

IN THE SUPREME COURT OF THE STATE OF FLORIDA

RALPH GROSS, JR.,

Petitioner,

Case No. 95,302

District Court of Appeal,
4th District No. 96-3312

-VS-

STATE OF FLORIDA,

Respondent.

**PETITIONER'S REPLY BRIEF ON THE MERITS ON DISCRETIONARY
REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL**

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CERTIFICATE OF TYPE AND STYLE

I hereby certify that the Petitioner's Initial Brief on the Merits on Discretionary Review to the Supreme Court conforms to the Administrative Order dated July 13, 1998. This brief is typed using 14 point Times New Roman and is proportionally spaced.

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PRELIMINARY STATEMENT

Petitioner was the defendant and the Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

The following symbols will be used:

“R” Record on Appeal

POINT ON APPEAL

THE DEFINITION OF THE ENTERPRISE ELEMENT OF THE FLORIDA RICO STATUTE AS INTERPRETED BY BOYD IS LEGALLY CORRECT AND IS SOUND PUBLIC POLICY. PETITIONER DID NOT RECEIVE A FAIR TRIAL BECAUSE THE COURT DID NOT PROPERLY INSTRUCT THE JURY AS TO THE DEFINITION OF THE ENTERPRISE ELEMENT OF THE FLORIDA RICO STATUTE AS REQUESTED.

Respondent argues that Petitioner is asking this Court to add elements to the RICO statute which do appear in the statute. Answer brief of Respondent, p. 22. The position of Petitioner is simply that common sense and public policy mandate that the enterprise element of the RICO statute be interpreted in accord with Boyd v. State, 578 So.2d 718 (Fla. 3d DCA 1991), rev. denied, 581 So.2d 1310 (Fla. 1991) and United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983), cert. denied, 464 U.S. 849, 104 S.Ct. 157, 78 L. Ed. 2d 145 (1983).¹ To do otherwise would lead to absurd and ridiculous results never intended by either Congress or the Florida legislature. The intent of Congress in passing the RICO statute in the first instance was to target *organized* crime. Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). The RICO statute was never intended to target individuals who commit two or more predicate acts

¹ These cases established the requirement that in order to establish an enterprise, there must be proof of an identifiable decision-making structure and a mechanism for controlling and directing the group on an ongoing, rather than an ad hoc basis.

together who have only a minimal association with each other. United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982), cert.denied, 459 U.S. 1040, 103 S.Ct. 456, 74 L.Ed.2d 608 (1982). Thus the enterprise element requires “proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering.” Bledsoe, at 664. ²

Petitioner agrees that there does not need to be proof of any traditional notions of organized crime popularized by gangster movies. Petitioner also agrees that the enterprise element may exist in wholly criminal organizations with no pretense of legitimacy. United States v. Turkette, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). The disagreement is whether proof of an organization as demonstrated by an identifiable decision-making structure and a mechanism for controlling and directing the group on an ongoing, rather than an ad hoc basis is required to establish the existence of an enterprise.

It was suggested that Petitioner’s argument that not requiring proof of the above

² Going back to basics, the short title of the statute which is the subject matter of this appeal is the Florida RICO (Racketeer Influenced and Corrupt *Organization*) Act. Fla. Stat. 895.01, emphasis added. This fact is highlighted for the simple reason that it may be instructive to look to the title of the statute to aid in determining whether the enterprise element of this law should require proof of an organization (ie. proof of an identifiable decision-making structure and a mechanism for controlling and directing the group on an ongoing, rather than an ad hoc basis). Further, the federal RICO statute is virtually identical to the Florida RICO statute in terms of it’s definition of enterprise, yet some Federal Circuits have adopted the definition of enterprise urged by Petitioner. See, Riccobene, supra; 18 U.S.C. Section 1962.

definition of enterprise could result in the conviction for RICO of any two persons who committed two predicate crimes together was without merit. This, it was argued, is because the “pattern of racketeering activity” instruction specifies that the predicates may not be “isolated incidents.” Answer brief of Respondent, p. 22. The rationale underlying the pattern element, however, is to insure that the predicate acts are related to the affairs of the enterprise and that they have a common goal (usually being making money for the organization or enterprise). United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), cert. denied, 493 U.S. 95, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978). Thus, instructing the jury that the pattern of racketeering activity may not be established by proof of unrelated and isolated predicate acts does nothing to dispel the very real likelihood that a RICO defendant could be convicted simply by proof that he committed two predicate acts. If this Court were to uphold the District Court’s opinion and overrule the Boyd definition of enterprise, the misapplication of the RICO statute which took place in Boyd would become judicially sanctioned.³

Respondent warns that if the Boyd definition of enterprise is required, “a large

³ In Boyd, the defendant and some fellow criminals got together and went on a violent, albeit brief, crime spree. There was no organization, structure, or decision making structure between these hoodlums. But, based on the standard instruction defining the elements of RICO, the defendant was convicted of RICO. Clearly, that factual scenario was not contemplated by either the Florida legislature or Congress when the respective RICO statutes were enacted.

group of persons that associated for many years and committed hundreds of crimes together could not be prosecuted under the statute if the group had no ‘identifiable decision making structure.’” Answer brief of Respondent, p. 23. If such a situation suggested by Respondent should arise, and all of the crimes were indeed committed on an ad hoc basis without benefit of any decision making structure, then they *should not* be subjected to RICO prosecution simply based on the large scale of the crimes committed.⁴ This is because the intent of the RICO statute is to target “organized crime”. Riccobene, at 220.

As was correctly pointed out by Respondent, the language used in the enterprise instruction requested by Petitioner was taken from Boyd. Answer brief of Respondent, p. 36. Notwithstanding this fact, Respondent argues that the requested enterprise jury instruction was incomplete and misleading because it omitted qualifying language found in Riccobene. Answer brief of Respondent, p. 38. It was argued that because the Petitioner did not include in his requested instruction that the structure could be hierarchial or consensual, and that the decisions need not be all made by the same person or that authority could be delegated, that the instruction was fatally flawed. As indicated,

⁴ Petitioner can not imagine that in such an example, the prosecution would not be able to present evidence of a decision making structure. As indicated, however, if there truly was no such proof, then there is no racketeering and the State should only charge the members of the group with the substantive crimes which they committed.

the instruction was taken directly from Boyd, which at that time constituted the leading and undisputed case construing this element of the RICO statute. Certainly, Petitioner was entitled to rely upon well established Florida law when he drafted and requested this instruction. This is particularly true where the enterprise instruction set forth in Boyd is in accord with legislative intent.

Respondent also argues that because Petitioner requested the instruction for count 1 only (the RICO count), that he did not preserve this issue as to count 2 (Conspiracy to Commit RICO). Answer brief of Respondent, p. 39. The law does not require futile acts. In this case, Petitioner requested a special enterprise instruction as to the RICO count. This request was denied on two occasions by the trial judge (R 2064-65; 2089). It would have served absolutely no legitimate purpose to ask that the instruction be given as to count 2 which incorporates virtually all of the elements of count 1. The record is patently clear that such an instruction would not have been given.

Finally, the issue here is not whether there was sufficient evidence to submit the case to the jury, but whether the jury should have been properly appraised as to the enterprise element.⁵ The jury clearly was not properly instructed as to a key element of

⁵ The heart of Petitioner's defense to the RICO counts was that the people involved in the predicate crimes were simply a group of disorganized thugs with no glue to hold them together. Petitioner analogized them to "the gang that couldn't shoot straight" and repeatedly argued that the group lacked organization and planning and that the enterprise element was not established (R 937; 2110-11). Petitioner argued that the

the RICO statute. As such, Petitioner was denied a fair trial as to the RICO counts. A new trial on these counts is therefore required.

crimes committed were “ad hoc” and thus no enterprise was proven (R 2111). Thus, refusing Petitioner’s requested instruction was truly harmful error because of the nature of his defense to the RICO counts.

CONCLUSION

Based upon the foregoing argument, the judgments and sentences imposed should be reversed and a new trial should be ordered as to Count 1 (RICO) and Count 2 (Conspiracy to Commit RICO).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was delivered by U.S. mail to James Carney, Assistant Attorney General, Department of Legal Affairs, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Fl. 33401-2299, this _____ day of June, 1999.

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