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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT  
No. 09 - 1190

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UNITED STATES OF AMERICA,	)	On appeal from the United
	)	States District Court for
Plaintiff-Appellee,	)	the Northern District of
	)	Illinois, Eastern Division
	)	
v.	)	No. 03 CR 90-1
	)	
BOLIVAR BENABE,	)	Hon. Ruben Castillo
	)	Presiding
Defendant-Appellant.	)	

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**BRIEF OF APPELLANT**

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**ORAL ARGUMENT REQUESTED**

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proceedings..." *United States ex rel. Mireles v. Greer*, 736 F.2d 1160, 166 (7<sup>th</sup> Cir. 1984). Here, with the defendant going from active cooperation with counsel to refusing to even meet, and with defendant Benabe beginning to file *pro se* pleading that were legally nonsensical, counsel had a bona fide doubt as to the defendant's competence. But the court refused to order a competency examination or hearing. This, compounded by defendant Benabe's exclusion from the courtroom, deprived him of a fair trial.

## II

### **The District Court Gave An Erroneous Jury Instruction On Aiding And Abetting The RICO Conspiracy.**

The district court gave the Seventh Circuit pattern instruction on aiding and abetting, for violation of 18 U.S.C. §2. That instruction reads, "any person who knowingly aids, counsels, commands, induces or procures the commission of an offense may be found guilty of the offense. That person must knowingly associate with the criminal activity, participate in the activity, and try to make it succeed." The defense proposed an alternative aiding and abetting instruction for Count One, the RICO conspiracy charge (attached as Appendix 6). It reads:

With respect to Count One, a defendant who aids and abets the commission of that offense may be found guilty of that offense.

In order to aid and abet the commission of the offense charged in Count One, a defendant must:

1) know of the conspiratorial agreement alleged in Count One;

- 2) knowingly assist in the commission of at least two of the predicate acts set forth in Paragraph 11 of Count One; and
- 3) try to make the conspiratorial agreement alleged in Count One succeed.

Judge Castillo denied the requested instruction.

The pattern jury instruction on aiding and abetting derives from Learned Hand's often quoted characterization of the concept. *United States v. Peoni*, 100 F.2d 401 (2<sup>nd</sup> Cir. 1938). However, "pattern books often fail to supply useful instructions because the circumstances with which they must deal are so diverse." *United States v. Duff*, 76 F.3d 122, 127 (7<sup>th</sup> Cir. 1996). This is a case where the pattern aiding and abetting instruction is inappropriate.

We must first consider what a conspiracy is, since a RICO conspiracy is one application of conspiracy law. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." *Iannelli v. United States*, 420 U.S. 770, 777, 95 S.Ct. 1284 (1975). Consequently, "to join a conspiracy, then, is to join an agreement rather than a group."

This Court has explained how a conspiracy is aided and abetted: "In *Galiffa*, the defendant argued that because a conspiracy is an agreement to commit an unlawful act, one can only aid and abet a conspiracy by aiding and abetting the formation of the agreement, such as bringing the parties together. We held: 'We believe this interpretation of the conspiracy statute is too restrictive...[A] person can be guilty of aiding and abetting a conspiracy when the person commits an act

designed to further the conspiracy.'... We have continued to follow this holding. See *United States v. Pearson*, 113 F.3d 758, 762 (7<sup>th</sup> Cir. 1997)(one who assisted drug sales for conspiracy after it was formed would be aider and abettor of that conspiracy)". *United States v. Irwin*, 149 F.3d 565, 570 (7<sup>th</sup> Cir. 1998).

In this case, the other jury instructions (Rec. Doc. 915) state that the agreement in this case has two parts. First, the jury must find that "the defendant you are considering knowingly agreed to conduct or participate in the conduct of the affairs of the Insane Deuce street gang, an enterprise, through a pattern of racketeering activity as described in Count One." Then the jury is told that "in order to find 'a pattern of racketeering activity' for purposes of Count One, you must find beyond a reasonable doubt that a particular defendant knowingly agreed that one or more members of the conspiracy would commit at least two separate acts of racketeering as described in Paragraph 11 of Count One." The instruction adds, "you must also find that the agreed to acts of racketeering were in some way related to each other and that there was continuity between them."

Thus, to be guilty of RICO conspiracy, a particular defendant must:

(1) agree to personally participate in the affairs of the enterprise, and (2) agree that one or more members of the conspiracy would commit two more of the predicate acts, which predicate acts must be in some way related to each other and between which there must be continuity.

That leads to the question of how a defendant aids and abets the RICO

conspiracy. Defendant Benabe's proposed instruction would require the aider and abettor to first know of the conspiracy he is aiding and abetting. Then he must "commit an act designed to further the conspiracy," (as required by *Irwin, supra*) in the form of aiding and abetting (or committing) two predicate acts. This is the only practical way of satisfying the requirement that a defendant act in furtherance of a type conspiracy that is based upon at least two predicate acts. The alternative is to go back to a requirement that the aiding and abetting be in furtherance of the formation of the conspiratorial agreement, which approach was rejected by *Galiffa*. A finding of aiding and abetting two predicate acts would also satisfy the requirement that the defendant to try to make the conspiracy succeed, the third criteria.

The other circuits that have addressed this question have concluded that this is the right approach. The Second Circuit has stated, "Case law unequivocally establishes...that a defendant may be convicted of a RICO conspiracy violation if he aids and abets the commission of racketeering acts. See *United States v. Daly*, 842 F.2d 1380, 1389-92 (2<sup>nd</sup> Cir.)(court affirms RICO conspiracy conviction since there is sufficient evidence to show that defendant committed one predicate act and aided and abetted a predicate Taft-Hartley offense), *cert. denied*, 488 U.S. 821, 109 S.Ct. 66, L.Ed.2d 43 (1988); *United States v. Qaoud*, 777 F.2d 1105, 1117-18 (6<sup>th</sup> Cir. 1985)(defendant was properly convicted on substantive and conspiracy RICO offenses given evidence that he aided and abetted predicate acts involving bribery), *cert. denied*, 475 U.S. 1098,

106 S.Ct. 1499, 89 L.Ed.2d 899 (1986)... " *United States v. Rastelli*, 870 F.2d 822, 832 (2<sup>nd</sup> Cir. 1989).

In 2005, a district court found that the foregoing remains the standard for RICO conspiracy liability, in that "a defendant may be convicted of a RICO conspiracy if he aids and abets the commission of racketeering acts," citing *Rastelli*. *State Farm Mutual Automobile Insurance Company v. CPT Medical Services, P.C.*, 375 F.Supp.2d 141, 151 (E.D.N.Y. 2005).

The failure to give the proposed instruction was particularly prejudicial to defendant Benabe. Judge Castillo gave the following theory of defense instruction for defendant Benabe.

Defendant Bolivar Benabe is charged in Counts One and Nine of the indictment. It is defendant Benabe's theory of defense that he was a member of the Insane Deuces, but he is not guilty of the charge in Count One of the Superseding Indictment because he did not know about or agree to the specific predicate acts set forth in Paragraph 11 of Count One, all of which occurred in Aurora. With respect to Count Nine, defendant Benabe similarly did not know about or agree with any other conspirator that the drug transactions of Count Nine would take place.

The parties argued the case consistently with the jury instructions. Counsel for Benabe argued that he worked in an advisory or administrative capacity for the Deuces as a whole, but that he had no authority to order anything, and that he did not agree that he or anyone else would commit any of the predicate acts in

Aurora, as alleged in the indictment. Transcript, April 1, 2008, pp. 5754 - 5761. The government argument first outlined the legal requirements contained in the jury instructions. Then they said that the judge would instruct the jury of the requirement that "each defendant agreed to personally participate in the operation and management of the Insane Deuces." Transcript, March 31, 2008, pp. 5537-8. Then the judge would instruct on the pattern of racketeering activity: "First that the defendant agreed...that some member of the conspiracy would commit at least two acts of racketeering. Second that the acts of racketeering were separate from each other, and that they were related, and that there was continuity between them." Transcript, March 31, 2008, p. 5539.

As applied to Bolivar Benabe, the government argued in its opening close that "he's involved in maintaining, creating, and enforcing the rules of the gang. And that makes him part of this RICO conspiracy. It makes him guilty of this RICO conspiracy." The defense countered that Benabe had no authority to enforce anything, and that what he did was to assist with administrative matters such as helping gang members in prison communicate with each other or keeping the gangs rules and other documents in order. There was no evidence that he participated in any of the predicate acts, ordered any of the predicate acts, or knew that any of the predicate acts were going to happen.

In rebuttal argument, the government argued, "Now, Mr. Beal also suggested that Bolivar Benabe wasn't guilty of RICO conspiracy because he didn't agree to any specific act." Mr. Pope continued that they "didn't have to prove that

any of the defendants agreed to personally commit the racketeering acts. It was enough that they set up this system, they perpetuated this system where they said the Shorties are going to do this, the Juniors are going to do this, too...when they gave those orders and they enforced those orders, they're guilty." Transcript, April 3, 2008, pp. 6008-9. This was in response to the defense argument that defendant Benabe did not set up or implement anything in Aurora, where the predicate acts in this case took place.

The problem is that the judge also gave the pattern aiding and abetting instruction. "Any person who knowingly aids, counsels, commands, induces or procures the commission of an offense may be found guilty of that offense. That person must knowingly associate with the criminal activity, participate in the activity, and try to make it succeed." The jury could easily have concluded from reading this instruction that it was sufficient to convict defendant Benabe if defendant Benabe had some association with the Insane Deuces, participated in some of their activities even in an advisory or administrative capacity, and simply wanted to see the gang be successful, in the sense of continuing to have membership and meetings. However, this would not satisfy the requirement of an agreement that a member of the enterprise would commit two predicate acts.

It is also important to remember the context in which the jury was acting. It was an anonymous jury, which unavoidably created in the jury's mind an apprehension about the defendants. Why, after all, they had to have wondered, was there a need for them to be anonymous? Second, defendant Delatorre and

Benabe were not in the courtroom, which created its own sense that something had to be wrong. Most importantly, there was extensive testimony about many violent crimes and about drug trafficking. Defendant Benabe came to the June 7 Junior meeting, but the significance of what he said there was strongly disputed. He also attended a wake in Aurora. And he had a role with keeping the rules and communicating with members of the group in prison, although the significance of those communications was also strongly disputed. The jury, undoubtedly being horrified by the violence and feeling there had to be accountability for it, could easily have concluded that, under the wording of the aiding and abetting instruction as given, defendant Benabe could be found guilty for: 1) associating with the Deuces at the time some of them were, in fact, engaged in the predicate acts, 2) assisting the Deuces with administrative matters, and 3) trying through that assistance to help the Deuces persist as an organization. The vital requirement of his agreeing to the commission of two predicate acts could easily have gotten lost in the shuffle.

Therefore, the aiding and abetting instruction as given was erroneous and giving it was prejudicial to defendant Benabe.

### III

#### **It Was Error to Give the Pinkerton Instruction in the Second Round of Jury Deliberations.**

The district court exacerbated the error in giving the aiding and abetting instruction by improperly giving the Pinkerton instruction in the second, or