

RACKETEERING¹
(N.J.S.A. 2C:41-2a)

Count _____ of the indictment charges defendant with racketeering.

[READ COUNT OF INDICTMENT]

That section of our statutes provides in pertinent part:

It is unlawful for any person who has received any income derived, directly or indirectly, [from a pattern of racketeering activity] [through collection of an unlawful debt in which he has participated as a principal]. . . to use or invest, directly or indirectly, any part of the income, or the proceeds of the income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in or the activities of which affect trade or commerce.

In order to convict defendant of the charge, the State must prove the following elements beyond a reasonable doubt:

1. That defendant received income derived directly or indirectly from a pattern of racketeering activity.

OR

1. That defendant received income derived directly or indirectly through collection of an unlawful debt in which he participated as a principal.
2. That defendant [used] [invested] directly or indirectly any part of the [income] [proceeds from the income] to [acquire any interest in] [establish] [operate] an enterprise.
3. That the enterprise was engaged in trade or commerce or that its activities affected trade or commerce.
4. That defendant acted purposely or knowingly.

The first element that the State must prove beyond a reasonable doubt is that defendant received income derived directly or indirectly from a pattern of racketeering activity. Income is defined as money or other gain received by an individual or corporation for, among other things,

¹ The statute also provides that a defendant can be charged with conspiracy to commit any of the substantive offenses of racketeering. N.J.S.A. 2C:41-2d. If a defendant is charged under this subsection, the

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labor, for services, from property, from investment or from operations.² A pattern of racketeering requires the State to prove beyond a reasonable doubt (1) that defendant engaged in at least two incidents of racketeering conduct, one of which must have occurred after June 5, 1981, and the last of which must have occurred within 10 years of a prior incident of racketeering activity,³ and (2) that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

The concept of pattern of racketeering activity is not designed to punish mere repeated offenses. To be a pattern, there must be more than a string of two or more similarly-committed crimes. There must be some degree of relatedness, of continuity or threat of continuity. You should use a totality of the circumstances approach, considering factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators and the character of the unlawful activity in determining whether a pattern existed. There may be incidents that occur sequentially over time. This criminal activity must encompass incidents of criminal conduct that are not disconnected or isolated. Incidents of racketeering that occur sequentially, to overcome any inference that they are totally disconnected or isolated, must exhibit some temporal connection or continuity over time.⁴

In this case, the State alleges that the incidents of racketeering activity were _____[Charge elements of substantive crimes or, if already charged, remind jurors of those definitions].⁵ The State must prove beyond a reasonable doubt that defendant committed [at

trial judge should use the Model Jury Charge on Conspiracy. See N.J.S.A. 2C:5-2.

² Webster's New World Dictionary at 683 (3d College Edition 1988).

³ The statute excludes from the 10 year period any time the defendant spent in prison. N.J.S.A. 2C:41-1(d)(1). If this is relevant in a case, the parties and trial court should discuss a way to inform the jury of that fact without unduly prejudicing the defendant.

⁴ State v. Ball, 141 N.J. 142, 167-69 (1995).

⁵ The crimes or conduct which are eligible for racketeering activity are set forth in N.J.S.A. 2C:41-1a(1) and (2). Note that N.J.S.A. 2C:41-1a(1) was amended in 1995, 1999, 2003, 2005 and 2007 to add various crimes to those eligible for racketeering activity. Inclusion in the indictment of a crime which was not in effect at the time of the alleged offense could raise an ex post facto issue, at least in the absence of a continuing crime.

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least two of] these crimes and that the crimes he/she committed were a continuing series of crimes that constitute a pattern of racketeering. You must unanimously agree about the crimes defendant committed.

OR

The first element that the State must prove beyond a reasonable doubt is that defendant received income derived, directly or indirectly, through his/her personal collection of an unlawful debt.⁶ Income is defined as money or other gain received by an individual or corporation for, among other things, labor, for services, from property, from investment or from operations.⁷ Unlawful debt means a debt which was incurred or contracted in gambling activity which was in violation of the law of the United States, a state or political subdivision or which is unenforceable under state or federal law in whole or in part as to principal or interest because of the laws relating to usury.⁸

In this case, the State alleges that the defendant _____ (set forth allegations of collection of unlawful debt).

The second element that the State must prove beyond a reasonable doubt is that defendant [used] [invested], directly or indirectly, [any part of the income] [proceeds from the income] [to acquire any interest in] [to establish] [to operate] an enterprise.

The term enterprise means any individual, sole proprietorship, partnership, corporation, association, or other entity or group of individuals associated in fact although not a legal entity.⁹ It includes illicit as well as licit enterprises and governmental as well as other entities.

There does not need to be a distinct, ascertainable structure to constitute an enterprise. Rather, the term embodies any group of persons associated in fact and includes traditional organized crime groups, with internal command systems or structures, as well less organized and non-

⁶ The statute makes reference to the defendant being a “principal” as set forth in N.J.S.A. 2C:2-6. It is unclear what the Legislature meant, since N.J.S.A. 2C:2-6 is the accomplice liability provision, but it seems that the legislation was intended to limit liability to those defendants who personally collect the unlawful debt.

⁷ Webster’s New World Dictionary at 683 (3d College Edition 1988).

⁸ See N.J.S.A. 2C:41-1e.

⁹ See N.J.S.A. 2C:41-1c.

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traditional criminal groups. While the term is broad, it targets only organized crime type activities that are substantial in nature.¹⁰

The enterprise must have an organization, the hallmark of which consists in the kinds of interactions that become necessary when a group, to accomplish its goal(s), divides among its members tasks that are necessary to achieve a common purpose. The division of labor and the separation of functions undertaken by the participants serve as the distinguishing marks of the enterprise because when a group divides and assembles its labors in order to accomplish its criminal purposes, it must necessarily engage in a high degree of planning, cooperation and coordination, and, in effect, constitute itself as an organization.¹¹

Evidence of an ascertainable structure will support an inference that the group engaged in carefully planned or highly coordinated criminal activity and thus, will support the conclusion that an enterprise existed. But apart from an organization's structure, the focus of the evidence must be on the number of people involved, their knowledge of the objectives of the association, how they associated with each other, whether they each performed discrete roles in carrying out the scheme, the level of planning involved, how decisions were made, the coordination involved in implementing decisions and how frequently the group engaged in incidents or committed acts of racketeering activity and the length of time between the acts.¹²

[CHARGE ONLY WHEN PURCHASE OF SECURITIES ALLEGED]

A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer or of assisting another to do so, shall not be unlawful provided that the sum total of the securities of the issuer held by the purchaser, the members of his/her family and his/her or their accomplices [in any pattern of racketeering activity] [in the collection of an unlawful debt] does not amount in the aggregate to 1% of the outstanding securities of any one class, or does not, either in law or in fact, empower the holders of the securities to elect one or more directors of the issuer.

¹⁰ State v. Ball, 141 N.J. 142, 161 (1995), cert. denied sub nom. Mocco v. New Jersey, 516 U.S. 1075, 116 S.Ct. 779 (1996).

¹¹ State v. Ball, 141 N.J. at 162.

¹² State v. Ball, 141 N.J. at 162-63.

[STATUTORY INFERENCE]¹³

If it is established that over half the defendant's aggregate income for a period of two or more years immediately preceding the investment was derived from a pattern of racketeering activity, then you may infer that the investment included income derived from a pattern of racketeering activity.

An inference is a deduction of fact that may be drawn logically and reasonably from another fact or group of facts established by the evidence. Whether or not an inference should be drawn is for you to decide using your own common sense, knowledge and everyday experience. Ask yourselves is it probable, logical and reasonable. However, you are never required or compelled to draw an inference. You alone decide whether the facts and circumstances shown by the evidence support an inference and you are always free to draw or not to draw an inference. If you draw an inference, you should weigh it in connection with all the other evidence in the case keeping in mind that the burden of proof is upon the State to prove all the elements of the crime beyond a reasonable doubt.

[CHARGE IN ALL CASES]

The third element that the State must prove beyond a reasonable doubt is that the enterprise engaged in trade or commerce in New Jersey or that the activities affected trade or commerce in New Jersey.¹⁴ The terms "trade or commerce" include any type of economic activity that relates to services or commodities.

The fourth element that the State must prove beyond a reasonable doubt is that defendant acted purposely or knowingly. A person acts purposely with respect to the nature of his/her conduct or the result of that conduct if it is his/her conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if the person is aware of the existence of such circumstances or believes or hopes that they exist. "With purpose," "designed," "with design," or equivalent terms have the same meaning.

¹³ The statute speaks in terms of "rebuttable presumption" but pursuant to N.J.R.E 303(c), it has been changed to inference.

¹⁴ State v. Casilla, 362 N.J. Super. 554, 565 (App. Div.), certif. denied, 178 N.J. 251 (2003) (State must prove that enterprise engaged in trade or commerce in New Jersey or affected trade or commerce in New Jersey or affected trade or commerce in New Jersey).

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A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that the conduct is of that nature or that such circumstances exist or the person is aware of a high probability of their existence. A person acts knowingly with respect to a result of the conduct if he/she is aware that it is practically certain that the conduct will cause a result. “Knowing,” “with knowledge,” or equivalent terms have the same meaning.

Purposely and knowingly are states of mind that cannot be seen and can only be determined by inference from conduct, words or acts. Therefore, it is not necessary that the State produce witnesses to testify that a defendant said that he/she purposely or knowingly did something. His/Her purpose or knowledge may be gathered from his/her acts and conduct, from all that he/she said and did at the particular time and place, and from all the surrounding circumstances reflected in the testimony [and evidence adduced at trial].

If the State has proven every element beyond a reasonable doubt, then you must find the defendant guilty. If the State has failed to prove any element beyond a reasonable doubt, then you must find the defendant not guilty.

[CHARGE IF APPROPRIATE]¹⁵

If you find defendant guilty of racketeering beyond a reasonable doubt, you must go on to consider whether the State has proven beyond a reasonable doubt that the pattern of racketeering activity involved a crime of violence. Here, the State alleges that the racketeering activity involved the violent crime of _____.¹⁶

If you find that the State has proven beyond a reasonable doubt that the racketeering activity involved the violent crime of _____, then you must find defendant guilty of racketeering involving a crime of violence. If you find that the State has failed to prove beyond a reasonable doubt that the racketeering activity involved the violent crime of _____,

¹⁵ The racketeering statute provides that racketeering is ordinarily a second degree crime, but is a first degree crime when the defendant violates any provision of N.J.S.A. 2C:41-2 which involves a crime of violence, the use of firearms or a crime of the first degree. N.J.S.A. 2C:41-3a.

¹⁶ Presumably, the “crimes of violence” already have been charged to the jury. If not, the trial court must charge the jury on the elements of the crimes. See State v. MacIlwraith, 344 N.J. Super. 544, 548 (App. Div. 2001) (analyzing similar element in terroristic threats offense).

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then you must find defendant not guilty of racketeering involving a crime of violence and guilty of racketeering.

OR

If you find defendant guilty of racketeering beyond a reasonable doubt, you must go on to consider whether the State has proven beyond a reasonable doubt that the pattern of racketeering activity involved the use of a firearm. A firearm means [choose appropriate] any handgun, rifle, shotgun, machine gun, automatic or semi-automatic rifle, or any gun, device or instrument in the nature of a weapon from which may be fired or ejected any solid projectable ball, slug, pellet, missile or bullet, or any gas, vapor or other noxious thing, by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances. It shall also include, without limitation, any firearm which is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person. Here, the State alleges that defendant used a _____.

If you find that the State has proven beyond a reasonable doubt that the racketeering activity involved the use of a _____, then you must find defendant guilty of racketeering involving the use of a firearm. If you find that the State has failed to prove beyond a reasonable doubt that the racketeering activity involved the use of _____, then you must find defendant not guilty of racketeering involving the use of a firearm, and guilty of racketeering.