ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2013-0827
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Clark County
v.	:	Court of Appeals,
	:	Second Appellate District
JORDAN BEVERLY,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 11-CA-0064
	:	

MERIT BRIEF OF APPELLANT STATE OF OHIO

MARSHALL LACHMAN (0076791)
75 North Pioneer Boulevard
Springboro, Ohio 45066
937-743-9443

Counsel for Defendant-Appellee
Jordan Beverly

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

D. ANDREW WILSON (0073767)
Clark County Prosecuting Attorney

ANDREW R. PICEK (0082121)
Assistant Prosecuting Attorney
50 E. Columbia Street, 4th Floor
P.O. Box 1608
Springfield, Ohio 45501
937-521-1770

Counsel for Plaintiff-Appellant
State of Ohio

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INTRODUCTION

Ohio's Corrupt Practices Act—the state version of the federal RICO statute—was enacted to address the problem of ongoing criminality by giving prosecutors, as a legislative sponsor said, a "toughest in the nation" statute. But several appellate districts, including the Second District in its decision below, have shackled the Act, forcing the State to prove an element the drafters did not include and effectively taking this tool out of the hands of prosecutors in many criminal cases. The appellate courts have strayed from the text of Ohio's statute, lured by some federal courts' interpretations of the federal counterpart. But the federal beacons the Ohio courts followed were mirages, as later U.S. Supreme Court decisions confirmed. So even if federal law should guide the meaning of Ohio's statute—a dubious course since the Ohio statute reaches more broadly—the path the Second and other districts have taken must be rerouted.

The core of Ohio's Act is the twin concepts of "enterprise" and "pattern of corrupt activity." This case concerns the relationship of those concepts. An enterprise is an "organization, association, or group of persons," however loose, that is connected to the criminal activity; the pattern is the series of crimes themselves. The district courts in Ohio differ over whether a prosecutor can prove the enterprise element by showing a structure inherent in the pattern of corrupt activity (under the so-called "separate-element" view of the statute) or must prove a structure "separate and apart" from that pattern (under the so-called "separate-structure" view of the statute). This difference formerly divided the federal appellate courts, but the U.S. Supreme Court resolved that issue (consistent with the State's position in this case) in 2009.

This Court has twice before acknowledged the split in the lower courts, but ultimately declined ruling on the question in this appeal. *See* State's Mot. For Recon. at 2-3 (Oct. 7, 2013)

(listing cases). It should not repeat that outcome. The Second District is entrenched, now drawing on its own precedents to cement its error in borrowing federal law (and now incorrect federal law to boot). Other districts—like the Tenth—seem locked into the same error. Without resolution now, prosecutors in some of Ohio's most populous counties will operate without the full measure of a statute the General Assembly designed to combat criminal enterprises.

The current split in Ohio's courts and the former split in the federal courts arose from the sometimes difficult distinction between the pattern and the enterprise. That distinction is rightly labeled "elusive." Paul Batista, Civil RICO Practice Manual, § 6.02 (3d ed. 2014). One commentator's effort to address the elusiveness helps make concrete what formerly split the federal circuits and what led the Second District astray. He writes: under the separate-structure view, proof that a football team "engaged in the pattern of activity of playing football would *not*, in and of itself, establish that the team was an 'enterprise.'" *Id.* at 6.02[B]. But under the separate-element (but not separate-structure) view, "proof that the team engaged in a pattern of playing football would also provide proof that it was an 'enterprise' for RICO purposes, since the proof as to the existence of the enterprise and the pattern would tend to 'coalesce.'" *Id.* The latter view is now the law of the land for the federal statute. And it represents the natural reading of Ohio's similar (indeed, broader) statute.

Those competing views of what Ohio's statute means were at play with the following facts. Defendant Jordan Beverly was one of the "worker bees" who, after stealing vehicles in other counties, broke into houses in Clark County, stole high-value items, and fenced them for money. Beverly and his associate repeated this pattern over at least three months, culminating in five burglaries the day they were caught. Those crimes show an organization that threatens future crimes in a way different from Beverly and his associate acting only sporadically each

time a criminal opportunity presented itself. That threat—where some organization makes future crime more likely and more damaging to the social fabric of the law-abiding majority—is exactly what the Corrupt Practices Act is designed to thwart.

The Corrupt Practices Act reaches enterprises that—like the criminal acts in this case—arise from the pattern of corrupt activity itself. The Act is not limited—as the Second District held here in reversing the conviction—to enterprises with a separate existence that *also* engage in a pattern of corrupt acts. As one court explained, the enterprise may be a group "formed for the sole purpose of carrying out a pattern" of illegal acts. *Pavlov v. Bank of New York Co., Inc.*, 25 F. App'x 70, 71 (2d Cir. 2002) (reversing lower court that demanded "continuity extending beyond the pattern of predicate racketeering acts"). The Act's language, structure, and purpose, as well as other courts' interpretation of similar statutes all tell us that the pattern can reveal the enterprise, such as when a series of crimes shows that the perpetrators have an ongoing relationship that facilitates the crimes. These factors all rebut the view of some Ohio districts holding that an enterprise must be a structure "separate and distinct" from the pattern of criminal acts.

First, the language. The Ohio statute defines enterprise broadly. In drafting that definition, the General Assembly was codifying a broad reach for the statute immediately after the U.S. Supreme Court had to confront the question under the federal statute of whether "enterprise" was narrow and included only legal associations. The Supreme Court said no, and the General Assembly wrote a correspondingly broad law. *See* R.C. 2923.31(C) (enterprise includes "illicit as well as licit enterprises"). The expansiveness of the definition is evident in what the General Assembly did *not* write. Instead of defining enterprise narrowly such as by limiting it to "a group of persons sharing a common purpose of engaging in criminal conduct,

associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents," *e.g.*, N.Y. Penal Law § 460.10(3), it wrote broadly to encompass "any organization, association, or group of persons associated in fact although not a legal entity." R.C. 2923.31(C).

Second, the structure. The three core offenses under the Act are (1) conducting or participating in an enterprise through a pattern of corrupt activity, (2) acquiring or maintaining an interest in an enterprise by means of a pattern of corrupt activity, and (3) investing proceeds of corrupt activity in an enterprise. R.C. 2923.32(A). While offenses (2) and (3) contemplate an enterprise entirely separate from the pattern of corrupt activity, offense (1) does not. And offense (1) is listed first. The forefront of legislative concern was corrupt activity carried out through organization (however loose).

Third, the purpose. The Act is designed to "stop . . . criminal enterprises." *State v. Schlosser*, 79 Ohio St. 3d 329, 335 (1997); *cf. H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989) (federal statute designed to combat the "threat of continuing [criminal] activity"). When repeat crime is organized (an enterprise) and not sporadic, it poses a distinct danger to the social order. The statute is aimed at criminal enterprises even if they exhibit no other structure than the organization necessary to commit crime.

Finally, the experience of the federal courts and courts in other States. Some lower federal courts once embraced a meaning of "enterprise" like what the Second District did here. But the Supreme Court has since corrected those lower courts. And other states courts that have looked closely at the issue have rejected the position of the Second District. Ohio appellate courts that lost their way latched on to a federal interpretation that has since been repudiated even for the narrower federal statute.

STATEMENT OF FACTS AND PROCEDURE

A jury found Jordan Beverly guilty of violating Ohio's pattern of corrupt activity statute after an 8-day trial. App. Op ¶ 6. The corrupt-practices charge was count one of a 25-count indictment covering acts of burglary, receiving stolen property, and possessing weapons under a disability—acts that stretched from November 2010 through January 2011. (Indictment, R. 1). The prosecutor described Beverly's role in the criminal scheme as one of two "worker bees" in on ongoing pattern of thefts and sales of the fruits of home burglaries. (Trial Trans. at 213) (opening statement).[1] The scheme worked like this. Beverly and his partner (Imber) would get rides from Clark County (the scene of most of the burglaries) to another county and steal a vehicle there. (*Id.* at 214; *see also id.* at 387-88, 455). Beverly and Imber would return to Clark County and case houses while pretending to work for a tree-cutting service (*Id.* at 214; *see also id.* at 1008-10). If someone answered the door, they claimed to be selling firewood; if no one answered, they broke in and removed items like TVs, guns, and jewelry. (*Id.* at 214). They then quickly sold the items for cash to several different fences. (*Id.* at 216; *see also id.* at 1379).

By the time law enforcement caught up to Beverly and his partner on January 28, 2011, their scheme had peaked. They committed five separate burglaries earlier that day. (*Id.* at 233; *see also id.* at 920, 941, 1032, 1065, 1128-29). By then, the pattern of burglaries had aroused the suspicion of neighbors, some of whom had provided a description of the stolen truck being used to commit burglaries on the 28th. (*Id.* at 238; *see also id.* at 1038-1041). A description of the truck led authorities to it and the defendants. (*Id.* at 239; *see also id.* at 1150, 1177, 1198).

Throughout the series of burglaries, Beverly and Imber (and others) worked as a "criminal team" to make money from stealing and selling property they filched from the homes

[1] All pages of the trial transcript through page 242 are to the prosecutor's opening statement.

of people who were at work. (*Id.* at 242). Beverly and Imber's role on the team showed repeated patterns and efficiency. In one instance they even used the same stolen dealer tag on different stolen vehicles when they brought the vehicles back to Clark County. (*Id.* at 233). And after his apprehension, Beverly rode around Springfield with the police to show them the houses where he and Imber fenced property they had stolen. (*Id.* at 1379). Indeed, when they were caught, even though they had burgled five houses that day, they had already fenced televisions and guns. (*Id.* at 1856) (closing argument).

Beverly challenged his conviction and sentence on appeal. The Second District held that the pattern-of-corrupt-activities conviction rested on insufficient evidence, and reversed for resentencing. App. Op. ¶ 30. And, although Beverly did not assign it as error, the Second District held that the trial court erred by "fail[ing] to instruct the jury . . . using the definition" of "enterprise" developed by some lower federal courts. *Id.* ¶ 31. Judge Donovan dissented on grounds not raised in this Court.

ARGUMENT

State's Proposition of Law:

> *In order to prove the existence of an "enterprise" to sustain a conviction for engaging in a pattern of corrupt activity in violation of R.C. 2923.32, the State is not required to prove that the organization is a structure separate and distinct from the pattern of activity in which it engages.*

The Ohio statute "was designed to impose . . . liability for the criminal enterprise." *State v. Miranda*, ____ Ohio St. 3d ____, 2014-Ohio-451 ¶ 14 (internal quotation marks omitted). The language, structure, and purpose of Ohio's statute show this design to attack criminal enterprise activity, and, critically, affirm the State's interpretation here that an enterprise may be proven from the pattern of the corrupt acts themselves. The State's interpretation is also confirmed by other States that have adopted this same view with respect to their similar acts. The Second

District's contrary view, by comparison, never addresses the statute's language, structure or purpose. Instead it looked to federal law, but U.S. Supreme Court precedent now shows that it misinterpreted that federal law.

A. The broad language of the Act includes both enterprises inherent in a pattern of corrupt acts and those separate from the pattern.

The language of the Corrupt Practices Act shows that it contains no requirement that the enterprise exhibit a structure *independent* of the pattern of corrupt activity. That requirement adds an additional element that the General Assembly left out; it dulls a tool for attacking ongoing criminality; and it makes the Act something other than the "toughest" in the nation. The pattern of activity can prove the enterprise. The text shows this in several ways.

For one thing, a separate-structure requirement would contradict the "illicit or licit" language in the definition of enterprise because it would suggest that enterprises organized to carry out wholly illegitimate activity also must carry out some legitimate activity. R.C. 2923.31(C). If the corrupt activity cannot be used to prove the enterprise, prosecutors essentially need to prove that the organization conducts some legal acts. Thus, "[t]o require that an associated-in-fact enterprise have a structure beyond that necessary to carry out its racketeering activities would be to require precisely" what the Act "does *not* require." *Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) (en banc). Such a requirement "would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities." *Id.* The General Assembly rejected such a requirement when it included "illicit" in the enterprise definition. R.C. 2923.31(C).

At the very least, insisting that the enterprise exhibit a structure separate from the pattern of corrupt activity would mean that an enterprise that engaged in only one kind of corrupt practices would escape liability no matter how wide-spread the activity, while a small-scale

enterprise that engaged in two kinds of illegal activity would be liable. That is, a separate-structure requirement would artificially excuse a large-scale criminal enterprise that, for example, consistently robbed jewelry stores, because those operations would not exhibit any structure "separate and apart from" the robberies. App Op. ¶ 29. But a separate-structure requirement would still encompass a small-scale enterprise that both sold drugs and peddled prostitution. For the small-scale enterprise involved in multiple kinds of corrupt acts, even applying a separate-structure requirement, the different kinds of activities would be enough to show a structure separate from the underlying pattern of either set of predicate acts—a prosecutor could charge the drug crimes as the pattern and prove a separate-structure enterprise by pointing to the organization needed to conduct the prostitution. As one court illustrated the point, a separate-structure requirement would mean that "a large scale underworld operation which engaged solely in trafficking of heroin would not be subject to RICO's enhanced sanctions, whereas small-time criminals jointly engaged in infrequent sales of contraband drugs and illegal handguns arguably could be prosecuted under RICO." *United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir. 1983). The plain language of the statute confirms the point. The statute makes each listed crime a potential "corrupt activity." R.C. 2923.31(I). If defendants can escape liability by confining their illegal action to a single defined corrupt activity, they would evade liability even though the General Assembly specifically included that particular crime in the Act. The Act is written to cover both specialized enterprises engaged in a single kind of corrupt activity and small-scale enterprises engaged in multiple kinds of corrupt acts. The Second District's interpretation rewrites the statute to eliminate a key component of what it is designed to cover.

Another way the text betrays a separate-structure requirement is that the requirement necessitates a narrow reading of a definition written broadly. Enterprise includes "*any* individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity" and extends to "*any* [other] organization, association, or group of persons associated in fact." R.C. 2923.31(C) (emphasis added). Statutes "phrased in broad, sweeping language" have "sweeping application." *State ex rel. Mager v. State Teachers Retirement Sys. of Ohio*, 123 Ohio St. 3d 195, 2009-Ohio-4908 ¶ 16 (per curiam); *see also Smith v. Landfair*, 135 Ohio St. 3d 89, 2012-Ohio-5692 ¶ 29 (noting broad language of statute when liberally construing specific term). Demanding proof that the enterprise has a structure over and above that needed to conduct its illicit aims narrows the meaning of enterprise to something more akin to a business. But that is decidedly not what the General Assembly intended when it penned the words "or group of persons associated in fact although not a legal entity." R.C. 2923.31(C). A separate-structure requirement improperly narrows the definition of an associated-in-fact enterprise because criminal enterprises "may not observe the niceties of legitimate organizational structures." *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001). A separate-structure requirement all but makes superfluous the "persons associated in fact" portion of the enterprise definition because that requirement essentially demands proof of structure like an "organization [or] association." R.C. 2923.31(C); *cf. State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Ed.*, 131 Ohio St. 3d 478, 2012-Ohio-1484 ¶ 19 (no part of a statute "should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative") (internal quotation marks omitted).

Yet another way the text disproves a separate-structure requirement is the core "pattern of corrupt activity" language itself. That language "supplant[ed]" an earlier statute that outlawed engaging in organized crime. Ohio Leg. Serv. Comm'n, Summary of Enactments January-July 1985, 45. That change reveals the General Assembly's concern with broadening the reach of the statute from traditional (highly) organized crime to all enterprises that pose a risk of continuing criminality. The change shows "a general intention to broaden" the statute. *Brown v. Martinelli*, 66 Ohio St. 2d 45, 49 (1981). Reading in a separate-structure requirement narrows what the General Assembly intended to broaden. An early comment on the Act agreed. "The use of the term 'corrupt activity' indicates that Ohio did not intend to limit [the Act's] application to those persons traditionally labelled [sic] 'organized criminals' and 'racketeers' or to the infiltration of organized crime into legitimate businesses. Rather, it is likely that Ohio intended the statute to apply to a wide variety of criminal activity." Note, *Ohio's Pattern of Corrupt Activities Law: Ohio Revised Code Sections 2923.31-36*, 17 Univ. Dayton L. R. 279, 288 (1991). The comment also rightly predicted that "Ohio's corrupt activities statute will be used primarily against ordinary criminals who happen to be connected with some sort of enterprise, regardless of whether that enterprise is legal or even distinct from the pattern of corrupt activity itself." *Id.* at 301 (although this prediction was on target, the author wrongly urges that the statute should have a rigid separate-structure requirement).

A final way the text shows that the statute contains no separate-structure requirement is the obvious ways that alternate text *could* impose that requirement. If the General Assembly had intended that the Act contain a separate-structure requirement, it could have said so explicitly. *State v. Cowan*, 101 Ohio St. 3d 372, 2004-Ohio-1583 ¶ 11 (rejecting interpretation that General Assembly "could have explicitly" embraced, but did not). If the General Assembly intended a

particular meaning, "it would not have been difficult to find language which would express that purpose." *Lake Shore Elec. R. Co. v. Public Utilities Comm'n of Ohio*, 115 Ohio St. 311, 319 (1926). For example, New York defines "criminal enterprise" as "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure *distinct* from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents." N.Y. Penal Law § 460.10(3) (emphasis added). That is effectively what the Second District's separate-structure requirement adds to the Ohio statute. But the General Assembly did not use language like their New York counterparts. And this Court should not countenance the Second District's judicial addition to the statute.

One last thing. Even though the text definitely rejects the notion that the enterprise element must be shown by proving a structure separate and apart from the pattern of corrupt activity, that does not collapse the pattern and enterprise elements into one. The same evidence frequently proves multiple elements of a crime. Consider theft by deception. If a criminal deceives a pawn shop about the value of the pawned item, those facts show both a purpose to deprive the owner of money and the deception. *See, e.g.*, *State v. Nelms*, No. 17657, 2000 WL 217116, at *4 (2d Dist. Feb. 25, 2000). The same is true for the federal and Ohio statutes that include "pattern" and "enterprise" as elements. Even if "the same evidence may prove" the pattern and the enterprise, that "does not mean that the two elements collapse into one." *Boyle*, 556 U.S. at 950 n.5; *see also State v. Welch*, No. 16-06-02, 2006-Ohio-6684 ¶¶ 28-29 (3d Dist.) (holding that the "same evidence" supported the pattern and enterprise elements of a Corrupt Practices Act conviction).

B. The structure of the Act, like the language, shows a broad intent to reach enterprises whether they are inherent in the pattern of corrupt activities or not.

More than the specific words of the statute rebuff the idea that the Act contains a separate-structure requirement. Two structural features of the Act also show that the enterprise element may be satisfied by proof of the pattern of corrupt acts, even without evidence that the enterprise exhibits a structure separate and apart from the pattern. *See, e.g.*, *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St. 3d 549, 552 (2000) (examining "language, structure, and purpose" to interpret statute). One structural indicator is that the statute's three substantive offenses each treat the relationship between the pattern and the enterprise differently. And one of those three plainly contemplates the loose sorts of associations that typify small-time criminal enterprises. The second structural feature is the breadth of the enterprise definition compared to another organized crime provision—the prohibition on criminal gangs. The specificity of the gang definition illustrates the breadth of the expansive enterprise definition.

Ohio's corrupt activities statute prohibits three different relationships between an enterprise and a pattern of corrupt activity, and that tripartite framework undercuts any notion that an enterprise must have a structure separate and apart from the pattern. The three prohibitions are (1) participating in the affairs of an enterprise, (2) acquiring an interest in an enterprise, and (3) investing in an enterprise, each by conducting a pattern of corrupt activity. R.C. 2923.32(A). The second and third prohibitions contemplate some distinction between the pattern and the enterprise. The ban on "acquiring . . . control" of an enterprise through a pattern of corrupt acts suggests that the enterprise has a life apart from the pattern. R.C. 2923.32(A)(2). And the prohibition against "invest[ing] . . . proceeds" from corrupt activity in "any enterprise" evokes a distinction between the pattern of corrupt acts and the enterprise. R.C. 2923.32(A)(3). But the same cannot be said about the crime of "participating" in an enterprise through a pattern

of corrupt acts. Participating contemplates overlap between the pattern and the enterprise. This "broad definition[] stand[s] in contrast to the more limited definition[s]" and confirms the breadth of the enterprise described in section 2923.32(A)(1). *See Wohl v. Swinney*, 118 Ohio St. 3d 277, 2008-Ohio-2334 ¶ 21 (interpreting insurance contact); *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 165-66 (2004) ("comparative breadth" of one section and another required avoiding "cramped" reading of broadly worded section) (quotation marks omitted). And the breadth of the three prohibitions taken as a whole dispels any notion that the meaning of enterprise has only a narrow scope. *See State v. Jackson*, 102 Ohio St. 3d 380, 2004-Ohio-3206 ¶ 36 ("criminalization of numerous . . . activities" indicated the broad purpose of the statute).

Another structural feature of the Act demonstrates the breadth of the enterprise definition in section 2923.31(C)—the comparatively narrower meaning of "criminal gang" in the adjacent part of the Revised Code. A criminal gang, unlike a Corrupt Practices Act enterprise, must be an organization or association of three or more "members" that share a common name or other identifying symbol. *See* R.C. 2923.41. This narrow definition of criminal gang contrasts with the broad definition of enterprise and shows that enterprise is broadly defined. As the U.S. Supreme Court observed in using a similar structural clue to interpret the RICO statute, the "breadth of the 'enterprise' concept" is "highlighted by comparing the statute with other . . . statutes that target organized criminal groups." *Boyle*, 556 U.S. at 949 (comparing RICO to a different statute that defined "continuing criminal enterprise" as "five persons who act in concert and . . . have an organizer, supervisor, or other manager") (internal quotation marks omitted).

The contrast between the broad enterprise definition and the narrower "criminal gang" definition is lost if an enterprise must exhibit—as the Second District insisted—a structure apart

from the pattern of corrupt activity itself. Indeed, the Second District's interpretation of enterprise would make it *narrower* than criminal gang, because a gang is defined in part by having "as one of its primary activities the commission of one or more" designated crimes. R.C. 2923.41(A)(1). So even the more narrowly drawn Criminal Gang Statute recognizes that the existence of the organization may be shown by the illegal acts themselves. The Second District's insistence that proof of enterprise must entail more than the structure inherent in the underlying criminal acts would make the Corrupt Practices Act narrower than the Gang Statute despite the plain textual indicator that the Gang Statute is meant to be the narrower law.

C. The Act's purpose removes all doubt that evidence illustrating a pattern of corrupt acts can also establish the existence of an enterprise.

More than language and structure confirm that an enterprise need not exhibit a structure separate and apart from the pattern of corrupt activity. The Act's purpose also shows that an enterprise may be established from the pattern of corrupt acts themselves. Ohio's act is intended to "stop . . . criminal enterprises" by imposing "cumulative," "additional liability" beyond the underlying corrupt acts. *State v. Schlosser*, 79 Ohio St. 3d 329, 335 (1997) (reinstating conviction reversed by appellate court); *see also Miranda*, 2014-Ohio-451 ¶ 10 (act intended to impose separate liability for violating the statute and committing the underlying crimes); *id.* at ¶ 26 (act designed to punish activities "conduct[ed] . . . within a criminal enterprise") (Lanzinger, J., concurring). Ohio's Corrupt Practices Act is designed to attack "organized criminal activities," not merely organized crime. Gongwer News Service 1985 Ohio Report 117, 3 (June 18, 1985). As a sponsor described it, the Act is "state-of-the-art legislation" designed to be "the toughest and most comprehensive racketeering influence corrupt organization (RICO) act in the nation." *Id.* (describing and quoting statement of Senator Watts). Those purposes are inconsistent with a cramped view of what constitutes an enterprise.

Further evidence that the purpose of the Act rejects a narrow meaning for enterprise is the contrast between the current law and the law it replaced. The 1985 Act "repeal[ed] the crime of engaging in organized crime and supplants it with the crime of engaging in a pattern of corrupt activity." Ohio Leg. Serv. Comm'n, Summary of Enactments (July 1985), 45; *see* 141 Ohio Laws (Part I) 1105 (1985) (repealing R.C. 2923.04). The prior law criminalized only those acts committed with a purpose to "establish or maintain a criminal syndicate or to facilitate any of its activities" where a syndicate meant "five or more persons collaborating to . . . engage in . . . [certain crimes] on a continuing basis." *See State v. Young*, 62 Ohio St. 2d 370, 373 (1980) (quoting former R.C. 2923.04, 135 Ohio Laws (Part I) 1923-24 (1973)). An enterprise that must exhibit a structure separate from the pattern of activity is more like the law that the 1985 law *replaced*, which addressed only criminal syndicates. The intended breadth of the Ohio statute cannot be squared with a narrow reading of the enterprise element.

Reading a separate-structure requirement into the Corrupt Practices Act also undermines the purpose of a state statute that parallels the federal RICO act. Ohio, like "[m]ost states," has a parallel statute to the federal RICO law with a "broad enterprise definition[]" aimed at reaching "all forms of organized criminality, however loose the association might be." Note, *Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element*, 81 Cornell L. Rev. 224, 272 (1995). A narrow meaning of enterprise clashes with important justifications for having a parallel statute.

A state parallel serves an important deterrent to "the relatively large numbers of small-time criminal organizations" because "federal RICO is often limited to only the most well-developed criminal syndicates," and "states have far greater prosecutorial resources to combat local enterprise criminality." 81 Cornell L. Rev. at 231. Ohio's statute empowers prosecutions

against these "small-time criminal organizations" by creating statewide investigation and prosecution power in the Ohio Attorney General. Under the Act, the Attorney General leads investigations into corrupt practices as the chair of the Ohio Organized Crime Investigations Committee ("OOCIC"). The OOCIC is charged with "coordinat[ing] investigations of organized criminal activity." R.C. 177.01(B). The commission may set up a "task force" to investigate alleged corrupt practices. R.C. 177.02(B). The Commission then aids either the task force or local law enforcement and local prosecutors in investigating and prosecuting ongoing criminal activity by providing funding for confidential informants and technical training, loaning equipment such as pen registers and covert surveillance cameras, and offering special-prosecution assistance through assistant attorneys general with experience in white-collar and corrupt-practices trials.[2]

With the Corrupt Practices Act filling a practical gap left by federal RICO prosecutions, a separate-structure requirement (that is not even present in federal law) thwarts that gap-filling role because it makes the Ohio statute *narrower* that its federal counterpart. Any narrowing of the state statute's ability to fill this gap is especially significant because the statute allows "juries to see the connections between multiple crimes rather than a disjointed array of criminal activities," 81 Cornell L. Rev. at 232, through mechanisms such as letting one county prosecutor present the full pattern of corrupt activity to a single jury. *See* R.C. 177.03(D)(2).

Another benefit of a state parallel statute is that it takes advantage of local law enforcement's better on-the-ground knowledge of local crimes compared with federal law enforcement. "[L]ocal and state authorities are often far more knowledgeable than their federal

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[2] *See* http://www.ohioattorneygeneral.gov/getattachment/08cff4c5-3529-47d0-9f6c-bb2e4a36ebf1/Ohio-Organized-Crime-Investigations-Unit-Overview.aspx (last visited Feb. 2, 2014).

counterparts about enterprise criminality in the areas where they have been working for long periods of time. This is particularly true in rural areas where there are no F.B.I. or U.S. Attorney offices, and members of local law enforcement have grown up in the very communities they serve." *Id.* at 232. Reading Ohio's version of RICO more narrowly than its federal counterpart sacrifices this law-enforcement comparative advantage.

The purpose of Ohio's current Corrupt Practices Act, as seen through its history and animating justifications, reject a reading that confines "enterprise" to only those organizations that exhibit a structure separate and apart from the pattern of corrupt acts.

D. Other jurisdictions read their similarly worded statutes as rejecting a separate-structure requirement for the enterprise element.

The experience of other States confirms what the language, structure, and purpose of the Ohio Act already dictate about the breadth of the enterprise element.

The Florida Supreme Court addressed the same problem that faces this Court, and held that Florida law contains no separate-structure requirement. The court faced a split of interpretations in its lower appellate courts about the meaning of enterprise. It resolved the split by rejecting the position identical to the one the Second District embraced in this case. Like Ohio's Second District, one Florida district "essentially" required "a showing that the enterprise be an ongoing and separate entity *beyond* the mere commission of the alleged predicate criminal acts." *Gross v. State*, 765 So. 2d 39, 43-44 (Fla. 2000). That lower Florida court essentially inquired "as to whether the removal of the predicate acts would necessarily eliminate the enterprise. If the answer is yes, there is no separate enterprise; if the answer is no, an enterprise is established." *Id.* The Florida Supreme Court disclaimed that narrow view, instead explaining that the State can prove the enterprise element by showing just two things: (1) an ongoing organization, formal or informal, with a common purpose of engaging in a course of conduct,

which (2) functions as a continuing unit. *Id.* at 45. In reaching that conclusion, the Florida Supreme Court rejected earlier Florida cases that had followed the same federal cases that the Second District did in this case. *Id.*

Other state courts agree with the reasoning of the Florida Supreme Court, explaining that proving enterprise is not a high hurdle. The Utah Supreme Court concluded that two men satisfied the enterprise element where they had "an ongoing association in fact for the purpose of making money from the sale of controlled substances." *State v. McGrath*, 749 P.2d 631, 637 (Utah 1988). The two thus "functioned as a continuing unit for a common purpose of engaging in a course of conduct," and, when combined with "acts constituting a pattern of racketeering activity, establishe[d] the necessary elements to convict." *Id.*

These decisions recognize that proving enterprise is not an elaborate requirement. Instead, the word conveys no more than basic organization. As the Connecticut Supreme Court held when interpreting its corrupt-practices statute, proving enterprise demands "no proof" of a "structure separate and apart from the pattern of criminal activities." *State v. Rodriguez-Roman*, 3 A.3d 783, 793 (Conn. 2010). Thus, "evidence that serves to establish such an enterprise need not be distinct or different from the proof that establishes the pattern of racketeering activity." *Id.* Therefore, as a New Mexico court noted, the purpose of an enterprise "may be as simple as earning money from repeated illegal acts." *State v. Hughes*, 767 P.2d 382, 389 (N.M. App. 1988) (enterprise engaged in methamphetamine manufacturing) (internal quotation marks omitted).

The "enterprise" is a separate element of Ohio's (and others') corrupt practices acts, but that element does not bear the weight that some lower courts in Ohio have placed on it. An

enterprise need not be hierarchical or have goals beyond accomplishing the corrupt acts. The enterprise may be apparent from the pattern of activity itself.

E. The Second District's "separate and apart" requirement to prove enterprise derives from a misreading of federal law.

As shown, the Second District's separate-structure requirement cannot be found in Ohio's statute. Nor—as other state decisions show—can it be found in the generally broad concept of enterprise as used in many state parallels to the federal RICO act. To its credit, the Second District did not claim to find its separate-structure requirement in the text of Ohio's act, or in the experiences of other States. Instead, the Second District reversed Beverly's conviction believing it was "appl[ying] federal law," when it held that his conviction rested on insufficient evidence that the enterprise exhibited "a structure separate and apart from the pattern of corrupt activity." App. Op. ¶¶ 30-31 (internal quotation marks omitted). But the Second District misreads the federal law it inserted into Ohio's statute.

Before 2009, the lower federal courts disagreed about whether the enterprise element in the RICO statute embodied a separate-structure requirement. But, in 2009, the U.S. Supreme Court resolved the dispute by rejecting the idea that an enterprise must exhibit a structure separate and apart from the pattern of racketeering activity. The history of that dispute and its resolution show the Second District's error.

The federal origin of the separate-structure requirement is usually attributed to an Eighth Circuit decision, *United States v. Bledsoe*. The Eighth Circuit, thinking it was applying the then-recent U.S. Supreme Court decision in *United States v. Turkette*, explained the requirement this way: "[A]n enterprise must have an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity. This distinct structure might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an *organizational pattern*

or system of authority beyond what was necessary to perpetrate the predicate crimes. The command system of a Mafia family is an example of this type of structure as is the hierarchy, planning, and division of profits within a prostitution ring." *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982) (emphasis added) (internal quotation marks and citation omitted) (reversing RICO convictions for fraudulent sale of securities). The Eighth Circuit based this interpretation of the enterprise element on a passage in *Turkette* noting that an enterprise "is an entity separate and apart from the pattern of activity in which it engages." *Id.* at 663-64 (interpreting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

That, however, was only *one* view in the federal circuits about how to interpret *Turkette*. In contrast with the Eighth Circuit, several other federal circuits held that the enterprise element may be inherent in the pattern of corrupt acts itself. Only two years after *Turkette*, the Eleventh Circuit rejected the argument that an enterprise "must possess an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity." *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983). Other circuits lined up on opposite sides of this split. *Compare e.g.*, *United States v. Patrick*, 248 F.3d 11, 18 (1st Cir. 2001) ("explicitly reject[ing]" the Eighth Circuit's *Bledsoe* approach); *United States v. Riccobene*, 709 F.2d 214, 224 (3d Cir. 1983) (enterprise must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses").

This divide worked its way into Ohio law. Some districts, like the First, Eighth, and Tenth, embraced the federal cases like *Bledsoe* that demanded a structure separate from the underlying acts. *See, e.g.*, *Ramminger v. Archdiocese of Cincinnati*, No. C-060706, 2007-Ohio-3306 ¶ 20 (1st Dist.); *Herakovic v. Catholic Diocese of Cleveland*, No. 85467, 2005-Ohio-5985 ¶ 24 (8th Dist.); *Morrow v. Reminger & Reminger Co., L.P.A.*, 183 Ohio App. 3d 40, 2009-Ohio-

2665 ¶ 38 (10th Dist.). Other districts, like the Fifth and Ninth, declined to follow these federal authorities. *See, e.g.*, *State v. Yates,* No. 2009 CA 0059, 2009-Ohio-6622 (5th Dist.); *State v. Wilson*, 113 Ohio App. 3d 737 (9th Dist. 1996); *see also State v. Franklin*, No. 24011, 2011-Ohio-6802 ¶¶ 92-94 (2d Dist.) (cataloging Ohio districts); ABA Section of Antitrust Law, RICO State by State: A Guide to Litigation Under the State Racketeering Statutes, 956 nn.3365-67 (2d ed. 2011) (same).

For its part, the Second District generally aligned itself with the federal Eighth Circuit and the Ohio districts that required a separate structure to prove the enterprise element. *See, e.g.*, *State v. Owen,* No. 98 CA 17, 1999 WL 76826, *3, 5 (2d Dist. Feb. 19, 1999) (citing *Bledsoe* for the "structure separate and apart" requirement); *State v. Zorn,* No. 98 CA 16, 1999 WL 64254, * 3, 51 (2d Dist. Feb. 12, 1999) (same). Despite citing federal authorities for this point, the Second District regarded its decisions as resolving the appeals "without reference to the federal requirements." *State v. Franklin*, 2011-Ohio-6802 ¶ 94 (internal quotation marks omitted).

That changed in 2011 when the Second District explicitly decided to follow federal cases. In reversing a conviction, the court held that "the trial court should have instructed the jury, consistent with the federal law on 'enterprise.'" *Franklin*, 2011-Ohio-6802 ¶ 105. *Franklin* is the direct predecessor to the opinion in this case. *See* App. Op. at ¶¶ 30, 32. The Second District thus formally aligned itself with federal circuits that interpreted the U.S. Supreme Court's *Turkette* decision to require a structure separate and apart from the pattern of activity. That is, the Second District took "the view that a RICO complaint must allege an enterprise that has some type of structure separate from whatever organizing principle arises from the acts of the people or entities that constitute the group" Civil RICO Practice Manual, § 6.02 n.7.

While Ohio courts continued to line up on opposite sides of the debate about proving enterprise, the U.S. Supreme Court ended the debate under federal law in 2009. Notably for present purposes, in *Boyle v. United States*, 556 U.S. 938 (2009), the Court "resolved this issue" in favor of circuits like the Eleventh that permitted proof of enterprise as a structure inherent in the pattern of activity. *See* U.S. Department of Justice, *Criminal RICO: 18 U.S.C. §§ 1961-1968*, 78 (5th ed. 2009). So at the time that Ohio's Second District adopted federal law in 2011 (in its *Franklin* decision), the U.S. Supreme Court had already *renounced* the very interpretation of federal law that the Second District was *adopting*. *Boyle* renounced the argument that "the existence of an enterprise may never be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity." 556 U.S. at 947. Instead, it held that prosecutors can prove the enterprise element by showing these features: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.* at 946. Put another way, an enterprise need not exhibit a *structure* separate and apart from the racketeering activity, it need only be an *entity* separate and apart from the pattern of activity.

Despite the U.S Supreme Court's holding, the Second District adopted the interpretation of federal law *discarded* by that decision. The Second District reversed Beverly's conviction for insufficient evidence of "a structure separate and apart from the pattern of corrupt activity." App. Op. ¶ 30. The Second District attributed its separate-structure requirement to *Turkette* and *Boyle*, but neither decision contains that language. Instead, the idea that an enterprise must be a "structure separate and apart" from the pattern of activity traces back through earlier Second and Tenth District Ohio cases citing to federal decisions such as the Third Circuit's decision in

Riccobene. *See Franklin*, 2011-Ohio-6802 ¶ 91 (*citing State v. Warren*, No. 92AP-603, 1992 WL 394872 (10th Dist. Dec. 31, 1992)); *Warren* at *3 (*citing Riccobene*).

Boyle simply cannot be read consistently with what the Second District held in this case. *Boyle* explains that, while proving an enterprise remains an element of a RICO offense, and must be an ***entity*** "separate and apart" from the pattern of activity, the enterprise need not have a *structure* separate and apart from the pattern. The "existence of an enterprise may . . . be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity" and "the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise may . . . coalesce." *Boyle*, 556 U.S. at 947 (internal quotation marks omitted).

Although the evidence may coalesce, proving a pattern does not necessarily prove an enterprise because it is "easy to envision situations in which proof that individuals engaged in a pattern of racketeering activity would not establish the existence of an enterprise. For example, suppose that several individuals, independently and without coordination, engaged in a pattern of crimes listed as RICO predicates—for example, bribery or extortion. Proof of these patterns would not be enough to show that the individuals were members of an enterprise." *Id.* at 947 n.4. *Boyle* reaffirms the obvious—that enterprises are distinct elements of a RICO conviction—but it removes any suggestion that an enterprise must exhibit a ***structure*** separate and apart from the pattern itself.

Boyle upended the foundation for the Second District's judgment reversing Beverly's conviction. But the Court need not just take the State's word for it. Courts and commentators alike proclaim that *Boyle* rejected the requirement of proving a structure separate and apart from the pattern of activity. The Tenth Circuit (which previously adhered to the view reflected in the

Second District) holds that "*Boyle* . . . eschew[ed] . . . [the] requirement[]" that "the enterprise [must have] an existence separate and apart from the pattern of racketeering activity." *United States v. Hutchinson*, 573 F.3d 1011, 1020-21 (10th Cir. 2009). And the Seventh Circuit acknowledges that *Boyle* "throws . . . in doubt" prior circuit precedent and requires "nothing more" of an enterprise than purpose, relationships, and longevity. *Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 389 (7th Cir. 2010) (Posner, J.). Commentators agree that *Boyle* "rejected" the requirements of certain circuits, including the requirement that an enterprise exhibit a structure distinct from the pattern of corrupt acts. RICO State by State: A Guide to Litigation Under the State Racketeering Statutes, 956 n.3365; *see also Criminal RICO: 18 U.S.C. §§ 1961-1968*, 78 (*Boyle* "resolved" the separate-structure question in favor of those circuits finding no such requirement in the Act). After *Boyle* there is simply no way to read federal law as the Second District did when it reversed Beverly's conviction.

To be sure, one concern that may have motivated the Second District's reversal is true—the Corrupt Practices Act does not reach every pattern of corrupt activities. *Cf. Boyle*, 556 U.S. at 947 n.4. When even the minimal structure needed to prove an enterprise is lacking, a conviction under the Act is inappropriate. But those cases are far fewer than would result if the Second District's judgment stands. Two cases illustrate. A federal court dismissed a RICO count where the plaintiffs did no more than allege that a group had committed numerous predicate acts listed in the statute. *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 119 (D.D.C. 2005). As the court explained, it is "not enough for a group of individuals to commit acts enumerated by [the RICO statute]; plaintiff must assert that those individuals were organized together in some way, and that there was a structure to the association." *Id.*

A state court example from New Mexico drives the point home. There, a defendant repeatedly exchanged drugs for in-kind payments from different buyers, including work on his house. *State v. Rael*, 981 P.2d 280 (N.M. App. 1999). Those "[s]poradic, temporary criminal alliances" did not "demonstrate the sort of organization" showing an enterprise "in the association between Defendant and buyers for personal use." *Id.* at 284 (reversing racketeering conviction).

The evidence from Beverly's trial shows the distinction between these failed prosecutions under RICO and one of its state counterparts. Far from alleging no organization at all, the prosecution proved that Beverly and his associate were the brute force in an enterprise that repeatedly stole cars from other counties, cased houses in Clark County, burgled those houses while owners were at work, and quickly fenced the stolen items for cash. And, in contrast with a "temporary criminal alliance," Beverly's crimes comprised a structured plan involving out-of-county vehicle thefts, coordinated house burglaries, and hasty fencing of the property for cash. Beverly and his associate were part of an enterprise with the minimal structure needed to sustain a conviction under Ohio's Corrupt Practices Act.

* * * *

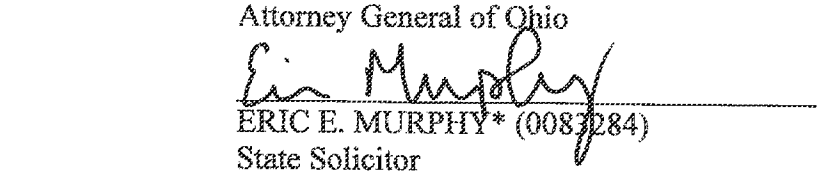
The Second District reversed Beverly's conviction by claiming to use federal law as its beacon. But federal law had already resolved this question opposite to the Second District's view. In summary, the Second District's holding conflicts with the text of the statute, its structure, its purpose, and case law interpreting similar statutes. It even conflicts with the very federal law on which it relied. It must be reversed.

CONCLUSION

The Court should reverse the judgment of the Second District and reinstate the conviction under Ohio's Pattern of Corrupt Practices Act.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio



ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

and

D. ANDREW WILSON (0073767)
Clark County Prosecuting Attorney

ANDREW R. PICEK (0082121)
Assistant Prosecuting Attorney
50 E. Columbia Street, 4th Floor
P.O. Box 1608
Springfield, Ohio 45501
937-521-1770

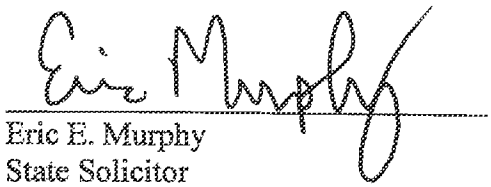
Counsel for Appellant
State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of the State of Ohio was served on February 24, 2014, by U.S. mail on the following:

Marshall Lachman
75 North Pioneer Boulevard
Springboro, Ohio 45066

Counsel for Defendant-Appellee
Jordan Beverly



Eric E. Murphy
State Solicitor

APPENDIX

EXHIBIT 1

ORIGINAL

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	S.C. Case No. 13-0827
Plaintiff-Appellant,	:	On Appeal from the Clark County Court of Appeals, Second Appellate District
-vs-	:	
JORDAN BEVERLY	:	Court of Appeals Case No. 11-CA-0064
Defendant-Appellee	:	

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

D. ANDREW WILSON (0073767)
Prosecuting Attorney, Clark County Ohio

ANDREW R. PICEK (0082121)
Assistant Prosecuting Attorney
50 E. Columbia Street, 4th Floor
P.O. Box 1608
Springfield, Ohio 45501
(937) 521-1770

COUNSEL FOR PLAINTIFF-APPELLANT

MARSHALL LACHMAN (0076791)
75 North Pioneer Boulevard
Springboro, Ohio 45066
(937) 743-9443

COUNSEL FOR DEFENDANT-APPELLEE

FILED
MAY 23 2013
CLERK OF COURT
SUPREME COURT OF OHIO

EXHIBIT 1

Notice of Appeal of Appellant State of Ohio

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Clark County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 11-CA-0064 on the 9th of April, 2013.

This case involves a felony and is one of public or great general interest.

Respectfully,

D. Andrew Wilson
Prosecuting Attorney, Clark County Ohio

By: Andrew R. Picek (0082121)
Assistant Prosecuting Attorney
50 E. Columbia St., 4th Floor
Springfield, Ohio 45501
(937) 521-1770

CERTIFICATE OF SERVICE

This is to certify that a copy of this Notice was mailed by regular U.S. mail to counsel of record for defendant-appellee, Marshall Lachman, 75 North Pioneer Boulevard, Springboro, Ohio 45066, and upon the Office of the Ohio Public Defender at 250 East Broad Street, Suite 1400, Columbus, OH 43215 on this 23rd day of May, 2013.

Andrew R. Picek (0082121)
Assistant Prosecuting Attorney

EXHIBIT 2

CERTIFIED COPY
5/22 2013 Certified as
Entry Filed 4/8, 2013
Clerk
By Andrea Stretsky Deputy

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2011 CA 64
v.	:	T.C. NO. 11CR258A
JORDAN BEVERLY	:	FINAL ENTRY
Defendant-Appellant		

CLARK COUNTY
COURT OF APPEALS
APR 8 2013
FILED
RONALD E. VINCENT, CLERK

Pursuant to the opinion of this court rendered on the 5th day of April, 2013, Beverly's conviction and sentence for engaging in a pattern of corrupt activity is reversed and vacated; the sentence imposed by the trial court is reversed, and this cause is remanded for re-sentencing.

Costs to be paid by plaintiff-appellee.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Clark County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

Mike Fain

MIKE FAIN, Presiding Judge

Entered Entered

EXHIBIT 2

MARY E. DONOVAN, Judge

JEFFREY E. FROELICH, Judge

Copies mailed to:

[illegible] M. Fannin
Assistant Prosecuting Attorney
[illegible]
P.O. Box [illegible]
Springfield, Ohio 45501

Marshall G. Lachman
75 North Pioneer Blvd.
Springfield, Ohio 45066

Hon. [illegible] M. Rastatter
Common Pleas Court
[illegible]
Springfield, Ohio [illegible]

EXHIBIT 3

[Cite as *State v. Beverly*, 2013-Ohio-1365.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2011 CA 64
v.	:	T.C. NO. 11CR258A
JORDAN BEVERLY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

OPINION

Rendered on the 5th day of April, 2013.

. . . . . .

LISA M. FANNIN, Atty. Reg. No. 0082337, Assistant Prosecuting Attorney, 50 E. Columbia Street, 4th Floor, P. O. Box 1608, Springfield, Ohio 45501
Attorney for Plaintiff-Appellee

MARSHALL G. LACHMAN, Atty. Reg. No. 0076791, 75 North Pioneer Blvd., Springboro, Ohio 45066
Attorney for Defendant-Appellant

. . . . . .

FAIN, P.J.

{¶ 1} Defendant-appellant Jordan Beverly appeals from his conviction and sentence for one count of Engaging in a Pattern of Corrupt Activity, in violation of R.C. 2923.32(A)(1), a

EXHIBIT 3

felony of the first degree; eight counts of Burglary, in violation of R.C. 2911.12(A)(3), all felonies of the third degree; five counts of Receiving Stolen Property, in violation of R.C. 2913.51, all felonies of the fourth degree; one count of Receiving Stolen Property, in violation of R.C. 2913.51, a felony of the fifth degree; one count of Attempted Burglary, in violation of R.C. 2923.02 and 2911.12(A)(1), a felony of the third degree; one count of Attempted Burglary, in violation of R.C. 2923.02 and 2911.12(A)(3), a felony of the fourth degree; two counts of Fleeing and Eluding, in violation of R.C. 2921.331(B), a felony of the third degree; and one count of Having Weapons While Under Disability, in violation of R.C. 2923.13, a felony of the third degree.

{¶ 2} Beverly contends that the trial court erred in overruling his motion to suppress incriminating statements he made to police, because those statements were not knowing and voluntary. He contends that the evidence in the record is insufficient to support his conviction for Engaging in a Pattern of Corrupt Activity, because there was insufficient proof of the existence of an enterprise. Beverly also contends that his sentence of 66½ years constitutes an abuse of discretion. Finally, Beverly contends that his convictions for Receiving Stolen Property and for Having Weapons While Under a Disability should have been merged.

{¶ 3} We conclude that the trial court did not err when it overruled Beverly's motion to suppress, because the record establishes that his incriminating statements were made knowingly, intelligently, and voluntarily. We agree with Beverly that there is insufficient evidence in this record to prove the enterprise element of Engaging in a Pattern of Corrupt Activity. We agree with Beverly that his sentence of 66½ years constitutes an abuse of discretion. We also agree with Beverly that the trial court erred when it failed to merge his convictions for Receiving

Stolen Property and for Having a Weapon While Under a Disability. Accordingly, Beverly's conviction and sentence for Engaging in a Pattern of Corrupt Activity is Reversed and Vacated; the sentence imposed by the trial court is Reversed; and this cause is Remanded for merger of the Receiving Stolen Property and Having a Weapon While Under a Disability convictions and for re-sentencing.

I. The Course of Proceedings

{¶ 4} Beverly was originally indicted in February 2011. In April, Beverly was re-indicted in a 25-count indictment. Both indictments concerned a series of thefts and burglaries that occurred in and around Clark County, Ohio, in late 2010 and early 2011. It was alleged that Beverly committed most, if not all, of the offenses with his co-defendant, Brandon Imber.

{¶ 5} Beverly moved to suppress statements he made to police officers after he was arrested and taken into custody. After a hearing on the motion, the trial court overruled it.

{¶ 6} Beverly's jury trial lasted eight days. Beverly was convicted on one count of Engaging in a Pattern of Corrupt Activity; eight counts of Burglary; six counts of Receiving Stolen Property; two counts of Attempted Burglary; two counts of Fleeing and Eluding; and one count of Having Weapons While Under a Disability. The trial court merged the two counts of Fleeing and Eluding, and sentenced Beverly to an aggregate prison term of 66½ years.

{¶ 7} From his conviction and sentence, Beverly appeals.

II. Beverly's Waiver of his *Miranda* Rights, and His Subsequent Statements, Were Knowing and Voluntary

{¶ 8} Beverly's First Assignment of Error is as follows:

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS.

{¶ 9} Beverly contends that the trial court erred when it overruled his motion to suppress statements he made to police during a custodial interrogation after he was arrested. Specifically, Beverly argues that the interviewing officer used physical threats and offers of leniency to coerce his statements. Accordingly, Beverly asserts that the waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), was not knowing, intelligent, and voluntary.

{¶ 10} In deciding a motion to suppress, "the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Hopfer*, 112 Ohio App.3d 521, 548, 679 N.E.2d 321 (2d Dist.1996), quoting *State v. Venham*, 96 Ohio App.3d 649, 653, 645 N.E.2d 831 (4th Dist.1994). The court of appeals must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *State v. Isaac,* 2d Dist. Montgomery No. 20662, 2005-Ohio-3733, citing *State v. Retherford*, 93 Ohio App.3d 586, 639 N.E.2d 498 (2d Dist.1994). Accepting those facts as true, the appellate court must then determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. *Id.*

{¶ 11} The Fifth Amendment provides that "[n]o person *** shall be compelled in any criminal case to be a witness against himself." "The Fifth Amendment privilege against compulsory self-incrimination 'protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.'" *Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humbolt Cty.*, 542 U.S. 177, 124 S.Ct. 2451,

159 L.Ed.2d 292 (2004) (quoting *Kastigar v. United States*, 406 U.S. 441, 445, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)); *Ohio v. Reiner*, 532 U.S. 17, 20, 121 S.Ct. 1252, 149 L.E.2d 158 (2001). The Sixth Amendment to the United States Constitution provides that an individual has a right to the assistance of counsel for his defense in all criminal prosecutions. This right attaches only at the initiation of adversarial criminal proceedings. *United States v. Davis*, 512 U.S. 452, 456-57, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446. Nevertheless, the United States Supreme Court has held that "a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins." *Davis*, 512 U.S. at 457, citing *Miranda v. Arizona*, *supra*.

{¶ 12} When a suspect waives his right to counsel after *Miranda* warnings have been given, law enforcement officers are free to question him. However, once a suspect requests counsel, the police must cease their interrogation until an attorney has been provided or the suspect himself reinitiates conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Davis*, 512 U.S. at 458.

{¶ 13} Whether a suspect has invoked his right to counsel is an objective inquiry. *Id.* A request for an attorney must be clear and unambiguous, to the extent that a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to counsel. *Davis*, 512 U.S. at 459; see *State v. Murphy*, 91 Ohio St.3d 516, 520, 2000-Ohio-112, 747 N.E.2d 765.

{¶ 14} Beverly was first interviewed by Detective James Hollopeter at about ten p.m. Throughout the brief interview, Beverly appeared lethargic and sluggish. At the beginning of

the interview, Detective Hollopeter informed Beverly of his *Miranda* rights. During Detective Hollopeter's recitation of his constitutional rights, Beverly unequivocally stated that he wanted to be represented by an attorney. At that point, Detective Hollopeter ended the interview. Although Beverly contends that Detective Hollopeter forced him to his feet and slammed him against the wall in the interview room, the audiovisual recording of the interview does not depict these actions. The recording does support Beverly's claim that Detective Hollopeter orally threatened him, saying "you [Beverly] are not going down for a couple of years. You're going down for a couple of decades." Beverly acknowledges that three days later, he asked to speak with Detective Hollopeter regarding his arrest, through a jail deputy, Matthew Kerns.

{¶ 15} At the second interview, three days later, Detective Hollopeter began by asking Beverly if he remembered invoking his right to counsel at the first interview. Beverly stated that he was "pretty messed up," and that he did not even remember speaking with Detective Hollopeter in the first interview or invoking his right to counsel. Beverly then informed Detective Hollopeter that he wanted to discuss his role in the crimes for which he was arrested and taken into custody. Detective Hollopeter read Beverly his *Miranda* rights. Detective Hollopeter then asked Beverly to read the rights waiver out loud, in order to make sure that he understood the contents of the form. Beverly indicated that he understood his rights. Detective Hollopeter also informed Beverly that he had just spoken with the prosecutor assigned to the case. According to Detective Hollopeter, the prosecutor stated that "life will be better" for whomever confesses first, be it Beverly or his co-defendant, Imber. Thereafter, Beverly waived his rights and made a number of incriminating statements regarding his role in the burglaries and thefts for which he was charged.

{¶ 16} A defendant's statement to police is voluntary absent evidence that his will was overborne and his capacity for self-determination was critically impaired due to coercive police conduct. *Colorado v. Spring*, 479 U.S. 564, 574, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987); *State v. Otte*, 74 Ohio St.3d 555, 562, 1996-Ohio-108, 660 N.E.2d 711. "In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), at paragraph two of the syllabus, overruled on other grounds, 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155 (1978). *See also*, *State v. Brewer*, 48 Ohio St.3d 50, 58, 549 N.E.2d 491 (1990); *State v. Marks*, 2d Dist. Montgomery No. 19629, 2003-Ohio-4205. The State has the burden to show by a preponderance of the evidence that a defendant's confession was voluntarily given. *State v. Melchior*, 56 Ohio St.2d 15, 381 N.E.2d 195 (1978). A police officer's "[p]romises that a defendant's cooperation would be considered in the disposition of the case, or that a confession would be helpful, does not invalidate an otherwise legal confession." *State v. Loza*, 71 Ohio St.3d 61, 67, 641 N.E.2d 1082 (1994), overruled on other grounds, citing *Edwards*, 49 Ohio St.2d at 40-41.

{¶ 17} Upon review, we conclude that Beverly's statements to Detective Hollopeter were not induced by unlawful promises of leniency that would render his statements involuntary. Although Detective Hollopeter told Beverly "life will be better," the detective did not promise Beverly that he would receive a more lenient sentence. Furthermore, Detective Hollopeter did not indicate to Beverly that he had any control over the sentence he would receive, if Beverly

cooperated. We conclude that Detective Hollopeter's statements to Beverly during both the first and second interviews did not render Beverly's confession involuntary. The record portrays a knowing and intelligent waiver of *Miranda* as well.

{¶ 18} Beverly's First Assignment of Error is overruled.

III. The State Failed to Prove the "Enterprise" Element of Engaging in a Pattern of Corrupt Activity

{¶ 19} Beverly's Second Assignment of Error is as follows:

THE JURY'S VERDICT AS TO COUNT I – ENGAGING IN A PATTERN OF CORRUPT ACTIVITY SHOULD BE REVERSED AS IT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 20} Beverly argues that his conviction for Engaging in a Pattern of Corrupt Activity is against the manifest weight of the evidence. Specifically, Beverly asserts that the State failed to prove the "enterprise" element of the offense, which requires that there be an ongoing organization, with associates, that functions as a continuing unit with a structure separate and apart from the pattern of corrupt activity. *State v. Franklin*, 2d Dist. Montgomery Nos. 24011, 24012, 2011-Ohio-6802, citing *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981).

{¶ 21} Although Beverly frames his Second Assignment of Error in terms of a manifest-weight analysis, he actually argues that the evidence in the record is insufficient to support his conviction for Engaging in a Pattern of Corrupt Activity.

{¶ 22} "A challenge to the sufficiency of the evidence differs from a challenge to the

manifest weight of the evidence." *State v. McKnight*, 107 Ohio St.3d 101,112, 2005-Ohio-6046, 837 N.E.2d 315. "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' (Internal citations omitted). A claim that a jury verdict is against the manifest weight of the evidence involves a different test. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Id.*

{¶ 23} Engaging in a Pattern of Corrupt activity, is proscribed by R.C. 2923.32(A)(1), as follows:

> (A)(1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

{¶ 24} An "enterprise" includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. "Enterprise" includes illicit as well as licit enterprises. R.C. 2923.31(C).

{¶ 25} In *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981), the United States Supreme Court held that:

> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

{¶ 26} We have joined other Ohio courts of appeals in concluding that R.C. 2923.32 (the Ohio RICO Act) is patterned after the Federal RICO Act, Section 1962, Title 18, U.S.Code. *Franklin*, 2011-Ohio-6802. Using the language in *Turkette* as a guide, in order to establish the existence of an "enterprise" under Ohio's RICO Act, there must be some evidence of: (1) an ongoing organization, formal or informal; (2) with associates that function as a continuing unit; and (3) with a structure separate and apart, or distinct, from the pattern of corrupt activity. *Id.*; *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

[We have] applied *Turkette's* evaluation of the existence of an "enterprise" in determining if the defendant's conviction for engaging in a pattern of corrupt activity was established by sufficient evidence. *See State v. Humphrey*, Clark App. No. 02CA0025, 2003–Ohio–2825, ¶ 34; *State v. Humphrey*, Clark App. No.2002 CA 30, 2003–Ohio–3401, ¶ 41(separate appeals involving cousins and co-defendants involved in the same criminal "enterprise"); and *State v. Fritz*, 178 Ohio App.3d 65, 2008–Ohio–4389. In fact, in the latter *Humphrey* decision, we specifically cited *Turkette*, noting that the evidence indicated the existence of an ongoing organization that functioned as a continuing unit. 2003–Ohio–3401, at ¶ 41. Subsequently, in *Fritz*, we cited [*State v.*] *Owen*, [2d Dist. Miami No. 98 CA 17, 1999 WL 76826 (February 19, 1999),] and noted that we had previously " 'resolved cases questioning the existence of an enterprise under the corrupt activity statute without reference to the federal requirements.' " 2008–Ohio–4389, at ¶ 48. Despite having made this statement, we did use the federal requirements in *Fritz*, when we held that the evidence established the existence of an enterprise, because it showed that the defendants had associated in an ongoing organization with a decision-maker and supplier, and a seller, and had also functioned as a continuing unit. *Id.* at ¶ 51. *State v. Franklin*, at ¶ 94.

{¶ 27} Expanding upon its holding in *Turkette*, the United State Supreme Court in *Boyle v. United States*, 556 U.S. 938,129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009), separated its inquiry into three parts: whether the association must have a structure; whether the structure must be "ascertainable"; and whether the structure must go beyond what is inherent in the pattern of racketeering activity in which its members engage. *Id.* at 2244. The Court first concluded that

an association must have at least three structural features: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purposes." *Id.* Next, the Court held that the word "ascertainable" was redundant and potentially misleading, because each element of any crime must be "ascertainable" in order for the jury to find that the element has been proven beyond a reasonable doubt. *Id.*

{¶ 28} "Regarding the last part of the inquiry, the Supreme Court reiterated its holding in *Turkette* that 'the existence of an enterprise is a separate element that must be proved.' *Id.* The Court stressed, as it had in *Turkette*, that 'the existence of an enterprise is an element distinct from the pattern of racketeering activity and proof of one does not necessarily establish the other.' " *Id.* at 2245, quoting *Turkette*, 452 U.S. at 583. *Franklin*, 2011-Ohio-6802, at ¶ 97.

{¶ 29} In *Franklin*, we concluded that "[w]e have never specifically rejected the application of federal law, and, in fact, have both impliedly and expressly applied federal law to Ohio RICO cases when deciding questions of sufficiency of the evidence." *Id.* at ¶ 105. Applying the definition of "enterprise" outlined in *Turkette* and *Boyle*, namely "an ongoing organization with associates that function as a continuing unit with a structure separate and apart from the pattern of corrupt activity," we conclude that the evidence in the record before us is insufficient to prove the "enterprise" element of engaging in a pattern of corrupt activity.

{¶ 30} The evidence in the record establishes that Beverly and Imber were acting in concert when they engaged in the crime spree leading to these charges. But there is no evidence in the record that Beverly and Imber were involved in any type of ongoing organization, functioning as a continuing unit, with a structure separate and apart from the pattern of corrupt

activity. At best, the evidence establishes that Beverly and Imber's actions were disorganized and chaotic in the commission of the burglaries and thefts. Accordingly, Beverly's conviction for Engaging in a Pattern of Corrupt Activity is not supported by sufficient evidence. His additional contention that the conviction is against the manifest weight of the evidence is therefore moot.

{¶ 31} We also note that the trial court erred when it failed to instruct the jury properly regarding the "enterprise" element of engaging in a pattern of corrupt activity. The charge read to the jury only contained the statutory definition of "enterprise," which is insufficient as a matter of law. "The definitions outlined in *Turkette* and *Boyle* are pertinent, and state the law correctly." *Franklin*, 2011-Ohio-6802, at ¶ 106. Thus, the trial court erred when it failed to instruct the jury on "enterprise" using the definition contained in *Turkette* and *Boyle*.

{¶ 32} Beverly's Second Assignment of Error is sustained.

IV. Beverly's Convictions for Receiving Stolen Property and for Having a Weapon While Under a Disability Should Have Merged, Since Both Offenses Were Consummated by the Same Act – Possession of a Gun, and Were Animated by the Same Animus – His Desire to Possess a Gun

{¶ 33} Beverly's Third Assignment of Error is as follows:

THE TRIAL COURT ERRED IN FAILING TO MERGE COUNTS 17 AND 18 OF DEFENDANT'S CONVICTION AS THOSE COUNTS CONSTITUTE ALLIED OFFENSES OF SIMILAR IMPORT.

{¶ 34} Beverly contends that the trial court erred when it failed to merge Counts 17 and

18, which were the Receiving Stolen Property and Having a Weapon While Under a Disability offenses. R.C. 2941.25, concerning allied offenses of similar import, provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 35} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Supreme Court of Ohio revisited the analysis courts should use in determining whether offenses are allied offenses of similar import. *Johnson* overruled *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999) "to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." *Johnson* at ¶44. Now, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Id.*

{¶ 36} *Johnson* states that "the intent of the General Assembly is controlling." *Id.* at ¶46. "We determine the General Assembly's intent by applying R.C. 2941.25, which expressly instructs courts to consider the offenses at issue in light of the defendant's conduct." *Id.* The trial court must determine prior to sentencing whether the offenses were committed by the same

conduct. The trial court is no longer required to perform hypothetical or abstract comparisons of the offenses at issue in order to conclude that the offenses are subject to merger. *Id.* at ¶47 "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *Id.* at ¶48. (Emphasis in original, and internal citation omitted).

{¶ 37} "If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶49 (citation omitted). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Id.* at ¶50. "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Id.* at ¶51. (Emphasis in original.)

{¶ 38} Beverly's conduct in taking possession of the firearm completed both offenses. To be sure, each offense has additional elements. The Receiving Stolen Property offense has the additional element of "knowing or having reasonable cause to believe that the property [was] obtained through the commission of a theft offense." R.C. 2913.51(A). The Having a Weapon While Under a Disability offense has the additional element that the offender must be under indictment or have been convicted of a felony offense of violence. R.C. 2923.14(A)(2). Under

State v. Rance, supra, these would not be allied offenses, because each contains an element not contained by the other.

{¶ 39} *State v. Johnson, supra,* overruled *Rance*, with its elements-of-the-offense based analysis, replacing it with an analysis based on the defendant's conduct. In *Johnson*, the Supreme Court recognized that the allied-offenses statute sets forth the defendant's *conduct* as the basis for analysis, not the elements of the offenses. *State v. Johnson*, at ¶ 44. Here, Beverly's conduct in taking possession of the firearm consummated his commission of both offenses.

{¶ 40} The next step of the analysis is to determine whether Beverly committed the two offenses with a separate animus as to each. R.C. 2941.25(B). We conclude that he did not.

{¶ 41} The Supreme Court of Ohio has interpreted the term "animus" to mean "purpose or, more properly, immediate motive." *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979); *see also, e.g., State v. Smith*, 7th Dist. Mahoning No. 11 MA 120, 2013-Ohio-756, ¶ 89; *State v. Harding*, 3d Dist. Auglaize No. 2-12-14, 2013-Ohio-643, ¶ 14; *State v. Cowan*, 8th Dist. Cuyahoga No. 97877, 2012-Ohio-5723, ¶ 37; *State v. LaPrairie*, 2d Dist. Greene No. 2010-CA-09, 2011-Ohio-2184, ¶ 41. "Like all mental states, animus is often difficult to prove directly, but must be inferred from the surrounding circumstances. * * * Where an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, A priori, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime " *Logan* at 131. "If the defendant acted with the same purpose, intent, or motive in both instances, the animus is identical for both offenses." *State v. Lewis*, 12th Dist. Clinton No. CA2008-10-045, 2012-Ohio-885, ¶ 13.

{¶ 42} The evidence established that Beverly came into possession of a gun; the gun was stolen, and Beverly was not allowed to possess it due to a legal disability. However, there is nothing to suggest that Beverly possessed the gun with distinct motives both to have a stolen gun and to have one while under disability; he simply wanted to possess a gun. The offenses occurred simultaneously and, based upon the evidence in the record, one offense did not temporally precede or extend beyond the other. *Compare State v. Brown*, 3d Dist. Allen No. 1-12-33, 2013-Ohio-854, ¶ 18 (defendant's possession of firearm after committing burglary demonstrated separate animus for having weapon while under disability); *State v. Young*, 2d Dist. Montgomery No. 23642, 2011-Ohio-747 (having a weapon while under disability, carrying a concealed weapon, and illegal possession of a firearm in a liquor permit premises did not merge, where defendant acquired the weapon prior to concealing it, and then later brought it into a liquor establishment); *State v. Bray*, 2d Dist. Clark No. 2010 CA 14, 2011-Ohio-4660, ¶ 23 (same).

{¶ 43} The circumstances here are analogous to those in *State v. Fairfield*, 8th Dist. Cuyahoga No. 97466, 2012-Ohio-5060, in which a defendant was charged with multiple counts of Possession of a Dangerous Ordnance, Possession of Criminal Tools, and Receiving Stolen Property, among other charges. These charges arose from the defendant's possession of shock tubes, detonation cords, blasting caps, and an actuator, all of which were explosive devices that had been stolen from the United States government while the defendant was in the Army. The trial court merged "the category of offenses for the items that were the same. For instance, the court merged all of the counts for possession of a dangerous ordnance regarding the four detonation cords. However, the court then also sentenced Fairfield for possession of criminal tools and receiving stolen property regarding the same cords." *Id.* at ¶ 26.

{¶ 44} On appeal, the Eighth District Court of Appeals held that the defendant's offenses of Possession of Criminal Tools, Possession of a Dangerous Ordnance, and Receiving Stolen Property were allied offenses of similar import. The court noted that, under *Johnson*, "[o]ur focus is now whether it is possible for the offenses to be committed by the same conduct." *Id.* The court concluded that defendant's "receiving the stolen property in the instant case, results in him also unlawfully possessing a dangerous ordnance and possessing a criminal tool." *Id.* The court then concluded that the defendant had not acted with a separate animus in committing each offense. The court stated: "Here, there is no indication that Fairfield was acquiring the materials for separate purposes, or had a separate intent or motive in having the materials. Therefore, the offenses were all committed with the same animus." *Id.* at 28. The court concluded that, "under the facts of this case, possession of a dangerous ordnance, possession of criminal tools, and receiving stolen property are allied offenses of similar import that must be merged."[1] *Id.* at ¶ 29.

{¶ 45} In this case, Beverly possessed a stolen gun while he was under a legal disability from doing so. His immediate motive was to possess a gun. There is no indication that Beverly had multiple purposes that would distinguish his having a weapon while under disability from receiving stolen property. The facts that this particular gun was stolen and that Beverly was under disability when he got the gun simply resulted in the State's ability to charge him with multiple offenses as a result of Beverly's possession of the gun; it did not create a separate animus.

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[1] The State appealed and asked the Supreme Court of Ohio to review whether Possession of a Dangerous Ordnance and Receiving Stolen Property were allied offenses of similar import. The Supreme Court declined to accept jurisdiction. *State v. Fairfield*, S.Ct. No. 2012-2103, 2013-Ohio-902 (March 13, 2013).

{¶ 46} Because the two offenses were not committed each with a separate animus, the trial court erred when it failed to merge them for sentencing purposes. Beverly's Third Assignment of Error is sustained.

V. The 66½-year Sentence Imposed in this Case Constitutes an Abuse of Discretion

{¶ 47} Beverly's Fourth and Fifth assignments of error are as follows:

THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING A SENTENCE OF 66 ½ YEARS ON THE DEFENDANT.

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE UPON THE DEFENDANT THAT WAS NOT CONSISTENT WITH SENTENCES FOR SIMILAR CRIMES COMMITTED BY SIMILAR OFFENDERS.

{¶ 48} In his Fourth Assignment of Error, Beverly contends that the trial court abused its discretion when it sentenced him to 66½ years in prison. In his Fifth Assignment of Error, Beverly contends that the trial court's imposition of an aggregate sentence of 66½ years is error, because his co-defendant, Imber, received a significantly shorter sentence for essentially the same conduct.[2]

{¶ 49} In *State v. Barker,* 2d Dist. Montgomery No. 22779, 2009-Ohio-3511, at ¶ 36-37, we stated:

> " 'The trial court has full discretion to impose any sentence within the

[2]After pleading guilty to ten fourth-degree felony offenses, the trial court sentenced Imber to thirteen and one-half years in prison.

authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum, consecutive, or more than the minimum sentences. *State v. Foster,* 109 Ohio St.3d 1, * * * 2006-Ohio-856, at paragraph 7 of the syllabus. Nevertheless, in exercising its discretion the trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and 2929.12. *State v. Mathis,* 109 Ohio St.3d 54, * * * 2006-Ohio-855, at ¶ 37.' " *State v. Ulrich,* 2d Dist. Montgomery No. 23737, 2011-Ohio-758, at ¶ 20-21. "[E]ven if there is no specific mention of [R.C. 2929.11 and R.C. 2929.12], 'it is presumed that the trial court gave proper consideration to those statutes.' " *State v. Hall,* 2d Dist. Clark No. 10-CA-23, 2011-Ohio-635, ¶ 51.

{¶ 50} " 'When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 and 2929.12, in order to find whether the sentence is contrary to law. *State v. Kalish,* 120 Ohio St.3d 23, * * * , 2008-Ohio-4912. If the sentence is not clearly and convincingly contrary to law, the trial court's decision in imposing the term of imprisonment must be reviewed under an abuse of discretion standard. Id.' " *State v. Ulrich,* 2d Dist. Montgomery No. 23737, 2011-Ohio-758, at ¶ 22. Beverly's sentence is not contrary to law. We therefore review his sentence under an abuse-of-discretion standard.

{¶ 51} Since at least 1940, innumerable Ohio cases have stated that an abuse of discretion "means more than an error of law or judgment," which incorrectly implies that a trial court may commit an error of law without abusing its discretion. *State v. Bowles,* 2d Dist.

Montgomery No. 23037, 2010-Ohio-278, ¶ 15, citation omitted. To the contrary, "[n]o court – not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law." *Id.* at ¶ 26. The abuse-of-discretion standard is more accurately defined as " '[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.' " *Id.* at ¶ 18, quoting Black's Law Dictionary, Eighth Edition (2004), at 11.

{¶ 52} Upon sentencing Beverly, the trial court stated the following as its apparent rationale for imposing the sentence it ordered:

> By my calculations, all of your crimes, there is [sic] fifteen distinct victims and that doesn't even include households that are occupied by more than one person.
>
> Nor does it include the law enforcement officers whose health and safety and lives you put at risk while you were fleeing; nor does that include the women and children in these homes that you burglarized that no longer have a sense of security in their own homes.
>
> Nor does that take into consideration probably the hundreds maybe even thousands of hours of time and effort spent by our local law enforcement agencies, tracking down all the property that you stole from people, organizing it, trying to return it to the rightful owners.
>
> The Court is going to order that Counts 1, 9, 10, 12, 13, 14, 15, 18, 21, 22, 23, 24, [and] 25 run consecutively to one another.
>
> The Court is going to order that Counts 2, 3, 5, 11, 16, 17, and 19 run

consecutively to one another but concurrent with the previous list of counts that I mentioned.

* * *

The aggregate sentence by my calculations will be sixty-six and one-half years (66 ½ years) in the Ohio State Penitentiary.

{¶ 53} A pre-sentence investigation report was not prepared in this case. At sentencing, the State informed the trial court on the record of Beverly's criminal record, dating back to when he was thirteen years old. The State also noted that at the time of his arrest and indictment in this case, Beverly was under indictment in a separate case for manufacturing drugs.

{¶ 54} In outlining the reasons for the sentence it imposed, the trial court did not mention Beverly's prior criminal history. Instead, the trial court noted the number of households victimized, the number of people whose personal property was stolen or damaged, and the loss of a sense of security by his victims, which was compromised as a result of Beverly's crimes. While these considerations were proper, the trial court also sought to justify Beverly's lengthy sentence by noting that law enforcement officers put in "hundreds[,] maybe even thousands[,] of hours of time and effort" spent by law enforcement agencies in investigating and tracking down all of the property stolen, organizing it, and trying to return said property to its rightful owners. We conclude that the amount of police work involved should not have formed a basis to increase Beverly's sentence. The police officers, detectives, and other law enforcement officials involved were performing their respective jobs conducting the investigation, cataloguing, and retrieving the items stolen by Beverly and Imber.

{¶ 55} Fortunately, none of the victims suffered any physical injury. Although the

anger, fear, and disturbances experienced by the victims may properly be considered, there is nothing in the record to suggest that these psychological injuries were qualitatively greater than those predictably experienced by any victim of a burglary, or that the victims are unlikely to overcome these effects within a reasonable period of time. We also note that the lack of a pre-sentence investigation report in a case of this nature makes it harder to fashion a sentence consistent with the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12.

{¶ 56} We do not seek to minimize the criminality of Beverly's actions and the wrong done to his victims. Nevertheless, treating this case as if these crimes were the most serious forms of the offenses, and treating Beverly as if he were the most depraved of offenders, is not supported by the evidence in the record. The imposition of the 66½-year sentence in this case deprecates the validity of similar harsh sentences in those cases that truly merit them. As Justice Lanzinger has written, "[i]t is a rare victim who does not consider the crime committed by an offender to be undeserving of a maximum penalty. * * * It will take a courageous judge not to 'max and stack' every sentence in multiple-count cases." *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, at ¶31 (Lanzinger, J., concurring).

{¶ 57} Finally, Beverly argues that his co-defendant, Imber, who plead guilty, received a more lenient sentence. Specifically, Imber entered guilty pleas to ten fourth-degree felony offenses and received an aggregate sentence of thirteen and one-half years in prison, less than a quarter of the sentence Beverly received. *State v. Imber*, 2d Dist. Clark No. 11 CA 0063, 2012-Ohio-372. Although there is no information in the record to indicate whether Imber had a prior record, the evidence in the record established that Imber was equally culpable with Beverly

regarding the charged offenses. On this record, a disparity of over 50 years suggests the appearance of a trial tax, whereby one reason for Beverly's much harsher sentence was that he exercised his right to a jury trial.

{¶ 58} We conclude that although Beverly's sentence is not contrary to law, the evidence in the record does not justify the lengthy sentence imposed herein. Accordingly, we conclude that the trial court abused its discretion when it imposed a sentence of 66½ years in this case.

{¶ 59} Beverly's Fourth Assignment of Error is sustained; his Fifth Assignment of Error is overruled as moot.

VI. Conclusion

{¶ 60} Beverly's First Assignment of Error having been overruled; his Second, Third and Fourth assignments of error having been sustained; and his Fifth Assignment of Error having been overruled as moot, his conviction and sentence for Engaging in a Pattern of Corrupt Activity is Reversed and Vacated; his sentence is Reversed; and this cause is Remanded for the merger of the Receiving Stolen Property and Having a Weapon While Under a Disability convictions and for re-sentencing.

. . . . . .

FROELICH, J., concurs.

DONOVAN, J., concurring in part and dissenting in part:

{¶ 61} I disagree solely with the majority's resolution of the third assignment of error regarding merger of the Receiving Stolen Property and Having a Weapon While Under a

Disability offenses. Beverly acquired the legal disability that prevents him from possessing a firearm long before he came into possession of this stolen gun. The Weapons Under Disability statute punishes Beverly for his own past conduct as well as his current conduct.

{¶ 62} Furthermore, the gravamen of the receiving stolen property charge is the acquisition of a stolen gun which necessitates a mens rea distinct from acquiring of a gun while under legal disability. Non-merger in this case would not run afoul of the General Assembly's intent under R.C. 2923.13 to protect the general public from "bad risks" such as Beverly from having a weapon. Nor would it offend the purpose of R.C. 2941.25 to prevent shotgun convictions.

. . . . . .

Copies mailed to:

Lisa M. Fannin
Marshall G. Lachman
Hon. Douglas M. Rastatter

Case Name: *State of Ohio v. Jordan Beverly*
Case No.: Clark App. No. 2011 CA 64
Panel: Fain, Donovan, Froelich
Author: Mike Fain
Summary:

EXHIBIT 4

Ohio Revised Code 2923.31
Corrupt activity definitions.

As used in sections 2923.31 to 2923.36 of the Revised Code:

(A) "Beneficial interest" means any of the following:

(1) The interest of a person as a beneficiary under a trust in which the trustee holds title to personal or real property;

(2) The interest of a person as a beneficiary under any other trust arrangement under which any other person holds title to personal or real property for the benefit of such person;

(3) The interest of a person under any other form of express fiduciary arrangement under which any other person holds title to personal or real property for the benefit of such person.

"Beneficial interest" does not include the interest of a stockholder in a corporation or the interest of a partner in either a general or limited partnership.

(B) "Costs of investigation and prosecution" and "costs of investigation and litigation" mean all of the costs incurred by the state or a county or municipal corporation under sections 2923.31 to 2923.36 of the Revised Code in the prosecution and investigation of any criminal action or in the litigation and investigation of any civil action, and includes, but is not limited to, the costs of resources and personnel.

(C) "Enterprise" includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. "Enterprise" includes illicit as well as licit enterprises.

(D) "Innocent person" includes any bona fide purchaser of property that is allegedly involved in a violation of section 2923.32 of the Revised Code, including any person who establishes a valid claim to or interest in the property in accordance with division (E) of section 2981.04 of the Revised Code, and any victim of an alleged violation of that section or of any underlying offense involved in an alleged violation of that section.

(E) "Pattern of corrupt activity" means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.

At least one of the incidents forming the pattern shall occur on or after January 1, 1986. Unless any incident was an aggravated murder or murder, the last of the incidents forming the pattern shall occur within six years after the commission of any prior incident forming the pattern, excluding any period of imprisonment served by any person engaging in the corrupt activity.

EXHIBIT 4

For the purposes of the criminal penalties that may be imposed pursuant to section 2923.32 of the Revised Code, at least one of the incidents forming the pattern shall constitute a felony under the laws of this state in existence at the time it was committed or, if committed in violation of the laws of the United States or of any other state, shall constitute a felony under the law of the United States or the other state and would be a criminal offense under the law of this state if committed in this state.

(F) "Pecuniary value" means money, a negotiable instrument, a commercial interest, or anything of value, as defined in section 1.03 of the Revised Code, or any other property or service that has a value in excess of one hundred dollars.

(G) "Person" means any person, as defined in section 1.59 of the Revised Code, and any governmental officer, employee, or entity.

(H) "Personal property" means any personal property, any interest in personal property, or any right, including, but not limited to, bank accounts, debts, corporate stocks, patents, or copyrights. Personal property and any beneficial interest in personal property are deemed to be located where the trustee of the property, the personal property, or the instrument evidencing the right is located.

(I) "Corrupt activity" means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in any of the following:

(1) Conduct defined as "racketeering activity" under the "Organized Crime Control Act of 1970," 84 Stat. 941, 18 U.S.C. 1961(1)(B), (1)(C), (1)(D), and (1)(E), as amended;

(2) Conduct constituting any of the following:

(a) A violation of section 1315.55, 1322.02, 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2905.01, 2905.02, 2905.11, 2905.22, 2905.32 as specified in division (I)(2)(g) of this section, 2907.321, 2907.322, 2907.323, 2909.02, 2909.03, 2909.22, 2909.23, 2909.24, 2909.26, 2909.27, 2909.28, 2909.29, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.31, 2913.05, 2913.06, 2921.02, 2921.03, 2921.04, 2921.11, 2921.12, 2921.32, 2921.41, 2921.42, 2921.43, 2923.12, or 2923.17; division (F)(1)(a), (b), or (c) of section 1315.53; division (A)(1) or (2) of section 1707.042; division (B), (C)(4), (D), (E), or (F) of section 1707.44; division (A)(1) or (2) of section 2923.20; division (E) or (G) of section 3772.99; division (J)(1) of section 4712.02; section 4719.02, 4719.05, or 4719.06; division (C), (D), or (E) of section 4719.07; section 4719.08; or division (A) of section 4719.09 of the Revised Code.

(b) Any violation of section 3769.11, 3769.15, 3769.16, or 3769.19 of the Revised Code as it existed prior to July 1, 1996, any violation of section 2915.02 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would have been a violation of section 3769.11 of the Revised Code as it existed prior to that date, or any violation of section 2915.05 of the Revised Code that occurs on or after July

1, 1996, and that, had it occurred prior to that date, would have been a violation of section 3769.15, 3769.16, or 3769.19 of the Revised Code as it existed prior to that date.

(c) Any violation of section 2907.21, 2907.22, 2907.31, 2913.02, 2913.11, 2913.21, 2913.31, 2913.32, 2913.34, 2913.42, 2913.47, 2913.51, 2915.03, 2925.03, 2925.04, 2925.05, or 2925.37 of the Revised Code, any violation of section 2925.11 of the Revised Code that is a felony of the first, second, third, or fourth degree and that occurs on or after July 1, 1996, any violation of section 2915.02 of the Revised Code that occurred prior to July 1, 1996, any violation of section 2915.02 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would not have been a violation of section 3769.11 of the Revised Code as it existed prior to that date, any violation of section 2915.06 of the Revised Code as it existed prior to July 1, 1996, or any violation of division (B) of section 2915.05 of the Revised Code as it exists on and after July 1, 1996, when the proceeds of the violation, the payments made in the violation, the amount of a claim for payment or for any other benefit that is false or deceptive and that is involved in the violation, or the value of the contraband or other property illegally possessed, sold, or purchased in the violation exceeds one thousand dollars, or any combination of violations described in division (I)(2)(c) of this section when the total proceeds of the combination of violations, payments made in the combination of violations, amount of the claims for payment or for other benefits that is false or deceptive and that is involved in the combination of violations, or value of the contraband or other property illegally possessed, sold, or purchased in the combination of violations exceeds one thousand dollars;

(d) Any violation of section 5743.112 of the Revised Code when the amount of unpaid tax exceeds one hundred dollars;

(e) Any violation or combination of violations of section 2907.32 of the Revised Code involving any material or performance containing a display of bestiality or of sexual conduct, as defined in section 2907.01 of the Revised Code, that is explicit and depicted with clearly visible penetration of the genitals or clearly visible penetration by the penis of any orifice when the total proceeds of the violation or combination of violations, the payments made in the violation or combination of violations, or the value of the contraband or other property illegally possessed, sold, or purchased in the violation or combination of violations exceeds one thousand dollars;

(f) Any combination of violations described in division (I)(2)(c) of this section and violations of section 2907.32 of the Revised Code involving any material or performance containing a display of bestiality or of sexual conduct, as defined in section 2907.01 of the Revised Code, that is explicit and depicted with clearly visible penetration of the genitals or clearly visible penetration by the penis of any orifice when the total proceeds of the combination of violations, payments made in the combination of violations, amount of the claims for payment or for other benefits that is false or deceptive and that is involved in the combination of violations, or value of the contraband or other property illegally possessed, sold, or purchased in the combination of violations exceeds one thousand dollars;

(g) Any violation of section 2905.32 of the Revised Code to the extent the violation is not based solely on the same conduct that constitutes corrupt activity pursuant to division (I)(2)(c) of this section due to the conduct being in violation of section 2907.21 of the Revised Code.

(3) Conduct constituting a violation of any law of any state other than this state that is substantially similar to the conduct described in division (I)(2) of this section, provided the defendant was convicted of the conduct in a criminal proceeding in the other state;

(4) Animal or ecological terrorism;

(5)

(a) Conduct constituting any of the following:

(i) Organized retail theft;

(ii) Conduct that constitutes one or more violations of any law of any state other than this state, that is substantially similar to organized retail theft, and that if committed in this state would be organized retail theft, if the defendant was convicted of or pleaded guilty to the conduct in a criminal proceeding in the other state.

(b) By enacting division (I)(5)(a) of this section, it is the intent of the general assembly to add organized retail theft and the conduct described in division (I)(5)(a)(ii) of this section as conduct constituting corrupt activity. The enactment of division (I)(5)(a) of this section and the addition by division (I)(5)(a) of this section of organized retail theft and the conduct described in division (I)(5)(a)(ii) of this section as conduct constituting corrupt activity does not limit or preclude, and shall not be construed as limiting or precluding, any prosecution for a violation of section 2923.32 of the Revised Code that is based on one or more violations of section 2913.02 or 2913.51 of the Revised Code, one or more similar offenses under the laws of this state or any other state, or any combination of any of those violations or similar offenses, even though the conduct constituting the basis for those violations or offenses could be construed as also constituting organized retail theft or conduct of the type described in division (I)(5)(a)(ii) of this section.

(J) "Real property" means any real property or any interest in real property, including, but not limited to, any lease of, or mortgage upon, real property. Real property and any beneficial interest in it is deemed to be located where the real property is located.

(K) "Trustee" means any of the following:

(1) Any person acting as trustee under a trust in which the trustee holds title to personal or real property;

(2) Any person who holds title to personal or real property for which any other person has a beneficial interest;

(3) Any successor trustee.

"Trustee" does not include an assignee or trustee for an insolvent debtor or an executor, administrator, administrator with the will annexed, testamentary trustee, guardian, or committee, appointed by, under the control of, or accountable to a court.

(L) "Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in this state in whole or in part because the debt was incurred or contracted in violation of any federal or state law relating to the business of gambling activity or relating to the business of lending money at an usurious rate unless the creditor proves, by a preponderance of the evidence, that the usurious rate was not intentionally set and that it resulted from a good faith error by the creditor, notwithstanding the maintenance of procedures that were adopted by the creditor to avoid an error of that nature.

(M) "Animal activity" means any activity that involves the use of animals or animal parts, including, but not limited to, hunting, fishing, trapping, traveling, camping, the production, preparation, or processing of food or food products, clothing or garment manufacturing, medical research, other research, entertainment, recreation, agriculture, biotechnology, or service activity that involves the use of animals or animal parts.

(N) "Animal facility" means a vehicle, building, structure, nature preserve, or other premises in which an animal is lawfully kept, handled, housed, exhibited, bred, or offered for sale, including, but not limited to, a zoo, rodeo, circus, amusement park, hunting preserve, or premises in which a horse or dog event is held.

(O) "Animal or ecological terrorism" means the commission of any felony that involves causing or creating a substantial risk of physical harm to any property of another, the use of a deadly weapon or dangerous ordnance, or purposely, knowingly, or recklessly causing serious physical harm to property and that involves an intent to obstruct, impede, or deter any person from participating in a lawful animal activity, from mining, foresting, harvesting, gathering, or processing natural resources, or from being lawfully present in or on an animal facility or research facility.

(P) "Research facility" means a place, laboratory, institution, medical care facility, government facility, or public or private educational institution in which a scientific test, experiment, or investigation involving the use of animals or other living organisms is lawfully carried out, conducted, or attempted.

(Q) "Organized retail theft" means the theft of retail property with a retail value of one thousand dollars or more from one or more retail establishments with the intent to sell, deliver, or transfer that property to a retail property fence.

(R) "Retail property" means any tangible personal property displayed, held, stored, or offered for sale in or by a retail establishment.

(S) "Retail property fence" means a person who possesses, procures, receives, or conceals retail property that was represented to the person as being stolen or that the person knows or believes to be stolen.

(T) "Retail value" means the full retail value of the retail property. In determining whether the retail value of retail property equals or exceeds one thousand dollars, the value of all retail property stolen from the retail establishment or retail establishments by the same person or persons within any one-hundred-eighty-day period shall be aggregated.

EXHIBIT 5

Ohio Revised Code 2923.32
Engaging in pattern of corrupt activity.

(A)

(1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

(2) No person, through a pattern of corrupt activity or the collection of an unlawful debt, shall acquire or maintain, directly or indirectly, any interest in, or control of, any enterprise or real property.

(3) No person, who knowingly has received any proceeds derived, directly or indirectly, from a pattern of corrupt activity or the collection of any unlawful debt, shall use or invest, directly or indirectly, any part of those proceeds, or any proceeds derived from the use or investment of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

A purchase of securities on the open market with intent to make an investment, without intent to control or participate in the control of the issuer, and without intent to assist another to do so is not a violation of this division, if the securities of the issuer held after the purchase by the purchaser, the members of the purchaser's immediate family, and the purchaser's or the immediate family members' accomplices in any pattern of corrupt activity or the collection of an unlawful debt do not aggregate one per cent of the outstanding securities of any one class of the issuer and do not confer, in law or in fact, the power to elect one or more directors of the issuer.

(B)

(1) Whoever violates this section is guilty of engaging in a pattern of corrupt activity. Except as otherwise provided in this division, engaging in corrupt activity is a felony of the second degree. Except as otherwise provided in this division, if at least one of the incidents of corrupt activity is a felony of the first, second, or third degree, aggravated murder, or murder, if at least one of the incidents was a felony under the law of this state that was committed prior to July 1, 1996, and that would constitute a felony of the first, second, or third degree, aggravated murder, or murder if committed on or after July 1, 1996, or if at least one of the incidents of corrupt activity is a felony under the law of the United States or of another state that, if committed in this state on or after July 1, 1996, would constitute a felony of the first, second, or third degree, aggravated murder, or murder under the law of this state, engaging in a pattern of corrupt activity is a felony of the first degree. If the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, engaging in a pattern of corrupt activity is a felony of the first degree, and the court shall sentence the offender to a mandatory prison term as provided in division (B)(7) of section 2929.14 of the Revised Code and shall order the offender to make restitution as provided in

EXHIBIT 5

division (B)(8) of section 2929.18 of the Revised Code. Notwithstanding any other provision of law, a person may be convicted of violating the provisions of this section as well as of a conspiracy to violate one or more of those provisions under section 2923.01 of the Revised Code.

(2) Notwithstanding the financial sanctions authorized by section 2929.18 of the Revised Code, the court may do all of the following with respect to any person who derives pecuniary value or causes property damage, personal injury other than pain and suffering, or other loss through or by the violation of this section:

(a) In lieu of the fine authorized by that section, impose a fine not exceeding the greater of three times the gross value gained or three times the gross loss caused and order the clerk of the court to pay the fine into the state treasury to the credit of the corrupt activity investigation and prosecution fund, which is hereby created;

(b) In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by section 2929.18 of the Revised Code, order the person to pay court costs;

(c) In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by section 2929.18 of the Revised Code, order the person to pay to the state, municipal, or county law enforcement agencies that handled the investigation and prosecution the costs of investigation and prosecution that are reasonably incurred.

The court shall hold a hearing to determine the amount of fine, court costs, and other costs to be imposed under this division.

(3) In addition to any other penalty or disposition authorized or required by law, the court shall order any person who is convicted of or pleads guilty to a violation of this section or who is adjudicated delinquent by reason of a violation of this section to criminally forfeit to the state under Chapter 2981. of the Revised Code any personal or real property in which the person has an interest and that was used in the course of or intended for use in the course of a violation of this section, or that was derived from or realized through conduct in violation of this section, including any property constituting an interest in, means of control over, or influence over the enterprise involved in the violation and any property constituting proceeds derived from the violation, including all of the following:

(a) Any position, office, appointment, tenure, commission, or employment contract of any kind acquired or maintained by the person in violation of this section, through which the person, in violation of this section, conducted or participated in the conduct of an enterprise, or that afforded the person a source of influence or control over an enterprise that the person exercised in violation of this section;

(b) Any compensation, right, or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in division (B)(3)(a) of this

section that accrued to the person in violation of this section during the period of the pattern of corrupt activity;

(c) Any interest in, security of, claim against, or property or contractual right affording the person a source of influence or control over the affairs of an enterprise that the person exercised in violation of this section;

(d) Any amount payable or paid under any contract for goods or services that was awarded or performed in violation of this section.

EXHIBIT 6

Ohio Revised Code 2923.41
Criminal gang definitions.

As used in sections 2923.41 to 2923.44 of the Revised Code:

(A) "Criminal gang" means an ongoing formal or informal organization, association, or group of three or more persons to which all of the following apply:

(1) It has as one of its primary activities the commission of one or more of the offenses listed in division (B) of this section.

(2) It has a common name or one or more common, identifying signs, symbols, or colors.

(3) The persons in the organization, association, or group individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(B)

(1) "Pattern of criminal gang activity" means, subject to division (B)(2) of this section, that persons in the criminal gang have committed, attempted to commit, conspired to commit, been complicitors in the commission of, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of two or more of any of the following offenses:

(a) A felony or an act committed by a juvenile that would be a felony if committed by an adult;

(b) An offense of violence or an act committed by a juvenile that would be an offense of violence if committed by an adult;

(c) A violation of section 2907.04, 2909.06, 2911.211, 2917.04, 2919.23, or 2919.24 of the Revised Code, section 2921.04 or 2923.16 of the Revised Code, section 2925.03 of the Revised Code if the offense is trafficking in marihuana, or section 2927.12 of the Revised Code.

(2) There is a "pattern of criminal gang activity" if all of the following apply with respect to the offenses that are listed in division (B)(1)(a), (b), or (c) of this section and that persons in the criminal gang committed, attempted to commit, conspired to commit, were in complicity in committing, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in committing:

(a) At least one of the two or more offenses is a felony.

EXHIBIT 6

(b) At least one of those two or more offenses occurs on or after January 1, 1999.

(c) The last of those two or more offenses occurs within five years after at least one of those offenses.

(d) The two or more offenses are committed on separate occasions or by two or more persons.

(C) "Criminal conduct" means the commission of, an attempt to commit, a conspiracy to commit, complicity in the commission of, or solicitation, coercion, or intimidation of another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of an offense listed in division (B)(1)(a), (b), or (c) of this section or an act that is committed by a juvenile and that would be an offense, an attempt to commit an offense, a conspiracy to commit an offense, complicity in the commission of, or solicitation, coercion, or intimidation of another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of an offense listed in division (B)(1)(a), (b), or (c) of this section if committed by an adult.

(D) "Juvenile" means a person who is under eighteen years of age.

(E) "Law enforcement agency" includes, but is not limited to, the state board of pharmacy and the office of a prosecutor.

(F) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.