NEW YORK COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,	:	AD 7 9000 Bronx County
Respondent	:	Indictment No: 4848/00
- against -	:	
MAZIN ASSI,	:	**BRIEF OF PROPOSED *AMICUS CURIAE***
Defendant-Appellant	:	

BRIEF OF PROPOSED *AMICUS CURIAE* THE ANTI-DEFAMATION LEAGUE

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PRELIMINARY STATEMENT

Hate crimes in the United States are a national problem perpetrated at a local level. While hate crimes affect society as a whole, nowhere is an individual hate crime felt more acutely than within the community that is victimized. Hate crimes breed feelings of intimidation, isolation, and fear. When even one member of a protected community is targeted for a hate crime, the entire community feels at risk. It is no surprise, therefore, that when property belonging to that community as a whole is targeted, the entire community becomes the victim of the hate crime. The majority of states that have enacted hate crime laws, including the State of New York, make certain property crimes subject to hate crime penalty enhancement just as they do crimes against identifiable persons.

New York's Hate Crimes Act of 2000, Penal Law § 485.05 (the "Hate Crimes Act" or "Act") provides for enhanced sentencing for certain crimes perpetrated on the basis of race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation. The Hate Crimes Act expressly provides for enhanced sentencing for certain property crimes, including criminal mischief in the third degree and attempted arson in the third degree, the crimes for which the Defendant-Appellant Mazin Assi ("Appellant") was convicted. *See* McKinney's Cons. Laws of N.Y., Book 39, Penal Law ("P.L.") § 485.05(3) (West 2000 & 2008 Supp.) (citing, in relevant part, P.L. § 145.05

("criminal mischief in the third degree") and P.L. § 150.10 ("arson in the third degree")).

This appeal concerns property crimes targeting Conservative Synagogue Adath Israel of Riverdale in Bronx County ("CSAIR") and the Jewish community that makes up CSAIR's congregation. Early in the morning on October 8, 2000, the eve of Yom Kippur, Appellant committed multiple property crimes at CSAIR, including throwing or leaving two ignited Molotov cocktails at or near its door. (*See* Appellant's Br. at 6, 19.) One bottle making up a Molotov cocktail was broken; the other was intact. (*Id.* at 19.) Both bottles were found to be incendiary devices. (*Id.* at 19-22.) The glass windows in the door were cracked either from the thrown Molotov cocktails or from thrown rocks that were also found near the door. (*Id.* at 23-24.) Appellant was convicted of one count of criminal mischief in the third degree as a hate crime under P.L. § 485.05(3) applied to P.L. § 145.05, one count of attempted arson in the third degree as a hate crime under P.L. § 485.05(3) applied to P.L. § 150.10, and one count of aggravated harassment in the first degree under P.L. § 240.31, as well as two weapons charges. His conviction was affirmed by the Appellate Division, First Department on March 26, 2009. *See People v. Assi,* 63 A.D.3d 19, 877 N.Y.S.2d 231 (1st Dept. 2009).

Seeking to have the decision of the Appellate Division, First Department reversed and Appellant's conviction under the Hate Crimes Act vacated, Appellant

asserts that the Hate Crimes Act is or should be limited to only those crimes where an identifiable human being is targeted by the perpetrator based on characteristics defined by the Act. (Appellant's Br. at 54-62.) Such a narrow -- and inaccurate -- interpretation of the Hate Crimes Act would limit the Act's application and flout the intent of the Legislature, which expressly included property crimes in the Act. It would also defy the common wisdom in New York and numerous other states that an enhanced sentence is appropriate when the predicate crime is based on bias against a particular protected group, even when a specific individual is not targeted. This aligns precisely with the text, the purposes, and the plain meaning of the Act.

Members of religious communities are particularly susceptible to property crimes because churches, synagogues, mosques, and other places of worship are often highly visible reminders of the religious community that worships there. In 2007, 18% of all reported hate crimes nationwide were based on religious bias, with 69% of those grounded in anti-Semitism. *FBI: Hate Crimes Statistics 2007, at* http://www.fbi.gov/ucr/hc2007/incidents.htm.[1] On a national level, there were more than 1,477 religion-based hate crimes reported in 2007. *FBI: Hate Crimes*

[1] *The FBI Hate Crimes Statistics* are tabulated and released annually in the fourth quarter of the year. At the time of this writing, the 2007 statistics are the most recent available.

Statistics 2007, Table 4, *at* http://www.fbi.gov/ ucr/hc2007/table_04.htm. Of these, 972 were property crimes involving destruction or damage to property or vandalism. *Id.* In New York State in 2007, 55% -- more than half -- of all reported hate crimes were based on religious bias.

For 1999 and 2000 -- the year before the Hate Crimes Act passed and the year that it passed -- New York law enforcement reported 1,219 hate crimes to the FBI. *FBI: Hate Crimes Statistics 1999*, *at* http://www.fbi.gov/ucr/99hate.pdf; *FBI: Hate Crimes Statistics 2000*, *at* http://www.fbi.gov/ucr/cius_00/hate00.pdf. Almost half of the reported hate crimes for that period were identified by New York law enforcement as property crimes. As we show herein, such attacks against places of worship in New York continue to this day, demonstrating the need for the Hate Crimes Act.

Under Appellant's contorted reading of the Act, property crimes that New York law enforcement reports as hate crimes to the FBI would not be punishable under the Hate Crimes Act. Appellant's interpretation, however, cannot be reconciled with sound public policy, the plain meaning of the Act, or the intent of the Legislature in passing the Act nine years ago. As such, it should be disregarded.

STATEMENT OF INTEREST OF PROPOSED *AMICUS CURIAE*

The Anti-Defamation League ("ADL") is uniquely qualified to act as *amicus* in this matter, having drafted the model hate crimes law after which New York's Hate Crimes Act was patterned. ADL is a leading organization in the United States and internationally in the fight against hatred and discrimination.

Since its inception in 1913, it has been ADL's mission to combat religious, racial, and ethnic prejudice and to develop and implement programs to fight anti-Semitism and bigotry. To that end, it drafted the model hate crime law ("ADL Model Law") 27 years ago.[2] Since then, 45 states and the District of Columbia have enacted hate crime laws. Many of these states, including New York, patterned their laws after the ADL Model Law. *See* Sponsor's Mem. at 1, Bill Jacket, L. 2000, ch. 107 (acknowledging that Section 1 of the New York Hate Crimes Act "is patterned after model legislation drafted by the Anti-Defamation League"). New York defines a "hate crime" as occurring when a person is intentionally targeted to be the victim of the predicate crime under P.L. § 485.05(1)(a) *or* when the predicate crime is committed because of the perceived

[2] The complete text of the ADL Model Law is available on ADL's website at http://www.adl.org/99hatecrime/text_legis.asp.

race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person under P.L. § 485.05(1)(b).

ADL submits this proposed *amicus* brief in support of the People of the State of New York with respect to Point II of Appellant's argument against the application of the Hate Crime Act to property crimes. ADL believes that any reading of the Hate Crimes Act to require the victims of a property crime to be specifically identified individuals rather than a given population -- in this case the Jewish population -- would be a boon to bigots.

This is consistent with the position ADL took with respect to Appellant's crime after he was arrested. ADL supported the State's charges against Appellant under the Hate Crimes Act, telling the New York Times that:

> The intent of the perpetrators to burn a house of worship, to burn a synagogue, is intended not only to damage property but to send a message to the members of that congregation and to the members of that community that they were targeted just because of who they are.

Elissa Gootman, *Hate Crimes Charges Filed in Vandalism of Synagogue*, N.Y. Times, Oct. 12, 2008, *available at* http://www.nytimes.com (search "hate crime Riverdale" and follow resulting link to article) (quoting Howie Katz, the ADL New York Regional Director at the time).

ADL has an encyclopedic knowledge of hate crimes and hate crimes legislation, including the reasons why hate crime laws are necessary. Moreover,

having drafted the Model Law on which the New York Hate Crimes Act was patterned, ADL brings an important perspective before this Court regarding the passage of the New York Hate Crimes Act.

ARGUMENT

Fourteen words are engraved on a plaque on the wall of the synagogue that Appellant attacked early on the eve of Yom Kippur in the year 2000:

We loved our house of worship.
It enriched our lives and uplifted our souls.

See History of Conservative Synagogue Adath Israel of Riverdale, *at* http://www.csair.org/history.htm. Drafted to commemorate the 1973 consolidation of the Conservative Synagogue of Riverdale, located at CSAIR's current 250th Street location, with the Adath Israel Congregation of the Grand Concourse, these few words serve as a permanent reminder of the important role churches, synagogues, mosques, and other houses of worship play in the lives of their religious communities.

Appellant's criminal acts that damaged and attempted to burn CSAIR in order to send a message to Jewish people targeted far more than the brick and mortar of a building -- they struck at the very heart of the Jewish community in Riverdale. Appellant asserts that he should not have been charged under the Hate Crimes Act because his actions were not directed against an identifiable human being. Because Appellant's actions were taken with the obvious and undisputed intention of intimidating and harming the Jewish community of Riverdale, they were hate crimes under Section 1(b) of the New York Hate Crimes Act, and he was

properly charged and convicted. In affirming his conviction, the First Department acknowledged:

> There is no question that defendant chose the synagogue because of the religion or religious practice it represents. To be sure, the synagogue itself only has significance because congregants use it as a center of religious practice. Defendant's actions, although literally directed at the building, were in fact directed at those who utilize the synagogue and attend religious services there.

Assi, 63 A.D.3d at 26, 877 N.Y.S.2d at 236 (citing *People v. Uthman*, 31 A.D. 3d 1179, 817 N.Y.S.2d 554 (4th Dept. 2006), *lv. den.* 7 N.Y.3d 852, 823 N.Y.S.2d 781, 857 N.E.2d 76 (2006)).

As shown below, applying the Hate Crimes Act to bias-motivated acts of violence against synagogues and other property is sound public policy. Moreover, the wording of P.L. § 484.05 unambiguously allows specified bias-motivated crimes to be charged as hate crimes. Finally, the legislative record reflects the Legislature's clear intention to make certain property crimes subject to the Hate Crimes Act. Accordingly, Appellant has no credible basis for arguing that the Act does not or should not apply to the specified bias-motivated property crimes for which he was convicted.

I. Applying The Hate Crimes Act To Bias-Motivated Property Crimes Comports With Sound Public Policy

There are sound public policy reasons for treating bias-motivated property crimes as hate crimes. Contrary to Appellant's interpretation, they are recognized as such under the Hate Crimes Act.

A. Hate Crimes Harm The Community As A Whole

During the Senate debates on the Hate Crimes Act, Senator Oppenheimer told a story about a "horrible incident" that had happened in Mamaroneck where "many homes were defaced . . . with not only swastikas but statements like 'Kill all the Jews' and 'Burn the cancer within us . . . . '" N.Y. Senate Debate on Senate Bill 4691a, June 7, 2000, at 4608:8-14. The "entire community was so appalled" that they "ended up marching, the entire community, marching from synagogue to church to synagogue to church" to show that the community would not tolerate such acts. *Id.* at 4608:9-22. Senator Oppenheimer concluded "[a]nd now we have a law which says it cannot be tolerated." *Id.* at 4608:15-23.

The incident in Mamaroneck underscores the need for including property crimes under the Hate Crimes Act. As the Washington Post opined in a 2008 editorial: "While all crimes are an affront to society, offenses rooted in animus toward a victim's real or perceived characteristics are especially pernicious. The fear of crime becomes an extra burden for members of these groups, who can feel that they are being hunted." *Hate Crimes, Good news on bias incidents based on*

race and religion. Bad news on those based on sexual orientation, Washington Post, Nov. 5, 2008, at A25, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/11/04/AR2008110404106.html.

Left uncorrected, hate crimes can rip a community apart. Perpetrators of hate crimes intend to intimidate, isolate, and instill fear. Victims, their families, and their communities feel that sense of isolation and terror. If hate crimes go unaddressed, tensions percolate. Entire communities can become affected -- leading to polarization, anger, suspicion, and a general sense of vulnerability, including toward law enforcement. Ultimately, the tensions can boil over. The Hate Crimes Act is intended to deter people who would engage in bias-motivated crimes by making the crimes eligible for enhanced penalties or to punish any perpetrators who cannot be deterred. *See People v. Diaz*, 188 Misc. 2d 341, 343-44, 727 N.Y.S.2d 298, 299 (Sup. Ct. N.Y. Co. 2001) (noting that the Legislative Findings to the Hate Crimes Act explains the need for the Act to "provide clear recognition of the gravity of hate crimes and the compelling importance of preventing their recurrence") (quoting P.L § 485.00).

The evils addressed by New York's Hate Crimes Act, including specifically bias-motivated attacks against Jewish places of worship, remain a public policy concern of the highest order. Indeed, the Court may wish to take notice that even in the months since the First Department's decision in this matter, there have been

other incidents in New York State where crimes against property have targeted the Jewish community. This past July, Congregation Beth Shalom Chabad in Mineola was spray-painted with swastikas. *See* Keegan Calligan, *Mineola synagogue vandalized with swastikas,* News Day, July 3, 2009, *available at* http://www.newsday.com/long-island/crime/mineola-synagogue-vandalized-with-swastikas-1.1273721. The Mineola incident is being investigated as a bias crime. Matthew Chayes, *Reward offered in case of vandalized Mineola synagogue*, News Day, July 8, 2009, *available at* http://www.newsday.com/long-island/crime/reward-offered-in-case-of-vandalized-mineola-synagogue-1.1275386. In the days following the incident, the rabbi for Congregation Beth Shalom described "[t]his despicable attack" as an attack on the entire congregation and noted that when congregants "discovered a large swastika painted on the front doors of [their] beloved shul," they "felt hurt," "sad," and "violated." *Id.* The crime was manifested against property, but the perpetrator's obvious intent was to harm the Jewish people of Mineola.

Also intending to harm the Jewish community were four men in Riverdale who were arrested in May 2009 in an alleged plot to attack two synagogues. *Feds Bust Bomb Plot Against Riverdale Temples; Rabbi Relieved*, The Jewish Week, May 19, 2009, *available at* http://www.thejewishweek.com/view Article/c36_a15844/ News/New_York.html. Although this crime will be

prosecuted under federal laws, it is yet another example of a hate-based act involving the attempted bombing of two synagogues for the purpose of striking out against the Jewish community.

B. Almost Half Of All Reported Hate Crimes Are Property Crimes

Since 1991, the Federal Bureau of Investigation ("FBI"), in accordance with its congressional mandate under 28 U.S.C. § 534 (the "Hate Crimes Statistics Act"), has released an annual report on the incidents of hate crimes in each State and the District of Columbia, relying on information provided by state law enforcement agencies to the FBI's Hate Crime Data Collection Program.

In 1999, just before the enactment of the Hate Crimes Act, New York law enforcement agencies reported 602 hate crimes to the FBI.[3] *FBI: Hate Crimes Statistics 1999*, Table 8 (Number of Offenses by State ("New York"), *at* http://www.fbi.gov/ucr/99hate.pdf. Included within these 602 hate crimes were 251 property crimes, the overwhelming majority of which -- 239 -- involved destruction of property, damage to property or vandalism. *Id.* Five of these hate crimes involved arson. Sixteen more involved robbery or burglary. *Id.*

[3] The FBI does not assert that all hate crimes are reported, but even if incomplete the FBI's statistics are a valuable and revealing source of information.

In 2000, New York law enforcement agencies reported 617 hate crimes to the FBI, 250 of which involved destruction or damage to property or vandalism, five involved arson, and 27 more involved robbery, burglary or theft. *FBI: Hate Crimes Statistics 2000*, Table 11 ("Offenses/Offense Type by Participating State"), *at* http://www.fbi.gov/ucr/cius_00/hate00.pdf.

Appellant wrongly asserts that property crimes are not hate crimes under New York law, even when the crime is intended to harm people in protected groups. In fact, *more than half* of all reported hate crimes in New York in 2007 were property crimes. *See FBI: Hate Crimes Statistics 2007,* Table 11 *at* http://www.fbi.gov/ucr/hc2007/table_11.htm. Under Appellant's analysis, none of last year's 302 reported bias-motivated property crimes in New York could be made subject to enhanced penalties, no matter how many persons in a protected class were harmed, and no matter that the perpetrator committed the crime based on his belief or perception about the "race . . . or religion . . . of a person." P.L. § 485.05(b)(1). That would be an absurd result that, as shown herein, is contrary to the law of New York.

II. The Unambiguous Wording Of Penal Law § 485.05 Allows Specified Bias-Motivated Property Crimes To Be Charged As Hate Crimes

The trial court correctly held that the Legislature intended the Hate Crimes Act to encompass crimes carried out against property owned or used by persons protected under the Act. The "intent of the legislative body is always the primary

object of all statutory construction." *Pardi v. Barone*, 257 A.D.2d 42, 45, 690 N.Y.S.2d 315, 317 (3d Dept. 1999); *see also State v. Patricia II*, 6 N.Y.3d 160, 162, 844 N.E.2d 743, 745 (2006).

The best indicator of legislative intent and therefore the best place for the Court to begin in construing a statute is the language itself. *People v. Rice*, 44 A.D.3d 247, 251, 841 N.Y.S.2d 72, 75 (1st Dept. 2007) (citing McKinney's Cons. Laws of N.Y., Book 1, Statutes ("McKinney's Statutes") § 92 (West 1971 & 2008 Supp.). Statutes should be read as a whole, with every word given effect. McKinney's Statutes § 231. Words should be given their natural meaning, without any need for forced construction. McKinney's Statutes § 94. If a word is used in a statute one way, it is presumed to carry the same meaning in other parts of the statute. *Id.* § 236. The words of a statute, however, are not to be "blindly" applied "to arrive at an unreasonable or absurd result." *People v. Santi*, 3 N.Y.3d 234, 242-43, 818 N.E.2d 1146, 1151 (2004) (declining to apply the defendant's construction of a statute because the construction ignored "the legislative intent underlying the statute's enactment" and would lead to an absurd result). Such a result should be rejected. *Id.*, *see also* McKinney's Statutes § 145. Rather, a statute should be construed to promote the "spirit, purpose, and the objectives of the enactors." *Albano v. Kirby*, 36 N.Y.2d 526, 530-31, 330 N.E.2d 615, 619

(1975) (construing the terms "minimum" and "maximum" as used with respect to probationary periods); *see also* McKinney's Statutes § 96.

When the Hate Crimes Act was enacted, the Legislature recognized the increasing prevalence of "criminal acts involving violence, intimidation, and *destruction of property*" in New York. McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 485.00 ("Legislative Findings") (emphasis added). In response to its findings, the Legislature passed the Hate Crimes Act, which provides for increased penalties for specified offenses including multiple property crimes, including two of the crimes for which the petitioner was convicted: criminal mischief in the third degree and attempted arson in the third degree. P.L. § 485.05(3). By definition, a property crime is not directed against a specific individual. Appellant's argument would, in essence, re-write the Hate Crimes Act to eliminate property crimes from the Act's scope.

By its plain meaning, there can be no question that the Hate Crimes Act is inclusive of property crimes, *viz.,* criminal trespass, burglary, criminal mischief, arson, petit larceny, grand larceny, and robbery. *See id.* Specifically, the Act provides:

> 1. A person commits a hate crime when he or she commits a specified offense and either:
>
> > (a) intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the

> race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, or
>
> (b) intentionally commits the act or acts constituting the offense in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct . . . .
>
> 3. A "specified offense" is an offense defined by any of the following provisions of this chapter: . . .; section 140.10 (criminal trespass in the third degree); section 140.15 (criminal trespass in the second degree); section 140.17 (criminal trespass in the first degree); section 140.20 (burglary in the third degree); section 140.25 (burglary in the second degree); section 140.30 (burglary in the first degree); section 145.00 (criminal mischief in the fourth degree); section 145.05 (criminal mischief in the third degree); section 145.10 (criminal mischief in the second degree); section 145.12 (criminal mischief in the first degree); section 150.05 (arson in the fourth degree); section 150.10 (arson in the third degree); section 150.15 (arson in the second degree); section 150.20 (arson in the first degree); section 155.25 . . . .

P.L. § 485.05 (2008).

Within a year of the Hate Crimes Act becoming law, it was tested in New York courts. *See Diaz*, 188 Misc. 2d at 341, 727 N.Y.S.2d at 298. Although the issue before the court did not involve a property crime, the court tellingly recognized that the passage of the Act was necessitated by the "prevalence [in New York] of criminal acts involving violence, intimidation, and *destruction of property* based on bias and prejudice." *Id.* at 343-44, 77 N.Y.S.2d at 299 (emphasis added). As such, the court found it "impossible to imagine that any person in our

community would not understand the plain meaning of this law and the ultimate penalties now consequent to putting hateful thoughts and words into action." *Id.* at 344, 77 N.Y.S.2d at 299.

Appellant has asserted to this Court that it should ignore the wording of the Hate Crimes Act, the relevant legislative findings, and the legislative record, and instead find that the Act does not apply to property crimes when a "person" is not present. It is "impossible to imagine" how Appellant could so interpret the Act, which, on its face, clearly contradicts any such reading. Appellant's suggestion would lead to an absurd result and should be rejected.

A. Under The Hate Crimes Act, Persons May Be Intentionally Selected *Or* Intentionally Acted Upon

The Hate Crimes Act has two distinct prongs, one of which Appellant's argument ignores. The Act applies when the perpetrator "intentionally *selects the person* against whom the offense is committed" based on characteristics that fit within the definition of the statute *or* when the perpetrator "*intentionally commits the act or acts constituting the offense* in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person." P.L. § 485.05(1)(a) and (b) (emphasis added). The use of the two distinct prongs here reflects the Legislature's recognition that the Act covers both crimes perpetrated because of *an individual victim's* certain identifiable characteristic, *and* crimes

perpetrated because of *a person's* characteristics, regardless of whether that person is an individual victim, or whether that "person" is an individual or a group.

Had Appellant targeted an individual member of CSAIR and committed one of the crimes specified in the Hate Crimes Act against that person, there would be no question as to the applicability of the Act under § 485.05(1)(a). It is no different when applying § 485.05(1)(b): when Appellant threw or placed two Molotov cocktails on the steps of CSAIR and broke the glass windows of CSAIR's front door, Appellant committed acts "constituting the offense" against an entire community of persons based upon their religion. P.L. § 485.05(1)(b).

The fact that Appellant damaged the synagogue building is not, by itself, the issue -- if he had firebombed CSAIR only because it was a convenient target for testing a new form of Molotov cocktail, then his actions would not have been chargeable as a hate crime. But his conviction reflects that Appellant instead targeted CSAIR, by his own admission, to send a message to the "rich fucking Jews of Riverdale." (Appellant's Br. at 34 (citing Ryan: 2170; Sinclair: 3289-90).) *See also Assi*, 63 A.D.3d at 23, 877 N.Y.S.2d at 234. Under Section (1)(b) of the Hate Crimes Act, Appellant thus acted based on his "belief" about "a person." P.L. § 485.05(1)(b). Indeed, a noted commentary specifically cites a "perpetrator who, professing hatred against a particular religion, sets off a bomb in that religion's place of worship" as an example of the type of predicate crime that

would be carried out by a perpetrator "who does not intentionally select an individual," but who intentionally commits the predicate crime because of a specified attribute of a person. William Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y. § 485.05 (2000 & 2008 Supp. at 230).

Appellant's assertion that he was wrongfully convicted would require the Court to overlook Section 1(b) of the Act entirely and to apply only Section 1(a). Under the basic tenets of statutory construction, however, the statute must be read as a whole to give effect to each word, which, in turn, precludes Appellant from achieving his desired outcome in this appeal. McKinney's Statutes § 231.

B. Appellant's Offenses Are Property Crimes Listed Among the Specified Offenses in Section 485.05(3)

Statutory construction is not a complex process. It simply requires reading the statute to give effect to the intent of the legislature. *Rice*, 44 A.D.3d at 251, 841 N.Y.S.2d at 74-75. In addition, statutes are never construed in a way that would make them ineffective. McKinney's Statutes § 144. Construing P.L. § 485.05 as it relates to property crimes is very straightforward in that §485.05(3) specifies the precise crimes that the Legislature intends to be eligible for hate-crime penalty enhancement, including the crimes for which Appellant was convicted.

1. Appellant's argument turns on an erroneous reading of the word "persons" as used in the Act

The crux of Appellant's argument is that the statute does not apply to property crimes because P.L. § 485.05(1) refers to "persons" in paragraphs (a) and (b). Ignoring the Legislature's inclusion of property crimes within the specified offenses of § 485.05(3), Appellant relies on a theory that his actions represented nothing more than hatred against "a building -- the synagogue -- and not a person or persons," and that therefore "although reprehensible," the crimes did not fall within the Hate Crimes Act. (Appellant's Br. at 55.)

Appellant is correct that his crimes were reprehensible, but he is absolutely wrong that his hatred was not directed at persons.[4] Appellant was convicted, in part, of criminal mischief in the third degree as a hate crime. The underlying crime of criminal mischief in the third degree requires an "intent to damage the property

[4] Appellant's argument that the Hate Crimes Act applies only to crimes against "people" and therefore cannot apply to corporations because it would "be nonsensical to punish the same crimes differently solely based on the incorporated status of the group" is itself nonsensical. (Appellant's Br. at 93.) Of course, the Hate Crimes Act is not applied differently depending upon whether a "religious group" is incorporated. While the Synagogue happens to be incorporated and, thus, a "person" under New York law, it is the "religious group" -- the Jewish persons who make up the congregation of the Synagogue -- that the Hate Crimes Act is intended to protect. This would be equally true with respect to any property crime carried out against persons within a protected category under Section 1(b) of the Hate Crimes Act.

of another person" along with the act of damaging "*the property of another person.*" McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 145.05 (West 1999 and 2008 Supp.) (emphasis added). Intent to injure a person is not an element of the crime of criminal mischief in the third degree. *Matter of Daniel K.*, 89 A.D.2d 630, 453 N.Y.S.2d 96 (3d Dept. 1982).

New York defendants have been convicted of criminal mischief in the third degree in situations where, for example, an inmate caused more than $600 damage to an isolation cell at the Cattaraugus County Jail and where three people caused more than $300 damage to the windows and doors of a public magnet school in Buffalo. *People v. Mu-Min*, 172 A.D.2d 1022, 569 N.Y.S.2d 280 (4th Dept. 1991); *People v. Woodward*, 148 A.D.2d 997, 539 N.Y.S.2d 220 (4th Dept. 1989). In neither *Mu-Min* nor *Woodward* did the question of "persons" arise, however, since in both cases it was obvious that the "persons" to whom the damaged property belonged were not specific individuals but the community as a whole. The same is true when the property is a religious building belonging to its congregants. All that the Hate Crimes Act does is provide for an enhanced sentence when the reason for selecting the property to be damaged is based on a belief or perception about "a person" having any of the characteristics protected under the Act. P.L. §§ 485.05 (1)(b), 485.10(2).

Appellant was also convicted of attempted arson in the third degree as a hate crime. Arson in the third degree requires that a perpetrator intentionally damage a building or motor vehicle "by starting a fire or causing an explosion." McKinney's Cons. Laws of N.Y., Book 39, Penal § 150.10(1) (West 1999 & 2008 Supp.). The only reference to "persons" in the arson statute relates to an affirmative defense that may be asserted if the property burned belongs to the defendant and the defendant had no reasonable ground to believe that his actions might endanger the life or safety of another person. Even so, the Legislature included arson among the property crimes that are subject to enhanced sentencing under the Act. Clearly, the intent of the Legislature was to enhance the sentence of any arsonist or attempted arsonist whose motivation was bias against an identified person under Section 1(a) of the Act *or* whose actions were motivated by a belief or perception regarding a protected characteristic of "a person" under Section 1(b) of the Act.[5]

[5] Appellant is not the only New York defendant to have been convicted under the Hate Crimes Act for property crimes involving a synagogue. In *Uthman*, 31 A.D.3d at 1180, 817 N.Y.S.2d at 555, the Fourth Department upheld a jury verdict convicting a defendant who had burglarized and set fire to a synagogue. The defendant was convicted of, among other crimes, burglary in the second degree as a hate crime, burglary in the third degree as a hate crime, arson in the third degree as a hate crime, and criminal mischief in the second degree as a hate crime. On appeal, the Fourth Department held that the evidence established that Uthman had "intentionally committed the crimes at the

(Cont'd on following page)

By his own admission, Appellant was angered by the "rich fucking Jews of Riverdale." (Appellant's Br. at 34 (citing Ryan: 2170; Sinclair: 3289-90).) Appellant intended for his attack on CSAIR to be felt by its Jewish congregants. Rabbi Barry Dov Katz of CSAIR testified at Appellant's sentencing hearing that "the incident had rekindled painful memories of other events in Jewish history for both members of the congregation and others who saw the damage to the synagogue." Press Release, Bronx District Attorney's Office, *Yonkers Man Receives the Maximum Sentence by Law for His Role in the Attempted Firebombing of a Riverdale Synagogue*, Feb. 23, 2003, *at* http://bronxda.nyc.gov/information/2003/case 14.htm. The greater Riverdale Jewish community is made up of ten synagogues. *See* History of Conservative Synagogue Adath Israel. The fear that Appellant intended to instill and did instill was felt throughout the Jewish community of greater Riverdale. Fear and isolation, the feelings most commonly associated with hate crimes, do not just affect one victim who is present at the moment the crime is committed. They permeate the community as a whole. *See* Statement of the Anti-Defamation League before the House Judiciary Subcommittee on Crime, Terrorism and

(Cont'd from preceding page)

> synagogue because of a belief or perception regarding . . . religion [or] religious practice." *Id.* (citing P.L. § 485.05(1)(b)).

Homeland Security on H.R. 1592, the Local Law Enforcement Hate Crimes Prevention Act, April 12, 2007, at 1.

2. No law required CSAIR to be occupied at the time of Appellant's crimes before his acts could constitute hate crimes

Appellant further asserts that because of the late hour in which the petitioner perpetrated his acts, when CSAIR was unoccupied by anyone other than the caretaker, it could not be a crime against a person. (Appellant's Br. at 54-55, 59.) This is nonsense. People often commit property crimes when no one else is present, for the simple reason that they do not want to be identified as the perpetrator. This does not change what they did. Under neither the predicate crime of criminal mischief in the third degree or attempted arson in the third degree is there a requirement that a "person" be present. *See* P.L. §§ 145.05, 150.10.

Appellant's argument that a hate crime cannot be committed through a property crime is contrary to the Hate Crimes Act and to common sense. Such an absurd reading of the Act would render nugatory the entire list of property crimes included among the Act's specified predicate offenses. That would violate a basic tenant of statutory construction that statutes may not be construed in a way that makes them ineffective. McKinney's Statutes § 144. Moreover, Appellant's insistence that the Hate Crimes Act prohibits only acts directed at identifiable

persons but does not prohibit his actions, which were directed at the "rich fucking Jews of Riverdale," is inherently offensive as well as both factually and legally inaccurate. It should be given no credence by this Court. (Appellant's Br. at 34.)

III. The Legislative Record Reflects The Legislature's Clear Intention To Make Certain Property Crimes Subject To The Hate Crimes Act

As shown below, nothing in the legislative record supports Appellant's argument that the Hate Crimes Act should be limited to crimes directed against identifiable persons.

A. Appellant's Contentions Cannot Be Reconciled With The Legislative Record, The Conditions At The Time the Act Was Adopted, And The Contemporaneous Understanding Of The Act

There is no doubt that the Legislature intended to include property crimes in the Hate Crimes Act and, therefore, no reason for this Court to accept Appellant's *sub silento* invitation to rewrite the Act. The sponsor's memorandum in support of passage of the Hate Crimes Act underscores the legislative thinking with respect to identifiable persons: "Some hate crimes are committed by persons who do not intentionally select a particular victim but are equally culpable, since they are motivated by invidious hatred to commit criminal acts." Sponsor's Mem. at 2, Bill Jacket, L. 2000, ch. 107; *see also* P.L. § 485.00. Such was the case with respect to Appellant's criminal acts.

While statutory wording is considered the best evidence of the legislature's intent -- and here, it is more than enough to defeat Appellant's position -- that does

not set up an artificial boundary to the Court reviewing the legislative record. *City of New York v. State*, 282 A.D.2d 134, 725 N.Y.S.2d 10 (1st Dept. 2001) (citing *Riley v. County of Broome*, 95 N.Y.2d 455, 463, 742 N.E.2d 98, 102 (2000)). In fact, it has long been the law in New York that in interpreting a statute, a court has a "right to consider the relevant conditions existing when it was adopted," including the "particular mischief it was designed to remedy." *Woollcott v. Shubert*, 217 N.Y. 212, 111 N.E. 829 (1916) (citation omitted) (declining to apply a law intended to prohibit theaters from refusing admission to patrons on the basis of race or religion to a theater critic barred on the basis of a caustic review). The history of the times and the "events and circumstances associated with, and leading to, the passage of the statute" can be a "valuable guidepost" to determining legislative intent. *Rice*, 44 A.D.3d at 252, 841 N.Y.S.2d at 75 (citing, in part, McKinney's Statutes § 124). "[C]ontemporaneous exposition, common usage under a statute, or a course of conduct indicating a particular understanding of it" can be of great value in determining the meaning of a statute. *W. L. Maxson Corp. v. Ralph*, 47 N.Y.S.2d 643, 644-45 (Sup. Ct. 1944) *aff'd* 268 A.D. 753, 48 N.Y.S.2d 802 (1st Dept. 1944) *aff'd* 294 N.Y. 880, 62 N.E.2d 782 (1945).

In addition, courts may study the legislative debates, as they can be a "legitimate and trustworthy aid." *Woollcott*, 217 N.Y. at 212, 111 N.E. at 829.

"Indeed, the proper function of the legislative debates is to show the evil at which the statute in question is aimed as a remedy." McKinney's Statutes § 125.

When P.L. § 485.05 was enacted, the Legislature acknowledged the "intolerable truth" that victims of hate crimes are "intentionally selected, in whole or in part, because of their race, color, national origin, ancestry, gender, religion, religious practice, age, disability, or sexual orientation." P.L. § 485.00 ("Legislative Findings"). The legislative findings emphasize that:

> Hate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes.

Id. (finding that "[c]urrent law does not adequately recognize the harm to public order and individual safety that hate crimes cause"). For that reason, the Legislature included property crimes within the specified offenses in the Hate Crimes Act. Any other construction would be "absurd" under the plain meaning of the Act.

The Senate debates prior to the passage of the Hate Crimes Act are illuminating with respect to the property question. The sponsor, Senator Roy M. Goodman, noted in his remarks, for example, the "extraordinarily sad happenings"

leading to the need for the Act, such as "cases in which churches and synagogues have been wantonly attacked for no reason other than that they represent religious views of certain people not in harmony with those who had launched the attacks." N.Y. Senate Debate on Senate Bill 4691a, June 7, 2000, at 4533:6-7; 4533:16-21. He cited the "imperative that society recognize the nature of these things, not as crimes against one individual but rather as crimes against a whole class of people." *Id.* at 4534:4-8.

Senator Goodman concluded his thoughts with a personal observation:

> As an individual who has lost relatives in the Holocaust myself, I obviously have a heightened sense of the importance of society awakening in ample time to deal with this type of hatred which can, if allowed to spread, become a conflagration and an epidemic of uncontrollable proportions. What we seek to do is put out these fires before they spread.

N.Y. Senate Debate on Senate Bill 4691a, June 7, 2000, at 4539:16-25; 4540:1.

Appellant has ignored the statutory construction imperative to avoid absurdity. As quoted above, the legislative history and the contemporaneous statements made at the time the Act was passed support the First Department's understanding of the Legislature's intent. *Assi*, 63 A.D.3d at 26, 877 N.Y.S.2d at 236 ("A review of the legislative history leaves no doubt that the Legislature intended to include . . . crimes directed against property within the statute's scope.").

Statements regarding legislative intent at the time Appellant was charged also contradict Appellant's theory. During the Senate debates on the Hate Crimes Act, Senator David L. Paterson (now Governor Paterson) specifically cited the work that ADL and other groups belonging to the Hate Crimes Coalition had invested in supporting and lobbying for passage of hate crimes legislation in New York. N.Y. Senate Debate on Senate Bill 4691a, June 7, 2000, at 4558:17-25. He also recognized Howie Katz, ADL's New York Regional Director at the time, for his "persistent and unending work on this particular issue." *Id.* at 4559:1-4. Therefore, when, four months later, Mr. Katz publicly commended the State for bringing charges against Appellant under the Hate Crimes Act because the "intent" behind burning a synagogue is "not only to damage property but to send a message to the members of that community that they were targeted because of who they are," the statement came from someone who had an intimate knowledge of the Act. *See* Elissa Gootman, *Hate Crimes Charges Filed in Vandalism of Synagogue*, N.Y. Times, Oct. 12, 2008. Governor Pataki, who had signed the Act into law, likewise made contemporaneous comments in support of these charges. *See id.*

The plain language of the Act, the legislative history, the contemporaneous remarks upon Appellant's arrest that were made by Governor Pataki, who signed the Act, and by advocates involved in drafting the Act, collectively show that

under P.L. § 485.05(1)(b), the Hate Crimes Act applies to property crimes even when no identifiable individual "person" is present.

B. Appellant's Reliance On The New York Act's Differences From Wisconsin's Hate Crimes Statute Is Misplaced

Appellant relies on marginal differences in the wording between the New York Act and Wisconsin's hate crimes statute to assert that property crimes are not included in the New York Act. (Appellant's Br. at 61.) His assertions have no merit. First, Appellant's assertions are irrelevant, because the only hate crimes legislation under consideration in this appeal is the New York Act, and therefore it is the intent of the New York State Legislature -- not that of the Wisconsin legislature -- which matters. Moreover, Appellant's assertions are wrong because both the New York Act and the Wisconsin statute expressly make property crimes subject to sentencing enhancement. *See* P.L. § 485.05(3); Wis. Stat. Ann. § 939.645. ADL drafted the Model Law on which both the New York Act and the Wisconsin statute were based and thus may offer the Court a helpful perspective.

In 1981, in response to a growing trend of racist and anti-Semitic crimes across the United States, ADL drafted the Model Law. Its purpose was to encourage states to enact legislation enhancing penalties for certain criminal offenses where the victim was targeted based on being a member of a protected group. The ADL Model Law contains examples of property crimes that should be considered for inclusion when a state law is enacted. *See* ADL Model Law § 2.

Including property crimes is precisely what the Legislature did when it "patterned" the New York Act after the ADL Model Law. Sponsor's Mem. at 1, Bill Jacket, L. 2000, ch. 107.

In 1989, Wisconsin was among the earliest states to enact a hate crimes statute, which it patterned after the ADL Model Law. *See* ADL Introduction, Hate Crime Laws, *at* http://www.adl.org/99hatecrime/intro.asp. The Wisconsin statute is titled "penalty; crimes committed against certain people and property." *See* Wis. Stat. Ann. § 939.645. It reads as follows:

> If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
> (a) Commits a crime under chs. 939 to 948.
> (b) Intentionally *selects the person against whom the crime under par. (a) is committed* or *selects the property that is damaged or otherwise affected by the crime under par. (a)* in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

Id. (emphasis added).

The constitutionality of Wisconsin's statute was tested and upheld by the United States Supreme Court more than 15 years ago. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993). ADL was among the *amici* who briefed the Court on the rise

of "bias-motivated violence" throughout the United States. *Id.* at 483 n.4.[6] The *Wisconsin* Court did not distinguish between property crimes and crimes against persons. Rather, it looked to bias-motivated conduct, which *amici* argued is "more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." *Id.* at 488. The Court agreed that the State's focus is on the conduct and therefore conduct could be subject to penalty enhancement when the catalyst for the conduct is bias. *Id.* In short, the ADL Model Law, the Wisconsin statute, and the New York Act all address property crimes with varying phraseology, and, contrary to Appellant's assertions, this is a distinction without a difference.

C. That The Aggravated Harassment Statutes Were Amended When The Hate Crimes Act Passed Is Irrelevant

At the time the Legislature passed the Hate Crimes Act, it also amended two other Penal Laws to make their language consistent with the perception and bias wording and protected characteristics found in the Hate Crimes Act. *See* N.Y. Advance Legislative Service, S.B. 4691, 2000 N.Y. Laws 107. Specifically, the

[6] New York's then-Congressman Charles E. Schumer was also an *amicus* to the Wisconsin Court in support of the State. *Id.* at 488.

Legislature amended the opening paragraphs of P.L. § 240.31 (aggravated harassment in the first degree) to read as follows:

> A person is guilty of aggravated harassment in the first degree when with intent to harass, annoy, threaten or alarm another person, because of a belief or perception regarding such person's race, color, or national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct, he or she . . . .

P.L. § 240.31. The statute proscribes four different acts that might be perpetrated by someone attempting to harass protected people or groups, including by burning a cross, painting a swastika, hanging a noose, or causing damage to "premises primarily used for religious purposes, or . . . maintained for purposes of religious instruction, [if] the damage to the premises exceeds fifty dollars." P.L. § 240.31 (1). Aggravated harassment in the first degree is a Class E felony. It is not included among the specified offenses in the Hate Crimes Act. (The predicate crimes for which Appellant was convicted under the Hate Crimes Act are both Class C felonies.)

The Legislature also added to the specified offenses delineated in P.L. § 240.30:

> A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threat or alarm another person, he or she. . . : (3) *Strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same* because of a belief or perception regarding such person's race, color,

> national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct . . . .

P.L. § 240.30 (emphasis added); *see also* N.Y. Advance Legislative Service, S.B. 4691a, L. 2000, ch. 107. P.L. § 240.30 is a misdemeanor that is included among the specified offenses in the Hate Crimes Act. *See* P.L. § 485.05(03).

The Legislative history is largely silent with respect to the reason the Legislature changed these laws, other than to make them more compatible with the language of the Hate Crimes Act. *See* Sponsor's Mem. at 2-3, Bill Jacket, L. 2000, ch. 107.

Appellant points to P.L. § 240.31 as evidence that the Legislature "chose not to include acts directed at" buildings in the Hate Crimes Act. (Appellant's Br. at 57.) Appellant asserts that this is proof that the Legislature intended to distinguish between "criminalizing acts directed towards people and those directed at buildings . . . ." (*Id.*) Notably, that is neither what the Legislature did nor what P.L. § 240.31 provides.

Appellant was convicted of attempted arson in the third degree as a hate crime, for which he was sentenced to five to fifteen years; three counts of criminal mischief in the third degree as a hate crime, for which he was sentenced to three

terms of 2 1/3 to 7 years imprisonment; and one count of aggravated harassment in the first degree, for which he was sentenced to 1 1/3 to 4 years imprisonment.[7] (Appellant's Br. 1-2.) Obviously, the State brought charges under several different penal laws, including P.L. § 240.31.

Appellant's argument fails to recognize that prosecutors are provided with "broad discretion to decide what crimes to charge." *People v. Urbaez*, 10 N.Y.3d 773, 775 (2008) (citing *People v. Eboli*, 34 N.Y.2d 281, 313 N.E.2d 746 (1974)). Indeed, overlapping statutes provide an "opportunity for prosecutorial choice," and are not a "bar to prosecution." *People v. Robinson*, 95 N.Y.2d 179, 184, 733 N.E.2d 220, 223 (2000). In fact, the general rule is that "prosecution may be obtained under any penal statute proscribing certain conduct, notwithstanding that the penal statute overlaps with a more specific statute." *People v. Walsh*, 67 N.Y.2d 747, 749, 490 N.E.2d 1222, 1223 (1986).

Nowhere in P.L. § 240.31 does it state that the aggravated harassment statute is the one and only means of prosecuting a hate crime involving property damage to a religious structure. Indeed, New York's entire statutory scheme would crumble under Appellant's analysis, beginning with P.L. § 240.30. Under

[7] Appellant was also convicted of two counts of criminal possession of a weapon in the third degree, which is not relevant to the Hate Crime Act.

Appellant's interpretation, if every bias-motivated property crime were precluded from being charged as a hate crime because of P.L. § 240.31, then any bias-motivated crime involving striking, shoving or kicking the victim would have to be brought under P.L. § 240.30(3). That simply is not the case. A crime involving striking, shoving or kicking the victim could be charged as, for example, assault in the third degree under P.L. § 120.00, assault in the second degree under P.L. § 120.05, or assault in the first degree under P.L. § 120.10. The prosecutor would have the discretion to charge as a hate crime any assault meeting the other parameters of the Hate Crimes Act. Depending upon the facts, a crime involving striking, shoving, or kicking the victim could also be charged as hazing in the second or first degrees under P.L. §§ 120.16-17 or gang assault in the second or first degrees under P.L. §§ 120.06-.07, neither of which are expressly included among the specified offenses in the Hate Crimes Act.

An argument that the Legislature did not intend crimes against *persons* to be included in the Hate Crimes Act because P.L. § 485.05(3) fails to list *all* crimes against persons would be silly. For the same reason, Appellant cannot forge a rule that the Legislature did not intend to include any *property crimes* under the Hate Crimes Act because it did not make aggravated harassment in the first degree subject to sentencing enhancements under that Act. *See* P.L. § 240.31.

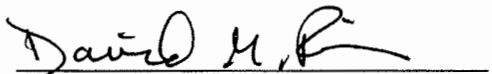
In amending Section 240.31 in 2000, all the Legislature did was apply the bias and perception wording and the protected characteristics under the Hate Crimes Act to very specific bias-motivated vandalism that falls within a Class E felony statute. *See id.* Appellant's attempt to extrapolate from this a revelation of legislative intent not to include any property crimes in the Hate Crimes Act is so broad and self-evidently incorrect that it must be dismissed out of hand. As already discussed, Appellant's position is belied by the litany of property crimes that the Legislature specifically made subject to hate crimes sentencing enhancement. *See* P.L. § 485.05(3).

CONCLUSION

For the reasons set forth above, and the reasons included in the papers submitted by the People of the State of New York, the Proposed *Amicus Curiae*, the Anti-Defamation League, respectfully ask this Court to deny the Defendant-Appellant's appeal.

Dated: October 27, 2009
Washington, D.C.

CHADBOURNE & PARKE LLP

By: 
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