APL-2017-00166

Court of Appeals
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

DAMIAN JONES,

Appellant.

BRIEF FOR AMICI CURIAE FOR APPELLANT

Center for Appellate Litigation, New York State Association of Criminal Defense Attorneys, and Chief Defenders Association of New York.

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STATEMENT UNDER RULE 500.1(f)

The proposed amici curiae, the Center for Appellate Litigation, the New York State Association of Criminal Defense Attorneys, and the Chief Defenders Association of New York, have no parents, subsidiaries, or affiliates.

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STATEMENT OF INTEREST

The Center for Appellate Litigation ("The Center") is a non-profit, public-defense firm. The Center represents indigent defendants appealing their convictions to the First Department and this Court. The Center has litigated numerous enterprise corruption convictions in the New York appellate courts, including People v. Western Express Intern. Inc., 19 N.Y.3d 652 (2012) and People v. Keschner, 25 N.Y.3d 704 (2015). As the Center represents those accused of crimes, it has a keen interest in preventing over-criminalization and excessive penalization.

The Chief Defenders Association of New York is a membership organization of appointed public and conflict defenders, executive directors of nonprofit indigent defense offices, and assigned counsel administrators throughout the state. It advocates for executive and legislative policy measures that will promote the fair treatment of indigent criminal defendants.

The New York State Association of Criminal Defense Lawyers is a nonprofit bar association that works on behalf of its member attorneys across the state to ensure justice and due process for those accused of crimes. It regularly files amicus briefs in federal and state cases presenting issues of broad importance to its members, their clients, and the criminal justice system as a whole.

RELEVANT STATUTORY PROVISION

Penal Law § 460.10 (3)-(4)

> 3. "Criminal enterprise" means 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.
>
> 4. "Pattern of criminal activity" means conduct engaged in by persons charged in an enterprise corruption count constituting three or more criminal acts . . .

SUMMARY OF ARGUMENT

The Organized Crime and Control Act ("OCCA") provides "superadded" and "draconian" penalties for enterprise corruption. Penal Law § 460.20; People v. Western Express Int'l. Inc., 19 N.Y.3d 652, 658 (2012). Under the OCCA, if a group engages in a pattern of three felonies (including virtually every C, D, and E felony in the Penal Law), and does so in connection with a "criminal enterprise," the group has committed B-felony enterprise corruption, punishable by up to 25 years in prison. Penal Law Article 460; Penal Law § 70.02(2)(b).

The OCCA is a powerful—but limited—prosecutorial tool. Richard A. Greenberg, et al., New York Practice Series: New York Criminal Law, Enterprise Corruption § 36:1 (4th ed.); Penal Law § 460.00 (legislative findings). Indeed, the Legislature guarded against over-criminalization by including elements in the OCCA which expressly limit

its scope. The OCCA's "distinct-structure" requirement, found in Penal Law § 460.10(3), is one of those critical elements.

The distinct-structure requirement limits enterprise corruption to "patterns of criminal activity" committed in connection with an "ascertainable structure" that is "distinct" in form and purpose from a "pattern of criminal activity":

> "Criminal enterprise" means 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.

Penal Law § 460.10(3) (emphasis added).

Under this critical distinct-structure element, the mere commission of a "pattern of criminal activity" in a group is insufficient, even if the group possesses an "ascertainable structure." Instead, the group's "ascertainable structure" must also be distinct in form and purpose from a pattern of crime.

The Appellate Division deleted the OCCA's critical statutory limitations. Under the Appellate Division's standard, whenever a group engages in a "pattern of criminal activity" while using certain methodologies (e.g., it assigns roles), an "enterprise" exists under Penal Law § 460.20. People v. Jones, 149 A.D.3d 407 (1st Dept. 2017). For example, if a mere three people repeatedly conduct street-level drug sales and assign each other roles ("hand-to-hand," "money-man," and "steerer"), that methodology proves an enterprise under the OCCA.

This newly-minted standard gets the OCCA backwards. The employment of methodologies during a pattern of criminal activity simply describes the characteristics of the pattern—it does not establish an "ascertainable structure" that is "distinct" in form and purpose from the pattern itself. On the contrary, when the group's structure is nothing more than its modus operandi, that structure <u>is</u> the pattern of criminal activity.

Under this new "methodology-proves-an-enterprise" theory, every pattern of group crime will constitute enterprise corruption. After all, every pattern of group crime will invariably entail certain methodologies, such as role assignment or repeat practices. The result is rampant over-criminalization and arbitrary prosecutions, with the government possessing broad authority to prosecute virtually all "group" crimes as B felonies.

By enforcing the Legislature's distinct-structure requirement, this Court can halt prosecutorial practices that treat ordinary group crime as if it were the Mafia.

STATEMENT OF FACTS

The government charged Appellant Jones with B-Felony Enterprise Corruption under Penal Law § 460.20. The indictment alleged that while Mr. Jones was "employed by or associated with" an enterprise, he committed (in October and November of 2011) four acts of D-felony criminal possession of stolen property (motorcycles). A8.

At trial, the government established that throughout a one-year period (March 2011 through July 2012), Appellant and others repeatedly stole motorcycles and sold them to buyers. Group participants played certain roles:

- "procurers" stole the bikes, determined the re-sale price, and divided profits;
- "brokers" located buyers and received a commission;
- participants "broke down" the bikes to disguise their stolen origins; and
- "lookouts" helped the group evade detection.

Trial Testimony: A100, A1000, A1360-65, SA165, SA1840.

Appellant supplied stolen motorcycles to buyers during four transactions in 2011. To do so, he texted photographs of stolen bikes to a broker (Dawson) and proposed the price. In turn, Dawson contacted another middle man (Dow), who located a buyer and disassembled the motorcycles. Dow would pay Jones from the final sale, and Jones then provided Dawson a commission. A1029-32.

Beyond proving that numerous individuals stole and sold motorcycles, there was no evidence that the group's offenses benefited any structure independent from the group's pattern of acquiring, stealing, and then selling motorcycles. Nor did any independent organization serve as a front for this pattern of theft.

At the close of the prosecution's case, Appellant moved to dismiss, arguing that the government failed to prove that an enterprise existed under Penal Law § 460.10(3). A1839-49, 1850-51, 1985-95, 2089, 2074-79, 2373-81. Counsel pressed that dismissal was required under People v. Western Express, 19 N.Y.3d 652 (2012) because, like that case, the government merely proved "an illegal industry where in the industry people have roles. . . . I think what we see is that we saw in Western Express, this is an industry, and that's all they've done is they've described [an industry]. . . . And I think that's not

an appropriate argument. And I think it's been rejected by the Court." A1847, A1851. Counsel further pressed that it was an "extreme interpretation" of the OCCA to find an enterprise based on the mere existence of "roles." A1845.

The jury convicted Mr. Jones of enterprise corruption. The court sentenced him to 5-10 years in prison.

The Appellate Division affirmed, finding "a sufficiently ascertainable structure in which members of the enterprise played specific roles and worked collaboratively to effectuate the common purpose of the enterprise." A Judge of this Court granted Appellant leave to appeal. A1.

ARGUMENT

THE APPELLATE DIVISION DELETED PENAL LAW § 460.10(3)'S DISTINCT-STRUCTURE REQUIREMENT FROM THE OCCA, MERELY REQUIRING THAT A GROUP'S PATTERN OF CRIMINAL ACTIVITY FEATURE A MODUS OPERANDI, SUCH AS "ROLE" ASSIGNMENT. THIS NEW STANDARD VIOLATES THE OCCA'S PLAIN TEXT AND HAS LIMITLESS BREADTH.

I. Penal Law § 460.10(3)'s Distinct-Structure Requirement

The Appellate Division and Respondent have proposed a radical rewriting of the OCCA: whenever a group engages in a pattern of criminal activity and—as will invariably be the case—"assigns roles" or employs certain "methods," the group's members have committed B-felony enterprise corruption. Jones, 149 A.D.3d at 407. Respondent even insists that it can expose any group to enterprise-corruption liability simply because it employs a structure "beyond that which is necessary merely to commit each of the acts charged as predicate [felony] offenses.'" Respondent's Brief at 44 ("RB") (quoting People v. D.H. Blair & Co., 2002 WL 766119, at *9 (N.Y. Sup. Ct. Jan. 29, 2002)).

These radical standards fundamentally misconstrue § 460.10(3)'s critical distinct-structure element. And the adoption of these standards would expand prosecutorial power far beyond the Legislature's intent.

* * *

The OCCA elevates certain group crime to "enterprise corruption." Penal Law § 460.20. The OCCA permits a "draconian" maximum prison sentence of 12.5-to-25

years for enterprise corruption—the same maximum prison exposure for Class B-violent offenses, such as manslaughter and rape. Penal Law §§ 125.20, 130.35; Penal Law §§ 70.00(2)(b), 70.02(1)(a),(3)(a); Western Express, 19 N.Y.3d at 658.

To prove enterprise corruption, the government must establish that a group engaged in a "pattern of criminal activity" (three or more related felonies) while connected to a "criminal enterprise." Penal Law § 460.10(4).[1]

Under Penal Law § 460.10(3), a "criminal enterprise" is a group with an "ascertainable structure." Penal Law § 460.10(3); see American Heritage Dictionary 1718 (4th ed. 2000) ("structure" means "[t]he way in which parts are arranged or put together to form a whole" or "[t]he interrelation or arrangement of parts in a complex entity."). Critically though, the group's "ascertainable structure" must also be "distinct" from the pattern of criminal activity—a requirement the OCCA makes "express in its definition of 'criminal enterprise'":

> [An enterprise does not exist unless] the group of persons shar[es] a common purpose of engaging in criminal conduct, [and was] associated in an ascertainable structure distinct from a pattern of criminal activity, and with

[1] If the underlying pattern acts are A or B felonies, the prosecution can charge "aggravated enterprise corruption," an A-I felony requiring a minimum sentence of 15 years to life. Penal Law § 460.22 (a conviction for aggravated enterprise corruption requires that: (1) at least two of the predicate A or B felonies are "armed felonies"; (2) one felony is an armed felony and another is a Penal Law § 265.17(2) violation; or (3) one act is a B-violent felony and two acts are Penal Law § 265.17(2) violations); Penal Law § 265.17(2) (a person commits "criminal purchase or disposal of a weapon" when, "[k]nowing that it would be unlawful for another person to possess a firearm, rifle or shotgun, he or she purchases a firearm, rifle or shotgun [for that person]").

> a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents.

Penal Law § 460.10(3) (emphasis added); Western Express, 19 N.Y.3d at 659; see also American Heritage Dictionary 1718 (4th ed. 2000). As this Court has held, the statute's distinct-structure requirement "specifically demands that the structure be distinct from the predicate illicit pattern." People v. Keschner, 25 N.Y.3d 704, 719 (2015) (quoting Express, 19 N.Y.3d at 659); see also People v. Kancharla, 23 N.Y.3d 294, 304-05 (2014) ("the crime of enterprise corruption 'demand[s] proof of an association possessing a continuity of existence, criminal purpose, and structure—which is to say, of constancy and capacity exceeding the individual crimes committed under the association's auspices or for its purposes'") (quoting Western Express, 19 N.Y.3d at 658) Western Express, 19 N.Y.3d at 658 (the OCCA distinguishes "between what on the one hand were merely patterns of criminal conduct and what on the other were patterns of such conduct demonstrably designed to achieve the purposes and promote the interests of organized, structurally distinct criminal entities"); People v. Besser, 96 N.Y.2d 136, 142 (2001) (the OCCA's "emphasis" is "not on the quantity or nature of the myriad, isolated criminal activities underlying the new offense . . . . Instead, '[the OCCA is focused] upon criminal enterprises because their sophistication and organization make them more effective at their criminal purposes and because their structure and insulation protect their leadership from detection and prosecution'") (quoting Penal Law § 460.00).

Therefore, under the OCCA, Tony Soprano's crime family (HBO) is subject to enhanced prosecution whenever its agents engage in a pattern of extortion because that family has an ascertainable structure—e.g., leadership, command systems, and protocols—and that structure is meaningfully distinct from the pattern of extortion itself.

In contrast, if three people band together to engage in a pattern of extortion with repeat methodologies (e.g., during each act of extortion, one group member demands a protection payment by phone, another demands it by e-mail, and the final member demands it in-person), the OCCA does not apply. While that extortion group has an "ascertainable structure"—that is, a modus operandi and roles, the structure is not meaningfully "distinct" from the pattern of extortion. Instead, the structure is the pattern of extortion.

II. Contrary to the Appellate Division's New Rule, a Group's Employment of a Modus Operandi, Such as Role Assignment, Does Not Satisfy Penal Law § 460.10(3)'s Distinct-Structure Requirement.

The Appellate Division deleted the distinct-structure requirement from Penal Law § 460.10(3). Jones, 149 A.D.3d at 408. In doing so, the Court ignored the fundamental rule that courts cannot "pick up the legislative pen and rewrite the statute," a rule having particular force in criminal cases, where liberty is on the line. Desiderio v. Ochs, 100 N.Y.2d 159, 176 (2003); see Morissette v. United States, 342 U.S. 246, 263 (1952) (the judiciary "should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in

the statute"); Hroncich v. Con Edison, 21 N.Y.3d 636, 648 (2013) (Pigott, J., dissenting) ("The legislature didn't write the statute that way; why should the courts rewrite it?").

A.

The Appellate Division found an enterprise under Penal Law § 460.10(3) because "members of the enterprise played specific roles and worked collaboratively to effectuate the common purpose of the enterprise." A1. Before this Court, Respondent adds a potpourri of vague factors to the mix, citing the group's "detection-evasion" techniques, "coordination," and "sophistication." RB 31-35, 42. These factors purportedly satisfy the distinct-structure requirement because they show conduct beyond what was "necessary" to satisfy the elements of the underlying predicate; here, criminal possession of stolen property. RB 31, 34, 36.

Under these plainly extra-statutory standards, a group's use of a modus operandi and/or its assignment of roles proves an "enterprise." This limitless theory, which effectively elevates all group crime to B-felony enterprise corruption, cannot stand.

The extra-statutory standards suggested by the Appellate Division and Respondent white out § 460.10(3)'s distinct-structure requirement. The methods employed by a group during a "pattern of criminal activity," such as role assignment and police-evasion techniques, are not distinct from the pattern of criminal activity. Instead, they simply explain the methodology underlying the pattern. Penal Law § 460.10(3)'s distinct-struc-

ture requirement precludes the State from claiming that a group's modus operandi, employed during a pattern of criminal activity, is an ascertainable structure "distinct" from that pattern. On the contrary, that structure simply describes the pattern itself. People v. Yarmy, 171 Misc.2d 13, 18 (Sup. Ct. N.Y. Cty. 1996) (declining to find enterprise corruption despite there being "two roles in this alleged enterprise: Yarmy was the supplier and Lugo was the distributor"); People v. Moscatiello, 149 Misc. 2d 752, 756 (Sup. Ct. N.Y. Cty. 1990) (role assignment "does not result in a structure 'distinct from [a] pattern of criminal activity'") (quoting Penal Law § 460.10.3).

"Small wonder" the Legislature, in enacting the OCCA, "did not go so far as" to apply the OCCA to all groups with a modus operandi. See generally Maslenjak v. United States, 137 S. Ct. 1918, 1927 (2017). Such a broad "standard" would render the OCCA's "draconian" power "limitless." Id.; Western Express, 19 N.Y.3d at 658. All patterns of group criminal activity entail, in some way or another, coordination, repeated methodology, role-assignment, and/or planning. It's very difficult to imagine a pattern of group crime which would not satisfy this new "methods-and-roles" standard.

Suppose three individuals work together as a "group" to sell illegal drugs on three separate occasions. This group has (under the Appellate Division's standard) committed enterprise corruption if each participant has a distinct role ("procurer," "chopper," and "lookout"). The same is true if a robbery group repeatedly commits robbery on "Tuesdays at midnight," assigns one member the role of "lookout," and then divvies up the

robbery's proceeds in isolated Swiss bank accounts to "ensur[e] immediate profits and minimiz[e] the risk of detection." RB 31.

While these groups have pursued a pattern of criminal activity within an ascertainable structure—that is, they have assigned roles and adopted techniques—that structure is not distinct from a pattern of criminal activity. That critical defect ends the statutory inquiry.

Respondent's "minimally necessary" test, plucked from an unpublished trial court decision, fares no better. RB 42 (the distinct-structure requirement is satisfied whenever the group engages in conduct "'beyond that which is necessary merely to commit each of the acts charged as predicate [felony] offenses'") (quoting People v. D.H. Blair & Co., 2002 WL 766119, at *9 (N.Y. Sup. Ct. Jan. 29, 2002)).

Penal Law § 460.10(3) requires a structure distinct from the pattern of criminal activity, not merely a pattern that seems to involves conduct beyond the bare "minimum necessary" to commit the pattern. Had the Legislature intended that shockingly broad standard, it "would have said so." Hroncich, 21 N.Y.3d at 647.

This "minimum necessary" standard leads to vast over-criminalization. Any group that does something beyond the bare minimum necessary to make out the elements of the pattern crime satisfies this standard. Apparently, a robbery group's meeting up at a restaurant to share wine after every predicate robbery would satisfy this test. After all, wine consumption goes beyond the bare minimum necessary to accomplish robbery.

Perhaps the group's "regularly talk[ing] on the phone" and "jok[ing] with each other," satisfies this broad standard too, RB 35, since it is "beyond" the conduct necessary to commit robbery. Of course though, that conduct does not show a structure distinct from the underlying pattern; it's just part of the pattern.

It is similarly irrelevant whether a group's pattern is "very coordinated"/"sophisticated"; whether the group has "overseas" ties; or whether the group "demonstrated a level of coordinated activity . . . beyond . . . a mere market." RB 30, 31, 39; Jones, 149 A.D.3d at 408. This potpourri of vague factors is simply not in the OCCA. The OCCA does not punish "highly coordinated" patterns of criminal activity, or patterns that seem to go "beyond" the coordination expected in a market (whatever that means). The OCCA punishes distinct structures. Ultimately, extensive cooperation proves the discrete "common purpose" and "ascertainable structure" elements, but it does not prove the independent distinct-structure element. See Penal Law § 460.10(3) (defining "criminal enterprise" to require (1) "a group of persons sharing a common purpose of engaging in criminal conduct"; (2) an "ascertainable structure"; and (3) a structure distinct from the pattern).

Further, extensive "cooperation" and "coordination" merely show conspiracy and/or accomplice liability, which were already regulated well before the OCCA. Penal Law §§ 20.00, 105.15. The OCCA, however, was "plainly intended to reach conduct that was not already subject to criminal prosecution," thus proving that it requires much

more than coordinated conspiracy. Besser, 96 N.Y.2d at 142 (emphasis added) (citing Bill Jacket, L 1985, ch. 516); see also Penal Law § 460.00 (the OCCA "is not intended to be employed to prosecute relatively minor or isolated acts of criminality which, while related to an enterprise and arguably part of a pattern as defined in this article, can be adequately and more fairly prosecuted as separate offenses").[2]

Simple examples demonstrate the flaws in the Respondent's effort to rewrite the OCCA. A group of thieves that develops a clever method for stealing candy from a drug store may employ a sophisticated and highly-coordinated structure (e.g., it sends a computer virus to the storeowner moments before the theft to distract him, and then runs a complex eBay auction for stolen goods, assigning each member of the group to specific functions). But that group's "ascertainable structure" (a repeated methodology involving computers) is hardly "distinct" from its pattern of theft. The same is true if the group repeatedly ships the stolen candy to "Barbados," RB 22, or functions better than "a mere market." Jones, 149 A.D.3d at 408.

The film Ocean's Eleven provides another example of the OCCA's limits. There, a group of eleven individuals developed a sophisticated plan to steal millions from a Ca-

[2] For the same reasons that sophistication and modus operandi cannot show enterprise corruption, it is irrelevant that the group's members worked collaboratively and did not try to undercut each other. RB 34. Working collaboratively shows the "common purpose" element of the OCCA, but it does not prove a "distinct ascertainable structure." Street-level drug dealers routinely work together to accomplish a criminal goal without undercutting each other but they are not therefore enterprise-corruption felons.

sino vault. Daniel Ocean, the head of the group, enlisted assistance from ten other individuals, each having a distinct role, including: (1) Ocean's right-hand man; (2) a bankroller; (3) two escape drivers (who also helped distract casino employees during the planning and execution of the heist); (4) an electronics specialist; (5) a demolitions expert; (6) an inside-man who provided security information; (7) a gymnast; and (8) two con men. Although Ocean's crew had a highly sophisticated structure and each member had a specific role, that structure was not distinct from the group's casino-vault larceny scheme—the structure was the criminal scheme. Accordingly, Ocean's group lacked an "ascertainable structure distinct from [its] pattern of criminal activity and with a continuity of existence, structure and criminal purpose beyond the scope of individual [larcenies]." Penal Law § 460.10(3).

Respondent's argument seems to be that groups like Ocean's are pernicious and must be subject to enhanced punishments, so the statutory text can be ignored. But of course, this Court lacks the authority to criminalize conduct that the statutory text does not reach. See, e.g., People v. Kent, 19 N.Y.3d 290, 303 (2012) (refusing to apply a criminal statute prohibiting the possession of child pornography to viewing of child pornography because "[t]o hold otherwise, would extend the reach of [the statute] to conduct . . . that our Legislature has not deemed criminal.").

B.

Penal Law § 460.10(3)'s plain text is more than sufficient to defeat the Appellate Division and Respondent's effort to re-write the OCCA. But this Court's jurisprudence dooms the effort too.

In Western Express, this Court held that a group of buyers, sellers, and intermediaries who participated in a sophisticated international market for stolen credit card data by using a website ("Western Express") as a fraudulent-laundering hub was not "a distinct, structured criminal enterprise." 19 N.Y.3d at 659. Although the government argued that the group's use of the website was a distinct structure, the Court disagreed, reasoning that it was simply part of "a prevalent pattern" of criminal activity "evidently organic to the 'carding' market" and "it did not support the further inference of a distinct, beneficially related criminal enterprise." Id.

In Kancharla, Keschner, and Besser, the story was different. The structures there were independent in form and purpose from the underlying pattern of criminal activity. In Kancharla, the defendant utilized a "major metropolitan materials testing company" to advance and conceal an underlying building inspection scheme. 23 N.Y.3d at 305. In Keschner, the defendant used a medical clinic as a front for a fraudulent billing scheme. 25 N.Y.3d at 719-20. And in Besser, the defendant was part of an established criminal organization, the Colombo crime family, that featured a rigid hierarchy and which pro-

vided the requisite structure to pursue "a number of illegal moneymaking schemes, encompassing bookmaking, loansharking, credit card fraud, extortion, coercion and larceny . . . ." 96 N.Y.2d at 144.

In each of these cases, the structure was "distinct" from the predicate felonies and served a "criminal purpose beyond the scope of individual criminal incidents." Penal Law § 460.10.3. Indeed, Kancharla and Besser were careful to cite the distinct-structure element, only to then explain why the facts satisfied it. Kancharla, 23 N.Y.3d at 304-05; Besser, 96 N.Y.2d at 142.

Respondent's reliance on Boyle v. United States, 556 U.S. 938 (2009)—a federal RICO case—shows that its theory ignores New York's distinct statutory mandates. RB 28, 38, 43-44. RICO lacks a distinct-structure requirement, so RICO is satisfied by mere evidence of "a continuing unit that functions with a common purpose." Boyle, 556 U.S. at 948. But "[t]he OCCA, unlike RICO . . . specifically demands that the structure be distinct from the predicate illicit pattern, and not surprisingly there are no New York cases in which the requisite structure has been inferred simply from an underlying pattern." Western Express, 19 N.Y.3d at 659-60 (emphasis added). As such, Respondent's argument that "[t]here need only be evidence of sufficient cooperation and coordination" (RB 28) applies a federal standard that's irrelevant to the state statutory question before this Court.

C.

In failing to enforce the distinct-structure requirement, the Appellate Division also ignored the OCCA's policy goals.

A distinct-structure enterprise can serve as a powerful shell for the pattern acts. Such "enterprises were understood to present a distinct evil by reason of their unique capacity to plan and carry out sophisticated crimes on an ongoing basis while insulating their leadership from detection and prosecution." Western Express, 19 N.Y.3d at 657 (quoting Penal Law § 460.00). For example, in Kancharla, the defendant used Testwell Laboratories, "a leading materials testing company," to disguise "a multitude of illegal acts involving the falsification of test results, improper inspections of construction projects and double-billing of clients." 23 N.Y.3d at 299.[3]

Second, a distinct structure can deter individual members from cooperating with law enforcement. Unlike "ordinary street crime," organized crime's "conspiracy of silence makes it very difficult to prosecute." Bill Jacket, Public Hearing on Organized Crime Control Act at 44, Statement of Associate U.S. Attorney General Rudolph Giuliani (Feb. 24, 1983); id., Statement of Oregon Attorney General Dave Frohnmayer (Feb. 24, 1983) (discussing the difficulty of fighting organized crime because of "the need to

[3] A classic example of a distinct-structure serving as a front for criminal activity is Gustavo Fring's chicken restaurant in "Breaking Bad" (AMC). Fring effectively used that restaurant to provide a cover for his vast drug business.

rely on informants to infiltrate a gang's structure" and "the need to break organized crime's conspiracy of silence").

Groups with distinct structures may bind their individual members through loyalty, shared profits, enforcement of disciplinary codes, hierarchical leadership structure, or regular association beyond the commission of criminal acts. Keschner, 25 N.Y.3d at 710 (describing a criminal enterprise where the defendant had employees as well as profit-sharing agreements with specialists, lawyers, and imaging facilities, all of which would provide kickbacks for referrals and prescribed tests); People v. Wright, 139 A.D.3d 1094, 1099-1100 (3d Dept. 2016) (finding ascertainable structure for a drug ring run by a sect of the Bloods gang, where members underwent "initiation requirements" and "a loyalty oath"); id. (noting that certain members of the Bloods gang had obligations to "enforce the rule against cooperating with law enforcement" and "had the authority to kill other Bloods").

Respondent's answer seems to be that persons who engage in "sophisticated" patterns of criminal activity may insulate members and ensure loyalty even if they have no connection to a "distinct structure." RB 32, 41. Perhaps that's true in some scenarios, but statutory construction doesn't work like that:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates, rather than effectuates, legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987); see also Holloway v. United States, 526 U.S. 1, 18 (1999) (Scalia, J., dissenting) ("[E]very statute intends not only to achieve certain policy objectives, but to achieve them by the means specified. Limitations upon the means employed to achieve the policy goal are no less a 'purpose' of the statute than the policy goal itself. Under [a contrary] analysis, any interpretation of the statute that would broaden its reach would further the purpose the Court has found. Such reasoning is limitless and illogical.") (citing Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 135-136 (1995)).

The State cannot prosecute all conduct that seems to implicate "evils" similar to those identified in the statutory text, only to later claim: "we are acting consistently with legislative purpose." See Rodriguez, 480 U.S. at 525-26. A statute that bans the sale of "cookies and soda" is, no doubt, intended to target the evil of "unhealthy food." But it does not ban the sale of "ice cream," no matter how "unhealthy" that dessert may be. The same logic defeats Respondent's effort to expand the OCCA beyond its clear limitations under the guise of "legislative intent."

Indeed, the Legislature determined that distinct structures are more pernicious than mere patterns of criminal activity and thus limited § 460.10(3) to that discrete problem. Ignoring § 460.10(3)'s specific textual limitation not only violates the basic rule that

courts cannot rewrite statutes—it sidesteps express efforts by the Legislature to mandate adherence to the statutory text. Penal Law § 460.00 ("The organized crime control act is a statute of comparable purpose [to RICO] but tempered by reasonable limitations on its applicability, and by due regard for the rights of innocent persons. . . . [T]hese definitions should be given their plain meaning.") (emphasis added); Western Express, 19 N.Y.3d at 659 (the OCCA makes the distinct-structure requirement "express in its definition of 'criminal enterprise'").

As its last stab, Respondent relies on Governor Mario Cuomo's approval memorandum, part of which stated: "[if a group] demonstrates a structure - such as the hierarchy of a 'Cosa Nostra' family, or the specialization of a narcotics, loansharking or gambling operation the criminal enterprise requirement is satisfied." Governor's Mem., L. 1986, ch. 516, 1986 McKinney's Session Laws of N.Y. at 3177; RB 28, 38.[4] Respondent suggests that the Governor's "specialization" line proves the Legislature intended sophisticated group activity to suffice. RB 28, 38.

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[4] This line appears in a paragraph which states in full:

> This bill applies only to persons employed by or associated with criminal enterprises. This significant modification from the federal statute represents an attempt to protect against abuse and undue prejudice to defendants. The reach of the bill is not limited to traditional organized crime families or crime syndicates; rather, it includes any group with a shared criminal purpose and a continuity of existence and structure. Crimes committed by individuals who engage in a brief series of criminal acts in an ad hoc group are not subject to and unstructured prosecution under the Act. If, however, the group

As this Court held just six years ago, a Governor's approval memorandum cannot "supply something that is just not in the statute." People v. Miller, 18 N.Y.3d 704, 709 (2012).

Moreover, many "specialized" loansharking, narcotics, and gambling operations will satisfy Penal Law § 460.10(3)—not because they are "sophisticated—but because they satisfy the distinct-structure requirement. If a group creates "Narcotics International" and develops rules and leadership hierarchies, that structure is, no doubt, distinct from a pattern of drug dealing connected to the group. The problem with the Appellate Division and Respondent's theory, however, is that it does not require anything more than sophistication and division of labor. Neither the Governor's memorandum, nor (more critically) the statutory text, authorizes that theory.

D.

The sky won't fall if the statutory text is enforced. Even without the OCCA's enhanced penalties, prosecutors can, based on the pattern acts, pursue lengthy prisons sentences. Penal Law §§ 70.00 and 70.02 (maximum sentence for a B felony is 25 years; maximum sentence for a C felony is 15 years; maximum sentence for a D felony is 7

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demonstrates a structure - such as the hierarchy of a "Cosa Nostra" family, or the specialization of a narcotics, loansharking or gambling operation the criminal enterprise requirement is satisfied.

years; maximum sentence for an E felony is 4 years). Prosecutors may even obtain consecutive sentences for multiple pattern crimes. Penal Law § 70.25(2). The OCCA's "superadded penalties" are therefore not the only means of fighting dangerous and sophisticated crime.

Enforcement of the distinct-structure rule will also forestall the rise of an unworkable—"I-know-it-when-I-see-it"—jurisprudence. A group's degrees of "coordination," "sophistication," and "specialization" are subjective and malleable factors. These flimsy standards would be difficult to apply in any consistent or meaningful way, producing jurisprudential confusion.

Malleable standards will also make it all too easy for the government to secure B-felony indictments, thus allowing it to overleverage enterprise corruption charges during plea bargaining. Bordenkircher v. Hayes, 434 U.S. 357, 368 n. 2 (1978) (Blackmun, J., dissenting) ("[P]rosecutors, without saying so, may sometimes bring charges more serious than they think appropriate for the ultimate disposition of a case, in order to gain bargaining leverage"); Russell D. Covey, Fixed Justice: Reforming Plea-Bargaining With Plea-Based Ceilings, 82 Tulane L. Rev. 1237, 1254 (2008) ("In most cases, prosecutors overcharge not because they seek to impose unduly harsh sentences on defendants, but simply because of the bargaining leverage it provides.").

This Court should avoid these harmful outcomes by simply enforcing the clear text of the OCCA: the structure must be distinct from the pattern of criminal activity. Penal Law § 460.10(3).

III. Mr. Jones' Appeal Demonstrates the Critical Distinction Between Group Crime and Group Crime with a "Distinct, Ascertainable Structure."

Here, the government presented no evidence of 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." Penal Law § 460.10(3). Even assuming Appellant Jones and the motorcycle-theft group engaged in "a pattern of criminal activity" under an "ascertainable structure" (role assignment, planning, and detection-evasion maneuvers),[5] the government failed to prove that this structure was distinct from the theft pattern. Penal Law § 460.10(3). Instead, the coordinated conduct in this case—the theft, "break-down," distribution, and sale of motorcycles—was the "pattern of criminal activity" and lacked a "purpose beyond" that pattern's scope. Id.

As in Moscatiello, the government has "sought, with some imagination and ingenuity, to show the existence of an organization by showing" that each person played a distinct role in a pattern of group crime. 149 Misc. 2d at 756. But the fact that persons

[5] SA239, 1259, 1289, 1331-33, 1859-60, 2233-36, 2541-43, 2594.

involved in a pattern of criminal activity "assign themselves separate roles does not result in a structure 'distinct from [their] pattern of criminal activity.'" Id.

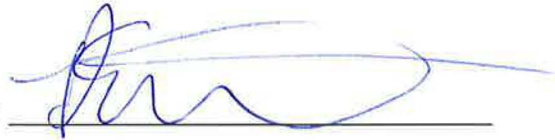
To be sure, the government had other options. It could have pursued four independent D-felony charges against Mr. Jones, each punishable by 2.33 to 7 years' incarceration. It could have even requested consecutive sentencing, producing an aggregate sentence of 9.33 to 28 years. Instead, it overreached and pursued an enterprise corruption theory. Under Penal Law § 460.10(3)'s plain text, that theory fails.

CONCLUSION

This Court should reverse the Appellate Division's order and dismiss the enterprise-corruption count.

Dated: September 21, 2018

Respectfully submitted,

By: 

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