DISTRICT COURT, EL PASO COUNTY, COLORADO

Case Nos. 92CR3027, 3028, 3029, 3030, 3031, 93CR0519, 0520

MEMORANDUM OF POINTS AND AUTHORITIES CONCERNING THE COLORADO ORGANIZED CRIME CONTROL ACT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

EDWARD IVAN McGHEE, a/k/a Daryl Woods;
JAMES L. UPSHUR, JR., a/k/a Raymond D. Williams, Jr.;
CHRIS CHILDS, a/k/a Kenneth Green, a/k/a Chris Johnson;
JAMES D. WILLIAMS, a/k/a Samuel McClane;
VINCENTE RAFAEL PIERRE;
CHRIS BAYLOR; and
EDWARD NICHOLAS LAURENT FLINTON, a/k/a Edward Solomon Katz, a/k/a William Alfred Lemay,

Defendants.

The following memorandum of points and authorities was prepared to offer, for the Court's consideration, pertinent authority on the more significant issues of litigation under this statute and its Federal model RICO.

COCCA AND RICO

The Colorado Organized Crime Control Act, §§ 18-17-101 to 109, C.R.S. ("COCCA"), was enacted by the Colorado General Assem-

bly in 1981 for the purpose of seeking:

> [t]he eradication of organized crime in this state by strengthening the legal tools in the evidence gathering process by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime

Section 18-17-102. The General Assembly further noted that this was not only a Colorado but a national problem (§ 18-17-102) and clearly intended to bring Colorado's law in line with the existing federal statute know as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. COCCA is, in those sections where its state origins do not require otherwise, a virtual reenactment of the federal RICO provisions except where Colorado made specific changes.**1

It is quite clear that the General Assembly did not envision an entirely new or different scheme for attacking what they recognized as a criminal problem which did not change as it crossed state borders.

1** COCCA obviously has no provisions requiring that prohibited activities affect interstate or foreign commerce as does RICO (18 U.S.C. § 1962(a)-(d)). The definition of "racketeering activities" is also different in each although RICO adopts many state offenses (18 U.S.C. § 1961(1)) and COCCA adopts a number of federal offenses (§ 18-17-103(5)(a)). Also see the sections of this memorandum relating to "Enterprise", "Pattern of Racketeering Activity" and "Conspiracies" for discussions of changes made by Colorado General Assembly when COCCA was enacted.

Further evidence of the General Assembly's intent to harmonize the state and federal provisions is found in the fact that the 14 years since the adoption of COCCA have been extremely active with regard to federal court interpretations of RICO. RICO has been and remains quite controversial and heavily litigated. In spite of all of the controversy and extensive litigation, the General Assembly has not seen fit to make any significant amendments to COCCA which would indicate a departure from the course Congress and the federal courts have taken with RICO.**2

It is, therefore, the intent of this memorandum to rely on federal RICO authority when construing a similar COCCA provision upon which the Colorado courts have not spoken.

THE ENTERPRISE

COCCA provides that it is illegal to engage in four specific activities. They are briefly:

1. To invest proceeds of racketeering activity in real property or any enterprise. Section 18-17-104(1)(a).

2** Both Colorado and federal courts have held that COCCA is "modeled after" RICO and have found RICO decisions to be persuasive in analyzing COCCA. Benson v. People, 703 P.2d 1274, 1276 n.1 (Colo. 1985); Behunin v. DOW Chemical Co., 650 F. Supp. 1387, 1390 (D. Colo. 1986); Plains Resources Inc. v. Gable, 782 F.2d 883, 888 (10th Cir. 1986); Federal Deposit Ins. Corp. v. Antonio, 843 F.2d 1311, 1313 (10th Cir. 1988).

2. Acquire control of real property or any enterprise through a pattern of racketeering activity. Section 18-17-104(2).

3. To conduct or participate in any enterprise through a pattern of racketeering activity. Section 18-17-104(3).

4. To conspire to violate the first three. Section 18-17-104(4).

Each of those violations incorporates the term "enterprise" which means:

> [a]ny individual, sole proprietorship, partnership, corporation, trust or other legal entity or any chartered union, association, or group of individuals, associated in fact although not a legal entity, and shall include illicit as well as licit enterprises and governmental as well as other entities.

Section 18-17-103(2).

This a somewhat broader statement of enterprise than is found in RICO but it is consistent with federal interpretations of the term. See 18 U.S.C. § 1961(4) and United States v. Turkette, 452 U.S. 576 (1981). The term enterprise in RICO has been held to be merely illustrative, not exhaustive. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed.2d 195 (1989).

The enterprise may be comprised of a combination of entities. United States v. Aimone, 715 F.2d 822, 826 (3d Cir. 1983),

cert. denied, 468 U.S. 1217 (1984) (enterprise was of several illegal entities and a group of individuals associated in fact); the association in fact enterprise may also change its membership over time. See United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988); United States v. Hewes, 729 F.2d 1302, 1310-11 (11th Cir. 1984), cert. denied, 469 U.S. 1110 (1985).

Proof of an "association in fact" enterprise requires evidence of the existence of a group of persons associated together for a common purpose of engaging in a course(s) of conduct. United States v. Turkette, supra, at 583. It is an entity separate and apart from the pattern of racketeering activity in which it engages but proof used to establish the enterprise may coalesce with proof used to establish the pattern of racketeering. United States v. Turkette, supra; United States v. Bascaro, 742 F.2d 1335, 1362 (11th Cir. 1984), cert. denied, 472 U.S. 1017 (1985); United States v. Phillips, 664 F.2d 971, 1011 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); Hofstetter v. Fletcher, 860 F.2d 1079 (6th Cir. 1988); United States v. Oaoud, 777 F.2d 1105, 1115 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986).

The issues of ongoing organization, continuing membership, and separate existence are factual ones for the jury and are subject to review on appeal as any factual determination would be.

United States v. Riccobene, 709 F.2d 214, 222 (3d Cir.), cert. denied, 465 U.S. 849 (1983); United States v. Feldman, 853 F.2d 648 (9th Cir. 1988).

Interlocking schemes and overlapping acts of wrongdoing provide sufficient evidence for the jury to conclude that a single enterprise existed. United States v. Perholtz, supra, at 355. Evidence of a series of overlapping schemes as well as an association among the defendants over a period of many years would support a finding of an "association in fact" enterprise. United States v. Hewes, 729 F.2d 1302, 1311 (11th Cir. 1984). See also United States v. Cagnina, 697 F.2d 915, 921 (11th Cir. 1983). There was sufficient evidence for a jury to find a RICO enterprise where the facts showed an informal association united for the purpose of making money from repeated criminal activity and the association continued for 6 years.

In reviewing the question of "separate existence" of an enterprise (apart from the racketeering acts) the Third Circuit found that it is not necessary to show that the enterprise had some functions wholly unrelated to the racketeering activity, but rather that it had an existence beyond that which is necessary to commit each of the acts charged as predicate racketeering offenses. United States v. Riccobene, 709 F.2d 214, 224 (3d Cir.), cert. denied, 465 U.S. 849 (1983). The Second Circuit found that a "circle" of jockeys and a "circle" of bettors who came together

to fix horse race results constituted an enterprise in that they were a community of interest with a continuing core of personnel associated for 8 months. United States v. Errico, 635 F.2d 152, 156 (2d Cir. 1988). The continuity of such association does not, however, require that each member of the enterprise participate in it from beginning to end. United States v. Feldman, 853 F.2d 648 (9th Cir. 1988), citing United States v. Hewes, supra.

The continuing nature of the enterprise and its separate existence may be shown through proof of separate criminal schemes as racketeering acts and by some continuity of leadership in each of these separate schemes. United States v. Lemm, 680 F.2d 1193, 1199-1201 (8th Cir. 1982) (court noted that one individual defendant was involved in both criminal schemes and that these schemes could have existed apart from each other). Even repeated acts of a single scheme could suffice. United States v. Mazzei, 700 F.2d 85, 89 (2d Cir.), cert. denied, 103 S. Ct. 2124 (1983).

The jury is entitled to infer the existence of an enterprise from largely or wholly circumstantial evidence. United States v. Elliott, 571 F.2d 880, 897-900 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

PROFIT SEEKING PURPOSE

The defense in many RICO cases has suggested that only

those activities undertaken for profit or financial gain are subject to RICO (and the identical provisions of COCCA). This view is apparently based on the Second Circuit's holding in United States v. Ivic, 700 F.2d 51 (2d Cir. 1983) in which an associated in fact enterprise was charged with RICO violations for a series of assassination conspiracies and attempted bombings. The court held that RICO applies only when the enterprise or the predicate acts have a financial purpose. (emphasis added) 700 F.2d 65. See also, United States v. Bagaric, 706 F.2d 42 (2nd Cir.), cert. denied, 464 U.S. 840 (1983); United States v. Ferguson, 758 F.2d 843, 853 (2nd Cir.), cert. denied, 474 U.S. 841 (1985) (RICO conviction of terrorist group for robberies, prison escapes and kidnapping even though the group had a political purpose); United States v. Dickens, 695 F.2d 765 (3rd Cir.), cert. denied, 460 U.S. 1092 (1983) (RICO conviction of members of "New World" Muslim sect based on robberies and murder); Von Bulow v. Von Bulow, 634 F. Supp. 1284, 1305 (S.D.N.Y. 1986).

This issue was settled by the Supreme Court, in National Organization for Women v. Scheidler, ___ U.S. ___, 114 S. Ct. 790 (1994) when the Court held that RICO does not require an underlying economic motive. The Court noted "Nowhere in either § 1962(c), or in the RICO definitions in § 1961, is there any indication that an economic motive is required" 114 S. Ct. 804.

The Court went on to note that the perceived requirement

that the violators have an economic motive apparently arose from the RICO language in § 1962(c) which applies to "...any enterprise engaged in, or the activities of which affect, interstate or foreign commerce." The Court stated "[A]n enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seek motives" 114 S. Ct. 804.

Since this language relating to the affect on interstate or foreign commerce is not included in COCCA there is no reason that this issue should have ever arisen in a Colorado case.

PATTERN OF RACKETEERING ACTIVITY

COCCA was drafted to avoid the ambiguity found in the "pattern requirement" in RICO which had generated a great deal of Federal litigation prior to 1989. The RICO statute (§ 1961(5)) did not use a definitional term such as "means" but, rather, stated a pattern of racketeering activity -- "requires at least two acts racketeering activity...." (Emphasis added).

One federal circuit, the Eighth, found that a RICO pattern of racketeering activity could not be established by proof of a single scheme to commit multiple violations of the same offense. This controversy was put to rest by the United States Supreme Court in H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed.2d 195 (1989), when the court

stated that what the prosecutor had to prove was the continuity of the racketeering activity or its threat. 109 S. Ct. at 2901. The court held that there was no "multiple scheme" requirement.

This has not been an issue in Colorado since COCCA defines pattern of racketeering as "'means' (rather than 'requires' as in RICO) engaging in at least two acts of racketeering activity which are related to the conduct of the enterprise...." Section 18-17-103(3). The Colorado definition is therefore more precise then the federal and is, in any case, in accord with the holding in H.J. Inc. v. Northwestern Bell, supra. See People v. Chaussee, 847 P.2d 156 (Colo. App. 1992).

There is a "continuity" requirement to be met in RICO. See 109 S. Ct. 2901. The prosecution must show that the acts which make up the "pattern" are not isolated, unrelated or remote from one another, and that they continued over some period of time or that there was a threat of repetition. H.J. v. Northwestern Bell Telephone Co., supra, at 2901. COCCA on the other hand does not have a continuity requirement since COCCA defines "pattern" very specifically and there is no need to indulge in the judicial search for meaning that the federal courts have undertaken in their attempt to define "requires" in RICO. People v. Chaussee, supra.

COCCA AND RICO CONSPIRACIES

There are some significant differences between COCCA and RICO conspiracies and standard conspiracy law, but the two are much alike in some respects such as the admissibility of co-conspirators statements, United States v. Hewes, supra; United States v. Tille, 729 F.2d 615, 620 (9th Cir.), cert. denied, 469 U.S. 854 (1984); United States v. Ruggerio, 726 F.2d 913, 923-24 (2d Cir.), cert. denied, 469 U.S. 831 (1984); and the principle that conspirators need not know the full scope of the conspiracy nor the identity of all co-conspirators. United States v. Rastelli, 870 F.2d 822 (2d Cir.), cert. denied, 110 S. Ct. 515 (1989); United States v. Norton, 867 F.2d 1354 (11th Cir.), cert. denied, 109 S. Ct. 3192 (1989); United States v. Cagnina, supra.

The most significant difference is that COCCA and RICO conspiracies permit the joinder of diverse conduct that could not be joined under standard conspiracy theories. United States v. Elliot, 571 F.2d 880, 900-05 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Sutherland, 656 F.2d 1181, 1189-95 (5th Cir.), cert. denied, 455 U.S. 949 (1982); United States v. Pepe, 747 F.2d 632, 659 (11th Cir. 1984). The reason is that in a RICO conspiracy the agreement is to (1) participate in the affairs of the enterprise, (2) through a pattern of racketeering activity. If therefore the conspirators all agree to further the

goals of the enterprise but do so through various, diverse schemes with some conspirators agreeing to some schemes and other conspirators to others it is still a single conspiracy. United States v, Manzella, 782 F.2d 533, 538-539 (5th Cir. 1986), cert. denied, 476 U.S. 1123 (1986); United States v. Deperi, 778 F.2d 963, 975 (3rd Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Tillett, 763 F.2d 628 (4th Cir. 1985); United States v. Watchmaker, 761 F.2d 1459, 1477 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986); United States v. Sutherland, supra, 1189-95; United States v. Zemek, 634 F.2d 1159, 1167 (9th Cir. 1980), cert. denied 450 U.S. 916 (1981).

This is particularly true in the case of illegal association-in-fact enterprises because even standard conspiracy law permits broad inferences about a conspirator's knowledge of the scope of the conspiracy. United States v. Rastelli, supra; United States v. Norton, supra; United States v. Riccobene, supra; United States v. Sutherland, supra.

One question which does arise is the depth of a conspirator's involvement. Must a conspirator in a COCCA/RICO case agree to personally commit two or more predicate acts or is he liable if he agreed to the commission of two or more acts by any conspirators? The former position is taken by three federal circuits. United States v. Ruggerio, supra, at 921; United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. de-

nied, 460 U.S. 1101 (1983); and United States v. Sanders, 929 F.2d 1466, 1473 (10th Cir. 1991). While seven circuits have adopted the latter position. United States v. Traitz, 871 F.2d 368, 395-96 (3d Cir.), cert. denied, 110 S. Ct. 78 (1989); United States v. Pryba, 900 F.2d 748 (4th Cir. 1990); United States v. Joseph, 781 F.2d 549, 554-55 (6th Cir. 1986); United States v. Neopolitan, 791 F.2d 489, 491-98 (7th Cir. 1986), cert. denied, 479 U.S. 1101 (1987); United States v. Tille, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Alonzo, 740 F.2d 862, 871 (11th Cir.), cert. denied, 469 U.S. 1166 (1985).

The test therefore ought, by the weight of authority, to be an agreement to conduct or participate in the affairs of the enterprise and an agreement that some conspirator would commit at least two acts. United States v. Neopolitan, supra, at 499.**3

Another question is raised in RICO by the requirement that

3** Certainly those commentators who have analyzed the question agree with the latter interpretation finding that to require that a conspirator agree to personally commit two or more predicate acts would engraft onto conspiracy law an element never intended by Congress and would frustrate the purposes for which RICO was enacted since it would allow enterprise leaders to escape prosecution by simply agreeing that all acts would be committed by subordinates. See Clarifying RICO's Conspiracy Provisions: Personal Commitment Not Required, 62 Tulane L. Rev. 1399 (1988); Conspiracy to Violate RICO: Expanding Traditional Conspiracy Law, 58 Notre Dame L. Rev. 587 (1983).

one conduct or participate, (or conspire to do so) directly or indirectly in the conduct of the affairs of the enterprise. 18 U.S.C. § 1962(c); (emphasis added).

In its most recent review of RICO requirements the United States Supreme Court held that one must participate in the operation or management of the enterprise in order to be subject to § 1962 liability. This "operation or management test" was made necessary, according to the court, because Congress used to word "conduct" twice. In order for that portion of the section which proscribed conducting or participating "directly or indirectly in the conduct of the affairs of the enterprise" to have meaning the use of the word conduct a second time implies some element of directing the enterprises affairs is required. Reves v. Ernst & Young, 507 U.S. ___, 113 S. Ct. 1163, 122 L. Ed.2d 525 (1993).

The court explained "on the other hand, as we have already noted, 'to participate in the conduct of --- affairs' must be narrower than to 'participate in affairs' or Congress' repetition of the word 'conduct' would serve no purpose." The Colorado General Assembly opted for the broader definition in the same provision in COCCA when they provided that

> It is unlawful for any person employed by or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

STATE OF COLORADO

DEPARTMENT OF LABOR AND EMPLOYMENT

DIVISION OF LABOR

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EXPLOSIVES PERMIT

PERMIT NUMBER 1043 U **FOR THE YEAR ENDING** August 31, 1989

TYPE AND DESCRIPTION OF PERMIT

TO USE, INCLUDING PURCHASE AND STORAGE,

INCIDENT THERETO.

THIS PERMIT IS ISSUED UNDER THE PROVISIONS OF TITLE 9, ARTICLE 7, CRS 1973, AS AMENDED.

THIS PERMIT IS NON-TRANSFERABLE AND SHALL BE CONSPICUOUSLY POSTED IN THE PRINCIPAL OFFICE OF PERMITTEE.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL

THIS 31st DAY OF August, 19 88.

Edward E. Morgan
DIRECTOR

DLSI-365-R70