738 F.3d 338
(Cite as: 738 F.3d 338)

United States Court of Appeals,
District of Columbia Circuit.
UNITED STATES of America, Appellee
v.
Gerald W. EILAND, Frederick Miller, Appellants.

Nos. 07–3131, 11–3001.
Argued Oct. 4, 2013.
Decided Dec. 27, 2013.

Before: GARLAND, Chief Judge, and ROGERS and BROWN, Circuit Judges.

Opinion for the Court by Circuit Judge BROWN.

BROWN, Circuit Judge.

Appellants, Gerald Eiland and Frederick Miller, were convicted of various narcotics-related offenses. The government's evidence at trial showed that Eiland and Miller organized an extensive drug ring in the Washington, D.C. area that had ties across the country. After almost a year and a half of investigation including numerous wiretaps, the government indicted twenty-one defendants. Many of the defendants pled guilty. The government brought the remaining defendants to trial in two groups. This appeal results from the second of these trials. We also heard an appeal from the first trial, *United States v. Miller,* Nos. 07–3135 & 07–3139, and we have disposed of those issues in another opinion released today.

Eiland and Miller allege numerous errors affecting the second trial. Although we reject most of appellants' arguments, we vacate Miller's insufficiently supported conviction for his participation in a continuing criminal enterprise and remand for resentencing. We also vacate the fine imposed on Eiland by the district court and remand for reconsideration of that portion of Eiland's sentence.

I. Facts and Procedural History

Our opinion in the companion case sets out the factual and procedural background of this case in some detail. We need not retell that story here, and we limit our discussion to facts relevant to the second trial and this appeal.

Sometime in 2003, the Safe Streets Task Force of the FBI began investigating a drug trafficking ring in Southeast Washington, D.C. The evidence revealed a wide-ranging drug operation headed by Eiland and Miller. The operation dealt in heroin, cocaine, cocaine base, and phencyclidine (PCP) and had ties around the country and to foreign travelers. On February 13, 2004, the task force applied for and was granted court authorization to wiretap Miller's cell phone. The court approved two extensions and the wiretap lasted three months. In April, the district court permitted the task force to tap Eiland's three phones and approved an extension for one of those phones. FBI Agent Daniel Sparks provided supporting affidavits for each of the initial wiretap and extension applications. Although the conspirators often used untapped payphones to discuss their illicit activities and spoke in guarded language while on the wiretapped phones, the FBI obtained substantial evidence from the wiretaps. Following a “reverse sting” operation, the FBI arrested Eiland and Miller in August 2004. The government charged twenty-one defendants in a 100–count superseding indictment. The defendants were charged with conspiring to distribute heroin, cocaine, cocaine base, and PCP between 1999 and 2004 in Virginia, the District of Columbia, and Maryland.

* * * *

C. RICO Conspiracy

In his pro se brief, Miller also challenges the sufficiency of the evidence supporting his RICO conspiracy conviction. The RICO statute, 18 U.S.C. § 1962(d), makes it unlawful to conspire to violate § 1962(c), which, in turn, provides that it is unlawful for anyone "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." 18 U.S.C. § 1962(c). Miller contends the government failed to prove at trial the existence of either an "enterprise" or "a pattern of racketeering activity."

The RICO statute defines "enterprise" to include "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). An association-in-fact enterprise must have three structural features: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States,* 556 U.S. 938, 946, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009). An association-in-fact enterprise "need not have a hierarchical structure or a 'chain of command'; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times." *Id.* at 948, 129 S.Ct. 2237. "[P]roof of a pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an association-in-fact enterprise." *Id.* at 951, 129 S.Ct. 2237.

A pattern of racketeering activity requires "two or more related predicate acts of racketeering within a 10–year period." *United States v. Crosby,* 20 F.3d 480, 481 (D.C.Cir.1994). The government must show that "the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

The same evidence that supports the narcotics conspiracy conviction supports the jury's finding of an enterprise. The enterprise's purpose was to distribute drugs for profit. The defendants organized themselves so each would carry out a separate role in the distribution chain, with Eiland and Miller overseeing the operation. Rashawn Briggs testified he was dealing drugs with Eiland and Miller between 2000 and 2002. Oct. 19, 2006 AM Trial Tr. at 56. Thus, the enterprise continued for a period "sufficient to permit the [ ] associates to pursue the enterprise's purpose." *Boyle,* 556 U.S. at 946, 129 S.Ct. 2237.

The government also presented evidence establishing the existence of an agreement to engage in a pattern of racketeering activity. *See Salinas v. United States,* 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense...."). The jury found the government proved agreement to commit three racketeering acts—Act 1 (conspiracy to distribute heroin, cocaine, and cocaine base), Act 4 (attempt to possess with intent to distribute cocaine and unlawful use of a communication facility), and Act 6 (attempt to possess with intent to distribute heroin). Miller argues the proven acts were not related. In fact, the predicate acts were related by the nature of the acts (all narcotics offenses), temporal proximity (the acts all occurred between 1999 and 2004), purpose (to distribute drugs for profit), and participants. The government established the existence of both an enterprise and an agreement to engage in a pattern of racketeering activity. Miller's challenge to the RICO conspiracy conviction will be denied.

* * * *