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RICO's Enterprise Element: Redefining or Paraphrasing to Death?

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RICO'S ENTERPRISE ELEMENT: REDEFINING OR PARAPHRASING TO DEATH?

The term 'enterprise' under RICO is one of those subjects that the more it is explained—at least in the abstract—the more elusive it becomes, and there is the danger of paraphrasing the term to death.¹

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I. INTRODUCTION

Imagine a local gang or group of individuals banded together repeatedly for the common purpose of distributing selling cocaine. The profits of the illicit drug sales are used to buy more drugs. While these illegal drug activities could be prosecuted under Minnesota's criminal statutes, prosecutors in Minnesota would be unlikely to establish a successful claim under the Racketeer Influenced and Corrupt Organizations Act (RICO).² The criminal activities would not be considered beyond what is necessary to constitute the elements of the underlying drug offenses.

Amidst years of debate in the federal courts over the construction of RICO,³ different tests have emerged among the circuit courts to prove

1. State v. Huynh, 519 N.W.2d 191, 196 n.7 (Minn. 1994).
2. See infra part II.D.
3. Racketeering is defined as "[a]ctivities of organized criminals who extort money from legitimate businesses by violence or other forms of threats or intimidation or conduct of illegal enterprises such as gambling, narcotics traffic, or prostitution." BLACK'S LAW DICTIONARY 1258 (6th ed. 1991). The U.S. Department of Justice defined organized crime as including "any group of individuals whose primary activity involves violating criminal laws to seek illegal profits and power by racketeering activities and, when appropriate, engaging in intricate financial manipulations." NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON ORGANIZED CRIME 213 (1976); see also Sen. McClellan's congressional testimony, 116 CONG. REC. 18,940 (daily ed. June 9, 1970) (noting that organized crime is not a precise

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a RICO cause of action. The debate focuses on two of the main RICO elements, establishment of an “enterprise” and proof of a “pattern of racketeering activity.”4 The different tests developed primarily due to each circuit’s interpretation of the statutory definition of “enterprise,” and the quantum of proof required to meet this element.5

Minnesota recently adopted the Eighth Circuit’s stringent test for the determination of an enterprise,6 and applied that test in State v. Kelly.7 The Minnesota Supreme Court, however, modified one of the enterprise requirements of the Eighth Circuit’s test. In Kelly, the court considered whether the defendant, a pimp, was associated with a criminal enterprise and engaged in a pattern of racketeering activity.8 The supreme court held that Kelly’s prostitution activities were insufficient proof of racketeering and reversed the appellate court’s decision and Kelly’s RICO conviction.9

This Case Note will show that the Kelly court correctly applied the new Minnesota RICO test to determine the existence of an enterprise. This new test modifies the former test to focus more on the activities committed by the enterprise rather than the structure of the organization. However, this Case Note will explain that this is not the test Minnesota courts should be using to determine the existence of an enterprise. This Case Note will describe how the court’s new test may require greater proof than is mandated under the federal statute, and why Minnesota should adopt a broader test to prove the existence of a RICO enterprise. In sum, the Minnesota Supreme Court should adopt the test that the majority of federal circuit courts use to establish a RICO enterprise.

II. BACKGROUND

A. Origins of RICO

The origins of RICO, dating back to the 1930s and 1940s, are found in congressional concerns about the influence of organized crime on legal concept, unlike crimes such as murder, rape or robbery). 4. See infra text accompanying note 25 for discussion of RICO elements. 5. See 18 U.S.C. § 1961(4) (1994) (providing that an “enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”). 6. State v. Huynh, 519 N.W.2d 191, 196 (Minn. 1994) (citing United States v. Kragness, 830 F.2d 842, 855 (8th Cir. 1987); United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir.), cert. denied, 459 U.S. 1040 (1982)). 7. 519 N.W.2d 202 (Minn. 1994). Kelly was decided the same day as Huynh. 8. Kelly, 519 N.W.2d at 205-04. 9. Id. at 205 (noting that the episodic association between Kelly and the prostitutes and the lack of any organization beyond commission of the prostitution crimes were insufficient to constitute a RICO offense).
the U.S. economy.10 In 1951, and again in 1963, congressional studies reported that the Mafia had infiltrated legitimate businesses in the United States.11 Two years later, in 1965, a bill targeting membership in organized crime, including the Mafia, was introduced for the first time in the Senate.12 The bill, however, was criticized as uncon-
stitutional and ultimately tabled by Congress.\(^\text{13}\) Then in 1967, the President's Commission on Law Enforcement and Administration of Justice, also known as the Katzenbach Commission,\(^\text{14}\) called for a heightened governmental response to fight organized crime.\(^\text{15}\) The Commission identified the four most prevalent means by which organized crime infiltrated and controlled legitimate business concerns.\(^\text{16}\) In response to the Katzenbach Commission's task force report, Congress introduced a number of bills aimed at combating the influence of organized crime on the American economy.\(^\text{17}\)

In 1969, Sen. John McClellan, along with cosponsors Senators Hruska, Ervin and Allen, introduced Senate Bill 30, the Organized Crime Control Act of 1969.\(^\text{18}\) The bill incorporated a number of the Katzenbach Commission's recommendations, for example, broad coverage of organized crime issues including grand juries, immunity, contempt, false statements, depositions, and sentencing of dangerous offenders.\(^\text{19}\)

Senate Bill 1861, the Corrupt Organizations Act of 1969, was also introduced in Congress as an effort to fight organized crime.\(^\text{20}\) This bill, RICO's immediate predecessor, was drafted and sponsored by

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15. *Id.* at 190. In its 340-page report, the President's Commission discussed the growing influence of organized crime and the inability of traditional criminal laws and law enforcement methods to curb the problem. *Id.* at 187-200. The Commission reported that the economic cost of organized crime was double that of all other crimes, and its economic power in the United States was virtually unlimited. *Id.* at 31-35.

16. *See Task Force Report, supra* note 11, at 4. The four methods of criminal influence in legitimate businesses included the investment of concealed profits acquired from gambling and other illegal enterprises, acceptance of business interests in payment of the owner's gambling debts, foreclosure on usurious loans, and use of various forms of extortion. *Id.*

17. Sen. Roman Hruska sponsored two bills which were designed to target organized crime with anti-trust remedies. S. 2048, 90th Cong., 1st Sess. (1967); S. 2049, 90th. Cong., 1st Sess. (1967); see Bradley, *supra* note 10, at 840-42. Companion bills were introduced in the House by Rep. Richard Poff. *See H.R. 11,266, 90th Cong., 1st Sess. (1967); H.R. 11,268, 90th Cong., 1st Sess. (1967).* Although these proposed bills were ultimately tabled, the findings and recommendations of the President's Commission were not ignored. *See Blakey & Gettings, supra* note 10, at 1017-21.


19. *See id.; see also Blakey & Gettings, supra* note 10, at 1017. Later that session, Sen. Hruska also sponsored Senate Bill 1629, the Criminal Activities Profits Act, a recasting of his bills from two years earlier. *See S. 1629, 91st Cong., 1st Sess. (1969).*

Senators McClellan and Hruska to "deal with the infiltration or management of legitimate organizations" by racketeering activity or investment of racketeering profits. Following extensive testimony, including recommendations from the Department of Justice on Senate Bill 1861, this bill became part of Senate Bill 30.22

Finally, after further revisions by the Senate and House, Congress passed Title IX of the Organized Crime Control Act of 1970, which was signed into law on October 15, 1970.23 The purpose of the Act was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."24

B. Federal RICO Test for an Enterprise

A substantive violation of the federal RICO statute requires the following proof: (1) the existence of an enterprise whose activities affect interstate or foreign commerce; (2) that the defendant used income derived from a pattern of racketeering activity to acquire an interest in or operate an enterprise; and (3) that the defendant participated in the affairs of an enterprise through a pattern of racketeering activity, or conspired to engage in such conduct.25 Thus, the prosecution of a RICO claim focuses essentially on the proof required to establish the key elements of an "enterprise" and a "pattern of racketeering activity."

To secure a RICO conviction, the government must prove that the defendant committed a series of criminal acts, or predicate crimes, constituting a pattern of racketeering.26 A federal statute 18 U.S.C.

21. See id.; see also Bradley, supra note 10, at 840.
22. See Blakey & Gettings, supra note 10, at 1019-20. Senate Bill 1861 was incorporated into Senate Bill 30 as Title IX. The bill passed the Senate seventy-three to one and was sent to the House. Id. at 1019 n.61. Although there were attempts by the House to narrow the bill's scope, including the definition of pattern of racketeering activity, none succeeded. Id. at 1020.
24. Id.
26. See 18 U.S.C. § 1961(5). The federal RICO statute did not create a new substantive offense because criminal activities punishable under RICO are also punishable under existing federal and state laws. RICO encompasses a variety of federal and state crimes which can form the pattern of racketeering activity. To protect against overuse or abuse of RICO by federal prosecutors, RICO prosecutions must be approved by the Organized Crime and Racketeering Section of the U.S. Department of Justice. ALEXANDER S. WHITE ET AL., U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED AND
section 1961, describes state and federal felonies that constitute racketeering activity. 27 Racketeering activity is defined as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance... which is chargeable under State law and punishable by imprisonment for more than one year," in addition to a variety of related federal offenses. 28 These criminal acts must be related and amount to a current or future threat of further criminal activity. 29 Furthermore, the pattern of racketeering activity must consist of at least two predicate crimes, "one of which occurred after the effective date of this Chapter and the [other] which occurred within ten years... after the commission of a prior act of racketeering activity." 30

In addition, the government must prove the existence of an enterprise, which is also defined in section 1961 as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 31 The statute describes, essentially, two types of RICO enterprises: legal entities and association-in-fact enterprises.

A RICO enterprise is also characterized by its members having a common or shared purpose, where there is some sort of hierarchical, decision-making structure, and where the enterprise is ongoing, with some continuity of personnel. 32 Congressional concern over enterprise criminality is reflected in the language of section 1962, which prohibits any person "employed by or associated with any enterprise... from conducting or participating... in the conduct of such enterprise's affairs through a pattern of racketeering activity." 33

28. § 1961(1)(a)-(d).
29. § 1962(a)-(d).
30. § 1961(5).
31. § 1961(4). The term "enterprise" includes private businesses, labor unions, government agencies, as well as "groups of individuals informally organized for a common purpose." See Blakey & Gettings, supra note 10, at 1025.
33. 18 U.S.C. § 1962(c). There are four criminal violations proscribed by the federal RICO statute in § 1962: (a) prohibition of use or investment of the proceeds of a pattern of racketeering activity; (b) prohibition of the acquisition of or maintenance of an interest in an enterprise affecting interstate commerce through a pattern of criminal activity or collection of unlawful debts; (c) prohibition of conducting the affairs...
In sum, it is this broad definition of a RICO enterprise that has generated much litigation and debate in the federal courts over the proper scope of a RICO enterprise, particularly association-in-fact enterprises.  

RICO was used minimally by federal prosecutors in the 1970s and, consequently, there were few decisions in the federal courts discussing the statute. Early decisions by the lower federal courts applied RICO only to legitimate businesses or legal entities owned, operated or infiltrated by organized crime. In the mid-1970s, however, a dispute began over whether the Act also reached illegitimate businesses. The first federal court case to decide that RICO's legislative history was intended to encompass illegitimate business concerns was United States v. Cappetto. The following year in Iannelli v. United States, of an enterprise affecting interstate commerce through a pattern of racketeering activity or collection of unlawful debt; and (d) prohibition of conspiring to commit any of the above acts. §

34. This broad definition can be of little guidance, since "[e]ssentially, an association-in-fact is what the pleader makes it, so long as the Turkette requirements are met. In their efforts to contain litigators' imaginations, courts are developing various rules for the enterprise element to restrict its scope." O'Neill, supra note 10, at 664. Commentators have described the problem as one of separateness or distinctiveness between the enterprise and pattern of racketeering elements. See Emily R. Donovan et al., Racketeer Influenced and Corrupt Organizations, 32 AM. CRIM. L. REV. 549, 564-66 (1995); Gardiner, supra note 32, at 682-84; Ludwick, supra note 32, at 387-98; Eric P. Israel, Of Racketeers, RICO, The Enterprise-Pattern Separateness Issue and Chicken Little: What's Really Falling, 17 Sw. U. L. REV. 565, 582-92 (1988); O'Neill, supra note 10, at 708-13, 709 n.283 (noting that the Supreme Court in Turkette rejected the reasoning used by the Eighth Circuit to reach its conclusion in Bledsoe requiring distinctiveness); David Vitter, Comment, The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View, 62 TUL. L. REV. 1419, 1424-30 (1988).

35. See United States v. Anderson, 626 F.2d 1358, 1364 n.8 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981) (noting that prosecutors' reluctance to use RICO in the 1970s "no doubt stemmed in part from its complexity and the fear of unleashing a Pandora's box of statutory interpretation problems"); see also Lisa Barsoomian, RICO "Pattern" Before and After H.J. Inc.: A Proposed Definition, 40 AM. U. L. REV. 919, 923 (1991) (describing how RICO was used sparingly prior to 1981); Bradley, supra note 10, at 845 (noting that RICO provides law enforcement and prosecutors with enhanced criminal penalties and remedies). See generally Blakey & Gettings, supra note 10, at 1011-12 (noting that RICO was virtually ignored at first by prosecutors, then ultimately expanded beyond organized crime cases to include white collar and political corruption prosecutions).

36. For a discussion of the disagreement between the circuit courts over whether RICO should be applied to illegal businesses, see Blakey & Gettings, supra note 10, at 1022-28; Bradley, supra note 10, at 851-53. See also Israel, supra note 34, at 574 (noting how certain circuit courts have sought to narrow the scope of the enterprise element by excluding illegal enterprises).

37. 502 F.2d 1351, 1358 (7th Cir. 1974) (finding that a broad construction of the term "enterprise" included illegitimate businesses, such as a gambling operation),

38. See United States v. Anderson, 626 F.2d 1358, 1364 n.8 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981) (noting that prosecutors' reluctance to use RICO in the 1970s "no doubt stemmed in part from its complexity and the fear of unleashing a Pandora's box of statutory interpretation problems"); see also Lisa Barsoomian, RICO "Pattern" Before and After H.J. Inc.: A Proposed Definition, 40 AM. U. L. REV. 919, 923 (1991) (describing how RICO was used sparingly prior to 1981); Bradley, supra note 10, at 845 (noting that RICO provides law enforcement and prosecutors with enhanced criminal penalties and remedies). See generally Blakey & Gettings, supra note 10, at 1011-12 (noting that RICO was virtually ignored at first by prosecutors, then ultimately expanded beyond organized crime cases to include white collar and political corruption prosecutions).
However, the Supreme Court stated in a footnote that RICO was designed "to prevent the infiltration of legitimate business operations . . . by individuals who have obtained investment capital from a pattern of racketeering activity." 39

But some federal courts, citing legislative history and the broad language of the Act, ignored the Iannelli dicta and began extending the enterprise element to encompass illegitimate businesses or entities. 40 For example, in United States v. Hawes, 41 the Fifth Circuit emphasized that the federal RICO statute on its face and its legislative history supported an application of the Act to "enterprises which are from their inception organized for illicit purposes." 42

As use of RICO in criminal and civil prosecutions increased in the 1980s, 43 the circuit courts remained split over whether the statute's scope extended to both legitimate and illegitimate businesses. The debate, however, was finally resolved by the Supreme Court in United States v. Turkette. 44 The Court held that RICO applied not only to legitimate businesses, but also to wholly illegitimate businesses. 45

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39. Id. at 787 n.19.
40. See, e.g., United States v. Sutton, 642 F.2d 1001, 1003 (6th Cir. 1980) (en banc) (holding that RICO's enterprise element is not limited to legitimate businesses and organizations), cert. denied, 453 U.S. 912 (1981); United States v. Elliott, 571 F.2d 880, 897-98 (5th Cir.) (holding that RICO enterprises include not only legitimate businesses, but businesses organized for illegal activities), cert. denied, 439 U.S. 953 (1978); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976) (interpreting the use of the word "any" in the RICO statutes to mean that Congress intended to include illegitimate organizations), cert. denied, 429 U.S. 1039 (1977). But see United States v. Turkette, 632 F.2d 896 (1st Cir. 1980) (stating that criminal enterprises are not included in RICO), rev'd, 452 U.S. 576 (1981).
41. 529 F.2d 472 (5th Cir. 1976) (noting that "Congress gave the term 'enterprise' a very broad meaning").
42. Id. at 479; see also United States v. McLaurin, 557 F.2d 1064, 1073 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978).
43. See Bonney, supra note 11, at 598. In the 1980s, federal prosecutors increasingly used the statute to target enterprise criminality as more federal courts determined that Congress had not expressly limited RICO to cases where the defendant or enterprise was tied to organized crime. See Terrance G. Reed, The Defense Case for RICO Reform, 43 VAND. L. REV. 691, 695 (1990) (noting the significant increase in criminal and civil RICO prosecutions arose in part because of RICO's broad statutory language and severe monetary penalties).
45. Id. at 579-81. The Turkette court expressly rejected the lower court's limited application of RICO to solely legitimate enterprises. Id. The Court reasoned, "[h]ad Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate.'" Id. at 581. The Court also noted that "insulating the wholly criminal enterprise from prosecution under RICO is the more incongruous position." Id. at 587.
The *Turkette* court also discussed the essential characteristics of a racketeering offense that must be proved to secure a RICO conviction: the existence of an enterprise and a connected pattern of racketeering activity. The Court explained that while the pattern of racketeering is proved by evidence of the requisite number of racketeering acts committed by members of the enterprise, the enterprise requires "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." In *Turkette*, the Court determined that there was sufficient evidence of an association-in-fact enterprise, even though loosely structured, based upon the respondent's leadership of and participation in the criminal organization.

Furthermore, the Court held that the "existence of an enterprise at all times remains a separate element which must be proved by the Government," and thus the enterprise element is not the pattern of racketeering activity. The *Turkette* court noted, however, that "[w]hile the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other." Thus, the Court resolved the legitimate or illegitimate issue, but created another.

Since *Turkette*, various tests have emerged among the federal circuit courts to determine what characteristics an enterprise should possess, and whether the enterprise element must be established with proof apart from that used to demonstrate the pattern of racketeering activity. The circuit courts particularly differ on the requisite proof needed to establish an association-in-fact enterprise as opposed to a legal entity such as a partnership or corporation. *Turkette*, therefore,

46. *Id.* at 583.
47. *Id.*
48. *Id.* The alleged enterprise was comprised of a group of persons associated in fact for the purpose of illegal trafficking in narcotics and other dangerous drugs, bribery, mail fraud and insurance fraud. *Id.* at 579. The Court noted that "[t]he common thread to all counts was *Turkette*’s alleged leadership of this criminal organization through which he orchestrated and participated in the commission of the various crimes delineated in the RICO count or charged in the eight preceding counts." *Id.*
49. *Id.* at 583.
50. See 18 U.S.C. § 1961 (4) (1994) (giving definition of "enterprise"). For detailed discussions of the tests that have developed in the federal courts of appeal defining a RICO enterprise, see O’Neill, *supra* note 10, at 705-13; Bradley, *supra* note 10, at 851-61; Vitter, *supra* note 34, at 1422-36; Donovan, *supra* note 34, at 564-65; Gardiner, *supra* note 32, at 684-91; Ludwick, *supra* note 32, at 387-98; Tracy Doherty et al., *Racketeer Influenced and Corrupt Organizations*, 31 AM. CRIM. L. REV. 769, 789-96 (1994). See also Israel, *supra* note 34, at 574-81 (noting that under the narrow approach taken by some of the circuit courts, including the Eighth Circuit, repeated acts of racketeering are not sufficient to prove a RICO enterprise separate from the pattern of racketeering activity
has not proved to be the last word on how federal RICO is to be interpreted.

The majority of federal appellate courts, including the Second, Fifth, Sixth, Eleventh and District of Columbia, take an expansive approach and hold that the same proof used to establish the enterprise can overlap with the proof used to satisfy the pattern of racketeering requirement. According to the majority view, a RICO enterprise does not require proof of an association independent of the pattern of racketeering activity.

Support for the majority position developed out of dicta in the Supreme Court's decision in *Turkette*, which noted that proof of the if part of a single criminal scheme); Barsoomian, *supra* note 35, at 925-26 (describing the Eighth Circuit's "multiple schemes" test for a racketeering pattern, under which multiple illegal acts committed to further a single criminal scheme fail to establish a pattern).


53. See, e.g., United States v. Perholtz, 842 F.2d 343, 369 (D.C. Cir.) (holding that the defendant along with other individuals and corporations formed an association-in-fact enterprise, which conspired to obtain government funds from improperly awarded contracts and distributed the proceeds among the associates), *cert. denied*, 488 U.S. 821 (1988). The *Perholtz* court distinguished between the requisite proof of an organized criminal association and separate proof of organized criminal activity apart from that committed by the organization. The court reasoned:

The same group of individuals who repeatedly commit predicate offenses do not necessarily comprise an enterprise. An extra ingredient is required: organization. To the extent, however, these [minority view] cases suggest that the organization cannot be inferred from the pattern (or even more, that the organization cannot exist unless it does something other than commit predicate acts), we cannot agree.

*Id.* at 363. See also United States v. Qaoud, 777 F.2d 1105, 1115 (6th Cir. 1985) (holding that while the enterprise and pattern of racketeering are separate and distinct elements, the same evidence can be used to establish both elements), *cert. denied*, 475 U.S. 1098 (1986), and *cert. denied*, 484 U.S. 832 (1987); Weinstein, 762 F.2d at 1537 n.13 (finding that in a case involving a conspiracy to defraud pharmaceutical manufacturers by obtaining products through false pretenses, the enterprise need not possess a structure distinct from that necessary to carry out the racketeering activity); United States v. Hewes, 729 F.2d 1302, 1325 (11th Cir. 1984) (holding that a RICO enterprise was established where a dozen "bust out schemes" were carried out by various individuals with little overlap, but using very similar methods of operation), *cert. denied*, 469 U.S. 1110 (1985); United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).
two elements may sometimes coalesce. Further support for this position can be found in the expansive language and liberal construction clause of the statute, as well as in RICO's legislative history.

Under the majority approach, the Second Circuit has adopted the most expansive construction of a RICO enterprise. In *United States v. Indelicato*, the Second Circuit emphasized that while proof of two acts of racketeering by itself is not sufficient to establish a pattern of racketeering, "the relatedness and the continuity necessary to show a RICO pattern may be proven through the nature of the RICO enterprise." The court reasoned, reiterating the language of *Turkette*, that although the government was required to prove both the existence of an enterprise and a pattern of racketeering activity, the proof could coalesce.

The minority view, held by the Third, Fourth, Eighth and Tenth Circuits, favors a narrow construction of the RICO statute. These federal courts require proof that the enterprise exist outside the course

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54. *Turkette*, 452 U.S. 576, 583 (1981); see also Donovan, *supra* note 34, at 565 (rejecting the distinctiveness requirement of the minority position, and supporting the majority view that the government is not required to prove the existence of the enterprise and the pattern of racketeering activity with separate evidence).


56. See *Vitter*, *supra* note 34, at 1424-27.


58. *Id.* at 1988; see also *United States v. Bagaric*, 706 F.2d 42 (2d Cir.) (explaining how RICO can be properly applied in situations where the enterprise was essentially nothing more than the sum of the underlying predicate racketeering acts), *cert. denied*, 464 U.S. 840 (1988). The court reasoned that "it is logical to characterize any associative group in terms of what it does, rather than by abstract analysis of its structure." *Id.* at 56 (emphasis added).

59. *Indelicato*, 865 F.2d at 1384; *United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983). In *Mazzei*, the Second Circuit held that an association-in-fact enterprise had been proved by evidence of a common purpose, that the group functioned as a continuing unit, and that it derived profit from illegal acts, which constituted the pattern of racketeering. *Id.* at 89. The court did not require that the enterprise be distinct from the organization needed to commit the pattern of racketeering activity. *Id.* at 88. Rather, the court rejected the Eighth Circuit's distinctness position, and noted that "time is not less organized where its purposes are singular." *Id.* at 90. The court reasoned that *Turkette* did not "hold that proof of these separate elements be distinct and independent, as long as the proof offered is sufficient to satisfy both elements." *Id.* at 89.

60. See *Vitter*, *supra* note 34, at 1427-30; O'Neill, *supra* note 10, at 708-14, 721 n.68; *Israel*, *supra* note 34, at 582-84, 587-88; *Gardiner*, *supra* note 32, at 688-91; Donovan, *supra* note 34, at 565.
of conduct needed to commit the predicate offenses.61

The minority and majority views have identified several basic characteristics that a RICO enterprise must possess.62 Association members must have a common or shared purpose, and the enterprise must exhibit some degree of organizational structure and continuity over time. But the minority view diverges from the majority position by requiring that a third characteristic be satisfied to establish a RICO enterprise; the enterprise must be distinct and separate from the pattern of racketeering.63 As one commentator noted:

About one-third of the federal circuits require, in addition to the elements set forth in the Act itself, that the enterprise element of a RICO claim be substantially different from the predicate acts which constitute the pattern of racketeering activity. Whether this element should be implied in the Act is often called the separateness issue.64

The "distinctiveness" or "separateness" characteristic requires that the enterprise element be established with evidence apart from that used to prove the pattern of racketeering activity.65 Similar to the majority view, the minority view relies on the language of Turkette that the "existence of an enterprise remains at all times a separate element which must be proved by the Government," as support for its position.66

C. The Eighth Circuit's RICO Test for an Enterprise

Of all the circuits adopting the minority view, the Eighth Circuit has


62. See supra note 50 and accompanying text.

63. See Vitter, supra note 34, at 1427; O'Neill, supra note 10, at 708; Israel, supra note 34, at 569.

64. Israel, supra note 34, at 569.

65. Turkette, 452 U.S. at 583. The Fourth Circuit has emphasized the importance of a developed structure, that the criminal enterprise must consist of more than what is required to commit the underlying predicate crimes. Tillett, 763 F.2d at 628. In Tillett, the government established that the criminal enterprise had operated beyond its drug trafficking activities, including running a seafood restaurant as a smuggling front. Id. at 632; see also United States v. Griffin, 660 F.2d 996 (4th Cir. 1981) (noting that the enterprise must exist "separate and apart" from the pattern of racketeering), cert. denied, 454 U.S. 1156 (1982).

The Third Circuit has similarly reasoned that the third element to prove a RICO enterprise requires establishing that the organization is an entity separate and apart from the racketeering activity in which it is engaged. Riccobene, 709 F.2d at 223 (citing Turkette, 452 U.S. at 583).

66. Turkette, 452 U.S. at 583.
developed the strictest test for proving a RICO enterprise. The Eighth Circuit's position was first articulated in *United States v. Anderson*, a pre-*Turkette* case, in which the court stated that to secure a RICO conviction, the government must show that an association-in-fact enterprise is "substantially different from the underlying predicate offenses constituting the racketeering pattern." More specifically, the *Anderson* court held that:

Congress intended that the phrase "a group of individuals associated in fact although not a legal entity," as used in its definition of the term "enterprise" in section 1961(4), to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity." In sum, *Anderson* established, in the Eighth Circuit, what has become known as the "distinctiveness" or "separateness" requirement.

Although the Eighth Circuit adopted a distinctiveness requirement in *Anderson*, commentator David Vitter suggests that subsequent decisions defined distinctiveness in a new way. Unlike *Anderson's* emphasis that the enterprise's economic goal be defined separately from the commission of the predicate acts, subsequent cases focus on the requirement that there be a structured enterprise more developed than the organization needed or inherent in the commission of the racketeering pattern.

In 1982, the Eighth Circuit in *United States v. Bledsoe* relied on the language of *Anderson* as it attempted to limit RICO's use in prosecutions of associations-in-fact. The *Bledsoe* court determined that the characteristics of a RICO enterprise include "an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering." The court explained that "[t]his distinct structure might be demonstrated by proof that a group engaged in a diverse

67. See *supra* note 50 and accompanying text.
68. 626 F.2d 1358 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981).
69. *Id.* at 1365. This was the first time the Eighth Circuit addressed the problem of how to define RICO's scope. *Id.* at 1362.
70. *Id.* But see National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 798, 804 (1994) (holding that a RICO enterprise was not required to have an economic purpose). For a discussion of the unanimous Supreme Court's decision overruling the economic motive, see Donovan, *supra* note 34, at 561.
72. See *supra* text accompanying note 50.
73. 764 F.2d 647 (8th Cir.), cert. denied, 459 U.S. 1040 (1982).
74. *Id.* at 665. The *Bledsoe* court reversed the defendant's RICO conviction, holding that the association between the agricultural cooperatives and individual participants did not constitute an enterprise. *Id.* at 667.
75. *Id.* at 665.
pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes.\textsuperscript{76} The court also noted that "under 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 . . . ."\textsuperscript{77} Thus, the \textit{Bledsoe} court held that absent this distinctiveness requirement, "the Act simply punishes the commission of two of the specified crimes within a 10-year period."\textsuperscript{78}

In a case decided later that year, however, the Eighth Circuit in \textit{United States v. Lemm},\textsuperscript{79} interpreted Turkette's language that the enterprise is "an entity separate and apart from the pattern of activity in which it engages,"\textsuperscript{80} to exclude those entities that do not have a structure separate from that needed to commit the predicate acts.\textsuperscript{81} Similar to \textit{Bledsoe}, the \textit{Lemm} court characterized a RICO enterprise as having a structure distinct from that inherent in the conduct of the pattern of racketeering.\textsuperscript{82} The \textit{Lemm} court, however, focused its inquiry on the \textit{activities} of an alleged arson ring.\textsuperscript{83} Since the arson ring could have conducted its criminal activities without the underlying predicate acts of mail fraud, the court found that the RICO enterprise was distinct and separate.\textsuperscript{84} The test as applied in \textit{Lemm}, therefore, suggests that proof of the enterprise structure could be established by a diverse pattern of crimes, whereas the \textit{Bledsoe} court's inquiry had focused on the structure of the alleged criminal enterprise.

Today, the Eighth Circuit's test for the existence of an "enterprise"

\textsuperscript{76}. \textit{Id.} To illustrate this type of structure, the \textit{Bledsoe} court gave the example of the command system of the Mafia family. \textit{Id.} Another example the court provided was the "hierarchy, planning, and division of profits in a prostitution ring." \textit{Id.}

\textsuperscript{77}. \textit{Id.} at 664. The court found that "[a]t best, the Government has shown two separate associations of individuals without any overarching structure or common control." \textit{Id.} at 666.

\textsuperscript{78}. \textit{Id.} at 664; see Vitter, supra note 34, at 1429-36 (explaining how, after \textit{Anderson}, the Eighth Circuit interpreted the distinctiveness question differently in \textit{Bledsoe} and \textit{Lemm}).

\textsuperscript{79}. 680 F.2d 1193 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983). In \textit{Lemm}, three defendants were convicted of conspiracy to violate RICO and of mail fraud as part of an insurance fraud scheme that included 17 arson fires over a three-year period. \textit{Id.} at 1196. The court found that "[t]his is not an instance of a sporadic and temporary criminal alliance to commit one of the enumerated RICO crimes." \textit{Id.} at 1201.

\textsuperscript{80}. Turkette, 452 U.S. at 583.

\textsuperscript{81}. \textit{Lemm}, 680 F.2d at 1198.

\textsuperscript{82}. \textit{Id.} at 1200-01.

\textsuperscript{83}. \textit{Id.} at 1201.

\textsuperscript{84}. \textit{Id.} The court held that, "if we eliminate for purposes of argument the predicate acts of mail fraud, the evidence still shows an ongoing structure . . . . Clearly, the enterprise alleged by the government has not been impermissibly equated with the predicate acts of racketeering." \textit{Id.}
RICO's Enterprise Element consists of three distinct characteristics: "1) common or shared purpose; 2) some continuity of structure and personnel; and, 3) an ascertainable structure distinct from that inherent in a pattern of racketeering." The third characteristic of this three-prong test is the most controversial. Under this prong, the facts and evidence used to prove a pattern of racketeering activity are not sufficient to prove a RICO enterprise. Recently, Minnesota adopted a new test which retained the first two Eighth Circuit requirements for a RICO enterprise, but altered the third Eighth Circuit requirement.

D. Minnesota's RICO Test for an Enterprise

In 1989, Minnesota enacted a racketeering statute generally patterned after the federal RICO statute with a few key distinctions. One difference is that Minnesota's RICO Act excludes the word "individual," so that one person, with the exception of a sole proprietorship, cannot constitute a criminal "enterprise" under Minnesota

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85. Id. at 1198; Bledsoe, 764 F.2d at 664; Kragness, 880 F.2d at 855.
86. Commentators and prosecutors have attacked the Eighth Circuit's distinctiveness requirement as inconsistent with Turkette. See supra note 50 and accompanying text; see also RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS, U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION 35-36 (1985) (acknowledging that the Eighth Circuit's efforts to restrain indiscriminate application of RICO "is premised on a requirement that evidence establishing the enterprise's existence must be distinct from the evidence establishing the pattern of racketeering, [but that] it is in error, in our view").
87. Minnesota's RICO Act states:

A person is guilty of racketeering if the person: 1) is employed by or associated with an enterprise and intentionally conducts or participates in the affairs of the enterprise by participating in a pattern of criminal activity; 2) acquires or maintains an interest in or control of an enterprise, or an interest in real property, by participating in a pattern of criminal activity; or 3) participates in a pattern of criminal activity and knowingly invests any proceeds derived from the conduct, or any proceeds derived from that investment or use of those proceeds, in an enterprise or in real property.

MINN. STAT. § 609.903 (1994); see also interview with Michael Freeman, Hennepin County Attorney, in Minneapolis, Minn. (Mar. 18, 1996) [hereinafter Freeman Interview]. In 1989, Freeman, then a senator, introduced a bill in the Minnesota Senate modeled after the New York statute with the intent to formulate a statute more narrowly written than federal RICO. Thus, the statute also incorporates features of New York's Organized Crime Control Act, which served as a model. Cf. N.Y. PENAL LAW § 460 (McKinney Supp. 1987). For more information on the New York RICO statute, see Daniel L. Feldman, Principled Compromise: The New York State Organized Crime Control Act, 6 CRIM. JUST. ETHICS 50 (1987).

Rep. Phil Carruthers introduced a House bill, drafted by the Minnesota Attorney General's Office, based upon the federal statute. Interview with Phil Carruthers, Minnesota Representative, in St. Paul, Minn. (Feb. 7, 1996) [hereinafter Carruthers Interview].
Another difference is that the significant definitions of "criminal activity" and "pattern of racketeering activity" are drawn more narrowly than the federal statute. These key definitions have been the product of case law since the early 1980s. The concept of "enterprise criminality," borrowed from the federal RICO statute, is also significantly narrowed to concentrate on violent crimes and illegal drug trafficking.

A third important difference is that Minnesota's statute requires a pattern of racketeering activity to be established by three rather than two predicate acts, and two of these underlying crimes must be felony offenses, as compared with the federal RICO Act requiring only one felony. Finally, Minnesota's statute excludes private RICO actions and mandates that RICO actions be brought by either the county attorney or the attorney general.

88. MINN. STAT. § 609.902, subd. 3 (1994). Section 609.902, subdivision 3 defines a RICO enterprise as "a sole proprietorship, partnership, corporation, trust, or other legal entity, or a union, governmental entity, association, or group of persons, associated in fact although not a legal entity, and includes illicit as well as legitimate enterprises." Id. For a discussion about how the Minnesota courts have narrowed the scope of RICO's enterprise element, see infra text accompanying note 142. Compare MINN. STAT. § 609.902, subd. 3 with 18 U.S.C. § 1961(4) (1994). See Bonney, supra note 11, at 586-87 (noting that in the wake of the Mafia's increasing influence on the U.S. marketplace, RICO was designed as a remedial statute, to give law enforcement and prosecutors a means to successfully combat organized crime).

89. The Minnesota statute also defines criminal activity to include only felonies. MINN. STAT. § 609.902, subd. 4.

90. Racketeering Influenced and Corrupt Organizations Act: Hearings on S.F. 483 Before the Senate Judiciary Comm., Criminal Law Division, 76th Minn. Leg., 1989-90 Reg. Sess. (1989) (statement of Stephen Kilgriff, former Deputy Attorney General). The Minnesota Legislature wanted to ensure that Minnesota's RICO statute would not contain the more controversial aspects of the federal bill, most notably private RICO actions, and that statutory definitions be narrower than under federal RICO to avoid too broad a statute. Id.


92. See MINN. STAT. § 609.902, subd. 6 (defining a pattern of racketeering activity as three or more criminal acts committed within a 10-year period that are neither isolated nor so closely related that they should be considered a single offense, and that are related through a common scheme or plan or shared criminal purpose). But see 18 U.S.C. § 1961 (5) (1994) (requiring a minimum of two predicate crimes within 10 years). Compare MINN. STAT. § 609.902, subd. 5 with 18 U.S.C. § 1961 (1) (requiring only one of the predicate crimes be a felony offense).

93. Minnesota Statutes § 609.902, subdivision 9 designates that the prosecuting authority for RICO actions is "the office of a county attorney or office of the attorney general." Members of both the House and Senate were concerned about private RICO actions, the source of much controversy in the federal act. For a discussion of this issue, see Racketeering Influenced and Corrupt Organizations Act: Hearings on S.F. 483 Before the Senate Judiciary Comm., Criminal Law Division, 76th Minn. Leg., 1989-90 Reg. Sess. (1989)
A comparison of legislative histories of the federal RICO Act and Minnesota RICO Act reveals a somewhat different focus in each of the statutes, although both statutes target the problem of organized crime. While Congress intended that the federal statute's major purpose be to eradicate a wide variety of illegal activity, the Minnesota Legislature was particularly concerned about controlled substance crime. Whereas gambling and loansharking were the largest sources of revenue for organized crime when federal RICO was enacted, nearly two decades later, the Minnesota Legislature denounced street gangs profiting from the illegal drug trade as the organized crime threat of the 1980s and 1990s.

Minnesota Rep. Phil Carruthers, who introduced the House RICO bill, described the importance of targeting the threat posed by street gangs engaged in drug trafficking and sales. Mr. Carruthers stated:

This bill is an attempt to go after the drug syndicates and the drug gangs that have become so much of a threat to public safety in our state and other states. We're seeing, of course, the Vice Lords, the Bloods and the Crips. They're moving in here . . . . This bill attempts to take away those illegal profits and take away those illegal gains from the drug pushers and from the drug organizations.

Hennepin County Attorney Michael Freeman, then senator, sponsored the Senate bill. He also intended that the bill concentrate on drug-
related crimes, while acknowledging its effectiveness against other illegal activity. Mr. Freeman stated:

This [RICO] is really to be used against drug gangs and the scope is now limited because of that. It seems at least to my understanding of the Minnesota crime problem, that's our biggest problem. . . . Now RICO can be used very effectively in terms of obscenity, and prostitution, and other areas. But it seems that we need the prosecutorial resources and we ought to focus on our chief area.

Although there were some differences, both the Minnesota House and Senate focused on gang activity, particularly gang involvement in drug dealing and money laundering, in formulating Minnesota's RICO statute.

Minnesota's RICO Act, similar to its federal counterpart, was intended to be broadly construed and not limited to drug-related offenses or even to traditional organized crime. Minnesota's statute contains an express provision that it "shall be liberally construed to achieve [its] remedial purposes of curtailing racketeering activity and controlled substance crime . . . ." This broad interpretation follows the lead of the United States Supreme Court which has adopted a literal and expansive reading of the federal statute. It is not apparent, however, that the Minnesota Supreme Court has adopted a broad test to determine the existence of an "enterprise" in the RICO statute.

Minnesota recently adopted the Eighth Circuit's distinctive three-part test for determining the existence of a RICO enterprise in State v. Huynh. The Huynh court held that to establish a RICO enterprise the state must prove the following three elements: (1) a common or shared enterprise among the individuals associated with the enterprise; (2) an ongoing organization with some continuity of structure and personnel; and (3) an ascertainable structure distinct from that

100. Id.
102. RICO was enacted to attack "enterprise criminality." See Blakey & Gettings, supra note 10, at 1013-14 (explaining that RICO should not be limited in use to the Mafia or traditional organized crime, because "organized crime" has other meanings).
103. MINN. STAT. § 609.901 (1994); see also MINN. STAT. §§ 609.902-.912.
104. See Israel, supra note 34, at 589-92 (describing the Supreme Court's broad interpretation of RICO given the pattern of holdings in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)). The Supreme Court in Sedima stated, "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to be liberally construed to effectuate its remedial purposes." Sedima, 473 U.S. at 497-98 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970)) (citations omitted).
105. 519 N.W.2d 191 (Minn. 1994).
inherent in the racketeering activity.\textsuperscript{106} The supreme court, however, modified the third prong by focusing more on the activities of the organization than the structure of the organization as did the Eighth Circuit in \textit{Bledsoe} and \textit{Kragness}.\textsuperscript{107}

In \textit{Huynh}, a case of first impression according to the dissent, the supreme court considered whether the defendant, a member of an Asian gang, had engaged in racketeering.\textsuperscript{108} Defendant Huynh and his associates extorted money from a restaurateur, threatening to kill the owner and his family if he failed to pay $1,500 in monthly protection money.\textsuperscript{109} A jury convicted Huynh of five counts of coercion and one count of racketeering.\textsuperscript{110}

The supreme court held that Huynh and the associates with whom he extorted money constituted an "association-in-fact" enterprise.\textsuperscript{111} The court found that the three prongs of the Eighth Circuit's test for an enterprise were met.\textsuperscript{112} The first prong was met since the gang had a common purpose of extortion.\textsuperscript{113} The second prong was satisfied because the organization and its criminal activity continued over a period of time.\textsuperscript{114} The supreme court, however, modified the third prong to focus on whether the activities of Huynh and his associates extended beyond the commission of the underlying extortion crimes, as opposed to merely seeking evidence of a pattern of authority or infra-structure of the organization.\textsuperscript{115} The majority in \textit{Huynh}, therefore, concluded that the group's money laundering activities were sufficient proof that the organization had an existence beyond that required to commit the predicate offenses,\textsuperscript{116} and thus affirmed the racketeering conviction.\textsuperscript{117}

\textsuperscript{106} \textit{Id.} at 196 (citing \textit{Diamonds Plus, Inc. v. Kolber}, 960 F.2d 765, 770 (8th Cir. 1992); \textit{United States v. Kragness}, 850 F.2d 842, 855 (8th Cir. 1987); \textit{United States v. Bledsoe}, 674 F.2d 647, 665 (8th Cir.), \textit{cert. denied}, 459 U.S. 1040 (1982)).

\textsuperscript{107} \textit{Id.} at 197-98.

\textsuperscript{108} \textit{Id.} at 192.

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.} at 193.

\textsuperscript{111} \textit{Id.} at 197.

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} \textit{Id.} at 196. The third prong requires the following: "the activities of the organization extend beyond the commission of the underlying criminal acts to coordinate the underlying criminal acts into a pattern of criminal activity or to engage in other activities." \textit{Id.}

\textsuperscript{116} \textit{Id.} at 197.

\textsuperscript{117} \textit{Id.} at 196 n.7, 198. (explaining that the new prong of the test for an enterprise under Minnesota RICO's Act derives from \textit{Diamonds Plus, Inc. v. Kolber}, 960 F.2d 765, 770 (8th Cir. 1992)). The Eighth Circuit's distinct structure inquiry focused on "whether the enterprise encompasses more than what is necessary to commit the
The dissent in Huynh, however, criticized the majority's new version of the Eighth Circuit's test for its shift in focus from the organizational structure of the enterprise to the activities engaged in by the enterprise. This shift, the minority argued, collapsed the requirements for the enterprise and pattern of racketeering together. According to the dissent, "the majority would require the state to prove that 'the activities of the organization extend beyond the commission of the underlying criminal acts either to coordinate the underlying criminal acts into a pattern of criminal activity or to engage in other activities.'" The dissent concluded that the evidence was insufficient to establish an enterprise under the third prong because the activities used to prove the enterprise were those that constituted the pattern of racketeering activity. Thus, the dissent found "[t]he existence of 'money laundering' does not provide the proof of a separate entity ... [because] appellant had to negotiate the checks and money orders in some fashion to have access to the fruits of his crime. Nor was any evidence introduced that an organization coordinated appellant's acts of extortion." Although the dissent agreed with the majority that Minnesota courts should look to the federal courts' interpretations of RICO law when interpreting Minnesota's RICO Act, the dissent would apply the Eighth Circuit's enterprise test without modification.

In sum, given the various tests developed by the circuit courts, there remains a critical difference between the majority and the minority positions: the degree of separateness required to establish the enterprise and the pattern of racketeering activity as distinct elements. Moreover, in Huynh, the Minnesota Supreme Court modified the Eighth Circuit's test in an effort to further narrow the definition of what constitutes a RICO enterprise. The same day that the court set out its new test for an enterprise in Huynh, it applied the predicate RICO offense."}


http://open.mitchellhamline.edu/wmlr/vol22/iss3/2
test in the companion case State v. Kelly. 125

III. THE KELLY DECISION

A. The Kelly Facts

From July 1989 through February 1991, Gary Allen Kelly worked as a pimp in prostitution activities which took place in Minneapolis and Chicago. 126 He solicited teen-age girls to work as prostitutes, recruiting them with promises of money and gifts, and then kept the girls' prostitution money. 127 Kelly also threatened and physically abused at least one of the girls to prevent her from leaving. 128

On April 2, 1992, a jury found Kelly guilty of one count of soliciting prostitution, five counts of promoting prostitution, five counts of receiving profits derived from prostitution, and one count of racketeering. 129 The court of appeals applied the Eighth Circuit's RICO test, but also suggested, as Turkette had, that proof of a RICO enterprise and pattern of racketeering may coalesce. 130 The appellate court affirmed the conviction, stating that Kelly's promises of gifts and money, deception, threats, and violence used to maintain his organization demonstrated that an enterprise existed beyond what was necessary to commit the predicate prostitution offenses. 131

B. The Minnesota Supreme Court's Analysis

The Minnesota Supreme Court accepted review to determine what is required to establish the existence of a RICO enterprise under

125. 519 N.W.2d 202 (1994).
126. State v. Kelly, 504 N.W.2d 513, 516 (Minn. Ct. App. 1993), rev'd, 519 N.W.2d 202 (1994). Kelly recruited eight runaway girls to prostitute for him and fellow pimps Herman Gordon, and Ronnie Nelson. Id. at 516-17. Testimony by the juvenile prostitutes indicated that Kelly was most active in directing the prostitution efforts. Id. at 516-18. Kelly worked from customer lists, taking the girls to motels and apartments in the Twin Cities to perform prostitution acts. Id. He and codefendant Nelson also brought several juveniles to Chicago, where Kelly took the girls to apartment complexes to have sex with waiting customers. Id. at 516.
127. Id. Kelly pocketed all prostitution money, except for some money he allowed a prostitute whom he dated to keep. Id. at 517.
128. Id. (noting that Kelly became enraged and hit one of the teen-age prostitutes when she tried to run away).
129. Id. at 513.
130. Id. at 518. But see Brief for Respondent at 23, State v. Kelly, 509 N.W.2d 202 (Minn. 1994) (criticizing the Minnesota Court of Appeals' suggestion that the state "must prove inter alia the existence of an organizational pattern or system of authority beyond that necessary to perpetrate the predicate crimes").
131. Kelly, 504 N.W.2d at 519.
Minnesota's RICO test. The *Kelly* court noted that a lone individual, unless operating as a sole proprietorship, cannot constitute a RICO "enterprise" under Minnesota's statute. The supreme court, reversing the racketeering conviction, determined that there was no "association-in-fact" between *Kelly* and the juvenile prostitutes.

The *Kelly* court applied the Eighth Circuit's narrow definition and test for a RICO enterprise, which was adopted and modified in *Huynh* the very same day. The supreme court held that the first requirement of a common purpose was met because *Kelly* and the juveniles were engaged in the business of prostitution. The court determined that the second prong, which requires some degree of

132. See State v. *Kelly*, 519 N.W.2d 202 (Minn. 1994) (applying a new version of the *Bledsoe* and *Kragness* test). Two justices concurred in the result reached by the majority, but dissented in part, arguing for the test applied in *Kragness*. Id. at 205-06 (Gardebring, J., concurring in part, dissenting in part).


134. *Kelly*, 519 N.W.2d at 205 (noting that *Kelly*’s requirement and transportation of prostitutes, his black book of customers and pocketing fees, did not prove a criminal association). See Brief for Appellant at 44-46, State v. *Kelly*, 504 N.W.2d 513 (Minn. Ct. App. 1993) (arguing on appeal that the trial court abused its discretion in sentencing *Kelly*). The court assigned a severity level VIII to the offense, which is not enumerated in the Minnesota Sentencing Guidelines. Id.; see also *MINNESOTA SENTENCING GUIDELINES COMM’N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY* 4 (Aug. 1, 1995). Comment II.A.05 permits judges to exercise their discretion by assigning offenses excluded from the Offense Severity Level Table, to a severity level they believe appropriate. Id.

Another issue the *Kelly* court considered was whether characterizing *Kelly*’s conduct as racketeering would unfairly enhance the punishment already imposed for the same crimes. *Kelly*, 519 N.W.2d at 205. The court concluded that *Kelly* would be twice punished if the RICO penalties were added on to the traditional criminal penalties. *Kelly*, 519 N.W.2d at 205. However, the Supreme Court held in United States v. Grayson, 795 F.2d 278, 283 (3rd. Cir. 1986), cert. denied, 481 U.S. 1018 (1987), that a RICO offense and the underlying predicate crimes are not the same under a double jeopardy analysis, so that successive prosecutions are not barred by double jeopardy. See generally Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95 (1992) (giving a detailed analysis of the double jeopardy issues raised by RICO).

135. *Kelly*, 519 N.W.2d at 204-05. The supreme court required separate proof of the enterprise and pattern elements in order to find a RICO violation. Id. at 205. Justices Gardebring and Wahl dissented, arguing the *Kragness* test should have been applied as discussed in their *Huynh* dissent. Id. at 205-06 (citing State v. *Huynh*, 519 N.W.2d 191, 199 (Minn. 1994)). The *Huynh* dissent suggested that the third prong of the majority’s test be replaced by the *Kragness* test, requiring an ascertainable structure distinct from the entity needed to conduct a pattern of racketeering activity. *Huynh*, 519 N.W.2d at 199-200.

136. *Kelly*, 519 N.W.2d at 205.
continuity and structure, was likely not met because of the turnover in
the juveniles employed by Kelly.\textsuperscript{137} Finally, the court found that the
third requirement for an enterprise was definitely not met.\textsuperscript{138}

The supreme court found that the third requirement for an
enterprise was not satisfied because there was no proof that a
prostitution enterprise existed beyond that necessary to perpetrate the
prostitution-related crimes.\textsuperscript{139} Whereas the appellate court deter-
mined a distinct structure was proved by Kelly's promises, deception,
threats, violence and his client lists,\textsuperscript{140} the supreme court found that
these activities were insufficient proof of a prostitution enterprise
separate from the underlying predicate offenses, Kelly's prostitution
activities.\textsuperscript{141} The majority also set forth policy concerns in support
of its narrow construction of a RICO enterprise.\textsuperscript{142} In sum, the \textit{Kelly}
court was particularly troubled that a broad interpretation of a RICO
enterprise could result in racketeering offenses being imposed on
small-time criminals.\textsuperscript{143}

Justices Gardebring and Wahl, however, disagreed with the majority's
formulation of the test for the existence of an enterprise.\textsuperscript{144} Justice
Gardebring, cross-referencing her dissent in \textit{Huynh}, criticized the
majority for focusing on an organization's activities rather than
requiring proof of a structural framework.\textsuperscript{145}

\begin{itemize}
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} State v. Kelly, 504 N.W.2d 513, 519 (Minn. Ct. App. 1993).
\item \textsuperscript{141} \textit{Kelly}, 519 N.W.2d at 205 (noting that "[t]here was no coordination of the
    predicate criminal acts into a 'pattern,' such as by organizing a house of prostitution
    or a prostitution ring or network").
\item \textsuperscript{142} Id.; see also State v. \textit{Huynh}, 519 N.W.2d 191, 194 (Minn. 1994). In \textit{Huynh}, the
    supreme court detailed its public policy considerations for narrowing the scope
    of Minnesota's RICO Act. \textit{Id.} at 194-95. The \textit{Huynh} court found that if a
    minimal cooperative effort is all that is required to prove the existence of a criminal
    enterprise, Minnesota RICO collapses into a recidivist statute. \textit{Id.} at 195. Thus, the court
    reasoned that "[t]o avoid this collapse, we think there must be some requirement focusing
    the statute on 'organized crime' and excluding ordinary, run-of-the-mill criminal activity."
    \textit{Id.}
\item \textsuperscript{143} See \textit{Kelly}, 519 N.W.2d at 205 (noting that a "lone individual (unless operating
    as a sole proprietorship) cannot be an enterprise for purposes of RICO").
\item \textsuperscript{144} \textit{Id.} at 205-06 (Gardebring, J., dissenting).
\item \textsuperscript{145} \textit{Id.} (citing \textit{Huynh}, 519 N.W.2d at 198-201). Justice Gardebring criticized the
    majority's disregard of the third prong of the Eighth Circuit's test for establishing a
    RICO enterprise. \textit{Id.} at 205. In the companion case, Justice Gardebring noted the
    majority departed from the test used in \textit{Kragness} by failing to require "an ascertainable
    structure distinct from that inherent in the conduct of a pattern of racketeering
    \textit{Kragness}, 830 F.2d 842, 855 (8th Cir. 1987)). In \textit{Huynh}, Justice Gardebring questioned
    the majority's reasoning, noting "[h]ad the court asked what 'ascertainable structure'
IV. ANALYSIS OF THE KELLY DECISION

The Minnesota Supreme Court correctly found that Kelly's pimping activities did not constitute a RICO enterprise based upon the Eighth Circuit's three-step analysis as modified by Huynh. The Kelly court adhered to the precedent set by the Eighth Circuit in determining that a RICO enterprise is a separate element apart from the pattern of racketeering activity.146

The Huynh and Kelly courts retained the first two prongs of the Eighth Circuit's test for determining the existence of an enterprise: (1) a common purpose among the individuals associated with the enterprise; where (2) the organization is ongoing and continuous, with its members functioning under some sort of decision-making arrangement or structure.147 The Huynh court, however, intending to clarify the requirement of an "ascertainable structure," rewrote the third prong.148 In effect, Minnesota now has a new test to determine the existence of a RICO enterprise.149 In Kelly, the supreme court held that this third requirement had not been met.150

the state had proven, the answer would have been very difficult to find. Even the majority acknowledges that this is a case "where it [was] difficult to get evidence of the organizational framework of the criminal enterprise." Huynh, 519 N.W.2d at 200.

146. Kelly, 519 N.W.2d at 205; see Vitter, supra note 34, at 1427-29, 1434-44 (discussing the Eighth Circuit's approach to the enterprise element of RICO); Ludwick, supra note 32, at 593-96 (discussing the Eighth Circuit's requirement that enterprise be separate from the pattern of activity). The Eighth Circuit has been critical of efforts to expand RICO's scope. In a series of decisions, beginning with Bledsoe, the Eighth Circuit has required proof that an enterprise have some structure separate from that needed to conduct the pattern of racketeering activity. United States v. Bledsoe, 674 F.2d 647, 651 (8th Cir.), cert. denied, 459 U.S. 1040 (1982); see also Barsoomian, supra note 35, at 925-26.

147. The Eighth Circuit's support for a narrow construction of the enterprise and pattern elements pre-dates the Turkette decision. In United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981), the court held that a RICO enterprise must be an association substantially different from the acts which form the pattern of racketeering activity. Id. at 1372. The Anderson court was concerned that a broad interpretation of section 1962 (c) would unfairly result in persons being prosecuted under RICO merely for engaging in prohibited conduct on two separate occasions. Id.; see supra part II.C.

148. By redefining the third prong, the court believed its resulting formulation of a RICO enterprise to be "simple and functional." See Huynh, 519 N.W.2d at 196 n.7.

149. See supra text accompanying notes 107, 115, 117.

150. Kelly, 519 N.W.2d at 205. The supreme court focused mostly upon the proof lacking for the third element of the Eighth Circuit's test requiring an ascertainable
The third requirement was not met since Kelly’s solicitation and profits were inherent in the underlying prostitution crimes, and therefore the court concluded that these activities failed to constitute a RICO enterprise.\textsuperscript{151} This holding, however, is inconsistent with the language of \textit{Turkette} and with the majority of federal circuits which have held that separate proof is not required to establish the enterprise and pattern of racketeering elements.\textsuperscript{152}

From a public policy standpoint, the \textit{Kelly} court properly recognized the need to construe Minnesota’s RICO Act in a way to avoid punishing ad hoc criminals.\textsuperscript{153} The court explained the resulting public policy ramifications if RICO is liberally construed to apply to all individuals who commit a series of predicate crimes.\textsuperscript{154} The \textit{Kelly} court reflected upon the concern in \textit{Huynh} that RICO not be construed to include persons who loosely associate with others to commit sporadic crimes.\textsuperscript{155} This public policy concern is consistent with legislative intent which states that the statute is not to merely create an enhanced punishment statute, even though the statute’s language is meant to be broadly interpreted.\textsuperscript{156} Thus, the supreme court is attempting to address this concern, albeit incorrectly, with a narrow construction of the “enterprise” requirement. In effect, however, this restricts RICO’s application to more sophisticated and “organized” criminal associations.

As a result, the supreme court has altered the focus of the third characteristic of a RICO enterprise in an effort to constrain the inappropriate use of RICO against loosely-structured criminal organizations. Prior to the \textit{Huynh} decision, however, the third prong

\begin{itemize}
\item \textsuperscript{151} \textit{Id.} at 204-05.
\item \textsuperscript{152} \textit{Turkette}, 452 U.S. 576, 583 (1981); \textit{See, e.g.,} Diamonds Plus, Inc. v. Kolber, 960 F.2d 765, 770 (8th Cir. 1992) \textit{rev'd in part on other grounds}, 710 F.2d 1361 (8th Cir. (en banc) (noting that the facts used to support the predicate offenses may be considered when conducting an inquiry into whether the enterprise encompasses more than is necessary to commit the RICO crimes). \textit{But see} Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir.) (noting that a RICO enterprise must be proved by facts other than those used to prove the predicate acts of racketeering), \textit{cert. denied}, 464 U.S. 1008 (1983).
\item \textsuperscript{153} \textit{See Huynh}, 519 N.W.2d 191, 196 (Minn. 1994) (noting that without application of Bledsoe’s “distinct structure” requirement, Minnesota’s RICO Act might be applied to catch unorganized criminals and, to this end, "isolated, sporadic criminal acts" are excluded under Minnesota’s RICO Act).
\item \textsuperscript{154} \textit{Kelly}, 519 N.W.2d at 205; \textit{Huynh}, 519 N.W.2d at 196.
\item \textsuperscript{155} \textit{Kelly}, 519 N.W.2d at 205; \textit{see also} \textit{Huynh}, 519 N.W.2d at 194-96.
\item \textsuperscript{156} \textit{See infra} note 160. The court found that Kelly individually induced girls to work for him as prostitutes in order to support his drug habit. \textit{Kelly}, 519 N.W.2d at 205. As such, RICO was not appropriate for such individual criminal behavior. Rather, "Kelly has been found guilty and is being punished." \textit{Id.}; \textit{see also Huynh}, 519 N.W.2d at 196.
\end{itemize}
of establishing a RICO enterprise required “an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity.” The focus of this prong concentrates on the activities, as opposed to the structure, of an organization. By focusing on the activities of an organization, the requirements for the distinct elements of an enterprise and the racketeering pattern may begin to collapse.

The court should have rejected the Eighth Circuit’s test as inconsistent with Minnesota legislative intent and Minnesota RICO’s broad definition of an enterprise. The Eighth Circuit’s position contradicts the Supreme Court’s language in by requiring separate proof to establish the enterprise and pattern of racketeering elements. Although these elements are separate and distinct, the Supreme Court expressly noted in that proof may coalesce. The court, however, modified the Eighth Circuit’s test by characterizing the enterprise more in terms of the activities in which it is engaged, and less in terms of the structure and organization of the enterprise. It is this characterization of a RICO enterprise that could prove contrary to the directives in the state and federal statutes that RICO be broadly construed.

There are several inherent dangers that arise when the focus shifts to an organization’s activities. The first danger is that an activities test may preclude the prosecution of structured criminal organizations that have a singular criminal purpose. Minnesota prosecutors say the new test will be difficult to satisfy if the court requires proof of a highly

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158. The dissent criticized this focus as a departure from the *Kragness* test. *Huynh*, 519 N.W.2d at 199. The dissent found the majority’s new test “contradicts the Supreme Court’s directive that the enterprise is an entity separate and apart from the activity in which it engages.” *Id.* at 200 (quoting *Turkette*, 452 U.S. 576, 583 (1975)).

159. See *id*.

160. See *Minn. Stat. § 609.901* (1994) (providing that “Sections 609.902 to 609.912 shall be liberally construed to achieve their remedial purposes of curtailing racketeering activity and controlled substances crime and lessening their economic and political power in Minnesota”). However, the U.S. Supreme Court recently noted in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), that the liberal construction provision “is not an invitation to apply RICO to new purposes that Congress never intended.” *Id.* at 170-71.


structured organization with a well-defined chain of authority.\footnote{163} Such evidence typically is available only if an informant assists prosecutors and police, or the police successfully infiltrate an organization using an undercover officer.\footnote{164} Moreover, if the supreme court requires separate proof for the enterprise and pattern elements, certain kinds of prosecutions clearly envisioned by RICO's sponsors would be excluded. For example, if a gang is involved exclusively in gun trafficking, the evidence required to prove the enterprise and the predicate acts would coalesce, and thus the gang likely could not be prosecuted under Minnesota's RICO.

A second danger is the inherent uncertainty of Minnesota's new enterprise test, since it fails to sufficiently define a RICO enterprise and its requisite proof. What is certain is that the supreme court will construe Minnesota's RICO Act as narrowly as needed to prevent the statute from being used to merely target repeat criminals or enhance penalties for group crime. What is not clear, however, is whether the new test is a weaker version of the Eighth Circuit's test, as the dissent claims, or whether it mandates a higher standard of proof.\footnote{165} What degree of separation will the Minnesota courts require? As one prosecutor in \textit{Huynh} noted,

If the new test requires proving the enterprise by proving the criminal activities are beyond what was needed to commit the underlying predicate offenses, then it is not too tough a standard of proof. It would be a test that separates out the sporadic crime from organized crime. But if the new test means that the court will require proof of an organizational command and control, or evidence of the lines of authority, RICO prosecution will be problematic.\footnote{166}

A third danger is the potential for abuse of prosecutorial discretion. If a diversity of crimes exists, prosecutors could charge some as predicate crimes and use the other crimes to establish the enterprise as distinct from the pattern of criminal activity.\footnote{167} For example, a series of drug sales could be charged as a RICO violation and as
criminal violations such as concealing criminal proceeds or aiding an offender, which would differentiate acts in furtherance of the RICO scheme from elements of any underlying offense.

A final danger which may arise by focusing on an organization's activities as compared to its structure is that there may be inconsistencies resulting when one court considers a series of criminal acts to be related, while another court finds the same series to be unrelated. For example, the supreme court in *Huynh* held that the defendant's money laundering activities were not related to his predicate extortion crimes. The court, therefore, was able to find a separate and distinct enterprise and pattern of criminal activity. In *Kelly*, however, the court found that the defendant's threats, violence, and promises of gifts and money were inherent in the underlying prostitution crimes. Therefore, there was no enterprise distinct from the predicate crimes. In sum, these problems associated with the new enterprise test suggest that Minnesota should adopt a different test.

The Minnesota Supreme Court should not have applied the Eighth Circuit's test as modified by *Huynh* in *Kelly*. Rather, the court should have applied the test used by the majority of federal circuits, since it does not have the distinctiveness or separateness requirement. With such a test, the facts used to support the predicate offenses may coincide with those used to prove the existence of the enterprise. The majority's test, by allowing the evidence to coalesce, allows RICO to be more broadly applied.

Using the majority's approach, RICO statutes can be applied more successfully to a new type of criminal organization that poses an economic and social threat throughout the country—street gangs. Neither Congress nor the Minnesota Legislature intended the scope of

169. *Id.*
171. For a discussion of the Eighth Circuit's three-part analysis, see *supra* text accompanying note 85.
172. See Bonney, *supra* note 11, at 606. Although arguably less sophisticated and more loosely organized than traditional organized crime syndicates, gangs have evolved into "criminal entities that have hierarchical management structures and use violence and bribery to evade prosecution." *Id.; see, e.g.*, Burdett v. Miller, 957 F.2d 1375, 1379 (7th Cir. 1992). The Burdett court reasoned that

The statute is aimed not only at formal enterprises such as corporations, labor unions, and government departments controlled by racketeers (in the special sense that the statute gives this term) but also at criminal gangs, which have a less formal, a less reticulated and differentiated structure. There must be some structure, to distinguish an enterprise from a mere conspiracy, but there need not be much.

*Id.*
the RICO statutes to apply solely to traditional organized crime.\textsuperscript{173} Although the federal and state RICO statutes were originally intended to fight the economic effects of organized crime, over time RICO has been extended to include patterns of criminal activity by persons outside the traditional organized crime framework.\textsuperscript{174}

In the past decade, the RICO statute has been used successfully to prosecute a variety of gangs,\textsuperscript{175} since street gangs fit within RICO's requisite characteristics.\textsuperscript{176} For example, gang members join for a common purpose, usually to gain social and economic power through

\textsuperscript{173} The federal circuit courts have extended RICO beyond organized crime. See Ruth E. Greenfield, \textit{Business Law—Racketeer Influenced and Corrupt Organizations Act (RICO)—Maintenance of a Private Civil RICO Action Does Not Require a Showing That the Defendant Has Been Criminally Convicted of the Predicate Acts Nor That the Plaintiff Has Sustained a "Racketeering Injury" Distinct from the Alleged Predicate Acts}, 17 ST. MARY'S LJ. 465, 468 (1986).

The language of Minnesota RICO also does not limit application to traditional organized crime, but rather encourages a broad interpretation. See MINN. STAT. § 609.901. The Minnesota Supreme Court acknowledged Minnesota RICO's broader applications in \textit{Huynh}, stating that "clearly our statute is not limited to drug 'kingpins' or major crime syndicates . . . ." \textit{Huynh}, 519 N.W.2d at 195.

174. Bonney, supra note 11, at 606. RICO has not been limited in application to traditional organized crime. The federal statute has been used to prosecute a variety of criminal enterprises and organizations including street gangs, prison gangs and motorcycle clubs, as well as conspiracies between individuals including lawyers and police officers, and certified public accountants. See, e.g., United States v. Krout, 66 F.3d 1420 (5th Cir. 1995) (holding that a Texas prison gang constituted a RICO enterprise), cert. denied, 116 S. Ct. 963 (1996); United States v. Weiner, 3 F.3d 17 (1st Cir. 1993) (RICO conspiracy involving bank official's association with loansharking operation); Burdett v. Miller, 957 F.2d 1375 (7th Cir. 1992) (describing enterprise consisting of investment advisor and three associates); United States v. Williams-Davis, 821 F. Supp. 727 (D.D.C. 1993) (discussing street gang's drug trafficking conspiracy in Washington, D.C.).

In another new use of RICO, Texas recently filed suit in federal court against the tobacco industry, basing its claims in part on federal racketeering, conspiracy, wire and mail fraud statutes. See Barnaby J. Feder, \textit{Texas Files Suit on Smoking, Using Racketeering Statute}, N.Y. TIMES, Mar. 29, 1996, at A9; United States v. Hoo, 825 F.2d 667 (2nd Cir. 1987) (New York City juvenile gang), cert. denied, 484 U.S. 1035 (1988).

175. See United States v. Coonan, 938 F.2d 1553 (2d Cir. 1991) (holding that members of a gang in New York City were participants in a RICO enterprise, which was engaged in loansharking, extortion, drug dealing and murder), cert. denied, 503 U.S. 941 (1992). In determining whether a RICO enterprise existed, the court said that an association-in-fact is often more readily proven by what it does, rather than by abstract analysis of its structure. \textit{Id.} at 1559.

176. Bonney, supra note 11, at 592-93. Urban street gangs resemble traditional organized crime organizations based on the following characteristics: continuity of operations over an extended time period; a hierarchical management structure; common purpose for which members join the organization; continued criminal activity as an important source of income; violence and threats of violence as a means of maintaining control; and a motivation to increase influence in the community in order to obtain more power and profits. \textit{Id.}
criminal activity, and gangs have a hierarchical structure that maintains sufficient continuity to exert an ongoing community influence. Furthermore, prosecutors have successfully fit a gang's organizational structure and its activities into the definitions of a RICO enterprise and pattern of racketeering activity.

The prosecution can establish that a gang is an enterprise by focusing on the gang's organizational structure, its common business purpose, its profit motivation, and its reliance on criminal activity to

177. Bonney, supra note 11, at 603. The criminal activities of an urban street gang and its recognized existence as part of the criminal underworld give the gang a level of power and influence in the community. Patterned after federal RICO, a number of states have passed criminal statutes making participation in the activities of a criminal street gang a prosecutable offense. For a discussion of the various state statutes addressing criminal street gangs, see David R. Truman, Note, The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs, 73 WASH. U. L.Q. 683 (1995). One commentator noted that RICO's liberal construction clause and its expansive definition of a pattern of racketeering make it an effective tool to use against street or prison gangs. Robert A. Destro, Essay, The Hostages in the 'Hood, 36 ARIZ. L. REV. 785, 800 (1994). The final provision of RICO's definition of pattern of racketeering activity, which includes those state crimes punishable by imprisonment for more than one year, "is particularly sweeping because of the sheer number of crimes which fit this description." Id.

178. For a discussion of similarities between the structure of organized crime and street gangs, see Bonney, supra note 11, at 600-04. The management hierarchy of urban street gangs, similar to organized crime organizations like the Mafia, is often based upon the type of activities in which the gang is engaged. Id. Established street gangs are characterized by strong leadership at the top of the organization and loyalty from the gang's membership. Id. at 600. Violence and threats are used not only to protect the gang's position and criminal activities in the community, but also by leaders to maintain control over members. Id.

179. In United States v. Wong, 40 F.3d 1347 (2nd Cir. 1994), cert. denied, 115 S. Ct. 1968, and cert. denied, 115 S. Ct. 2568, and cert. denied, 116 S. Ct. 190 (1995), gang members were convicted of a variety of racketeering offenses including murder, kidnapping, assault, extortion, and conspiracy. Id. at 1555. Gang members extorted protection money from local Chinese businesses, committed robberies, and kidnapped and murdered rival gang members for status, as well as potential witnesses and business owners who refused to pay protection money. Id. The appellate court found there was sufficient evidence to establish a criminal enterprise and pattern of racketeering, and noted that crimes committed by several of the defendants as juveniles could constitute RICO predicate acts. Id. at 1555-56.

An example of other types of organized gangs that prosecutors have targeted using RICO is illustrated in United States v. Killip, 819 F.2d 1542 (10th Cir.), cert. denied, 484 U.S. 865, and cert. denied, 484 U.S. 987 (1987), where the court held that the government established that the defendants, as past or present members of the Oklahoma City chapter of the Outlaws Motorcycle Club, were associated with a RICO enterprise. Id. at 1550-51. The club members engaged in the affairs of the enterprise through a pattern of criminal activity that included drug trafficking and sales and attempted arson. Id. at 1544; see generally Bonney, supra note 11, at 604.
generate money to help finance the enterprise. The pattern of racketeering element is then satisfied by proving that the predicate crimes were committed through the operation of the gang enterprise. Proving a pattern of racketeering activity should not be a significant hurdle considering that the primary business for many street gangs is drug dealing. The federal and Minnesota RICO Acts expressly prohibit the manufacture, importation, receiving, buying, selling or dealing of narcotic or other dangerous drugs. As such, prosecutors should also successfully prove the racketeering element when prosecuting gangs.

The Second Circuit, in particular, has handled a large number of appeals involving gang prosecutions under federal RICO. In United States v. Coonan, the court held that there was ample evidence establishing that the Westies, a gang controlling criminal activity in Manhattan, was a criminal enterprise. The Westies gang was engaged in drug trafficking and drug sales, loansharking, and extortion. The gang's power increased when it began working with the Gambino Organized Crime Family. As required in Turkette, the court found that the gang's power structure endured and that its members functioned as a unit. The court also noted that

180. For a discussion of how the government can prove that an urban or only urban gang is a criminal enterprise, see Bonney, supra note 11, at 607-11.

181. See Bonney, supra note 11, at 611. Bonney opined that:

[O]nce the 'enterprise' has been established, the 'pattern' element is usually not difficult to prove. Because of the significant number of offenses that are committed on a daily basis through the operation of a drug enterprise, the prosecution can tie drug charges to other charges, such as violent crimes, in order to establish the 'pattern.'

Id.

182. Compare 18 U.S.C. § 1961 (1) with Minn. Stat. § 609.902, subd. 4. Prosecution of gangs under federal RICO is easier because the federal statute broadly defines a pattern of racketeering to include:

[A]ny act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year . . . .


183. See Bonney, supra note 11, at 604; Donovan, supra note 34, at 561; Vitter, supra note 34, at 1424-27.


185. Id. at 1556.

186. Id.

187. Id. at 1560-61. The court found there was ample evidence demonstrating that the Westies, as an ongoing association-in-fact, controlled criminal activities on the West Side piers, and extorted jobs and payments from several labor unions. Further, the government showed that the Westies entered
the existence of an association-in-fact enterprise, such as the Westies, is often more easily shown by what the enterprise does than by an analysis of its structure. Moreover, the court held, "we have previously indicated that proof of various racketeering acts may be relied on to establish the existence of the charged enterprise." The Eighth Circuit has also held that the criminal activities of gang members can be prosecuted under RICO. In United States v. Darden, the court considered whether the defendants' involvement in a St. Louis drug trafficking syndicate constituted racketeering. Specifically, the court examined whether the distinctiveness requirement for proof of the existence of a RICO enterprise had been satisfied. While the court acknowledged that proof of an enterprise and pattern of racketeering may coincide, the court applied the minority test requiring an ascertainable structure distinct from that inherent in the pattern of racketeering.

Similar to the Minnesota Supreme Court in Huynh, the Darden court held that the enterprise characteristic may be met by evidence of the organization's activities extending beyond what required for the commission of the underlying criminal acts. The Eighth Circuit held, citing the reasoning of Coonan, that "[c]ommon sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." The Darden court relied, however, upon evidence of the

into an alliance with the Gambino Organized Crime Family, suggesting that other criminal organizations perceived the Westies as an ongoing enterprise.

Id. at 1560.

188. Coonan, 938 F.2d at 1559 (citing United States v. Bagaric, 706 F.2d 42, 56 (2nd Cir.), cert. denied, 464 U.S. 840 (1983)). The Second Circuit's RICO test in Coonan supports the activities-based test in Huynh, with one critical difference. Under the broad definition of an enterprise adopted by the Second Circuit, there is no distinctiveness requirement. The Second Circuit and other circuit courts that adhere to a broader view of a RICO enterprise will determine that the organizational requirement is satisfied "so long as the court can find an informal association of individuals banded together for the purpose of conducting activities that constitute predicate acts . . . ." Gardiner, supra note 32 at 687.

189. Coonan, 938 F.2d at 1560 (citing United States v. Ferguson, 758 F.2d 843, 853 (2nd Cir.), cert. denied, 474 U.S. 1092 (1985)).

190. 70 F.3d 1507 (8th Cir. 1995).

191. Id. at 1516-17.

192. Id. at 1520.


194. Id.

195. Darden, 70 F.3d at 1521. In an unusual juxtaposition, the Eighth Circuit, which adheres to the distinctiveness requirement, is citing the Second Circuit, which applies the broadest test in determining the existence of an enterprise.
gang's coordination and oversight activities, including "post-shooting reviews to improve the techniques it employed to snuff out rivals and informants," to decide that evidence of the distinct structure was overwhelming. 196 This recent decision, therefore, seems to indicate that although the Eighth Circuit recognized the same evidence may help establish the enterprise and pattern elements, the court will continue to apply the distinctiveness requirement.

Although federal prosecutors have successfully used RICO to prosecute street gangs, far fewer RICO prosecutions have been brought under state "little RICO" statutes. 197 A 1993 U.S. Department of Justice Survey of local prosecutors found that the reasons cited for lack of use at the state level include the high standards of proof, the possibility of failure, and the legal complexity of the statute. 198 For example, prosecutors for Minnesota's Hennepin and Ramsey counties report that their drug cases involve less sophisticated and structured group crime than the Minnesota Legislature anticipated when RICO was enacted. 199

These drug crimes, therefore, are being prosecuted as substantive crimes instead of as RICO crimes. 200 Ramsey County Attorney Susan Gaertner and Hennepin County Attorney Michael Freeman agreed with survey participants that when prosecuting drug offense cases, state and drug forfeiture statutes are simpler to present to juries and carry enhanced penalties. 201 Moreover, state and local prosecutors pointed out the extensive resources required to conduct the investigation necessary to prove the structured existence of the gang and that the crimes are gang related. 202 Furthermore, sentencing under RICO is less certain, since RICO is not included in the Minnesota Sentencing Guidelines, and thus trial courts have wider discretion when sentenc-

196. Id.
198. Id. at 12-16.
199. Freeman Interview, supra note 87. Mr. Freeman stated that "Our gangs in Minnesota have not turned out to be as tightly structured as we thought they would be when we enacted RICO. We do not have the same kind of settled or established territorial boundaries here as gangs do in other parts of the country." Id.; see also Gaertner Interview, supra note 163.
200. Freeman Interview, supra note 87; Gaertner Interview, supra note 163.
201. Freeman Interview, supra note 87; Gaertner Interview, supra note 163.
202. Freeman Interview, supra note 87; Gaertner Interview, supra note 163.
One reason RICO is attractive to state and local prosecutors, however, is that its criminal penalties can be more severe than those available for violations of the incorporated crimes. The type of case where RICO's penalties provide such an incentive is illustrated by Huynh. The prosecution combined the extortion and money laundering crimes, which under state criminal statutes carry a penalty of presumptive probation. If prosecuted under RICO, however, the crimes would result in a prison sentence. Similarly, as in Kelly, RICO has been used to target prostitution because prosecutors may confiscate ill-gotten profits and the penalties are more severe under RICO.

A second reason RICO should be used to target gangs is the potential of Minnesota's gangs becoming more sophisticated with hierarchies and control structures as in other jurisdictions where gangs have been successfully prosecuted under RICO. The more recent threat of gun trafficking by street gangs is the type of crime that the
Minnesota Legislature sought to eradicate with Minnesota's RICO Act. Moreover, the penalties available for the substantive crimes would be less serious than if the gun trafficking were prosecuted under RICO. Yet, street gangs concentrating in a certain type of criminal activity such as gun trafficking, could not be effectively prosecuted under the supreme court's test, if proof of the gang's activities cannot serve as proof of the criminal organization.

In sum, the definition of a RICO enterprise and its proof requirements under the new Minnesota test realistically should be clarified through an evolution of common law. Minnesota courts should eliminate the Eighth Circuit's distinctiveness requirement, which was not envisioned by Minnesota RICO sponsors. Eventually, however, the U.S. Supreme Court should grant certiorari and resolve the controversy among the federal circuits.

In addition, Congress and the Minnesota Legislature should amend the definition of a RICO enterprise, particularly association-in-fact enterprises, which has generated much controversy over how broadly RICO should be construed. Minnesota lawmakers need to precisely define the scope of Minnesota's RICO Act and eliminate confusion over what types of criminal enterprises RICO is targeting.

Without legislative clarification, Minnesota courts will continue to

210. In 1989, former Sen. Michael Freeman, sponsor of the Senate Bill, testified that "[w]e think that some of the important organized crime outfits of the 1990s will be drug gangs—that they are sophisticated and that they are organized." *Racketeering Influenced and Corrupt Organizations Act: Hearings on S.F. 483, Before the Senate Judiciary Comm., Criminal Justice Division, 76th Minn. Leg., 1989-90 Reg. Sess. (1989).* Freeman further testified that "[d]rug dealing and violent crimes are increasingly part and parcel of organized gang activity." *Id.*

Rep. Phil Carruthers is disappointed that RICO has not been used more frequently in criminal prosecutions at the county and state levels. Gang-related crimes, most notably drug crimes, are being charged as substantive crimes instead of under Minnesota RICO. Carruthers Interview, *supra* note 87.

211. See Freeman Interview, *supra* note 87. Freeman opined that "[t]he Minnesota Supreme Court has read in a limitation we didn't contemplate. The court is limiting RICO further than we intended." Freeman Interview, *supra* note 87. For a discussion on the legislative history of Minnesota's RICO statute, see *supra* Part II.D and text accompanying note 210.

212. *Minn. Stat.* § 609.902, subd. 3.

213. See *supra* note 50 and accompanying text.

214. Minnesota Rep. Phil Carruthers would like the Minnesota RICO Act amended so that it mirrors the federal statute, which is broader than Minnesota's. "I would like to go back to the bill as I introduced it . . . . I would support legislative efforts to broaden Minnesota's law." Carruthers Interview, *supra* note 87. Carruthers' version of Minnesota RICO as introduced in the House of Representatives was modeled after the federal statute, and later changed in conference committee. Carruthers Interview, *supra* note 87.
apply a test that may exclude RICO's use against the newest criminal threat, street gangs. RICO is a powerful weapon that prosecutors and law enforcement should be able to use against gang-generated crime. The legislative history of the federal statute supports such an application in both federal courts and in Minnesota, which largely patterned its statute after the federal Act. RICO should be used, as Congress intended, against "sophisticated, diversified and widespread activity that drains billions of dollars from America's economy by unlawful conduct and illegal use of force, fraud and corruption."216

V. CONCLUSION

The Minnesota Supreme Court's activities-based test for a RICO enterprise has not been widely applied. If the new prong of the court's three-prong test is satisfied only by showing that the criminal activities are beyond what is needed to commit the underlying

215. See Bonney, supra note 11, at 609 (noting that sophisticated urban street gangs satisfy the enterprise and pattern requirements because they are united for a common business purpose with core members in a hierarchical order).

216. Congressional Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970). Additionally, the congressional findings and purpose of the federal RICO act provided that:

(1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption;

(2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Id.
predicate offenses, then such a test is problematic for the well-organized but singular-purpose criminal organization. Furthermore, the test does not clearly define how to distinguish activities that are necessary and inherent in the pattern of racketeering activity from criminal activity that is sufficiently separate and distinct. The court’s inconsistent interpretation of what constitutes necessary and inherent is exemplified by Kelly and Huynh.

On the other hand, if the new test means that the court will require separate proof of an organizational control system or structure, RICO prosecution of wholly criminal entities will be more difficult. The new test suggests a continued adherence to the Eighth Circuit’s distinctiveness or separateness requirement, potentially eliminating those cases where the facts used to prove the existence of an illegitimate enterprise overlap with those used to prove the pattern of racketeering.217

Under the hypothetical set forth in the introduction to this Case Note, the gang solely organized to sell and distribute illegal drugs would fail to satisfy the Eighth Circuit’s test for the existence of a RICO enterprise. The drug-related criminal activity would not provide sufficient evidence of an “ascertainable structure” separate and apart from that needed to commit the underlying predicate acts.

Under the position adopted by the majority of circuit courts, however, which rejects this distinctiveness requirement, the hypothetical could result in a racketeering conviction. While Minnesota courts have correctly held that the enterprise and pattern of racketeering must be established as separate elements, the Minnesota Supreme Court should discard the distinctiveness requirement to analyze whether an enterprise exists. Such a requirement narrows the requisite proof for a RICO enterprise beyond what the U.S. Supreme Court, state courts or federal laws have mandated.

Consequently, the U.S. Supreme Court needs to reiterate the proof requirements noted in Turkette, evidence of the enterprise and pattern of racketeering elements can coalesce.218 Disagreements between federal and state courts over the proper interpretation of the enterprise element would be resolved by statutory amendments more precisely defining what constitutes a RICO enterprise. Any statutory amendments, however, should retain the legislative intent and statutory directives that RICO be broadly construed. Furthermore, the Minnesota Legislature should amend the racketeering statute to explicitly reflect the evolution of structured criminal organizations beyond traditional organized crime, to enhance prosecutorial efforts to target

217. See Barsoomian, supra note 35, at 929 (noting that the multiple schemes requirement is not found in RICO’s statutory language).

218. For further discussion of how proof of the enterprise and pattern elements may coalesce, see United States v. Turkette, 452 U.S. 576, 583 (1981).
street gangs, the modern day version of "organized crime."

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