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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent-Appellant,

-against-

No. 82

V. REDDY KANCHARLA,

Appellant-Respondent.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent-Appellant,

-against-

No. 83

VINCENT BARONE,

Appellant-Respondent.

20 Eagle Street
Albany, New York 12207
March 26, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: 82 and 83.

2 Counselor?

3 MR. SHECHTMAN: Good afternoon, Your Honor.

4 Paul Shechtman; I represent the appellant Reddy
5 Kancharla in this matter. I'm going to argue in - -
6 - I'm going to ask to reserve two minutes.

7 CHIEF JUDGE LIPPMAN: Two minutes, sure.
8 Go ahead, counselor.

9 MR. SHECHTMAN: And I'm going to try, in
10 what I think is twelve minutes allotted to me, to
11 touch on a sufficiency issue, a spillover prejudice
12 issue, and this issue related to the steel count,
13 which I actually think is important to the
14 resolution.

15 CHIEF JUDGE LIPPMAN: Talk about the
16 sufficiency issue first.

17 MR. SHECHTMAN: And let me just say the
18 following. There's a jurisdictional question as to
19 that, and Mr. Lankler will - - - will address it.

20 CHIEF JUDGE LIPPMAN: Okay.

21 MR. SHECHTMAN: We may be sort of backwards
22 in going to the merits first, but - - -

23 CHIEF JUDGE LIPPMAN: That's okay.

24 MR. SHECHTMAN: - - - I hope you'll allow
25 it.

1 Look, the sufficiency question here is a
2 simple one, which is, is this a criminal enterprise.
3 And I think the answer to that is plainly no. And
4 Your Honor, your opinion in Western Electric (sic)
5 said, well, in theory, there may be criminal
6 enterprises that don't have a hierarchical structure.
7 But I think the following is true: If you look at
8 all of the cases in the lower court where there's
9 been a criminal enterprise, there's been a
10 hierarchical structure.

11 JUDGE SMITH: But isn't there one here?

12 MR. SHECHTMAN: There isn't, Your Honor, at
13 - - - at all.

14 CHIEF JUDGE LIPPMAN: What about the
15 corporation itself?

16 JUDGE GRAFFEO: This business and the
17 corporation - - -

18 MR. SHECHTMAN: No, look - - -

19 JUDGE GRAFFEO: - - - didn't have
20 management?

21 MR. SHECHTMAN: Oh, it - - - it did, and
22 that's one of the problems in this case.

23 CHIEF JUDGE LIPPMAN: So why is that not a
24 hierarchical structure?

25 MR. SHECHTMAN: Because the business had a

1 hierarchical structure. The question here is did the
2 illegal activities have a hierarchical structure,
3 because - - -

4 JUDGE SMITH: You don't think a jury could
5 infer that everybody in that company doing anything
6 legally - - - legal or illegal, was under Kancharla's
7 supervision?

8 MR. SHECHTMAN: It would be - - - it's a
9 bad rule, Your Honor, if you say the following:
10 There is no proof that he knew anything about the
11 field tests that were mostly for the Yankee Stadium
12 job; I think there's one other job. But there's no
13 proof that he knew anything about field tests.

14 JUDGE SMITH: But that doesn't necessarily
15 mean - - - I mean, I under - - - and maybe they
16 couldn't convict him of the steel test, but - - - but
17 there's - - - but if you - - - what you do have is
18 you have evidence of a lot of phony tests, some of
19 which he knew about and some of which he didn't. And
20 he's the head of the company.

21 MR. SHECHTMAN: But that - - -

22 JUDGE SMITH: Isn't that a hierarchical
23 structure - - -

24 MR. SHECHTMAN: But that's an awfully - - -

25 JUDGE SMITH: - - - with an illegal

1 activity?

2 MR. SHECHTMAN: - - - it's an awfully
3 dangerous proposition. I - - - make it a law firm,
4 make it this court, right - - -

5 CHIEF JUDGE LIPPMAN: You agree that you
6 can - - - that there can be cases where that can be
7 inferred - - -

8 MR. SHECHTMAN: Oh, if - - -

9 CHIEF JUDGE LIPPMAN: - - - that there's an
10 ascertainable structure.

11 MR. SHECHTMAN: If the answer is can there
12 be circumstantial evidence, of course. Right? You
13 couldn't - - - you - - -

14 CHIEF JUDGE LIPPMAN: But why can't we
15 infer here that they all knew about this?

16 MR. SHECHTMAN: Because there is - - -
17 there's nothing to infer it from. There is no
18 evidence that Mr. Kancharla knew anything about bad
19 field tests. There's no evidence that he knew
20 anything about compressive strength - - -

21 JUDGE GRAFFEO: He didn't know that
22 numerous people could adjust some of the components
23 on the computer - - -

24 MR. SHECHTMAN: He - - -

25 JUDGE GRAFFEO: - - - in those tests?

1 MR. SHECHTMAN: Look, there's no evidence
2 of that, but I don't - - - and so I suppose you could
3 - - - he was involved in - - - in asking for the
4 computer to be developed. But even so, Your Honor -
5 - -

6 JUDGE GRAFFEO: I mean - - -

7 MR. SHECHTMAN: - - - there are situations
8 in which a test result gets put in wrong and you can
9 change it. It doesn't mean that you know that
10 results are being altered improperly. There's not a
11 single - - -

12 JUDGE GRAFFEO: But the bill - - - the
13 bills were hundreds, thousands of dollars less than
14 the full field test, right? They were, like, 3-, 400
15 dollars instead of - - -

16 MR. SHECHTMAN: Oh, but that - - -

17 JUDGE GRAFFEO: - - - 4,000 dollars?

18 MR. SHECHTMAN: - - - that - - - that cuts
19 in my favor. Those bills weren't altered ever. All
20 right? That's the mix design part of this test,
21 right? And those bills went out for 300 dollars for
22 tests that, if you did it right, cost 4,000 dollars.
23 That's my point on the mix designs that there can't
24 be that I think we have a viable - - -

25 JUDGE SMITH: If they were so blatant about

1 it, it couldn't have been have been criminal?

2 MR. SHECHTMAN: Say - - - pardon?

3 JUDGE SMITH: You're saying they were so
4 blatant about it, they couldn't have thought it was
5 criminal.

6 MR. SHECHTMAN: Well, I'm saying the
7 following. Usually, if you falsify tests, it's in
8 order to get a higher price, right? Here those tests
9 were done, not in accordance with the regulations, in
10 accordance with the way I think every company in the
11 city was doing them, right? But they weren't - - -

12 CHIEF JUDGE LIPPMAN: Is that relevant,
13 that every company in the city was doing it?

14 MR. SHECHTMAN: I think it's relevant in
15 two senses. One, I think it's relevant as to whether
16 he intended to defraud anybody. But two, what he
17 told Mr. Thumma, when he asked him to do this, is we
18 can do it this way; everybody does it. Right? And
19 it'll get caught when they do the compressive tests.
20 So I think the jury should have heard about it.

21 But Your Honor, my point is a more
22 important one because it goes to Judge Smith's
23 question. There is no evidence of any meeting of
24 this enterprise. There's no evidence that anyone
25 ever gave directions. There's no evidence of any

1 plan. Right? You had, as your star witness, Thumma,
2 the head of - - -

3 JUDGE SMITH: Well, who - - - well, he said
4 that Kancharla told him to sign these things.

5 MR. SHECHTMAN: He - - - what's "these
6 things", Your Honor, respectfully? "These things"
7 are the mix design reports. There's no doubt that
8 Mr. Kancharla was involved in that. He inherited the
9 mix design program; he continued it. He asked Mr.
10 Thumma to stamp them after he was stamping them.

11 CHIEF JUDGE LIPPMAN: Counselor, are you
12 saying - - -

13 MR. SHECHTMAN: But Your Honor, can I
14 finish? My apology.

15 CHIEF JUDGE LIPPMAN: Go ahead.

16 MR. SHECHTMAN: You have four other schemes
17 here, and Thumma knew nothing about any of them,
18 right?

19 CHIEF JUDGE LIPPMAN: But counsel - - -

20 MR. SHECHTMAN: And he - - -

21 CHIEF JUDGE LIPPMAN: But counsel, let - -
22 -

23 MR. SHECHTMAN: - - - is the head of the
24 lab.

25 CHIEF JUDGE LIPPMAN: Counsel, let me ask

1 you this. Are you saying, though, when you say that
2 there's - - - there's no evidence, you can't prove
3 he knew it, are you saying that there has to be, in
4 order to have a criminal enterprise, someone on the
5 inside who says this one knew, that one knew, that's
6 what's going on? Is that the only way you can get a
7 criminal enterprise - - -

8 MR. SHECHTMAN: Judge - - -

9 CHIEF JUDGE LIPPMAN: - - - that someone
10 has to give it up?

11 MR. SHECHTMAN: Judge, you can have - - -

12 CHIEF JUDGE LIPPMAN: Or can you infer - -
13 -

14 MR. SHECHTMAN: Judge, you can have
15 documents, right? You can have other ways of
16 inferring, but nothing turns out to be nothing. If I
17 said what proof is there that he knew about the
18 compressive-strength test - - - that to me is the - -
19 - is the single most egregious aspect of this. They
20 changed those numbers falsely. All right? There's
21 not a whit of evidence that he knew about it.
22 There's not a whit of evidence that Thumma, the lab
23 director, knew about it. He was the insider, right?
24 It was his lab. It was his numbers that were being
25 changed. So in the end - - -

1 JUDGE GRAFFEO: So why were they being
2 changed if nobody gave the direction for it?

3 MR. SHECHTMAN: Well, they were being
4 changed because I think Mr. Caruso changed them, and
5 did it on his own, right? I mean, that was - - -
6 that was his crime, right? And he changed them
7 because these results - - -

8 JUDGE SMITH: You're going to tell me it's
9 a dangerous rule again, but does it - - - how likely
10 is it that if - - - if we know that Kancharla is
11 signing tests that - - - that say - - - that say
12 things happened that didn't happen on the design mix
13 side, and Caruso is meanwhile altering results on the
14 other, that Caruso - - - that Kancharla has no idea
15 what Caruso is doing?

16 MR. SHECHTMAN: Can I ask you a question,
17 Judge? And I know I'm not supposed to be asking in
18 this direction, but how unlikely is it that Thumma
19 didn't know? And we know he didn't know, because he
20 testified that he didn't know. He is the lab
21 director. And one of the thing - - - and when
22 Kancharla and Thumma had the one criminal
23 conversation that there is in this record, what was
24 said to Thumma was this: We can do it this way.
25 Right? We can do it without the preliminary tests

1 that are required by the rules, because when they do
2 the testing in the field, they'll catch any problems.

3 Now, the People's theory is that the reason
4 that there were changes in the field was - - - was to
5 hide the problems. But that's not what Kancharla
6 told Thumma; that's not what Thumma believed. And so
7 the response to the question is - - - can't we infer
8 that he knew is Thumma didn't know. That's the lab
9 director of what is supposedly a corrupt lab. And if
10 you get yourself in the business of saying we can
11 infer from nothing, that's a dangerous business.
12 Look, I don't want to - - - I don't - - -

13 CHIEF JUDGE LIPPMAN: But you're inferring
14 from a lot of things that are happening here. It's
15 not from nothing.

16 MR. SHECHTMAN: Well - - -

17 CHIEF JUDGE LIPPMAN: You're seeing in all
18 these different so-called schemes - - - you're seeing
19 different things happening - - -

20 MR. SHECHTMAN: Well, what - - -

21 CHIEF JUDGE LIPPMAN: - - - and isn't there
22 the ability to put it together and say, gee, you
23 know, I would - - - I would quite reasonably infer
24 that they all knew what was going on.

25 MR. SHECHTMAN: Judge, what are you putting

1 together? Certified inspectors. Two inspectors on a
2 job in Queens for 630 dollars. Steel inspections,
3 right? Inspections for basically three jobs done
4 together in South Carolina, right? Field tests, a
5 Yankee Stadium job, and one day, one person at Hunter
6 College. It's not a pervasive pattern.

7 The First Department tells us that it's
8 less than one-half of one percent of revenue. If you
9 had something that was ninety-eight percent of
10 revenue, I suppose you could say to yourself I'll bet
11 the CEO knows about it. But it's awfully dangerous
12 in a large organization; this is 20 million dollars
13 and 250 employees. It's awfully dangerous to say
14 because two of our people on a - - - on a school job
15 were found to be unqualified at 630 dollars, the CEO
16 had to know about it; because field tests weren't
17 done at Yankee Stadium, the CEO had to know about it.
18 There's no evidence that he did, right, on any of
19 those things. And it's one thing to talk about
20 people banding together; it's another thing to make
21 up bands.

22 JUDGE PIGOTT: Was he charged individually
23 on the field test?

24 MR. SHECHTMAN: No, was he charged
25 individually on the compressive strength test? No.

1 Was he charged individually on the certified
2 inspectors? Yes, and it's - - - and he was acquitted
3 or - - - because it's a pattern act he wasn't found -
4 - - found liable. Right? But these are not the crux
5 of this - - -

6 CHIEF JUDGE LIPPMAN: You're saying there
7 aren't enough incidents here to put it together in a
8 way that gives you the - - -

9 MR. SHECHTMAN: I'm saying - - -

10 CHIEF JUDGE LIPPMAN: - - - inference of a
11 criminal enterprise?

12 MR. SHECHTMAN: I'm saying there's not - -
13 - the only conversation - - - look, the People's view
14 is the following. This was such a well-entrenched
15 organization that they didn't have to talk to each
16 other, right? Maybe. All right. But you have a
17 situation in which you have - - - you have the star
18 witness, you would think, the head of the lab in a
19 corrupt lab, and he says there were meetings every
20 week. Was there ever a discussion of criminal
21 activity at those? No. What did Mr. Kancharla tell
22 you? Mr. Kancharla said run the best lab you could.
23 What'd you try to do? Run a state of the art lab.
24 How many different testing projects did you have?
25 How many kinds of testing? A dozen. Right? Was

1 there any problem in this, this, this? This, this,
2 being things like asbestos, right?

3 Now, I know the People's response, well,
4 you don't have to corrupt all of it. Right? But
5 you're asking to infer, from very little, that the
6 head, the CEO had to know and had to be the leader in
7 a case where there's no proof. I mean, he was the
8 leader at trial, right? There was a board that put
9 him - - -

10 JUDGE SMITH: He was convicted - - - and
11 apart from mix design, he was convicted on the steel
12 inspections test?

13 MR. SHECHTMAN: Yes, and - - - and Judge,
14 here's what we know about that, and that's why I say
15 I think it's so, so important. And look, I think
16 this is a hard case for this court in the following
17 sense. In many ways, it's not a law case. You know,
18 there's a lot of facts - - - facts here, and that
19 makes it hard.

20 But we know the following. We know that
21 all of the invoices and all of the bad reports were
22 submitted to these companies by mid-September, right?
23 And we know that all of the witnesses say there's no
24 evidence that Mr. Kancharla was involved in any of
25 that. So - - - and he was acquitted on all of those.

1 No involvement in any of the reports. No involvement
2 in any of the invoices.

3 JUDGE SMITH: What was he convicted of in
4 the steel - - - in the steel inspection?

5 MR. SHECHTMAN: One scheme to defraud. And
6 if you ask me what he did, I think what he did,
7 right, was to call up and say, hey, look, I
8 understand we're having a billing dispute. We've
9 offered you a twenty percent discount. You haven't
10 accepted it. What do you think - - - we don't have
11 any guidelines. What do you want us to do? Right?
12 That's the only evidence on this - - -

13 JUDGE SMITH: The jury presumably found
14 that he tried to collect for bills that he knew were
15 fraudulent.

16 MR. SHECHTMAN: In a case in which they
17 acquitted him of every bill and every invoice and
18 there's no proof that he knew. Right? And the
19 reason they convicted him, I think, is because you
20 had massive spillover prejudice from an enterprise
21 corruption charge that should not have existed. You
22 can't try one of these cases, right, in which the
23 common - - - the drum beat is fraud, enterprise
24 corruption, leader.

25 JUDGE PIGOTT: Well, as I understand it,

1 when it was given to the jury, they - - - they
2 decided the individual ones first and the enterprise
3 last.

4 MR. SHECHTMAN: That's true, but that
5 shouldn't matter, Judge, respectfully. In other
6 words, they got the evidence all together, right, so
7 that as they're going through those, they know the
8 drum beat. And all - - - everything he was acquitted
9 of - - - that certified inspection scheme, there's no
10 evidence. The twenty-one of the twenty-two steel
11 counts, there's no evidence. So I understand we all
12 say they're mixed verdicts; they must be discerning.
13 But respectfully, I mean, I tried this case; my
14 daughter could have won those counts, right? There's
15 no evidence as to them, and so - - -

16 CHIEF JUDGE LIPPMAN: Okay, counselor.

17 MR. SHECHTMAN: - - - so where you're hurt
18 is the scheme to defraud, and you're hurt there
19 because he's the leader of an enterprise.

20 CHIEF JUDGE LIPPMAN: Okay. Thank you,
21 counsel. Let's hear from your co-counsel.

22 Counselor, do you want any rebuttal time?

23 MR. LANKLER: Two minutes, please.

24 CHIEF JUDGE LIPPMAN: Two minutes of your
25 six. Go ahead.

1 MR. LANKLER: Thank you, Judge. May it
2 please - - -

3 CHIEF JUDGE LIPPMAN: You're on.

4 MR. LANKLER: May it please the court. My
5 name is Andrew Lankler. I represent Vincent Barone.

6 Mr. Shechtman has argued that portion
7 regarding - - -

8 CHIEF JUDGE LIPPMAN: Right.

9 MR. LANKLER: - - - legal sufficiency. I
10 wanted to be very clear; we completely concur and
11 agree with Mr. Shechtman's arguments. But we would
12 also submit that the Appellate Division was correct
13 in ruling that the verdict was - - - in addition to
14 being legally sufficient, was in fact, against the
15 weight of the evidence.

16 And I'd like to spend part of my time
17 talking about that, because I think a careful reading
18 of the opinion demonstrates that the majority - - -

19 JUDGE SMITH: The majority seems to say
20 that there's no evidence that either of these guys
21 did - - - knew anything about any bad tests.

22 MR. LANKLER: Well, the - - -

23 JUDGE SMITH: Did they really mean that?

24 MR. LANKLER: You're talking about the
25 first sentence - - -

1 JUDGE SMITH: Yes.

2 MR. LANKLER: - - - of the opinion? I
3 struggle with that too. I have to confess, I
4 struggle with that too. But I do think that the
5 reality is that this is a deeply factual analysis.
6 And - - - and if you look at the way that they're
7 analyzing the elements of enterprise corruption - - -
8 and I'd submit that they absolutely applied the
9 appropriate standard - - - then if you look at the
10 first element, which is common purpose, what you see
11 is an analysis of things like Testwell, that the
12 River Place client was more than satisfied with the
13 testing work performed by Testwell, that the evidence
14 demonstrated that the workers who did not have
15 appropriate certification were, in fact, paired with
16 workers who did, that the evidence concerning
17 instances where uncertified workers were used were
18 extremely rare.

19 JUDGE SMITH: So what is - - - what is the
20 - - - just focus on the question that I think you're
21 arguing. You're saying that even if we disagree with
22 the Appellate Division's analysis of enterprise
23 corruption, and we think there was sufficient
24 evidence, you say that independently they found that
25 it wasn't proved.

1 MR. LANKLER: Okay. I believe that
2 independently they found it wasn't proved.

3 JUDGE SMITH: By the weight of the
4 evidence.

5 MR. LANKLER: Correct.

6 JUDGE SMITH: And what exactly says that in
7 the opinion?

8 MR. LANKLER: To me, it's the factual
9 analysis that exists within the - - - within the
10 opinion itself. A classic example, Mr. Shechtman
11 touched on it, which is that - - - that the court
12 looks at the schemes, and what it con - - - what it
13 concludes is, is that the value of the schemes is
14 equal to less than one-half of one percent of the
15 company's total revenue. That's a - - - that is a -
16 - - that is a finding of fact.

17 JUDGE SMITH: But isn't it also - - -

18 JUDGE GRAFFEO: There are still - - -

19 JUDGE SMITH: Is it implici - - -

20 JUDGE GRAFFEO: - - - some rather serious
21 breaches here, in some cases - - -

22 MR. LANKLER: I don't - - -

23 JUDGE GRAFFEO: - - - don't you think?

24 MR. LANKLER: I don't think - - -

25 JUDGE GRAFFEO: I mean - - -

1 MR. LANKLER: Well - - -

2 JUDGE GRAFFEO: - - - checking the welding
3 joints, that can be pretty serious in a building.

4 MR. LANKLER: And - - - and - - -

5 JUDGE GRAFFEO: It shouldn't just be a - -
6 -

7 MR. LANKLER: - - - there's an awful lot of
8 evidence - - -

9 JUDGE GRAFFEO: - - - financial
10 consideration, should it?

11 MR. LANKLER: Well, there's an awful lot of
12 evidence - - - Mr. Barone is not charged with not
13 checking the - - - with failing to check the welds.

14 JUDGE GRAFFEO: No, but I'm saying that - -
15 -

16 MR. LANKLER: I - - - I hear you. Testing
17 is serious.

18 JUDGE GRAFFEO: - - - I don't think, as a
19 CEO, you should just say I don't have to worry about
20 what my people are doing because that's not a major -
21 - -

22 MR. LANKLER: I don't - - - I - - -

23 JUDGE GRAFFEO: - - - part of my revenue.

24 MR. LANKLER: I don't believe that - - -
25 Mr. Bar - - - Mr. Shechtman can address Mr.

1 Kancharla's duties on that. I can tell you that the
2 defense for Mr. Barone, particularly with respect to
3 compressive tests, was that in fact the - - - the - -
4 - the steps were taken to try and correct results.
5 And - - -

6 JUDGE PIGOTT: Well, the compression test,
7 is that the one where it takes - - - it takes twenty-
8 eight days to do it and you guys were doing it in
9 four?

10 MR. LANKLER: There are - - - there are - -
11 - it's a little bit more complicated with that - - -
12 than that, but yes, there are - - - when concrete is
13 tested, it's tested at different intervals, seven,
14 fourteen, twenty-eight, and fifty-six. And there
15 were - - - there were efforts that were made to
16 measure concrete at - - - after there were breaks on
17 the beams. And that's why Mr. Barone - - - that's
18 why we submit, and submitted to the jury, that Mr.
19 Barone made the changes that he did. And that's why
20 it's significant that he wasn't changing results that
21 were failing results to passing results.

22 JUDGE PIGOTT: Well, there's also an offer
23 of proof with respect to what I would call an
24 everybody-does-it defense that that was essentially
25 the standard in the industry was not to follow - - -

1 MR. LANKLER: That related to mix design,
2 Judge.

3 JUDGE PIGOTT: Oh, that was mix design?

4 MR. LANKLER: Yeah, correct, it's - - -

5 JUDGE PIGOTT: Okay.

6 MR. LANKLER: - - - it's mix design, not to
7 - - - not to flexural changes. But in any event, the
8 reality is, if you look at the opinion, I think that
9 the Appellate Division did exactly what you asked the
10 Appellate Division to do in Bleakley (ph.), which is
11 that the Appellate Division takes a look at the
12 entire record, and it makes a determination whether
13 or not the trial was appropriately conducted, whether
14 or not the evidence is sufficient, and also whether
15 or not the evidence was persuasive. And - - - and I
16 don't think that the - - - that the statement made by
17 Judge Catterson that this was legally insufficient
18 and against the weight of the evidence, I don't think
19 for a second that the use of the term "weight of the
20 evidence" was a throwaway.

21 CHIEF JUDGE LIPPMAN: Okay, counselor.

22 MR. LANKLER: Thank you very much.

23 CHIEF JUDGE LIPPMAN: Thank you. You'll
24 have your rebuttal.

25 Counselor?

1 MS. RETTEW: May it please the court. My
2 name is Amyjane Rettew, and I'm here on behalf of the
3 respondent-appellant. And I would also like to
4 reserve two minutes - - -

5 CHIEF JUDGE LIPPMAN: No, no, you don't - -
6 -

7 MS. RETTEW: - - - of my time.

8 CHIEF JUDGE LIPPMAN: - - - you don't get
9 to reserve, counselor.

10 MS. RETTEW: All right. Then I'll do it
11 all at once.

12 CHIEF JUDGE LIPPMAN: Okay, use up all your
13 time.

14 Counsel, let me ask you a question.
15 Where's the ascertainable structure?

16 MS. RETTEW: I think that you were right,
17 Your Honor, when you began by saying that the
18 structure here is modeled on and grows out of the
19 corporate structure. That's something that the
20 legislature contemplated in adopting the enterprise -
21 - -

22 CHIEF JUDGE LIPPMAN: But what - - - but in
23 answer to your adversaries, what is it, specifically,
24 that we're making that inference? We can't just say,
25 oh, there's a corporate structure, that's enough.

1 What is it that allows us to infer that the corporate
2 structure does represent something beyond the - - -
3 the criminal conduct - - -

4 MS. RETTEW: Well - - -

5 CHIEF JUDGE LIPPMAN: - - - that there's an
6 ascertainable structure?

7 MS. RETTEW: I think, in that sense, my
8 adversaries are conflating two different things.

9 CHIEF JUDGE LIPPMAN: Go ahead.

10 MS. RETTEW: The first is the question of
11 the structure, and that's proven by the insiders,
12 like Mr. Thumma and Ms. Murthy, who explain how the
13 crimes work and that they work through the hierarchy
14 of the corporation.

15 The second thing, which was proven by
16 inference in this case, is whether each defendant
17 intended to participate in the pattern of criminal
18 activity of the enterprise as a whole. So it's not
19 really the structure that's being inferred in this
20 case - - - that is an open question left by Western
21 Express - - - but something much more traditional,
22 which is what did each defendant know about the
23 enterprise within which he was committing - - -

24 JUDGE SMITH: And how much do you have to -
25 - -

1 MS. RETTEW: - - - those crimes.

2 JUDGE SMITH: How much do you have to prove
3 that Kancharla knew to - - - to make it a criminal
4 enterprise?

5 MS. RETTEW: Well, I think in terms of - -
6 - in terms of his mens rea, what you have to prove is
7 that he knew the nature of the enterprise as a whole.
8 Not every crime being committed every day - - -

9 JUDGE SMITH: Well, do you have to prove
10 that the whole enterprise was corrupt?

11 MS. RETTEW: No, I do not think that is - -
12 -

13 JUDGE SMITH: Do you have to prove that he
14 knew about all or substantially all of the corrupt
15 aspects of it?

16 MS. RETTEW: No, I don't believe we have to
17 prove that either.

18 JUDGE SMITH: Okay. So now tell me what
19 you do have to prove.

20 MS. RETTEW: I believe that we have to
21 prove that he knew the nature of the activities being
22 committed by all of his confederates, so that it - -
23 - it is necessary for the jury to infer, in a case
24 like this, that he was committing the mix design
25 crimes at the front of the scheme, knowing that his

1 confederates were backing him up - - -

2 JUDGE PIGOTT: If we had - - -

3 MS. RETTEW: - - - later on.

4 JUDGE PIGOTT: If we had a case, not this
5 one, where let's assume that there was an auto
6 company and that they had defective ignitions, and
7 people knew about it but didn't do anything about it.
8 Would that corporation be guilty of enterprise
9 corruption?

10 MS. RETTEW: I believe that it depends on
11 many things, including are all of the other very
12 rigorous requirements of this statute satisfied.
13 Just not knowing about something or not reporting it
14 - - -

15 JUDGE PIGOTT: Oh, they knew. I'll help my
16 hypothetical; they knew. They said, geez, you know,
17 there's people getting hurt out there, you know, with
18 respect to this; maybe we've got to do something.
19 And they said, no, we don't; it's a small matter. In
20 fact, we even write a letter to some of them telling
21 them if you don't stop suing us, we're going to come
22 after you.

23 MS. RETTEW: Then as I say, Judge, the
24 question would be did that knowledge of what was
25 going wrong translate into three pattern act crimes

1 by each individual that fit the statute's
2 enumeration, that are the right degree - - -

3 JUDGE PIGOTT: Oh, yes - - -

4 MS. RETTEW: - - - of crime - - -

5 JUDGE PIGOTT: But the fact of the matter
6 is you think that that - - - you know, a corporation
7 such as that could be charged with enterprise
8 corruption - - -

9 MS. RETTEW: And then do they also show - -
10 -

11 JUDGE PIGOTT: - - - even if it's a very
12 small part of - - - you know, the entire operation of
13 the corporation.

14 MS. RETTEW: Okay. So the next step would
15 be something else we have here, which is do we have
16 proof of three separate criminal ventures by the
17 enterprise as a whole, because that, of course, is
18 something that is required - - -

19 JUDGE SMITH: Yeah, but it seems you pretty
20 clearly meet - - - isn't the harder question whether
21 they - - - whether you've proven that each of these
22 people knew the nature of the enterprise and its
23 activities? Isn't that really the crux of this one?

24 MS. RETTEW: Here I think that's definitely
25 true. I think that as Judge Manzanet - - -

1 JUDGE SMITH: Suppose, as - - - Mr.
2 Shechtman seems to be saying, look, all they proved
3 as to his client is that he committed this mix design
4 fraud, and as far as he knew, every - - - I mean, we
5 can quarrel about the details, but simplify it, and
6 as far as he knew, everything else in the company was
7 clean. On those assumptions, could he be convicted
8 of enterprise corruption?

9 MS. RETTEW: Well, I don't think you can
10 get to those assumptions if you read the record - - -

11 JUDGE SMITH: Okay. That's an implicit no
12 - - -

13 MS. RETTEW: - - - and you read it in the
14 light most - - -

15 JUDGE SMITH: That's an implicit no to my
16 question, though, right? You - - - you - - -

17 MS. RETTEW: Definitely no.

18 JUDGE SMITH: Yeah, okay.

19 MS. RETTEW: And - - -

20 JUDGE SMITH: Go ahead.

21 MS. RETTEW: And I think - - -

22 CHIEF JUDGE LIPPMAN: Counsel, let me stop
23 you a second. You do have a cross-appeal?

24 MS. RETTEW: Yes. This - - -

25 CHIEF JUDGE LIPPMAN: So you can reserve -

1 - - I'm sorry. How much did you want to rebuttal?

2 MS. RETTEW: Can I - - - can I have my two
3 minutes?

4 CHIEF JUDGE LIPPMAN: You'll have your two
5 minutes.

6 MS. RETTEW: Okay.

7 CHIEF JUDGE LIPPMAN: We'll take it away
8 from what you're doing now. Fine.

9 MS. RETTEW: Thank you.

10 CHIEF JUDGE LIPPMAN: Go ahead.

11 MS. RETTEW: So to get back to it, I think
12 that the key thing here is that there is a huge
13 difference between the enterprise corruption statute
14 and the RICO statute, but that the core of the
15 problem in the Appellate Division below, what divided
16 them, is that they wanted to go beyond all those
17 requirements that are into the statute to something
18 that I think you mentioned, which is that it should
19 only apply to organizations that are wholly criminal,
20 either because they are gangs or mafia families - - -

21 JUDGE SMITH: But okay, but be a little
22 more specific on the de - - - how do you prove that
23 each of these guys, Kancharla and Barone, knew about
24 something other than the - - - than the acts they
25 were - - - the conspiracies they were proved to be

1 involved in?

2 MS. RETTEW: All right. Let's start with
3 Mr. Barone. His crime was to cover up flaws in the
4 field work, the collection process of the concrete,
5 which would have shown up in the true results, and to
6 cover up the fact that the concrete wasn't coming up
7 to the passing level on those tests. Now, a
8 legitimate corporate executive of a testing company
9 has - - - that hasn't been corrupted in this way, at
10 the pre-test stage, has no motive to do that at all.
11 In fact, the company exists to find those places
12 where the - - - where the concrete isn't turning out
13 to be what it's supposed to be.

14 JUDGE SMITH: You're saying you don't do
15 that scheme unless you know there are other schemes
16 going on?

17 MS. RETTEW: There's no motive for it, none
18 at all. And by the same token, you can't be in Mr.
19 Kancharla's position of skipping the critical pre-
20 testing every time, for years on end - - -

21 JUDGE SMITH: But Mr. - - -

22 MS. RETTEW: - - - without knowing - - -

23 JUDGE SMITH: - - - Mr. Shechtman's theory
24 is, oh, he thought that was okay because he had such
25 confidence in the post-testing that we didn't need

1 the pre-testing.

2 MS. RETTEW: No, the post-testing would
3 reveal flaws in the concrete that would reveal the
4 mix design scheme.

5 JUDGE SMITH: Well, that's - - - that's
6 what you - - - but was that proved or was it - - - he
7 says all those post-tests were fine. He doesn't
8 understand why they were - - - why they were faking
9 them up and Kancharla had nothing to do with it.

10 MS. RETTEW: Okay. Then what you should
11 look at, Judge, is the Freedom Tower example. In the
12 Freedom Tower example, they skip that critical pre-
13 testing. They went to the next stage, and the Port
14 Authority began doing its own field testing and its
15 own lab testing, and immediately, they found that
16 things were not right. At the very same time,
17 Testwell's reports from the field and the lab were
18 showing everything was perfect. So that is how you
19 know that the three schemes are working together.
20 You see that Mr. Barone has no motive.

21 JUDGE SMITH: Field testing, mix design,
22 and - - - and the one that I can never remember - - -

23 MS. RETTEW: The compressive strength - - -

24 JUDGE SMITH: - - - a long, long name,
25 yeah.

1 MS. RETTEW: Compressive strength test.

2 JUDGE SMITH: Yeah.

3 MS. RETTEW: So and - - -

4 CHIEF JUDGE LIPPMAN: And your argument is
5 they had to be working together?

6 MS. RETTEW: They - - - they provide - - -

7 CHIEF JUDGE LIPPMAN: Or that we can infer
8 that they - - -

9 MS. RETTEW: They provide the motive for
10 each other. One set of crimes provides the motive
11 for the later crime. So yes, they work together.
12 And nobody - - - particularly, I think, this emphasis
13 on the small amount of money involved is actually
14 something that cuts against the defense argument,
15 because nobody would commit a felony, no vice
16 president of a testing company, like Mr. Barone,
17 would commit a felony to hide a 600-dollar mistake.

18 CHIEF JUDGE LIPPMAN: So what is the
19 significance then, if it's only five percent, or
20 whatever it is, a small amount of the revenue?

21 MS. RETTEW: I don't believe that there is
22 any legal relevance to that at all. I think that the
23 court became confused by the fact that they focused
24 only on the monetary amount for the tests - - -

25 CHIEF JUDGE LIPPMAN: But it - - -

1 MS. RETTEW: - - - themselves - - -

2 CHIEF JUDGE LIPPMAN: But it is significant
3 if it's - - - if it's just a - - - if they go about
4 their business and these things that came up had very
5 little to do with the overall health of the business
6 - - -

7 MS. RETTEW: Oh, I agree.

8 CHIEF JUDGE LIPPMAN: - - - it is of some
9 relevance, right?

10 MS. RETTEW: I agree that if there was - -
11 - if it was not just that it was a small amount - - -
12 although 100,000 dollars a year is not a small amount
13 - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
15 if it's not a significant part of their business.

16 MS. RETTEW: Yes, if it was, in fact, shown
17 to be simply ad hoc, occasional. If what we showed -
18 - - if the proof showed that sometimes somebody would
19 forget some cylinders in the store room and just not
20 do the test and then - - -

21 CHIEF JUDGE LIPPMAN: What does the proof
22 show that - - - that magnifies this beyond the small
23 amount of the monetary value?

24 MS. RETTEW: It shows that it's
25 institutionalized, it's organized in the organized

1 context.

2 CHIEF JUDGE LIPPMAN: Is it essential to
3 the well-being of their business?

4 MS. RETTEW: I'm not sure, Your Honor, that
5 I know what you mean by "essential to the well-being
6 of the business". It certainly was - - -

7 CHIEF JUDGE LIPPMAN: I mean, is this a
8 matter of great concern to them, or is this just
9 something happening that's kind of not central to the
10 corporat - - -

11 MS. RETTEW: Oh, I believe that across the
12 board the common purpose here was essential, because
13 what they were doing in each of these schemes,
14 including the steel scheme, was cutting labor costs,
15 in the mix design cutting out all of the labor
16 altogether and just making up a phony test report
17 when no tests were done at all. But each scheme
18 worked exactly the same way: cutting labor, cutting
19 equipment, sending - - -

20 CHIEF JUDGE LIPPMAN: So it's their modus
21 operandi - - -

22 MS. RETTEW: Right.

23 CHIEF JUDGE LIPPMAN: - - - in your mind.

24 MS. RETTEW: And all of it goes - - - and
25 that's why the - - -

1 CHIEF JUDGE LIPPMAN: And there's proof
2 it's their modus operandi?

3 MS. RETTEW: Yes, because each of the
4 schemes falls into that pattern, as Judge Manzanet-
5 Daniels said. And I think that one of the problems
6 with trying to analyze what went on in the decision
7 below is that it was written by the one judge who
8 didn't really agree at all with any of them about
9 whether any of these crimes were committed at all.
10 Four of them did, and - - - and the evidence is
11 certainly - - -

12 JUDGE SMITH: Well, if you take the
13 opinions literally, though, everybody signed on to
14 the - - -

15 MS. RETTEW: I know; it's very difficult to
16 tell what's going on in this decision, in the same
17 way it's difficult to tell why they would even use a
18 phrase like we find the evidence legally insufficient
19 and against the weight of the evidence, because if
20 it's legally insufficient, there's no - - - first,
21 there's no need to - - -

22 JUDGE SMITH: So your suggestion would be
23 if we find it insufficient, send it back to them, and
24 let them figure out what they meant about the rest of
25 it?

1 MS. RETTEW: Yes, Judge, I think that
2 that's the right approach here. And in the course of
3 that, the thing that's so important, and why on the
4 jurisdictional issue it's important for the court to
5 do legal analysis, and not simply treat this as a
6 factual decision, is that anyone reading it is going
7 to come to the conclusion that they were setting the
8 law on enterprise corruption in a whole variety of
9 ways, that this court should step in and clarify
10 whether they're true.

11 CHIEF JUDGE LIPPMAN: Well, we stated
12 before what we think it is, right?

13 MS. RETTEW: Well - - -

14 CHIEF JUDGE LIPPMAN: How you get there.

15 MS. RETTEW: - - - but you have never - - -

16 CHIEF JUDGE LIPPMAN: Western Express.

17 MS. RETTEW: Yes, but Western Express
18 doesn't address the kinds of issues that the court
19 below was - - - was moving on to. So Western
20 Express, you reserved decision on the question of
21 whether a hierarchy was even required, as opposed to
22 simply some kind of structure which is - - -

23 CHIEF JUDGE LIPPMAN: Well, an
24 ascertainable structure.

25 MS. RETTEW: - - - what the statute said.

1 CHIEF JUDGE LIPPMAN: Right.

2 MS. RETTEW: But the Appellate Division, in
3 this decision, went from structure to hierarchical
4 structure to distinct structure, apparently distinct
5 from the corporate structure, to leadership
6 structure, a term which apparently they think means
7 that you have to have proof of conversations between
8 the leader and each person - - -

9 CHIEF JUDGE LIPPMAN: So you're saying
10 they're putting - - -

11 MS. RETTEW: - - - working in the scheme.

12 CHIEF JUDGE LIPPMAN: - - - further
13 conditions on our - - - what we stated about - - -
14 about criminal enterprises? They're building on that
15 - - -

16 MS. RETTEW: I - - -

17 CHIEF JUDGE LIPPMAN: - - - in your - - -
18 from your argument.

19 MS. RETTEW: I think that they've gone well
20 beyond what the statute requires or what you said in
21 Western Express. And it - - - go ahead, Your Honor.

22 JUDGE SMITH: Okay. Well, I'm switching to
23 a different subject, but why - - - why shouldn't they
24 have been allowed to prove that they weren't hiding
25 anything, that - - - and that therefore - - - yeah, I

1 mean, presumably if - - - if one of the defendants
2 had testified, and his lawyer said did you think you
3 were doing anything wrong? No. Did you hide it?
4 No, I practically advertised it; look at all these
5 documents that show exactly what I was doing.
6 They're all - - - they'd be allowed to do that,
7 wouldn't they?

8 MS. RETTEW: He certainly would be allowed
9 to do that, and Judge McLaughlin - - -

10 JUDGE SMITH: So why - - - isn't he trying
11 to do the same thing - - -

12 MS. RETTEW: Judge McLaughlin - - -

13 JUDGE SMITH: - - - with those documents
14 that the court wouldn't let him put in?

15 MS. RETTEW: Well, the problem with those
16 documents is that they didn't show anything about his
17 mens rea. The first set of documents showed only
18 that - - -

19 JUDGE SMITH: Well, they showed - - - they
20 showed that he was claiming to have done, what,
21 forty-eight-day tests, and he was turning them around
22 in five days.

23 MS. RETTEW: That's the second set of
24 documents on turnaround. The problem there is that
25 they weren't being shown to the victims of the

1 JUDGE PIGOTT: Yeah.

2 MS. RETTEW: Yes, and - - - and at some
3 level - - -

4 JUDGE PIGOTT: Is that a proper standard,
5 when you're dealing in evidence? I - - -

6 MS. RETTEW: Well, actually, yes, I think
7 it's right to look to whether - - - whether a person
8 is a beneficiary of a scheme or a dupe of the scheme.

9 JUDGE SMITH: You - - -

10 MS. RETTEW: I think - - -

11 JUDGE SMITH: You would agree that maybe
12 unindicted co-conspirators was an overstatement?

13 MS. RETTEW: Well, I think it's an
14 overstatement he picked up from the defense, which
15 kept saying the whole industry did this, when, in
16 fact, it was eight companies out of the hundreds, one
17 of whom came out of Testwell, was a former Testwell
18 engineer. And in the same way, they kept saying
19 everyone knew this, when in fact all the evidence
20 showed is that people at the concrete supplier and
21 contractor knew it. So you know, what - - - what
22 happens is if you don't - - - if you don't weigh
23 those two things, what you end up doing is sort of
24 giving the jury a lot of evidence that can be used
25 improperly - - -

1 JUDGE PIGOTT: Was there any thought - - -
2 because when that issue came up, it struck me - - -
3 because our industrial code in the state of New York
4 is, I think, last amended forty-five years ago - - -
5 that maybe the standard in the industry has advanced
6 to the point where the building - - - the City of New
7 York building code is out of date, that this is a
8 better way of doing, you know, what they needed to do
9 - - -

10 MS. RETTEW: It may very well be out of
11 date in a lot of ways, Your Honor, but every single
12 expert, every single engineer, every single architect
13 who testified at this trial, and there were a dozen,
14 said these tests are critical. You can't tell what
15 concrete is going to do unless you test it. And you
16 don't want to wait until it's poured in the field - -
17 -

18 JUDGE SMITH: I would think - - -

19 MS. RETTEW: - - - to find out - - -

20 JUDGE SMITH: I would think, from what you
21 say, the city - - - when they discovered this scheme,
22 they should have been evacuating a lot of buildings.
23 There's a lot of unsafe stuff out there.

24 MS. RETTEW: Actually, Your Honor, they
25 retested the concrete. They had to bore holes in it.

1 They went through the engineering design and they - -
2 - and they rechecked it - - -

3 JUDGE PIGOTT: How'd they do?

4 MS. RETTEW: - - - with - - - I think they,
5 in some cases, assumed that the concrete was going to
6 be thirty percent below standard. There were - - -
7 there were definite concerns, because these are not
8 just regulatory things like - - -

9 JUDGE PIGOTT: No, I understand there could
10 be concerns - - -

11 MS. RETTEW: - - - who stamps it or - - -

12 JUDGE PIGOTT: - - - but I was curious if -
13 - - you know, you say, oh my God, this is what
14 happened, and then you go out and test Yankee Stadium
15 and you tell the Yankees they're playing in New
16 Jersey this year because they - - - you can't use
17 Yankee Stadium.

18 MS. RETTEW: I think in fact one of the
19 witnesses at the reparations hearing was from the
20 Yankee Stadium group, and they did retest everything.

21 JUDGE PIGOTT: And they said - - -

22 CHIEF JUDGE LIPPMAN: No, no, but are there
23 consequences - - -

24 JUDGE PIGOTT: And they found that it was
25 sufficient?

1 CHIEF JUDGE LIPPMAN: - - - is what Judge
2 Pigott is - - - what's the consequence - - - what
3 happened with all the retesting?

4 JUDGE PIGOTT: I don't mind the retest.
5 I'm saying if the retest showed - - -

6 MS. RETTEW: Oh.

7 JUDGE PIGOTT: - - - you know what, what
8 they did was fine, and - - -

9 MS. RETTEW: They found out how strong it
10 actually was, and they generally looked back at the
11 engineering design. And fortunately, New York cont -
12 - - New York engineers and architects over-engineer
13 things. So everything was declared safe, in that
14 sense. But exactly as I say, this is not the kind of
15 thing that anybody wants to be monkeying around with.

16 JUDGE PIGOTT: To make it a little more
17 obvious, because I used to be a lawyer one day - - -
18 one time. You know, if somebody says, will you fax
19 me something? Well, I might say will you fax me - -
20 - nobody faxes anymore; they send it on the computer.
21 And they still - - - so there's a better way of doing
22 what I think is a fax, and the fact that they send it
23 to me and it's even better than the fax, doesn't make
24 him a criminal.

25 MS. RETTEW: The better way to do it in

1 this case is exactly what has happened as a result of
2 - - - of this prosecution and the others, which is
3 now all of the companies are doing the tests ahead of
4 time. And - - - and one hopes that they're also not
5 faking their lab - - - their field tests and their
6 lab tests. Those tests, there's nothing antiquated
7 about that. As I say, all of the experts said this -
8 - - these are critical tests.

9 JUDGE PIGOTT: Yeah, but some of the
10 evidence seemed to indicate that this test was
11 supposed to take twenty-eight days and was being
12 turned around in four or in a week.

13 MS. RETTEW: Well, that's because they were
14 just printing out a piece of paper.

15 JUDGE PIGOTT: Right.

16 MS. RETTEW: They weren't doing tests at
17 all.

18 JUDGE PIGOTT: Right. So why wouldn't the
19 - - - why wouldn't the contractor say, wait a minute,
20 you can't be pouring concrete, you know, four days
21 after you were supposed to do a twenty-eight-day
22 test.

23 MS. RETTEW: Because a general contractor
24 probably would have said that, the same way the
25 engineer and the developer and the builder and the

1 regulator would have. The people who didn't say that
2 were the concrete suppliers - - -

3 JUDGE PIGOTT: I know that - - -

4 MS. RETTEW: - - - the concrete
5 contractors.

6 JUDGE PIGOTT: - - - but what I'm saying
7 is, when your building is going up thirty days faster
8 than it's supposed to, you say, where are you getting
9 this concrete? I mean, it can't be properly tested.

10 MS. RETTEW: On, no, I'm sorry, Your Honor.
11 It wasn't - - - it wasn't coming up faster than it
12 should. What was happening is that the concrete
13 suppliers weren't even asking for the test reports
14 until the last minute. So instead of sending them
15 the request for the report up front, with all those
16 months, it would be at the end - - - at the very end
17 right before they had to pour, saying please give us
18 the test report - - -

19 CHIEF JUDGE LIPPMAN: Okay.

20 MS. RETTEW: - - - tomorrow.

21 CHIEF JUDGE LIPPMAN: Okay, counselor.

22 You'll have your two minutes. First let's go to your
23 adversaries.

24 MR. SHECHTMAN: I begin with an apology,
25 because I think in my first argument I was

1 exasperated, but I was exasperated because I think
2 the jury was fooled here, and I think it's terribly
3 important that this court not be.

4 We began this argument with a statement
5 that said that Mr. Kancharla knew that his
6 confederates were backing him up. Now, Mr. Kancharla
7 - - - put aside the one steel count - - - Mr.
8 Kancharla's crime is the mix design reports. Those
9 are the preliminary tests before it goes to the
10 contractor, the cement contractor, and before it goes
11 to the field. The backup, presumably, is what's done
12 in the field, right, the cone test and the like, and
13 critically important, those compression tests. You
14 take the concrete, you put it into molds, and you
15 test it to see whether what you got is what you want.
16 And so the notion is he had to know that people were
17 doing those backup tests wrong. No one, it was said,
18 can be in that position.

19 Well, we know that sentence is false
20 because one person was in that position, the lab
21 director, who testified that he knew the mix designs
22 were made improperly according to the regulations,
23 but he knew nothing about what followed. Indeed, he
24 believed that it was okay to do what he did because
25 what was followed was being done properly and would

1 catch it. That's what he thought; that's what Mr.
2 Kancharla thought. So the notion here that you can
3 infer broad knowledge because there were these
4 subsequent tests and that no one could be in that
5 position - - -

6 JUDGE GRAFFEO: So - - -

7 MR. SHECHTMAN: - - - just isn't true.

8 JUDGE GRAFFEO: - - - do all the
9 participants of an enterprise corruption scheme all
10 have to have the same - - -

11 MR. SHECHTMAN: No, of - - -

12 JUDGE GRAFFEO: - - - information?

13 MR. SHECHTMAN: I don't mean to say of
14 course not, but of course not. But they have to know
15 that there's an enterprise. What Mr. Kancharla knew
16 was that mix designs were being done in the way that
17 he inherited and that he believed, with good cause,
18 was the way it was done throughout New York City.

19 JUDGE PIGOTT: That's Porter that was
20 testifying?

21 MR. SHECHTMAN: Thumma, the lab - - -

22 JUDGE PIGOTT: Okay, still Thumma?

23 MR. SHECHTMAN: - - - the lab director,
24 Your Honor. And his testimony is I knew nothing
25 about what followed; indeed, I thought just the

1 opposite. I thought it was all good, and that's why
2 I thought - - - look, we're - - - we're maybe cutting
3 a corner here. We're cutting a corner but we're not
4 cutting price; we're putting them out for 300. You
5 do it the right way, it's 4,000, right? But he
6 thought everything that followed was right, and so
7 did Reddy Kancharla. And if Mr. Kancharla did
8 anything wrong, it was mix designs, but mix designs
9 does not get you a criminal enterprise. Look, if you
10 were running a criminal enterprise here, you'd have a
11 simple rule. If we do the mix designs, we do the
12 testing. Right? That wasn't their rule. Lots of
13 other companies actually did the testing in the
14 field. Right? You're - - -

15 CHIEF JUDGE LIPPMAN: Okay - - - okay, Mr.
16 Shechtman.

17 MR. SHECHTMAN: Judge?

18 CHIEF JUDGE LIPPMAN: Finish off; go ahead.

19 MR. SHECHTMAN: Can I spend one more minute

20 - - -

21 CHIEF JUDGE LIPPMAN: One minute - - -

22 MR. SHECHTMAN: - - - and just say - - -

23 CHIEF JUDGE LIPPMAN: - - - you've got it.

24 Go ahead.

25 MR. SHECHTMAN: - - - say the - - - say the

1 - - -

2 MR. LANKLER: Judge, can I cede my two
3 minutes to Mr. Shechtman?

4 CHIEF JUDGE LIPPMAN: Sure.

5 MR. SHECHTMAN: Thank you.

6 Judge - - - Judge Graffeo said the
7 following, right? As a CEO, you have to worry more
8 about just the dollars; you have to worry about what
9 your people are doing. That's got to be correct,
10 right? But as a CEO to get convicted, you have to
11 know what they're doing is wrong, right? And he
12 didn't. There's no proof as to any knowledge of that
13 and - - -

14 JUDGE PIGOTT: But he testified that he
15 knew that they were not in compliance with the
16 building code, right?

17 MR. SHECHTMAN: Well, he didn't testify,
18 but the proof that - - - clearly we stipulated they
19 weren't in compliance with the building code. But
20 that's just these preliminary tests, and that does
21 not a criminal enterprise make. Every company in
22 this city was doing them that way. And so the only
23 way you get a criminal enterprise, and this is what
24 the prosecution said, is if you can infer that he
25 knew about these other things. And you can't,

1 because the proof is just the opposite. Thumma - - -

2 JUDGE SMITH: Isn't there something almost
3 fantastic about the idea that he is - - - he's doing
4 one conspiracy and his two senior executives are
5 doing two or three other conspiracies and they don't
6 - - - he has no idea?

7 MR. SHECHTMAN: Judge, they - - - what they
8 said is there's no motive, okay? These two other
9 people or one other people - - - Caruso is out in the
10 field. The results come back and they don't make
11 sense. The latter - - - the thirty-two days are - -
12 - are softer than the sixteen and cement is supposed
13 to get harder over time. So he changed them; that's
14 his motive. His motive is someone else is going to
15 ask questions. But his motive wasn't I'm changing
16 them because I know the mix designs are bad. There's
17 absolutely no proof of that. And - - - and what
18 we're saying ourself is steel; there's nothing he did
19 on steel. Certified inspectors; there's nothing he
20 did on certified inspectors. There's - - -

21 CHIEF JUDGE LIPPMAN: Counselor, what about
22 - - -

23 MR. SHECHTMAN: There's - - -

24 CHIEF JUDGE LIPPMAN: - - - what about this
25 issue about the - - - the amount of the business,

1 that you brought up before, that this is a very small
2 part. Your adversary says it's still a significant
3 part of your business; it's not the kind of thing
4 that - - - that people in positions of authority
5 wouldn't know about.

6 MR. SHECHTMAN: Well - - -

7 CHIEF JUDGE LIPPMAN: How do you answer
8 that? Is - - - is - - - are these particular areas
9 significant parts of the business?

10 MR. SHECHTMAN: Judge, I mean, you run a
11 pretty large court system, right? I represent judges
12 who are being disciplined, right? Do you know about
13 them? Should you know about them? It's a little
14 dangerous to say you're - - - you're the chief judge.
15 Should you know that the certified inspectors on one
16 job in Queens, two employees were improperly
17 certified?

18 CHIEF JUDGE LIPPMAN: That's what I'm
19 asking. I gather your answer is no, that they
20 wouldn't know about it.

21 MR. SHECHTMAN: My notion is no in spades.
22 Should you know at Yankee Stadium that two field
23 inspectors weren't doing their job? Should you know
24 that - - - that we were double-billing for one job?
25 I mean, look, my guess is every year in this state,

1 four, five, six, ten, twenty judges are disciplined.
2 No one expects you to know that. Why is it that
3 Reddy Kancharla knows - - -

4 CHIEF JUDGE LIPPMAN: But your real
5 contention here is that this is penny ante stuff - -
6 -

7 MR. SHECHTMAN: No, it's - - -

8 CHIEF JUDGE LIPPMAN: - - - that - - - that
9 did not have - - -

10 MR. SHECHTMAN: No, it's - - -

11 CHIEF JUDGE LIPPMAN: - - - that did not
12 have a major piece to do with the business.

13 MR. SHECHTMAN: It's enormously serious
14 stuff.

15 CHIEF JUDGE LIPPMAN: No, no, I agree with
16 that.

17 MR. SHECHTMAN: And this is - - - this is
18 where Judge Graff - - -

19 CHIEF JUDGE LIPPMAN: No, no, but you
20 understand what I'm saying.

21 MR. SHECHTMAN: This is where Judge Graffeo
22 was right, right? These tests out in the field,
23 those compressive tests, were changed. Now, it turns
24 out it didn't have any effect at all; that's what the
25 proof shows.

1 CHIEF JUDGE LIPPMAN: But counsel, is it
2 important to the offices what was going on? Would it
3 be fair to infer that they would know, that this is a
4 significant part of what they do?

5 MR. SHECHTMAN: Judge, if it was in a
6 twenty million dollar company - - -

7 CHIEF JUDGE LIPPMAN: That's what I'm
8 asking.

9 MR. SHECHTMAN: - - - half of the business,
10 twenty percent of the business, ten percent of the
11 business, maybe you can infer the CEO must have known
12 about it, right? Must have known is not what we
13 usually say in criminal law. We say the proof says
14 they knew. Here - - -

15 JUDGE RIVERA: With the potential for such
16 serious - - -

17 MR. SHECHTMAN: Pardon?

18 JUDGE RIVERA: - - - consequences? Even
19 with the potential for such serious consequences - -
20 -

21 MR. SHECHTMAN: Judge - - -

22 JUDGE RIVERA: - - - that the concrete - -
23 -

24 MR. SHECHTMAN: Judge, how - - -

25 JUDGE RIVERA: - - - is not going to hold

1 up?

2 MR. SHECHTMAN: - - - how - - -

3 JUDGE RIVERA: Thank goodness here that's
4 not the case.

5 MR. SHECHTMAN: How is it - - - remember
6 the following; I can't say it enough: the lab
7 director, their witness, their cooperation agreement
8 says I never knew that anybody was faking these - - -
9 changing these results; I never knew it. Now, they
10 credit it. Why? They gave him a cooperation
11 agreement. And it's true. You saw him on the
12 witness stand. He didn't know. He believed because
13 those tests were good, that what he was doing was
14 okay.

15 JUDGE SMITH: And when you have a
16 cooperating witness who's a member of the conspiracy,
17 the jury doesn't have to believe every exculp - - -
18 every self-exculpatory word that he says.

19 MR. SHECHTMAN: I guess, but if we're
20 convicting Reddy Kancharla because he told Thumma you
21 can do this because we'll catch it later, and he
22 believed it, and there's no proof to the contrary,
23 and you're going to create an enterprise corruption
24 crime, respectfully - - - and if I'm exasperated I
25 apologize - - - and you're going to create an

1 enterprise corruption because they could disbelieve
2 him? Right? There's just no evidence that says - -
3 - and as I said to you before, your rule, Judge, if
4 you were running this, you would say if our mix
5 designs are bad, we're going to make sure we do the
6 compressive tests. But that wasn't what happened
7 here. Any other company could do them, right?

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. SHECHTMAN: You would also say to
10 yourself we're making no money on these. We're
11 making no money but we're going to protect ourselves
12 by having compressive stress tests which are so
13 dangerous?

14 CHIEF JUDGE LIPPMAN: Counsel, thank you.

15 MR. SHECHTMAN: I thank the court.

16 CHIEF JUDGE LIPPMAN: We appreciate it.
17 Counsel, now your two minutes.

18 MS. RETTEW: Thank you, Your Honor. I
19 think that you can see that nobody can give a
20 summation like my old friend Mr. Shechtman. But the
21 problem with the argument he just gave you is that it
22 suffers from the same flaws that the Appellate
23 Division majority did; it's viewing the evidence in
24 the light most favorable to the defendant, not most
25 favorable to the jury's verdict.

1 So for example, Your Honor, as you pointed
2 out, Mr. Thumma did say that he knew nothing about
3 the rest of those schemes. The jury doesn't even
4 have to buy that, and it certainly would be rational
5 for them to say, well, yeah, okay, that's what he
6 says but we don't really believe it. But beyond
7 that, there's more evidence about - - -

8 JUDGE SMITH: But you put him on to say it,
9 and you're now telling us that for Kancharla to say
10 it - - - or he doesn't say it, but to argue it,
11 theoretically, is ridiculous, that the jury couldn't
12 - - -

13 MS. RETTEW: No, because, as I was going to
14 say, there's more evidence on that point. One is
15 that he immediately decided to cooperate when he
16 found out the other things were being faked. And
17 most important, I think, is that Mr. Kancharla was
18 one of the privileged acc - - - privileged users with
19 access to tamper with the data. And so it's
20 perfectly reasonable for the jury to - - - to say the
21 computer was put in on his watch, he was one of the
22 privileged users. It wouldn't make sense for him to
23 try to do this crime four years at a time without
24 some kind of backup behind him, and that, therefore,
25 we do know that he knew - - -

1 JUDGE SMITH: What about the fact that they
2 - - - that they didn't insist that they do the backup
3 tests at all, that other labs did them sometimes?

4 MS. RETTEW: Yes, but they were the
5 preeminent people. There was not a lot of cases
6 where they were not going to be doing the follow-up
7 because, in fact, concrete was the major portion of
8 this company's business. And as the prosecutor
9 pointed out, at some level, the mix design scheme was
10 kind of like a loss leader to get the suppliers to
11 use Testwell in the million-dollar process that
12 followed up on that.

13 JUDGE PIGOTT: So they risked all of that
14 for this?

15 MS. RETTEW: No, as I say, I don't think
16 that they would have risked everything without some
17 backup. I think that's why the jury thought it was
18 unreasonable to think that the CEO and - - - and his
19 top two vice presidents, in the concrete department
20 and the engineering department, were committing a
21 series of crimes.

22 CHIEF JUDGE LIPPMAN: But your adversary's
23 contention is that there - - - that there are
24 important things that are happening, but the CEO
25 doesn't necessarily know, in a huge corporation like

1 this, everything that's happening, and whosever
2 working on Yankee Stadium, or whatever it might be.
3 That's the content - - - so where do we - - - where
4 do we - - - how do we come to a conclusion?

5 MS. RETTEW: That would certainly be true
6 if we were talking about some guy in the field doing
7 something. But we're talking about a very small
8 company, a million dollar - - -

9 CHIEF JUDGE LIPPMAN: That all these people
10 were a part of; is that your contention?

11 MS. RETTEW: Yes. Mr. - - -

12 CHIEF JUDGE LIPPMAN: That the leadership
13 is a part of it; is that - - -

14 MS. RETTEW: Yes, Mr. - - -

15 CHIEF JUDGE LIPPMAN: - - - your argument?

16 MS. RETTEW: - - - Barone was the vice
17 president in charge of engineering. Mr. Caruso was
18 the vice president in charge of the concrete
19 department. And Mr. Kancharla - - -

20 CHIEF JUDGE LIPPMAN: So by nature of their
21 titles they would have to know?

22 MS. RETTEW: Not their titles, but the fact
23 that it was a very small group. I mean, on the Web
24 site it lists him and five - - - five - - -

25 CHIEF JUDGE LIPPMAN: But a big corporation

1 - - - a big - - - a lot of things happening in that
2 corporation, right?

3 MS. RETTEW: Well, a lot of things
4 happening in the field. There were hundreds of
5 employees sent out every day.

6 CHIEF JUDGE LIPPMAN: That's what I meant,
7 in the field.

8 MS. RETTEW: But what was going on at the -
9 - - at the heart of the bureaucracy there at the top,
10 very, very small. As I say, there were only - - -

11 JUDGE PIGOTT: Well - - -

12 MS. RETTEW: - - - five people - - -

13 JUDGE PIGOTT: - - - I forget if it's
14 summation or where, but it made it - - - the People
15 made it sound like this was the purpose of Testwell,
16 that it was born, raised and matured so that it could
17 - - - so that it - - -

18 MS. RETTEW: No, I don't think so, Your
19 Honor. I think, in fact, what the - - - what the
20 prosecutor's position was, was that this company had
21 been corrupted from inside. And - - -

22 JUDGE PIGOTT: And that was its major
23 business now?

24 MS. RETTEW: The concrete division was
25 certainly its major - - -

1 JUDGE PIGOTT: Oh, Testwell - - - Testwell
2 is the one that got convicted, and it - - - I think
3 it was the summation I was looking at, made it sound
4 like, you know, this - - - the goal now of Testwell
5 was to - - - was to corruptly do all of this.

6 MS. RETTEW: I think, Your Honor, that was
7 of the Testwell group, which was the name for the
8 defendants working as the enterprise. And yes, that
9 was the common purpose here, was to maximize
10 Testwell, the company - - -

11 JUDGE PIGOTT: So that two percent or four
12 percent that Mr. Shechtman was talking about is
13 grossly - - -

14 MS. RETTEW: Sure, because, Your Honor - -
15 -

16 JUDGE PIGOTT: - - - deflated.

17 MS. RETTEW: - - - as you know, two percent
18 - - - an additional two percent of profit can make -
19 - - can make - - -

20 JUDGE PIGOTT: No, two percent of the
21 business; it's not all profit.

22 MS. RETTEW: Well, all of that was profit.
23 The - - - the percentage that they were pointing to
24 was pure profit, because they were spitting out
25 reports without having to do any work. So adding an

1 additional percentage here or percentage there, by
2 cutting labor costs, by - - -

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 MS. RETTEW: Sure.

5 CHIEF JUDGE LIPPMAN: Thanks.

6 Thank you all. Appreciate it.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of The State of New York v. V. Reddy Kancharla, No. 82, and The People of The State of New York v. Vincent Barone, No. 83 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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