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 No. 091089 CA A142712 SC S060828

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Clatsop County
Honorable PHILIP NELSON, Judge

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INTRODUCTION

This case concerns the scope of the Oregon Racketeering and Corrupt Organizations Act (ORICO or the "Act"). The state charged defendant with one count of violating that Act, after he and his associate committed a series of thefts from grocery stores over the course of two months−all from Safeway stores, all in the same manner, and all involving the same high-cost items. Defendant moved for a judgment of acquittal at trial, asserting that the state had failed to prove the existence of an "enterprise," as required by ORICO. The trial court denied that motion, reasoning that the relevant provisions of ORICO must be broadly construed to encompass the type of informal partnership involved in this case.

The trial court's interpretation is the correct one. "Enterprise" is properly construed in a manner that encompasses loosely formed criminal organizations. The informal partnership in this case possessed all of the organization and continuity that is required for an ORICO "enterprise." Defendant and his criminal associate formed an ongoing illicit entity for the purpose of committing a certain type of theft, they used that entity to engage in coordinated criminal conduct, and the entity formed by defendant and his associate was of two months' duration. Nothing more is required.

Questions Presented and Proposed Rules of Law

Question: 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[.]" Did the legislature intend for "enterprises" to encompass a broad variety of criminal entities, even those that are loosely-organized, do not have a businesslike structure, and lack continuity that is independent of the individual members?

Proposed Rule: Yes. The text and context of the relevant statutes show that the legislature intended ORICO to encompass a wide variety of entities in which criminals act in concert to harm other persons, including informal associated-in-fact enterprises. Under ORICO, the only structure required for such an "enterprise" is: (1) a common purpose; (2) relationships among the associates; and (3) longevity that is sufficient to allow the associates to pursue the purpose of the enterprise.

Question: Was the evidence in the present case sufficient to show an "enterprise" for purposes of ORICO, where the state proved that defendant and the same criminal associate, over the course of two months, committed a series of thefts in various Oregon locations, targeting the same chain of stores, using the same methods, and stealing the same high-dollar items?

Proposed Rule: Yes. An informal association of this type is an "enterprise." From the evidence in this case, a reasonable juror could find that: (1)

defendant and his criminal associate had formed a casual partnership with the common purpose of stealing specified items from Safeway stores; (2) they had a relationship in which they travelled and worked together to commit the thefts; and (3) they worked together long enough to actively commit several thefts from Safeway stores, just as they had planned.

Summary of Argument

"Enterprise" is properly construed in a comprehensive fashion that covers informal partnerships such as that involved in this case. The text and context show that, when the legislature implemented ORICO, it intended to cast a wide net that encompasses casual criminal entities like the one formed by defendant and his criminal associate.

The text of the statutes contains broad terminology that describes the type of enterprise that ORICO targets. For example, ORS 166.720(3) states 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 activity * * *." (emphasis added). ORS 166.715(2), the statute that defines "enterprise," includes expansive terminology and a large list of the types of entities that are

included in the term "enterprise."[1] Furthermore, the legislature inserted a requirement into ORICO stating that the provisions "shall be liberally construed[.]" ORS 166.735(2). The legislature discussed the breadth of ORICO enterprises, and did nothing to limit or restrict the reach of the pertinent statutes. The text enacted into law by the legislative body as a whole is the best indicator of legislative intent, and it compels a comprehensive definition of the term "enterprise." Given that definition, this court should rule that "enterprise," as used in ORICO, encompasses an informal criminal partnership such as that involved in this case.

Factual and Procedural Summary

A. The Trial

Defendant and his associate, Williams, entered the Seaside Safeway at about 4:15 p.m. on March 26, 2009. Tr 95, 97. Defendant went to the seafood department, selected nine large bags of frozen shrimp, put them into a shopping cart, took the cart into an aisle, removed plastic Safeway bags from his pocket, and put the shrimp into those bags. Tr 98-99, 109, 136-37. In a separate shopping cart,

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[1] That provision states: "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." (Emphasis added.)

Williams had several boxes of diapers, beer, Tide detergent, and several bags of frozen shrimp. Tr 108.

Defendant left the store first. Tr 109-10. He took the bags of shrimp from the store without making any attempt to pay for them. Tr 109. Defendant walked to a car that belonged to Williams, opened the back passenger-side door, and threw the shrimp inside. Tr 109, 113, 138-39. Store loss-prevention officers had followed defendant. Tr 109. After they saw defendant put the bags of shrimp into the car, they yelled at defendant and he ran. Tr 110. In the meantime, Williams abandoned his cart inside the store and left the area on foot. Tr 110-11, 125. Loss-prevention officers saw him and yelled at him to stop, but Williams kept on walking. Tr 110-11. Store security did not succeed in their attempts to catch the two men. Tr 111.

Safeway personnel called the police and began to remove merchandise from Williams' car. Tr 112. The back part of the interior was "full of merchandise." Tr 112. It contained diapers, Tide, bags of frozen shrimp, cold beer, and beef jerky. Tr 112, 136-37. That merchandise filled two-and-one-half shopping carts, and it was valued at $804.11. Tr 113. The merchandise was from the Seaside Safeway store. Tr 188-19.

Police towed Williams' car and then located Williams, who allowed police to search the trunk of the car. Tr 119, 138-40. They found cold beer, frozen shrimp,

and boxes of Huggies diapers. Tr 140. That merchandise was also stolen from the Seaside Safeway, and it was valued at $329.06. Tr 120-21.

Police subsequently arrested defendant. Tr 162-64. He confessed that he had stolen from the Seaside Safeway. Tr 164. He said that he took the nine bags shrimp because he was going to eat it on the beach. Tr 143. Defendant disputed that the value of the merchandise exceeded $750. Tr 164. He said that would be a "felony theft, and that he wasn't stupid." Tr 164. Defendant told police that he and Williams had travelled to Seaside for the day, that they travelled together, and that they stole from Safeway together. Tr 164-65, 170. Defendant also said that he and Williams had been involved in these types of thefts in the Portland area for the last two months. Tr 170.

Safeway employs an organized retail crime specialist who investigates thefts of "high dollar merchandise." Tr 198, 221. He reviewed videotapes from the Safeway store in Sandy, Oregon. Tr 198-203, 209. A videotape from February 8, 2009, showed defendant and Williams entering that store. Tr 203. Defendant placed about six bags of frozen shrimp into a shopping cart. Tr 213-14. Williams placed bags of frozen shrimp into another cart. Tr 214. Defendant went to a different aisle and put two boxes of Tide detergent into his cart. Tr 214-15. Defendant then put several large boxes of Huggies diapers (priced at $33.99 per box) and four cases of beer into his cart. Tr 215-16, 221, 227. Defendant took plastic bags from his pocket and put the bags of shrimp inside. Tr 217. He then

pushed the cart out of the store without paying. Tr 212, 218-19. Williams left the store with a cart containing Tide, Huggies, and beer. Tr 220.

Another videotape revealed a similar theft from the Sandy Safeway on February 23, 2009. Tr 224. That tape showed defendant entering the store, selecting a cart, and placing several boxes of Tide and two large boxes of Huggies into the cart. Tr 223-24. He then put four cases of beer into the cart. Tr 224-25. Defendant left the store without paying for the items, which were priced at $215.91. Tr 226-27. Williams also had entered the store, and he stole Tide, Huggies, and beer. Tr 227. Those items were valued at approximately $200. Tr 227.

The state charged defendant with one count of racketeering under ORS 166.720 and one count of first-degree theft. (ER 1). The state based the count of first-degree theft on the theft from the Seaside Safeway, which is located in Clatsop County. (ER 1). The count of racketeering was based on the Seaside theft as a predicate, along with the two second-degree thefts from the Sandy Safeway, which is located in Clackamas County. (ER 1).

The case was tried to a jury. (App Br 1).[2] Defendant moved for a judgment of acquittal on the racketeering count, asserting that the state had failed to prove the existence of an "enterprise." Tr 238-40. In arguing the motion, both parties relied on the Court of Appeals' opinion in *State v. Cheek*, 100 Or App 501, 786 P2d 1305, *rev den*, 310 Or 121 (1990). The trial court denied defendant's motion. Tr 245-46. After hearing the evidence summarized above, the jury found defendant guilty of both counts alleged in the indictment. (App Br 1).

B. The Court of Appeals

Defendant appealed the denial of his motion for a judgment of acquittal. *State v. Walker*, 252 Or App 1, 3, 285 P3d 751 (2012). His sole contention was that the trial court erred when it found the evidence sufficient to demonstrate an "enterprise" under ORICO. *Walker*, 252 Or App at 3. The Court of Appeals considered the issue in terms of whether, "under the formulation of 'enterprise' prescribed in * * * ORICO decisions [that existed at the time of trial] * * * the state's evidence was legally sufficient[.]" *Id*., at 7. The court mentioned and briefly discussed a more recent decision, *Boyle v. United States*, 556 US 938, 129 S Ct 2237, 173 L Ed 2d 1265 (2009), in which the United States Supreme Court

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[2] "App Br" refers to the brief that defendant filed in the Court of Appeals. "Pet BOM" will refer to the brief that defendant filed in this court.

interpreted the term "enterprise" under the federal counterpart to ORICO. *Id.* The Court of Appeals observed that *Boyle* was decided after the motion for a judgment of acquittal in this case, and declined to express any view concerning the possible impact of that case. *Id*. Instead, the court based its opinion on the statutory text and its own precedent, primarily *Cheek*, with reference to federal jurisprudence that had existed at the time the legislature enacted ORICO. *Id*., at 8-10.

The Court of Appeals concluded that an "enterprise" was an organization, however loose, with ongoing continuity, and that is distinct from the criminal acts committed by an individual. *Id*., at 10. The court recognized that, in many cases involving informal, or "associated-in-fact" enterprises, there is a symbiotic relationship between the pattern of racketeering activity and the enterprise. *Id*., at 11. Thus, depending on the circumstances, proof of the pattern of racketeering can be legally sufficient to prove the enterprise. *Id*.

The Court of Appeals determined that a jury could infer that defendant and Williams were an organization due to the coordinated and systematic nature of the thefts. *Id*., at 12-13. It reasoned that an enterprise of approximately two months' duration was "ongoing" and had sufficient continuity. *Id*., at 13. Further, it determined that the informal partnership formed by defendant and Williams amounted to a distinct entity, because it was a collective that was qualitatively distinct from its individual members. *Id*. On that basis, the court determined that

the evidence sufficed to prove an "enterprise." Defendant disagrees with that conclusion, and he brings his challenge to this court.

ARGUMENT

Defendant's challenge raises an issue of statutory interpretation that focuses on the meaning of the term "enterprise," as that term is used in ORS 166.720(3). The overarching question is what ORS 166.720(3) means by prohibiting persons associated with any "enterprise" from participating in the "enterprise" through a pattern of racketeering activity. But that question is capable of further refinement, because the dispute concerns a matter of degree. In other words, the parties appear to agree on the skeletal components of an enterprise: an enterprise must, on some level, have some type of continuity and an ascertainable structure. But the parties dispute whether an enterprise must have a continuity that is independent of its individual members and how much formality is required for the structure of the enterprise.

To resolve that question, this court must examine the statutory text, context and legislative history, and the relevant maxims of statutory construction, in an effort to determine what the legislature meant when it used the term "enterprise." *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (to ascertain the meaning of a statute, the court examines text, context, and any legislative history offered by the parties; if the meaning remains unclear, the court may resort to general maxims of statutory construction). As discussed below, that statutory

analysis results in a liberal construction of "enterprise." The text and context of the statute combine to resolve the issue presented to this court, because they show that "enterprise" is very broad and that it encompasses loosely-formed criminal enterprises. The legislative history demonstrates that the legislature as a whole intended ORICO to have a broad reach. Finally, if this court reaches them, canons of construction dictate that this court should resolve the issue in a manner consistent with the resolution recently reached by the United States Supreme Court: that the only requirements for an "enterprise" are a purpose, relationships among the associates, and longevity sufficient to permit the associates to pursue the purpose of the enterprise.

A. Statutory analysis confirms that an enterprise includes loosely-formed associations.

"[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes. * * * Only the text of the statute receives the consideration and approval of a majority of the members of the legislature, as required to have the effect of law." *Gaines*, 346 Or at 171 (internal citations and quotation marks omitted). Thus, the text of the statute at issue, and the text of related statutes, supplies the most powerful and useful framework for the analytical exercise presented by this case. The text and context of ORS 166.720(3) belie the importation of formal, stringent standards into the definition of an ORICO "enterprise." The text and context, when considered

together, mandate an interpretation that encompasses loosely-organized entities such as those involved in this case.

1. The statutory text dictates an expansive construction.

When the legislature enacted ORICO, it implemented terminology that reflected its intent to reach a wide variety of entities that might be involved in criminal activities. The particular provision at issue states, in its entirety:

> 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 or the collection of an unlawful debt.

ORS 166.720(3) (emphasis added). ORICO provides examples of what constitutes an "enterprise." The relevant definitional provision states:

> "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.

ORS 166.715(2) (emphasis added). Those behind the passage of ORICO have observed the significance of the definitional provision: "Because the definition is by way of illustration and not limitation, it is clear that the legislature intended to provide as broad a definition as possible." Frohnmayer, Arnold and Hamilton, *RICO: Oregon's Message to Organized Crime*, 18 Will L Rev 7 (1982).

ORS 166.715(2) does not fully define "enterprise." The provision says what "enterprise" *includes*, but it does not say what that term *means*. The statute

provides guidance by listing examples of entities that are enterprises, but it does not provide a complete definition. Because ORICO contains what amounts to an incomplete definition of "enterprise," this court should resort to the ordinary meaning of the statutory terms. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993) (In the absence of a legislative definition, the first-level statutory analysis requires that the word must be accorded its plain, natural and ordinary meaning).

"Enterprise," at the time ORICO passed, was defined 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 * * * **d :** *any systematic purposeful activity or type of activity* * * *[.]

Webster's Third New International Dictionary 757 (unabridged ed 1976) (emphasis added).[3] Thus, the dictionary definition of "enterprise" encompasses virtually any type of organization, even a very casual one, formed for the purpose of engaging in a particular project or activity. It is not predicated on longevity, nor

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[3] To the extent that "enterprise" might be considered a legal term of art, Black's Law Dictionary contained a similar description, defining the term as "[a] venture or undertaking especially one involving financial commitment." *Black's Law Dictionary* 476 (5th ed 1979). It also referred to the definition of an "enterprise" under the Fair Labor Standards Act, which has no relevance here.

does it mandate any particular kind of structure or an existence independent of its participants.

Both ORS 166.720(3) and ORS 166.715(2) contain other terms and phrases that evince a legislative intent to cast a wide net over the activity and entities encompassed by ORICO. For example, ORS 166.720(3) loosely defines the nexus between the perpetrators and the subject entity, prohibiting certain conduct by those "employed by or associated with" an enterprise. Those requirements capture relationships that are formal (such as an employer-employee relationship) and those that are informal (such as persons who somehow associate with an entity). ORS 166.720(3) also prohibits persons from participating in the criminal conduct "directly or indirectly," which suggests that the legislature intended to reach a breadth of activity when it enacted ORICO. ORS 166.715(2) contains an expansive list of examples of the kinds of entities that constitute enterprises, including various business entities, entities that operate for profit and those that do not, unions, groups of individuals, entities that are legal and illegal, and entities that are governmental and those that are not. That provision indicates an intent to reach almost any kind of entity in which individuals coalesce to purposefully engage in criminal activity.

And the same two provisions—ORS 166.720(3) and ORS 166.715(2)—use the word "any," repeatedly, to describe the types of "enterprise" that they address. The legislature would not have repeatedly used the term "any" had it intended to

reach only a narrow category of entities. The dictionary definition of the word "any" includes the following:

> **1 :** * * * **b :** one, no matter what one : EVERY – used as a function word esp. in assertions and denials to indicate one that is selected without restriction or limitation of choice * * * **c :** one or some of *whatever kind or sort*; *esp* **:** one or some however imperfect – used as a function word to indicate one that is selected with indifference to quality * * * **2 : * * * b :** ALL – used as a function word to indicate the *maximum* or whole of a number of quantity * * * **c :** a or some no matter how great or small – used as a function word to indicate what is considered despite its quantity or extent * * * **3 a :** great, *unmeasured or unlimited* in amount, quantity, *time*, or *extent* * * * [.]

Webster's at 97. The ordinary meaning of "any" indicates breadth and, as used in ORICO, it evinces an effort to reach a maximum number of criminal enterprises of whatever kind or sort.

In sum, the text implemented by the legislature compels a broad construction of "enterprise." When the dictionary definitions of the words used by the legislature are used to complete the statutory description of "enterprise," the result is a statutory scheme that has a wide application. The words and phrases contained in the text indicate that the statutes encompass a broad range of entities, even those that are casual and last only as long as necessary to accomplish the planned criminal purpose.

2. Context mandates a liberal construction.

a. ORICO requires its provisions to be "liberally construed."

Another provision of ORICO provides context for the statutory text discussed above, and it supports the conclusion that "enterprise" should be broadly construed. *See, e.g.*, *Force v. Dept. of Revenue*, 350 Or 179, 188-89, 252 P3d 306 (2011) (looking to other provisions of the tax code as context for the particular provisions at issue). The legislature inserted a provision into ORICO to insure against a restrictive interpretation of the statutory scheme. ORS 166.735(2) states: "The provisions of [ORICO] *shall be liberally construed* to effectuate its remedial purpose." (emphasis added).

ORS 166.735(2) requires a liberal construction that advances the remedial purpose of ORICO. The remedial purpose is to combat "systematic and concerted lawlessness [that] creates a greater social threat than individual criminal acts." Frohnmayer, Arnold and Hamilton, *RICO: Oregon's Message to Organized Crime*, 18 Will L Rev 2 (1982). The rationale behind ORICO was to give adjudicators a complete and accurate picture of the types of crimes they are considering. "Where conventional criminal statutes focus on a single incident, [ORICO] provides a view of the continuing series of events of criminal activity which, occurring over a period of time, combine to form 'organized crime.'" *Id*. ORS 166.735(2) requires a liberal construction of ORICO to capture situations in which criminals act in concert, and so judges and juries can understand and assess situations in which

criminals combine to engage in a pattern of racketeering activity. That, in turn, requires a liberal construction of "enterprise" that will allow adjudicators to look beyond individual crimes and to appreciate that criminals may have formed a loose partnership, with a common purpose, to facilitate their participation in repeated criminal activity.

b. Pertinent cases broadly construed the statutory terms.

When Oregon law is modeled after a federal statute, federal cases interpreting the federal statute, especially those decided before Oregon implemented its statute, provide persuasive context. *See Redmond Ready-Mix, Inc. v. Coats*, 283 Or 101, 110, 582 P2d 1340 (1978); *Weber and Weber*, 337 Or 55, 67, 91 P3d 706 (2004) ("[T]his court presumes that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing upon those statutes."). ORICO was modeled after federal law, the Racketeer Influenced and Corrupt Organizations Act (RICO), which was implemented more than ten years before the passage of ORICO. Frohnmayer, Arnold and Hamilton, *RICO: Oregon's Message to Organized Crime*, 18 Will L Rev 1 n 2 (1982). A few months before Oregon enacted ORICO in August 1981, the United States Supreme Court issued a decision that defined the RICO term "enterprise." In *United States v. Turkette*, 452 US 576, 101 S Ct 2524, 69 L Ed 2d 246 (1981), the Court addressed whether "enterprise" should be construed broadly to encompass legitimate and illegitimate entities or whether "enterprise" was "limited in application[.]" 452 US at 578.

The Court addressed the dictionary definition of "enterprise," and observed that RICO contained a statute directing that "[t]he provisions of this Title shall be liberally construed to effectuate its remedial purposes." *Id.* at 580-81, 587. After also considering the legislative history, the Court observed that it was "unpersuaded that Congress * * * confined the reach of the law to only narrow aspects of organized crime[.]" *Id.* at 590-91. The Court defined "enterprise" as "a group of persons associated together for a common purpose of engaging in a course of conduct." *Id.* at 583. It rejected the more restrictive definition advanced by the defendant, concluded that "enterprise" encompassed illegitimate entities, and explained "[t]he language of the statute, however—the most reliable evidence of its intent—reveals that Congress opted for a far broader definition of the word 'enterprise,' and we are unconvinced by anything in the legislative history that this definition should be given less than its full effect." *Id.* at 593. The Oregon legislature presumably knew, before it enacted ORICO, that the United States Supreme Court had broadly construed "enterprise".

And the tenor of other federal opinions lends to the conclusion that the legislature knew that courts would likely construe "enterprise" in an expansive fashion. Federal courts were in the process of addressing the breadth of the RICO term "enterprise." More specifically, federal courts were grappling with the issue of whether "enterprise" encompassed illegal entities or governmental entities because RICO did not specifically address those types of organizations. *See* Pet

BOM 8 (quoting 18 USC §1961 (1976)). As defendant correctly observes, most federal circuits had broadly construed RICO enterprises to include illegal entities and governmental entities. (Pet BOM 14). And at least one federal court had addressed informal illegal entities, determining that a small group of individuals who committed burglaries was a RICO "enterprise." *See United States v. Aleman*, 609 F2d 298, 302-05 (7th Cir 1979) ("[T]he Act is not restricted to members of organized crime, but can be used to reach out for others if the statutory conditions are met."). Thus, it was apparent that "enterprise," as used in a statutory scheme such as ORICO, would be construed very broadly.[4]

One other case is noteworthy, and that is *Boyle v. United States*, 556 US 938, 129 S Ct 2237, 173 L Ed 2d 1265 (2009). The state acknowledges that the case was not decided at the time the legislature passed ORICO, but it is consistent with the federal precedent discussed above and this court may find it to provide useful

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[4] Opinions that this court issued prior to the enactment of ORICO also indicated that "enterprise" would be broadly construed. As discussed, the legislature repeatedly used "any" in a manner that modifies the term "enterprise." This court had repeatedly construed "any" in an expansive manner. *See Dickinson v. Leer*, 255 Or 274, 276-77, 465 P2d 885 (1969) ("any," as used in statute related to service of summons, is "unrestricted and comprehensive"); *Reed v. Reed*, 215 Or 91, 96, 332 P2d 1049 (1958) ("The word 'any,' which is a part of the statutory phrase referred to, has a comprehensive meaning [.]"); *Pugsley v. Smyth*, 98 Or 448, 468, 478, 194 P 686 (1921) (interpreting statutory reference to "any communication" in statute as embracing all communications and expressing the idea of "every" communication).

context.[5] In *Boyle*, the Court attempted to further define the RICO term "enterprise." The defendant in that case argued that an "enterprise" must have "an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts." 129 S Ct at 2242. The Court rejected that definition, holding that an association-in-fact enterprise does not need to have an ascertainable structure beyond that inherent in the pattern of racketeering activity, and need not have a hierarchy, chain of command, or other business-like attributes. The Court observed the expansive text of the relevant statutes, that Congress had included a mandate for RICO's liberal construction, and that the inclusion of the word "any" "ensures that the definition [of enterprise] has a broad reach." 129 S Ct at 2243. The Court announced a definition of "enterprise" that would encompass loosely-formed criminal organizations with limited continuity. It required only three structural features: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id*. at 2244. That definition is entirely consistent with the text and context discussed

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[5] This discussion of *Boyle* is, perhaps, more properly framed as one addressing canons of construction. For that reason, it is also briefly addressed under that topic.

above, and it underscores that "enterprise"− as used in ORS 166.720(3) − should be broadly construed to include transient, informal entities.

3. The legislative history supports an expansive interpretation.

The legislative history reflects that legislators specifically considered whether ORICO would reach casual organizations formed by criminals, and it nevertheless enacted the broad provisions discussed above to reach those very kind of organizations. Oregon legislators heard about the reach and structure of the Act. For example, Professor G. Robert Blakey, a proponent who had helped to draft ORICO, testified before the Senate Justice Subcommittee and he explained the types of criminal activity that ORICO would prohibit. The professor testified that ORICO was meant to reach crimes beyond those that involved "a single incident, on a single day and a single person[.]" Minutes, Joint Subcommittee on Organized Crime, SB 531, April 23, 1981, 6 (statement of Professor Blakey). He explained that ORICO addressed crimes that were "part of a pattern," and where "there is an organization involved * * * [t]he statute calls it an enterprise." *Id*. Professor Blakey gave, as examples of the types of activity ORICO would cover, descriptions of some entities that were large and sophisticated. (Pet BOM 23). But he also mentioned entities involved in "theft done for resale or fencing." (Pet BOM 23). That description encompasses lower-level criminal entities involved in activity such as organized shoplifting.

Others testified before the Senate Justice Subcommittee and they engaged senators in discussions concerning the breadth of the criminal activity that ORICO might reach. (Pet BOM 25). Jim Hennings, a criminal defense attorney who opposed the bill, told the subcommittee that, if ORICO passed as written, prosecutors could bring charges against "a group of 20 year olds who shoplift a couple times[.]" (Pet BOM 25). Hennings asserted that the Attorney General had indicated that shoplifting rings should not be prosecuted under ORICO, and Senator Wyers replied, "I know that's his hope." Tape Recording, Senate Justice Committee, SB 531, 5/18/81, Tape 185, Side A (statement of Senator Wyers). The senator added that some district attorney might nevertheless decide to prosecute such crimes under ORICO. *Id*. Another witnesses, Deputy Crannell, told the Senate Justice Subcommittee that ORICO would reach some "home grown" enterprises engaged in organized shoplifting. Tape Recording, Senate Justice Committee, SB 531, May 18, 1981, Tape 186, Side A (statement of Deputy Crannell). Given the testimony of Hennings and Deputy Crannell, the legislature knew it was possible that shoplifting enterprises could be prosecuted under ORICO.

Defendant cites a few examples where individual legislators suggest the "legislative history" of ORICO should indicate a narrow construction so that it would not cover activity such as loosely-organized shoplifting. (Pet BOM 22, 26, 30). But that does not suffice to overcome the text and context discussed above.

See Gaines, 346 Or at 173 ("When the text is truly capable of only one meaning, no weight can be given to legislative history that suggests−or even confirms−that legislators intended something different."); *White v. Jubitz Corp.*, 347 Or 212, 223, 219 P3d 566 (2009) ("[L]egislative history cannot substitute for, or contradict the text of, [a] statute."). The expressions or intentions of individual legislators cannot prevail over the words that the legislature, as a whole, enacted into law.

And different parts of the legislative history suggest that other legislators did not share the concerns expressed by those whom had reservations about the reach of ORICO. Senator Wyers told the Senate Justice Committee that he was concerned that prosecutors might use ORICO to reach low-level crimes involving a few "stumblebums." Tape Recording, Senate Justice Committee, SB 531, May 19, 1981, Tape 192, Side A (statement of Senator Wyers). He stated that the legislative history should be that ORICO should not apply to low-level crimes, and the Senate Justice Committee discussed whether to amend ORICO to narrow its reach. Tape Recording, Senate Justice Committee, SB 531, May 19, 1981, Tape 192, Side A (statement of Senator Wyers). But there was no proposal to amend ORICO in that manner. Senator Brown moved to pass the bill without amendment, and that motion was carried. Tape Recording, Senate Justice Committee, SB 531, May 19, 1981, Tape 192, Side A (statement of Senator Brown). Later, Attorney General Frohnmayer testified to the House Judiciary Committee that ORICO was not limited to mafia-like organizations, that it would cover a wide variety of "home

grown" activity, and that federal courts had given RICO a broad construction. Tape Recording, House Judiciary Committee, SB 531, July 8, 1981, Tape 522, Side A (statement of Frohnmayer). Thus, the legislature passed ORICO while fully aware that it could be used to prosecute informal entities that committed crimes such as organized shoplifting.

It is true that some proponents mentioned that ORICO would target sophisticated criminal enterprises when they urged the passage of the Act, but that does not mean that the legislature intended to restrict ORICO so that it *only* reached that type of enterprise. When the fact that individuals mentioned larger criminal organizations is balanced against the text that was implemented, it is the text the truly reveals legislative intent. *See, e.g.*, *Hamilton v. Paynter*, 342 Or 48, 55, 149 P3d 131 (2006) ("[T]he statutory text shows that, even if the legislature had a particular problem in mind, it chose to use a broader solution"); *South Beach Marina, Inc. v. Dept. of Revenue*, 301 Or 524, 531, 724 P2d 788 (1986) ("Statutes ordinarily are drafted in order to address some known or identifiable problem, but the chosen solution may not always be narrowly confined to the precise problem. The legislature may and often does choose broader language that applies to a wider range of circumstances than the precise problem that triggered the legislative attention."). The legislature did not limit ORICO enterprises to large, businesslike entities that existed independent of their participants. It easily could have inserted such limitations if it had wished to do so.

The significance of the legislative history lies in the fact that the legislature actively considered the types of casual criminal entities that ORICO might reach and it declined to enact restrictive amendments or limiting text. The legislature did the opposite−it implemented legislation that gave "enterprise" an expansive definition, together with a statute that compels a liberal construction of what constitutes an enterprise. In other words, despite concerns and knowing full well that ORICO could be used to reach relatively short-term unsophisticated criminal organizations, the legislature enacted laws that encompassed that type of entity. When it did so, it encompassed the type of enterprise that is involved in this case.

4. Canons of construction support an expansive interpretation of ORICO enterprises.

Because the text and context clearly convey the intent of the legislature, it is not likely that this court will resort to this step of the analysis. To the extent that it does, it may wish to consider *Boyle* at this stage of the analysis. That case is based on legislation similar to ORICO, and it may shed light on what the Oregon legislature would have done if it had further considered the meaning of enterprise. *See, e.g.*, *Carlson v. Myers*, 327 Or 213, 225, 959 P2d 31 (1981) (the court may resort to maxims of statutory construction, including the maxim that it will attempt to determine how the legislature would have intended the statute to be applied, had it considered the issue). This court sometimes seeks guidance from post-enactment decisions, to determine whether the legislature would have intended Oregon law to

be applied in a manner that is consistent with other jurisdictions. *Marks v. McKenzie High School Fact–Finding Team*, 319 Or 451, 457–63, 878 P2d 417 (1994). *See also State v. Warner*, 298 Or 640, 650, 696 P2d 1052 (1985) (where Oregon law is based on the law from another state, this court will examine post-enactment decisions from that state for the persuasive value of their analyses).

As mentioned in the foregoing discussion of *Boyle*, the United States Supreme Court rejected arguments almost identical to those that defendant puts forth in this appeal. The Court held that an association-in-fact enterprise, such as the informal partnership involved in the present case, needs only three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose. 129 S Ct at 2244. If this court reaches this stage of the analysis, it should use *Boyle* to guide the assessment of what the Oregon legislature would have done had it further considered the application of the term "enterprise." It is likely that the legislature would have intended reasoning such as that applied by the United States Supreme Court. This court should rule accordingly.

5. Defendant's proposal is contrary to the legislative intent.

Defendant advances a far more formalistic and narrow interpretation of the term "enterprise" than that suggested by the foregoing analysis. He argues that the legislature intended ORICO to reach only those entities with a hierarchical and businesslike structure, and which have continuity independent of their individual

members. As shown above, and as addressed here with a focus on defendant's propositions, his construction of the relevant statute contradicts the intent of the legislature.

The text used by the legislature proves defendant wrong, as discussed above. Nothing in ORS 166.715(2) requires an "associated in fact" enterprise, such as the one involved in this case, to have a formal, businesslike structure. Nor do the statutes at issue contain any text that requires an enterprise to have continuity independent of its participants, as defendant contends.

Defendant's discussion of the terms "organize" and "organization" does not negate the statutory text. As defendant recognizes, those terms are contained in ORICO's title. Neither of the terms is contained in the statute at issue, nor did the legislature choose to use them in describing the types of entities that constitute an enterprise.[6] Moreover, the definitions of "organize" and "organization" do not require the "continuity independent of [the entity's] individual members" that defendant urges this court to insert into the statutory terminology. (Pet BOM 12). An "organization" includes "something organized" and a "purposive systematic

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[6] The state acknowledges that the title of a legislative act may be used to help construe the text contained in the act, *if* the text is ambiguous. *City of Portland v. Duntley*, 185 Or 365, 386, 203 P2d 640 (1949). That is not the case here, given the breadth of the words and phrases the legislature chose to use in the statutes.

arrangement." *Webster's* at 1590. The definition of "organize" includes "to unify into a coordinated functioning whole." *Id*. Both terms could include an informal partnership such as that created by defendant and his criminal associate.

Context also negates defendant's arguments. He acknowledges the federal cases that existed at the time Oregon enacted ORICO. (Pet BOM 14-15). The essence of the cases that defendant cites is a consistently liberal construction of the term "enterprise." They fail to support defendant's plea for a narrow interpretation of that term. More important, defendant ignores ORS 166.735(2), in which the Oregon legislature expressly provided that the provisions of ORICO must be construed liberally. Defendant's formalistic construction of the term "enterprise" cuts against the liberal construction mandate contained in ORS 166.735(2).

Defendant primarily relies on legislative history to support his argument that this court should construe "enterprise" to exclude informal partnerships such as that involved in this case. He points to parts of the legislative history in which witnesses, and even two legislators, expressed concern that ORICO prosecutions might not be confined to large, sophisticated criminal entities and might capture lower-level criminal enterprises such as those involved in several instances of shoplifting or minor theft. (Pet BOM 22-32). Defendant's emphasis on the legislative history fails for two fundamental reasons. First, the opinions expressed by non-legislative witnesses, such as the defense attorneys who expressed their desire to limits the scope of ORICO, are entitled to little weight. *See State v.*

Guzek, 322 Or 245, 261, 906 P2d 272 (1995), *vac'd on other grds*, 336 Or 424 (2004). ("the views of one witness * * * do not evidence the general intent of the Legislative Assembly"). Second, "it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law." *Gaines*, 346 Or at 171. As noted above, the legislature considered the possible reach of ORICO and proceeded to implement expansive statutes that clearly encompass the type of criminal entity involved in this case. "[L]egislative history cannot substitute for, or contradict the text of, [a] statute." *White*, 347 Or at 223. It is the statutory text that controls, regardless of any statements made by individuals at the time the legislature considered the passage of ORICO. That text directly refutes defendant's proposed construction of the term "enterprise."

B. The trial court properly construed ORICO in denying the motion for a judgment of acquittal.

To establish an ORICO "enterprise," the state had to prove the existence of an entity with a common purpose, relationships among the associates, and longevity sufficient to pursue the common purpose. A jury can reasonably infer those elements, and ascertain the existence of an enterprise, from evidence of an informal partnership that engages in a pattern of theft. The requisite evidence was present here.

The jury heard that defendant and his criminal associate, Williams, consistently engaged in a pattern of stealing certain items, using the same

methodology, from a particular chain of stores. That evidence sufficed to show all three structural components of an "enterprise." First, it demonstrated that defendant and Williams shared a common purpose: to carry-out thefts of high-dollar items from Safeway stores. Second, there was evidence that defendant and Williams routinely worked together in committing the thefts, drove together to Seaside, and shared the same vehicle to store and transport the stolen goods; that was sufficient to establish that there was a relationship among the two associates. Third, there was longevity sufficient to allow defendant and Williams to pursue the purpose of their informal partnership. Not only did they engage in the three Safeway thefts alleged in the indictment, defendant confessed that he and Williams had been involved in the same types of theft in the Portland area for two months.

To any extent that the state had to prove that the enterprise was an independent entity that existed apart from the two individuals involved in this case, the evidence met that requirement as well. *See Walker*, 252 Or App at 12 (stating that an informal partnership exists independently of its participants because the partnership is qualitatively distinct from its members). The partnership in this case existed only when defendant and Williams *combined* to engage in criminal activity. It is that combination that formed the "enterprise." And that combination is a type of "concerted lawlessness" that is more of a "social threat than individual criminal acts," which is precisely what ORICO was meant to address. Frohnmayer, Arnold

and Hamilton, *RICO: Oregon's Message to Organized Crime,* 18 Will L Rev 2 (1982).

The state presented evidence to prove all of the necessary elements for an enterprise under ORICO. It was not required to prove a complex organization that had an independent life of its own. The trial court correctly construed ORICO when it denied the motion for a judgment of acquittal.

CONCLUSION

For all of the reasons explained above, this court should affirm the judgments of the trial court and the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 17, 2013, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Erica Herb, attorneys for petitioner on review, by using the court's electronic filing system.

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

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 7392 words. I further 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(2)(b).

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