No. 07-1309

In The

# Supreme Court of the United States

OCTOBER TERM 2007

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EDMUND BOYLE,

*Petitioner,*

-against-

UNITED STATES OF AMERICA,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## REPLY TO GOVERNMENT BRIEF OPPOSING *CERTIORARI* PETITION

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## REPLY TO GOVERNMENT BRIEF OPPOSING *CERTIORARI* PETITION

The government's reasons for opposing *certiorari* in this case are unpersuasive.

**First**, its characterization of the circuit split at issue as "superficial and limited"[1] strains credulity. As demonstrated at pages 10-14 of our petition, at least four federal circuits – the Third, Fourth, Eighth and Tenth – require that a valid RICO enterprise have an ascertainable structure distinct from the pattern of

[1] Brief for the U.S. in Opposition to Edmund Boyle's Petition for a Writ of *Certiorari*, filed July 2, 2008 ("Opp."), at 6, 9.

racketeering in which it engages. Another five circuits – the First, Second, Ninth, Eleventh and District of Columbia – flatly reject any such requirement, while a sixth – the Seventh Circuit alone among its peers – steers a middle course. A more direct, fully-developed conflict is hard to imagine.

**Second**, in asserting that an ascertainable structure requirement would defy the truism that "RICO covers both legitimate and illegitimate enterprises,"[2] the government merely begs the question. For as several members of the *en banc* Ninth Circuit countered in *Odom v. Microsoft Corp.*, that objection is easily met: while many "criminal enterprises may not observe the niceties of legitimate organizational structures," the statute nonetheless "targets a more sophisticated crowd." 486 F.3d 541, 551, 555 (9th Cir.) (*en banc*) (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result) (citation and internal quotes omitted), *cert. denied*, 128 S. Ct. 464 (2007); *accord, e.g., Limestone Dev. Corp. v. Village of Lemont, Il.*, 520 F.3d 797, 804-05 (7th Cir. 2008) (Posner, J.) ("'associated in fact' just means structured without the aid of legally defined structural forms such as the business corporation").

In contrast to the government's apparent position, we thus contend that RICO was not meant to reach any and all "criminal enterprises." *Odom*, 486 F.3d] at 551 (majority opinion). Rather, as our petition further explains, its declared purpose was to eradicate

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[2] Opp. at 7 (citation omitted).

> "*organized* crime," [*U.S. v. Turkette*,] 452 U.S. [576,] 589 [(1981)] (citation omitted) (emphasis supplied) – enduring and entrenched criminal groups with at least some "minimal structure, coordination, or ordering principle." *Odom*, 486 F.3d at 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result). Conversely, the statutory focus was never on "individuals merely associated" together for the commission of *ad hoc* or "sporadic crime." [*U.S. v.*] *Bledsoe*, 674 F.2d [647,] 665 [(8th Cir. 1982)]; *accord, e.g., U.S. v. Pelullo*, 964 F.2d 193, 212 (3d Cir. 1992) (contrasting RICO enterprises with "individuals who associate for the commission of sporadic harm"). ... At any rate, ... **no one suggests that criminal confederacies must "observe" the formal "niceties" of "legitimate organization[s]" to qualify as RICO enterprises**. *Odom*, 486 F.3d at 551 (citation and internal quotes omitted). All we urge – and all the Third, Fourth, Seventh, Eighth and Tenth Circuits prescribe – is **some** "ascertainable structural hierarchy" beyond the charged "predicate acts." A: 683 (Boyle's proposed charge) (citations and footnote omitted).

Edmund Boyle's Petition for a Writ of *Certiorari*, filed April 15, 2008, at 17-18 (additional emphasis supplied).

The foregoing debate, about reconciling a structural hierarchy requirement with RICO's covering legitimate and illegitimate enterprises alike, is the very issue that splintered the *Odom* Court and has long confounded its sister circuits. And it is the very issue on which we seek *certiorari*. It is no answer to invoke the same debate, as the government circularly does, as grounds for denying Boyle's petition.

**Third**, while the government would downplay the circuit conflict here as more theoretical than real – complaining that we identify no "analogous" case "in which the ascertainable structure test has led to a reversal"[3] – research shows that courts have indeed found the issue outcome-determinative. *See, e.g., U.S. v. Lacy*, No. 95-10398, 87 F.3d 1324, 1996 WL 327095, at **1 (9th Cir. June 13, 1996) (affirming dismissal of RICO charges, under pre-*Odom* standard advocated here, for failure to allege an enterprise "structure" beyond that "inherent in the predicate racketeering acts"); *cf., e.g., Bledsoe*, 674 F.2d at 667 (reversing RICO convictions partly because there was "no real evidence of a structure [or] pattern of authority or control"); *Pelullo*, 964 F.2d at 210-12 (same where, *inter alia*, jury instruction failed to require an enterprise "separate and apart from the pattern of activity in which it engages," among other flaws).

In any event, the relative rarity of criminal reversals for insufficient enterprise proof is unsurprising, as ascertainable structure is a "question[] of fact" for a properly instructed jury, whose findings

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[3] Opp. at 8-9 (footnote omitted).

command great deference on appeal. *Id.* at 211 (citation omitted). The threshold question, of course – and the main one pressed here – is what constitutes a "proper instruction" in the first place. Moreover, criminal reversals aside, Boyle's argument also has broad implications in the civil RICO context – implications that he is perfectly competent to explore and present to this Court.

**Fourth**, this Court has long recognized that the "denial of a writ of *certiorari* imparts no expression of opinion on the merits of a case." *U.S. v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.). It follows that the purported denial of other petitions allegedly "raising the same issue" simply has no bearing here. *See* Opp. at 9 (citations omitted). And for good reason: the "variety of considerations" underlying such "denials" – *e.g.*, insufficient development of an issue among the lower courts; waiver; mootness; different petitions raising different arguments regarding the same issue – "counsels against according denials of *certiorari* any precedential value." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (citation and internal quotes omitted). Boyle's case illustrates the point. There is no indication, for example, that the argument raised at pages 18-19 of his petition – early RICO cases shunning enterprise structure were decided when other statutory glosses, since discredited, served as a structural proxy – was previously before this Court. The government's position on this score thus contravenes a basic tenet of Supreme Court jurisprudence: the non-precedential effect of *certiorari* denials.

At any rate, for substantially similar reasons – namely, the "variety of considerations"[4] just rehearsed – it is not unusual for this Court to "consistently"[5] deny *certiorari* on a given issue only to grant the writ later. To the contrary, research reveals that this is a regular occurrence. *Compare, e.g., Smith v. U.S.*, 429 U.S. 925 (1976) (denying *certiorari* in case holding that defendant had no right to stipulate to prior felony conviction in federal gun trial) with *Old Chief v. U.S.*, 519 U.S. 172 (1997) (addressing same issue, after granting *certiorari*, and recognizing such a right); *Mandel v. U.S.*, 445 U.S. 961 (1980) (denying *certiorari* in case holding that mail fraud statute proscribes schemes to defraud citizens of intangible right to honest services) with *McNally v. U.S.*, 483 U.S. 350 (1987) (addressing same issue, after granting *certiorari*, and reaching opposite conclusion); *Pryba v. U.S.*, 498 U.S. 924 (1990) (denying *certiorari* on issue whether RICO conspiracy requires personal commission of, or agreement to personally commit, two or more predicate acts) with *Salinas v. U.S.*, 522 U.S. 52 (1997) (addressing same issue, after granting *certiorari*, and holding it does not).

**Fifth**, it is equally unremarkable for this Court to grant *certiorari* petitions, like Boyle's, emanating from "unreported, *per curiam*, summary order[s]." Opp. at 9-10. In fact, the Court routinely does just that – and as recently as this past term – unpublished appellate opinions spawning some of its most consequential

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[4] *Teague*, 489 U.S. at 296 (citation and internal quotes omitted).

[5] Opp. at 9.

decisions. *See, e.g., Bell v. Kelly*, 128 S. Ct. 2108 (2008); *Samson v. Ca.*, 545 U.S. 1165 (2005); *Scheidler v. NOW, Inc.*, 545 U.S. 1151 (2005); *Hudson v. Michigan*, 545 U.S. 1138 (2005); *U.S. v. Flores-Montano*, 540 U.S. 945 (2003). Contrary to the government's suggestion, then, the lack of detailed appellate "consideration" in a particular "case"[6] rarely deters this Court from granting *certiorari* where, as here, an issue is otherwise ripe for review. On the government's odd theory, lower courts could shield their opinions from further judicial scrutiny merely by leaving them unpublished, effectively freezing the law in time. To state this proposition is to reject it.

**Sixth**, citing only its own appellate brief, the government insists that "the evidence introduced at [Boyle's] trial" – ostensibly showing meager role differentiation, profit-sharing and the use of aliases and burglar's tools – sufficed to satisfy any ascertainable structure requirement. Opp. at 3, 10. This characterization of the record is both disputed and self-serving, belied by the government's own accomplice testimony excerpted at pages 3-5 of our petition. More significantly, it was never passed on below because the jury was not instructed on the structural hierarchy requirement. As such, it deserves no deference here, and is properly addressed to the Court of Appeals in the first instance – for purposes of conducting harmless error analysis and/or fashioning an appropriate remedy – upon any reversal and remand.

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[6] Opp. at 10.

Even more fundamentally, the generic attributes the government touts as structural proof – participants variously acting as "lookout[s] or burglar[s]," using aliases and "burglar's tools," and splitting proceeds[7] – are staples of **any** ongoing bank burglary conspiracy. The government's position thus conflates the discrete concepts of conspiracy and enterprise, making every "run-of-the-mill conspira[tor]"[8] an automatic racketeer facing enhanced criminal penalties and the threat of treble damages. *Cf., e.g., U.S. v. Riccobene*, 709 F.2d 214, 221 (3d Cir. 1983) (without structured enterprise, "federal prosecutors could use the [statute] to invoke an additional penalty" in any case involving commission of two offenses "listed as 'racketeering activities'"), *abrogated on other grounds*, *Griffin v. U.S.*, 502 U.S. 46 (1991). To borrow Judge Posner's phrase, "[t]hat does not make good sense, and [can]not [be] the law." *Limestone Dev. Corp.*, 520 F.3d at 801, 804-05 ("a conspiracy is not a RICO enterprise unless it has some enterprise-like structure... Without a requirement of structure, 'enterprise' collapses to 'conspiracy'"); *accord, e.g., Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir. 1996) (conspiracy "not an enterprise" within RICO's purview), *abrogated by Odom*; *U.S. v. Korando*, 29 F.3d 1114, 1117 (7th Cir. 1994) (quality of "structure" distinguishes enterprise from "mere conspiracy"); *U.S. v. Perholtz*, 842 F.2d 343, 363 (D.C. Cir. 1988) ("The same group of individuals who repeatedly commit predicate offenses do not necessarily constitute an enterprise. An extra ingredient is required: organization."); *Bledsoe*, 674 F.2d

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[7] *See* Opp. at 3.

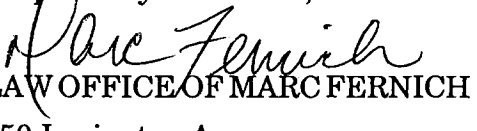
[8] *Odom*, 486 F.3d at 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result).

at 665 (enterprise connotes more than common purpose shared by "wrongdoers" committing crimes through "concerted action").

## CONCLUSION

For the reasons stated here and in Boyle's petition, *certiorari* should be granted.

Respectfully submitted,



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## CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the accompanying *certiorari* petition contains approximately 1808 words, excluding the parts of the document exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed July 8, 2008

**MARC FERNICH**