No. 07-1309

In the Supreme Court of the United States

EDMUND BOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in order to establish the existence of an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, the government must prove the existence of an entity with an ascertainable structure apart from the pattern of racketeering activity in which it engages.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not reported but is available at 2007 WL 4102738.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2007. On February 6, 2008, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 17, 2008, and the petition was filed on April 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(c); conspiracy to commit racketeering, in

violation of 18 U.S.C. 1962(d); conspiracy to commit bank burglary, in violation of 18 U.S.C. 371; and eight counts of bank burglary or attempted bank burglary, in violation of 18 U.S.C. 2113(a). He was sentenced to 151 months of imprisonment. The court of appeals affirmed his conviction, but vacated his sentence and remanded for resentencing. Pet. App. 1a-4a; Gov't C.A. Br. 1-2.

1. Petitioner was one of a crew of approximately eight men based in the New York City area who engaged in a string of bank burglaries in at least five States between 1991 and 1999. The crew would scout out banks that had a specific type of night deposit box they had learned to break into. The crew, which frequently communicated via walkie-talkies, focused on banks in areas with retail businesses, like shopping malls, which were likely to receive a high volume of cash deposits. Members of the crew, including petitioner, would burglarize those boxes in the early morning hours at the beginning of the week using crowbars, screwdrivers, fishing gaffs, and other burglar's tools. Each participant had a particular role as a lookout or burglar, and the members of the crew would protect their identities by referring to each other using false names. The crew members split the proceeds of the burglary based on the amount of risk inherent in each participant's role. Gov't C.A. Br. 6-12.

2. In 2003, a federal grand jury returned an indictment charging petitioner and other members of the crew with, among other offenses, violating 18 U.S.C. 1962(c). Section 1962(c), which was enacted as part of the Racketeer Influenced and Corrupt Organizations Act (RICO), provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign com-

> merce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Ibid. RICO defines an "enterprise" to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). In *United States* v. *Turkette*, 452 U.S. 576 (1981), this Court held that "an enterprise includes any union or group of individuals associated in fact," *id.* at 580, and that the existence of an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit," *id.* at 583. See also *NOW* v. *Scheidler*, 510 U.S. 249, 259 (1994) ("[T]he 'enterprise' in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed.").

Tracking the language of RICO and *Turkette*, the district court in this case instructed the jury that the term "enterprise"

> includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.
>
> * * * * *
>
> Moreover, you may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts. Such an association of persons may be established by evidence showing an

> ongoing organization, formal or informal, and that by evidence that the people making up the association functioned as a continuing unit. Therefore, in order to establish the existence of such an enterprise, the government must prove that: (1) There is an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose.
>
> Regarding "organization," it is not necessary that the enterprise have any particular or formal structure, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise.

C.A. App. 771-772.

Petitioner objected to the court's instruction that an enterprise could be established "without structural hierarchy," C.A. App. 693, and that the enterprise's organization need not "have any particular or formal structure," *id.* at 694. Petitioner asked the district court instead to instruct that the government had to prove beyond a reasonable doubt that the enterprise "had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts." *Id.* at 683. The district court rejected petitioner's request. *Id.* at 770-771.

The jury found petitioner guilty of racketeering, conspiracy to commit racketeering, conspiracy to commit bank burglary, bank burglary, and attempted bank bur-

glary. Pet. App. 2a. He was sentenced to 151 months of imprisonment. *Id.* at 3a.

3. The court of appeals affirmed petitioner's conviction but vacated his sentence. Pet. App. 1a-4a.

Petitioner argued, *inter alia*, that the district court's instructions were erroneous because they failed to require the government to establish that petitioner's enterprise had "an ascertainable structural hierarchy distinct from the charged predicate acts." Pet. C.A. Br. 19-20. The court of appeals did not discuss that issue, stating only that it "considered [petitioner]'s other challenges to the judgment of conviction and find them without merit." Pet. App. 3a.

The court of appeals vacated petitioner's sentence because, based on an application note added to the Sentencing Guidelines two months *after* the conclusion of his charged conduct, the district court had denied petitioner credit for 33 months of imprisonment he had served on a New York state burglary conviction. The court of appeals determined, in light of *Miller* v. *Florida*, 482 U.S. 423 (1987), that the denial of credit based on the post-conduct change violated the Ex Post Facto Clause. Pet. App. 3a-4a.

4. On remand, the district court credited petitioner the aforementioned 33 months and otherwise reimposed the same sentence. Amended Judgment (Apr. 18, 2008). Petitioner has appealed that judgment, and the appeal is pending before the court of appeals.

ARGUMENT

Petitioner claims that the court of appeals erred by refusing to hold that a RICO enterprise must have an "ascertainable organizational structure separate and beyond that necessary to engage in the pattern of illegal

racketeering activity." Pet. 10 (internal quotation marks and citation omitted). That claim lacks merit, and the court of appeals' decision does not conflict with any decision of this Court. To the extent that the courts of appeals disagree, any disagreement appears to be both superficial and limited. In any event, this case is not a proper vehicle to resolve any such disagreement. Accordingly, no further review is warranted.

1. Petitioner argues that the district court's instructions, omitting an "ascertainable structure" requirement, allowed the jury to conflate the "enterprise" and "pattern" requirements of Section 1962(c), in contravention of *United States* v. *Turkette*, 452 U.S. 576 (1981). Although the Court in *Turkette* held that the enterprise is "separate and apart" from the pattern of racketeering activity, it recognized that "the proof used to establish these separate elements may in particular cases coalesce." *Id.* at 583. Moreover, the jury instructions here made clear that the government had to prove *both* the existence of a RICO enterprise and a pattern of racketeering activity. C.A. App. 770 (describing those requirements as independent elements). In defining the term "pattern of racketeering activity," the district court discussed "the requisite relationship between the RICO enterprise and a predicate racketeering act," *e.g.*, that the pattern of acts have "furthered the purpose of the enterprise," thereby further conveying their distinct but related nature. *Id.* at 778-779.

Importantly, no "ascertainable structure" requirement is found in either *Turkette* or RICO's text. In *Turkette*, the Court stated that an enterprise can consist merely of "a group of persons associated together for a common purpose of engaging in a course of conduct," established "by evidence of an ongoing organization,

formal or informal, and by evidence that the various associates function as a continuing unit." 452 U.S. at 583. The jury instructions here tracked that language nearly word-for-word. C.A. App. 770-772. An additional "ascertainable structure" requirement would be inconsistent with *Turkette*'s recognition that RICO covers both legitimate and illegitimate enterprises, 452 U.S. at 581-582, since an associated-in-fact criminal enterprise "may not observe the niceties of legitimate organizational structures." *Odom* v. *Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir.) (quoting *United States* v. *Patrick*, 248 F.3d 11, 19 (1st Cir.), cert. denied, 534 U.S. 1043 (2001), and 535 U.S. 910 (2002)), cert. denied, 128 S. Ct. 464 (2007). That RICO's text does not include any "ascertainable structure" requirement confirms the correctness of the jury instructions. As this Court recently reiterated, it is "not at liberty to rewrite RICO to reflect * * * views of good policy" where "RICO's text provides no basis for imposing a * * * requirement." *Bridge* v. *Phoenix Bond & Indemnity Co.*, No. 07-210 (June 9, 2008), slip op. 20.

2. The Second Circuit's adherence to *Turkette* and rejection of an "ascertainable structure" requirement is consistent with decisions of at least four other circuits. In *Odom*, the Ninth Circuit recently held that "an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise." 486 F.3d at 551. See *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir.) (reaffirming that "the definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes"), cert. denied, 531 U.S. 1015

(2000); *Patrick*, 248 F.3d at 18-19; *United States* v. *Perholtz*, 842 F.2d 343, 364 (D.C. Cir.) (approving jury instruction stating "[i]t is not necessary that the enterprise, if it existed, have any particular or formal structure") (internal quotation marks and citation omitted), cert. denied, 488 U.S. 821 (1988); *United States* v. *Mazzei*, 700 F.2d 85, 88-90 (2d Cir.), cert. denied, 461 U.S. 945 (1983).

Although some other courts of appeals require proof that the alleged RICO enterprise has an "ascertainable structure," those courts generally apply this requirement in a manner consistent with *Turkette*, which held that a RICO enterprise must be an "ongoing organization" composed of associates who "function as a continuing unit," 452 U.S. at 583. See, *e.g.*, *United States* v. *Tocco*, 200 F.3d 401, 425 (6th Cir. 2000) ("Continuity of structure exists where there is an organizational pattern * * * that provides a mechanism for directing the group's affairs on a continuing, rather than ad hoc, basis.") (citation omitted); *United States* v. *Korando*, 29 F.3d 1114, 1117-1118 (7th Cir.) ("[T]he continuity of an informal enterprise, and the differentiation of roles can provide the necessary 'structure' to satisfy RICO's statutory requirement."), cert. denied, 513 U.S. 993 (1994). The circuits that have adopted an "ascertainable structure" requirement also accept that, as this Court held in *Turkette*, 452 U.S. at 583, the same evidence can establish both the existence of a RICO enterprise and a pattern of racketeering activity. See. *e.g.*, *United States* v. *Darden*, 70 F.3d 1507, 1521 (8th Cir. 1995), cert. denied, 517 U.S. 1149, and 518 U.S. 1026 (1996); *United States* v. *Pelullo*, 964 F.2d 193, 212 (3d Cir. 1992). The "ascertainable structure" requirement, therefore, would rarely, if ever, produce a different result than the

straightforward test from *Turkette* to which the Second Circuit adheres. And petitioner identifies no case with facts analogous to those in this case in which the ascertainable structure test has led to a reversal.*

This Court consistently has denied petitions for certiorari raising the same issue in the past. See, *e.g.*, *Odom*, 128 S. Ct. 464 (2007); *Arthur* v. *United States*, 534 U.S. 1043 (2001); *Kirillov* v. *United States*, 534 U.S. 1043 (2001). There is no reason for a different result now.

3. Even assuming that such superficial and limited disagreement merits this Court's attention, this case is a poor vehicle to resolve any such disagreement for at least two independent reasons.

First, the court of appeals' decision is an unreported, per curiam, summary order. Pet. App. 1a-4a. It does not even mention the issue on which petitioner seeks this Court's review, let alone analyze it. Rather, after addressing petitioner's first, unrelated contention on appeal that his due process rights were violated because the government advanced inconsistent theories, the court of appeals conclusorily rejected all of petitioner's

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* Of the cases petitioner cites as imposing an "ascertainable structure" requirement (Pet. 10-16), only two appear to have found it not satisfied. See *Chang* v. *Chen*, 80 F.3d 1293, 1300-1301 (9th Cir. 1996); *United States* v. *Bledsoe*, 674 F.2d 647, 665-667 (8th Cir.), cert. denied, 459 U.S. 1040 (1982). Neither creates a clear conflict. *Chang* has been overruled by the Ninth Circuit. See *Odom*, 486 F.3d at 551. As to *Bledsoe*, it is quite possible that the court's finding of "no real evidence of * * * a pattern of authority or control, or of continuity in the pattern of association or the common purpose of all of the defendants" would have required reversal under *Turkette,* without resort to the "ascertainable structure" test; in any event, the court noted that reversal of the RICO convictions was warranted on independent grounds. 674 F.2d at 667 & n.11.

other claims (including presumably the one raised in the present petition) in a single sentence. *Id.* at 3a ("We have considered the appellant's other challenges to the judgment of conviction and find them without merit."). The Court therefore lacks the benefit of the court of appeals' consideration of the question presented in the context of this case.

Second, even if the RICO statute did require proof that the alleged RICO enterprise had an ascertainable structure (which it does not), the evidence introduced at petitioner's trial would satisfy that requirement. Members of petitioner's crew had particular roles in their spree of burglaries (which could be characterized as an hierarchy), protected their identities with false names, divided their profits, and retained tools of the trade. Gov't C.A. Br. 6-12. They engaged in illegal activities crossing five non-contiguous States, reflecting a degree of sophistication and experience typical of ongoing criminal organizations and beyond that necessarily accompanying any joint criminal activity. *Id.* at 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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