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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 122

DAMIAN JONES,

Appellant.

20 Eagle Street
Albany, New York
October 16, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 122, The People of
3 the State of New York v. Damian Jones.

4 Counsel?

5 MR. DANNER: Good afternoon, Your Honors, and may
6 it please the court, my name is Scott Danner. I'm joined
7 at counsel table by Rosemary Herbert, from the Office of
8 the Appellate Defender. We represent the appellant, Damian
9 Jones. If I may, I'd like to reserve three minutes
10 rebuttal?

11 CHIEF JUDGE DIFIORE: Three, sir? You may.

12 MR. DANNER: Thank you, Your Honor.

13 JUDGE RIVERA: So does an ascertainable structure
14 require a boss at the top?

15 MR. DANNER: An ascertainable structure requires
16 a system of authority. That may take the form of a boss at
17 the top. It may be hierarchical. But I don't think
18 hierarchy is necessary to the existence of authority. And
19 I do think authority is necessary to having a criminal
20 enterprise within the intention of the statute.

21 JUDGE RIVERA: But what - - - I'm a little
22 confused.

23 JUDGE STEIN: What about coordination - - -

24 JUDGE RIVERA: What does mean that if - - - let's
25 say that there were five people that we're talking about,



1 and they all shared equal authority. You would say that's
2 an ascertainable structure, or do you mean there have to be
3 ascending levels of authority?

4 MR. DANNER: I think the former case may fit the
5 statute. It's not what we have here, but there, as long as
6 there is an exercise of and a submission to authority,
7 that's where you start to get the dangers that the
8 legislators specified in the legislative findings. In
9 other words - - -

10 JUDGE RIVERA: That means there's somebody below
11 the five, is there not?

12 MR. DANNER: Put - - -

13 JUDGE RIVERA: That it's not just the five?

14 MR. DANNER: If it's - - - yeah, certainly in
15 that case. I mean, I think, even the classic mafia cases,
16 you have this commission of the five families, and you
17 know, they're all equals around the table. Obviously,
18 their decisions ramify down through the ranks.

19 JUDGE RIVERA: Yeah, they have underlings.

20 MR. DANNER: Exactly. And you know, you can
21 picture a law partnership. Not to conflate the two, but -
22 - -

23 JUDGE RIVERA: But that's what I'm trying to
24 understand. What's the system of authority that doesn't
25 have ascending command or supervision? I've - - - that is



1 what I'm trying to understand.

2 MR. DANNER: Sure, and - - - ultimately there may
3 not be. I - - - you know, again, because this case doesn't
4 involve any authority, whether hierarchical or not, in a
5 way, that may be a question for the next case. But what is
6 essential is that there's somebody giving directions, and
7 that those who are alleged to participate in the enterprise
8 are taking directions.

9 JUDGE WILSON: Let me - - - in a classic
10 partnership, common-law partnership, there's no one doing
11 that, is there? I'm wondering what you mean by authority.

12 MR. DANNER: Sure. I - - - by authority, I mean,
13 essentially the power to direct. So it's true. In a - - -
14 in a classic partnership, there's equal - - -

15 JUDGE WILSON: Everybody has equal power in that.

16 MR. DANNER: - - - equal governance rights.

17 JUDGE WILSON: Yeah.

18 MR. DANNER: But nevertheless, the partners agree
19 and submit themselves to the - - - to the - - - to the
20 partnership. They agree to work and dedicate all of their
21 efforts for the partnership. There is a distinct entity -
22 - -

23 JUDGE WILSON: But each of them has the ability
24 to bond - - -

25 MR. DANNER: - - - to which they have submitted



1 themselves.

2 JUDGE WILSON: Each of them has the ability to
3 bond all the partners individually. They're not relying on
4 a vote or a majority or anything like that.

5 MR. DANNER: That's also true, but I think to be
6 a partner, and to - - - and to enter a partnership, there
7 has to be an agreement to carry out the partnership's work.
8 And when you don't have - - - and so that's - - - that's
9 something that binds them together. And - - - and it - - -
10 it may not be a hierarchical authority, but that's a pretty
11 easy case in some ways, because you can point to the
12 partnership as the entity, the distinct from the pattern of
13 activity entity to which people have submitted themselves,
14 and for whom they act.

15 By contrast, what we have here are individuals
16 who act at their own direction and for their own benefit,
17 not to benefit any distinct entity.

18 JUDGE FAHEY: But - - - but to be go - - - to go
19 beyond the phrase of ascertainable structure, it seems that
20 there was proof in the record, not of an hierarchical
21 structure - - - and I wonder if that's necessary at all - - -
22 - but of a continuity of existence and it - - - to quote
23 the language, "In a criminal purpose beyond the scope of
24 any individual" let's say motorcycle theft in this
25 particular case, there - - - there - - - that - - - there



1 seem to be proof in the record for that.

2 MR. DANNER: Well, yes, Your Honor, but note that
3 continuity is a distinct element of a criminal enterprise.
4 You not only have to have continuity, you also have to have
5 the ascertainable structure. Certainly, for example, in
6 People v. Western Express, it wasn't one or two stolen
7 credit-card sales. It wasn't an odd - - -

8 JUDGE FAHEY: But ascertainable means to me
9 understandable. That doesn't mean hierarchical. And I
10 guess ultimately the question for us may be - - - and you
11 can respond to this - - - is that what's the difference
12 between an ascertainable structure and a market? Because
13 you - - - you could argue that this a market or you could
14 market - - - all markets are structured, however, so where
15 are we drawing the line.

16 MR. DANNER: Exactly, and I think - - - I think
17 Your - - - Your Honor's hit on it. The difference between
18 a market - - - or one difference between a market and an
19 ascertainable structure of the kind targeted by this
20 statute, specified in the findings, is that a market is one
21 in which, although things are organized and may be quite
22 coordinated and complex, what's causing that coordination
23 and complexity is individual self-interest, or market
24 forces, supply and demand. When that is the cause of
25 coordination, that is not the danger the statute exists to



1 - - -

2 JUDGE STEIN: No, the - - - the court - - -

3 MR. DANNER: - - - to target.

4 JUDGE STEIN: - - - instructed the jury here,
5 though, right, that - - - that what was necessary was
6 "coordination plus collective decision making." Do you
7 agree with that?

8 MR. DANNER: I - - - I don't think that - - -

9 JUDGE STEIN: In the absence of hierarchy?

10 MR. DANNER: I - - - I don't think that is
11 sufficient, at - - - at least in this case, and - - - and
12 here's why. Because what the coordination and collective
13 decision making constituted here is - - - that's akin to me
14 going to Starbucks, buying a cup of coffee, and saying, the
15 barista and I collectively decided that I was going to buy
16 a coffee and he was going to sell it to me. If that's all
17 you have, you just have a description of a pattern of
18 criminal activity. And that is not enough.

19 Western Express makes clear that is not enough.
20 We could have characterized the purchases and sales in
21 Western Express as collective decision making and
22 coordination, but we know that this court dismissed the
23 indictment there. If by - - - on the other hand, if
24 coordination is caused by a distinct entity with authority
25 and the collective decisions are imposed and enforced, now



1 we're in the world of a criminal enterprise of the sort
2 imagined by the statute. That's what distinguishes - - -

3 JUDGE RIVERA: So you're saying they could all
4 have an understanding of how they're going to function, and
5 they are all on equal - - - on an equal level amongst one
6 another? It's totally egalitarian, very democratic?

7 MR. DANNER: You know, I think in a way, a market
8 is very egalitarian, in the sense that you can take it or
9 leave it. You're at arm's length. The sellers set their
10 prices. The brokers set their commissions. The buyers
11 took it or leave it. That's certainly egalitarian in the
12 sense that nobody's making them do deals with one another.
13 But that's nevertheless certainly not an enterprise within
14 the meaning of the statute, and again, we just point to
15 Western Express to know that.

16 JUDGE WILSON: El Chapo's drug trade is a market,
17 no? I mean, there's buyers and sellers and that's what
18 demand - - - in terms of price.

19 MR. DANNER: Right, but there's also enforcers
20 and bosses and underbosses, and these are the people - - -

21 JUDGE WILSON: There's lookouts - - - there's
22 lookouts here and middlemen here and - - - they're
23 different names, but - - -

24 MR. DANNER: Well, there, in the sort of classic
25 case of a - - - of a drug enterprise like that, you have



1 people working for, employed by, and following the
2 instructions of the enterprise, kicking up profits. If you
3 take El Chapo's drug empire and then you look at an addict
4 on the outside buying drugs, we wouldn't say that the
5 addict is in the enterprise. You've drawn it too broadly
6 at that point.

7 For example, in Western Express - - -

8 JUDGE RIVERA: Well, that - - - that person's
9 buying the product of the enterprise.

10 MR. DANNER: What about some of these - - -

11 JUDGE RIVERA: I - - - I thought Judge Wilson was
12 referring to these other kind of perhaps lower-level
13 players or external players.

14 MR. DANNER: I think if those lower-level players
15 bind themselves to the enterprise, submit to the
16 directions, take the directions, act for the benefit of the
17 El Chapo organization, you've got it. You've drawn the
18 enterprise where it belongs.

19 CHIEF JUDGE DIFIORE: These guys were all
20 specialized, right? I mean, does - - - doesn't that count
21 for something? You had the guy who was expert at stealing
22 and scrubbing the bikes, right? You had the guy who had
23 the con - - - the connection to the - - - your client. We
24 had the distributors, and we had the - - - the person with
25 the contacts to distribute them. Doesn't that count for



1 something?

2 MR. DANNER: Specialization, again, can't just be
3 a description of complex criminal - - -

4 CHIEF JUDGE DIFIORE: But they couldn't operate
5 without each other.

6 MR. DANNER: Well, certainly, I think the - - -
7 what - - - in Western Express you have the buyers who had
8 the method of stealing the credit-card information. You
9 had the broker who dealt in cryptocurrencies. You had the
10 - - - the ultimate sellers of it, right? So and - - - and
11 there, what the court found was that that was a description
12 of a pattern of criminal conduct, and that does not meet
13 the distinct requirement of the structure.

14 Now, if there's somebody saying you're going to
15 be the - - - you know, the - - - the thief. Here, I
16 instruct you to go out and do that. You go out and do
17 this. Now we start to have someone who is removed from the
18 street level crime. That's the insulation referred to - -
19 -

20 CHIEF JUDGE DIFIORE: One person - - -

21 MR. DANNER: - - - in the statute.

22 CHIEF JUDGE DIFIORE: - - - has to occupy that
23 spot?

24 MR. DANNER: Not necessarily. What's - - -
25 what's essential is that - - - that some either person or



1 group or partnership, somebody or something distinct from
2 just an observation of the crimes themselves, is doing the
3 directing.

4 JUDGE WILSON: Well, the bike that was stolen on
5 order fits that description. Now, I realize that doesn't
6 involve Mr. Jones.

7 MR. DANNER: Sure, Your Honor, and - - - and
8 there's evidence in the record that I think does likely
9 meet the enterprise requirement. But it pertains to a
10 small subset of the market here. That's Dwayne Whyte's
11 steal crew. We talk about this in the brief. There are -
12 - - there's evidence of giving orders. There's evidence of
13 sharing profits. But that pertains to a small subset. And
14 when you start generalizing, and you charge a citywide
15 market as the relevant enterprise, you've broken the one
16 thing that bound everyone together and made it an
17 enterprise in the first place.

18 You know, the respondent asks, if we have Dwayne
19 Whyte's crew, why doesn't adding the brokers and the
20 buyers, why doesn't that make it more of an enterprise?
21 That's like asking if I have a triangle and add a fourth
22 side, why doesn't that make it more of a triangle?

23 CHIEF JUDGE DIFIORE: Thank you.

24 MR. DANNER: You've taken away the thing that
25 made it what it was.



1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MR. DANNER: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel?

4 MR. MAZER: Thank you, Your Honor. May it please
5 the court, my name is Ross Mazer for the respondent, the
6 People of the State of New York.

7 JUDGE RIVERA: So - - - so what's an
8 ascertainable structure that doesn't have a hierarchy? A
9 nonhierarchical ascertainable structure, what would that
10 look like?

11 MR. MAZER: So the - - - just to start with the
12 statutory text, the - - - the second element of the
13 definition of enterprise corruption from Penal Law
14 460.10(3) requires that a - - - the criminal enterprise be
15 associated in an ascertainable structure, distinct from a
16 pattern of criminal activity. And this court, in all of
17 its decisions from Western Express through Cantarella,
18 through Keschner, has interpreted the - - - the phrase
19 "ascertainable structure" to require a - - - and I'm
20 quoting here - - - "constancy and" compac - - - "and
21 compacity exceeding the individual crimes."

22 Case law has elaborated - - -

23 JUDGE RIVERA: Each of those cases has a separate
24 business, whether it's the web business or the medical
25 center. I mean, there's a separate business. Right,



1 they're - - - they're all tied to that business in some way
2 or another. So it's obvious in that way, right?

3 MR. MAZER: So in - - - in cases where, like - -
4 - like here, where it's a purely criminal enterprise, and
5 it's not linked to an otherwise legitimate enterprise, like
6 in the federal system, where we - - - we talk about
7 associations in fact, there are, you know, a host of
8 factors that determine whether an ascertainable structure
9 is present.

10 For one thing, the duration that the enterprise
11 has existed with a relatively stable group of people. This
12 investigation lasted for sixteen months, but the leaders of
13 the enterprise, those who were identified in the indictment
14 as the distributors, professed that they had been in the
15 same business for up to five years.

16 JUDGE RIVERA: So if in Western Express, it had
17 been the same people for five years, would it have come out
18 differently?

19 MR. MAZER: No.

20 JUDGE RIVERA: Why not?

21 MR. MAZER: Oh - - -

22 JUDGE RIVERA: Well, how do you distinguish that
23 case?

24 MR. MAZER: Well, on a - - - a number of levels,
25 but for one thing, Western Express made no effort to



1 control access to the market. Anybody who had access to a
2 computer could - - - could log on and go onto Western
3 Express' market and either sell or buy illegal data. Here,
4 on the other hand, this was an enterprise who took great
5 pains to control who was a member and who was not. And we
6 saw, you know, at various points - - - I - - - I'll just
7 cite a couple of examples. In one case - - -

8 JUDGE STEIN: Do you mean - - - you mean the
9 people that were finding the buyers wouldn't have accepted
10 anybody who came along and said I've got a - - - I've got a
11 stolen motorcycle? Wha - - - you know, what - - - what
12 evidence in the record is there of that?

13 MR. MAZER: Well, it's true that they may have
14 dealt with outside suppliers who were not members of the
15 organization. However, in one instance, for example,
16 Mills, who was a - - - a steal-team leader, admonished
17 Cadet, the last name of a member of his steal team, for
18 doing a favor for a friend by selling a motorcycle to Paul,
19 one of the distributors.

20 JUDGE STEIN: But to what - - - to what
21 consequence? What was the consequence? Was there a
22 consequence to - - - to - - - to the person being
23 admonished?

24 MR. MAZER: He said he would not do it again.

25 JUDGE GARCIA: What's the - - -



1 JUDGE STEIN: But I - - - I'm having a hard time
2 - - - I'm having a hard time with what we have here,
3 distinguishing it from any kind of market. There - - - it
4 - - - in order for - - - if this was a - - - if these were
5 legal motorcycles, right, and - - - or, you know, or some
6 other product that you were - - - you were trying to create
7 a market for and get buyers and sellers, and people that
8 would fix it up or clean it up or, you know, whatever it
9 might be, how is this any different from any market, black
10 or not black market?

11 MR. MAZER: Well, it's certainly true that a - -
12 - a black market exists for stolen motorcycles, and that
13 this - - - but this was a - - - a distinct entity that
14 operated within that larger market, and I think this goes
15 back to Judge - - -

16 JUDGE FAHEY: You know, one - - - one of the
17 things I'd look for, if there is a - - - a discernable
18 structure, would be competitors, people doing the same
19 thing within the market. Were there competitors here?

20 MR. MAZER: I - - - I don't think there's
21 evidence in the record one way or the other.

22 JUDGE FAHEY: Were - - - were there identifiable
23 competitors with different names and different
24 organizations? I didn't see any proof like that at all.

25 MR. MAZER: I don't believe the record touched on



1 that one way or the other.

2 CHIEF JUDGE DIFIORE: So getting beyond this,
3 what - - - what's the proof that this defendant was aware
4 of the existence of the criminal enterprise and
5 participated in it?

6 MR. MAZER: So there's a lot of evidence that we
7 discuss in our brief, and I probably can't catalog all of
8 it, but I would like to highlight just a couple of elements
9 that I think refute or completely belied the defense
10 counsel's suggestion that what we have here is really a
11 defendant who was just involved in selling four motorcycles
12 on three separate dates.

13 For one thing, the October 4th, 2011 transaction
14 did not involve any of the elements that defense counsel
15 says - - - that defense counsel refers to. For example,
16 the defendant himself was not at that sale, which occurred
17 to the undercover officer, neither was Dawson, the
18 cooperator and the defendant's principal contact.

19 Instead, Dow, who was one of the distributors,
20 one of the leaders of the enterprise, and another member
21 whose name was Chochezi Ingoondo sold an under - - - a - -
22 - a stolen motorcycle to the undercover officer, which was
23 linked to defendant, because the VIN number was actually
24 registered to him.

25 JUDGE WILSON: Fake - - - fake VIN number.



1 MR. MAZER: The - - - the - - -

2 JUDGE WILSON: It was not - - - it was not - - -

3 MR. MAZER: It did - - -

4 JUDGE WILSON: - - - the VIN number that belonged
5 to that bike. It belonged to a different bike that the
6 defendant owned.

7 MR. MAZER: Absolutely. So the - - - so the VIN
8 number was registered to him, but it didn't match the
9 engine number, it didn't match many of the other parts,
10 which - - - which only further demonstrated that defendant
11 had access to the, you know, the - - - the store of spare
12 motorcycle parts that this enterprise obviously used as a -
13 - - a chop shop.

14 JUDGE GARCIA: Counsel, what's the difference
15 between a conspiracy and a criminal enterprise?

16 MR. MAZER: I'm - - - you know, I'm not - - - I'm
17 not sure offhand there's precise differences. I think they
18 share a lot of the same elements.

19 JUDGE GARCIA: And it seems to me, though, that a
20 criminal enterprise has to be something different, right?
21 It has to be some type of aggravated conspiracy in a way,
22 more than just agreement among parties to engage in a
23 criminal act, or - - - or to further a criminal purpose,
24 which is my understanding of general conspiracy.

25 So what is it in a criminal-enterprise statute,



1 and how is that here, which - - - most of what I hear you
2 saying, to me, I would think, yes, this is some type of
3 conspiracy. How is this a criminal enterprise different
4 from what we understand a traditional agreement to further
5 a criminal purpose to be?

6 MR. MAZER: I would point to two things, Your
7 Honor. First, the criminal-enterprise statute requires
8 that each defendant be convicted beyond a reasonable doubt
9 of three predicate acts, with - - - either employed by or
10 associated with the enterprise and with the intent to
11 participate in the enterprise's affairs. So there is that
12 requirement of three predicate crimes.

13 The second thing I would identify are just the -
14 - - the other factors that - - - that distinguish this case
15 from Western Express, the - - - the - - - to kind of get
16 back to Judge Rivera's question, and show that this was - -
17 - that this enterprise possessed all of the features of a
18 distinct entity that existed continuously over time, you
19 know, and I'm - - - and here, I'm referring to things like
20 rules and - - -

21 JUDGE GARCIA: I - - - I think the first part - -
22 - you know, the - - - the conviction of three separate
23 crimes, goes to really the level almost of participation it
24 seems, but the amicus brief here proposes a test, a
25 distinct structural requirement, separate and apart from

1 the illegal activity. Would you agree that that's a valid
2 test?

3 MR. MAZER: I - - - yes, yeah, the - - - the
4 enterprise, by statute, has to exist in the - - - has to
5 have an existence that goes beyond the mere criminal
6 instance.

7 JUDGE GARCIA: Beyond those three crimes, and
8 what you need to participate in those three crimes, right,
9 in this case, it would be?

10 MR. MAZER: Yes.

11 JUDGE GARCIA: Okay.

12 MR. MAZER: And so for example here, you know,
13 we're talking about things like rules and procedures for
14 decision making and those can be either things like a
15 hierarchy or a leadership structure, or they can be any
16 kind of collec - - - collective decision making, or a
17 system for resolving conflicts. And as we go into in our -
18 - - our brief, an - - - you know, a couple of incidents of
19 competition or conflict arose, and the members had a system
20 for resolving that. And even the - - - the case detective,
21 McGuire - - -

22 JUDGE RIVERA: So - - - so in that example, all
23 of the participants are on the same level?

24 MR. MAZER: They're - - -

25 JUDGE RIVERA: They're equal authority amongst



1 each other?

2 MR. MAZER: I - - - I think that the - - -

3 JUDGE RIVERA: And there's no one else who's
4 involved who is, for lack of a better way of saying it, an
5 underling or someone inferior to them?

6 MR. MAZER: It's true that there - - - that
7 there's no one in the enterprise with the authority to
8 command, but it's not true that there aren't some mem - - -
9 some members who are more important, and - - - and these
10 are really the distributors like Paul and Dow and Minors -
11 - -

12 JUDGE RIVERA: But - - - but how does that square
13 then with Section 460, which has all that - - - that has
14 all that language about leadership and the Cosa Nostra
15 families. It's not limited to those families, of course,
16 simply because we're aware of - - - besides the mafia,
17 there are other kinds of these criminal enterprises. How
18 do you - - - how do you square the way you're looking at
19 that with that kind of language which is in the findings
20 and so integral to the statute?

21 MR. MAZER: So the - - - the - - - the more
22 influential members of the - - - the enterprise were
23 removed from some of the street crimes. They were not the
24 ones as - - -

25 JUDGE STEIN: I thought that Paul and Dow were



1 the first ones to actually to be - - - to be approached by
2 the undercover.

3 MR. MAZER: By their own admission, they had been
4 in this business for up to five years and - - - and so I -
5 - - I don't know that that characterization is en - - -
6 entirely accurate, although the - - - the undercover ended
7 up doing business with them. But they - - -

8 JUDGE STEIN: So - - - so, I mean, so - - - I
9 guess you're talking about protecting them and them being
10 removed, but I - - - I don't see that. Maybe they're not
11 the ones going out and stealing the motorcycles, but - - -

12 MR. MAZER: Yeah.

13 JUDGE STEIN: - - - I just - - -

14 MR. MAZER: Just to finish my answer, so they are
15 removed from the - - - from some of the - - - the most
16 dangerous street crime, but beyond that, the - - - the
17 enterprise, the entire structure of the enterprise existed
18 to limit the exposure of its members, and especially of its
19 senior members, by - - - by adopting, you know, the - - -
20 the basic groundwork of - - - and this - - - this again
21 goes into why this is so completely different from Western
22 Express, of placing orders in advance and telling the - - -
23 the procurers, the thieves, which motorcycles to steal, so
24 that they didn't have to have them around any longer than
25 necessary, and avoid the risks that otherwise attend long-



1 term possession of stolen property.

2 They also took more specific means of avoiding
3 detection, such as employing tail cars to follow police
4 cars, such as using lookouts when they were engaging in
5 criminal activities. And like I said, you know, the
6 distributors were not the ones riding motorcycles to the
7 buy locations, nor were they the ones lifting motorcycles
8 off the street, which were the most dangerous parts of the
9 criminal activity, and so they were - - - they were
10 shielded from view in - - - in that regard as well.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MR. MAZER: Thank you.

13 CHIEF JUDGE DIFIORE: Mr. Danner?

14 MR. DANNER: Thank you, Your Honor.

15 At least three points I'd like to try to get to.
16 First, the respondent has done this now in his brief and
17 again at the argument. There is no evidence of a system of
18 authority here, and trying to conjure one on this record is
19 completely impossible.

20 I'll start with what Dow - - - what Dawson,
21 excuse me, the lone cooperating witness, testified. Now -
22 - - the question - - - "Now, was there anything like a boss
23 or a hierarchy or anything like that?" Answer, "No, there
24 was no boss. Everyone was working at your own free will, I
25 guess." Later, question - - -



1 JUDGE FAHEY: But the problem is - - - I agree
2 with you about the record, but the problem is, is that the
3 - - - the argument - - - the argument is not that you need
4 a hierarchical structure. There not - - - the argument is
5 that the structure has to be ascertainable, and it can be
6 ascertainable without being hierarchical. And that's what
7 I struggle with.

8 MR. DANNER: Sure, and you know, I - - - I heard
9 a few questions about, well, what about this
10 nonhierarchical system of authority. Can there be such a
11 thing? And - - - and perhaps the concern is this for - - -
12 this court's dictum in Western Express, that it may be true
13 in theory that an enterprise need not be hierarchical.
14 That's not even a dictum. The - - - the court went on to
15 dismiss the indictment in that case. And it didn't say it
16 is true that you don't need a hierarchy. It said it may be
17 true.

18 This court does not go out of its way to decide
19 questions that aren't presented, so there's no impediment
20 to this court holding now that a hierarchy is required.

21 JUDGE STEIN: To meet the - - -

22 JUDGE GARCIA: What about the amicus test? Would
23 you agree that that's a valid test?

24 MR. DANNER: Yes, I think the amicus is - - - is
25 a - - - is a valid test. I - - - I take one point of



1 departure. I think what they say is that to the extent
2 that when you're describing a pattern, that is your
3 ascertainable structure, that's not sufficient, because
4 it's not distinct. I agree with that. But I wouldn't even
5 get that far, because I'd say you don't have a structure in
6 the first place.

7 CHIEF JUDGE DIFIORE: Mr. Danner, point two?

8 MR. DANNER: Yes. Point two is the question
9 about the knowledge and intent which Your Honor asked. And
10 what we heard was this October 4th bike, and they say,
11 well, Jones wasn't there, and Dawson wasn't there, so, you
12 know, they want you to infer from this that Jones must have
13 been more involved, maybe directly connected to Dow.

14 But we can't make inferences contrary to fact.
15 Dawson testified that Jones needed Dawson because he
16 couldn't get in touch with Dow. And Dow needed Dawson,
17 because Dow couldn't get in touch with Jones. The fact is
18 that Jones' only connection to this enterprise is via
19 Dawson, and Dawson, who testified for the prosecution in
20 exchange for leniency, didn't put any of the requisite
21 knowledge on Mr. Jones.

22 There is no proof that he knew anything other
23 than that there are buyers of stolen motorcycles out there,
24 and Dawson can put me in touch with them. That is not
25 knowledge of the overarching criminal design required under



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the statute.

And the third point, Judge Garcia asked what's the difference from conspiracy? One of them is the knowledge requirement. There - - - there's a very specific knowledge requirement added in addition to RICO's, requiring specific knowledge of the nature of the enterprise's activities. That's lacking here.

Another difference: conspiracy, to commit an E felony, which is all that's at issue here, is an A misdemeanor in this state. Enterprise corruption, a B felony, punishable by up to twenty-five years in prison. There is no way the statute was intended to wrap up conduct like Mr. Jones' into a B felony with such a severe sentence.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. DANNER: Thank you.

(Court is adjourned)



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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Damian Jones, No. 122 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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