IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. STEVEN BRADLEY WALKER, Defendant-Appellant Petitioner on Review.	Clatsop County Circuit Court Case No. 091089 CA A142712 S060828

PETITIONER'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Clatsop County
Honorable Philip L. Nelson, Judge

Opinion Filed: August 29, 2012
Author of Opinion: Haselton, Chief Judge
Concurring Judge(s): Armstrong, Presiding Judge
Dissenting Judge(s): Edmonds, Senior Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITIONER'S BRIEF ON THE MERITS

INTRODUCTION

This case presents a statutory construction issue concerning the meaning of the term "enterprise" as it is used in the Oregon Racketeering and Corrupt Organizations Act (ORICO), ORS 166.715-166.735. ORS 166.720(3) provides that "it is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity * * *." ORS 166.715(2) defines "enterprise" in part to include "any individual, sole proprietorship, partnership, corporation, business trust or other profit or nonprofit legal entity, and includes any * * * association or group of individuals associated in fact, although not a legal entity, and both illicit and licit enterprises * * *."

Defendant was charged and convicted of a single count of racketeering based on his commission of three shoplifts from two different Safeway grocery stores on three different occasions with a single co-conspirator. Defendant challenged that conviction on appeal and argued that the state failed to present sufficient evidence to prove that he had associated with or participated in an enterprise. The Court of Appeals rejected defendant's argument and concluded that the state's evidence was sufficient to prove the existence of an enterprise because defendant and his co-conspirator followed "a precisely planned course

of action" in which they stole the "same, idiosyncratic consumer items" from two Safeway stores on three occasions. *State v. Walker*, 252 Or App 1, 12, 285 P3d 751 (2012). Defendant petitioned for review, and this court allowed his petition.

Question Presented

Is evidence that a defendant and one other person used the same *modus operandi* to commit three shoplifts of frozen shrimp, beer, diapers, and Tide laundry detergent from two grocery stores sufficient to prove the existence of an enterprise for purposes of ORICO?

Proposed Rule of Law

To prove that a person committed racketeering, the state must prove that the person engaged in a pattern of racketeering activity through an enterprise. The enterprise element requires proof of the existence of an entity that (1) has an ascertainable structure, (2) has continuity independent of its individual members, and (3) engages in systematic and purposeful criminal activity. Evidence that two individuals acted in concert to commit three shoplifts is insufficient to prove the existence of an enterprise.

Summary of Argument

Defendant was charged and convicted of a single count of racketeering for committing three shoplifts from two grocery stores with one other person. To prove that defendant committed racketeering, the state had to show that he

was associated with and participated through an enterprise in a pattern of racketeering activity. The evidence showed only that defendant and his co-conspirator stole similar items using the same *modus operandi* each time.

That evidence was insufficient to prove the enterprise element of racketeering. "Enterprise" is broadly defined to include "an association or group of individuals associated in fact although not a legal entity, and both illicit and licit enterprises and governmental and nongovernmental entities." ORS 166.715(2). The plain text, context, and most importantly, the legislative history of the racketeering statute demonstrate that the term refers to those entities that possess the following core characteristics: (1) an ascertainable structure, (2) continuity independent of the individual members, and (3) engagement in systematic and purposeful criminal activity.

The evidence that defendant and one other individual committed three shoplifts from two different Safeway grocery stores was sufficient to prove the pattern of racketeering activity, but not the enterprise element. The evidence did not show that defendant and his co-conspirator were part of an organization that had a definable or hierarchical structure, that the organization existed apart from defendant and his co-conspirator, or that there was an organization that engaged in regular criminal activity.

Statement of Historical and Procedural Facts

The Court of Appeals opinion accurately states the historical facts and is sufficient for this court's review of the legal issue presented:

> "On February 8, 2009, defendant and another man, Williams, entered a Safeway store in Sandy. A security camera recording revealed that both men placed various items into their shopping carts – including disposable diapers, Tide laundry detergent, beer, and frozen shrimp – and then left the store without paying for the items. Approximately two weeks later, on February 23, 2009, defendant and Williams returned together to the same Safeway store in Sandy and again each stole disposable diapers, Tide laundry detergent, and beer.
>
> "On March 26, 2009, defendant Williams traveled together to a Safeway store in Seaside. A store security guard observed Williams pushing a shopping cart that contained diapers, Tide laundry detergent, beer, and several bags of frozen shrimp. The guard also watched as defendant selected bags of frozen shrimp from the seafood freezer and then walked to a different aisle where he placed the freezer bags into plastic Safeway shopping bags. Defendant then walked out of the store without paying. The guard followed defendant into the parking lot and saw defendant put the shopping bags into a car. The guard yelled out to defendant, and defendant fled on foot. During that time, Williams had abandoned his cart full of merchandise at the front of the store and had also left the scene.
>
> "The Seaside police arrived and searched the unlocked car, where they discovered that defendant had thrown bags of shrimp atop a stash of diapers, Tide laundry detergent, beer, and beef jerky. The items were returned to the store, and the police impounded the car. Shortly thereafter, the police located and arrested Williams, who was the registered owner of the vehicle. After Williams consented to a search of the car, the police opened the trunk and found more diapers, beer, and frozen shrimp. Williams denied stealing most of the items but admitted to taking 'only eight bags of frozen shrimp,' which he told the interviewing officer that he had intended to 'consume * * * on the beach.'

> "Meanwhile, defendant called 9-1-1 to inquire about the status of the car and its owner. Defendant claimed that he was calling from Portland, but the call was automatically traced back to a hotel in Seaside, where police officers subsequently apprehended him. During the ensuing police interview, defendant confessed that he and Williams had traveled together to Seaside for the day and that the men had taken items from the Seaside Safeway. However, defendant denied stealing items worth more than $750 total, because, he said, 'that would be a felony.' Defendant also admitted that he and Williams had 'been involved in these types of thefts in the Portland area' during 'the last two months.'"[1]

Walker, 252 Or App at 3-4.

The state charged defendant with one count of racketeering, ORS 166.720(3), based on the shoplift from the Seaside Safeway and the two previous shoplifts from the Sandy Safeway, and one count of theft in the first degree, ORS 164.055, based on one of the incidents. *Id.* at 3-5. Following a jury trial, defendant was convicted of both charges. *Id*. at 3. He challenged the racketeering conviction on appeal, assigning error to the denial of his motion

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[1] The evidence at trial showed that defendant and his co-conspirator took at least nine bags of shrimp, several boxes of diapers, beer, and Tide laundry detergent from the Seaside Safeway, not including the items discovered in the subsequent search of the co-conspirator's car. Tr 98-99, 100-01, 109. It also showed that during the first shoplift at the Sandy Safeway, defendant took six bags of frozen shrimp, two boxes of Tide laundry detergent, several large boxes of Huggies diapers, and four cases of Budweiser beer. Tr 213, 215-16. On that occasion, defendant's co-conspirator took the same items in similar quantities. Tr 220. During the second shoplift of the Sandy Safeway, defendant again took several boxes of Tide laundry detergent, two large boxes of Huggies diapers, and two cases of beer. Tr 222-26. Defendant's co-conspirator also took a shopping cart full of the same items. Tr 226.

for judgment of acquittal on that charge. *Id.* Defendant argued that the stated failed to adduce sufficient evidence to show that he had participated in an enterprise as defined by ORS 166.715(2). The Court of Appeals disagreed and affirmed defendant's conviction. *Id.* at 12-13.

Argument

This case presents a question of statutory interpretation and implicates the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), as modified by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). The issue is whether the term "enterprise," as it is defined in ORICO, encompasses two people who act in concert to commit three underlying shoplifts, using the same *modus operandi* each time.

I. Introduction

The federal racketeering statute was passed as Title IX of the Organized Crime Control of 1970. Pub L No 91-452, § 901(a), 84 Stat 941 (1970) (hereinafter RICO). In 1981, Professor Robert Blakely, a professor of law at Notre Dame Law School, helped draft Oregon's racketeering statute. Minutes, Senate Justice and House Judiciary Committees, SB 531, April 23, 1981, 1. Professor Blakely also drafted the federal RICO Act. *Id.* As a nationally recognized expert on RICO and organized crime, Professor Blakely helped Oregon, Florida, and Arizona draft their own racketeering statutes, and he modeled those state statutes on the federal law. *Id.* Thus, because Oregon's

statute is modeled on federal RICO, and because Professor Blakely's presentation to the Oregon Legislature included a discussion of the purpose behind the federal statute, it is helpful to begin with a brief history of federal RICO. *Id.* at 1-14.

The origins of federal RICO began in the 1950s as national concern with the rise of organized crime grew. Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 Iowa L Rev 837, 838 (1979-1980). In response, in 1961, Congress passed legislation prohibiting the promotion of gambling, narcotics, and other criminal endeavors through interstate travel or the use of interstate facilities. *Id.* at 838-39. However, organized crime continued to grow despite the new legislation. *Id.* at 839.

Between 1967 and 1969, several bills that focused on the organized crime problem were introduced in Congress but subsequently died in committee. *Id.* at 840-41. Finally, a new bill was introduced to "prohibit the infiltration or management of legitimate organizations by means of racketeering activity as well as investment of the proceeds of racketeering activity in such organizations." Bradley, 65 Iowa L Rev at 841-42 (internal quotations omitted). The bill was amended following some minor Justice Department suggestions, and it was included as title IX of the Organized Crime Control Act. *Id.* at 842-43. The President signed the bill into law on October 15, 1970. *Id.* at 843-44.

The criminal portion of federal RICO, which Oregon's statute closely resembles, is divided into three sections: (1) Section 1961, which provides the definitions, (2) Section 1962, which specifies the prohibited activities, and (3) section 1963, which provides the criminal penalties for a violation of section 1962. *Id.* at 844 (citing 18 USC §§ 1961-63 (1976)). Federal RICO defined "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 USC § 1961(4) (1976). The statute provided that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt." 18 USC § 1962(c) (1976).

Former Senator John McClellan, one of the co-sponsors of the federal act, summed up the overarching goal of federal RICO after its passage:

> "Title IX is aimed at removing organized crime from our legitimate organizations. Experience has shown that it is insufficient merely to remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, forfeiture of their ill-gotten gains.

Senator John L McCllelan, *Organized Crime Control Act (S.30) or Its Critics: Which Threaten Civil Liberties,* 46 Notre Dame L 55, 141 (1970). Thus, as can

be seen from Senator McClellan's comment, the primary purpose of federal RICO was to stem the tide of organized crime's infiltration of legitimate businesses. It was against that backdrop that Professor Blakely drafted and advocated for the passage of Oregon's statute.

II. The plain text and the context of the term "enterprise" show that it does not encompass two individuals acting in concert to commit several thefts using the same *modus operandi* each time.

A. The plain meaning of enterprise refers to those entities that have an ascertainable structure, continuity, and a common criminal purpose.

ORS 166.715-166.735 is collectively known as the Oregon Racketeering Influenced and Corrupt Organizations Act (ORICO). Like its federal counterpart, ORICO punishes a variety of racketeering activities. In this case, defendant was charged with a single count of racketeering under ORS 166.720(3) for "being associated with an enterprise" and participating "in such enterprise through a pattern of racketeering activity." *See* Indictment in the Trial Court File. ORS 166.720(3) provides that:

> "It is unlawful for any person employed by or associated with, any enterprise to conduct or participate, directly or indirectly through a pattern of racketeering activity or the collection of an unlawful debt."

ORS 166.715 provides the following relevant definitions for enterprise and pattern of racketeering activity:

> "(2) 'Enterprise' includes any individual, sole proprietorship, partnership, corporation, business trust or other profit or nonprofit legal entity, and includes any union, association

> or group of individuals associated in fact although not a legal entity, and both illicit and licit enterprises and governmental and nongovernmental entities."
>
> "* * * * *
>
> "(4) 'Pattern of racketeering activity' means engaging in at least two incidents of similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, including a nexus to the same enterprise, and are not isolated incidents, provided at least one of such incidents occurred after November 1, 1981, and that the last of such incidents occurred within five years after a prior incident of racketeering activity. * * *.
>
> "* * * * *
>
> "(6) 'Racketeering activity' includes conduct of a person committed both before and after the person attains the age of 18 years, and means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce or intimidate another person to commit:
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> "(a) Any conduct that constitutes a crime, as defined in ORS 161.515, under any of the following provisions of the Oregon Revised Statutes:
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> "* * * * *
>
> "(K) ORS * * * 164.045, 164.055, * * * relating to theft, burglary, criminal trespass and related offenses."

In light of the broad theoretical parameters of the term enterprise, the question in this case is what constitutes an enterprise for purposes of ORICO.

To resolve that statutory interpretation question, this court reviews the plain and ordinary meaning of the text, the context, the legislative history, and if necessary, applies general maxims of statutory construction. *PGE,* 317 Or at

610-12. This court is free to consider legislative history proffered by a party regardless of whether the court perceives an ambiguity in the statutory text. *Gaines*, 346 Or at 171-72. The court will consult that history after examining text and context, "where that legislative history appears useful to the court's analysis." *Id.* at 172. "However, the extent of the court's consideration, and the evaluative weight that the court gives [the proffered legislative history], is for the court to determine." *Id.*

The legislature did not strictly define the term "enterprise" in ORS 166.715(2). Rather it provided an illustrative list of entities that can qualify as an enterprise for purposes of an ORICO charge. Therefore, the plain and ordinary meaning of enterprise provides a useful starting point to define the term as it is used in the statute.

"Enterprise" is defined in relevant part as " 1 a: a plan or design for a venture or undertaking * * * b: venture, undertaking project; *esp* * * * an undertaking that is difficult, complicated, or has a strong element of risk * * * c: a unit of economic organization or activity (as a factory, a farm, a mine); *esp* * * * a business organization: firm, company * * * d: any systematic purposeful activity or type of activity." *Webster's Third New Int'l Dictionary* 757 (unabridged ed 2002) (emphasis and capitalization omitted). *Black's Law* similarly defines enterprise as "[a] business venture or undertaking." *Black's Law Dictionary* 531 (6th ed 1990). *Black's* provides further that, as it is used in

the federal racketeering statute, an enterprise "must be an ongoing organization, and an entity separate from the pattern of activity in which it engages." *Id.* (internal citation omitted).

Thus, the plain and ordinary meaning of the term enterprise demonstrates that it applies to organizations that engage in planned, systematic, and purposeful activity. Because the title of the act (the Oregon *Racketeering Influenced* and *Corrupt Organizations* Act) includes the term organization, the plain and ordinary meaning of that term also provides textual guidance to the meaning of enterprise. "Organization" is defined in relevant part as "2: something organized: * * * b: a group of people that has a more or less constant membership, a body of officers, a purpose, and usu. a set of regulations." *Webster's Third New Int'l Dictionary* at 1590. "Organize" is defined in relevant part as "2 a: to arrange or constitute into a coherent unity in which each part has a special function or relation * * * b: to unify into a coordinated functioning whole: put in readiness for coherent or cooperative action." *Id.*

Thus, the dictionary definitions of enterprise, organization, and organize suggest that the term enterprise, as it is used in ORICO, contains several characteristics. An enterprise is an organization that (1) has an ascertainable structure, (2) has continuity independent of its individual members, and (3) engages in systematic and purposeful criminal activity.

Finally, reviewing the list of entities included in the statutory definition and applying the rule of *noscitur a sociis* also provides textual support for the proposition that the term enterprise encompasses the characteristics discussed above. *See King Rehab., LLC v. Clackamas County*, 214 Or App 333, 341, 164 P3d 1190 (2007) ("Under the principle of *noscitur a sociis*, terms in a list are interpreted in light of the common characteristics of other terms in the same list.") (citing *State v. Moen*, 309 Or 45, 89 n 17, 786 P2d 111 (1990)).

ORS 166.715(2) can be viewed as providing a list of two types of entities – legal and illegal. The first half of the list includes the following legal entities: sole proprietorship, partnership, corporation, business trust, profit and non-profit entities, unions, and associations. The second half of the list includes a group of individuals associated in fact, although not a legal entity. All of the entities included in the first half of the list have common characteristics that mirror those described by the plain and ordinary definitions discussed above: (1) they are formally organized into an ascertainable structure, (2) they exist independent of their individual members, and (3) they engage in purposeful and systematic activity. Thus, under the principle of *noscitur a sociis*, the meaning of the phrase "a group of individuals associated in fact, although not a legal entity," should be interpreted to possess those same characteristics.

B. The context of the term enterprise reinforces the proposition that it includes those entities that have an ascertainable structure, continuity, and a common criminal purpose.

Because ORICO is modeled on the federal statute, federal case law that pre-dates the enactment of ORCIO provides useful context for interpreting the term. *See Fresk v. Kraemer*, 337 Or 513, 520-21, 99 P3d 286 (2004) ("Statutory context includes other provisions of the same statute and other related statutes, as well as the preexisting common law and the statutory framework within which the statute was enacted."). The case law analyzing federal RICO confirms that the term enterprise describes those organizations that possess the characteristics listed in the plain and ordinary meanings of the relevant terms.

In the decade between the passage of the federal statute and Oregon's statute, the federal courts were concerned primarily with two issues regarding the term enterprise: (1) whether the term included illegal as well as legal enterprises, and (2) whether the term included government entities. Bradley, 65 Iowa L Rev at 851-61. In 1981, the United States Supreme Court concluded that the term enterprise included not only legal entities, but also illegal entities. *United States v. Turkette*, 452 US 576, 583, 101 S Ct 2524, 69 L Ed 2d 246 (1981). Prior to the *Turkette* decision, most federal circuits had held that the term enterprise included illegal entities. *See, e.g., United States v. Rone*, 598 F2d 564, 568-69 (9th Cir 1979), *cert den*, 445 US 946 (1980) (RICO includes

illicit enterprises); *United States v. McLaurin*, 557 F2d 1064, 1073 (5th Cir 1977), *cert den*, 434 US 1020 (1978) (the term enterprise applies to entities, "which are from their inception organized for illicit purposes"); *United States v. Altese*, 542 F2d 104, 105-07 (2d Cir 1976), *cert den*, 429 US 1039 (1977) (enterprise definition applied to illegal, large scale gambling business); *United States v. Carpetto*, 502 F2d 1351, 1358 (7th Cir 1974), *cert den*, 420 US 925 (1975) (illegal gambling business was an enterprise for purposes of RICO).

During that decade, several federal circuits also decided that the term included government entities. *See, e.g., United States v. Frumento*, 563 F2d 1083, 1089-92 (3d Cir 1977), *cert den*, 434 US 1072 (1978) (holding that Pennsylvania Bureau of Cigarette and Beverage Taxes was an enterprise under RICO when employees of the agency were involved in a conspiracy to smuggle cigarettes for resale without payment of the state cigarette tax); *United States v. Brown*, 555 F2d 407, 414-16 (5th Cir 1977), *cert den*, 435 US 904 (1978) (holding that Macon, Georgia police department was an enterprise under RICO where some police officers solicited and accepted bribes).

Identifying the minimal requirements for an enterprise did not arise in the federal cases that pre-date the enactment of ORCIO because those cases contained extensive evidence of an organization that had an ascertainable structure, continuity independent of its individual members, and one that engaged in systematic and purposeful criminal activity. *See, e.g., United States*

v. Errico, 635 F2d 152, 153-56 (2d Cir 1980), *cert den*, 453 US 911 (1981) (organization headed by former jockey who bribed participating network of jockeys to hold back their horses in races, and the circle of bettors who won large prizes on the fixed races, qualified as an enterprise); *United States v. Elliot*, 571 F2d 880, 884-95, 897-900 (5th Cir 1978), *cert den*, 439 US 953 (1978) (informally associated group of six defendants and 37 unindicted co-conspirators, with hierarchical structure, that engaged in a large variety of crimes such as theft, arson, and murder for the purpose of making money was sufficient to prove the existence of an enterprise); *McLaurin*, 557 F2d at 1067-73 (sophisticated inter-state prostitution ring with hierarchical leadership that kidnapped women and forced them into prostitution constituted an enterprise). *But see United States v. Aleman*, 609 F2d 298, 302-05 (7th Cir 1979) (small group of individuals who committed home invasion burglaries, who met and planned each burglary, and who were headed by one individual who paid the others for committing the burglaries was an ORICO enterprise even though the enterprise was entirely illegal).

Although the issue before the Supreme Court in *Turkette*[2] was whether enterprise encompassed illegal entities, in reaching its conclusion, the Court provided useful guidance to the meaning of the term. 452 US at 578. In that case, the defendant had been charged with participating in the affairs of a wholly criminal enterprise, which was described in the indictment as "a group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing * * * local police officers, and corruptly influencing * * * the outcome of state court proceedings." *Id.* at 578-79 (internal quotations omitted). The Court explained how the enterprise and racketeering elements are interrelated, but still separate and distinct elements that the government must prove:

> "In order to secure a conviction under RICO, the Government must prove both the existence of an enterprise and the connected 'pattern of racketeering activity.' The enterprise is an entity, for present purposes *associated together for a common purpose of engaging in a course of conduct*. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. * * * The former is proved by evidence of an *ongoing*

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[2] The Supreme Court issued its opinion in *Turkette* on June 17, 1981. The governor approved ORICO on August 21, 1981, and it was filed in the Office of the Secretary of State on August 24, 1981. *See* Or Laws 1981 ch 769, §§2-7. Thus, *Turkette* was published while the Oregon Legislature was still reviewing and considering passage of ORICO. *See Mastriano v. Board of Parole*, 342 Or 684, 693, 159 P3d 1151 (2007) ("we generally presume that the legislature enacts statutes in light of existing judicial decisions that have a bearing on those statutes").

> *organization, formal or informal, and by evidence that the various associates function as a continuing unit*. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish th[o]se separate elements may in particular cases, coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity;' *it is an entity separate and apart from the pattern of activity in which it engages*. The existence of an enterprise at all times remains a separate element which must be proved by the Government."

Turkette, 452 US at 583 (emphasis added). Thus, the Supreme Court's analysis of the term enterprise includes the same common characteristics as those found in the relevant dictionary definitions: structure, continuity, and systematic and purposeful criminal conduct.

In *United States v. Bledsoe*, 674 F2d 647 (8th Cir 1982), the Eighth Circuit addressed the same issue that this case presents.[3] In that case, the indictment alleged that 22 defendants associated with an enterprise based on their participation in a complicated scheme that involved fraudulent sales of securities of agricultural cooperatives in several states. *Id.* at 651. On appeal,

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[3] Defendant recognizes that case law can be context when it existed at the time of the statute's enactment and that *Bledsoe* was decided after ORICO's enactment. However, *Bledsoe* was decided nine months after *Turkette*, and its reasoning relied heavily on *Turkette*, the legislative history of federal RICO, and its own decision in *United States v. Anderson*, 626 F2d 1358 (1980), which pre-dated *Turkette* and the passage of ORICO. Thus, defendant submits that although it is not direct context, the court's analysis in *Bledsoe* reflects a contemporary view and provides useful guidance to this court.

five defendants argued that the evidence was insufficient to prove the enterprise element necessary to sustain their RICO convictions. *Id.* at 659.

To resolve that issue, the court focused on what constituted an enterprise for purposes of RICO. *Id.* at 661. Recognizing that some courts had given the term a broad interpretation, the *Bledsoe* court looked to the legislative history of the statute and the Supreme Court's decision in *Turkette* to resolve the issue. The court first noted that Congress's primary intent in enacting RICO "was to prevent organized crime from infiltrating businesses and other legitimate economic entities." *Id.* at 662 (citing *Turkette*, 452 US at 576). RICO's supporters believed that when organized crime gained control of legal entities, its "infiltration was a source of power and protection for organized crime and gave it a permanent base from which it was more likely to perpetrate a continuing pattern of criminal acts." *Id.*

Relying on the analysis from *Turkette* and the ordinary meaning of the term enterprise, the court concluded that

> "* * * [U]nder 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*, 674 F2d at 664; *see also United States v. Griffin*, 660 F2d 996, 1000 (4th Cir 1981) (concluding that in determining whether the government offered sufficient proof of the existence of an enterprise "it is essential to determine the purpose of the enterprise," and that the common characteristics of a RICO enterprise are continuity, unity, shared purpose, and identifiable structure);[4] *United States v. Anderson*, 626 F2d 1358, 1371 (8th Cir 1980) (reviewing the legislative history of RICO and concluding that "[t]he reference to infiltration and the use of the word "entities," which denotes that the association must have an existence that is independent, self-contained, separate and distinct, follow from the general legislative purpose regarding RICO.").

Because the potential penalty for a RICO violation is much greater than that for conspiracy, "the Act must have been directed at participation in enterprises consisting of more than simple conspiracies to perpetrate the predicate acts of racketeering." *Bledsoe*, 675 F2d at 664. Thus, to distinguish a RICO enterprise from a simple conspiracy, the term encompasses three core characteristics: "commonality of purpose," it "function[s] as a continuing unit,"

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[4] The court issued its opinion in *Griffin* on October 2, 1981. Like the court in *Bledsoe*, the *Griffin* court relied heavily on *Turkette* for its analysis. Thus, defendant cites *Griffin* for the same reason that he has cited *Bledsoe*.

and it has "an ascertainable structure" that is "distinct from that inherent in the pattern of racketeering activity." *Id.* at 665.

The courts in *Turkette*, *Bledsoe*, and *Griffin* all reached similar conclusions on the meaning of the term enterprise. They concluded that all RICO enterprises, illegal or legal, have three broad categories of characteristics that are essentially the same as those that flow from the relevant dictionary definitions. First, an enterprise has a structure that stands apart from the individuals associated with it. Administrative structure distinguishes a RICO enterprise from a simple conspiracy; the enterprise serves as the conduit for the criminal activity. Second, the enterprise has continuity in both structure and personality. The court in *Bledsoe* explained the continuity component by way of example: "the operatives in a prostitution ring may change through time, but the various roles which the old and new individuals perform remain the same." *Id.* Finally, an enterprise also engages in systematic and purposeful criminal activity. The evidence of that characteristic can overlap or consist of the same evidence that proves the pattern of racketeering activity. Thus, the relevant federal case law provides strong contextual support that an ORICO enterprise exhibits the same characteristics as those contained in the plain and ordinary meaning of the term.

III. The legislative history of ORICO confirms that the legislature intended the term enterprise to apply to those entities that have an ascertainable structure, continuity, and a common criminal purpose.

In 1981, The Oregon Legislature passed Senate Bill 531, which became ORICO. Or Laws 1981 ch 769, §§2-7. Attorney General Dave Frohnmayer and Professor Blakely presented the bill to a joint subcommittee on organized crime. Minutes, Senate Justice and House Judiciary Committees, SB 531, April 23, 1981, 1. Following that hearing, the Senate Justice Committee held several hearings on the bill and heard testimony both in favor of and opposed to the bill. The House Judiciary Committee also held a hearing on the bill and heard testimony favorable to it. A review of those hearings makes it clear that the Oregon Legislature never intended ORICO to apply to individuals who merely act in concert and commit the requisite number of predicate acts.

Rarely does a statute's legislative history definitively address the specific issue or interpretation question that a case presents. However, in this case it does. The legislature's intent is best summed up by Senator Wyers's statement at a Senate Justice Committee hearing: "*Our legislative history would be that it would not be intended to apply to low-level criminal activity, but [to] the type of organized criminal activity that we heard testimony about*." Tape Recording, Senate Justice Committee, SB 531, May 19, 1981, Tape 192, Side A (statement of Sen Wyers). A review of the hearings that led up to that statement demonstrates that the legislature passed ORICO with the belief that it could rely

on prosecutors and, if need be, the court to construe the statute to exclude exactly the type of conduct at issue in this case.

On April 23, 1981, Professor Blakely testified extensively in favor of ORICO before a joint committee on organized crime. Minutes Joint Subcommittee on Organized Crime, SB 531, April 23, 1981, 1-14. He explained how Oregon could benefit from the passage of a racketeering statute even if it currently did not have a large organized crime problem. *Id.* He said that even if the Mafia did not have a presence in Oregon, we could have the "effects" or local groups. *Id.* at 2. For example, large scale cattle thefts (25-30 head at a time), thefts of large equipment like tractors and bulldozers, and automobile theft with a low recovery rate are all evidence of theft done for resale or fencing. *Id.* at 2-3. Most of the fencing in the United States is handled by the major organized crime families because they have the "national distribution system[s]" necessary to sell the stolen items. *Id.* at 3. Professor Blakely also discussed the possibility that Oregon could be a distribution point for "sophisticated [drug] syndicates" from Columbia and Cuba. *Id.* He explained that all of those examples could demonstrate "the beginnings of organized crime" in Oregon. *Id.*

Professor Blakely continued that a state like Oregon with a fast-growing population is "a fertile place for investment" for organized crime. *Id.* at 4. Once organized crime invests in a state, through land acquisition for example,

and gains economic power, then it can gain political power, which leads to corruption and vice. *Id.* He cited corruption in government contracting through individual legislators as a source of power that the "mob would openly want access to." *Id.* Professor Blakely summarized the benefits of a racketeering statute over the existing criminal code as follows:

> "Traditionally we have thought of crimes as a single incident on a single day and a single person engaged in it. For most crimes, street crimes, that is the whole story[.] [B]ut for organized crime the important things are the things that are not included in the current criminal code. That is the relationship between this crime this day and this crime the next day. That is, this crime is part of a pattern. *Almost as important as its being part of a pattern is that there is an organization involved. The statute calls it an enterprise*. * * * What RICO does is look to the organized character of the crime and makes that an element of the offense and it looks to the patterned character of the criminal behavior and makes that an element of the [offense][.] [It] imposes on the government [the burden of] proving those elements and once those elements are proven[,] it then warrants the treatment of that crime in a different fashion."

Minutes Joint Subcommittee on Organized Crime, SB 531, April 23, 1981, 6 (statement of Professor Blakely) (emphasis added).

Professor Blakely painted a potentially bleak picture for Oregon's future that ORICO could effectively combat. The need for ORICO was premised on the possible infiltration of sophisticated and organized criminal groups who could gain power and control in the state. ORICO could effectively prosecute the members of those groups and shut down their organizations. That focus on the prevention of infiltration of large-scale criminal organizations into the state

lends further support for the proposition that the term enterprise should be interpreted to describe those entities that have an ascertainable structure, continuity, and a common criminal purpose.

Following Professor Blakely's presentation, the Senate Justice Subcommittee heard testimony from two criminal defense lawyers who opposed the bill and two Multnomah County Sheriffs who supported the bill. Minutes Senate Justice Subcommittee, SB 531, May 18, 1981, 1-7. Jim Hennings of Metropolitan Public Defender Services, Inc. explained that the bill essentially re-wrote the criminal code because it allowed district attorneys around the state to transform otherwise minor crimes into class A felonies. Tape Recording, Senate Justice Subcommittee, SB 531, May 18, 1981, Tape 185, Side A (statement of Jim Hennings). In response to a question as to how the bill rewrote the criminal code, Hennings responded, "Now if you intend to go after a group of 20 year olds who go out and shoplift a couple times, the way this law is written now, you could go after them. And I don't think that that's your intent." *Id.*

That statement prompted questioning from Senator Wyers that evolved into a discussion over Hennings's concern that ORCIO could be improperly used to charge individuals like defendant in this case. Senator Wyers posed the following hypothetical for Hennings:

> "Let's say a district attorney decided they wanted to use RICO on somebody that was caught shoplifting and this person * * * is somebody who has a long record of various kinds of criminal activity, and they are apparently engaging in shoplifting not only themselves, but * * * they're doing it with half a dozen people or something like that. Now what would you have to do to get * * * in your opinion * * * under RICO in terms of the syndicate part or the conspiracy part?"

Id. (statement of Sen Wyers). Hennings responded:

> "I think the DA has to show that these people were participating in a pattern of racketeering activity, which any two of those instances would be, and it comes under section 3 subsection 3. That they are participating in racketeering activity * * * any of the crimes, which are being stated in number two. That's it."

Id. (statement of Jim Hennings).

Hennings explained further that he had discussed his concerns with Attorney General Dave Frohnmayer's staff, and that staff had assured him that they trusted the prosecutors to use ORICO with some discretion. *Id.* Wyers indicated that he had also spoken to Attorney General Frohnmayer's staff and that he believed that it was their "sincere intent" not to use the statute in that manner. *Id.* (statement of Sen Wyers).

Criminal defense attorney John Henry Hingson III also testified in opposition to the bill. In discussing the potential broad reach of the statute with Hingson, Senator Brown stated that he was "not awfully fearful of an overbroad statute *as long as we know it legislative history and we have the courts [that] give a rational, reasonable interpretation*." Tape Recording, Senate Justice

Subcommittee, SB 531, May 18, 1981, Tape 186, Side A (statement of Sen Brown) (emphasis added).

The committee also heard testimony from two Multnomah County Sheriff's Deputies who supported the bill. Echoing the concerns that Professor Blakely raised, the deputies explained the need for ORICO and how it could be used to combat organized criminal activity in Oregon. *See* Testimony, Senate Justice Subcommittee, SB 531, May 18, 1981, Ex B (statement of Multnomah County Sheriff's Deputy Neil Crannell). Senator Wyers questioned Deputy Crannell about Hennings's concern that ORICO could be misused, which led to a lengthy discussion. Senator Wyers described a hypothetical similar to Hennings's shoplifting example and asked Deputy Crannell whether that person would be prosecuted under ORICO. Tape Recording, Senate Justice Subcommittee, SB 531, May 18, 1981, Tape 186, Side A (statement of Sen Wyers). Deputy Crannell responded, "That would probably * * * (indiscernible) some organized groups that I can think of, yes, [but] not all." *Id.* (statement of Deputy Crannell). Senator Wyers countered, "What kind of organized group are you thinking of?" *Id.* (statement of Sen Wyers). Deputy Crannell described the type of organization that ORICO would target:

> "Where they are a group where they are some people who we've identified as heads of the organization, they steal, they take their goods to a specific place or get rid of them in a specific manner. We've learned about some of these through some of our sting operations. That kind of organiz[ation], it's organized not only in

> theft, but they're into forgery, and they're also into prostitution and various kinds of [crimes]; all those particular crimes are wrapped up in this, several that I can think of, organized criminal activities. And yes, I think they would be prime from something like this [bill]."

Id. (statement of Deputy Crannell).

Deputy Crannell discussed how ORICO would target organizations that are not affected when their members are prosecuted for the underlying predicate crimes. *Id.* (statement of Deputy Crannell). He explained that when people from the type of organization that he had just described are prosecuted under current law and released from prison, "none of their base of operations has shut down," and they can "step right back into the situation they had when they went into the penitentiary." *Id.* (statement of Deputy Crannell). Deputy Crannell believed that ORICO would solve that problem. *Id.* (statement of Deputy Crannell).

When Senator Wyers pressed Deputy Crannell with Hennings's concerns, the deputy responded,

> "*It's not an isolated theft or two that we're talking about. So it's not a small operation or something. When Mr. Hennings spoke, I have the feeling what he was talking about was a couple of theft in the second degrees that might be prosecuted under this kind of a statute. And this is certainly not what I am speaking of*."

Id. (statement of Deputy Crannell) (emphasis added). Deputy Crannell summarized the type of organizations and individuals who would be prosecuted under ORICO:

> "*This bill also allows the prosecutors the latitude of tracing crime to an otherwise insulated top person.* And it allows judges and juries to be shown the whole picture, including relationships between significant events occurring at different times, and they're allowed to see the significance of what occurred, and not just the fact that something occurred. And that is what organized crime is essentially about – *the inter-relatedness of various criminal activities whose focal purpose is victimizing for profit. * * * And this particular bill provides the means to accomplish the goal that is necessary to stem this particular kind of organized crime in Oregon.*"

Id. (statement of Deputy Crannell) (emphasis added).

Multnomah County Sheriff's Deputy Steve Tillinghast also testified in favor of the bill and made similar points as Deputy Crannell. In response to questions from Senator Smith, the deputies explained why the current conspiracy law was ineffective at shutting down large criminal organizations. Tape Recording, Senate Justice Subcommittee, SB 531, May 18, 1981, Tape 185, Side B (statements of Deputies Crannell and Tillinghast). In the case of drug rings, Tillinghast explained that prosecution under current law does not stop a drug ring from continuing its business either because a second-in-command individual runs the enterprise, or the person incarcerated continues to direct the enterprise from inside prison. *Id.* (statement of Deputy Tillinghast).

The next day, Senator Wyers summarized for the full Senate Justice Committee the testimony that the subcommittee had heard the previous day. Tape Recording, Senate Justice Committee, SB 531, May 19, 1981, Tape 192, Side A (statement of Sen Wyers). He expressed his concern that ORICO could

be used to prosecute a group of three or four people who are unsophisticated criminals, or what he referred to as "stumblebums," who commit a series of burglaries or shoplifts. *Id.* (statement of Sen Wyers). He said that he would consider it "a real mess" if ORICO were used to prosecute those crimes to "enhance penalties against career criminals," and as a result, those individuals were convicted of class A felonies. *Id.* (statement of Sen Wyers).

Following further discussion regarding the dangers of ORICO being misapplied, Senator Gardner assured Senator Wyers that "the proof requirements are so strong, they are so complex that it just doesn't make sense to use it against a low-level criminal." *Id.* (statement of Sen Gardner). Senator Wyers responded, "But I think that it would be our clear legislative intent that we didn't want that to happen. * * * *Our legislative history would be that it would not be intended to apply to low-level criminal activity, but [to] the type of organized criminal activity that we heard testimony about*." *Id.* (statement of Sen Wyers) (emphasis added). Senator Wyers said that the bill would be used for groups that are "highly organized" and "highly profitable group, criminal ventures." *Id.* (statement of Sen Wyers).

The legislative history of SB 531 in the Senate demonstrates that when presented with hypotheticals that are factually indistinguishable from this case, ORICO's supporters assured senators that: (1) the law was intended to prosecute sophisticated organizations that have an ascertainable structure,

continuity, and engage in systematic and purposeful criminal activity, and (2) the definition of the term enterprise was intended to exclude low-level criminals who conspire and commit a series of similar crimes from being prosecuted under ORICO.

On July 8, 1981, Attorney General Frohnmayer testified in favor of SB 531 before the House Judiciary Committee. Minutes House Judiciary Committee, July 8, 1981, 3. Attorney General Frohnmayer stated that, "The purpose of the measure is to take profit out of organized crime." Tape Recording, House Judiciary Committee, SB 531, July 8, 1981, Tape 532, Side B (statement of Attorney General Frohnmayer). In response to a question from Representative Hendrickson as to whether the same person caught twice transporting firewood without a permit could be prosecuted under ORICO, Attorney General Frohnmayer said that his office would be holding seminars for district attorneys and issuing guidelines on how to use the statute because that example "is a totally inappropriate charging instrument for a crime of that kind." *Id.* (statement of Attorney General Frohnmayer). He acknowledged that Representative Hendrickson's example was "a possible theoretical risk," but assured the committee that, "*the reality of a statute designed against organized crime to be used for a garden-variety case that prosecutors deal with by the thousands every day in the state of Oregon is simply not realistic*." *Id.* (statement of Attorney General Frohnmayer) (emphasis added). Attorney Bob

Hamilton of the Department of Justice added that prosecutors have "to prove both the existence of the enterprise and the racketeering activity," and that the definitions for those terms would "alleviate" Hendrickson's "concern." *Id.* (statement of Attorney Bob Hamilton).

The legislative history demonstrates that members of both the house and the senate had concerns that ORICO could be misused to bring a racketeering prosecution against an individual like defendant in this case. At hearings, members were assured that ORICO was not aimed at and would not be used to prosecute individuals like defendant because it was aimed at combatting much more sophisticated and organized entities. ORICO was intended to target entities that had an ascertainable structure, continuity, and were engaged in systematic and purposeful criminal conduct. Moreover, it was the term enterprise that would limit prosecution to members in organizations and prevent misapplication of the statute. Lastly, legislators believed that the appellate courts, guided by the clear legislative intent, would provide a rational and reasonable interpretation should the statute ever be misapplied.

IV. The plain text, context, and legislative history of the statute show that ORICO enterprises can be viewed on a spectrum and that defendant's conduct falls on the end of the spectrum where an enterprise does not exist.

The legislative history reveals that the legislature was concerned with the potential overbroad reach ORICO. Accordingly, based on those concerns, it is

useful to view ORICO enterprises on a spectrum. At one end of the spectrum are highly organized and structured entities like the mafia. The mafia possesses all of the characteristics of an enterprise. It has a clear hierarchical structure, it can continue to exist despite incarceration or removal of its various members, and it engages in systematic, criminal activity. That is precisely the type of entity that qualifies as an ORICO enterprise.

At the other end of the spectrum are individuals like defendant. They conspire with one or more individuals to engage in a series of crimes that may qualify as a pattern of racketeering, but they do not engage in that pattern through an enterprise. There is no separate, free standing entity that serves as conduit through which they commit their crimes. Those groups do not have any sort of even loosely defined structure, and they cease to exist when the members are absent or incarcerated.

At this end of the spectrum, the individuals' intent to participate in a conspiracy often derives from the circumstantial evidence in the case. *See, e.g.*, *Glasser v. United States*, 315 US 60, 80, 62 S Ct 457, 86 L Ed 680 (1942) ("participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and collocation of circumstances") (internal quotations and citations omitted); *State v. Brewer*, 267 Or 346, 350-52, 517 P2d 264 (1973) (circumstantial evidence was sufficient to infer that defendant conspired with one other individual to

commit first-degree robbery); *State v. Ryan*, 47 Or 338, 244, 82 P 703 (1905) ("It is seldom possible to establish a specific understanding by direct agreement between parties to effect or accomplish [a conspiracy]. * * * Therefore, the evidence must be necessarily circumstantial in character, and it will be sufficient, if it leads to the conviction such a combination in fact existed."). Those individuals plan and carry out their crimes such that they can be prosecuted for conspiracy. However, they do not commit their crimes through an entity or stand apart organization that possesses the characteristics of an ascertainable structure, continuity apart from its members, and existence for the purpose of engaging in criminal conduct.

In the middle of the spectrum, the determination of whether the group qualifies as an enterprise is more difficult. For example if defendant and his co-conspirator had stolen 5,000 bags of shrimp from the two different Safeway stores, that may have provided circumstantial evidence sufficient to prove the existence of an enterprise. As Professor Blakely explained while discussing large scale fencing operations, the type and volume of the proceeds of a theft can demonstrate that the individuals are connected to a large-scale distribution system simply because there would be no other logical way for them to sell the stolen goods. Repetitive thefts in volume suggest an association with a distribution system that could qualify as an enterprise for purposes of ORICO.

This case falls squarely on the end of spectrum that the legislature excluded from the term enterprise. The evidence showed that defendant and his co-conspirator committed three shoplifts from two grocery stores using the same *modus operandi* to take similar items each time. The pattern of those crimes shows that that defendant and his co-conspirator must have planned and coordinated the thefts. However, that is all that the evidence shows. There was no evidence that they worked through an organization to sell the goods after they stole them. Moreover, they did not take a volume of items such that it could be inferred that they must have been connected to a larger criminal distribution entity. In short, the evidence did not show that defendant committed his crimes through or with an organization that possessed an ascertainable structure, continuity, or a common criminal purpose. Accordingly, the state's evidence was insufficient to prove the enterprise element in this case.

CONCLUSION

Based on the foregoing, defendant respectfully requests that this court reverse the Court of Appeals decision to affirm defendant's conviction for racketeering and remand to the trial court for further proceedings.

Respectfully submitted,

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ESigned

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,741 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on May 16, 2013.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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