reference to [Oduwole] possibly being a safety threat"). Given this direct knowledge of the Oduwole investigation, Schmidt's purpose in conducting the search cannot reasonably be thought to have been protection of Oduwole's property or protection of the police from claims of theft.

Second, further cementing this conclusion is the fact of what items the police "inventoried" in Oduwole's vehicle and, importantly, what items they did not. If the purpose of their inventory search was truly "to protect the owner's items if he has any items of value inside the vehicle" (*id.* at 15) or to "protect the police department from any civil matters involving valuables being taken from the car" (*id.* at 48), then the officers would have done things much differently. For example, the officers would not have bothered reading a crumpled piece of paper shoved down next to the car's console, particularly after Schmidt had determined that the slip had no medical importance (*id.* at 12) and was instead a piece of paper containing writings that "didn't make any sense" (*id.* at 11). A detailed reading of this paper clearly had no value if the real purpose of the search was an inventory. Schmidt read the note in its entirety because he hoped to find evidence that he might use to connect Oduwole to some crime, and he even halted his inventory search to notify his superiors of the note he had found. (*Id.* at 11-12, 51.)

Equally significant is the fact that the police failed to inventory a number of items from Oduwole's car. Again, if the real purpose of the search had been to protect the police and to guard Oduwole's valuables, then every item of value in the car should have been inventoried. Yet the police admitted that they did not do this. (R933) (testimony that when Officer Schmidt inventoried the clothes in the car, he noted that there were "several shirts or pants" but "he may not have counted them" because "[t]hat's what an inventory is. It is not an exact."). Nor did Officer Schmidt photograph what he inventoried as "miscellaneous clothing" in order to fully document the valuables in the car (R758-59), although he did photograph the note and the bullets (R744) before removing them and securing them as evidence in the criminal case (08/22/2008 Suppression Hr'g Tr. 26-27).

Taken together, these facts establish that none of the permissible purposes for performing a valid inventory search—protection of property or protection of the police—was present in this case. As a result, a second of the three necessary criteria for establishing that a search is a permissible inventory search is absent in this case. The warrantless search thus violated the Fourth Amendment, and the materials found in Oduwole's car should have been suppressed.

B. Assuming *arguendo* that this was a valid inventory search, the search still violated the Fourth Amendment because the police exceeded the permissible boundaries of an inventory search

Even if the search is viewed as an inventory search (which it was not), the search went far beyond its permissible scope. In short, the police may not read private writings when conducting an inventory search. That police did so here is a third, independent reason to find the search unreasonable under the Fourth Amendment.

An inventory search is limited in scope, *People v. Hundley*, 156 Ill.2d 135, 142 (1993) (citing *United States v. Salmon*, 944 F.2d 1106, 1120 (3d Cir. 1991)), and a police officer's discretion to inspect items during this type of search is far more circumscribed than in the case of a warrant-based search, *see* 2 LAFAVE, CRIMINAL PROCEDURE § 3.7(e) n.120.1 (3d ed. 2011–2012 Supp.) (discussing that an inventory search is limited to a narrower area than other searches). An officer may only inspect areas of the car and open closed containers in an effort to inventory all of the items in the vehicle. *See Opperman*, 428 U.S. at 375-76 & n.10; *People v. Gipson*, 203 Ill.2d 298, 311 (2003); *Hundley*, 156 Ill.2d at 141-43. As Justice Powell's influential concurrence in *Opperman* states in no uncertain terms: An inventory search "provides no general license for the police to examine all the contents of such automobiles." 428 U.S. at 380 (Powell, J., concurring).

In *Opperman*, Justice Powell separated personal documents as a type of material demanding heightened protection, noting that "materials such as letters or checkbooks . . . 'touch upon intimate areas of an individual's personal affairs,' and 'reveal much about a person's activities, associations, and beliefs.'" *Id.* at 380 n.7 (quoting *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974)). The Supreme Court later confirmed as a whole that "an inventory search must not be a ruse for general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory." *Florida v. Wells*, 495 U.S. 1, 4 (1990). Many courts have adopted this common-sense limitation on inventory searches and bar police from scouring personal documents during an inventory search. *See Commonwealth v. Seng*, 766 N.E.2d 492, 501-06 (Mass. 2002) (holding that an inventory search does not justify the reading of handwritten checking and savings account numbers on a bank card);

D'Antorio v. State, 926 P.2d 1158, 1163 (Alaska 1996) (stating that police are "not permitted to read in detail papers seized as part of an inventory search"); *Waine v. State*, 377 A.2d 509, 517 (Md. App. Ct. 1977) (holding that "read[ing] [defendant's] papers" exceeded the bounds of a permissible inventory search); *State v. Rodewald*, 376 N.W.2d 416, 421–22 (Minn. 1985) (holding that while an inventory search allows police to look at the contents of a wallet found in a vehicle, including the lawful discovery of LSD within the wallet, the search does not allow police to read cards in the wallet); *see also United States v. Khoury*, 901 F.2d 948, 959–60 (11th Cir. 1990) (deciding that the a search of a notebook to "ensure that there was nothing of value hidden between the pages" was permissible but that reading what was written in the notebook was beyond the scope of an inventory search); *United States v. Pace*, 898 F.2d 1218, 1243 (7th Cir. 1990) (same); *United States v. Andrews*, 22 F.3d 1328, 1335 (5th Cir. 1994) (same). Leading treatises, too, have recognized that reading personal effects is off limits during an inventory search. *See* 2 LAFAVE, CRIMINAL PROCEDURE § 3.7(e) (3d ed. 2007) (noting that the Supreme Court's decision in *Opperman* should not be read as authorizing examination of personal documents).

This Court should likewise hold that the police exceeded their limited mandate permitted by the inventory-search exception to Fourth Amendment's warrant requirement when they read Oduwole's personal papers in his car. Schmidt first saw Oduwole's rap lyrics peeking out from under the center console of the vehicle. Although Schmidt claimed he was drawn to the paper because it depicted an asthma inhaler and he thought it might have medical significance (08/22/2008 Suppression Hr'g Tr. 10), he admitted that he quickly realized that the paper was not a prescription *(id.* at 12). That should have

ended Schmidt's review of the paper for purposes of the inventory search, for there was no reason to go any further—he could have simply written "miscellaneous papers" on his inventory log and moved on. Instead, however, he read the paper. (*Id.* at 11.) The words on the front side meant nothing to him at all, Schmidt said, and he knew well that the piece of paper had no value. (*Id.* at 11, 34.) Still, he read the entire front side of the paper, and then flipped it over to read the back. (*Id.* at 35.)

The decision to read in detail a private personal paper of no value at all for inventory purposes far exceeded the boundaries of an inventory search. Because the warrantless search was too broad and invaded Oduwole's personal effects, it was unreasonable under the Fourth Amendment. Accordingly, the handwritten sheet of rap lyrics found during this unconstitutional search should have been suppressed.

C. The warrantless search requires reversal of Oduwole's conviction

The trial court's error in admitting materials seized from Oduwole's car without a warrant and outside of the inventory-search exception to the warrant requirement caused Oduwole significant harm at trial. *See Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991) (observing that a violation of the Fourth Amendment in criminal proceedings does not require automatic reversal of a conviction if the error was harmless). As described above, the rap lyrics were the heart of the State's case. And though Oduwole maintains that his conviction based on this private speech is flatly unconstitutional, it is beyond dispute that without this piece of evidence the State would not have been able to proceed at all. *See People v. Spencer*, 408 Ill. App. 3d 1, 12 (1st Dist. 2011). Accordingly, the State cannot meet its burden of showing that the Fourth Amendment error was harmless

beyond a reasonable doubt, and Oduwole's conviction must be reversed. *Chapman v. California*, 386 U.S. 18, 24 (1967).

VI. THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE

The State repeatedly displayed the guns and part of the Movie Maker file to the jury. Neither the guns nor the Movie Maker file had any probative value when it came to proving the crime of attempting to make a terrorist threat. This evidence did, however, inflame the passions of the jury, invite it to decide the case on an improper basis, and paint Oduwole as a bad character, resulting in extraordinarily unfair prejudice. Thus, the trial court abused its discretion in admitting this evidence. *See* ILL. R. EVID. 403; *People v. Wheeler*, 226 Ill.2d 92, 132 (2007). This evidence was central to the State's case, and so its admission cannot be deemed harmless. *People v. Kannapes*, 208 Ill. App. 3d 400, 406-07 (1st Dist. 1990).

A. The guns were irrelevant and highly prejudicial

The fact that Oduwole bought or sold guns on the internet does not have any bearing on the question whether Oduwole had the intent to make a terrorist threat. Nor does that fact have any probative value when it comes to whether Oduwole took a substantial step toward making a threat. The guns do not offer any insight about whether Oduwole took a step toward making a *threat* to a civilian population, nor do they tell us whether he intended to make that kind of threat. In short, the guns are completely irrelevant. Despite this lack of relevance, the State relied on these weapons heavily during trial, in a number of highly inflammatory ways: (1) it referenced them during opening statements, handled them throughout trial, and brandished them closing arguments (R626-27) (opening); (R1264) (brandishing at closing); (2) it asked federal

firearms licensee Copeland to handle three weapons and check if each was loaded (R6673-75); (3) it asked ATF agent Heiser, who immediately followed Copeland on the witness stand to handle the same three weapons and to again check if each was loaded (R712-14); it asked forensic scientist Horn to handle a handgun and check if it was loaded (R960); it asked Weissenborn to examine a handgun (R864); (3) it asked the defense rap music expert, Dr. Kubrin, to inspect and identify the guns (R1204-16)[7]; and (4) it claimed falsely that these weapons were evidence supporting each element of its case—that they demonstrated both intent to threaten a civilian population and a substantial step toward making a threat (R1302-03) ("[Y]ou don't buy those weapons . . . without that intent."); (R1264-65) (characterizing the guns as "additional steps towards attempt making a terrorist threat" and concluding that there was "[n]o doubt in my mind what he was going to do with those weapons"). These tactics lead to 41 references to the guns by the State during trial (R659, 660, 661, 670, 673, 674, 675, 679, 701, 712, 713, 714, 715, 716, 727, 733, 924, 960, 961, 1204, 1205, 1206), and the State referred to these guns more than a dozen times during opening statements and closing argument (R626, 627, 1263, 1264, 1265, 1301, 1303, 1304).

The State's heavy reliance on these weapons had two separate prejudicial effects that each require reversal: first, the State's use of weapons served no other purpose than to make Oduwole look like a bad person in the eyes of the jury; and, second, it confused the issues and misled the jury. *See* ILL. R. EVID. 403; *People v. Gutirrez*, 205 Ill. App. 3d 231, 264-65 (1st Dist. 1990) (finding prosecutor's comments during closing misled and

[7] Over defense counsel's objection, the guns were then placed on the witness box approximately two feet in front Dr. Kubrin and allowed to remain there until the prosecutor finished his examination. (R1207.)

confused the jury and can serve as grounds for reversal); *see also Vujovich v. Chicago Transit Auth.*, 6 Ill. App. 2d 115, 118 (1st Dist. 1955) (accepting and applying principle that evidence "should be excluded where [it] would confuse or mislead rather than aid the jury, distract the jury's attention from the main issues . . . or where the natural effect of [its] introduction in evidence would be to arouse the sympathies or prejudices of the jury") (internal quotation marks and citations omitted).

Second, the admission of these weapons cannot be harmless error. This was a closely balanced case, one that the trial court admitted was "difficult, ambiguous, and puzzling" (R1092), and the State's evidence was tenuous at best. Despite this, the trial court failed to even consider prejudice in its ruling— it merely deemed the evidence relevant and ended the inquiry. (R88-91) (trial court finding only that "the weapons and ammunition are relevant, and they will be admitted at trial," despite defense counsel's repeated arguments about prejudice to the defendant). This was improper. *People v. Fyke*, 190 Ill. App. 3d 713, 718 (5th Dist. 1989) ("In determining whether relevant evidence should be admitted, the trial court *must* balance the prejudicial effect of the evidence with its probative value.") (emphasis added). Even a cursory balancing of probativeness and prejudice would have revealed that the guns had no evidentiary value whatsoever and caused extreme prejudice.

B. The Movie Maker file was irrelevant and highly prejudicial

Like the guns, the Movie Maker file was irrelevant, but for a different reason. It was irrelevant because it was a computer file that had been *deleted* from Oduwole's hard drive. A document that an author has affirmatively deleted or destroyed is the polar opposite of a threat, which must be communicated to some other person. The file's only

possible relevance was the fact that it reiterated words similar to those found on written on the sheet of paper in Oduwole's car. But even if the file was marginally probative, the Movie Maker file should have been excluded as unduly cumulative and unfairly prejudicial to the defendant.

First, to the extent that the Movie Maker file repeated similar information to the sheet of paper found in the car, it was cumulative, piling on of prejudicial evidence. *People v. Anderson*, 225 Ill. App. 3d 636, 648 (3d Dist. 1992) (cautioning that in a "closely balanced" case the court "would not hesitate to grant a defendant a new trial if it appears that the delicate scales of justice have been unfairly tilted by the sheer weight of repetition"). Second, the Movie Maker file was played near the end of the State's case-in-chief (R1060), and it was the last thing the jury saw before retiring to the jury room for deliberations (R1271) (prosecutor stating "I leave you with the Defendant's creation again" followed by "[t]he computer movie program was played in the presence of the Court and Jury"). The prejudice from broadcasting—twice—a stark video missing all of the sound and visual images is all too clear: it allowed the jury to draw only the worst conclusions. And without the benefit of the full, complete file, those conclusions could only be unsupported and speculative, which is improper. *In re Robert H.*, 302 Ill. App. 3d 980, 988 (2d Dist. 1999) (unfair prejudice is defined as "the capacity of relevant evidence to lead the fact finder to a decision on an improper basis") (internal quotation marks and citations omitted); *Rockett v. Chevrolet Motor Division, General Motors Corp.*, 31 Ill. App. 3d 217, 222 (1st Dist. 1975) (stating in the products-liability context that "a jury may not engage in mere speculation and conjecture").

In any event, like its ruling on the weapons, the trial court erred in failing even to consider prejudice in its ruling on the Movie Maker file; it admitted the evidence without any consideration of its obvious prejudice. (R1031) (trial court admitting the evidence because it "believe[d] that the information discovered is highly relevant under 403"). Again such errors cannot be harmless in a case with slim evidence.

The trial court abused its discretion in admitting this evidence. The evidence did not even approach the threshold standard of relevance: it did not tend to prove that Oduwole attempted to make a terrorist threat. What this evidence did, however, was lead the jury to envision and speculate about a terrorist act that had never been committed and was never charged by the State. In short, this evidence encouraged the jury to decide the case based improper considerations of fear and disgust. This Court should reverse Oduwole's conviction and remand for a new trial.

CONCLUSION AND REQUEST FOR RELIEF

Wherefore, for the above stated reasons, Olutosin Oduwole respectfully requests that this Court vacate his conviction or, in the alternative, reverse and remand this matter to the circuit court for a new trial.

Respectfully submitted,

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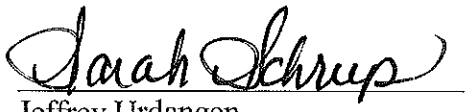
Certificate of Compliance

I certify that this brief conforms to the requirements of 341 (a) and (b). The length of this brief, excluding the appendix, is 50 pages.



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IN THE
APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Madison County, Illinois.
Plaintiff-Appellee,	)	
-vs-	)	Trial Court No. 07 CF 1648
OLUTOSIN O. ODUWOLE,	)	Honorable Richard Tognarelli, Judge Presiding.
Defendant-Appellant.	)	

NOTICE AND PROOF OF SERVICE

TO: Sharon Shanahan
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PLEASE TAKE NOTICE that on July 17, 2012 I sent to the Clerk for the 5th District Appellate Court, via U.S. mail, an original and nine copies of the enclosed *Brief and Argument of Defendant-Appellant*, and on that same date I have caused three copies of same to be sent to you via U.S. Mail.

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