

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

v.

JORDAN BEVERLY

Defendant-Appellee.

Case No. 2013-0827

On Appeal from the Clark County
Court of Appeals, Second
Appellate District

Court of Appeals Case No. 11-CA-
0064

**BRIEF OF AMICUS CURIAE,
THE CUYAHOGA COUNTY PROSECUTOR'S OFFICE**

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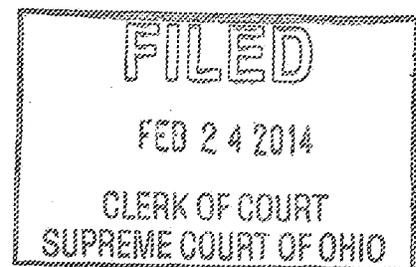
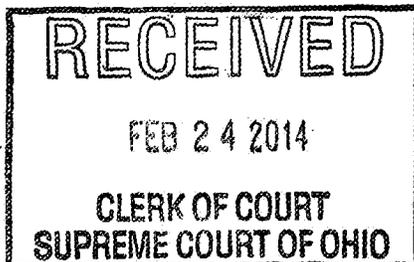


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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

The thirty-four judges of the Cuyahoga County Court of Common Pleas preside over an extremely large number of criminal trials each year. A significant number of those cases involve the application of Ohio's version of the RICO statute, known as Engaging in a Pattern of Corrupt Activity. Because of the large volume of criminal cases litigated by the Cuyahoga County Prosecutor's Office that involve that statute, the citizens of Cuyahoga County have a compelling interest in the uniform application of a settled and commonly understood legal standard governing what the State must show to prove the existence of a criminal enterprise.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae the Cuyahoga County Prosecutor's Office hereby adopts and incorporates by reference the Statement of the Case and Statement of Facts as set forth by the Appellant, the State of Ohio, in its merit brief.

LAW AND ARGUMENT

PROPOSITION OF LAW: IN ORDER TO PROVE THE EXISTENCE OF AN 'ENTERPRISE' TO SUSTAIN A CONVICTION FOR ENGAGING IN A PATTERN OF CORRUPT ACTIVITY IN VIOLATION OF R.C. 2923.32, THE STATE IS NOT REQUIRED TO PROVE THAT THE ORGANIZATION IS A STRUCTURE SEPARATE AND DISTINCT FROM THE PATTERN OF ACTIVITY IN WHICH IT ENGAGES.

The issue in this case is whether, in establishing the existence of the "enterprise" element in Ohio's Engaging in a Pattern of Corrupt Activity statute, the State is required to prove that the enterprise had an existence separate and distinct from the pattern of corrupt activity in which it engaged. Such a requirement is not found in Ohio's statutory definition of an "enterprise" in R.C. 2923.31(C) and it does not come from any decision by this Court. Instead, the Second District misconstrued federal law in this case to hold that an

association of two defendants acting in concert in a car theft ring to commit repeated instances of burglary and theft and then to re-sell the items stolen is not constitute an “enterprise” under Ohio law. “[T]here is no evidence in the record that Beverly and Imber were involved in any type of ongoing organization, functioning as a continuing unit, with a structure separate and apart from the pattern of corrupt activity.” *State v. Beverly*, 2d Dist. No. 2011 CA 64, 2013-Ohio-1365, at ¶ 31.

Amicus Curiae the Cuyahoga County Prosecutor’s Office submits that the Ohio Revised Code does not limit its definition of “enterprise” to only those entities that have an existence separate and apart from the pattern of corrupt activity in which they engage. R.C. 2923.31(C) defines an “enterprise” as follows:

“‘Enterprise’ includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. ‘Enterprise’ includes illicit as well as licit enterprises.”

The language of the statute does not contain any requirement that the enterprise have an existence distinct from the pattern of corrupt activity defined in R.C. 2923.31(E). Five Ohio appellate courts have recognized that Ohio law does not impose any such requirement:

District	Citation	Holding
Third	<i>State v. Weiss</i> , 3d Dist. No. 14-03-24, 2004-Ohio-1948, at ¶ 28.	“Ohio courts have differentiated the federal and Ohio RICO statutes both in their definitions of an “enterprise” and what is required to prove a pattern of conduct. Federal courts have held that an enterprise “is not a ‘pattern of racketeering activity,’ but must be ‘an entity separate and apart from the pattern of activity in which it engages.’” The Ohio Supreme Court has stated that in order to prove the level of association necessary to support an R.C. 2923.32(A)(1) conviction, the State must “prove that each defendant was <i>voluntarily connected</i>

		to the pattern [of corrupt activity comprising the enterprise], and performed two or more acts in furtherance of it.” (citations omitted).
Fifth	<i>CSAHA/UHHS-Canton, Inc. v. Aultman Health Found.</i> , 5th Dist. 2010CA00303, 2012-Ohio-897, at ¶ 67.	“This Court stated in <i>State v. Yates</i> , 5th Dist. No.2009CA0059, 2009-Ohio-6622, a POCA [Ohio Corrupt Practices Act] enterprise requires an ongoing organization with associates that function as a continuing unit. It is not required an ‘enterprise’ have an existence separate and apart from the underlying corrupt activity.”
Ninth	<i>State v. Wilson</i> , 113 Ohio App.3d 737, 742, 682 N.E.2d 5 (9th Dist.1996).	“Ohio courts, unlike their federal counterparts, have not defined ‘enterprise’ in such a way that a defendant may be convicted of those offenses only if he or she was associated with an ‘enterprise’ that had an existence separate and apart from the corrupt activity.”
Eleventh	<i>State v. Elersic</i> , 11th Dist. Nos. 2000-L-062, 2000-L-164, 2001-Ohio-8787, at *5, fn. 5.	“Ohio has not adopted the federal approach which requires that the enterprise have an existence separate from the pattern of corrupt activity.”
Twelfth	<i>State v. Baker</i> , 12th Dist. No. CA2011-08-088, 2012-Ohio-887, at ¶ 12.	“Therefore, this court has expressly rejected the notion that the state must prove that the enterprise is an entity separate and apart from the pattern of activity in which it engages.”

Amicus Curiae asks this Court to adopt this approach.

Amicus Curiae further submits that the decision of the Supreme Court of the United States in *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009) established that the federal RICO statute does not require the prosecution to prove that the enterprise had any ascertainable structure beyond that inherent in the pattern of corrupt activity in which it engaged. Under *Boyle*, the existence of the enterprise and the pattern of corrupt activity are separate *elements* of the offense, but they do not require separate *proof*. In reversing this case, the Second District confused the requirement that the State plead and prove the existence of the “enterprise” (defined in R.C. 2923.31(C)) as a separate element from the “pattern of corrupt activity” (defined in R.C. 2923.31(E)) with an artificial

requirement that the State somehow provide additional evidence that the enterprise had a separate existence from that pattern of corrupt activity. The Second District misapplied both State and federal law in this case to dramatically reduce the State's ability to prosecute associations of criminals acting in concert for a common purpose under Ohio's RICO statute.

Amicus Curiae therefore asks this Court to reverse the Second District's decision and hold that to sustain a conviction for Engaging in a Pattern of Corrupt Activity, the State is not required to prove that the enterprise has any structure separate and distinct from the pattern of corrupt activity in which it engaged.

1. Under *Boyle v. United States*, an Association-in-Fact Enterprise is Not Required to Have an Ascertainable Structure Beyond That Inherent in the Pattern of Corrupt Activity in Which It Engages.

Amicus Curiae submits that under *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009), the prosecution is not required to put on any evidence to show the existence of an enterprise separate and apart from the pattern of corrupt activity in which it engages. In *Boyle*, the Supreme Court granted certiorari to answer the following question: "whether an association-in-fact enterprise must have 'an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.'" *Id.*, at 945. The Court held that there was "no basis in the language of RICO for the structural requirements that petitioner asks us to recognize." *Id.*, at 948. Rather, the prosecution may satisfy its burden of proof as to the "enterprise" element through the same evidence that shows that persons associated with the enterprise engaged in a pattern of corrupt activity. *Id.*, at 947.

In this case, the Second District relied upon the three-part test from *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.E.2d 246 (1981) for the definition of an enterprise: “there must be some evidence of: (1) an ongoing organization, formal or informal; (2) with associates that function as a continuing unit; and (3) with a structure separate and apart, or distinct, from the pattern of corrupt activity.” *Beverly*, at ¶ 26, citing *Turkette*. This three-part test “has been essentially overruled by the United States Supreme Court in *Boyle*[,]” which “streamlined the definition for enterprise * * *.” *State v. Baker*, 12th Dist. No. CA2011-08-088, 2012-Ohio-887, at ¶ 10. In reversing, the Second District did not consider the new definition of an “association-in-fact” enterprise from *Boyle* and continued to apply the outdated definition from *Turkette*.

Boyle requires an “association-in-fact” enterprise to have three structural features: (1) “a purpose,” (2) “relationships among those associated with the enterprise,” and (3) “longevity sufficient to permit these associates to pursue the enterprise’s purpose.” *Boyle*, at 946. “The definition provided by the court in *Boyle* is more in harmony with Ohio’s version of the federal RICO statute, and eliminates the third factor * * *” from *Turkette*. *Baker*, at ¶ 11. In discussing these structural requirements, the Supreme Court was extremely broad in its description of what may constitute an “association-in-fact” enterprise:

“[A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a ‘chain of command’; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates

engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

Id., at 948.

All three required structural features are present in this case. Beverly and his co-defendant Branden Imber shared a common purpose to mutually profit by obtaining stolen property through repeated instances of burglary and theft and then re-selling the stolen items. *Beverly*, at ¶ 31. The Second District held that, "Beverly and Imber were acting in concert when they engaged in the crime spree leading to these charges." *Id.* And their association lasted for approximately a three-month period from October 31, 2010 through January 28, 2011. This is a sufficient period of time to establish that Beverly and Imber associated together and committed a series of criminal acts for the common purpose of the criminal enterprise. The facts of this case satisfy all three structural requirements of *Boyle*. Nothing further is required to show the existence of an enterprise.

The Second District's opinion in this case never acknowledged that the enterprise in this case was an "association-in-fact" enterprise and did not apply the definition for such an enterprise from *Boyle*. The court's emphasis on the "disorganized and chaotic" nature of Beverly and Imber's activities to show that "there is no evidence in the record that Beverly and Imber were involved in any type of ongoing organization" reflects a fundamental misunderstanding of what constitutes an association-in-fact enterprise. *Beverly*, at ¶ 31. Disorganized and chaotic enterprises may be well-within the scope of Ohio's definition of

an “enterprise” provided that they meet the three-part test from *Boyle*. If “a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute’s reach,” then these Defendants do as well. *Boyle*, at 948.

2. Proof of a Pattern of Corrupt Activity May by Itself Be Sufficient to Permit the Jury to Infer the Existence of an Association-in-Fact Enterprise.

Boyle further clarified that although the federal RICO statute treats the “enterprise” and “pattern of racketeering activity” requirements as separate elements, it does not require separate proof of each element. The Supreme Court first held that “the existence of an enterprise is a separate element that must be proved * * *.” *Id.*, at 947. “[P]roof of one does not necessarily establish the other.” *Id.*, quoting *U.S. v. Turkette*, 452 U.S. at 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). Ohio law likewise treats the “enterprise” and “pattern of corrupt activity” findings as separate elements of the offense. See 2 OJI-CR 523.32(A)(1) (listing each in different subsections).

The fact that the “enterprise” and the “pattern of corrupt activity” are separate elements, however, does not mean that the prosecution must prove the existence of an enterprise through evidence separate and distinct from the evidence that establishes the corrupt activity. “[A] pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an association-in-fact enterprise.” *Boyle*, at 951. See also *Turkette*, at 583 (noting that “the proof used to establish these separate elements may in particular cases coalesce”). The Supreme Court in *Boyle* thus approved the district court’s instruction that the jury could “find an enterprise where an association of individuals, without structural hierarchy, forms *solely* for the purpose of carrying out a pattern of racketeering acts.” *Boyle* at 942, n. 1 (emphasis added).

The Second District misconstrued the holding of *Boyle* by requiring the State to produce separate evidence of a level of organization or structure to Beverly and Imber's criminal activities as a prerequisite to proving the existence of an enterprise. No such evidence is required. Under *Boyle*, the jury can infer the existence of the enterprise solely through finding a pattern of corrupt activity that gives rise to an inference that its members shared (1) a common purpose, (2) some sort of relationships between the members, and (3) sufficient longevity to pursue the enterprise's purpose. *Boyle*, at 946. Thus, "although 'enterprise' and 'pattern of racketeering activity' are separate elements, they may be proved by the same evidence." *Hofstetter v. Fletcher*, 905 F.2d 897, 903 (6th Cir.1988). By requiring the State to prove that the enterprise had an existence separate and distinct from the pattern of corrupt activity, the Second District converted a legal distinction between two elements of an offense into a factual issue requiring proof of entirely new and unrelated conduct.

3. Because Ohio's RICO Statute is Broader than the Federal RICO Statute, the State is Not Required to Prove a Distinctness Element That Does Not Exist Under Federal Law.

Ohio's statute for Engaging in a Pattern of Corrupt Activity is broader and more inclusive than the federal statute. "Ohio's statute is substantially broader than the federal law * * *." *State v. Nasrallah*, 139 Ohio App.3d 722, 725, 745 N.E.2d 511 (6th Dist.2000), at fn. 1. In *State v. Schlosser*, 79 Ohio St.3d 329, 332, 1998-Ohio-716, 681 N.E.2d 911, this Court discussed the history of Ohio's RICO statute and noted that the legislative intent behind the statute was to impose "cumulative liability for the criminal enterprise." *Id.*, at 335. The General Assembly intended for Ohio's Engaging in a Pattern of Corrupt Activity statute to encompass even more criminal activity than the federal version. See *Schlosser*, at

333 (“Senator Eugene Watts, the statute’s Senate sponsor, described the Ohio RICO Act as ‘the toughest and most comprehensive [RICO] Act in the nation’ and ‘state-of-the-art legislation’”).

In light of the General Assembly’s intent to make Ohio’s RICO statute even tougher than the federal RICO statute, this Court should reject the Second District’s approach, which would limit those groups of criminals that could be charged as a criminal enterprise under R.C. 2923.32 beyond even what federal courts require. See *Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 793-94 (6th Cir. 2012) (reversing dismissal of RICO claim for failure to plead enterprise distinct from pattern of corrupt activity); *U.S. v. Perholtz*, 842 F.2d 343, 363 (D.C.Cir.1988) (“We therefore follow those courts that have held that the government satisfies its burden if it proves the existence of the enterprise and of the pattern, and refuse to require the government to prove each by separate evidence”); *U.S. v. Bagaric*, 706 F.2d 42, 55 (2d Cir.1983) (“We have upheld application of RICO to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering acts”).

4. Requiring an Enterprise to Have an Existence Separate and Distinct from the Pattern of Corrupt Activity Would Negate the Legislative Purpose of Ohio’s RICO Statute.

This Court should also decline to adopt the Second District’s approach because limiting the definition of “enterprise” to only those entities that an existence distinct from the pattern of corrupt activity is contrary to the legislative purpose the General Assembly manifested in enacting Ohio’s RICO statute. Such a requirement would have the counter-productive effect of punishing defendants who engage in diverse forms of low-level criminal activity more severely than high-level offenders who commit only one type of

predicate act. “[A] large scale underworld operation which engaged solely in trafficking of heroin would not be subject to RICO's enhanced sanctions, whereas small-time criminals jointly engaged in infrequent sale of contraband drugs and illegal handguns arguably could be prosecuted under RICO.” *U.S. v. Mazzei*, 700 F.2d 85, 89 (2d Cir.1983). The large-scale heroin operation in this example has no existence separate and apart from the pattern of corrupt activity in which it engages and therefore could not be prosecuted as an “enterprise” under RICO. It exists for no purpose other than to sell heroin and its members have no association with one another but for those predicate acts.

The purpose of the Engaging in a Pattern of Corrupt Activity statute is to provide “enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.” *Schlosser*, at 332, quoting the Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, reprinted in 1970 U.S. Code Cong. & Adm. News at 1073. This Court should not sanction a result that could, in some cases, turn the purpose of the RICO statute on its head by making the definition of “enterprise” dependent upon whether the defendant diversified his interests.

Under the Second District’s decision, Beverly cannot be convicted of Engaging in a Pattern of Corrupt Activity unless – in addition to the aggregation of all predicate instances of corrupt activity – the enterprise also engaged in some other activity unrelated to the predicate acts. This requirement is especially onerous here where Beverly’s criminal enterprise engaged in different kinds of criminal behavior: burglarizing homes, motor vehicle theft, engaging in police pursuits, and stealing firearms. But the Second District aggregated each predicate act into a single “crime spree” and found that the enterprise had no existence distinct from that spree. *Beverly*, at ¶ 31. This is not what the statute requires

and would create a perverse outcome whereby an association of criminals who have no purpose other than to engage in a variety of different types of corrupt activity is treated more favorably than an otherwise lawful association that performs some criminal activity.

5. The Existence of a Pattern of Corrupt Activity Reasonably Permits a Jury To Infer the Existence of a Criminal Enterprise.

The Second District's approach is also impractical and places an unrealistic burden on prosecutors. The best, and often only, evidence proving the existence of an enterprise is often the pattern of corrupt activity itself. In joining together to commit their predicate acts, criminals rarely take notes delineating the roles of each defendant in the enterprise and defining the contours of their association. Moreover, the individual members of the enterprise – such as drug dealers or car thieves – often have no association with one another outside of their criminal activity and join together solely for that reason. “[A] group of individuals may join together, and therefore be ‘associated in fact,’ although not a legally cognizable entity in one of the traditional forms, solely for the purpose of conducting their activities.” *Bagaric*, at 56 (citations omitted). This Court should not presume that the General Assembly crafted Ohio's RICO statute to be the “toughest * * * in the nation” but tied the State's hands by including a requirement that the State prove an additional element that will rarely ever exist. *Schlosser*, at 333.

In the vast majority of cases, it is reasonable for the jury to infer the existence of the enterprise through the pattern of criminal activity itself, even without independent evidence of the enterprise having a distinct nature. “[I]t is logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure.”

Bagaric, at 56 (emphasis in original). Beverly and Imber's conduct of repeatedly breaking into houses, stealing cars, and re-selling their stolen property, creates a reasonable inference of an ongoing association between the two of them to plan these acts. "The network or enterprise need not be explicit as long as its existence can plausibly be inferred from the interdependence of activities and persons involved." *State v. Hill*, 5th Dist. No. CA-8094, 1990 WL 237485, at *3. Where the State indicts the defendants as an "association-in-fact" enterprise, sufficient evidence exists to support a finding of an enterprise where the State satisfies the three-part test from *Boyle*. No further evidence of structure is required.

6. Ohio's RICO Statute Was Intended to Reach

Finally, in considering the impact of Ohio's RICO statute under the facts of this case, this Court should construe the scope of that statute liberally. "The *Boyle* court stated that the RICO statute should be 'liberally construed' to effectuate its remedial purposes." *State v. Baker*, 12th Dist. No. CA2011-08-088, 2012-Ohio-887, at ¶ 45, fn. 3. The scope of a RICO statute is not limited to traditional forms of organized criminal associations. See *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 243-244, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) ("[continuous] associations include, but extend well beyond, those traditionally grouped under the phrase 'organized crime.' * * * [T]he argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text and is at odds with the tenor of its legislative history").

This Court should therefore reject any interpretation of R.C. 2923.31 et seq. that limits Ohio's definition of "enterprise" to structured criminal organizations. "We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008). The General Assembly intended for Ohio's RICO statute to encompass broad forms of criminal associations. A requirement that limits the definition of "enterprise" to only those entities with an independent structure unrelated to the predicate acts is inconsistent with the General Assembly's sweeping approach. By relying on a misapplication of the three-part test from *Turkette*, the Second District erred by relying on a preconceived notion that organized crime involves only structured entities. The Supreme Court resolved this issue in *Boyle* when it laid that outdated understanding of a criminal enterprise to rest. Amicus Curiae asks this Court to follow *Boyle's* approach and end the confusion among Ohio's appellate courts.

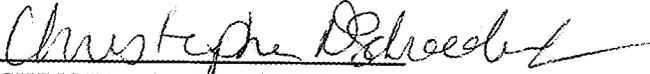
CONCLUSION

Amicus Curiae the Cuyahoga County Prosecutor's Office respectfully submits that the Second District incorrectly applied the definition of an "association-in-fact" enterprise from *Boyle v. United States*. The Second District's opinion artificially limits the number of criminal enterprises that may be charged with Engaging in a Pattern of Corrupt Activity by requiring evidence of a formal organization or hierarchy that is not present in the statute and that the Supreme Court disavowed in *Boyle*. Amicus Curiae therefore requests that this Honorable Court reverse the Second District's decision and hold that to sustain a conviction for Engaging in a Pattern of Corrupt Activity, the State is not required to prove that the

enterprise has any structure separate and distinct from the pattern of corrupt activity in which it engaged.

Respectfully submitted,

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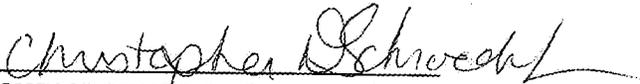
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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amicus Curiae the Cuyahoga County Prosecutor's Office was sent by regular U.S. mail this 21ST day of February, 2014 to Marshall Lachman, 75 North Pioneer Boulevard, Springboro, Ohio 45066, counsel for Defendant-Appellee Jordan Beverly.


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