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Thomas J. Salerno

Tricia N. Salerno

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United States v. Scotto*: Progression of A Waterfront Corruption Prosecution From Investigation Through Appeal

I. Introduction

Anthony M. Scotto, a man whom Governor Hugh Carey described as "trustworthy, energetic, intelligent, effective and educated,"¹ was convicted in federal district court on November 15, 1979, on charges of racketeering, accepting unlawful labor payments, and income tax evasion. Both Scotto and his co-defendant, Anthony Anastasio, were ranking union officials in the International Longshoremen's Association (I.L.A.), the powerful union representing American stevedores. Scotto and Anastasio specifically represented the Brooklyn longshoremen in New York.

This note uses *United States v. Scotto* to examine the progression and ramifications of a complex waterfront corruption case. In particular, the note examines the development of the *Scotto* case from investigation through appeal, and the practical effect which the prosecution and conviction has had on waterfront corruption. This note is written for the practitioner who desires an overview of a complex racketeering case.

II. Background

The New York docks have been overridden with illegal activity since the turn of the century. Loansharking, extortion, kickbacks and theft are routine on the piers² because of the unique geographical features of New York City and the nature of the shipping business.³ The New York harbor has no direct link with a railroad line.⁴ As a

* *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980). The *Scotto* case illustrates the historical and legal development of a complex federal racketeering case brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1976). The reader should not view the detailed discussion as commenting either on the defendants' guilt or innocence or on the merits of any legal issues raised during the course of the judicial process.

1 Welling, *On The Waterfront*, BARRON'S, Jan. 21, 1980, at 4 [hereinafter cited as Welling].

2 See Blakey & Goldstock, *The Investigation and Prosecution of Organized Crime and Labor Racketeering*, CORNELL INSTITUTE ON ORGANIZED CRIME, LABOR RACKETEERING: BACKGROUND MATERIALS 1-61 (1979) [hereinafter cited as Blakey & Goldstock].

3 D. BELL, *THE END OF IDEOLOGY* 178 (1962) [hereinafter cited as D. BELL].

4 *Id.*

result, longshoremen must load the incoming cargo onto waiting trucks for distribution. Congestion is common.⁵ The shipping business, furthermore, is seasonal and cyclical by nature, subject to weather, port delays, the overall economy, and other variables.⁶ Finally, the cargo may include perishables that require immediate unloading to avoid spoilage.⁷

These factors account for two of the most prevalent criminal activities on the docks: the "loading racket" and "kickbacks."⁸ The loading racket evolved from the trucking industry's great need for speed. Narrow piers and waterfront steets made it impossible to load more than a few trucks at a time. During World War I, waiting time became the most expensive aspect of trucking.⁹ The truckers resorted to hiring helpers to cut down on loading time; however, the prices charged increased with the demand for services. Truckers quickly learned they could speed the unloading process by paying an additional "hurry up" fee.¹⁰

The kickback, on the other hand, has been a more traditional form of criminal activity, caused by the fluctuation in the number of ships arriving daily in the New York harbor. This fluctuation made it difficult for employers to estimate how many laborers they would require each day. Consequently, the shipowners hired more workers than necessary, and each morning chose the needed men from the work pool. The remainder loitered on the piers, hoping to be chosen later in the day or the next morning. An employee's willingness to "kick back" a portion of his wages to the unloading foreman generally guaranteed that he would be chosen from the work pool.¹¹

Because the New York docks were a center of both illegal activity and high profits, the docks were an inviting target for infiltration by organized crime.¹² One commentator concludes that loading rackets were the principle incentive for such infiltration.¹³ During the 1920's, the underworld gangs fought fierce battles for control of

5 *Id.*

6 *Id.*

7 Blakey & Goldstock, *supra* note 2, at 41-42.

8 Consumers are the ultimate victims of these illegal activities. Concerning illegal activities on the docks, FBI deputy associate director for criminal investigations James B. Adams stated: "What makes this so devastating is that there's only one real victim: the consumer. Everyone else can get out of what he has to by passing the cost along to the consumer." N.Y. Times, Mar. 2, 1978, at 1, col. 3.

9 D. BELL, *supra* note 3, at 184.

10 *Id.*

11 Blakey & Goldstock, *supra* note 2, at 22.

12 *Id.* at 21.

13 J. HUTCHINSON, *THE IMPERFECT UNION* 98 (1970).

the loading rackets on the New York west side docks.¹⁴ The nature of the waterfront work force, primarily composed of uneducated and unskilled immigrants, made the work force easy to manipulate.¹⁵

Those who desired a piece of the waterfront action found that control of the union locals was a prerequisite to conducting racket operations on the piers.¹⁶ Organized crime figures gradually became integral parts of the I.L.A.¹⁷ By 1950, thirty percent of the I.L.A.'s officers had police records.¹⁸ Once in control of the unions, the underworld discovered other types of racketeering schemes, such as "strike insurance." Capitalizing on the shipping industry's need for speed, individual pier bosses regularly exacted payments from shippers by threatening walkouts.¹⁹

Organized crime infiltration in the union started slowly, but increased substantially during the union presidency of Joseph P. Ryan from 1927 to 1952.²⁰ In 1937, Albert Anastasia, reputed to have ties with the organized crime murder for hire network, "Murder, Inc.," assumed control of six Italian locals of the I.L.A.²¹ Under Anastasia's leadership, organized theft, kickbacks and loansharking on the piers reached unprecedented levels.²² Anastasia soon became the "absolute ruler of the Brooklyn waterfront."²³ He later arranged for his

14 D. BELL, *supra* note 3, at 168. Peace was eventually established among the organized crime "loading bosses" in the 1930's through Varick Enterprises, Inc., a "mob cooperative" that divided the total profit from all the piers among the various gangs. See Blakey & Goldstock, *supra* note 2, at 21 n.84.

15 Blakey & Goldstock, *supra* note 2, at 21.

16 *Id.* See V. JENSON, *STRIFE ON THE WATERFRONT* 100 (1974).

17 David Dubinsky characterized the I.L.A. as a "nest for waterfront pirates—a racket, not a union." D. DUBINSKY & A. RASKIN, *DAVID DUBINSKY: A LIFE WITH LABOR* 164 (1977). Daniel Bell wrote that the I.L.A. was "less a trade union than a collection of Chinese warlords, each ruling a great or small province." D. BELL, *supra* note 3, at 165. Elia Kazan brought the essence of life on the waterfront to the screen in his 1954 classic, "On The Waterfront" with Rod Steiger and Marlon Brando. G. Robert Blakey states "[T]he I.L.A. is virtually a synonym for corruption in the labor movement." Blakey & Goldstock, *supra* note 2, at 20.

18 V. JENSON, *supra* note 16, at 100. The criminal records were for arrests and convictions on felony charges. *Id.*

19 *Id.*

20 Blakey & Goldstock, *supra* note 2, at 22. See D. BELL, *supra* note 3, at 191.

21 The six locals were referred to as "Camarda locals" after the influence of International Vice-President Emil Camarda. Blakey & Goldstock, *supra* note 2, at 23.

22 H. NELLI, *THE BUSINESS OF CRIME* 244 (1976).

23 P. MAAS, *THE VALACHI PAPERS* 201 (1968). A rival gang executed Anastasia in a Manhattan barber shop in October, 1957. The Catholic Church denied Anastasia a church funeral, and he was buried in unconsecrated ground. The Church did not refuse a church funeral again until July, 1979, upon the death of organized crime figure Carmine Gallanti. N.Y. Times, July 16, 1979, at 1, col. 3.

brother, Anthony "Tough Tony" Anastasio²⁴ to become president of Local 1814, the largest of the I.L.A. locals. When "Tough Tony" died on March 1, 1963, his son-in-law succeeded him as president of Local 1814.²⁵ His son-in-law was Anthony M. Scotto.

Scotto was described as a "rising star in the labor world where it was assumed he would soon succeed Thomas W. Gleason as president of the 116,000 member I.L.A., and perhaps eventually . . . take the reins of the AFL-CIO."²⁶ In 1979, he was described by the New York Times as the dominant and most popular I.L.A. chief in the New York area, largely because of his successes in winning a guaranteed annual wage, free medical and dental care and other benefits for dock workers.²⁷ Scotto has also held many civic posts in New York and has lectured at various colleges and universities.²⁸

Scotto was born in the tough Red Hook waterfront section of Brooklyn in 1934, where both his father and grandfather had been dockworkers. In the early 1950's, Scotto too started working on the docks on weekends and summers. He eventually attended Brooklyn College where he studied political science with the goal of eventually entering law school. After two years of college, however, he dropped out to pursue a full time career on the waterfront.²⁹ By 1957, he was the business administrator of a health clinic operated jointly by the I.L.A. and the New York Shipping Association (NYSA), a conglomerate of waterfront employers. He held various other union posts until his father-in-law's death in 1963, when Local 1814 elected Scotto its president.³⁰ The I.L.A. soon elected Scotto its vice-president. Scotto began to build his reputation as a political power broker, quickly molding his union local's cash raising ability and manpower into a viable political force.³¹ Scotto actively supported President

24 The brothers disagreed as to the proper spelling of their last name. Albert insisted on the "a," while "Tough Tony" preferred the "o." N.Y. Times, Jan. 18, 1979, at 3, col. 6.

25 Scotto's co-defendant, Anthony Anastasio, is his cousin.

26 Welling, *supra* note 1, at 8.

27 N.Y. Times, Jan. 18, 1979, § D, at 15, col. 4.

28 Scotto has lectured at such schools as Harvard University and the New School for Social Research. He has served as president of the Maritime Port Council of Greater New York, as a chairman of the AFL-CIO's Committee on Political Education, and as a trustee of the Brooklyn Academy of Music. He has raised money for such philanthropic causes as the Saint Vincent's Home for Homeless Boys and the Anthony Anastasio Foundation, which provides scholarships for children of union members. N.Y. Times, Jan. 18, 1979, § B, at 1, cols. 3-4.

29 *Id.* at cols. 5-6.

30 Ten locals merged in 1954 to form Local 1814, which became the largest in the I.L.A. and the most powerful along the Atlantic and Gulf Coasts. *Id.* at col. 6.

31 Welling, *supra* note 1, at 24.

Carter and Governor Carey, and was instrumental in both the reelection of Mayor John V. Lindsey and the election of Lindsey's successor, Abraham Beame. He also raised funds for Mario Cuomo's unsuccessful mayoral campaign and helped to raise approximately one million dollars for the 1974 Carey campaign.³² Scotto served as a New York delegate to the Democratic National Conventions in 1972 and 1976 and, in 1976, he toured Brooklyn with Presidential candidate Jimmy Carter.³³

Scotto exerted considerable influence in New York state politics. In July of 1975 the New York legislature, influenced by Scotto,³⁴ passed a bill which amended the state's workmen's compensation law. The new law provided state payment for injuries to I.L.A. members treated at the NYSA-I.L.A. clinic in Brooklyn. Scotto also helped place men who "owed him" in city and state bureaucratic positions. Scotto claimed responsibility for "recommending" numerous bureaucrats to positions under Mayors Lindsey and Beame as well as Governor Carey and enjoyed a working relationship with such bureaucrats.³⁵

The federal government was aware of Scotto's ties to organized crime, beginning with his marriage into the Anastasia family in 1957. In 1969, the Justice Department identified Scotto as a "capocienda," or "chief," in the Carlo Gambino organized crime family. The finding resulted from an investigation by Senator John McClellan's Subcommittee on Organized Crime,³⁶ and from hearings by the Waterfront Commission of New York Harbor ("Waterfront Commis-

32 Wall Street Journal, Oct. 30, 1979, at 18, col. 1.

33 N.Y. Times, Jan. 18, 1979, § B, at 1, cols. 4-5.

34 *Id.*

35 At his trial, Scotto testified that he "caused the appointment" of Louis F. Mastriani as Commissioner of Ports and Terminals. *Id.* Scotto was also influential in other appointments, including: Arthur Cooperman, New York State Workmen's Compensation Board Chairman; Howard Schulman, member of the Port Authority of New York-New Jersey; Paul Hall, Seafarer's International Union President (Hall later testified as a character witness for Scotto at the trial. *See* note 100 *infra.*); Bert DiMattina, New York Shipping Association Vice-President, as New York State Insurance Fund Commissioner; John P. Laufer, Transportation Assistant Commissioner for Manhattan; and Louis Valentino, New York State Labor Affairs Commissioner (Valentino also testified at trial in Scotto's defense, *see* text accompanying notes 109-110 *infra.*).

36 The Justice Department requires information from three independent sources before making such an identification. Senator John L. McClellan (D. Ark.) has served as Chairman of the Senate Permanent Subcommittee on Investigations and as Chairman of the Senate Select Committee on Improper Activities in the Labor or Management Field.

For the findings of Senator McClellan's Subcommittee on Organized Crime, *see* S. REP. NO. 617, 91st Cong., 1st Sess. 39 (1969).

sion").³⁷ Scotto vehemently denied these allegations, calling them "anti-labor tactics"³⁸ and political guerilla warfare.³⁹ Other Scotto supporters claimed that the move was a revenge tactic by the Nixon Administration for Scotto's strong anti-war policy.⁴⁰

In 1970, Scotto was called before the New York State Legislature Joint Committee on Crime. Although Scotto invoked his Fifth Amendment right against self-incrimination rather than answer questions about his Mafia ties, the Committee's report listed Scotto as an alleged organized crime figure. A few months later, both Anthony and Marion Scotto appeared before the Waterfront Commission⁴¹ to respond to allegations of organized crime ties. Both invoked the Fifth Amendment a total of fifty-four times at the hearing. The furor caused by the investigations eventually died down and the Commission declined further action.⁴²

III. Investigation and Indictment

In 1975, the FBI began an extensive investigation into union racketeering on the docks. The investigation, termed UNIRAC (for "union racketeering"), extended over the entire Eastern seaboard

37 A longshoreman on the Brooklyn waterfront, Salvatore Passolacqua, testified before the Commission linking Scotto with organized crime figures. *See* S. REP. NO. 617, 91st Cong., 1st Sess. 39 (1979).

38 Daniel Bell states that a reaction such as this is a common response to exposure and has been since the 1950's. D. BELL, *supra* note 3, at 200.

39 In 1969, Scotto perceived that Attorney General John A. Mitchell and New York Governor Nelson Rockefeller were political foes of his and the politicians he supported. N.Y. Times, Dec. 17, 1979, at 1, col. 5.

40 Welling, *supra* note 1, at 24.

41 A compact between New York and New Jersey established the Waterfront Commission of the New York Harbor in 1953. Waterfront Commission Act of 1953, N.Y. UNCONSOL. LAWS §§ 9801-9937 (McKinney 1974). It was established to eliminate criminal practices in the handling of waterborne freight and regulate the employment of waterfront labor, previously subject to much abuse. *See* text accompanying notes 8-15 *supra*. The Commission has two members, one chosen by each state, and may act only upon a unanimous vote.

The legislature gave the Commission broad powers to effect the purposes of the interstate compact. Since 1953, it has attempted to clean up the waterfront by revoking the licenses of those engaging in criminal activity. Some law enforcement agencies doubt the effectiveness of the Commission. In 1979, several federal and state officials said they had withheld confidential information from the Commission concerning waterfront rackets because they suspected leaks to organized crime. *See* note 57 *infra*. N.Y. Times, May 27, 1979, § IV, at 7, col. 4.

42 N.Y. Times, May 27, 1979, § IV, at 7, col. 4. Allegations of Scotto's link to organized crime continued to surface. In 1978, a convicted loanshark named Gary Bowdach testified under immunity before a Senate Investigation Committee that he had seen Scotto transfer over \$40,000 to an organized crime courier for Meyer Lansky, a reputed underworld figure. Scotto denied these allegations. *Id.*, Jan. 18, 1979, § B, at 1, col. 5.

and Gulf Coast and involved more than 100 FBI agents.⁴³ The FBI conducted court ordered wiretaps in ten cities ranging from Manhattan to New Orleans.⁴⁴ UNIRAC resulted in charges against more than 100 persons operating in eastern and gulf seaboard ports such as Baton Rouge, Boston, Charleston, Houston, Miami, New Orleans, Raleigh, San Juan, and Savannah.⁴⁵ Federal grand juries handed down three indictments. The first was in June of 1978, when a Miami grand jury indicted twenty-two persons for union racketeering, including ten men associated with the I.L.A.⁴⁶

The other two indictments were handed down in New York. The larger of the two was against eleven men and contained 213 counts.⁴⁷ On January 19, 1979, Anthony Scotto, president of the I.L.A. Local 1814, and Anthony Anastasio, vice-president of Local 1814 and Scotto's cousin, were indicted by a New York Grand Jury. The fifty-three count indictment charged Scotto with violations of the Racketeer Influenced and Corrupt Organizations Act (RICO),⁴⁸

43 *Id.*, Sept. 11, 1979, § B, at 1, col. 1. An FBI spokesman termed the investigation "one of the most extensive investigations in the bureau's history." *Id.*

44 Wiretapping was conducted in Manhattan, Brooklyn, Fort Lauderdale, Miami, Jacksonville, New Orleans, Mobile, Norfolk, Hoboken and Philadelphia. *Id.*, Jan. 18, 1979, at 1, col. 2.

45 Welling, *supra* note 1, at 4.

46 Those people who were indicted and were connected with the I.L.A. were George Barone and William Boyle, both International vice-presidents of the I.L.A.; Isom Clemon, former president of an I.L.A. local in Mobile; Elizabeth Jackson and Robert Bateman, presidents of the Savannah and Charleston I.L.A. locals, respectively; Fred R. Field, I.L.A. general organizer; James Vanderwyde, office manager of a Miami local; Cornelius Vanderwyde, office employee of the Miami local; Cleveland Turner, president of Miami Local 1416; and Landon Williams, I.L.A. International Vice-President and president of Local 1408 in Jacksonville, Florida. An eight month trial resulted in convictions of twenty-two. *United States v. Barone*, 83 F.R.D. 565 (S.D. Fla. 1979). *See* N.Y. Times, Sept. 1, 1979, at 6, col. 5.

47 This indictment was filed after the Scotto indictment, in March of 1979. Four of the eleven men charged in this indictment were I.L.A. officials. They were Michael Clemente, New York Local 856 official before being barred from office for waterfront extortion in 1954; Thomas Buzzanca, Manhattan Locals 1804 and 1804-1 President; Vincent Colucci, Newark Locals 1235 and 1478-2 President; and Carol Gardner, Newark Local 1233 President. The other seven defendants were waterfront businessmen with connections to the I.L.A. such as Tino Fiumara and Michael Coppola, reputed underworld figures. A key witness against Scotto was also a key witness in this trial. William "Sonny" Montella testified that he made payments to Buzzanca, Colucci and Gardner to obtain business for his company, Quin Marine Services, a waterfront carpentry firm. *See* note 53 *infra*. *See also* text accompanying notes 66-136 *infra*. After an eleven week trial, most defendants received heavy sentences. N.Y. Times, June 22, 1980, at 35, col. 2. *See* *United States v. Clemente*, 494 F. Supp. 1310 (S.D.N.Y. 1980).

48 18 U.S.C. §§ 1961-1968 (1976). *See generally* H.R. REP. NO. 91-1549, 91st Cong., 2d Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007, 4010, 4032-33. 18 U.S.C. § 1962 (1976) states:

the Taft-Hartley Act,⁴⁹ mail fraud,⁵⁰ and income tax evasion.⁵¹ The indictment accused Scotto of receiving over \$300,000 in illegal payoffs in return for reducing the number of fraudulent workmen's compensation claims and promising to use his influence to get additional business for certain waterfront companies.⁵² The bulk of the \$300,000 allegedly came from two waterfront companies, John W. McGrath Services Corporation and Quin Marine Services, a Brooklyn subsidiary of McGrath Services Corporation.⁵³ The indictment

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

49 Labor Management Relations (Taft-Hartley) Act of 1946, 29 U.S.C. § 186 (1976), forbids any payment of money or other things of value by employers to a labor official, representative, or organization. The Act also forbids demand and/or receipt of money or "other thing of value" by any labor official, representative, or organization.

50 18 U.S.C. § 1341 (1976).

51 26 U.S.C. §§ 7201, 7206 (1976). The indictment charged Scotto with failing to report about \$200,000 in taxable income he received between 1975 and 1977 (N.Y. Times, Jan. 18, 1979, at 1, col. 2) and with participating in a scheme to persuade a waterfront company, Prudential Lines, to accept a questionable ten year lease for a Brooklyn warehouse. Two officers of Prudential Lines, Marc D. Coppel and Keith L. Nelson, pleaded guilty to making illegal payments connected with this charge. Two key government witnesses in this case narrowly escaped being murdered by a spray of automatic gunfire while leaving their Newark, New Jersey office on May 27, 1979. N.Y. Times, May 28, 1979, § B, at 2, col. 1. The government later dropped the charges stemming from the lease from the indictment. See text accompanying note 64 *infra*.

52 N.Y. Times, Jan. 18, 1979, at 1, col. 2.

53 The indictment alleged that money also came from C.C. Lumber, Inc. in Brooklyn,

charged Anthony Anastasio with participating in the RICO violations and sharing in illegal payments totalling \$15,000 in violation of the Taft-Hartley Act.⁵⁴

Reactions to the indictment were mixed. Scotto's attorney, James La Rossa, described the indictment as "a finale of a 15-year Justice Department vendetta against Mr. Scotto which has undoubtedly cost the taxpayers untold millions of dollars."⁵⁵ Many dockworkers and I.L.A. members interviewed in Scotto's home area viewed Scotto as a victim of the government investigation, and believed he would ultimately be cleared.⁵⁶

The chief evidence against Scotto was obtained from court-ordered wiretaps, conducted by the FBI during the UNIRAC investi-

Marine Repair Services in Staten Island, and American Navigation Corporation of Baltimore. All three companies had connections with the other two defendants named in the Scotto indictment, Vincent E. Marino and Joseph A. Lacqua. Marino and Lacqua were subsequently severed from Scotto and Anastasio because the former were indicted only on Taft-Hartley misdemeanor counts. N.Y. Times, Mar. 3, 1979, at 44, col. 1. Lacqua, a former district attorney in Brooklyn and a present officer of both the American Navigation Corporation and C.C. Lumber, Inc., was later acquitted on January 10, 1980. *Id.*, Jan. 11, 1980, § B, at 4, col. 2. Marino, however, was convicted in the same federal court. The jury found that he paid Scotto almost \$40,000 in kickbacks for business Scotto supplied. *Id.*, April 8, 1980, § B, at 5, col. 2.

Two executives of the largest contributors, McGrath Service Corporation and Quin Marine Services, testified for the government. *See* text accompanying notes 72-82 & 89-96 *infra*. These executives, William D. O'Hearn, President of McGrath Service Corporation, and William "Sonny" Montella, General Manager of Quin Marine Services, pleaded guilty to seven counts of violating 29 U.S.C. § 186(a) (1976) (Taft-Hartley), and later testified that they made illegal payments to Scotto and/or Anastasio. N.Y. Times, June 25, 1979, at 1, col. 2. O'Hearn testified that a drastic increase in fraudulent workmen's compensation claims in 1973 and 1974 threatened the survival of his company. *Id.* This was caused, in part, by a 1972 amendment to the Longshoremen's and Harbor Workers Act, 33 U.S.C. §§ 901-950 (1976), which permitted an injured longshoreman's claims to be based on his own physician's report, leading to what most of the industry agreed is a "racket" of filing fraudulent or exaggerated claims. Brief for appellee at 6, *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980) (hereinafter cited as Government Brief).

O'Hearn stated that he and his partners "became aware that this was a racket . . . and attempted to talk to Mr. Scotto to seek his assistance . . ." N.Y. Times, June 25, 1979, at 1, col. 2. *See* text accompanying notes 89-96 *infra*. O'Hearn received a suspended sentence. N.Y. Times, Jan. 16, 1980, § B at 2, col. 5.

Montella pleaded guilty to two separate conspiracy counts to violate both the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (1976). He entered the federal witness protection program on August 16, 1978. N.Y. Times, Jan. 19, 1979, § B, at 3, col. 3. He also testified for the government at the trial on the related indictment against Clemente and Fiumara. *See* note 47 *supra*.

54 N.Y. Times, Jan. 18, 1979, at 1, col. 3.

55 N.Y. Times, Jan. 18, 1979, at 1, col. 2. The federal government stated that La Rossa's figure of "untold millions" was highly exaggerated. Welling, *supra* note 1, at 4.

56 N.Y. Times, Sept. 10, 1979, § B, at 3, col. 6.

gation.⁵⁷ There was a total of 1100 hours of tapes at the conclusion of the investigation.⁵⁸

Scotto and Anastasio both pleaded not guilty at the arraignment on January 25, 1979.⁵⁹ Although La Rossa argued that the court should require no bail for Scotto because he was "a good enough risk for the President [Carter] to have lunch with . . .",⁶⁰ unsecured bail was set at \$50,000 for Scotto and \$30,000 for Anastasio.⁶¹ The case was assigned to Judge Charles E. Stewart, Jr., sitting in the Southern District of New York.

A superseding indictment filed on July 31, 1979⁶² added fourteen counts to the original fifty-six counts, and charged Anastasio with receiving an additional \$50,000 in payoffs, including \$4,000 allegedly received as recently as July 1, 1979.⁶³ The government subsequently withdrew ten counts that involved a scheme to expedite a questionable waterfront lease, payments by two severed defendants, and a wire fraud charge against Scotto.⁶⁴ The RICO charges, Taft-Hartley charges, and the income tax evasion charges remained intact.⁶⁵

IV. Trial

The jury selection for the anticipated seven week trial began on September 12, 1979,⁶⁶ resulting in a jury of eight women and four men.⁶⁷ The prosecution team consisted of the United States Attor-

57 The FBI obtained approximately thirty-two separate wiretap orders from sixteen different judges, naming Scotto in twenty-six orders. The wiretapping began in May of 1976 and continued until May of 1978.

The investigation revealed some unrelated facts that led to separate investigations. One such incident was the suspension and eventual dismissal of Alphonso T. Pelaez, a high ranking investigator for the Waterfront Commission for allegedly passing confidential information regarding the waterfront investigation to Scotto. *See Pelaez v. Waterfront Commission of New York Harbor*, 77 A.D.2d 947, 431 N.Y.S.2d 134 (1980).

58 N.Y. Times, Mar. 4, 1978, at 44, col. 1.

59 *Id.*, Jan. 26, 1979, § B, at 4, col. 1.

60 *Id.* Scotto had lunch with President Carter on November 2, 1978.

61 *Id.*

62 *Id.*, Aug. 24, 1979, § B, at 5, col. 4.

63 *Id.*, Aug. 1, 1979, § B, at 3, col. 6.

64 *Id.*, Sept. 11, 1979, § B, at 3, col. 1.

65 *See* notes 48-51 *supra*.

66 N.Y. Times, Sept. 15, 1979, at 23, col. 6. Selwyn Raab covered the trial for the New York Times substantially from start to finish.

67 The foreperson of the jury was Janice Shaw, a research chemist. Among the other jurors were an insurance broker, a retired minister, a mailman, a receptionist in a police precinct, a New York State Labor Department employee, a school consultant, an anthropologist, a New York State Tax Department clerk, a sausage company manager, a phone operator, and a retired housemaid. *Id.*, Nov. 12, 1979, § B, at 1, col. 1.

ney for the Southern District of New York (U.S. Attorney) Robert B. Fiske, and Assistant U.S. Attorneys Scott W. Muller and Alan Levine. Scotto was represented by James La Rossa, and Anastasio was represented by Gustave H. Newman.

In his opening statement on Tuesday, September 18, Fiske characterized Scotto as a "corrupt and greedy official" who "demanded and received \$300,000 in cash in illegal payoffs despite a union salary of more than \$100,000 a year."⁶⁸ La Rossa, on the other hand, characterized Scotto as a "responsible, sincere labor leader" with a sense of civic duty.⁶⁹ He outlined Scotto's defense, stating that any money Scotto received was for political contributions and was passed on.⁷⁰ This became known as Scotto's "conduit" defense. Newman used his opening statement to attack the credibility of a key government witness, William "Sonny" Montella.⁷¹

The government began its case-in-chief on Wednesday, September 19. Of the twenty-three witnesses called by the government,⁷² three were central to the government's case. The first was William "Sonny" Montella, the general manager of Quin Marine Services, a company involved in carpentry services for ships on the waterfront.⁷³ Montella revealed that he had personally paid at least \$75,000 to Scotto in return for Scotto's influence in preventing competitors from taking away any of Quin Marine's business.⁷⁴ He testified he made payments in 1976 according to an agreed upon schedule.⁷⁵

Montella testified further that he had carried a concealed recording device provided by the FBI to a July 13, 1978 meeting with

68 *Id.*, Sept. 19, 1979, § B, at 3, col. 1.

69 La Rossa stated that Scotto was a "responsible, sincere labor leader" who improved conditions on the docks, attracted business to the Brooklyn waterfront, and became "a viable power in the political world." *Id.*

70 *Id.* Scotto's defense was that he merely violated New York Elections Laws—a misdemeanor. N.Y. ELEC. LAW § 14-118(b) (McKinney 1976) forbids receipt by any candidate or political committee of more than one hundred dollars from any individual unless the money is in the form of a check. Under N.Y. ELEC. LAW § 14-126(c) (McKinney 1976), it is a misdemeanor for any person to aid in the acceptance of more than one hundred dollars in a form other than a check. It was this section that Scotto contended he violated.

71 Newman pointed to Montella's prior convictions, and accused him of "lying, cheating and stealing." N.Y. Times, Sept. 19, 1979, § B, at 3, col. 3.

72 Most of the government's witnesses were supporting witnesses. One such witness was Morton Sills, the owner of a custom tailor shop in New York City. He testified that Scotto bought \$12,000 worth of custom tailored suits, mostly with cash. *Id.*, Sept. 28, 1979, § B, at 4, col. 4.

73 See note 53 *supra*.

74 N.Y. Times, Sept. 20, 1979, § B, at 3, col. 1.

75 Montella stated that he made the first payment in late 1975, agreeing to pay \$25,000 a year—\$5,000 in March, June and September, and \$10,000 at Christmas. *Id.* See note 78 *infra*.

Scotto in the men's room at the Drake Hotel in Manhattan. At that meeting he gave Scotto \$5,000.⁷⁶ The government then introduced recordings made during meetings between Montella and Scotto on January 13, 1978, where Montella passed \$10,000 to Scotto,⁷⁷ and on March 13, 1978 where the two men reviewed their schedule of payments.⁷⁸ Montella also testified that he had built a \$15,000 cabana for Scotto's forty acre summer estate in the New York mountains as part of his payment⁷⁹ and denied that any of his payments to Scotto

76 N.Y. Times, Sept. 21, 1979, at 1, col. 3. Montella stated that he used false invoices at Quin Marine Services to raise the necessary cash. *Id.*

77 N.Y. Times, Sept. 21, 1979, at 1, col. 3. At the time of this recording, neither Scotto nor Montella knew of the court ordered wiretap. *Id.* At the time of the recording, Montella was late in making his 1977 final quarter payment. The conversation proceeded as follows:

Montella: Anthony, I was a little tardy in seeing ya, so I hope you understand. Sometimes things are very difficult.

Scotto: I understand

Montella: Too, too, you know, I had to help, I had to help, uh, Walter. You know, and so forth.

Scotto: Yeah.

Montella: And everything else.

Scotto: Yeah.

Montella: So it took me a little bit of time. Ah, a few things I wanted to talk to you about, all right? Can I close the door?

Scotto: Sure.

Montella: This is for you. That's from me, ten thousand (sound of paper, crumpled). Here you are.

Welling, *supra* note 1, at 28.

78 N.Y. Times, Sept. 21, 1979, at 1, col. 3. While Scotto and Montella did not specifically discuss illegal payments, their conversation did concern the payment of money. A March 13, 1978 excerpt contained the following conversation, with Montella (M) recounting the arranged payoff schedule to refresh Scotto's (S) memory:

M: March, I gave you five.

S: Yeah.

M: June, I gave you five. September, I gave you five. And then December, I gave you 10.

S: No, I know that, I just . . . thought it was earlier, but that's all right.

M: No. All the time it has been like that.

S: Right.

M: Because I would, you know, when you said . . .

S: I, I got a little screwed up, because . . .

M: A few days maybe, yes. But never months, never.

S: I got, I got screwed up because . . .

M: Because that was the bonus, you know.

S: I figured something. I figured it wrong.

M: Yeah.

S: See. I must have got screwed up when you did a double one at Christmas every year.

Welling, *supra* note 1, at 28.

79 N.Y. Times, Sept. 22, 1979, at 1, col. 3.

were for political contributions.⁸⁰

During the five day cross-examination by La Rossa, Montella admitted that he had lied, stolen and made illegal payoffs in the past⁸¹ and had pleaded guilty to making illegal payoffs, to extortion and to tax evasion.⁸² Montella also conceded that Scotto never actually steered any business to Quin Marine Services.

The key witness against Anastasio was Nicholas Seregos, the owner of a ship repair company in Hoboken, New Jersey.⁸³ Seregos reluctantly appeared under a court order of limited immunity.⁸⁴ He testified that he gave over \$50,000 in cash payoffs to Anastasio between 1975 and 1979, most of it under a ten percent "kickback" arrangement which was designed by Anastasio with Scotto's approval.⁸⁵ Seregos raised the cash for these payoffs by disbursing funds for non-existent purchases.

Newman cross-examined Seregos at great length regarding his "totally different" testimony given under oath before the Waterfront Commission in 1976.⁸⁶ Seregos admitted that at times Anastasio referred business to him without receiving money.⁸⁷ La Rossa challenged business records produced by the government in which Seregos had recorded the payments made to Anastasio. Because one entry recorded a single payment twice, La Rossa argued that such an

80 *Id.*, Sept. 26, 1979, § B, at 3, col. 6.

81 *Id.*, Sept. 22, 1979, at 1, col. 3. Montella stated: "If I pleaded guilty to everything (all prior payoffs and lies), I'd be looking at 100 years." *Id.* He admitted not only stealing money from Quin Marine, but also stated he tried to take over a bar by force by putting a hot blow dryer on his victim's neck to force him to sign over ownership papers. Montella also said that lying was the "only way to do business on the waterfront." *Id.*

82 *Id.* See note 53 *supra*.

83 *Id.*, Sept. 28, 1979, § B, at 4, col. 4.

84 The government gave Seregos immunity from prosecution for payments he made to Anastasio. See note 85 *infra*. A grand jury later indicted Seregos for his participation in an unrelated corruption scheme, for which he was convicted. See *United States v. Seregos*, No. 579 Cr. 569 (S.D.N.Y. Aug. 1, 1980), *rehearing denied*, No. 80-1403 (S.D.N.Y. Sept. 7, 1981).

85 N.Y. Times, Sept. 28, 1979, § B, at 4, col. 4. Seregos kicked back to Anastasio ten percent of the amounts received from two shipping companies, Prudential Lines and United States Lines, for their repair business. Seregos said he made the first payment in 1976, and the last payment of \$4000 on July 5, 1979. Anastasio requested this last payment for "helping Mr. Scotto pay his attorney fees," which resulted in the government making additional charges against Anastasio. See text accompanying note 63 *supra*.

86 Seregos testified before the Waterfront Commission in 1976 that he never paid any money to Anastasio and never spoke to Scotto. Seregos explained at trial that he lied to the Waterfront Commission because he was afraid of losing a multi-million dollar Navy contract. N.Y. Times, Sept. 30, 1979, at 40, col. 1. On redirect, he said he lied because he did not want to admit to a crime. *Id.*, Oct. 30, 1979, § B, at 10, col. 4.

87 *Id.* Anastasio's defense strategy was to deny ever receiving any money, whereas Scotto admitted accepting money in a mere intermediary capacity. See text accompanying notes 113-118 *infra*.

error demonstrated a lack of accuracy.⁸⁸

The government presented the third of its key witnesses on Friday, October 4, calling Walter D. O'Hearn, the president of McGrath Services Corporation.⁸⁹ O'Hearn greatly damaged Scotto in six days of testimony. He stated that he met with Scotto in April, 1974, in an attempt to decrease the fraudulent accident claims that were costing his company over one million dollars a year.⁹⁰ O'Hearn agreed to pay Scotto \$5,000 a month, and an extra payment at Christmas, for Scotto's assistance in reducing the number of claims.⁹¹ O'Hearn testified he had paid a total of \$210,000 in cash to Scotto until November of 1978.⁹² The prosecution then produced taped conversations to establish how Scotto and Anastasio had divided the money.⁹³ O'Hearn verified that there was a dramatic decrease in accident claims filed after the payoffs began.⁹⁴

88 N.Y. Times, Oct. 3, 1979, § B, at 10, col. 4.

89 Before O'Hearn was called, the prosecution called a few minor witnesses to establish that Scotto had an inordinate amount of ready cash. One such witness was Joseph Lane, an automobile dealer in Kingston, New York. He testified that Scotto put a \$1000 cash down payment on a new Mercedes Sports Coupe, with the \$25,000 balance being paid by a Local 1814 maintenance man with a yearly income of \$15,000. The balance was paid in bank checks, and the car was registered in the name of the maintenance man. The government introduced tapes from March of 1978 wherein Scotto discussed the arrangement with Steven Krosnick, the maintenance man. Scotto explained to Krosnick that the reason for the clandestine purchase was to avoid tax payments. N.Y. Times, Oct. 4, 1979, § B, at 14, col. 1. Scotto was to later testify on cross-examination that the reason the car was purchased in this surreptitious manner was due to the request of an unnamed "old family friend" who wished to give the car to Scotto's children as a gift. *Id.*, Nov. 2, 1979, § B, at 1, col. 5. See note 122 *infra*.

90 See note 53 *supra*.

91 O'Hearn stated that a different executive of McGrath Service Corporation, David Rosen, actually met with Scotto initially and arranged the agreement. N.Y. Times, Oct. 27, 1979, at 27, col. 1. Rosen pleaded guilty to his complicity in the payoffs on January 23, 1980. *Id.*, Jan. 24, 1980, § B, at 1, col. 6.

92 N.Y. Times, Oct. 9, 1979, § B, at 3, col. 4. O'Hearn usually paid Scotto \$15,000 quarterly. Scotto preferred face-to-face payoffs, which is evidenced by the first payment in August of 1975 in the men's room of Michael's One, a Manhattan restaurant. *Id.* The payments ended when O'Hearn agreed to cooperate with the government in November, 1978. Scotto tried to contact O'Hearn on several occasions to inquire about payments, and was unaware that O'Hearn was cooperating with the government. In one tape recorded message between Scotto and Montella, Scotto complained that O'Hearn was backing out of their arrangement: "[H]e's impossible to find. We had a deal . . ." Government Brief, *supra* note 53, at 11.

93 One such conversation was recorded on December 21, 1977. In three minutes Scotto and Anastasio split at least \$30,000. Government Brief, *supra* note 53, at 21-22. In a February 10, 1978 meeting in preparation for an I.L.A. meeting in Miami, Scotto and Anastasio divided \$9,000 between themselves, each taking \$2,500 and putting \$4,000 in a "kitty." *Id.* at 22-23.

94 In 1974, accident claims on the Brooklyn docks totalled over \$1.4 million. In 1976, the figure dropped to \$300,000. N.Y. Times, Oct. 9, 1979, § B, at 3, col. 4.

O'Hearn admitted on cross-examination that he made some political contributions to Governor Carey's 1978 campaign, and raised money for President Carter's campaign.⁹⁵ However, these payments were made by check, and not in cash, as were the Scotto payments.⁹⁶

The government completed its case-in-chief against both defendants by establishing the tax evasion charges.⁹⁷ The case had taken almost four full weeks to present. The government had presented three major witnesses, twenty supporting witnesses, and thirty-seven separate tapes.⁹⁸

The defense opened on Wednesday, October 17. Scotto called twenty-one witnesses, including nine character witnesses.⁹⁹ The impressive list included two former New York City Mayors, various labor leaders, and Governor Hugh Carey.¹⁰⁰ In an unusual move, La Rossa presented most of the character witnesses first, breaking the flow occasionally to present the other defense witnesses. Former Mayor John V. Lindsey stated that he regarded Scotto as "a man of high integrity."¹⁰¹ New York State Supreme Court Judge William C. Thompson testified that Scotto assisted in the desegregation of the Manhattan docks.¹⁰² Former Mayor Robert F. Wagner called Scotto

95 N.Y. Times, Oct. 10, 1979, § B, at 20, col. 2. O'Hearn specifically recalled making a \$1,000 contribution to the "Friends of Governor Carey" in 1978. *Id.*

96 *Id.* On redirect, O'Hearn stated that McGrath Service Corporation contributed \$11,250 to various political campaigns between 1975 and 1978, but all contributions were by check and all were legal. *Id.*, Oct. 13, 1979, § B at 3, col. 5.

97 The evidence established that Scotto failed to declare on his federal income tax returns payoffs amounting to \$69,700 in 1975, \$90,000 in 1976, and \$16,500 in 1977. *United States v. Scotto*, 641 F.2d 47, 51 (2d Cir. 1980).

98 The testimony of the government's three major witnesses, Montella, Seregos and O'Hearn, occupied sixteen of the twenty-two days of testimony in the government's case.

99 N.Y. Times, Oct. 17, 1979, § B, at 3, col. 2. The press learned that Judge Stewart had limited the number of character witnesses that each defendant could call to a reasonable number.

100 Each of Scotto's character witnesses conceded on cross-examination that they were unaware of the evidence against Scotto. The character witnesses appearing for Scotto, in order of appearance, were former New York City Mayor John V. Lindsey; Paul Hall, president of the Seafarer's International Union; New York Supreme Court Justice William C. Thompson; Lane Kirkland, secretary-treasurer of the AFL-CIO; Morris Biller, president of the New York area postal workers union; former New York City Mayor Robert F. Wagner; Victor Gottbaum, head of District Council 37 of the American Federation of State, County and Municipal Employees; William Shields, retired president of Barber Steamship Lines; and Governor Hugh L. Carey.

101 N.Y. Times, Oct. 18, 1979, § B, at 3, col. 5. Lindsey admitted under cross-examination that he was "embarrassed" by his association with Scotto after the Justice Department labeled Scotto an organized crime figure. Scotto had been instrumental in forming Lindsey's Independent Party. *Id.* See text accompanying notes 36-37 *supra*.

102 N.Y. Times, Oct. 23, 1979, § B, at 8, col. 3.

“a man of integrity and ability—and a darned good labor leader.”¹⁰³ The final character witness, Governor Hugh Carey, testified that Scotto acted “on his conscience for what is right and not what is popular.”¹⁰⁴ On cross-examination, Carey admitted that the I.L.A. had contributed \$42,000 to Carey’s 1978 campaign, and that Scotto had made a personal loan of \$20,000 (later repaid) to the same cause.¹⁰⁵ Carey was apparently unaware of Scotto’s “conduit” defense theory, and conceded on cross-examination that he would not testify as a character witness for Scotto if he thought Scotto had made illegal contributions to Carey’s 1978 campaign.¹⁰⁶

Scotto then presented other witnesses to combat the government’s case directly. To mitigate O’Hearn’s testimony that Scotto demanded money to assist in the reduction of fraudulent dock accident claims, Scotto called six witnesses.¹⁰⁷ John J. Farrell, Jr., president of International Terminal Operations Company, testified concerning Scotto’s efforts to reduce accident claims by longshoremen. The other five witnesses gave similar testimony.¹⁰⁸

Scotto attempted to refute Montella’s testimony that money had

103 N.Y. Times, Oct. 25, 1979, § B, at 1, col. 1. Wagner associated frequently with Scotto when Wagner ran Hugh Carey’s 1974 gubernatorial campaign, and had Scotto’s support as mayor of New York City. *Id.*

104 *Id.*, Oct. 27, 1979, at 21, col. 6. Governor Carey stated that he “would characterize Mr. Scotto as a man who seeks public service outside the ambit of his union.” *Id.*

105 *Id.*, Oct. 25, 1979, § B, at 1, col. 1.

106 Carey’s concession seriously undermined the effectiveness of his testimony. The government also proved that Scotto used his influence to end the 1979 newspaper strike in New York City before Election Day in October of that year. *Id.*, Oct. 27, 1979, at 21, col. 6.

A Carey spokesman later revealed that La Rossa assured Carey that he would not be made to look like “the bad guy” by his testimony in the trial. Carey’s aides stated in November, 1979, that Carey believed La Rossa honored the commitment despite Scotto’s “illegal contributions” defense. *Id.*, Nov. 2, 1979, § B, at 14, col. 1. However, Carey himself stated in November, 1979, that he felt La Rossa had an obligation to inform him of the defense before Carey testified. Carey stated in a December 13th interview that “[I]t was never clear to me how [Scotto’s defense] would develop—not until it was too late.” *Id.*, Dec. 17, 1979, § D, at 14, col. 6. The appearance for Scotto may be a “no win” situation for Carey. Scotto’s conviction showed that Carey entertained a mistaken opinion of Scotto. Even if the jury had acquitted Scotto, it may have believed that Carey’s campaign accepted illegal campaign contributions. Carey nevertheless testified, out of “obligation” to his friend of eighteen years. *Id.* But see note 138 *infra*.

107 The six witnesses called to counter O’Hearn’s testimony were John J. Farrell, Jr., president of International Terminal Operations Company; Joseph Byrne and Joseph Chiarello, two waterfront businessmen; Alfred Small, a safety official of Local 1814; Saveri Galati, a supervisor from Pittston Stevedoring Company; and Richard Toben, former terminal manager for J.W. McGrath Corporation.

108 See note 107 *supra*. For example, Galati testified that Scotto often visited the piers to urge the workers to “cut down on accidents.” N.Y. Times, Oct. 26, 1979, § B, at 3, col. 2. All witnesses stated that Scotto never sought payment for this service.

been passed between them by relying on his "conduit" defense. Scotto argued that he did receive certain payments, but that he acted only as an intermediary in passing the funds on to various political campaigns. Theresa Mazzilli, Montella's secretary, testified that Montella often complained about paying money to political campaigns without getting credit for it, contradicting Montella's earlier testimony, and supporting Scotto's defense. Scotto's next witness, Louis Valentino, New York State Deputy Commissioner of Labor, was an official in Mario Cuomo's 1977 mayoral campaign. Valentino testified that he had paid \$50,000 in cash to Cuomo's unsuccessful 1977 mayoral campaign and that Scotto arranged the transaction.¹⁰⁹ This testimony sparked an investigation by the New York State Board of Elections, which later concluded Valentino may have perjured himself.¹¹⁰

Joseph F. Colozza, a vice-president of I.L.A. Local 1814 who worked in Carey's 1978 reelection campaign, testified that Scotto gave him a \$25,000 cash contribution for the Carey campaign in June of 1978.¹¹¹ On cross-examination, Colozza stated that he was unaware of state laws requiring records to be kept of large cash contributions. Neither Valentino or Colozza kept any records of the cash that they said Scotto gave them.¹¹²

Taking the stand in his own defense, Scotto admitted to taking political contributions, but stated the amount he accepted was only \$75,000, not the \$300,000 the government charged him with receiving. He stated he had "never taken a cent from Sonny [William] Montella or anyone else" for his own purposes.¹¹³ Scotto also said he paid Montella for the cabana built at his summer home in 1975.¹¹⁴ Scotto admitted that he received a total of \$75,000 in cash from

109 N.Y. Times, Nov. 6, 1979, at 1, col. 2.

110 N.Y. Times, April 8, 1980, § B, at 5, col. 2. The Board of Elections investigation heard from Michael G. Dowd, director of Cuomo's 1977 mayoral campaign, and Lorraine Romano, who handled the day to day transactions in that campaign. Neither of the witnesses had any knowledge of the \$50,000 transaction. Valentino invoked his fifth amendment rights when questioned about this and the Board recommended that the Manhattan district attorney commence a perjury investigation. *Id.*

111 *Id.*, Nov. 7, 1979, § B, at 1, col. 5.

112 *Id.* The government's rebuttal witness, Donald Bachmann, comptroller of Cuomo's 1977 mayoral campaign, stated that he never heard of the \$50,000 cash contribution Valentino testified to receiving. *Id.*, Nov. 8, 1979, § B, at 1, col. 1. The official contribution records of both the 1977 Cuomo campaign and the 1978 Carey campaign did not reveal the contribution. *Id.*

113 Scotto stated he became involved in politics to protect the interests of his union members and the waterfront industry in New York. He said he told Montella and O'Hearn to get together and raise money for candidates that would be helpful to the waterfront industry. *Id.*

114 *See* text accompanying note 79 *supra*.

O'Hearn and Montella between 1977 and 1978, but testified that he gave the money to the Carey and Cuomo campaigns.¹¹⁵ Scotto said the tapes introduced by the government in which he accepted \$5,000 in March, 1978,¹¹⁶ represented a payment towards a \$50,000 commitment to Cuomo's campaign.¹¹⁷ He went on to say that he delivered the money to the political campaigns and that he identified the source of the funds.¹¹⁸

Fiske's cross-examination of Scotto lasted three full days. Fiske confronted Scotto with the public filings from both the 1977 Cuomo campaign and the 1978 Carey campaign,¹¹⁹ which included only two \$1,000 contributions by O'Hearn's corporations. Fiske then questioned Scotto about other illegal payments mentioned in the indictment, and Scotto admitted giving two expensive tickets to a political fund raiser (the "Lincoln Center Tribute to Governor Carey") to Louis F. Mastriani, the former New York City Ports Commissioner, in January of 1978.¹²⁰ The government presented evidence to establish that Mastriani, in return, had expedited approval of a city lease for the Northeast Maine Terminal waterfront project in Brooklyn, a project that Scotto favored.¹²¹

Fiske then questioned Scotto about the large number of bills he paid in cash.¹²² Scotto explained he paid in cash to make it difficult for the FBI agents who "followed and harrassed [him] ever since 1957" when he married Marion Anastasio.¹²³ Scotto reasserted his "conduit" defense, and he asserted that he was unaware of state laws

115 Scotto testified that Anastasio delivered \$50,000 to Valentino for the Cuomo campaign in 1977, and \$25,000 went to Colozza for the 1978 Carey campaign. N.Y. Times, Oct. 31, 1979, at 1, col. 1. Both Carey and Cuomo denied receiving any such money. Arthur D. Emil, the treasurer of the Carey campaign, went further and declared that he never heard of Joseph Colozza. *Id.* Scotto's testimony also conflicted with that of O'Hearn and Montella, both of whom said the payments began in 1975. *Id.*

116 See Government Brief, *supra* note 53, at 9-10.

117 See text accompanying note 75 *supra*.

118 N.Y. Times, Oct. 31, 1979, at 1, col. 1.

119 The campaign filings are required by N.Y. ELEC. LAW, § 14-108 (McKinney 1976).

120 N.Y. Times, Nov. 2, 1979, § B, at 1, col. 5. The tickets were each worth between \$500 and \$1000. Either Local 1814 or the Brooklyn Longshoremen's Political Action Fund paid for the tickets. Mastriani was the New York City Ports Commissioner from March, 1976 through December, 1977. *Id.*

121 Welling, *supra* note 1, at 26.

122 Scotto conceded that in one year he paid cash for several \$700 suits, \$16,000 for television and stereo equipment, and for improvements on his 40 acre summer estate in Saugertons, New York. N.Y. Times, Nov. 2, 1979, § B, at 1, col. 5. Scotto also bought a 13% interest in the 415 East 52 Street Corporation (a cooperative which owned a building worth \$6.1 million) for \$26. Mastriani is a tenant in that building. Scotto did not explain how he acquired the interest, worth over \$700,000, for \$26. N.Y. Times, Nov. 2, 1979, § B, at 1, col. 5.

123 *Id.* An FBI agent familiar with the case maintained, however, that "Scotto would be

prohibiting such contributions.¹²⁴ Scotto rested his case on Tuesday, November 6, after two weeks of testimony. Anastasio's case, on the other hand, lasted only one day and involved two witnesses.¹²⁵ He did not testify in his own defense.

Closing arguments began on Friday, November 9, and ended late Saturday afternoon. Levine summed up the government's case by stating that "Mr. Scotto's own voice" on tape was the best evidence in this case involving "greed, power and corruption."¹²⁶

Anastasio's defense attorney, Gustave Newman, assailed the government for taking tape excerpts out of context and attacked the credibility of both Montella and Seregos.¹²⁷ La Rossa not only attacked the credibility of Montella and O'Hearn, but joined Newman in asserting that the government took excerpts out of context. La Rossa reiterated Scotto's "conduit" defense, and characterized Scotto as "a winner" who even had Governor Carey on his side.¹²⁸

U.S. Attorney Fiske, on rebuttal, pointed out that Scotto's prominent character witnesses were not aware of the evidence against Scotto, and emphasized the abuse of the union positions held by both Scotto and Anastasio.¹²⁹

In an unusual Sunday session, Judge Stewart reviewed the sixty count indictment against the defendants in a two hour jury charge.¹³⁰ The jury began its four day deliberation by requesting and listening to three sets of tapes.¹³¹ The jury also requested court

insulted" if he knew how infrequently the FBI actually followed him. Welling, *supra* note 1, at 21.

124 N.Y. Times, Nov. 3, 1979, at 25, col. 1. Scotto was unable to explain why Montella and O'Hearn did not simply pass the money directly to the campaigns instead of using Scotto as a conduit. *Id.* Valentino was under federal subpoena to produce any records he had pertaining to these contributions, but said he had none. *Id.*

125 Anastasio presented Dr. Kyrin Powers, the principal of Xavier High School in Brooklyn, as a character witness. He then called Anthony Valvo, a longshoreman, who testified that Seregos was introduced to Anastasio in 1974, contrary to Seregos' testimony that he did not meet Anastasio until 1975. Government Brief, *supra* note 53, at 29.

126 N.Y. Times, Nov. 10, 1979, at 25, col. 5.

127 *Id.*

128 *Id.*, Nov. 11, 1979, at 40, col. 1.

129 Fiske also urged that a guilty verdict would show that justice applies to all people regardless of position. The defense objected to Fiske's statement as being prejudicial, and moved for a mistrial, which Judge Stewart denied. *Id.*

130 Judge Stewart read sixty-eight pages of instructions to the jury on November 11, 1979. The instructions were the result of an all-day conference that took place November 8, 1979, in chambers. Both sides submitted nearly 100 pages of proposed requests to charge. Government Brief, *supra* note 53, at 30. The instructions were the focal point of the defendants' appellate briefs. See text accompanying notes 174-273 *infra*.

131 The jury requested the tapes concerning a conversation between Montella and Scotto on March 13, 1978, see note 78 *supra*, the July 13, 1978 tape concerning a payoff in the men's

transcripts of Montella's testimony. The jury, in its third day of deliberations, requested the conflicting testimony of Scotto and Montella regarding the cabana built at Scotto's summer estate.¹³² The jury also requested the tapes of the December 21, 1977 conversations intercepted from Scotto's I.L.A. office in Manhattan, in which Scotto and Anastasio discussed splitting payoffs.¹³³ On the final day of deliberations, the jury requested the transcripts of Seregos' testimony, and asked specifically for the portions in which Seregos discussed his records of the payments.¹³⁴ The jury also requested three brief conversations between Scotto and Anastasio intercepted from Scotto's I.L.A. office on February 10, 1978.¹³⁵ On Thursday, November 15, 1979, the jury rendered a guilty verdict against both defendants on most of the counts.¹³⁶ Judge Stewart set January 4, 1980, as the sentencing date.

V. Reaction, Sentencing, and Ramifications

The reaction to the conviction was mixed. Scotto was "shocked," and declared: "I know I am innocent."¹³⁷ Both defense attorneys stated that their clients would appeal. Hours after the court announced the verdict, Carey issued a two paragraph statement expressing sympathy for Scotto's family and urging the State Board of Elections to investigate possible election law violations that trial testimony may have revealed.¹³⁸ There were no immediate

room at the Drake Hotel in Manhattan, and the October 24, 1978 tape concerning a payoff in a Manhattan restaurant. N.Y. Times, Nov. 13, 1979, § B, at 3, col. 5.

132 Cf. text accompanying notes 74-75 (Montella's testimony) with text accompanying note 113 (Scotto's testimony) *supra*.

133 See note 93 *supra*.

134 N.Y. Times, Nov. 15, 1979, § B, at 10, col. 1. See text accompanying note 88 *supra*.

135 N.Y. Times, Nov. 15, 1979, § B, at 10, col. 1.

136 The jury found Scotto guilty of 33 of the 44 counts against him—the RICO violation (Count one); RICO conspiracy (Count fifty); demanding and receiving unlawful "labor payments" totalling over \$250,000 (Counts 2-9, 16-30, 34-37) and income tax evasion (Counts 54-56). The jury found Anastasio guilty on 14 of the 27 counts against him—RICO conspiracy (Count fifty); violations of the Taft-Hartley Act (Counts 35-45); and income tax evasion (Counts 59-60). The jury was unable to reach a verdict on seventeen other counts alleging additional Taft-Hartley violations and tax evasion charges. (Counts 10-15, 31-33, 46-49, 51-52, and 57-58). *United States v. Scotto*, 641 F.2d at 50.

Juror Lucille Brockway stated in a later interview that the jury didn't believe the campaign contribution defense. "Most of us thought it was a cock-and-bull story—I called it a fairy tale day that first time it came up in court." N.Y. Times, Nov. 17, 1979, at 27, col. 5. The jurors cited the tapes as crucial to their decision, and the character witnesses' unfamiliarity with them greatly detracted from those witnesses' testimonies. *Id.*

137 N.Y. Times, Nov. 16, 1979, at 1, col. 3.

138 *Id.*, § B, at 2, col. 1. Carey, through a spokesman, stated that he "regrets that a person of such considerable talent and ability has violated our laws." *Id.* Carey admitted later that

comments from Lindsey, Wagner, or Judge Thompson. Cuomo was "gratified" that the jury had exonerated his campaign from election law violations.¹³⁹ At least one character witness, Victor Gottbaum, head of District Council 37 of the American Federation of State, County and Municipal Employees, was unconvinced by the verdict.¹⁴⁰ There were mixed reactions on the waterfront in Scotto's home section of Brooklyn.¹⁴¹

Scotto announced on November 16, 1979, that he would continue as union president pending appeals, citing the protections granted under the Landrum-Griffin Act.¹⁴² Jerome Klined, deputy director of the Waterfront Commission, however, stated that he would move under § 8 of the Waterfront Commission Act of 1953¹⁴³ to bar waterfront employers from collecting any dues for Local 1814 if Scotto and Anastasio refused to relinquish their union posts after sen-

he never knew the "other" Scotto. He dismissed as rumor the Justice Department identification of Scotto as an organized crime figure. *See* text accompanying note 36 *supra*. Carey said that even the late Robert F. Kennedy, former attorney general and Senator, had accepted a \$5000 campaign check from Scotto and the I.L.A. When Carey was told that the former United States Attorney Robert Morgenthau suggested that Mr. Kennedy not associate with Scotto, Carey said: "I wish Bob Morgenthau had told me that." *Id.*, Dec. 17, 1979, § D, at 14, col. 6.

139 Cuomo expressed gratitude "that the jury said my campaign—and Pete Dwyer in particular—were not involved in any illegality." *Id.*, Nov. 16, 1979, § B, at 2, col. 1.

140 Gottbaum adamantly stated: "[T]welve people can't make me change my mind about a friend I've known for years." *Id.*; *see* note 100 *supra*.

141 Some residents of Scotto's home area felt he had gotten a "raw deal" and took the news of the verdict "like a death in the family." N.Y. Times, Nov. 16, 1979, § B, at 3, col. 1. While some dockworkers felt the verdict was an injustice, others were afraid to speak out against Scotto. *Id.*, Nov. 17, 1979, at 27, col. 5.

The conviction did not ruin all of Scotto's political ties. Only days after his conviction, he received an invitation to attend a fundraising dinner on behalf of Massachusetts Senator Edward M. Kennedy. Ethel Kennedy handwrote a personal note on the invitation saying: "Tony, I know these are troubled times. But please come." *Id.*, Dec. 17, 1979 at 1, col. 4.

142 The Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. § 504 (1976), forbids, *inter alia*, a person convicted of a serious crime from serving in a leadership capacity in any labor organization for five years following imprisonment and/or probation. The Act defines the date of conviction as "the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event . . ." 29 U.S.C. § 504(c) (1976). Scotto argued he could retain his union post until his appeals were exhausted.

143 Waterfront Commission Act of 1953, N.Y. UNCONSOL. LAWS, § 9933 (McKinney 1974), forbids any person convicted of a felony under either federal or state law from holding union office. Unlike the Landrum-Griffin Act, *see* note 142 *supra*, § 8 of the Waterfront Commission Act is a permanent bar to holding union office in New York, and does not define "conviction." This section has been invoked to force approximately sixty-five resignations of convicted union leaders in New York, and has withstood constitutional challenges. *See, e.g.*, *DeVeau v. Braisted*, 363 U.S. 144 (1960).

tencing. Scotto called the Commission's action "grossly unfair."¹⁴⁴ The Commission took no action, however, pending Scotto's sentencing in January.

On January 15, 1980, seven days prior to sentencing, La Rossa filed a motion for a new trial on the grounds that some of the jurors had characterized Scotto as "a Mafia guy."¹⁴⁵ The basis of the motion was an anonymous letter sent to Judge Stewart dated December 17, 1979, stating that "Scotto should be tried by jurors who have no prejudice against Italian-Americans."¹⁴⁶ Judge Stewart denied the motion.¹⁴⁷

The court sentenced Scotto on January 22, 1980.¹⁴⁸ Pleading for leniency prior to sentencing, La Rossa said Scotto should not be treated like a "common thief."¹⁴⁹ Fiske responded that Scotto displayed "an arrogant contempt for the law," and committed crimes in the "classic pattern[s] of racketeering."¹⁵⁰ Judge Stewart sentenced Scotto on all counts consecutively, issuing an effective sentence of five years imprisonment, followed by five years probation, and a \$75,000 fine.¹⁵¹ While Judge Stewart could have given a maximum twenty-year sentence for the RICO count,¹⁵² he stated that pleas for leniency from a "wide range of people," and Scotto's lack of a previous crimi-

144 N.Y. Times, Nov. 20, 1979, § B, at 1, col. 6.

145 *Id.*, Jan. 16, 1980, § B, at 2, col. 4.

146 *Id.* Fiske argued at the January 18 hearing that there was no proof that the letter was sent by a juror.

147 *United States v. Scotto*, No. 80-1041 (S.D.N.Y. Jan, 1980). Stewart rejected defense suggestions that a newspaper advertisement be placed requesting the author of the letter to come forward. N.Y. Times, Jan. 19, 1980, at 28, col. 2.

148 Judge Stewart changed the sentencing date from January 4 to January 22 in mid-December, 1979. N.Y. Times, Dec. 17, 1979, § D, at 14, col. 6.

149 La Rossa stated: "He's not a common thief and he shouldn't be treated like one." *Id.*, Jan. 23, 1980, at 1, col. 3.

150 *Id.*, col. 4.

151 Scotto was sentenced to five years' imprisonment and a \$25,000 fine on Count 1; consecutive one year terms of imprisonment on Counts 2-6, for a total of five years, to run concurrently with the sentence imposed on Count 1; \$5,000 fines on Counts 2-6, totaling \$25,000; five years' probation on each of Counts 7-9 to run concurrently and to commence upon expiration of the period of incarceration; \$5,000 fines on Counts 16-20, totaling \$25,000; a suspended sentence and five years' probation on Counts 21-30 and 34-37; a suspended sentence, five years' probation to run concurrently with the sentence imposed on Count 1, and a \$25,000 fine on Count 50; five years' imprisonment on each of Counts 53 and 55, to run concurrently with the sentence on Count 1; and three years' imprisonment on each of Counts 54 and 56, to run concurrently with the sentence imposed on Count 1. *United States v. Scotto*, 641 F.2d 47, 50 n.1 (2d Cir. 1980).

152 18 U.S.C. § 1963(a) (1976) states that "[w]hoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both"

nal record, accounted for the relatively light sentence.¹⁵³ Although RICO contains a forfeiture clause whereby the government could force Scotto and Anastasio to resign from their union positions,¹⁵⁴ the court did not impose forfeiture on either Scotto or Anastasio.¹⁵⁵

Anastasio was sentenced to two years imprisonment, five years probation, and a \$5,000 fine.¹⁵⁶ Judge Stewart again showed leniency, having received many letters expressing "an unusual depth of compassion and affection" for Anastasio.¹⁵⁷ Both defendants were free on bail pending their appeals.

While the appeal was pending, the Waterfront Commission sent letters to Local 1814 and two organizations that collect and pay union dues to the I.L.A., stating that unless Scotto and Anastasio resigned, every collection of I.L.A. dues was a criminal violation of § 8 of the Waterfront Commission Act of 1953.¹⁵⁸ Scotto filed a de-

153 N.Y. Times, Jan. 23, 1980, at 1, col. 4. Assistant United States Attorney Scott W. Muller said the sentence was on the lighter end of the spectrum of sentences the government wished imposed. Telephone interview with Scott W. Muller, Assistant U.S. Attorney, in New York City (Aug. 18, 1981).

154 18 U.S.C. § 1963 (1976) states in part:

(a) Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962

155 Although there is scant mention of the forfeiture possibility in the record (*see* Brief for appellant Anastasio at 36 n.32, *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980) (hereinafter cited as *Anastasio Brief*), Assistant U.S. Attorney Scott Muller said that the government agreed to withdraw the forfeiture action after the convictions on the RICO counts. In RICO prosecutions, the government usually presents the forfeiture case after the verdict on the RICO charges. Although the defense moved to present all the issues to the jury at once, Judge Stewart ruled that the court would bifurcate the issues. The government offered to withdraw the section 1963(a) forfeiture issue if the defense would agree to have the Landrum-Griffin prohibition against convicted felons holding union office apply. *See* note 142 *supra*. This prohibition, found in 29 U.S.C. § 504(a) (1976), would prevent Scotto and Anastasio from holding any union office until five years after imprisonment and probation. Further, the government knew that the Waterfront Commission Act of 1953 barred the defendants from holding a union office in the New York-New Jersey area in the future. *See* note 143 *supra*. Telephone interview with Scott W. Muller, Assistant U.S. Attorney, in New York City (Aug. 18, 1981).

156 Anastasio was sentenced to concurrent one year terms of imprisonment and concurrent fines of \$5,000 on Counts 38-42; concurrent one year terms of imprisonment, consecutive to the one year term imposed on Count 38, and concurrent \$5,000 fines on Counts 35-37 and 43-45, the fines imposed concurrently with the \$5,000 concurrent fines on Counts 38-42; a concurrent two year term of imprisonment and concurrent \$5,000 fine on Count 50; and a suspended sentence and five years' probation on Counts 59-60. *United States v. Scotto*, 641 F.2d at 51, n.1.

157 N.Y. Times, Jan. 24, 1980, § B, at 1, col. 4.

158 *Id.*, Feb. 1, 1980, § B, at 1, col. 5. *See* note 143 *supra*. The letters stated that Scotto's

claratory judgment action in New York state court for a definition of when "conviction" occurs under the Waterfront Commission Act of 1953. The state court rejected Scotto's position that conviction does not occur until all appeals have been exhausted,¹⁵⁹ and on September 19, 1980, the New York State Supreme Court removed Scotto and Anastasio from their union posts.¹⁶⁰ The New York Court of Appeals refused to hear Scotto's appeal.¹⁶¹ Scotto then turned his attention to his federal appeal on the criminal conviction.

VI. Appeal

The Second Circuit heard oral arguments on Tuesday, May 20, 1980, before Circuit Judges Oakes and Meskill, and District Judge Bonsal.¹⁶² The issues before the court dealt with the sufficiency of the jury instructions, particularly concerning the RICO counts.

A. Overview of RICO

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) as Title IX of the Organized Crime Control Act of 1970, with the stated purpose of eradicating organized crime in business.¹⁶³ RICO applies to a "pattern of racketeering activity," which is defined as the commission of at least two predicate offenses ("acts of racketeering activity") from a list of twenty-four separate federal crimes and eight separate state crimes.¹⁶⁴ The commission of

and Anastasio's convictions disqualified them from union office under the Waterfront Commission Act of 1953, and that collection of dues or assessments on behalf of the I.L.A. constituted a violation of the Act. Carol Gardner, an official of I.L.A. Local 1233 in New Jersey, had been convicted in another trial resulting from the UNIRAC investigation, and the Commission had sent similar letters to his local, as well as the NYSA and the MMCA. *See* note 47 *supra*. *See also* United States v. Clemente, 494 F. Supp. 1310 (S.D.N.Y. 1980). The I.L.A. and the AFL-CIO sued the Commission to enjoin enforcement of criminal actions under the Waterfront Commission Act because section eight was being challenged as violative of the First Amendment right of free association. International Longshoremen's Ass'n v. Waterfront Comm'n, 495 F. Supp. 1108, 1131 (S.D.N.Y. 1980).

159 Scotto v. Waterfront Comm'n, No. 80-5580 (Sup. Ct. Sept. 19, 1980), *aff'd*, 78 A.D.2d 686, 434 N.Y.S.2d 1004, — N.E.2d — (1980). *See also* note 142 *supra*.

160 Scotto v. Waterfront Comm'n, 78 A.D.2d 686, 434 N.Y.S.2d 1004, — N.E.2d — (1980).

161 Scotto v. Waterfront Comm'n, 51 N.Y.2d 709, — N.Y.S.2d —, — N.E.2d — (1980).

162 Edward Bennett Williams of Washington, D.C., represented Scotto, and Michael E. Tigar of Washington, D.C., represented Anastasio, on appeal.

163 Statement of Findings and Purpose of the Organized Crime Control Act, 84 Stat. 922 (1970). *See* S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969). The wide range of legitimate businesses reportedly infiltrated by organized crime included advertising, florist shops, car dealerships, football franchises, real estate, and securities brokerages. *Id.*

164 18 U.S.C. § 1961(1)(A)(B) (1976) defines "racketeering activity" as including such acts as: murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotics,

at least two acts of racketeering activity within ten years constitutes the "pattern of racketeering activity."¹⁶⁵ Liability requires linking the pattern of racketeering activity to the establishment or operation of an "enterprise."¹⁶⁶ RICO is capable of many broad and varied applications.¹⁶⁷

RICO sets forth four crimes:

- (1) investment of income derived from a pattern of racketeering in an enterprise;¹⁶⁸
- (2) acquisition of an interest in any enterprise through racketeering activity;¹⁶⁹
- (3) participation in any enterprise through racketeering activity;¹⁷⁰ and
- (4) conspiracy to violate any of the above proscriptions.¹⁷¹

A violation of any of the above sections is punishable by a fine not exceeding \$25,000, imprisonment for twenty years, or both, plus

counterfeiting, embezzlement, mail fraud, wire fraud, obstruction of justice, interstate transportation of stolen property, etc., punishable under either state or federal law.

165 18 U.S.C. § 1961 (5) (1976).

166 18 U.S.C. § 1962(a) (1976). See note 48 *supra*. "Enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity." 18 U.S.C. § 1961(4) (1976).

The range of legitimate enterprises to which courts have applied RICO is broad. See, e.g., *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 993 (1979) (restaurant serving as a "front" for narcotics operation); *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) (auto dealership); *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978) (beauty college); *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (foreign corporation); *United States v. DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978) (theatre); *United States v. Frumento*, 363 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978) (Pennsylvania Bureau of Cigarette and Beverage Taxes); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (police department). RICO encompasses both legitimate and illegitimate enterprises. *United States v. Turkette*, 101 S. Ct. 2524 (1981).

167 *Blakey & Goldstock, "On the Waterfront": RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 348 (1980) [hereinafter cited as *Blakey & Goldstock RICO Article*].

However, certain legislators, judges, and commentators have expressed the concern that the language of RICO is overly broad, and thus may be applied to persons outside the scope of RICO's intended coverage. See, e.g., *Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & C. 1, 18 (1978) (RICO is a "sweeping act which intrudes on state power and has great potential for abuse"); Note, *Racketeers and Non-Racketeers Alike Should Fear Florida's RICO Act*, 6 FLA. ST. U.L. REV. 483, 506 (1978) ("broad definition of 'racketeering activity' makes the RICO statute a potential candidate for prosecutorial abuse"). See also Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?*, 55 NOTRE DAME LAW. 777 (1980); Tybor, *Racketeering Law Facing Key Test*, 3 N.L.J. (Nov. 29, 1980) 1, 18; Tarlow, *RICO: Someone Loaded the Dice*, TRIAL, Feb. 1981, at 54.

168 18 U.S.C. § 1962(a) (1976).

169 18 U.S.C. § 1962(b) (1976).

170 18 U.S.C. § 1962(c) (1976).

171 18 U.S.C. § 1962(d) (1976).

forfeiture of all illegal gains and any interest that the defendant has acquired or maintained in a business or enterprise in violation of RICO.¹⁷² RICO also states that its provisions "shall be liberally construed to effectuate its remedial purposes."¹⁷³

B. *Arguments on Appeal*

Scotto and Anastasio raised four major issues on appeal, all dealing with the sufficiency of the jury instructions given by Judge Stewart. The government's response to all the arguments was that the defense waived the issues by failing to raise them at trial.

1. Inadequate Jury Instructions on the "Conduct of the Affairs" Element

Scotto argued that the court inadequately instructed the jury on whether Scotto conducted the union's affairs through a "pattern of racketeering activity," namely, the Taft-Hartley violations.¹⁷⁴ Scotto contended that Judge Stewart's instructions failed to require a nexus between the Taft-Hartley violations (the "predicate offenses") and the conduct of the affairs of the enterprise (the union).¹⁷⁵ Scotto argued that RICO charges by their nature require precise jury instructions.¹⁷⁶ The RICO statute is a "sweeping criminal statute" with "great potential for abuse against individual defendants" and therefore requires the "wariest judicial supervision" to keep prosecutors in check.¹⁷⁷ The court must instruct the jury not in "incommunicative generalities," but in whatever specifics the facts of each case

172 18 U.S.C. § 1963 (1976). See note 154 *supra*. RICO restores the sanction of criminal forfeiture that was abolished by the first Congress, Act of April 30, 1790, ch. 9, § 24, 1 Stat. 117 (1790). See Taylor, *Forfeiture under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379 (1980).

173 Organized Crime Control Act, Pub. L. No. 91-452, § 904, 84 Stat. 922 (1970). See Blakey & Goldstock RICO Article, *supra* note 167, at 349-50. See also Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 177-80 (1980).

174 Brief for appellant Scotto at 10-22, *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980) (hereinafter cited as Scotto Brief). The Taft-Hartley violations were the demand and receipt of illegal labor payoffs in violation of 29 U.S.C. § 186(b) (1976). See note 49 *supra*. Labor unions are ordinarily considered "enterprises" under RICO. See *United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977) (labor union local an "enterprise" under 18 U.S.C. § 1961(4) (1976)). The I.L.A. is also an enterprise that affects interstate commerce, a fundamental jurisdictional requirement for RICO's application. 18 U.S.C. § 1962(c) (1976).

175 18 U.S.C. § 1962(c) (1976). See note 48 *supra*.

176 Scotto Brief, *supra* note 174, at 6.

177 *Id.* at 7. The brief stated that "since the racketeering activity itself may constitute 'the enterprise,' . . . even if it consists of only a single individual, . . . RICO could easily be used as oppressively as were *lettres de cachet* in pre-Revolutionary France." *Id.*

require.¹⁷⁸

Scotto urged that a crucial element of a section 1962(c) violation is the accused's "conduct [of] the enterprise's affairs through a pattern of racketeering activity."¹⁷⁹ The acts of racketeering in *Scotto* which arguably constituted the "pattern of racketeering activity" were numerous Taft-Hartley violations that involved no acts by Scotto in his capacity as a union officer.¹⁸⁰ The mere commission of such violations showed no connection between the pattern of racketeering and the operation of the enterprise, as RICO requires. The court should have required the jury to find this nexus before convicting Scotto.¹⁸¹ That is, the court should have instructed the jury to acquit Scotto on the RICO charge unless the jury found "that there was a connection between his receipt of the money and his conduct of union business."¹⁸² Relying on *Bollenbach v. United States*,¹⁸³ where the United States Supreme Court held that insufficient jury instructions will invalidate a conviction, Scotto urged the deficient instructions invalidated his RICO and RICO conspiracy convictions.¹⁸⁴

178 *Id.* at 9.

179 *Id.* at 10-11.

180 *Id.*

181 Scotto pointed out that the "conduct of the affairs" element is insignificant when the enterprise itself is the criminal activity. *Id.* at 14 (citing *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied sub nom.*, *Napoli v. United States*, 429 U.S. 1039 (1977); *United States v. Decidue*, 603 F.2d 535 (5th Cir. 1979)). In cases where the enterprise is an established, legitimate entity, however, the "conduct of the affairs" element is of paramount importance and must be presented to the jury in clear terms. Scotto Brief, *supra* note 174, at 14.

Scotto relied principally on the Seventh Circuit's reasoning in *United States v. Nerone*, 563 F.2d 836, 851-52 (7th Cir. 1977), *cert. denied sub nom.*, *Hornstein v. United States*, 435 U.S. 951 (1978), *summarized in United States v. Huber*, 603 F.2d 387, 395 (2d Cir. 1979).

182 Scotto Brief, *supra* note 174, at 16. Scotto stated that the prosecution took an "extreme position" in arguing that the "conduct of the affairs" element should be read out of RICO relying only on dictum in *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), for the proposition. The government countered with *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 137 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978). The court in *Field* held that § 1962(c) does not require proof of a predicate act advancing the affairs of the union, or proof that the union itself was corrupt. Section 1962(c) only requires that the government establish the defendant committed the illegal acts in the conduct of the union's affairs. 432 F. Supp. at 58. The government further relied on *United States v. Kaye*, 556 F.2d 855 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977), although Scotto contended that his case was "totally antagonistic" to the government's position. Scotto Brief, *supra* note 174, at 16-19.

183 326 U.S. 607, 612 (1964).

184 Scotto Brief, *supra* note 174, at 22. Scotto contended that tracking the statute's language in the instruction was inadequate because the statute on its face does not clearly convey the law. *Id.* (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 485, at 293 (1969)). See also *Lumetta v. United States*, 362 F.2d 644 (8th Cir. 1966); *United States v. Perisco*, 349 F.2d 6, 8 (2d Cir. 1965); *United States v. Hernandez*, 290 F.2d 86, 90 (2d Cir. 1961); *Morris v. United States*, 156 F.2d 525, 529 (9th Cir. 1946). Further, the jury could not

Anastasio joined in Scotto's arguments to the extent they were applicable.¹⁸⁵ Anastasio also argued that the jury instructions on the term "pattern of racketeering activity" were inadequate because they failed to require a finding that the predicate offenses (receipt of illegal labor payments) "were connected with *each other* by a common scheme or plan which constituted an actual pattern, and not merely a series of disconnected acts."¹⁸⁶ Anastasio cited Senator McClellan's

properly infer the nexus between the payoffs and the conduct of the union's affairs from some deliveries of money being made at Scotto's I.L.A. office. Scotto Brief, *supra* note 174, at 23 (citing *United States v. Nerone*, 563 F.2d 836, 852 (7th Cir. 1977) (mere geographical juxtaposition is insufficient basis for the inference); *United States v. Dennis*, 458 F. Supp. 197, 199 (E.D. Mo. 1978) (same)).

185 Anastasio Brief, *supra* note 155, at 28-44. Much of Anastasio's brief discussed the misjoinder of defendants under Fed. R. Crim P. 8(b) and prejudicial joinder under Rule 14. Anastasio Brief, *supra* note 155, at 14. The misjoinder arguments emphasized the small amount of evidence produced against Anastasio at trial. Among other things, he cited "sensational newspaper articles, all devoted solely to Scotto," and only 400 of the more than 7000 pages of trial transcript actually referred to Anastasio.

The government cited *United States v. Papodakis*, 510 F.2d 287, 300 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975), and *United States v. Turbide*, 558 F.2d 1053, 1061-62 (2d Cir.), *cert. denied*, 434 U.S. 934 (1977), and argued that Anastasio's participation in the events leading to the RICO conspiracy charge warranted the Rule 8(b) joinder of Scotto and Anastasio. Government Brief, *supra* note 53, at 58. Anastasio's decision not to move under Rule 8(b) to separate the RICO count against Scotto and the RICO conspiracy count against both Scotto and Anastasio was a tactical move to avoid giving the government "two shots at Scotto." Government Brief, *supra* note 53, at 62. The government also contended that the joinder of the RICO count and the RICO conspiracy count was proper, since Rule 8(b) only requires allegations that co-defendants participated in the same series of acts or transactions. *Id.* at 63 (citing *United States v. Weisman*, No. 79-1315, *slip op.* at 2252-55 (2d Cir. April 4, 1980); *Pacelli v. United States*, 588 F.2d 360 (2d Cir. 1978), *cert. denied*, 441 U.S. 908 (1979)). Finally, the government urged that any misjoinder was harmless error. Government Brief, *supra* note 53, at 67.

186 Anastasio Brief, *supra* note 155, at 39-43. Judge Stewart gave the following instruction on "pattern of racketeering activity":

[I]f you find that the requisite two or more deliveries or payments were requested, received or accepted within the requisite time period, you must also find beyond a reasonable doubt that any two of the deliveries or payments were connected with each other, that is, that they were in furtherance of the same goal or served the same purpose or were part of the same goal or served the same purpose or were part of the same scheme or plan or series or had something else in common and were not simply disconnected acts.

Id. at 39. The defense requested the following instruction:

A mere finding that two payments were made within the statutory period, however, does not amount to a pattern of racketeering. In order to find beyond a reasonable doubt that a pattern of racketeering existed you must find not only that the two acts were committed, but that these acts were connected to each other by a common scheme or plan which constituted an actual pattern, and not merely a series of disconnected acts. You must find beyond a reasonable doubt a factual nexus between the two payments, and that the two payments were part of a single scheme or illegal plan, before you can find a pattern of racketeering activity. Accordingly you must find that the unlawful payments constituted part of a larger

remarks concerning the necessary relationship between the predicate offenses that establish a pattern of racketeering activity.¹⁸⁷ Anastasio asserted that the failure to give his requested instruction was particularly prejudicial to Anastasio since only three payments by Seregos constituted the RICO conspiracy charge.¹⁸⁸

The government argued that the defense's submission of a written instruction request and a "blanket objection" at trial was insufficient to preserve the issue for appeal.¹⁸⁹ The government further responded that the court's instructions were in the "classic form" and therefore adequate.¹⁹⁰ The government contended that the plain meaning of the instruction's language adequately conveyed to the jury the essence of the instruction.¹⁹¹ The government also distinguished the principal cases Scotto relied on, *Huber* and *Nerone*,¹⁹² as irrelevant to the issue of jury instructions.¹⁹³ The government cited a similar charge in *Huber* to illustrate the irrelevancy.¹⁹⁴

pattern of activity which characterized the defendant's conduct of, or participation in, the general activities of the I.L.A. . . .

Id. at A-4.

187 See J. McClellan, *The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties*, 46 NOTRE DAME LAW. 55, 144 (1970) (hereinafter cited as McClellan). Scotto cited a case decided after he filed his initial brief, *United States v. Weisman*, No. 79-1315 (2d Cir. April 4, 1980), wherein the Second Circuit held that the acts of racketeering activity must be interrelated. *Id.* at 2235-39.

188 Anastasio Brief, *supra* note 155, at 43.

189 Government Brief, *supra* note 53, at 32 (citing *United States v. Byrd*, 542 F.2d 1026 (8th Cir. 1976); *United States v. Williams*, 521 F.2d 950 (D.C. Cir. 1975) (blanket objection insufficient to preserve issue for appeal)).

190 Government Brief, *supra* note 53, at 34. Judge Stewart first read 18 U.S.C. § 1962(c) to the jury, then recited the charges in the indictment, and then detailed the elements of the crimes in his instruction.

191 The defendants insisted that the instructions contained "totally opaque language" in stating the following: "while and as part of conducting or participating either directly or indirectly in the conduct of the affairs of the enterprise." Scotto Brief, *supra* note 174, at 26. The government replied that Scotto's contention "ignores the plain meaning of these words and phrases." The government further stated:

[T]he court's choice of words was certainly within its broad discretion in framing instructions. *United States v. Wright*, 542 F.2d 975 (7th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977). The District Court need not use the precise language tendered by a defendant as long as the substance is given and the charge is clear and fair. *United States v. Grezo*, 566 F.2d 854, 860 (2d Cir. 1977); *United States v. Wright* [542 F.2d 975 (7th Cir. 1976)].

Government Brief, *supra* note 53, at 36 n. *.

192 *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979); *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977).

193 *Huber* concerned a challenge to the allegations of an indictment, and *Nerone* concerned a challenge to the sufficiency of evidence. Government Brief, *supra* note 53, at 38.

194 *United States v. Huber*, 603 F.2d at 395.

2. Inadequate Jury Instructions on the Mens Rea Requirement

Scotto and Anastasio each argued that the court inadequately instructed the jury on the *mens rea* issue.¹⁹⁵ Scotto argued that, when the RICO predicate offense is a Taft-Hartley violation, which is a non-*mens rea* misdemeanor,¹⁹⁶ the court must read a *mens rea* requirement into RICO to avoid imposing a twenty year sentence without proof of *mens rea*.¹⁹⁷ Scotto stated that Congress did not intend to dispense with the *mens rea* requirement in enacting RICO.¹⁹⁸

Scotto urged that, in federal criminal law, the terms most commonly used to denote *mens rea* for a serious felony are “knowingly and willfully.”¹⁹⁹ He contended that the well established meaning of the term “willfully” in the criminal context is “intentionally violating a known legal duty.”²⁰⁰ Judge Stewart’s instructions, on the other hand, defined “willfully” as “done knowingly and deliberately with a

195 Scotto Brief, *supra* note 174, at 27. Anastasio Brief, *supra* note 155, at 28-44. Judge Stewart gave the following instructions regarding the *mens rea* requirement:

Fifth, [you must find] that the defendant acted willfully and knowingly. You must be satisfied beyond a reasonable doubt that the defendant knew what he was doing and that he did it deliberately and voluntarily and not because of a mistake, accident, negligence or some other innocent reason.

An act is willful for the purposes of this statute [RICO] if it is done knowingly and deliberately with a criminal motive or purpose.

In determining whether the defendant has acted knowingly and willfully it is not necessary that the defendant knew he was violating any particular act or law. It is sufficient if you are convinced beyond a reasonable doubt that the defendant was aware of the general unlawful nature of his act as alleged in the indictment.

Scotto Brief, *supra* note 174, at 34.

196 Scotto Brief, *supra* note 174, at 27 (citing *United States v. Ryan*, 350 U.S. 299, 305 (1956); *United States v. Ricciardi*, 537 F.2d 91 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966)).

197 Scotto Brief, *supra* note 174, at 27. RICO itself has no *mens rea* requirement, although each of the predicate offenses, except the Taft-Hartley violations, require high degrees of *mens rea*. Scotto cited *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) to support his proposition that a court may read a *mens rea* requirement into a statute even when the statute is silent on *mens rea*. Scotto Brief, *supra* note 174, at 28. *See also* *Dennis v. United States*, 341 U.S. 494, 500 (1951) (existence of *mens rea* is the rule, not the exception, in Anglo-American criminal jurisprudence).

Scotto conceded there exist situations in which a court may dispense with a *mens rea* requirement. *See* *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960). However, Scotto argued that RICO does not fit within the exceptions outlined in *Holdridge*. *Id.*

198 “Surely if there had been any understanding that RICO was dispensing with *mens rea* for a 20-year felony, Congress, or the ACLU would have commented on that point.” Scotto Brief, *supra* note 174, at 31 n.37.

199 Scotto Brief, *supra* note 174, at 32.

200 *Id.* at 33 (citing *United States v. Winston*, 558 F.2d 105 (2d Cir. 1977) (court found the jury instruction insufficient in a Railway Labor Act prosecution for failure to charge that the defendants “voluntarily and intentionally” violated a known legal duty)). *See also* *United States v. Pomponio*, 429 U.S. 10, 11 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973).

criminal motive or purpose.”²⁰¹ Scotto stated that the court’s instruction failed to meet *mens rea* standards because the instruction did not require the jury to find that the defendants had acted with intent to violate a known legal duty (a duty not to participate in the conduct of the affairs of the I.L.A. through a pattern of accepting money or things of value from employers of I.L.A. labor).²⁰² Scotto further urged that a more precise definition of “willfulness” is required because, technically, “willfulness” is also an element of the Taft-Hartley misdemeanor offense.²⁰³ Scotto argued that Judge Stewart’s use of the phrase “criminal motive and intent” in the instruction might have inferred the necessary *mens rea* required, but his later explanation that the jury need only find “an awareness of the general nature of his act” effectively destroyed the inference.²⁰⁴

The defendants argued further that the RICO conspiracy instruction,²⁰⁵ similar to the RICO instructions, did not require the jury to address the particular mental element of a RICO violation predicated on violations of the Taft-Hartley Act. Scotto used *United States v. Provenzano*²⁰⁶ to contend that a person can not conspire to commit a particular crime unless he is aware of all the elements of

201 See note 195 *supra*.

202 Scotto Brief, *supra* note 174, at 34. Scotto conceded that the court need not have instructed the jury that the defendants had to be specifically aware that RICO created the “legal duty,” although the defendants must have known that they were under a duty and must have had a specific intent to violate it. *Id.*

203 Scotto contended “willfulness” in a Taft-Hartley violation means “merely acting with knowledge of what one is doing, deliberately and voluntarily, and not by mistake, accident or inadvertance.” *Id.* at 35. Scotto urged this is a lesser degree of “willfulness” than RICO should require.

204 Scotto Brief, *supra* note 174, at 35. Scotto contended that an instruction requiring general awareness was inadequate since one can be aware of the general unlawful nature of an act without having a specific intent to violate a known legal duty. See *United States v. Heller*, 579 F.2d 990, 999 (6th Cir. 1978); *Screws v. United States*, 325 U.S. 91, 107 (1945). See also note 195 *supra*.

205 Judge Stewart gave the following instruction on *mens rea* for the RICO conspiracy charge:

The Government must establish beyond a reasonable doubt that the defendant you are considering was aware of the conspiracy’s basic purpose and object. That he participated in the conspiracy with a specific intent, that is, a purpose to violate the law.

So you must be satisfied beyond a reasonable doubt that the defendant knew what he was doing, that he did it deliberately and voluntarily and not because of some mistake, accident, carelessness, inadvertance or some other reason.

It is not necessary that the defendant knew he was violating any particular law. It is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his acts.

Anastasio Brief, *supra* note 155, at 31-32.

206 615 F.2d 37 (2d Cir. 1980).

that crime.²⁰⁷ Anastasio additionally contended that, even if the RICO instructions were valid, the RICO conspiracy instructions were still inadequate because courts always apply a stricter standard in conspiracy cases.²⁰⁸

The government urged that the defense contentions fail on their merits since Judge Stewart specifically instructed the jury to “distinguish between ‘wilfulness’ under RICO, wilfulness under the tax statutes and the intent element under [the Taft-Hartley Act].”²⁰⁹ Arguing that no single case can establish a definition to apply to all criminal statutes,²¹⁰ the government cited case law stating that the degree of criminal intent required depends on the context of each individual case.²¹¹ The absence of an explicit *mens rea* requirement in RICO indicates that Congress intended none. Reading in a *mens rea* requirement would “undoubtedly narrow its application,” and would impede the congressional intent that RICO be “liberally construed to effectuate its remedial purpose.”²¹² The government also urged that the inclusion of a *mens rea* requirement in RICO would not necessarily protect against untoward use of the statute. Rather, the government suggested that it is the concept of the “enterprise” that supplies the “significant unifying link,” ensuring proper use of the statute.²¹³

Finally, the government stated that Anastasio’s call for a more stringent specific intent requirement in conspiracy cases²¹⁴ is “simply not the law.”²¹⁵ Numerous cases, the government argued, hold that the intent required to prove a conspiracy to commit a given offense is no different than the intent required to show a violation of the substantive offense.²¹⁶

207 Scotto Brief, *supra* note 174, at 36 (quoting *United States v. DeMarco*, 488 F.2d 828, 832 (2d Cir. 1973)).

208 Anastasio Brief, *supra* note 155, at 30 (citing *United States v. Bailey*, 444 U.S. 394, 401 (1980)). The indictment did not include Anastasio in the substantive RICO count (Count one), but did include him in the RICO conspiracy count (Count fifty).

209 Government Brief, *supra* note 53, at 42 n.*.

210 Government Brief, *supra* note 53, at 44.

211 *Id.* (citing *United States v. Bishop*, 412 U.S. 346 (1973); *United States v. Murdock*, 290 U.S. 389 (1933); *United States v. Tolchow*, 532 F.2d 853 (2d Cir. 1976)).

212 Government Brief, *supra* note 53, at 45.

213 *Id.* at 46. The government further stated that, even if RICO were a “specific intent” crime, Judge Stewart’s instruction as a whole properly incorporated the essence of wilfulness under the appropriate standard. *Id.* at 46 n.* (citing *United States v. Huber*, 603 F.2d 387, 395 (2d Cir. 1979); *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976)).

214 See text accompanying note 208 *supra*.

215 Government Brief, *supra* note 53, at 47.

216 *Id.* See *United States v. Herrera*, 584 F.2d 1137, 1150 (2d Cir. 1978); *United States v.*

3. Inadequate Jury Instructions on Scotto's "Conduit" Defense

Scotto next argued that Judge Stewart improperly instructed the jury on Scotto's "conduit" defense, and that the convictions on certain section 186 (Taft-Hartley) counts should therefore be reversed.²¹⁷ Scotto insisted that he was not the ultimate beneficiary of the money he received, rather he was acting in an intermediary capacity. The court should have instructed the jury to find that Scotto intended to retain any money he received before convicting him on any Taft-Hartley violations.²¹⁸ Scotto contended that unless he intended to keep the money he received, he received no benefit or "other thing of value" within the meaning of section 186(b).²¹⁹

Scotto urged that Congress enacted section 186 "to prevent employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers."²²⁰ The

Mauro, 501 F.2d 45, 51 (2d Cir.), *cert. denied*, 419 U.S. 969 (1974); *United States v. Rosselli*, 432 F.2d 879, 891-92 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

217 Scotto Brief, *supra* note 174, at 38-43. Scotto's defense was that he transferred funds he received to political campaigns. *See* text accompanying notes 115-118 *supra*.

218 The court's instruction was as follows:

The defendant Scotto contends as to certain but not all of these counts as follows:

One, that the employer, here Mr. O'Hearn and Mr. Montella, delivered or paid a sum of money to the defendant intending that sum of money should be delivered or paid by the defendant in turn to the Cuomo campaign or the Carey campaign.

And, two, that the defendant knew this and paid or delivered that sum of money to the intended recipient.

And, three, that the recipient knew that the source of the sum of money was the employer.

And, four, that the defendant did not benefit in any way by the payment or delivery of the money to him, including the fact that he was the one who delivered the money to the campaign.'

If you find that the payments were made under all of these circumstances, then the Government has not met its burden of proof as to the second element and you must find the defendant not guilty as to those particular counts.

Scotto Brief, *supra* note 174, at 39-40.

219 *Id.* at 40. Scotto conceded that the phrase "other thing of value" in the Taft-Hartley Act was broad, citing *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964), *cert. denied*, 380 U.S. 942 (1965) ("value" of any particular thing is set by the desire to have the "thing" in question and depends on the particular circumstances), but he stated it was limited by court decisions. Scotto Brief, *supra* note 174, at 40 (citing *Zentner v. American Federation of Musicians*, 237 F. Supp. 457, 463 (S.D.N.Y.), *aff'd*, 343 F.2d 758 (2d Cir. 1965) (information about an employer's employees is not a "thing of value" under § 186(b))). *See also* *United States v. Sink*, 355 F. Supp. 1067 (E.D. Pa.), *aff'd mem.*, 485 F.2d 683 (3d Cir. 1973) (reimbursement of expenses not a "thing of value"); *NLRB v. Wyman-Gordon Co.*, 270 F. Supp. 280 (D. Mass. 1967), *rev'd on other grounds*, 397 F.2d 394 (1st Cir. 1968), *judgment of district court reinstated*, 394 U.S. 759 (1969).

220 Scotto Brief, *supra* note 174, at 40-41 (citing *United States v. Roth*, 333 F.2d at 453).

jury instruction, he argued, did not accurately reflect the statute's purpose. It was thus improper to instruct the jury to base an acquittal only on a finding that Scotto "did not benefit in any way" from his intermediary capacity and "benefit" should have been clearly defined for the jury.²²¹

Scotto next asserted that, even if he did receive an intangible benefit by virtue of his intermediary capacity in passing funds to a campaign, for this "benefit" to fall within section 186 it was necessary that Scotto be aware of this benefit. Absent such knowledge, case law mandates he be acquitted on the section 186 violations.²²² Scotto conceded that a jury instruction to this effect is unnecessary when a defendant receives a tangible benefit (cash, property, etc.) kept for his own use,²²³ but is essential when the benefit is difficult to value or identify, such as "the gratitude of a politician or of the head of a charity"²²⁴

Even if Scotto's argument were reviewable, the government contended that it was without merit. Neither the Taft-Hartley Act itself nor its legislative history suggests that section 186 is limited in application to tangible "things of value."²²⁵

221 Scotto Brief, *supra* note 174, at 41. Scotto contended that his actions were:

not distinguishable from soliciting an employer to contribute directly to a political campaign. Such a situation, too, could bring "benefit" to the union official, but surely would not be covered by § 186. Rather, such conduct would be political association protected by the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 14-15, 21-22 (1976).

222 Scotto urged that knowledge of the benefit does not transform § 186(b) into a "specific intent" crime, but only requires the jury to find that Scotto knew what he was doing. Scotto Brief, *supra*, note 174, at 41-42 (citing *United States v. Holt*, 333 F.2d 455, 456-57 (2d Cir. 1964), *cert. denied sub nom.*, *Holt v. United States*, 380 U.S. 942 (1965) (defendant must know that he is receiving a "thing of value" and that it is being conferred on behalf of an employer employing workers represented by the defendant)).

223 An example of a "thing of value" is the cabana, windows and doors mentioned in counts 14 and 15. Certain intangibles also do not require this instruction if they are of obvious value, such as cancellation of a debt or an oral agreement to make a future payment of money. Scotto Brief, *supra* note 174, at 43.

224 Scotto urged that Judge Stewart's instructions, *see* note 218 *supra*, vitiated his "conduit" defense, because the jury may have nevertheless believed that Scotto received a "tenuous, speculative, and unquantifiable" benefit from being the conduit of the money. *Id.*

225 Government Brief, *supra* note 53, at 52. The government argued that the accumulation of a cash "kitty" with money being disbursed at will undermined Scotto's defense. *See* note 93 *supra*. Furthermore, the "conduit" transactions would still violate § 186(b) since § 186(b) prohibits all "deliveries" of money, while making no requirement that the receiver ultimately retain any "benefit." Government Brief, *supra* note 53, at 52. Scotto, however, never argued that § 186 did not apply to intangible "things of value." *See* Reply Brief for appellant Scotto at 15, *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980).

4. Inadequate Instructions on Tax Evasion Counts

Finally Scotto challenged the jury instructions pertaining to four of the six tax evasion counts.²²⁶ Two of the tax evasion instructions related to payments that Scotto asserted he received only as an intermediary.²²⁷ Judge Stewart's instructions failed to clarify sufficiently to the jury that any intangible "benefit" he received from his intermediary capacity would not sustain a conviction for tax evasion, unless the jury specifically found that the "benefits" were taxable income.²²⁸ Scotto conceded not raising the point at trial, but claimed it was an oversight and not a strategy of counsel.²²⁹ Nonetheless, Scotto insisted that the incomplete instruction constituted "plain error" and required reversal, because the conviction would not be supported by a finding of proof beyond a reasonable doubt of every element of the offense.²³⁰

Scotto also challenged the last two tax evasion counts since Judge Stewart failed to distinguish in the jury instruction between the tax counts pertaining to Scotto's "conduit" defense (counts 55 and 56) and those counts pertaining to Scotto's defense of never receiving money (counts 53 and 54).²³¹ Scotto asserted that neither the court nor the government made any effort to focus on the tax counts individually which resulted in a "substantial possibility" that the jury considered all six tax counts as a group.²³²

The government called the contentions on the tax evasion counts "completely frivolous."²³³ Trial counsel had not "overlooked"

226 Scotto Brief, *supra* note 174, at 44-46, referring to counts 53 and 55 (tax evasion) and 54 and 56 (falsifying tax returns).

227 Counts 54 and 56.

228 Judge Stewart gave the following instruction with regard to tax evasion counts 51, 53, and 55:

[T]he Government must prove beyond a reasonable doubt . . . that the defendant had substantial unreported taxable income which he failed to report You are asked by the Government to find that certain moneys and things of value were received by the defendant and those moneys or things of value were income subject to income tax.

Scotto Brief, *supra* note 174, at 45.

229 *Id.* at 46 n.46. Scotto stated that the point was "subtle" and that the failure to perceive it at trial was understandable given the complex nature of the case.

230 *Id.* at 46 n.47 (citing *In re Winship*, 397 U.S. 358 (1970); *United States v. Calfon*, 607 F.2d 29 (2d Cir. 1979) (failure to instruct adequately on essential elements of crime goes to essence of case)).

231 Scotto conceded that Judge Stewart advised the jury of Scotto's contention that "certain funds he received were political contributions . . . ," but that the court never told the jury precisely to which tax counts this defense applied. *Id.* at 47 n.48.

232 *Id.*

233 Government Brief, *supra* note 53, at 53.

the issue as Scotto suggested, but raised it and even received a supplemental instruction to dispel any confusion concerning the income issue.²³⁴ The government also urged that the instructions adequately defined “thing of value” in the section 186(b) instruction,²³⁵ which thus informed the jury that the term did not include vague intangible benefits. That definition in the section 186(b) instruction undoubtedly carried over into the tax counts.²³⁶ Finally, the government dismissed Scotto’s claim that the tax evasion convictions were invalid because Judge Stewart did not match the counts with Scotto’s defenses. Judge Stewart was under no duty to “marshall” the defense evidence in his charge, and defense counsel did not even request that he do so.²³⁷

5. Miscellaneous Challenges

In a minor argument, Scotto stated that the Taft-Hartley violations were lesser included offenses in the RICO charge, and that the court should vacate convictions and sentences on these charges.²³⁸ Scotto argued that the government had to prove every element of a Taft-Hartley violation as part of a RICO violation that is predicated on a Taft-Hartley violation; therefore, the predicate offense is a lesser included offense for which the court may impose no sentences.²³⁹

The government countered Scotto’s argument by citing the legislative history of RICO, which explicitly stated that RICO imposes penalties in addition to any other penalties which might be imposed under existing law.²⁴⁰ In enacting RICO, Congress specifically intended that the predicate offense would be separate offenses, and

234 This instruction was explicitly accepted as satisfactory by defense counsel. *Id.* at 54.

235 See note 219 *supra*.

236 Judge Stewart gave the following section 186(b) instruction defining “thing of value”: “A thing of value can be any material thing with a monetary value such as a gift, services or work performed or services supplied.” Government Brief, *supra* note 53, at 55.

237 *Id.* at 54 n.*.

238 Scotto Brief, *supra* note 174, at 37-38.

239 *Id.* (citing *Whalen v. United States*, 445 U.S. 684, (1980) (offense of rape merged into the offense of felony murder based on rape), quoting *Blockburger v. United States*, 284 U.S. 299 (1932) (judicial assumption that “Congress ordinarily does not intend to punish the same offense under two different statutes”); *United States v. Sansone*, 380 U.S. 342, 349-50 (1965) (defining lesser included offenses); *United States v. Umans*, 368 F.2d 725, 730-31 (2d Cir. 1966), *cert. denied*, 389 U.S. 80 (1967) (multiple sentences, even if concurrent, may not be imposed for violation of a lesser included offenses)).

240 Government Brief, *supra* note 53, at 75 (citing Organized Crime Control Act, § 904(a), Pub. L. No. 91-452, 84 Stat. 941 (1970) (RICO should be liberally construed to effectuate its remedial purpose); *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979)).

could be prosecuted as such.²⁴¹ Finally, the government suggested that Scotto's argument was "illogical" because it would force the government to choose between RICO and the predicate offenses, thereby "seriously limiting the usefulness of RICO in cases involving multiple predicate offenses"²⁴²

Anastasio, in a novel argument, asserted that, of the four types of unlawful payments prohibited by the Taft-Hartley Act,²⁴³ Congress intended only the bribery prohibition of 29 U.S.C. § 186(a)(4) to be a predicate offense under RICO.²⁴⁴ He supported this theory by examining the birth of RICO, the comments of RICO sponsor Senator McClellan, and the Senate Reports, which specifically mention bribery as a means used by organized crime.²⁴⁵ Anastasio argued that based on these indications, the legislative intent was to include only the bribery prohibition of the Taft-Hartley Act as a RICO predicate offense. Since the charges against both Scotto and Anastasio revolved around violations of section 186(b), the court should reverse the RICO and RICO conspiracy convictions.²⁴⁶

The government noted that Anastasio's argument had been rejected in three RICO cases that were based on the same predicate acts of "racketeering activity" as found in *Scotto*.²⁴⁷ Second, RICO specifically enumerates as a "racketeering activity" any act "which is indictable under title 29, United States Code, section 186 . . .", and makes no distinction between a section 186(a) offense and a section 186(b) offense.²⁴⁸

241 Government Brief, *supra* note 53, at 76 (citing S. REP. NO. 91-617, 91st Cong., 1st Sess. 126).

242 Government Brief, *supra* note 53, at 76-77.

243 The Taft-Hartley Act, 29 U.S.C. § 186(a) (1976), forbids (1) payment to any labor representative of the employees of the payor; (2) payment to any labor organization (or any officer or employee of a labor organization) which is representing, or seeking to represent, a defined employee group; (3) payment to any employee (in the form of "extra compensation") to cause the employee to influence other employees regarding collective bargaining matters; and (4) bribes to union officers or employees.

244 Anastasio Brief, *supra* note 155, at 44. Anastasio distinguished a contrary decision in *United States v. Kaye*, 556 F.2d 855 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977), by noting that the defendants in *Kaye* argued reading 29 U.S.C. § 186 (1976) out of RICO altogether. *See also* *United States v. Field*, 423 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978); *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). Government Brief, *supra* note 53, at 44 n.43 & 49-50.

245 S. REP. NO. 91-617, 91st Cong., 1st Sess. 126, p. 158 (1969).

246 Anastasio Brief, *supra* note 155, at 48.

247 Government Brief, *supra* note 53, at 73 (citing *United States v. Field*, 578 F.2d 1371 (2d Cir. 1978); *United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977); *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975)).

248 *See* note 164 *supra*.

C. *The Second Circuit Decision*

The Second Circuit affirmed both convictions.²⁴⁹ Before turning to the substantive arguments, the court discussed RICO generally and observed that the statute had survived constitutionally based vagueness challenges.²⁵⁰ The court also noted the wide variety of situations to which courts have applied the statute.²⁵¹

The court then decided the merits of Scotto's "conduct of the affairs" argument, regardless of whether the defense waived the issue by failure to raise it at trial.²⁵² The court rejected Scotto's argument that the district court must require the jury to find that the predicate acts "concerned or related to the operation or management of the enterprise" and "[a]ffected the affairs of the I.L.A. in its essential functions."²⁵³ The court adopted the reasoning of *United States v. Stofsky*,²⁵⁴ which held that RICO does not define the degree of interrelationship between the pattern of racketeering and the conduct of the affairs of the enterprise.²⁵⁵ The court stated that:

[O]ne conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offense solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.²⁵⁶

Noting that section 1962(c) does not require proof that the defendant's activities advanced the union's affairs, that the union itself is corrupt, or that the union authorized the defendant to do the acts he did, the court held it unnecessary for an individual to "enhance his position in the enterprise through commission of the predicate violations."²⁵⁷ The court concluded that the instructions sufficiently emphasized the required connection between the predicate acts and the

249 *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980).

250 *Id.* at 52 (citing *United States v. Huber*, 603 F.2d 387, 393 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975) (per curiam), *cert. denied*, 423 U.S. 1050 (1976)).

251 *United States v. Scotto*, 641 F.2d at 52-53.

252 *Id.*

253 *See* text accompanying note 182 *supra*.

254 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

255 *United States v. Scotto*, 641 F.2d at 54.

256 *Id.* The court noted, however, that "[s]imply committing predicate acts which are unrelated to the enterprise or one's position within it would be insufficient."

257 *United States v. Scotto*, 641 F.2d at 54 (quoting *United States v. Field*, 432 F. Supp. 55, 58 (S.D.N.Y. 1977)).

affairs of the enterprise.²⁵⁸

The court found the RICO *mens rea* arguments raised by Scotto and Anastasio unpersuasive. The court restated the doctrine of *United States v. Boylan* that “[t]he RICO count does not include a scienter element over and above that required by the predicate crimes, in this case the violations of 29 U.S.C. § 186(b)(1).”²⁵⁹ Judge Stewart’s instructions were held to be more than adequate.²⁶⁰ The court went on to hold that the instructions need not require a finding of a willful violation of RICO.²⁶¹ The court similarly dispensed with appellants’ arguments pertaining to the RICO conspiracy convictions, stating that:

If anything, the district court erred in favor of the appellants by delivering this portion of the charge in which it implied that a specific intent to violate the RICO conspiracy provision was required.²⁶²

The court also dismissed the arguments that Taft-Hartley violations are lesser included offenses in RICO,²⁶³ citing *United States v. Boylan*²⁶⁴ and similarly dismissed the argument that a violation of 29 U.S.C. § 186(b)(1) is not a RICO predicate offense.²⁶⁵ RICO’s plain language makes a violation of any part of Title 29 of the United States Code sufficient to base a RICO conviction.²⁶⁶

The court rejected Scotto’s challenge of the instructions defining “things of value” under section 186(b)(1),²⁶⁷ relying principally on the government’s waiver argument.²⁶⁸ The court also dismissed

258 *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977). The court noted Judge Stewart’s instructions were clearer than those upheld in *United States v. Rubin*, 559 F.2d at 989-90, where the instruction merely tracked the language of § 1962(c). *United States v. Scotto*, 641 F.2d at 55.

259 *United States v. Scotto*, 641 F.2d at 55.

260 *See* note 195 *supra*.

261 *United States v. Scotto*, 641 F.2d at 55-56. The court distinguished *United States v. Winston*, 558 F.2d 105, 107-09 (2d Cir. 1977), *see* note 200 *supra*, on which Scotto relied, by noting that *Winston* involved the violation of a statute explicitly requiring a “willfull failure to comply with the terms” of other subsections of the law. RICO does not have the same requirement. *See* text accompanying notes 211-212 *supra*.

262 *United States v. Scotto*, 641 F.2d at 56. *See* note 195 *supra*.

263 *See* text accompanying notes 238-239 *supra*.

264 620 F.2d at 361. The Second Circuit held in *Boylan* that RICO and § 186 violations are “separate crimes, separately punishable,” because they “do not proscribe the same act or transactions, and they implement different Congressional purposes.” *Id.*

265 *See* text accompanying notes 243-246 *supra*.

266 *United States v. Scotto*, 641 F.2d at 56-57. *See* 18 U.S.C. § 1961(1)(c) (1976). *See also* text accompanying note 248 *supra*.

267 *United States v. Scotto*, 641 F.2d at 57. *See* text accompanying notes 217-224 *supra*.

268 *See* text accompanying note 225 *supra*.

Scotto's challenge to the section 186 violation instructions for failing to require a finding that Scotto knew he was receiving a thing of value. The court held Scotto did not have to know he was receiving a "thing of value," but required only an "awareness of the benefit itself."²⁶⁹ The court also dismissed Scotto's argument that the tax evasion instructions were inadequate for failing to better define a "thing of value" in the tax evasion context, calling Scotto's argument "farfetched" and speculative.²⁷⁰ Furthermore, the court held that the district court was not required to explain to the jury the defense theory behind each tax evasion count.²⁷¹

Finally, the court dismissed Anastasio's misjoinder argument under Federal Rule of Criminal Procedure 8(b), because he failed to raise it before trial as is required to preserve the issue for appeal.²⁷² Had Anastasio properly preserved the point, there were nonetheless sufficient allegations and proof of joint participation to justify the joinder.²⁷³

VII. Epilogue

To date, the UNIRAC investigation has resulted in the conviction of 110 defendants, fifty-two of whom were union officials. Nevertheless, the investigation "has hardly caused a ripple on the docks."²⁷⁴ In February of 1981 the Senate Permanent Subcommittee on Investigations heard evidence that it is "business as usual" on the waterfront.²⁷⁵

Such a result is frustrating in light of the extensive government UNIRAC investigation into waterfront corruption. It remains to be seen just how effective traditional RICO prosecutions like *Scotto* are, even when they result in convictions.

Even though Scotto will not hold a union position in the New

269 *United States v. Scotto*, 641 F.2d at 57.

270 *Id.* See text accompanying notes 226-230 *supra*.

271 *United States v. Scotto*, 641 F.2d at 57. See text accompanying notes 231-232 *supra*.

272 *United States v. Scotto*, 641 F.2d at 62.

273 *Id.* at 58.

274 *N.Y. Times*, Mar. 28, 1981, at 8, col. 1.

275 *Id.* Most of the witnesses testified against Thomas W. (Teddy) Gleason, president of the I.L.A. since 1963, stating that he is nothing more than a figurehead who is "owned" and controlled by organized crime. The principal witness against Gleason was George Wagner, a former I.L.A. functionary. Wagner testified that Gleason had extensive contact with convicted racketeer George Barone. See note 46 *supra*. The FBI also introduced the transcript of a taped conversation between William "Sonny" Montella, a key government witness against Scotto, and Michael Clemente, a member of the Vito Genovese organized crime family, in which Clemente told Montella that Gleason had been the "mob's choice" to succeed I.L.A. President William Bradley in 1963. *N.Y. Times*, Mar. 28, 1981, at 8, col. 2.

York-New Jersey area again because of the Waterfront Commission Act,²⁷⁶ the federal laws will keep him from a union post in other areas of the country for only five years after his imprisonment and probation.²⁷⁷ Scotto is only forty-seven years old and could conceivably hold a union position in another area of the country in the future. More significantly, even if Scotto never again holds a formal union position, organized crime influence on the waterfront is so institutionally entrenched that prosecutions of individuals will only take one man from a position to make room for another.²⁷⁸

An often overlooked yet powerful weapon in RICO is the broad civil remedies provision of § 1964.²⁷⁹ Patterned after antitrust legislation, the government has broad civil remedies and harsh civil penalties at its disposal under RICO. Section 1964 provides for "appropriate" injunctive relief for engaging in prohibited conduct. The court may enjoin any individual or corporation from investing in or operating a prohibited type of enterprise in the future, and the court is additionally empowered to order divestiture or dissolution.²⁸⁰ The statute even authorizes treble damages for injured persons and reasonable attorney's fees.²⁸¹

Private parties, possibly attracted by the treble damages and attorney's fees awardable under § 1964(c), are beginning to use RICO's civil remedies to a small degree.²⁸² However, prosecutors, who are more experienced in criminal matters, often overlook RICO's civil provisions.²⁸³ Accordingly, civil remedies are rarely imposed in racketeering cases.²⁸⁴

Aside from the advantage of the less stringent standard of proof in a civil case, there are other advantages to the government pursu-

276 See note 143 *supra*.

277 *Id.*

278 The UNIRAC investigation revealed the nationwide scope of waterfront corruption. See text accompanying notes 43-46 *supra*.

279 18 U.S.C. § 1964 (1976) provides the district courts with authority to fashion appropriate remedies to prevent and restrain violations of RICO, including forfeiture orders and orders dissolving or reorganizing any enterprise after making due provision for the rights of innocent persons. 18 U.S.C. § 1964(a) (1976). It goes on to allow the Attorney General of the United States to bring actions under § 1964, and provides jurisdiction to private individuals injured in their business or property by a RICO violation, authorizing treble damages and reasonable attorney's fees. 18 U.S.C. § 1964(b) & (c) (1976).

280 18 U.S.C. § 1964(a) (1976). See note 279 *supra*.

281 18 U.S.C. § 1964(c) (1976). See note 279 *supra*. See also Nathan, *Proposed Amendments for RICO: Making A Criminal Law More Civil*, NAT'L L.J., Aug. 31, 1981, at 28 (discussion of RICO civil possibilities for victims of securities and large contracting frauds).

282 See Nathan, *supra* note 281, at 28.

283 Blakey & Goldstock RICO Article, *supra* note 167, at 362.

284 *Id.*

ing the civil remedies. The Senate investigation that followed *Scotto* and the progeny resulting from the UNIRAC investigation²⁸⁵ indicates that criminal remedies, even when wide reaching, are not having the desired effect on waterfront corruption.²⁸⁶ The criminal remedies by necessity operate against the individuals within the corrupt entities, but the civil remedies can be used to effectively eradicate the corrupt entities themselves. Section 1964(a) allows the federal district court to order the dissolution or reorganization of any enterprise after making due provision for the rights of innocent persons.²⁸⁷ It is concededly a drastic measure, but the long history of crime on the waterfront and the ineffectiveness of criminal prosecutions may well warrant such a step.

Obviously, there is no single course of action that will effectively remedy a situation that has existed since the turn of the century. The situation will only worsen, however, unless the government and private individuals victimized by waterfront corruption take decisive action. The era of Kazan's "On the Waterfront", with open corruption, violence, and terror on the docks, may be over because of regulation and government intervention. However, the less visible forms of waterfront corruption are no less detrimental by virtue of their subtlety.

Thomas J. Salerno
Tricia N. Salerno

285 See text accompanying note.275 *supra*.

286 *Id.*

287 See note 279 *supra*. The concept of the federal government dissolving a union is indeed novel, and the myriad of potential problems was seen recently with the Reagan Administration's decertification of the Professional Air Traffic Controller's Union.