ORIGINAL

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.

PETITIONERS INITIAL BRIEF ON THE MERITS ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

Samuel R. Halpern
Attorney for Petitioner Ralph Gross, Jr.
2856 East Oakland Park Blvd.
Fort Lauderdale, Fl. 33306
954-630-1400
Florida Bar No. 444316

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.

Samuel R. Halpern
Attorney at Law
2856 East Oakland Park Blvd.
Ft. Lauderdale, Florida 33306
Florida Bar No.: 444316
(954) 630-1400

Attorney for Petitioner, Ralph Gross, Jr.

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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

STATEMENT OF THE CASE

Petitioner, Ralph Gross, Jr., was charged in a thirty-three count information, along with six other co-defendants, with an assortment of crimes including Racketeering (RICO), Conspiracy to Commit Racketeering (RICO), as well as a number of other offenses, seven of which corresponded with the predicate acts that formed the basis for the RICO count (R 2231-2254).[1]

Petitioner was represented at trial by Eugene Garrett. The judge assigned to the case was the Honorable Barry Goldstein.

The case was originally tried before Judge Goldstein in July of 1996. That trial

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[1] Petitioner was charged with Count 1, Racketeering (RICO); Count 2, Conspiracy to Commit Racketeering (RICO); Count 8, Armed Burglary With a Firearm (victim: Duffy); Count 9, Armed Burglary With a Firearm (victim: Mattos); Count 10, Armed Robbery With a Firearm (victim: Mattos, corresponding to predicate incident D); Count 12, Armed Burglary With a Firearm (victim: Payne); Count 13, Conspiracy to Commit Armed Burglary With a Firearm (victim: Payne); Count 14, Armed Robbery With a Firearm (victim: Payne, corresponding to predicate incident F); Count 18, Armed Burglary With a Firearm (victim: Jones/McPherson); Count 19, Conspiracy to Commit Armed Burglary With a Firearm (victim: Jones/McPherson); Count 20, Armed Robbery With a Firearm (victim: Jones/McPherson, corresponding to predicate incident J); Count 21, Armed Burglary With a Firearm (victim: Duffy); Count 22, Conspiracy to Commit Armed Burglary With a Firearm (victim: Duffy); Count 23, Armed Robbery With a Firearm (victim: Duffy, corresponding to predicate incident K); Count 31, Grand Theft in the Second Degree (victim: Allstate Insurance Company, corresponding to predicate incident Q); Count 32, False and Fraudulent Insurance Claims (victim: Allstate Insurance Company, corresponding to predicate incident R), and Count 33, Conspiracy to Commit False and Fraudulent Insurance Claims (victim: Allstate Insurance Company, corresponding to predicate incident, S) (R 2231-2254).

resulted in a mistrial on July 24,1996 (R 2363-64). The case was then transferred to Judge M. Daniel Futch, Jr. for "the purposes of Trial" (R 2370).

Petitioner timely moved for a directed verdict of acquittal as to Count 1 (RICO), based in large part upon a failure of proof of the "enterprise" element (R 1920). The Court deferred ruling on the Motion for Directed Verdict of Acquittal (R 1932). After the close of all of the evidence, that motion was renewed and denied (R 2059-60).

At the charge conference, Petitioner requested a special instruction defining the "enterprise" element of RICO. Petitioner requested the following:

> I would ask this on Count 1 that you read the definition of racketeering as I set fort [sic] in my Paragraph 1, I read that to you yesterday that in order for there to be racketeering, the State must prove the following elements beyond a reasonable doubt, and they say two but I ask that you add this, that the defendant was employed by, associated with an ongoing, structured, criminal enterprise. Such prove [sic] must show that the criminal enterprise had an identifiable decision making structure and a mechanism for controlling and directing the criminal enterprise on an ongoing rather than an ad hoc basis--and if you want to say for a special purpose that the jury knows what ad hoc means, I even looked it up--that the various employees or associates functioned as a continuous unit, and the criminal enterprise had an existence separate and apart from the pattern of racketeering activity in which the criminal enterprise engaged (R 2064).

This requested instruction was denied at the charge conference (R 2065). After the State's closing, Petitioner renewed this request based on the prosecutor's

misstatement of the law as it pertained to the enterprise element and the State's argument that an enterprise need not be structured (R 2089). For example, the state argued in closing:

> In fact an enterprise doesn't have to be Mafia, no organized crime. It doesn't have to be a [sic] of people. *There is an enterprise if there is one.* Everybody doesn't have to know each other. It just has to be this structure of people with Ralph Gross--I mean, with Chris Forester being the common link connecting different people. We have to prove that Ralph Gross was associated with them (R 2087, emphasis added).

This renewed request for an "enterprise" instruction was denied (R 2089).

The trial concluded with guilty verdicts on all but one count (R 2434-2450). The only count wherein Petitioner was not convicted as charged was Count 32, which resulted in a conviction of the lesser included offense of Attempt to Commit False and Fraudulent Insurance Claims (R 2449).

Sentencing resulted in a (40) forty-year prison term (R 2222;2465). This sentence was the top of the recommended range of the sentencing guidelines (R 2512).

Petitioner's Motion for Arrest of Judgment, Renewed Motion for a Judgment of Acquittal, and Motion for New Trial were denied (R 2204). Petitioner filed a timely Notice of Appeal (R 2513). Appeal was taken to the Fourth District Court of Appeal which resulted in the opinion which is before this Court for review. In that

opinion, the Court certified conflict with the holding in Boyd v. State, 578 So.2d 718 (Fla. 3rd DCA 1991), rev.denied, 581 So.2d 1310 (Fla. 1991). Gross v. State, 24 Fla. L. Weekly D705 (Fla. 4th DCA March 17, 1999).

Petitioner had argued, inter alia, in his appeal to the Fourth District Court of Appeal that the enterprise element of the RICO statute as defined by Boyd had not been proven based on sufficiency of evidence. Consequently, it was argued that the trial court erred in denying Petitioner's Motion for a Directed Verdict as to the RICO count. It was further argued that the trial court reversibly erred in failing to give his requested jury instruction which defined "enterprise" in accord with the holding in Boyd. The Fourth District declined to render a decision as to the sufficiency of evidence issue because of it's holding that the law does not require that the State prove a decision making structure and a mechanism for controlling and directing the group in order to establish an enterprise. Based on this reasoning, the Fourth District held that the trial court did not err in denying Petitioner's requested jury instruction.

A Notice to Invoke Discretionary Jurisdiction was filed on April 6, 1999 which resulted in this Court's order postponing decision on jurisdiction and briefing schedule. This brief is filed in response to that order.

STATEMENT OF THE FACTS

This case involves a series of home invasion robberies committed by an assortment of individuals over the course of approximately a one year period of time. The robbers modus operandi was to dress and act like police officers in order to gain entry to the homes of their intended victims. Two of the defendants were actually "dirty" police officers who decided to commit crimes. In essence, Petitioner's role in the crimes for which he was convicted was to provide information as to the identity and location of some of the victims in exchange for a share of the proceeds of the robberies.

Petitioner had known his co-defendant Christopher Forester since the early 1980's (R 978). There is no evidence that they had ever before committed any crimes together, or that Petitioner even knew most of the other co-defendants named in the information. During the time frames alleged (1993 and 1994), Petitioner lived in Broward County with his two boys, and was divorced from his wife (R 1981-82). Petitioner was employed at the time at a car dealership (R 993).

Forester developed a friendship with his next door neighbor, John Brady in 1990 or 1991 (R 1003;1808). Both lived in Ft. Pierce (R 1808). Brady was employed as a Ft. Pierce Police Detective and his partner was Xavier Evans (R 1789;1805). Ultimately, Brady and Forester cooked up the idea to rob those suspected of drug

offenses (R 1808-09). The plan was that they would target a victim and proceed to rob them at their homes while acting as if they were really carrying out legitimate police activity (R 1810).

Around the early part of September of 1993, Forester and Petitioner discussed robbing a few different people in Broward County (R 992). On September 10, 1993, Forester, Brady, and Evans traveled to Broward in order to commit the home invasion robberies (R 1810).

Once they arrived in Broward, Forester called Petitioner and requested that he meet them (R 1011). Petitioner could not meet them at that exact time because he was busy with his children, and it was arranged that Forester would call Petitioner later on in the evening (R 1011).

Evans and Brady dropped Forester off and went to the home of Cecil Miller so that they could rob him (R 1011;1814). The reason they targeted Miller, according to Forester, was because Petitioner said he did not care for him (R 1012). Evans and Brady went to his home, identified themselves as police officers who had a search warrant for drugs, and they proceeded to take a small quantity of marijuana from the house (R 1815). After the Miller robbery, Evans and Brady picked up Forester (R

1012).[2] A call was then placed to Petitioner where it was arranged for him to meet them at a McDonalds restaurant (R 1013;1815). The reason for Petitioner to meet them was so that he could show them where Mattos, a bookie, lived (R 1014;1817). Petitioner had previously told Forester about Mattos. Petitioner knew Mattos to possess a large amount of cash (R 996).

Evans, Brady and Forester were driving in a police detective car (R 1013). Petitioner arrived at the McDonalds parking lot in his car (R 1013). Once there, Petitioner drove Forester to Mattos' home to show him where it was located (R 1017;1817).[3] After Petitioner showed Forester where Mattos lived, they returned to the McDonalds where Forester joined Evans and Brady in their car (R 1817). They then followed Petitioner back to Mattos' house where Petitioner signaled the house by flashing his break lights (R 1817). Petitioner left without further participation in the robbery (R 1818). Although the plan was to rob Mattos at that time, that robbery had to be delayed because Mattos was not home (R 1818).

From there, Evans, Brady, and Forester drove back to McDonalds where they

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[2] The State nolle prosed Counts 3-5 (which named Miller as a victim) on April 7, 1995 (R 2529).

[3] Evans and Brady stayed behind. It was in the parking lot that Petitioner first *saw* Evans and Brady (R 1806).Petitioner had not been introduced to them at that point, and Brady was annoyed that Petitioner was in a position to even see him (R 1017;1806).

called Petitioner and arranged for him to meet with them again. (R 1018;1819). When he arrived back at the McDonalds, Petitioner led them to the apartment complex of another targeted victim named Duffy (R 1019). Petitioner had previously told Forester that Duffy kept several thousand dollars in a silverware drawer (R 1000). Forester drove with Petitioner to Duffy's apartment where Petitioner pointed out the apartment to him, but Duffy was not home (R 1019). Forester joined Evans and Brady. Petitioner left the scene (R 1019).

Forester went to the rear of Duffy's apartment and discovered that the sliding glass door was open (R 1032). Forester and Evans then went to the upstairs of the apartment and Brady went downstairs (R 1033;1821). Because there was nobody home to rob, their plan changed from robbery to simply breaking in and stealing the money and drugs (R 1820-21). During the time that they were in the apartment, Charles Duffy came home (R 1184;1821). He heard a crash from upstairs and later noted that a window had been broken (R 1185). The window was broken by Forester and Evans who jumped out to escape, while Brady simply walked out the front door (R 1821).

Without Petitioner being present, Evans, Forester and Brady then went back to Mattos's house (R 1036). This time he was home. Evans and Brady went to the door, while Forester stayed in the car (R 1038). They identified themselves as police

officers and Mattos permitted them to come inside (R 1821). Both of them were armed with handguns (R 1821). After a while, Forester entered wearing a police jacket (R 1038). Approximately three thousand dollars and a small amount of marijuana were stolen during the robbery (R 1822).

All of the above activities occurred on September 10, 1993 (R 2231-2254). On November 17, 1993, another robbery took place in which Ron Payne, Sr. and Ron Payne, Jr. were the victims. Ron Payne, Sr. was known by his nick name as Hank Williams, Jr. (R 1064;1523;1529). Forester decided to target Payne because Petitioner had told him that Payne was a cocaine dealer (R 1064). The plan was for Forester and Jamie Hall (another co-defendant in this case) to rob Payne and steal his drugs (R 1065). Petitioner was to show them where Payne lived (R 1065). On the date of the robbery, Forester, Hall and Jamie Deans (another co-defendant who lived in Ft. Pierce), drove to Broward and went to Petitioner's business. They then went to a bar where they met up with some other people, including an individual named Brian Johnson (R 1082). From there, they drove by Payne's house which was pointed out to Forester by Johnson (R 1083).

Prior to the Payne robbery, Petitioner was asked if he would like to participate. Although Petitioner declined, he purchased duct tape for use in restraining the victims during the robbery (R 1076;1085).

Jamie Hall and Forester dressed up in police garb and went up to Payne's door (R 1085). After they forced their way into the home at gunpoint, Forester tied up the occupants of the house with the duct tape, while Hall searched the house (R 1085-86; 1556). Jamie Deans (the driver in this particular robbery) was then invited by Forester to come into the house to help stand guard over the occupants (R 1087). All three were armed with firearms R 1557). During the course of the robbery, Payne, Sr. arrived at his house in his truck with a female friend. They were accosted in the driveway by one of the robbers and were restrained by duct tape (R 1524). An ounce of cocaine, a coin collection (valued at $1,000.00), and jewelry were stolen during this robbery (R 1527-28).

On November 30, 1993, Hall and Forester went to Petitioner's apartment (R 1103). Petitioner told them about a residence in Pompano which contained cocaine and expensive stereos (R 1105). Petitioner then drove them to this house where the victims, Joseph Jones and Heidi McPherson lived (R 1105). While Petitioner stayed in the car, Forester and Hall went to the door dressed as police officers (R 1103;1108). McPherson opened the door, while Jones was in the kitchen cooking (R 1499). She believed them to be police officers (R 1498-99). Forester was armed with a gun and Hall had a stun gun (R 1499). They identified themselves as cops and said that they were looking for stolen stereo equipment (R 1500). The victims were

handcuffed and were told that the handcuff key was outside (R 1501). Forester and Hall then took jewelry and leather coats, as well as about $200.00 (R 1503). Forester testified that some cocaine was taken as well (R 1111). Petitioner received some of the proceeds from this robbery in exchange for his role as a getaway driver (R 1117).

In January of 1994, Petitioner called Forester and asked if he wanted to "try Duffy again" (R 1118). Forester and Hall then traveled from Ft. Pierce and met Petitioner in a restaurant (R 1119). Forester was armed with a pellet gun and Hall had a handgun (R 1121). They drove to the Duffy apartment complex. Forester was in his truck with Hall and Petitioner was in his car (R 1123). Forester and Hall went to the door dressed as police officers and told the occupants that they were undercover agents looking for Steve Duffy. He was not home at the time (R 1124; 1187-88). A search of the apartment revealed either $9,000.00 (per Forester) or $11,000.00 (per Duffy) hidden under a fish tank (R 1124;1189-90). Duffy assumed that they were actually police officers (R 1189). Forester gave Petitioner $3,000.00 from this theft (R 1127).

Another robbery in St. Lucie was committed in March of 1994 by Forester and Brady. Petitioner was not involved in this at all (R 1127-28).

In June of 1994, Petitioner asked Forester if he would help him take a friend's boat with the aim of intentionally sinking it so as to collect money from a bogus

insurance claim (R 1129-30). Forester agreed, and he and his girlfriend took the boat along with Petitioner (R 1134-35). They dropped Petitioner off and proceeded to try to sink it. Due to the boat continuously breaking down, Forester ditched it at a marina without ever sinking the boat as planned (R 1135-36).

Marcia Howard, a claim investigator for Allstate, testified that the owner of the boat and the insured, Anthony Passalacqua, filed a Proof of Loss form with Allstate on August 24, 1994 for $9,815.13 (R 1614-15). This amount was claimed by Passalacqua after the boat had been recovered and represented his loss, not inclusive of the value of the boat itself (R 1617). The boat was insured for $104,500.00 (R 1618). Thus, had the boat not been recovered, Passalacqua would have been able to submit a claim for the full amount (R 1618). The claim was denied by Allstate (R 1616).

SUMMARY OF ARGUMENT

The holding rendered in Boyd v. State, 578 So.2d 718 (Fla. 3d DCA 1991), rev. denied, 581 So.2d 1310 (Fla. 1991) was correctly decided and the Fourth District should have followed it. The definition of the "enterprise" element of the RICO counts requires proof of an ongoing, structured, criminal association with an identifiable decision-making structure which functioned as a continuous unit, as opposed simply a group of people who decided to commit crimes on an ad hoc basis. Further, it must be established that the organization is an entity separate and apart from the pattern of activity in which it engages. This Court should quash the holding in Gross v. State, 24 Fla. L. Weekly D705 (Fla. 4th DCA March 17, 1999) and adopt the enterprise definition enunciated in Boyd.

Petitioner was denied a fair trial on Count 1 (RICO) and Count 2 (Conspiracy to Commit RICO) because the jury was not given a complete and proper definition of the "enterprise" element. Petitioner made a specific request that the jury be provided with the definition of enterprise as set forth in Boyd. His request was denied. The heart of Petitioner's defense to the RICO charge was that the enterprise element was not proven. It was correctly argued by Petitioner that the enterprise element of the RICO and the Conspiracy to Commit RICO count was missing ®

2110-11). To this end, he argued that these crimes were committed by "the gang that couldn't shoot straight" which lacked structure and functioned on an ad hoc basis (R 2110-11). The trial court, however , denied his request that the jury be instructed as to the definition of enterprise as set forth in Boyd (R 2064-65;2089). Failure to properly instruct the jury as to this element denied Petitioner due process which mandates reversal on Count 1 (RICO) and Count 2 (Conspiracy to Commit RICO).

FIRST 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.

"Enterprise" is defined in Section 894.02 (3), Fla. Stat.(1993) as follows:

> "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities.

This definition, indeed the entire RICO statute in Florida, is patterned upon the federal RICO statute. Title 18 U.S.C. Section 1962 (c). As such, Florida courts have looked to Federal interpretations of this statute. Boyd.

An essential element of the RICO statute is that the accused must be associated with an enterprise. Fla. Stat. 895.02 (3). It must also be proven that there exists an ongoing organization where members function as a continuing unit as shown by a decision-making structure. Manax v. McNamara, 842 F.2d 808 (5th Cir. 1988). The group must have a decision-making structure and a mechanism for controlling and directing the group on an ongoing, rather than on an ad hoc, basis. 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).

In order to establish the existence of an enterprise, the prosecution must show more than merely an association of criminals. Boyd v. State, 578 So.2d 718 (Fla. 3d DCA 1991), rev. denied, 581 So.2d 1310 (Fla. 1991). Rather, the prosecution must prove the enterprise element by proof that there exists "an ongoing organization, formal or informal, and by evidence that the various associates function as a continuous unit." United States v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed. 2d 246 (1981). The enterprise must be separate and apart from the pattern of racketeering activity from which the enterprise engages. Brown v. State, 652 So.2d 877 (Fla. 5th DCA 1995); Turkette, at 583. The logic of requiring that the enterprise exists separate and apart from the pattern of racketeering activity which the enterprise engages was set forth in 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) when it was stated:

> The word "enterprise" ordinarily means an undertaking or project or a unit of organization established to perform any such undertaking or project. However, under RICO, an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts. Any two criminal acts will necessarily be surrounded by some degree of organization and no two individuals will ever jointly perpetrate a crime without some degree of association apart from the commission of the crime itself. Thus unless the inclusion of 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, the Act

> simply punishes the commission of two of the specified crimes within a 10-year period. Congress clearly did not intend such an application of the Act.

Bledsoe, at 664.

It is proposed by the Fourth District that Florida law no longer requires the prosecution to prove a decision making structure and a mechanism for controlling and directing the group in order to establish the existence of an enterprise. Gross v. State, 24 Fla. L. Weekly D705 (Fla. 4th DCA March 17, 1999), citing with approval, United States v. Cagnina, 697 F. 2d 915 (11th Cir. 1983). To adopt such a holding would undermine the intent of the RICO statute (combating *organized* groups of people who commit crime).[4] If this requirement is eliminated, the court would in essence send a message that the enterprise element can always be proven, without more, simply by establishing the pattern of racketeering activity. In other words, per se

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[4] The intent of Congress in passing the RICO statute in the first instance was to prevent "organized crime" from infiltrating legitimate businesses. Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed 2d 17 (1983). It is clear, however, that the statute reaches wholly criminal organizations. Turkette, at 583. The federal RICO statute was enacted in order to eradicate organized crime by "strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Riccobene, at 220, quoting Pub.L. No. 91-452, 84 Stat. 922, 923 (1970). The statute was never intended for use in punishing criminals who together commit sporadic acts of violence. Boyd, at 720. See also, United States v. Elliott, 571 F.2d 880, 899 (5th Cir. 1978), cert. denied, 493 U.S. 95, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978) (the target of the RICO statute is not 'sporadic activity').

proof of enterprise could be established by presenting evidence of the predicate crimes, with nothing more.

Although it is true that proof of "enterprise" and "pattern of racketeering activity" may overlap, the supreme court has made it clear that "'enterprise' is not a 'pattern of racketeering activity' but is an entity separate and apart from the pattern of activity in which it engages" and both pattern and enterprise must be proven. Turkette, at 577. See also, Cagnina, at 921 ("Although both enterprise and a pattern of racketeering activity must be shown, the Court noted that the proof used to establish the two elements may in particular cases coalesce"). If the state is permitted to prove RICO simply by proof that there were two or more specified predicate crimes committed together by two or more people, the danger alluded to in Boyd and Bledsoe would become a reality. Virtually any co-defendant case would be elevated to the status of a RICO prosecution at the whim of the prosecutor, without the necessity for the proof of a heighten organizational structure which was clearly contemplated by Congress. This would not be sound public policy and would be inconsistent with the intent underlying the RICO statute.

The Cagnina opinion upon which the Gross court relies heavily on is premised on the holding in United States v. Elliot, 571 F.2d 880 (5th Cir. 1978), cert. denied, 493 U.S. 953, 99 S.Ct. 349, 58 L.Ed. 2d 344 (1973). A careful reading of Elliot

suggests that the court does not read the RICO statute so broadly as to apply it to ad hoc or sporadic crimes.[5] The facts in Elliot demonstrated a highly organized and structured, albeit diversified, criminal enterprise. The Elliot court recognized the need for the government to prove some degree of structure in order to establish the enterprise element when it stated "[T]here is no distinction, for 'enterprise' purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba-like infra-structure that *controls* a secret criminal network." Elliot, at 898, emphasis added. The key is that some degree of *control* of the criminal network must be established in order to prove that an enterprise exists. The criminal organization in Elliot was even analogized to the organization which would be expected to exist in a legitimate business.[6] The overwhelming intent behind the RICO statute was "to seek the eradication of organized crime." Elliot, at 899, citing Pub.L.91-452, Section 1, 84 Stat. 922 (1970). Thus, the Boyd requirement that there exist an identifiable decision making structure and mechanism for controlling and directing the criminal

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[5] "Additionally, although the target of the RICO statute is not 'sporadic activity' we find nothing in the Act excluding from its ambit an enterprise engaged in diversified activity". Elliot, at 899.

[6] "This enterprise can best be analogized to a large business conglomerate. Metaphorically speaking, J.C. Hawkins was the chairman of the board, functioning as the chief executive officer and overseeing the operations of many separate branches of the corporation." Elliot, at 898.

enterprise can find support in the legislative intent behind the RICO statute. After all, the intent of the statute was to go after "organized" crime. See, Bledsoe, at 663 (each element of RICO act was designed to limit the applicability of the statute and to separate individuals engaged in organized crime from ordinary criminals); United States v. Anderson, 626 F..2d 1358 (8th Cir. 1980), cert. denied, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981) (enterprise element requires proof of an ascertainable structure); Riccobene, at 222-224 (to prove enterprise, the prosecution must establish some mechanism for controlling and directing the affairs of the group on an ongoing, rather than an ad hoc, basis; that each person performs a role in the group consistent with the organizational structure established which furthers the activities of the organization, and that the enterprise or organization has some existence beyond that which is necessary to merely commit the predicate acts).

The above holdings that the enterprise element requires proof of an ascertainable structure are at odds with the holdings in several other federal circuits. See, United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), cert.denied, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980) (RICO not restricted to organized crime, so long as the statutory conditions of RICO are met, in this case, commission of three home invasions). The holding in Aleman, does not squarely address the issue as to whether enterprise requires an ascertainable structure. Indeed, the Aleman Court

analogized the activities of the participants of the home invasion robberies with a "small business" implying some degree of identifiable structure with a decision making and control mechanism was required in order to establish the enterprise element. Aleman, at 305. It is clear, however, that the Eleventh Circuit has held that there need not be an ascertainable structure distinct from the conduct necessary to conduct a pattern of racketeering activity. Cagnina, at 921.

Without the judicial check on RICO prosecutions requiring proof of an ascertainable structure as an element of enterprise as enunciated in Riccobene, Anderson, Bledsoe, and Boyd, absurd results never intended by the legislature are sure to follow. As previously indicated, if the holding in Boyd is overruled, the prosecution will be free to utilize the enhanced punishments of the RICO statute to arbitrarily punish a wide array of criminal conduct never envisioned by the legislature. For example, RICO could be applied to prosecute a pair of hoodlums who, on the spur of the moment, decide to steal a couple of cars. It could be used to prosecute a pair of school bullies who assault their peers on a lark without giving the matter a second thought. According to the holding in Gross, since no decision making structure and mechanism for controlling the group are required, the enterprise element in these examples would be established by proof of the predicate crimes themselves, even though there would be no proof that the "group" was structured

even minimally. Innumerable absurd prosecutions, never intended by the legislature could be judicially sanctioned if the enterprise element is weakened to the extent suggested in Gross.

The definition of enterprise set fourth in Boyd which requires proof of an identifiable decision making structure and a mechanism for controlling and directing the criminal enterprise on an ongoing, rather than an as hoc basis, should be adopted and the holding in Gross should be quashed.

SECOND POINT ON APPEAL

PETITIONER DID NOT RECEIVE A FAIR TRIAL ON COUNT 1 (RICO) OR COUNT 2 (CONSPIRACY TO COMMIT RICO) BECAUSE THE COURT DID NOT PROPERLY INSTRUCT THE JURY AS TO THE DEFINITION OF THE "ENTERPRISE" ELEMENT OF THE FLORIDA RICO STATUTE AS REQUESTED.

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; the enterprise element was accordingly not established (R 937; 2110-11). Petitioner argued that the crimes committed were "ad hoc" and no enterprise was proven (R 2111).

At the charge conference, Petitioner requested a special instruction defining the "enterprise" element of RICO. Petitioner requested a jury instruction which paralleled the language found in Boyd , as follows:

> I would ask this on Count 1 that you read the definition of racketeering as I set fort [sic] in my Paragraph 1, I read that to you yesterday that in order for there to be racketeering, the State must prove the following elements beyond a reasonable doubt, and they say two but I ask that you add this, that the defendant was employed by, associated with an ongoing, structured, criminal enterprise. Such prove [sic] must show that the criminal enterprise had an identifiable decision making structure and

> a mechanism for controlling and directing the criminal enterprise on an ongoing rather than an ad hoc basis--and if you want to say for a special purpose that the jury knows what ad hoc means, I even looked it up--that the various employees or associates functioned as a continuous unit, and the criminal enterprise had an existence separate and apart from the pattern of racketeering activity in which the criminal enterprise engaged (R 2064).

This request was denied (R 2065). Rather, the instruction which was submitted to the jury defining enterprise, tracked the standard instruction and read as follows:

> 'Enterprise' means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of Florida, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity, and includes lawful as well as unlawful enterprises and governmental as well as other entities (R 2386).

One of the most contentious issues at trial regarding the RICO counts was whether this group of criminals amounted to an "enterprise." Although Petitioner was permitted to argue that the evidence presented was not sufficient to prove an enterprise (because the group was unstructured and that the crimes committed were done on an ad hoc basis), the jury was never properly instructed by the trial court on this matter. It is the duty of the trial court to properly instruct the jury so that it will be able to base it's verdict on an accurate statement of the law as applied to the evidence before them. State v. Bryan, 287 So. 2d 73 (Fla. 1973), cert. denied, 417

U.S. 912, 94 S.Ct. 2611, 41 L. Ed. 2d 316 (1974).

As indicated in Point 1, in order to establish the existence of an enterprise, the State must prove that there is an ongoing organization, formal or informal, with various associates who function as a unit, and that the group has an identifiable decision making structure and a mechanism for controlling and directing the group as a whole. State v. Russell, 611 So.2d 1265 (Fla. 2d DCA 1992); Boyd, supra. It is clear that RICO was not designed to target sporadic criminal acts. Elliott, at 899. Petitioner correctly pointed out to the trial court that the standard instruction did not completely and accurately appraise the jury regarding this element and requested the court read an instruction on this point which was patterned after the language in Boyd. Clearly, because the jury was being asked to determine from the facts whether an enterprise existed, Petitioner had an absolute right to have the fact-finder know what the correct law was. In this case, they were kept in the dark, notwithstanding Petitioner's specific request that the jury be told what an enterprise is according to the law (R 2464). The prosecution took full advantage of the court's refusal to grant Petitioner's requested instruction when, in closing argument, they completely mis-stated the law as it applies to the enterprise element. The prosecutor essentially told the jury that an enterprise could exist with only one person, and if Petitioner was associated with Forester (the "common link"), that the enterprise element had been

proven [7] (R 2087).

Based on the prosecutor's improper closing argument, which misstated the definition of the enterprise element, Petitioner renewed his requested instruction (R 2089). The trial court again denied the requested instruction (R 2089). The law is crystal clear that the enterprise element as defined by Boyd and Riccobene is substantially more involved than what appears in the Standard Jury Instructions which were given to the jury. The instructions given by the trial court as to Count 1 (RICO) and Count 2 (Conspiracy to Commit RICO) did not therefore adequately instruct on the essential element of enterprise, and was silent as to most of the critical features of that element (R 2386;2394-95).[8] Because the jury was not properly instructed on this disputed and material element, Petitioner was denied a fair trial on the RICO and Conspiracy to Commit RICO counts. Shimek v. State, 610 So.2d 632 (Fla.1st DCA 1992), rev.denied, 621 So.2d 1066 (Fla. 5th DCA 1993), U.S. cert. denied, 570 U.S. 921,114 S.Ct. 320, 126 L.Ed.2d 266 (1993) (failure to instruct as

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[7] "In fact an enterprise doesn't have to be Mafia, no organized crime. It doesn't have to be a [sic] of people. *There is an enterprise if there is* one. Everybody doesn't have to know each other. It just has to be this structure of people with Ralph Gross--I mean, with Chris Forester being the common link connecting different people. We have to prove that Ralph Gross was associated with them." (R 2087, emphasis added).

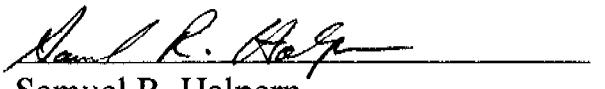
[8] The jury instruction on Count 2, Conspiracy to Commit RICO defined "enterprise" exactly the same as it was defined in Count 1 (R 2395).

to continuity element of RICO charge reversible error, where this point was in dispute and accused specially requested a continuity instruction). Petitioner's convictions and sentences on Count's 1 and 2 should be reversed for a new trial.

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,



Samuel R. Halpern
Attorney at Law
2856 East Oakland Park Blvd.
Ft. Lauderdale, Florida 33306
Florida Bar No.: 444316
(954) 630-1400

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 7th day of May, 1999.

Samuel R. Halpern
Attorney at Law
2856 East Oakland Park Blvd.
Ft. Lauderdale, Florida 33306
Florida Bar No.: 444316
(954) 630-1400
Attorney for Petitioner, Ralph Gross, Jr.

SAMUEL R. HALPERN, P.A.
ATTORNEY AT LAW

2856 EAST OAKLAND PARK BOULEVARD
FORT LAUDERDALE, FLORIDA 33306

TELEPHONE (954) 630-1400
FACSIMILE (954) 565-8454

May 7, 1999

Sid White
Clerk of the Supreme Court
Supreme Court of Florida
500 South Duval Street
Tallahassee, Fl. 32399-1925

Re.: Ralph Gross, Jr., v. State of Florida, case number 95,302

Dear Mr. White,

Please find the enclosed original and seven copies of the Petitioner's Brief on the Merits on Discretionary Review form the Fourth District Court of Appeal filed in the above referenced case. Additionally, in a separately marked envelope, you will find a 3 ½ inch floppy disc with my brief formatted in Word Perfect (8.0). This disc has been scanned for computer viruses.

I have also enclosed a copy of the order dated September 30, 1996 which declared the Petitioner indigent for the purposes of his appeal. This will explain why I have not enclosed the filing fee which ordinarily would be required.

Yours very truly,

Samuel R. Halpern
Attorney for Petitioner, Ralph Gross, Jr.

Enclosures