CRIMINAL RICO: 18 U.S.C. §§ 1961-1968

A Manual for Federal Prosecutors

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PREFACE

This manual is intended to assist federal prosecutors in the preparation and litigation of cases involving the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Prosecutors are encouraged to contact the Organized Crime and Racketeering Section (OCRS) early in the preparation of their case for advice and assistance.

All pleadings alleging a violation of RICO, including indictments, informations, and criminal and civil complaints, must be submitted to OCRS for review and approval before being filed with the court. Also, all pleadings alleging forfeiture under RICO, as well as pleadings relating to an application for a temporary restraining order pursuant to RICO, must be submitted to OCRS for review and approval prior to filing. Prosecutors must submit to OCRS a prosecution memorandum and a draft of the pleadings to be filed with the court in order to initiate the Criminal Division approval process. The submission should be approved by the prosecutor's office before being submitted to OCRS. Due to the volume of submissions received by OCRS, the prosecutor should submit the proposal three weeks prior to the date final approval is needed. Prosecutors should contact OCRS regarding the status of the proposed submission before finally scheduling arrests or other time-sensitive actions relating to the submission. Finally, prosecutors should refrain from finalizing any guilty plea agreement containing a RICO-related charge until final approval has been obtained from OCRS.

The policies and procedures set forth in this manual and elsewhere relating to RICO are internal Department of Justice policies and guidance only. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

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I

OVERVIEW, RICO LEGISLATIVE HISTORY AND DEPARTMENT OF JUSTICE APPROVAL PROCESS

A. Overview of Criminal RICO

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, was enacted October 15, 1970, as Title IX of the Organized Crime Control Act of 1970.[1] RICO provides for civil remedies[2] as well as criminal penalties. This Manual focuses exclusively on RICO's criminal provisions.[3]

RICO provides powerful criminal penalties for persons who engage in a "pattern of racketeering activity" or "collection of an unlawful debt"[4] and who have a specified relationship to an "enterprise" that affects interstate or foreign commerce. Under the RICO statute, "racketeering activity" includes state offenses involving murder, robbery, extortion, and several other serious offenses, punishable by imprisonment for more than one year, and more than one hundred serious federal offenses including extortion, interstate theft, narcotics violations, mail fraud, securities fraud, currency reporting violations, certain immigration offenses, and terrorism related offenses. A

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[1] See Pub. L. No. 91-452, 84 Stat. 941 (1970).

[2] See 18 U.S.C. § 1964.

[3] See ORGANIZED CRIME AND RACKETEERING SECTION, U.S. DEPT. OF JUSTICE, CIVIL RICO: A MANUAL FOR FEDERAL ATTORNEYS (OCTOBER 2007) ("OCRS' Civil RICO Manual (Oct. 2007)") available at (http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/civrico.pdf, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02090.htm, http://10.173.2.12/usao/eousa/ole/usabook/cric/index.htm), which discusses RICO's civil remedies under 18 U.S.C. § 1964 and related legal issues.

[4] Collection of unlawful debt is an alternate ground for RICO liability and proof of a pattern is not required. See Section II(F) below.

"pattern" may be comprised of any combination of two or more of these state or federal crimes committed within a statutorily prescribed time period. Moreover, the predicate acts must be related and amount to, or pose a threat of, continued criminal activity. An "unlawful debt" is a debt that arises from illegal gambling or loansharking activities. An "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any group of individuals associated in fact although not a legal entity. For example, an arson ring can be a RICO enterprise, as can a small business or government agency.

Three different substantive criminal violations, and RICO conspiracy, are proscribed by RICO. Section 1962(a) makes it a crime to invest the proceeds of a pattern of racketeering activity or from collection of an unlawful debt in an enterprise affecting interstate or foreign commerce. For example, a narcotics trafficker violates this provision by purchasing a legitimate business with the proceeds of a pattern of multiple drug transactions.

Section 1962(b) makes it a crime to acquire or maintain an interest in an enterprise affecting interstate or foreign commerce through a pattern of racketeering activity or collection of an unlawful debt. For example, an organized crime figure violates this provision by taking over a legitimate business through a pattern of extortionate acts or arsons designed to intimidate the owners into selling the business to him.

Section 1962(c) makes it a crime to conduct the affairs of an enterprise affecting interstate or foreign commerce "through" a pattern of racketeering activity or through the alternative theory of collection of an unlawful debt. For example, an automobile dealer violates this provision by using the dealership's facilities to operate a stolen car ring through a pattern of predicate violations.

Section 1962(d) makes it a crime to conspire to commit any of the three substantive RICO offenses.

Depending on the underlying racketeering activity, Section 1963(a) provides criminal penalties ranging from a maximum life sentence,[5] or any term of years up to life imprisonment and/or a fine under Title 18. See Section IV(A) below. In addition, Sections 1963(a)(1) through (a)(3) provide for forfeiture of the defendant's interest in the enterprise connected to the offense, and his interests acquired through or proceeds derived from racketeering activity or unlawful debt collection.[6] Section 1963 also permits the government to seek pre-trial and, in some cases, pre-indictment restraining orders to prevent the dissipation of assets subject to forfeiture.

B. RICO's Legislative History

1. RICO Initially Was Enacted in 1970 to Combat Organized Crime and Other Corruption

As noted above, RICO initially was enacted October 15, 1970. See n.1 above. Congress found that organized crime, particularly La Cosa Nostra ("LCN"), had extensively infiltrated and exercised corrupt influence over numerous legitimate businesses and labor unions throughout the United States, and hence posed "a new threat to the American economic system." See S. REP. NO.

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[5] Convictions under Section 1962 may result in life imprisonment when the violation "is based on a racketeering activity for which the maximum penalty includes life imprisonment." 18 U.S.C. § 1963(a).

[6] In 1984, Congress increased the maximum fines for all federal felonies occurring on or after January 1, 1985, to $250,000 for individuals, $500,000 for organizations, or twice the proceeds of the offense. Pub. L. No. 98-596, § 6(a), 98 Stat. 3137 (1984), now codified at 18 U.S.C. § 3571 (formerly codified at 18 U.S.C. § 3623). Section 1963 originally provided for a fine of $25,000 or up to twice the gross profit of the offense, but was amended in 1988 to provide for a fine under Title 18. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7058, 102 Stat. 4403 (Nov. 18, 1988).

617, 91st Cong., 1st Sess. at 76-78 (1969) ("S. REP. NO. 91-617"). In that regard, Section 1 of Pub. L. No. 91-452 (RICO) provided that:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

See Organized Crime Control Act of 1970, Congressional Statement of Findings and Purposes, Section 904(a) of Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970). See also United States v. Turkette, 452 U.S. 576, 588-89 (1981).

Congress also found that "[w]ith its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system." S. REP. NO. 91-617 at 77. Congress added that:

> Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others.

> It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here.

Id. at 78 (footnote omitted). Congress recognized that powerful, new remedies were necessary because of the inadequacy of existing remedies. Thus, Congress concluded:

> What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.
>
> . . . .
>
> [RICO] recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

Id. at 79.

RICO, therefore, reflects Congress' intent to create new, enhanced remedies to combat the corrupt influence of organized crime. RICO, however, is not limited to organized crime prosecutions, but rather broadly applies to all criminal conduct within its ambit regardless of whether it involves organized crime. See Section VI(D) below.

2. 1978-1996 Amendments to RICO

RICO was amended in several respects in 1978,[7] 1984,[8] 1986,[9] 1988,[10] 1989,[11] 1990,[12] 1994,[13]

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[7] The 1978 amendments to Section 1961 added cigarette bootlegging, 18 U.S.C. §§ 2341-2346, as a predicate offense, Pub. L. No. 95-575, § 3(c), 92 Stat. 2465 (1978), and changed the classification of "bankruptcy fraud" to "fraud connected with a case under Title 11," Pub. L. No. 95-598, Title III, § 314(g), 92 Stat. 2677 (1978).

[8] The 1984 amendments occurred in three stages. First, Congress amended the forfeiture provisions of Section 1963 to clarify proceeds forfeiture and other matters, and amended Section 1961 to add as predicate acts dealing in obscene matter (under state law and 18 U.S.C. §§ 1461-1465) and currency violations under Title 31. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, §§ 302, 901(g), 1020, 2301, 98 Stat. 2040, 2136, 2143, 2192 (1984) (effective October 12, 1984). Second, Congress added as predicate offenses three automobile-theft violations, 18 U.S.C. §§ 2312, 2313, and 2320 (now § 2321), Pub. L. No. 98-547, Title II, § 205, 98 Stat. 2770 (1984) (effective Oct. 25, 1984). Third, Congress deleted some expedition-of-action language from the civil provisions in §§ 1964(b) and 1966, Pub. L. No. 98-620, Title IV, § 402(24), 98 Stat. 3359 (1984).

[9] The 1986 amendments to Section 1961 added 18 U.S.C. §§ 1512 and 1513, relating to tampering with and retaliating against witnesses, victims, or informants, Criminal Law & Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 50, 100 Stat. 3605 (1986) (effective November 10, 1986); created 18 U.S.C. §§ 1956 and 1957, relating to money laundering, Anti-Drug Abuse Act of 1986, Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 5071 (1986) and added 18 U.S.C. §§ 1956 and 1957 as RICO predicates, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1365, 100 Stat. 5088 (1986) (effective October 27, 1986); and added a new subsection to 18 U.S.C. § 1963 relating to forfeiture of substitute assets, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1153, 100 Stat. 5066 (1986) (effective October 27, 1986).

[10] The 1988 amendments provided for a life sentence where a RICO violation is based on a racketeering activity that itself carries a life sentence, made minor typographical corrections, and added three new predicate offenses: 18 U.S.C. § 1029 (credit card fraud); 18 U.S.C. § 1958 (murder for hire, formerly designated § 1952A); and 18 U.S.C. §§ 2251-52 (sexual exploitation of children). Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (Nov. 18, 1988).

[11] The 1989 amendment added 18 U.S.C. § 1344 (bank fraud) as a predicate offense. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, Title IX, § 968, 103 Stat. 506 (Aug. 9, 1989).

[12] The 1990 amendment deleted 18 U.S.C. §§ 2251-52 (sexual exploitation of children) as a predicate offense and made minor typographical corrections. Crime Control Act of 1990, Pub. L.

(continued...)

1995,[14] and 1996.[15]

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[12](...continued)
No. 101-647, Title XXV, §§ 3560-61, 104 Stat. 4927 (Nov. 29, 1990).

[13] The 1994 amendment substituted the term "controlled substance or listed chemical" for "narcotics or other dangerous drug" in Section 1961. The amendment added a new RICO predicate for importing into the United States sexually explicit depictions of minors and restored 18 U.S.C. §§ 2251-2252 as RICO predicate acts. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title IX, § 90104, Title XVI, § 160001(f), Title XXXII, § 33021(1), 108 Stat. 1987, 2037, 2150 (Sept. 13, 1994). Another amendment excluded Section 157 of Title 11 as a RICO predicate act. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, Title III, § 312(b), 108 Stat. 4140 (Oct. 22, 1994).

[14] The 1995 amendment revised Section 1964(c) to provide that a civil RICO suit could not be based upon fraud in the purchase or sale of securities. This limitation does not apply to an action "against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final." Private Securities Reform Act of 1995, Pub. L. No. 104-67, Title I, § 107, 109 Stat. 758 (Dec. 22, 1995).

[15] A 1996 amendment added several new predicate acts related to immigration fraud and alien smuggling: 18 U.S.C. §§ 1542-1544 and 1546 (relating to false statements in or false use of passports and visas), if these offenses were committed for financial gain offenses; 18 U.S.C. §§ 1581-1588 (relating to peonage and slavery); and Sections 274, 277 and 278 of the Immigration and Nationality Act (8 U.S.C. §§ 1324, 1327, and 1328), relating to alien smuggling and harboring certain aliens if these offenses were committed for the purposes of financial gain. Pub. L. No. 104-132, Title IV, § 433, 110 Stat. 1274 (April 24, 1996). A second amendment added several predicate acts relating to counterfeiting: 18 U.S.C. § 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works); 18 U.S.C. § 2319 (relating to criminal infringement of a copyright); 18 U.S.C. § 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances); and 18 U.S.C. § 2320 (relating to trafficking in goods or services bearing counterfeit marks). Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, § 3, 110 Stat. 1386 (July 2, 1996). A third amendment deleted the requirement that violations of 18 U.S.C. §§ 1028, 1542-1544, and 1546, which were added by Pub. L. No. 104-132, be committed for the purpose of financial gain. This amendment also added the following predicate acts: Section 1425 (relating to the procurement of citizenship or nationalization unlawfully); Section 1426 (relating to the reproduction of naturalization or citizenship papers); and Section 1427 (relating to the sale of naturalization or citizenship papers) of Title 18, United States Code. Pub. L. No. 104-208, § 202, 110 Stat. 3009 (September 30, 1996). A fourth amendment corrected a typographical error. Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (October 11, 1996).

3. Patriot Act Amendments to RICO, 2001 to 2006

a. The 2001 Amendments

The USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 382 (2001), added a significant number of new RICO predicate offenses to Section 1961(1). After September 11, 2001, the Administration proposed legislation to fight terrorism in response to al Qaeda's attacks against the United States in New York, Pennsylvania, and Washington, D.C. Attorney General John Ashcroft presented the Anti-Terrorism Act of 2001 to Congress during a September 24, 2001 hearing before the House of Representative's Committee on the Judiciary. The draft proposal by the Administration contained numerous legislative changes in order "to give the Department of Justice and our intelligence community needed crime fighting tools." *Administration's Draft Anti-Terrorism Act of 2001*, Hearing before the H. Comm. on the Judiciary, 107th Cong. at 61 (2001).

Section 304 of Title III of the Administrations's proposal contained a provision that would have revised 18 U.S.C. § 1961(1) to add a new subpart G, which made "any act that is indictable as a Federal terrorism offense" a RICO predicate offense. The reason given by the Administration for this proposed amendment to the RICO statute was that "[t]he list of predicate federal offenses for RICO, appearing in 18 U.S.C. § 1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations." *Administration's Draft Anti-Terrorism Act of 2001*, Hearing before the H. Comm. on the Judiciary, 107 Cong. at 61 (2001) (materials submitted for the Hearing Record, Consultation Draft of September, 20, 2001, Section-By-Section Analysis).

The Administration's proposed legislation was eventually enacted, but with revisions, as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA Patriot Act") , Pub. L. No. 107-56, Title VIII, Section 813, 115 Stat. 382 (2001). As enacted on October 26, 2001, the legislative language for the amendment to the RICO statute was revised from the Administration's proposal. A new subsection G was added to Section 1961(1) that made "any act that is indictable under any provision listed in section 2332b(g)(5)(B)" of Title 18 a RICO predicate offense. At first glance, Section 1961(1)(G) does not appear to have added a substantial number of new RICO predicates. However, **18 U.S.C. § 2332b(g)(5)(B) lists approximately fifty offenses that may constitute RICO predicate offenses under 18 U.S.C. § 1961(1)(G)**.

As of October 26, 2001, the enactment date of the USA Patriot Act of 2001, Section 2332b(g)(5)(B) of Title 18, set forth the following offenses:

> **Section 2332b(g)(5)(B)(I)** - 18 U.S.C. § 32 (relating to destruction of aircraft or aircraft facilities), 18 U.S.C. § 37 (relating to violence at international airports), 18 U.S.C. § 81 (relating to arson within special maritime and territorial jurisdiction), 18 U.S.C. §§175 or 175b (relating to biological weapons), 18 U.S.C. § 229 (relating to chemical weapons), 18 U.S.C. §§ 351(a), (b), (c), or (d) (relating to congressional, cabinet, and Supreme Court assassination and kidnaping), 18 U.S.C. § 831 (relating to nuclear materials), 18 U.S.C. §§ 842(m) or (n) (relating to plastic explosives), 18 U.S.C. §§ 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 18 U.S.C. § 844(I) (relating to arson and bombing of property used in interstate commerce), 18 U.S.C. § 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 18 U.S.C. § 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 18 U.S.C. §1030(a)(1) (relating to protection of computers), 18 U.S.C. § 1030(a)(5)(A)(I) resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) (relating to protection of computers), 18 U.S.C. § 1114 (relating to killing or attempted killing of officers and employees of the United States), 18 U.S.C. § 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 18 U.S.C. § 1203 (relating to hostage taking), 18 U.S.C. § 1362 (relating to destruction of communication lines, stations, or systems),

18 U.S.C. § 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 18 U.S.C. §1366(a) (relating to destruction of an energy facility), 18 U.S.C. §§ 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnaping), 18 U.S.C. §1992 (relating to wrecking trains), 18 U.S.C. § 1993 (relating to terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air), 18 U.S.C. § 2155 (relating to destruction of national defense materials, premises, or utilities), 18 U.S.C. § 2280 (relating to violence against maritime navigation), 18 U.S.C. § 2281 (relating to violence against maritime fixed platforms), 18 U.S.C. § 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 18 U.S.C. § 2332a (relating to use of weapons of mass destruction), 18 U.S.C. § 2332b (relating to acts of terrorism transcending national boundaries), 18 U.S.C. § 2339 (relating to harboring terrorists), 18 U.S.C. § 2339A (relating to providing material support to terrorists), 18 U.S.C. § 2339B (relating to providing material support to terrorist organizations), or 18 U.S.C. § 2340A (relating to torture).

Section 2332b(g)(5)(B)(ii) - 42 U.S.C. § 2284 (relating to sabotage of nuclear facilities or fuel).

Section 2332b(g)(5)(B) (iii) - 49 U.S.C. § 46502 (relating to aircraft piracy), the second sentence of 49 U.S.C. § 46504 (relating to assault on a flight crew with a dangerous weapon), 49 U.S.C. § 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), 49 U.S.C. § 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or 49 U.S.C. § 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility).

Furthermore, it is noteworthy that the Administration's original proposal for the USA Patriot Act in 2001 would have amended Chapter 113B of Title 18, United States Code (18 U.S.C. §§ 2331-2339D) to state that "[t]here is extraterritorial jurisdiction over any Federal terrorism offense and any offense under this chapter." *Administration's Draft Anti-Terrorism Act of 2001*, Hearing before the H. Comm. on the Judiciary, 197 Cong. at 86 (2001) (materials submitted for the Hearing Record, Consultation Draft of September 20, 2001, Section-By-Section Analysis). The reason for this proposal to provide for extraterritorial jurisdiction was as follows:

> Under existing law, some terrorism crimes have extraterritorial applicability, and can be prosecuted by the United States regardless of where they are committed–for example, 18 U.S.C. § 175 (biological weapons offense) and 2332a (use of weapons of mass destruction) contain language which expressly contemplates their application to conduct occurring outside of the United States. However, there are no explicit extraterritorial provisions in the statutes defining many other offenses which are likely to be committed by terrorists. This section helps to ensure that terrorist acts committed anywhere in the world can be effectively prosecuted by specifying that there is extraterritorial jurisdiction for the prosecution of all federal terrorism offenses.

Id. at 63.

A provision to provide extraterritorial jurisdiction was included in one of the House bills, H.R. 2975, 107th Cong., 1st Sess. (2001), as that bill was introduced in the House of Representatives and as that bill was reported out of the House Committee on the Judiciary. Section 354 of Subtitle A of Title III of H.R. 2975, 107th Cong., 1st Sess. (2001), would have amended 18 U.S.C. § 2338 to provide extraterritorial jurisdiction "over any Federal terrorism offense and any offense under this chapter [chapter 113B of Title 18, United States Code], in addition to any extraterritorial jurisdiction that may exist under the law defining the offense, if the person committing the offense or the victim of the offense is a national of the United States (as defined in section 101 of the Immigration and Nationality Act) or if the offense is directed at the security or interests of the United States."

The Committee Report by the Committee on the Judiciary for the House of Representatives explained the need for this provision as follows:

> Chapter 113B of title 18 (18 U.S.C. § 2331 et seq.) sets forth the crimes of terrorism, including acts of terrorism across national boundaries. Under current law, certain terrorism crimes can be prosecuted by the United States regardless of where they are committed. For example, section 2333b (terrorism transcending national boundaries) and section 2332a (use of weapons of mass destruction). There are, however, no explicit extraterritorial provisions in other statutes that may be violated by terrorists. This section of the bill clarifies that extraterritorial Federal jurisdiction exists for any Federal terrorism offense.

H.R. REP. NO. 107-236, Part 1 at 72 (2001).

On October 12, 2001, however, the Committee on the Rules of the House of Representatives offered another bill as an amendment in the nature of a substitute for H.R. 2975. The amendment in the nature of a substitute did not contain the provision for extraterritorial jurisdiction. The Committee on the Rules' amendment in the nature of a substitute is the version that was passed by the House of Representatives. After the introduction of the amendment in the nature of a substitute, the debate in the House of Representatives does not explain why this specific provision of H.R. 2975 was eliminated. 147 Cong. Rec. H6705-79 (daily ed. Oct. 21, 2001).

Since the 2001 proposed extraterritorial jurisdiction provision was not enacted by Congress, prosecutors must examine each statute listed in 18 U.S.C. § 2332b(g)(5)(B) in order to determine whether that statute applies extraterritorially. See Section VI(E) below.

b. The Post-2001 Amendments

Moreover, Section 2332b(g)(5)(B) has been amended subsequent to the USA Patriot Act of 2001. Since the 2001 amendment to Section 1961(1) did not limit the offenses added as RICO predicates to those contained in Section 2332b(g)(5)(B) as of the enactment date of the USA Patriot Act of 2001, any subsequently added offense to Section 2332b(g)(5)(B) automatically becomes a RICO predicate offense. The following statutes have amended Section 2332b(g)(5)(B) and consequently added additional RICO predicate offenses to 18 U.S.C. § 1961(1)(G):

The Terrorist Bombing Convention Implementation Act of 2002, Pub. L. No. 107-197, 116 Stat. 721,728 (2002), added 18 U.S.C. §§ 2332f (relating to bombing of public places and facilities) and 2339C (relating to financing of terrorism) to Section 2332b(g)(5)(B) and as RICO predicate offenses. **These offenses are RICO predicate offenses as of the enactment date of June 25, 2002**.

The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3762, 3769, 3774 (2004) added the following offenses to clause (I) of Section 2332b(g)(5)(B): 18 U.S.C. § 1361 (relating to government property or contracts), 18 U.S.C. § 2156 (relating to national defense material, premises, or utilities), 18 U.S.C. § 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States), 18 U.S.C. § 2332g (relating to missile systems designed to destroy aircraft), 18 U.S.C. § 2332h (relating to radiological dispersal devices), and 18 U.S.C. § 175c (relating to variola virus). Additionally, clause (ii) of Section 2332b(g)(5)(B) was amended to add 42 U.S.C. § 2122 (relating to prohibitions governing atomic weapons). **These offenses are RICO predicate offenses as of the enactment date of December 17, 2004**.[16]

c. The 2005 Amendment

The USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192, 209 (2006) added 18 U.S.C. § 2339D (relating to military-type training from a foreign terrorist organization) as an offense to clause (I) of 18 U.S.C. § 2332b(g)(5)(B). It also created a new clause (iv) in Section 2332b(g)(5)(B) for section 1010A of the Controlled Substances Import and Export Act (relating to narco-terrorism) (21 U.S.C. § 960a). **These offenses are RICO predicate offenses as of the March 9, 2006, enactment date**.

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[16] The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, Div. B, Title IV, §4005(f)(1), made a minor punctuation correction that was effective as of the October 26, 2001, enactment date of Pub. L. No. 107-56 (USA Patriot Act of 2001). Additionally, the Identity Theft Enforcement and Restitution Act, Pub. Law 110-326, 122 Stat. 2560, **effective September 26, 2008**, amended, inter alia, 18 U.S.C. §§ 1030 and 2332b(g)(5)(B). For purposes of RICO pleading, the predicate citations for certain § 1030 violations will change (because the statute was restructured) and the computer fraud violations may now include "damage affecting 10 or more protected computers during any 1-year period." 18 U.S.C. § 1030(c)(4)(A)(i)(VI).

In addition to amending 18 U.S.C. § 2332b(g)(5)(B), and thereby adding new RICO predicate offenses by incorporation, the USA Patriot Improvement and Reauthorization Act of 2005 and the Intelligence Reform and Prevention Act of 2004 directly amended Section 1961(1)(B) to add new RICO predicate offenses.

The USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, Title IV, sec. 403(a), 120 Stat.192, 243 (2005), directly amended 18 U.S.C. § 1961(1)(B) to add 18 U.S.C. § 1960 (relating to illegal money transmitters) to the list of federal offenses. **This amendment is effective as of the enactment date of March 9, 2006**.

This amendment to Section 1961(1) was part of the "Combating Terrorism Financing Act of 2005," which was incorporated into the USA Patriot Improvement and Reauthorization Act of 2005. The House Conference Report explained the reason for this amendment to RICO as follows:

> Under current law, a number of activities that terrorist financiers undertake are not predicates for purposes of the Federal money laundering statute, 18 U.S.C. § 1956. Key among those activities is operating an illegal money transmitting business, including ''hawala'' networks, which terrorists and their sympathizers often use to transfer funds to terrorist organizations abroad. This section adds three terrorism-related provisions to the list of specified unlawful activities that serve as predicates for the money laundering statute. Subsection (a) adds as a RICO predicate the offense in 18 U.S.C. § 1960 (relating to illegal money transmitting businesses), which has the effect of making this offense a money laundering predicate through the cross-reference in 18 U.S.C. § 1956(c)(7)(A).

H.R. REP. NO. 109-333, at 106 (2005) (Conf. Rep.).

The Intelligence Reform and Prevention Act of 2004, Pub. L. No. 108-458, Title VI, subtitle I, sec. 6802(e), 118 Stat. 3638, 3767-68 (2004), contained the "Weapons of Mass Destruction Prohibition Improvement Act of 2004." The Weapons of Mass Destruction Prohibition Improvement Act of 2004 added 18 U.S.C. §§ 175-178 (relating to biological weapons), 18 U.S.C.

§§ 229-229F (relating to chemical weapons), and 18 U.S.C. § 831 (relating to nuclear materials) as RICO predicate offenses in Section 1961(1)(B). **This amendment is effective as of the enactment date of December 17, 2004**.

The Weapons of Mass Destruction Prohibition Improvement Act of 2004 was originally part of the 9/11 Recommendations Implementation Act, which was the House of Representatives's bill, while the Senate version of the bill was entitled the Intelligence Reform and Prevention Act of 2004. While the committee report by the Committee on the Judiciary of the House of Representatives for the 9/11 Recommendations Implementation Act did not specifically comment on the amendment to the RICO statute, the need for the statutory provisions in the subsection of the bill containing the RICO amendment were explained as follows:

> The [9/11] Commission Report states "that al Qaeda has tried to acquire or make weapons of mass destruction for at least ten years. There is no doubt the United States would be a prime target. Preventing the proliferation of these weapons warrants a maximum effort–by strengthening counter proliferation efforts. . . ." Section 2052 [the Section of the bill containing the amendment to the RICO statute] amends 18 U.S.C. § 2332a(a)(2), which makes it a crime for a person to use a weapon of mass destruction (other than a chemical weapon) against any person within the U.S., and the result of such use affects interstate and foreign commerce. This legislation would expand the coverage of the target to include property. The bill would also expand Federal jurisdiction by covering the use of mail or any facility of interstate or foreign commerce for the attack, by the property being used for interstate or foreign commerce, and when the perpetrator travels or causes another to travel in interstate or foreign commerce in furtherance of the offense. This section would also expand coverage to include the use of a chemical weapon.

H.R. REP. NO. 108-724, Part 5, at 173 (2004).

4. Other Amendments in 2003 and 2006

In 2003 and 2006, Section 1961(1) was amended to add additional predicate offenses related to alien smuggling. The Trafficking Victims Protection Reauthorization Act of 2003, Pub. L.

No.108-193, Sec. 5(b), 117 Stat. 2875, 2879 (2003), added several offenses relating to alien smuggling to the list of RICO predicate offenses. This statute added 18 U.S.C. § 1589 (forced labor), 18 U.S.C. § 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), and 18 U.S.C. § 1591 (sex trafficking of children or by force, fraud, or coercion) as RICO predicate offenses in Section 1961(1)(B). **The effective date for this amendment is December 19, 2003**.

The reason for this amendment to the RICO statute was stated in the committee report by the House Committee on International Relations.

> In light of the well-documented involvement of organized crime networks in the trafficking of persons, the Committee would like to see the Department of Justice Organized Crime Division become engaged in the fight against trafficking and to use the full resources available under U.S. law to prosecute acts of trafficking.

H.R. REP. NO. 108-264, Part 1, at 20 (2003).

In 2006, the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, Title 1, Sec. 103(c), 119 Stat. 3558, 3563 (2006), added 18 U.S.C. § 1592 (unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor) as a racketeering act. **The amendment is effective as of the enactment date of January 10, 2006**.

The committee report by the House of Representatives' Committee on International Relations explained the need for this amendment as follows: "Subsection (c) amends Title 18, U.S.C. to expand the list of trafficking offenses that may be considered as predicate offenses for prosecutions using the powers of the Racketeering Influenced and Corrupt Organizations Act (RICO)." H.R. REP. NO. 109-317, Part 1, at 20 (2005).

C. Prior DOJ Approval Through the Organized Crime and Racketeering Section is Required For All RICO Complaints, Informations and Indictments and Government Civil RICO Complaints and Civil Investigative Demands

1. Approval Authority

The Code of Federal Regulations, 28 C.F.R. § 0.55, provides, in relevant part, as follows:

§ 0.55 General Function

> The following functions are assigned to and shall be conducted, handled or supervised by, the Assistant Attorney General, Criminal Division:
>
> . . .
>
> (d) Civil or criminal forfeiture or civil penalty actions (including petitions for remission or mitigation of forfeiture and civil penalties, offers in compromise, and related proceedings under the . . . Organized Crime Control Act of 1970 . . . [i.e., RICO, 18 U.S.C. § 1961 et. seq].
>
> . . .
>
> (g) Coordination of enforcement activities directed against organized crime and racketeering.

USAM § 9-110.101 provides that:

> No RICO criminal indictment or information or civil complaint shall be filed, and no civil investigative demand shall be issued, without the prior approval of the Criminal Division. See RICO Guidelines at USAM 9-110.200.

Pursuant to USAM § 9-110.010, such approval and coordination authority has been delegated to the Organized Crime and Racketeering Section ("OCRS") of the Criminal Division. Accordingly, the following procedures must be followed in all RICO prosecutions brought by the United States:

(1) No indictment, information, or complaint shall be filed without the prior approval of OCRS.[17]

(2) No pleading alleging forfeiture under RICO or any other pleading relating to an application for a temporary restraining order pursuant to RICO shall be filed without

[17] This approval requirement also applies to civil RICO cases brought by the Government. See OCRS' Civil RICO Manual (Oct. 2007) at 6-8.

the prior approval of OCRS.

(3) No RICO charge shall be dismissed, in whole or in part, without prior approval of OCRS.

(4) In any criminal RICO prosecution, any adverse decision on an issue involving an interpretation of the RICO statute from any District Court or any Circuit Court of Appeals shall be timely reported to OCRS, in addition to reporting to the Solicitor General's Office and the appropriate Appellate Section of the Criminal Division or other Division, to enable OCRS to submit a recommendation to the Solicitor General's Office whether to seek further review of the decision.

These requirements are necessary to enable OCRS to carry out its supervisory authority over all Government uses of the RICO statute, to provide assistance to Government attorneys, and to promote consistent, uniform interpretations of the RICO statute. See, e.g., USAM § 110.300 "RICO Guidelines Policy", which provides that "[i]t is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the Criminal Division having supervisory responsibility for this statute," i.e., OCRS.

2. RICO Review Process

The review process for authorization of all Government civil and criminal suits pursuant to the RICO statute is set forth in the United States Attorneys Manual. See USAM §§ 9-110.010 -- 9-110.400, which provisions are attached as Appendix I(A). To commence the formal review process, submit a final draft of the proposed indictment, information or complaint, and a detailed prosecution memorandum to OCRS. The required content of a RICO criminal prosecution memorandum is described in the Criminal Resource Manual at section 2071 et seq. The prosecution memorandum

must contain a concise summary of the facts and a statement of the admissible evidentiary basis for each RICO element against each defendant, a statement of the applicable law, a discussion of anticipated defenses and unusual legal issues (federal, and where applicable, state), and a statement of justification for using RICO. It is especially important that the prosecution memorandum include a discussion of the nexus between the enterprise and the alleged racketeering acts, the defendant's role in the enterprise, and the continuity or threat of continuity of the alleged pattern of racketeering activity. The prosecution memorandum should also address the factors to be considered in determining whether to bring a RICO prosecution set forth in Section V(A) below. Before the formal review process begins, Government attorneys are encouraged to consult with OCRS in order to obtain preliminary guidance and suggestions.

The review process can be time-consuming, especially in light of the complexity of RICO prosecutions, and also because of the likelihood that modifications will be made to the indictment, information or complaint, and the heavy workload of the reviewing attorneys. Therefore, unless extraordinary circumstances justify a shorter time frame, a period of at least 15 working days must be allowed for the review process.

3. Post-Indictment Duties

Once a criminal RICO complaint, information or indictment has been approved and filed, it is the duty of the Government's attorney handling the matter to submit to OCRS a copy of the complaint, information or indictment, bearing the seal of the clerk of the district court. In addition, the Government's attorney should keep OCRS informed of adverse decisions as noted above and legal problems that arise in the course of the case to enable OCRS to provide assistance and carry out its supervisory functions.

II

DEFINITIONS: 18 U.S.C. § 1961

A. Racketeering Activity

Section 1961(1) defines "racketeering activity" as any crime enumerated in subdivisions A, B, C, D, E, F, or G of that subsection.[18] No crime can be a part of a RICO "pattern of racketeering activity" unless it is included in this subsection.[19] Subdivision A includes "any act or threat involving" the listed types of state offenses; subdivisions B, C, E, F, and G include "any act which is indictable under" the listed federal statutes; and subdivision D includes "any offense involving" three categories of federal offenses. The different introductory wording of the subdivisions is significant. For example, courts have interpreted the term "involving" broadly to include conspiracies or attempts to commit subdivision A[20] and D[21] crimes as proper RICO predicates

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[18] The listed crimes often are called "predicate crimes," because they make up the "predicate" for a RICO violation. See, e.g., United States v. Pepe, 747 F.2d 632, 645 (11th Cir. 1984); United States v. Ruggiero, 726 F.2d 913, 918 (2d Cir.), cert. denied, 469 U.S. 831 (1984).

[19] See, e.g., Bast v. Cohen, Dunn & Sinclair, PC, 59 F.3d 492, 495 (4th Cir. 1995); Rolo v. City Investing Co. Liquidating Trust, 845 F. Supp. 182, 225 n.28 (D.N.J. 1993), aff'd, 43 F.3d 1462 (3d Cir. 1994), judgment vacated on reh'g, 66 F.3d 312 (3d Cir. 1995), on remand, 897 F. Supp. 826 (D.N.J. 1995); United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. 1114, 1129 (E.D.N.Y. 1992).

[20] See, e.g., United States v. Fernandez, 388 F.3d 1199, 1259 (9th Cir. 2004) (conspiracy to murder); United States v. Pimentel, 346 F.3d 285, 303-04 (2d Cir. 2003), cert. denied, 543 U.S. 955 (2004) (attempted murder); United States v. Warneke, 310 F.3d 542, 546-47 (7th Cir. 2002) (conspiracies to commit various state offenses listed under subdivision A); United States v. Marino, 277 F.3d 11, 28-31 (1st Cir.), cert. denied, 536 U.S. 948 (2002) (conspiracy to murder); United States v. Carrillo, 229 F.3d 177, 181-82 (2d Cir.) (conspiracy to murder), cert. denied, 531 U.S. 1026 (2000); United States v. Darden, 70 F.3d 1507, 1524-25 (8th Cir. 1995) (conspiracy to distribute, and possess with intent to distribute controlled substances constitutes a RICO predicate, but simple possession of cocaine is not a RICO predicate), cert. denied, 517 U.S. 1149 (1996); United States v. Pungitore, 910 F.2d 1084, 1135 (3d Cir. 1990) (conspiracy to murder and attempted murder in (continued...)

because these crimes "involve" the specified types of conduct, and hence are not limited to a specified statutory provision.[22] Similarly, solicitation may be considered an "act involving" specified offenses under subdivisions A and D.[23] A conspiracy, however, or attempt to commit an offense

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[20](...continued)
violation of state law proper RICO predicates), cert. denied, 500 U.S. 915 (1991); United States v. Angiulo, 847 F.2d 956, 963 n.18 (1st Cir. 1988) (conspiracy to murder); United States v. Manzella, 782 F.2d 533 (5th Cir.) (conspiracy to commit state law arson proper RICO predicate), cert. denied, 476 U.S. 1123 (1986); United States v. Ruggiero, 726 F.2d 913, 919 (2d Cir.) (conspiracy to murder in violation of state law is an "act or threat involving murder" under 18 U.S.C. § 1961(1)(A)), cert. denied, 469 U.S. 831 (1984); United States v. Licavoli, 725 F.2d 1040, 1045 (6th Cir.) (same), cert. denied, 467 U.S. 1252 (1984); United States v. Welch, 656 F.2d 1039, 1063 n.32 (5th Cir. 1981) (same) (dictum), cert. denied, 456 U.S. 915 (1982); United States v. Dellacroce, 625 F. Supp. 1387, 1392 (E.D.N.Y. 1986) (conspiracy to murder); United States v. Gambale, 610 F. Supp. 1515 (D. Mass. 1985) (same).

[21] See, e.g., United States v. Darden, 70 F.3d 1507, 1524-25 (8th Cir. 1995) (conspiracy to distribute, and possess with intent to distribute controlled substances constitutes a RICO predicate, but simple possession of cocaine is not a RICO predicate), cert. denied, 517 U.S. 1149 (1996); United States v. Casamento, 887 F.2d 1141, 1165-66 (2d Cir. 1989) (conspiracy to import and distribute narcotics), cert. denied, 493 U.S. 1081 (1990); United States v. Echeverri, 854 F.2d 638, 648-49 (3d Cir. 1988) (conspiracy to possess and distribute narcotics); United States v. Benevento, 836 F.2d 60, 72 (2d Cir. 1987) (conspiracies to import, manufacture and distribute narcotics); United States v. Brooklier, 685 F.2d 1208, 1216 (9th Cir. 1982) (conspiracy to extort money under 18 U.S.C. § 1951), cert. denied, 459 U.S. 1206 (1983); United States v. Phillips, 664 F.2d 971, 1015 (5th Cir. 1981) (conspiracy to import marijuana), cert. denied, 457 U.S. 1136 (1982); United States v. Weisman, 624 F.2d 1118, 1124 (2d Cir.) (conspiracies to commit securities fraud and bankruptcy fraud), cert. denied, 449 U.S. 871 (1980); United States v. Santiago, 207 F. Supp. 2d 129, 144 n.10 (S.D.N.Y. 2002) (narcotics trafficking conspiracy).

[22] However, as a general rule, state offenses for "accessory after the fact" to the commission of a state offense referenced in Section 1961(1)(A) does not constitute "an act involving" such a referenced offense because, typically, an accessory after the fact offense does not require the same mens rea as required to prove the referenced state offense.

[23] See, e.g., United States v. Welch, 656 F.2d 1039, 1048 (5th Cir. 1981) (solicitation of and conspiracy to commit murder), cert. denied, 456 U.S. 915 (1982); United States v. Yin Poy Louie, 625 F. Supp. 1327, 1332 (S.D.N.Y. 1985) (conspiracy, solicitation, or attempt to murder), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986); Pohlot v. Pohlot, 664 F. Supp. 112, 116-17 (S.D.N.Y. 1987) (criminal solicitation of murder in violation of state law (continued...)

listed within subdivisions B, C, E, F or G could not be a RICO predicate unless attempt or conspiracy is expressly included within the terms of the listed statutory offense.[24]

1. State Offenses

Section 1961(1)(A) defines racketeering activity as follows:

> any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act) [i.e., 21 U.S.C. § 802], which is chargeable under State law and punishable by imprisonment for more than one year.

This definition does not identify specific state statutes that may provide the basis for a RICO predicate act of racketeering. Rather, Congress intended the state offenses referenced in Section 1961(1)(A) to identify "generically" the kind of conduct proscribed by RICO, and therefore it is immaterial whether a state statute uses the same labels or classifications as specified in Section 1961(1)(A). Thus, a state statutory offense may constitute a proper RICO predicate racketeering act under Section 1961(1)(A) provided it substantially conforms to the "generic" definition of the state

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[23](...continued)
constitutes proper RICO predicate). See also United States v. Miller, 116 F.3d 641, 674-75 (2d Cir. 1997) (act involving murder need not be actual murder as long as the act directly concerned murder, and facilitation of murder was a proper RICO predicate because accessorial offenses described in the New York State statutory provisions involved murder within the meaning of RICO where defendant provided information he knew would enable inquirer to commit murder), cert. denied, 524 U.S. 905 (1998).

[24] See, e.g., United States v. Ruggiero, 726 F.2d 913, 919-20 (2d Cir.) (conspiracy to violate 18 U.S.C. § 1955 is not a proper RICO predicate because conspiracy is not "indictable under" that provision), cert. denied, 469 U.S. 831 (1984); United States v. Brooklier, 685 F.2d 1208, 1216 (9th Cir. 1982) (conspiracy to violate 18 U.S.C. § 1951 is a proper predicate because conspiracy is "indictable under" that provision), cert. denied, 459 U.S. 1206 (1983); R.E. Davis Chem. Corp. v. Nalco Chem. Co., 757 F. Supp. 1499, 1510 (N.D. Ill. 1990) (conspiracy to commit mail and wire fraud and transportation of stolen property, in violation of 18 U.S.C. §§ 2314 and 2315 are not RICO predicates); Allington v. Carpenter, 619 F. Supp. 474 (C.D. Cal. 1985) (conspiracy to violate 18 U.S.C. § 1343 is not a RICO predicate).

offense referenced in Section 1961(1)(A) prevailing in 1970 when RICO was enacted.[25]

Moreover, because Section 1961(1)(A) was intended to only identify "generically" the kind of conduct proscribed by RICO for definitional purposes, RICO does not incorporate state procedural or evidentiary rules.[26] In the same vein, the language "chargeable under state law" under Section 1961(1)(A) means that the offense was chargeable under state law at the time that the underlying conduct was committed, and hence it is no bar to a RICO charge that the state offense at issue could not be prosecuted in the state court at the time the RICO charge was brought due to the application of a state procedural bar such as the statute of limitations.[27] Indeed, as a general rule, even if a defendant were acquitted in state court of a state offense referenced in Section 1961(1)(A), such state

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[25] See Section VI(I) below, which explains how to determine whether a state statutory offense falls within the ambit of the applicable "generic" definition, and hence may provide the basis for a proper RICO predicate racketeering act under Section 1961(1)(A).

[26] See, e.g., United States v. Shryock, 342 F.3d 948, 987 (9th Cir. 2003) (state accomplice corroboration rule not incorporated), cert. denied, 541 U.S. 965 (2004); United States v. Nguyen, 255 F.3d 1335, 1340-41 (11th Cir.) (defendant not entitled to instruction on lesser included state offenses), cert. denied, 534 U.S. 1032 (2001); United States v. Kaplan, 886 F.2d 536, 541-42 (2d Cir. 1989) (state rules governing permissible number of counts that may be charged not incorporated), cert. denied, 493 U.S. 1076 (1990); United States v. Muskovsky, 863 F.2d 1319, 1330-31 (7th Cir. 1988) (state rule barring conviction and sentence for both a substantive offense and a conspiracy to commit the substantive offense not incorporated), cert. denied, 489 U.S. 1067 (1989); United States v. Friedman, 854 F.2d 535, 565-66 (2d Cir. 1988) (state procedural rule barring multiple convictions arising from a single course of conduct not incorporated), cert. denied, 490 U.S. 1004 (1989); United States v. Erwin, 793 F.2d 656, 669 (5th Cir.) (state accomplice corroboration rule not incorporated), cert. denied, 479 U.S. 991 (1986); United States v. Paone, 782 F.2d 386, 393-94 (2d Cir.) (same), cert. denied, 479 U.S. 882 (1986).

[27] See, e.g., United States v. Licavoli, 725 F.2d 1040, 1045-47 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978), mod. on other grounds, 590 F.2d 1379 (5th Cir. 1979) (en banc); United States v. Forsythe, 560 F.2d 1127, 1134-35 (3d Cir. 1977); United States v. Brown, 555 F.2d 407, 418 n.22 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Revel, 493 F.2d 1, 3 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); see also Section VI (Q)(3) below.

offense, nevertheless, may be charged as a proper RICO predicate act.[28]

Of course, there is no requirement that the defendant previously be convicted of, or charged with, a state offense in state court to be able to charge a state offense as a RICO predicate racketeering act.[29] Moreover, miscitation of the state statute for an alleged state predicate offense is not fatal, absent clear evidence of prejudice to the defendant.[30]

Furthermore, the language "punishable by imprisonment for more than one year" means so punishable at the time the offense was committed, not at the time the RICO indictment is brought.[31]

a. Representative RICO Cases Charging State-Law Predicate Offenses:

Murder:

> United States v. Pimentel, 346 F.3d 285, 297-99 (2d Cir. 2003), cert. denied, 543 U.S. 955 (2004); United States v. Marino, 277 F.3d 11, 29-31 (1st Cir.), cert. denied, 536 U.S. 948 (2002); United States v. Nguyen, 255 F.3d 1335, 1337-38 (11th Cir.), cert. denied 534 U.S. 1032 (2001); United States v. Carrillo, 229 F.3d 177, 179-86 (2d Cir.), cert. denied, 531 U.S. 1026 (2000); United States v. Miller, 116 F.3d 641 (2d Cir. 1997), cert. denied, 524 U.S. 905 (1998); United States v. Coonan, 938 F.2d

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[28] See, e.g., United States v. Coonan, 938 F.2d 1553, 1563-65 (2d Cir. 1991) (acquittal on state murder charge did not bar its use as a RICO predicate act), cert. denied, 503 U.S. 941 (1992); United States v. Licavoli, 725 F.2d 1040, 1047 (6th Cir.) (same), cert. denied, 467 U.S. 1252 (1984); United States v. Frumento, 563 F.2d 1083, 1086-89 (3d Cir. 1977) (same), cert. denied, 434 U.S. 1072 (1978); United States v. Castellano, 610 F. Supp. 1359, 1414 (S.D.N.Y. 1985).

[29] See, e.g., Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 61 (1989); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488 (1985); United States v. Murphy, 768 F.2d 1518, 1531 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986); United States v. Malatesta, 583 F.2d 748, 757-58 (5th Cir. 1978).

[30] See, e.g., United States v. Watchmaker, 761 F.2d 1459, 1469 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986); United States v. Chatham, 677 F.2d 800, 803 (11th Cir. 1982). See also FED. R. CRIM. P. 7(c)(3).

[31] See, e.g., United States v. Davis, 576 F.2d 1066, 1067 (3d Cir.), cert. denied, 439 U.S. 836 (1978). Cf. United States v. Ruggiero, 726 F.2d 913, 920 (2d Cir. 1984), cert. denied, 469 U.S. 831 (1984).

1553 (2d Cir. 1991), cert. denied, 503 U.S. 941 (1992); United States v. Firestone, 816 F.2d 583 (11th Cir.), cert. denied, 484 U.S. 948 (1987); United States v. Licavoli, 725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); United States v. Russotti, 717 F.2d 27 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); United States v. Bagaric, 706 F.2d 42, 62-62 (2d Cir.), cert denied, 464 U.S. 840 (1983); United States v. Louie, 625 F. Supp. 1327 (S.D.N.Y. 1985), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986).

Kidnapping:

United States v. Ferguson, 758 F.2d 843 (2d Cir.), cert. denied, 474 U.S. 841 (1985); United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978); United States v. Shakur, 560 F. Supp. 347 (S.D.N.Y. 1983).

Gambling:

United States v. Joseph, 835 F.2d 1149 (6th Cir. 1987); United States v. Tripp, 782 F.2d 38 (6th Cir.), cert. denied, 475 U.S. 1128 (1986); United States v. Tille, 729 F.2d 615 (9th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Ruggiero, 754 F.2d 927 (11th Cir.), cert. denied, 471 U.S. 1127 (1985).

Arson:

United States v. Ellison, 793 F.2d 942 (8th Cir.), cert. denied, 479 U.S. 937 (1986); United States v. Bagaric, 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840 (1983); United States v. Melton, 689 F.2d 679 (7th Cir. 1982); United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983).

Robbery:

United States v. Gonzalez, 21 F.3d 1045 (11th Cir. 1994); United States v. Ferguson, 758 F.2d 843 (2d Cir.), cert. denied, 474 U.S. 841 (1985); United States v. Ruggiero, 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984).

Bribery:

United States v. Zichettello, 208 F.3d 72, 86-88 (2d Cir. 2000); United States v. Frega, 179 F.3d 793, 805-07 (9th Cir. 1999), cert. denied, 528 U.S. 1191 (2000); United States v. Marmolejo, 89 F.3d 1185 (5th Cir. 1996), aff'd sub nom. Salinas v. United States, 522 U.S. 52 (1997); United States v. Jackson, 72 F.3d 1370 (9th Cir. 1995), cert. denied, 517 U.S. 1157 (1996); United States v. Freeman, 6 F.3d 586 (9th Cir. 1993), cert. denied, 511 U.S. 1077 (1994); United States v. Eisen, 974 F.2d 246, 254-56 (2d Cir. 1992), cert. denied, 507 U.S. 998 (1993); United States v. Mokol,

957 F.2d 1410 (7th Cir.), cert. denied, 506 U.S. 899 (1992); United States v. Kotvas, 941 F.2d 1141 (11th Cir. 1991), cert. denied, 506 U.S. 1055 (1993); United States v. Kaplan, 886 F.2d 536, 541-42 (2d Cir. 1989), cert denied, 493 U.S. 1076 (1990); United States v. Traitz, 871 F.2d 368 (3d Cir.), cert. denied, 493 U.S. 821 (1989); United States v. Hocking, 860 F.2d 769 (8th Cir. 1988); United States v. Friedman, 854 F.2d 535 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989); United States v. Casamayor, 837 F.2d 1509 (11th Cir. 1988), cert. denied, 488 U.S. 1017 (1989); United States v. Garner, 837 F.2d 1404 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988); United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Kravitz, 738 F.2d 102 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985); United States v. Dozier, 672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943 (1982); United States v. Triumph Capital Group, 260 F. Supp. 2d 444, 455-57 (D.Conn. 2002); United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. 1114 (E.D.N.Y. 1992); United States v. Horak, 633 F. Supp. 190 (N.D. Ill. 1986); United States v. Gonzales, 620 F. Supp. 1143 (N.D. Ill. 1985).

Extortion:[32]

United States v. Watchmaker, 761 F.2d 1459, 1468-69 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986); United States v. Delker, 757 F.2d 1390 (3d Cir. 1985); United States v. Brooklier, 685 F.2d 1208 (8th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); Teamsters Local 372 v. Detroit Newspapers, 956 F. Supp. 753 (E.D. Mich. 1997); United States v. Cryan, 490 F. Supp. 1234 (D.N.J.), aff'd, 636 F.2d 1211 (3d Cir. 1980).

Dealing in Obscene Matter:

United States v. Pryba, 900 F.2d 748 (4th Cir.), cert. denied, 498 U.S. 924 (1990).

Dealing in Narcotic or Other Dangerous Drugs:

Pimentel, 346 F.3d at 300-01; United States v. Darden, 70 F.3d 1507 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996); United States v. Grayson, 795 F.2d 278 (3d Cir. 1986), cert. denied, 481 U.S. 1018 (1987); United States v. Schell, 775 F.2d 559 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986).

[32] See also United States v. Delano, 55 F.3d 720, 727 (2d Cir. 1995) (New York larceny by extortion statute requires forcing a person to surrender property; extortion of services did not constitute a violation of larceny by extortion statute; and court reversed RICO predicate acts based on extortion of services theory).

2. Federal Title 18 Offenses

Section 1961(1)(B) defines racketeering activity as "any act which is indictable under" any of a list of federal criminal statutes. This provision is narrower than Section 1961(1)(A) because the federal offense must be an "act" that is "indictable under" one of the listed statutes; attempts and conspiracies cannot be used as predicate offenses unless they are expressly included within the terms of the statute. For example, a conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, is a RICO predicate[33] because Section 1951(a) expressly makes conspiracy a crime. On the other hand, a conspiracy to conduct an illegal gambling business under 18 U.S.C. § 1955 cannot be a RICO predicate[34] because 18 U.S.C. § 1955 does not expressly make such a conspiracy a crime. Because of the effect of 18 U.S.C. § 2, however, one who aids and abets the commission of a federal crime is treated as if he had committed the crime as a principal and can be charged under RICO if the crime is one set forth in Section 1961(1)(B)-(G).[35]

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[33] See, e.g., United States v. Brooklier, 685 F.2d 1208, 1216 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); see also United States v. Vastola, 670 F. Supp. 1244 (D.N.J. 1987) (conspiracies may be RICO predicates); United States v. Biaggi, 672 F. Supp. 112, 122 (S.D.N.Y. 1987) (RICO conspiracy may be based on conspiracy predicates); United States v. Santoro, 647 F. Supp. 153, 177 (E.D.N.Y. 1986) (conspiracy to violate Hobbs Act proper RICO predicate), rev'd on other grounds, 845 F.2d 1151 (2d Cir. 1988); United States v. Dellacroce, 625 F. Supp. 1387, 1392 (E.D.N.Y. 1986) (conspiracy can be predicate act); United States v. Persico, 621 F. Supp. 842, 856 (S.D.N.Y. 1985) (conspiracy is proper RICO predicate and does not cause duplicity).

[34] See, e.g., United States v. Joseph, 781 F.2d 549 (6th Cir. 1986); United States v. Ruggiero, 726 F.2d 913, 913-20 (2d Cir.), cert. denied, 469 U.S. 831 (1984).

[35] See, e.g., United States v. Shifman, 124 F.3d 31, 36 (1st Cir. 1997) ("aiding and abetting one of the activities listed in Section 1961(1) as racketeering activities makes one punishable as a principal and amounts to engaging in that racketeering activity"), cert. denied, 522 U.S. 1116 (1998); United States v. Pungitore, 910 F.2d 1084, 1132-34 (3d Cir. 1990) (explaining principle of aiding and abetting and applying it to the facts of a RICO predicate offense), cert. denied, 500 U.S. 915 (1991); United States v. Rastelli, 870 F.2d 822, 831-33 (2d Cir.), cert. denied, 493 U.S. 982 (1989); (continued...)

Each statute listed in Section 1961(1)(B) is accompanied by a parenthetical phrase that gives a brief description of the conduct proscribed by the statute. These descriptions are included only for convenience and do not limit the conduct that can be charged as a RICO predicate.[36]

Although legal issues concerning federal predicate offenses often are the same as those arising in non-RICO prosecutions, some federal offenses chargeable under RICO present issues that relate particularly to RICO prosecutions.

a. Mail and Wire Fraud Predicate Offenses

(1) Mail and Wire Fraud Preemption Issues

RICO indictments frequently allege predicate offenses under the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. As a general rule, courts have held that the mail and wire fraud statutes may be used as RICO predicate offenses even though the conduct charged is also covered by another, more specific, statute that is not a RICO predicate offense.[37] However, in limited

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[35](...continued)
United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114, 1133-34 (E.D.N.Y. 1992).

[36] See, e.g., United States v. Herring, 602 F.2d 1220, 1223 (5th Cir. 1979), cert. denied, 444 U.S. 1046 (1980). It should be noted that the applicability of 18 U.S.C. § 659, relating to theft from interstate shipment, is expressly limited to a "felonious" violation of Section 659. See 18 U.S.C. § 1961(1)(B).

[37] See, e.g., United States v. Eisen, 974 F.2d 246, 253-54 (2d Cir. 1992) (mail fraud predicate offense applied to conduct that may constitute perjury even though perjury is not a RICO predicate offense), cert. denied, 507 U.S. 998 (1993); United States v. Porcelli, 865 F.2d 1352, 1357-58 (2d Cir.) (rejecting defense argument that mail fraud predicates could not be used for state sales tax violations because state had not criminalized such violations), cert. denied, 493 U.S. 80 (1989); Hofstetter v. Fletcher, 860 F.2d 1079 (6th Cir. 1988) (mailing of fraudulent tax return is a proper mail fraud RICO predicate and not improper because tax fraud is not RICO predicate); United States v. Busher, 817 F.2d 1409, 1412 (9th Cir. 1987) (same; relied on by court in Hofstetter, supra); United States v. Computer Sciences Corp., 689 F.2d 1181, 1186-88 (4th Cir. 1982) (mail fraud and (continued...)

situations, for example when the conduct underlying the RICO predicate offense is illegal solely because of the proscriptions of federal law, some courts have ruled that mail or wire fraud predicates are preempted by another statute.[38]

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[37](...continued)
wire fraud charges could be brought even though conduct was also charged under False Claims Act, 18 U.S.C. § 287), cert. denied, 459 U.S. 1105 (1983); United States v. Boffa, 688 F.2d 919, 931-33 (3d Cir. 1982) (mail fraud statute not preempted by labor statutes, despite some overlap in statutes' coverage), cert. denied, 460 U.S. 1022 (1983); United States v. Hartley, 678 F.2d 961, 990 n.50 (11th Cir. 1982) (use of mail fraud as RICO predicate not foreclosed where conduct could be prosecuted under False Claims Act), cert. denied, 459 U.S. 1170 (1983); United States v. Weatherspoon, 581 F.2d 595, 599-600 (7th Cir. 1978) (upholding use of mail fraud statute against acts also prosecuted under false statements statute); United States v. Int'l Brotherhood of Teamsters, 708 F. Supp. 1388 (S.D.N.Y. 1989) (RICO suit not preempted by the (Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 483); United States v. Regan, 706 F. Supp. 1087 (S.D.N.Y. 1989) (tax evasion prosecuted under mail fraud statute); Illinois v. Flisk, 702 F. Supp. 189 (N.D. Ill. 1988) (tax fraud charged under mail fraud statute); United States v. Standard Drywall Corp., 617 F. Supp. 1283, 1295-96 (E.D.N.Y. 1985) (allowed mail fraud predicates based on fraudulent mailings relating to tax liability); see also United States v. Local 560, Int'l Brotherhood of Teamsters, 780 F.2d 267, 282-83 (3d Cir. 1985)(LMRDA does not pre-empt Hobbs Act), cert. denied, 476 U.S. 1140 (1986); United States v. Dischner, No. A87-160 Cr (D. Alaska July 19, 1988) (allowed use of commercial bribery statute as RICO predicate even though conduct also could be covered by public bribery statute), aff'd, 974 F.2d 1502 (9th Cir. 1992); United States v. White, 386 F. Supp. 882, 884-85 (E.D. Wis. 1974) (proper to charge interstate transportation of stolen motor vehicles under 18 U.S.C. § 2314 rather than specific statute, 18 U.S.C. § 2312). Note, with respect to the White case, three specific motor vehicle violations--18 U.S.C. §§ 2312, 2313, and 2321--were made RICO predicates in an amendment effective October 25, 1984.

[38] See, e.g., Underwood v. Venango River Corp., 995 F.2d 677, 684-86 (7th Cir. 1993)(mail and wire fraud predicates depending solely upon interpretation of rights created by collective bargaining agreement preempted by the Railway Labor Act, ("RLA")), overruled on other grounds by Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994); Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 662 (7th Cir. 1992) (RICO suit involving conduct prohibited by labor laws was preempted by the National Labor Relations Act ("NLRA")); Hubbard v. United Airlines, Inc., 927 F.2d 1094, 1098 (9th Cir. 1991) (mail and wire fraud predicates involving rights created by collective bargaining agreement preempted by RLA); Chicago District Council of Carpenters Pension Fund v. Ceiling Wall Sys., Inc., 915 F. Supp. 939, 944 (N.D. Ill. 1996) (mail fraud predicate preempted by LMRDA, but not by NLRA); Mann v. Air Line Pilots Ass'n, 848 F. Supp. 990, 995 (S.D. Fla. 1994) (mail and wire fraud predicates preempted by RLA because court needed to look to federal labor statute to determine whether fraud had occurred); United States v. Juell, No. 84 C
(continued...)

Moreover, the Organized Crime and Racketeering Section will not approve a proposed RICO indictment that contains mail or wire fraud predicates involving federal tax evasion or other offenses arising under the federal internal revenue laws unless previously approved by the Criminal Section of the Tax Division.[39]

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[38](...continued)
7467 (N.D. Ill. June 30, 1987) (mail and wire fraud predicates preempted by NLRA § 8, 29 U.S.C. § 158; but for labor laws, those acts would not be fraud); Butchers' Union, Local No. 498, United Food & Commercial Workers v. SDC Inv., Inc., 631 F. Supp. 1001, 1011 (E.D. Cal. 1986) (mail and wire fraud predicates pre-empted by labor laws because liability is wholly dependent on labor laws); But see, e.g., United States v. Palumbo Bros., Inc., 145 F.3d 850, 871-76 (7th Cir. 1998) (holding that RICO predicate acts of mail fraud, based upon employers' scheme to defraud their employees of monetary benefits obtained through collective bargaining within the ambit of the NLRA, were not preempted since the unlawfulness of the charged conduct is determined by "the scope of the mail fraud statute;" the court stated (145 F.3d at 875) that "[t]he unfair labor practices implicated in the indictment cannot be defined solely in relation to federal labor law and policy; rather, that conduct also must be defined and analyzed in the context of the criminal offenses charged in the indictment"), cert. denied, 525 U.S. 949 (1998).

Preemption has also been applied to extortion and other types of RICO predicate acts. See, e.g., Tamburello v. Comm-Tract Corp., 67 F.3d 973, 979 (1st Cir. 1995) (RICO civil suit alleging Hobbs Act extortion preempted by NLRA), cert. denied, 517 U.S. 1222 (1996); Brennan v. Chestnut, 973 F.2d 644, 647 (8th Cir. 1992)(RICO civil suit alleging Hobbs Act extortion predicates preempted by NLRA); Teamsters Local 372 v. Detroit Newspapers, 956 F. Supp. 753 (E.D. Mich. 1997) (certain extortion predicate acts were preempted by NLRA, but robbery, arson, and other extortions were not pre-empted because these acts were unlawful without need to resort to the federal labor statutes to determine their illegality); Buck Creek Coal, Inc. v. United Workers of Am., 917 F. Supp. 601, 611 (S.D. Ind. 1995)(RICO predicate acts relating to intimidation and harassment and to failure to control individual union members with the purpose of forcing third parties to cease doing business with Buck Creek were preempted by federal labor statutes, predicate acts relating to theft and vandalism were dismissed on other grounds).

For a discussion of RICO preemption, see OCRS' Civil RICO Manual (Oct. 2007) at 272-82.

[39] According to the Tax Division there are, in general, three circumstances in which it can be said that an offense arises under the internal revenue laws: "when it involves (1) an attempt to evade a responsibility imposed by the Internal Revenue Code, (2) an obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue (continued...)

(2) Supreme Court's Decisions in McNally, Carpenter, and Cleveland

In 1987, in McNally v. United States, 483 U.S. 350 (1987), the Supreme Court held that the mail and wire fraud statutes were limited to schemes to defraud a victim of tangible or intangible property rights, and therefore did not cover schemes to defraud a victim of a right to honest services.[40] Under McNally and its progeny, the mail and wire fraud statutes could not cover schemes to defraud victims of their rights to honest services, such as those involving public corruption.[41] In response to the Supreme Court's decision, Congress enacted 18 U.S.C. § 1346 in 1988, which expressly defines "scheme or artifice to defraud," for purposes of the mail fraud and wire fraud statutes, to include a "scheme or artifice to deprive another of the intangible right of honest

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[39](...continued)
documents or the payment, collection, or refund of taxes." Tax Division Directive No. 128 at 1.

Thus, the Department of Justice requires Tax Division authorization for the charging of mail fraud counts, either independently or as RICO predicates "for any conduct arising under the internal revenue laws, including any charge based on the submission of a document of information to the IRS . . . [and] for any charge based on a state tax violation if the case involves parallel federal tax violations." Id. See Appendix I(B) for Tax Division Directive No. 128.

[40] In Carpenter v. United States, 484 U.S. 19, 25-27 (1987), the Supreme Court followed the holding of McNally, but held that the Wall Street Journal had an intangible property right in keeping confidential and making exclusive use, prior to publication, of its columns, within the ambit of the wire fraud statute.

[41] Because the wire fraud statute, 18 U.S.C. § 1343, was patterned after the mail fraud statute and has virtually identical language, courts have construed them identically. See, e.g., United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996); United States v. Manzer, 69 F.3d 222, 226 (8th Cir. 1995); United States v. Griffith, 17 F.3d 865, 874 (6th Cir.), cert. denied, 513 U.S. 850 (1984); United States v. Lemire, 720 F.2d 1327, 1335 n.6 (D.C. Cir. 1983). The only material difference is that the wire fraud statute requires that the wire transmission be "in interstate or foreign commerce," whereas the mail fraud statute covers "intrastate" use of the mails as well as those in interstate or foreign commerce. See, e.g., United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 247-48 (4th Cir. 2001), cert. denied, 535 U.S. 926 (2002); United States v. Marek, 238 F.3d 310, 317-18 (5th Cir.), cert. denied, 534 U.S. 813 (2001).

services."[42] Thus, Section 1346 was designed to overrule McNally, and hence McNally precludes application of the mail and wire fraud statutes to a scheme to defraud another of a right to honest services only when the underlying scheme to defraud was completed prior to November 18, 1988, the effective date of 18 U.S.C. § 1346.[43]

In Cleveland v. United States, 531 U.S. 12, 15 (2000), the Supreme Court held that "State and municipal licenses in general, and Louisiana's video poker licenses in particular" do not constitute property "in the hands of the official licensor" within the ambit of the mail fraud statute, 18 U.S.C. § 1341. Louisiana law allows certain businesses that qualify for a state license to operate video poker machines. Louisiana itself did not run such machinery. The charged RICO and mail fraud offenses alleged that because defendants Cleveland and Goodson had tax and financial problems that could have undermined their suitability to receive a video poker license, they fraudulently concealed that they were the true owners of the Truck Stop Gaming Casino in the license application that they had mailed to the State of Louisiana. The mail fraud offense alleged that the defendants had defrauded the State of Louisiana of its property interests in the video poker licenses by their false representations.

The Supreme Court held that such licenses were not "property" in the hands of the State within the compass of 18 U.S.C. § 1341. The Court stated:

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[42] See Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508 (Nov. 18, 1988).

[43] See, e.g., United States v. Rybicki, 354 F.3d 124, 132-39 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004); United States v. Vinyard, 266 F.3d 320, 326 n.4 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002); United States v. Martin, 228 F.3d 1, 17 & n.20 (1st Cir. 2000); United States v. Alkins, 925 F.2d 541, 548-49 (2d Cir. 1991); United States v. Dempsey, 768 F. Supp. 1256, 1267-68 (N.D. Ill. 1990).

> It does not suffice . . . that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim.

Id. at 15.[44]

Above all else, the Supreme Court explained that "whatever interests Louisiana might be said to have in its video poker licenses, the State's core concern is *regulatory*." Id. at 20. The Court added that "the statute establishes a typical regulatory program. It licenses, subject to certain conditions, engagement in pursuits that private actors may not undertake without official authorization. In this respect, it resembles other licensing schemes long characterized by this Court as exercises of state police powers." Id. at 21.

The Court rejected the State's argument that it has a property interest in its video poker licenses because it received a substantial sum of money in exchange for each license and continues to receive payments from the licensee as long as the license remains in effect. Id. at 21. The Supreme Court explained:

> Without doubt, Louisiana has a substantial economic stake in the video poker industry. The State collects an upfront "processing fee" for each new license application, . . . a separate "processing fee" for each renewal application, ... an "annual fee" from each device owner, . . . an additional "device operation" fee, . . . and, most importantly, a fixed percentage of net revenue from each video poker device . . . . It is hardly evident, however, why these tolls should make video poker licenses "property" in the hands of the State. The State receives the lion's share of its expected revenue not while the licenses remain in its own hands, but only *after* they have been issued to licensees. Licenses pre-issuance do not generate an ongoing stream of revenue. At most, they entitle the State to collect a processing fee from applicants for new licenses. Were an entitlement of this order sufficient to establish a state property right, one could scarcely avoid the conclusion that States have property rights in any license or permit requiring an upfront fee, including drivers' licenses, medical licenses, and fishing and hunting licenses. Such licenses, as the

[44] The Court noted that it did not "question that video poker licensees may have property interests in their licenses." Id. at 25.

> Government itself concedes, are "purely regulatory." Tr. of Oral Arg. 24-25.
>
> Tellingly, as to the character of Louisiana's stake in its video poker licenses, the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law.

Id. at 22.

The Court also rejected the view that the State had a property interest in its "right to choose the persons to whom it issues video poker licenses," explaining that "these intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate." Id. at 23. The Court also rejected analogies to a patent holder's interest in a patent that has not yet been licensed and "a franchisor's right to select its franchisees." Id. at 23-24. The Court also stated:

> We reject the Government's theories of property rights not simply because they stray from traditional concepts of property. We resist the Government's reading of § 1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress. Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities.

Id. at 24.

Following Cleveland, courts have held that governmental interests in various licensing schemes did not constitute property within the ambit of the mail and wire fraud statutes.[45]

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[45] See, e.g., Fountain v. United States, 357 F.3d 250, 257 (2d Cir. 2004) ("While a liquor license might not constitute property in the hands of the state, the sales taxes that the government can anticipate collecting from transactions in alcohol are property under the mail and wire fraud statutes"), cert. denied, 544 U.S. 1017 (2005); United States v. Griffin, 324 F.3d 330, 354 (5th Cir. 2003) (holding that unissued tax credits in the hands of a state agency have "zero intrinsic value," and hence are not property within the ambit of the mail fraud statute); United States v. Peter, 310 F.3d 709, 711 (11th Cir. 2002) (alleged misrepresentations on application for alcoholic beverage license did not fall within the ambit of the mail fraud statute); United States v. LeVegue, 283 F.3d (continued...)

b. Recent Supreme Court Decisions on Extortion Predicate Offenses -- Scheidler v. NOW and Wilkie v. Robbins

(1) Scheidler v. NOW

RICO charges also frequently include predicate offenses involving extortion under the Hobbs Act, 18 U.S.C. § 1951, and state law, as illustrated by several recent Supreme Court decisions. For example, in Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003), the Supreme Court reversed the Seventh Circuit's holding that the plaintiffs (an organization that supports the legal availability of abortion services and two clinics that provide medical services including abortions) were entitled to a permanent injunction against the defendants (individuals and organizations engaged in anti-abortion activities) and treble damages under RICO's civil remedies, 18 U.S.C. § 1964. The Seventh Circuit ruled that the defendants had committed a pattern of Hobbs Act and state extortions arising from their use of force, violence and fear to cause the plaintiffs "'to give up' property rights, namely, 'a woman's right to seek medical services [i.e., abortion services] from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear.'" Id. at 400 (quoting the jury instructions). The Seventh Circuit had also ruled that "as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." Id. at 399-400 (citation and internal quotations omitted).

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[45](...continued)
1098, 1102-03 (9th Cir. 2002) (alleged false representations in application for a hunting license did not fall within the ambit of the mail fraud statute); United States v. Antico, 275 F.3d 245, 267 (3d Cir. 2001) (alleged false representations on an application for a zoning permit did not fall within the ambit of the mail fraud statute), cert. denied, 537 U.S. 821 (2002).

The Supreme Court did not decide whether the matters the defendants sought constitute "property" within the meaning of the Hobbs Act. Id. at 401-02. The Court, however, decided that the defendants did not "obtain" or seek to "obtain" property within the meaning of the Hobbs Act, stating:

> But even when [the defendants'] acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because [defendants] did not "obtain" [plaintiffs'] property. [Defendants] may have deprived or sought to deprive [plaintiffs] of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. [Defendants] neither pursued nor received "something of value from" [plaintiffs] that they could exercise, transfer, or sell. United States v. Nardello, 393 U.S. 286, 290, 89 S. Ct. 534, 21 L.Ed. 2d 487 (1969). To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.

Scheidler, 537 U.S. at 404-05. The Court further explained that:

> Eliminating the requirement that property must be obtained to constitute extortion would not only conflict with the express requirement of the Hobbs Act, it would also eliminate the recognized distinction between extortion and the separate crime of coercion -- a distinction that is implicated in these cases. The crime of coercion, which more accurately describes the nature of [defendants'] actions, involves the use of force or threat of force to restrict another's freedom of action. Coercion's origin is statutory, and it was clearly defined in the New York Penal Code as a separate, and lesser offense than extortion when Congress turned to New York law in drafting the Hobbs Act. New York case law applying the coercion statute before the passage of the Hobbs Act involved the prosecution of individuals who, like [defendants], employed threats and acts of force and violence to dictate and restrict the actions and decisions of businesses. See, e.g., People v. Ginsberg, 262 N.Y. 556, 188 N.E. 62 (1933) (affirming convictions for coercion where defendant used threatened and actual property damage to compel the owner of a drug store to become a member of a local trade association and to remove price advertisements for specific merchandise from his store's windows); People v. Scotti, 266 N.Y. 480, 195 N.E. 162 (1934)(affirming conviction for coercion where defendants used threatened and actual force to compel a manufacturer to enter into an agreement with a labor union of which the defendants were members); People v. Kaplan, 240 App. Div. 72, 269

> N.Y.S. 161 (1934) (affirming convictions for coercion where defendants, members of a labor union, used threatened and actual physical violence to compel other members of the union to drop lawsuits challenging the manner in which defendants were handling the union's finances).

Scheidler, 537 U.S. at 405-06 (footnotes omitted). The Court explained the distinction between "extortion" and "coercion," stating:

> Under the Model Penal Code § 223.4, Comment 1, pp. 201-202, extortion requires that one "obtains [the] property of another" using threat as "the method employed to deprive the victim of his property." This "obtaining" is further explained as "'bring[ing] about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another.'" Id., § 223.3, Comment 2, at 182. Coercion, on the other hand, is defined as making "specified categories of threats . . . with the purpose of unlawfully restricting another's freedom of action to his detriment." Id., § 212.5, Comment 2, at 264.

Scheidler, 537 U.S. at 408 n.13. The Court added that:

> [W]hile coercion and extortion certainly overlap to the extent that extortion necessarily involves the use of coercive conduct to obtain property, there has been and continues to be a recognized difference between these two crimes, see, e.g., ALI, Model Penal Code and Commentaries §§ 212.5, 232.4 (1980) . . . and we find it evident that this distinction was not lost on Congress in formulating the Hobbs Act.

Id. at 407-08 (footnote omitted). Accordingly, the Supreme Court concluded that the defendants "did not obtain or attempt to obtain property from [the plaintiffs]." Id. at 409.

Scheidler establishes a general rule that a defendant does not "obtain" or seek to obtain property within the meaning of the Hobbs Act and generic extortion by merely interfering with or depriving someone of property, or by merely depriving or seeking to deprive someone of his "exclusive control of [his] business assets." Id. at 404-05.[46]

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[46] For a discussion of the impact of the Scheidler decision on the Government's application of RICO and the Hobbs Act to extortion of union members' rights to free speech and to participate in internal union democracy guaranteed by the Labor Management Reporting and Disclosure Procedure Act, 29 U.S.C. §§ 401-531, see OCRS' Civil RICO Manual (Oct. 2007) at 282-98.

(2) Scheidler Decisions on Remand

On remand from the Supreme Court, the Seventh Circuit held that the jury's RICO verdict could conceivably rest on four instances of threats of physical violence unrelated to extortion. See Nat'l Org. for Women Inc. v. Scheidler, 91 Fed. Appx. 510, 512 (7th Cir. 2004). In that respect, the Hobbs Act imposes criminal liability on

> [w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* . . . .

18 U.S.C. § 1951(a) (emphasis added). The Seventh Circuit remanded the case to the district court to determine "whether the phrase 'commits or threatens physical violence on any person or property' constitutes an independent ground for violating the Hobbs Act," regardless of whether the defendant's plan involved an effort to extort or rob the intended victim. Id. at 513.

The Supreme Court reversed, holding that "physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act." Scheidler v. Nat'l Org. for Women Inc., 547 U.S. 9, 16 (2006). Thus, the Supreme Court stated:

> We conclude that Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies).

Id. at 23.

(3) Wilkie v. Robbins

In Wilkie v. Robbins, 127 S. Ct. 2588 (2007), the Supreme Court afforded the United States significant protection from civil suits alleging violations of RICO and the Hobbs Act. In Wilkie, the

plaintiff brought a civil RICO suit against the United States, alleging that current and former employees of the Bureau of Land Management had engaged in a pattern of harassment and intimidation under color of official right, aimed at forcing him to regrant an easement to the United States to use and maintain a road on the plaintiff's ranch, allegedly in violation of the Hobbs Act (18 U.S.C. § 1951) and civil RICO.

The Supreme Court held that "the Hobbs Act does not apply when the National Government is the intended beneficiary of the allegedly extortionate acts." Id. at 2605. The Court noted that case law "is completely barren of an example of extortion under color of official right undertaken for the sole benefit of the Government." Id. at 2606. The Court added:

> [D]rawing a line between private and public beneficiaries prevents suits (not just recoveries) against public officers whose jobs are to obtain property owed to the Government. So, without some other indication from Congress, it is not reasonable to assume that the Hobbs Act (let alone RICO) was intended to expose all federal employees . . . to extortion charges whenever they stretch in trying to enforce Government property claims.

Id. at 2607.

The Court also said that because the plaintiff's RICO claims must be rejected since the Hobbs Act claims fall, it did not reach the issue whether "a valid claim of entitlement in the disputed property is a complete defense against extortion." Id. at 2605.

c. Representative Cases Charging Title 18 Predicate Offenses

Section 201 (relating to bribery)

> United States v. Bustamante, 45 F.3d 933 (5th Cir.), cert. denied, 516 U.S. 973 (1995); United States v. Garner, 837 F.2d 1404 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988); United States v. Persico, 646 F. Supp. 752 (S.D.N.Y. 1986), aff'd and rev'd on other grounds, 832 F.2d 705 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); United States v. Perholtz, 622 F. Supp. 1253 (D.D.C. 1985); United States v. Perkins, 596 F. Supp. 528 (E.D. Pa.), aff'd, 749 F.2d 28 (3d Cir. 1984), cert.

denied, 471 U.S. 1015 (1985); United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981); United States v. Licavoli, 725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984).

Section 224 (relating to sports bribery)

United States v. Burke, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983); United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).

Sections 471- 473 (relating to counterfeiting)

United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

Section 659 (relating to theft from an interstate shipment)

United States v. Elliott, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Piteo, 726 F.2d 53 (2d Cir.), cert. denied, 467 U.S. 1206 (1984).

Section 664 (relating to embezzlement from pension and welfare funds)

United States v. Busacca, 936 F.2d 232 (6th Cir.), cert. denied, 502 U.S. 985 (1991); United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983); United States v. Ostrer, 481 F. Supp. 407 (S.D.N.Y. 1979).

Sections 891-894 (relating to extortionate credit transactions)

United States v. Shifman, 124 F.3d 31 (1st Cir. 1997), cert. denied, 522 U.S. 1116 (1998); United States v. Zizzo, 120 F.3d 1338 (7th Cir.), cert. denied, 522 U.S. 998 (1997); United States v. Doherty, 786 F.2d 491 (2d Cir. 1986); United States v. Persico, 621 F. Supp. 842 (S.D.N.Y. 1985); United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Groff, 643 F.2d 396 (6th Cir.), cert. denied, 454 U.S. 828 (1981).

Section 1028 (relating to fraud in connection with identification documents)

Section 1029 (relating to fraud in connection with access devices)

Section 1084 (relating to illegal transmission of wagering information)

Section 1341 (relating to mail fraud)

United States v. Hively, 437 F.3d 752 (8th Cir. 2006); Porcelli v. United States, 404 F.3d 157 (2d Cir. 2005); Kemp v. American Tel. & Tel. Co., 393 F.3d 1354 (11th Cir. 2004); United States v. Genova, 333 F.3d 750 (7th Cir. 2003); United States v. Edwards, 303 F. 3d 606 (5th Cir. 2002); United States v. Porcelli, 303 F. 3d 452 (2d Cir. 2002), cert. denied, 537 U.S. 1113 (2003); United States v. Najjar, 300 F.3d 466 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); United States v. Antico, 275 F.3d 245 (3d Cir. 2001), cert. denied, 537 U.S. 821 (2002); United States v. Palumbo Brothers, Inc., 145 F.3d 850 (7th Cir.), cert. denied, 525 U.S. 949 (1998); United States v. Blandford, 33 F.3d 685 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995); United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991), cert. denied, 505 U.S. 1220 (1992); United States v. Horak, 833 F.2d 1235 (7th Cir. 1987); United States v. Busher, 817 F.2d 1409 (9th Cir. 1987); United States v. Martino, 648 F.2d 367 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); United States v. Sheeran, 699 F.2d 112 (3d Cir.), cert. denied, 461 U.S. 931 (1983); United States v. Boyd, 309 F. Supp. 2d 908 (S.D. Tex. 2004); United States v. Salvagno, 306 F. Supp. 2d 258 (N.D.N.Y. 2004); United States v. Segal, 299 F. Supp. 2d 840 (N.D. Ill. 2004); United States v. Ganim, 225 F. Supp. 2d 145 (D. Conn. 2002); United States v. Standard Drywall Corp., 617 F. Supp. 1283 (S.D.N.Y. 1985).

Section 1343 (relating to wire fraud)

United States v. Gotti, 459 F.3d 296, 327-34 (2d Cir. 2006), cert. denied, 127 S. Ct. 3001 (2007); United States v. Edwards, 303 F.3d 606 (5th Cir. 2002), cert. denied, 537 U.S. 1192 (2003); United States v. Antico, 275 F.3d 245 (3d Cir. 2001), cert. denied, 537 U.S. 821 (2002); United States v. Blinder, 10 F.3d 1468 (9th Cir. 1993); United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983).

Section 1344 (relating to financial institution fraud)

Sections 1425 -1427 (relating to the unlawful procurement of citizenship or nationalization)

Sections 1461-1465 (relating to obscene matter)

United States v. Pryba, 674 F. Supp. 1504 (E.D. Va. 1987).

Section 1503 (relating to obstruction of justice)

United States v. Abbell, 271 F.3d 1286, 1300-01 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002); United States v. Russotti, 717 F.2d 27 (2d Cir. 1983), cert. denied,

465 U.S. 1022 (1984); United States v. Romano, 684 F.2d 1057 (2d Cir.), cert. denied, 459 U.S. 1016 (1982); United States v. Triumph Capital Group, 260 F. Supp. 2d 470 (D. Conn. 2003); United States v. Vitale, 635 F. Supp. 194 (S.D.N.Y. 1985), dismissed on other grounds, 795 F.2d 1006 (2d Cir. 1986).

Section 1510 (relating to the obstruction of a federal criminal investigation)

United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); United States v. Smith, 574 F.2d 308 (5th Cir.), cert. denied, 439 U.S. 931 (1978).

Section 1511 (relating to the obstruction of state or local law enforcement)

United States v. Welch, 656 F.2d 1039 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Feliziani, 472 F. Supp. 1037 (E.D. Pa. 1979), aff'd, 633 F.2d 580 (3d Cir. 1980).

Sections 1512 -1513 (relating to witness/victim/informant tampering or retaliating against a witness, victim or informant)

United States v. Gotti, 459 F.3d 296, 342-43 (2d Cir. 2006), cert. denied, 127 S. Ct. 3001 (2007); Mruz v. Caring, Inc., 991 F. Supp. 701 (D.N.J. 1998).

Sections 1542 -1544 (relating to false and forged statements in application and use of passport, misuse of passport)

Section 1546 (relating to fraud, misuse of visas and related documents)

Sections 1581-1588 (relating to peonage and slavery)

Section 1951 (Hobbs Act extortion or robbery)

United States v. Gotti, 459 F.3d 296, 319-28 (2d Cir. 2006), cert. denied, 127 S. Ct. 3001 (2007); United States v. Merlino, 349 F.3d 144 (3d Cir. 2003), cert. denied, 541 U.S. 965 (2004); United States v. Edwards, 303 F.3d 606 (5th Cir. 2002), cert. denied, 537 U.S. 1192 (2003); United States v. McLeczynsky, 296 F.3d 634 (7th Cir. 2002), cert. denied, 537 U.S. 1037 (2002); United States v. To, 144 F.3d 737 (11th Cir. 1998); United States v. Blandford, 33 F.3d 685 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995); United States v. Carpenter, 961 F.2d 824 (9th Cir.), cert. denied, 506 U.S. 919 (1992); United States v. O'Malley, 796 F.2d 891 (7th Cir. 1986); United States v. Hampton, 786 F.2d 977 (10th Cir. 1986); United States v. Walsh, 700 F.2d 846 (2d Cir.), cert. denied, 464 U.S. 825 (1983); United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); United States v.

Dozier, 672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943 (1982).

Section 1952 (relating to interstate or foreign travel or use of such facilities or the mail in aid of unlawful activity)

United States v. Edwards, 303 F.3d 606 (5th Cir. 2002), cert. denied, 537 U.S. 1192 (2003); United States v. Griffith, 85 F.3d 284 (7th Cir. 1996); United States v. Stern, 858 F.2d 1241 (7th Cir. 1988); United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 489 U.S. 1055 (1989); United States v. Hunt, 749 F.2d 1078 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); United States v. Mazzei, 700 F.2d 85 (2d Cir.), cert. denied, 461 U.S. 945 (1983); United States v. Al-Arian, 308 F. Supp. 2d 1322 (M.D. Fla. 2004).

Section 1953 (relating to interstate transportation of wagering paraphernalia)

Section 1954 (relating to kickbacks to influence employee benefit plan)

United States v. Norton, 867 F.2d 1354 (11th Cir.), cert. denied, 491 U.S. 907 (1989); United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), cert. denied, 461 U.S. 928 (1983); United States v. Palmeri, 630 F.2d 192 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981).

Section 1955 (prohibiting illegal gambling businesses)

United States v. Zemek, 634 F.2d 1159 (2d Cir. 1980), cert. denied, 450 U.S. 916 (1981); United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

Sections 1956 -1957 (relating to money laundering)

United States v. Gotti, 459 F.3d 296, 335-38 (2d Cir. 2006), cert. denied. 127 S. Ct. 3001 (2007); United States v. Abbell, 271 F.3d 1286 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002); United States v. Jackson, 72 F.3d 1370 (9th Cir. 1995), cert. denied, 517 U.S. 1157 (1996); United States v. London, 66 F.3d 1227 (1st Cir. 1995), cert. denied, 517 U.S. 1155 (1996).

Section 1958 (relating to murder for hire)

Sections 2251- 2252 (relating to sexual exploitation, abuse and buying and selling children)

Sections 2312 - 2313 (relating to the transportation, sale or receipt of stolen vehicles)

Section 2314 (relating to transportation of stolen goods and other property)

United States v. Neapolitan, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 940 (1986); United States v. Conner, 752 F.2d 566 (11th Cir.), cert. denied, 474 U.S. 821 (1985); Cooper v. United States, 639 F. Supp. 176 (M.D. Fla. 1986); United States v. Haley, 504 F. Supp. 1124 (E.D. Pa. 1981).

Section 2315 (relating to sale or receipt of stolen goods and other property)

United States v. DeVincent, 632 F.2d 155 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981); United States v. Martin, 611 F.2d 801 (10th Cir. 1979), cert. denied, 444 U.S. 1082 (1980).

Sections 2318-2320 (relating to copyright infringement and counterfeiting in the performance and entertainment and audiovisual and computer industries)

Section 2321 (trafficking in motor vehicles and motor vehicle parts with obliterated or altered vehicle identification numbers)

Sections 2341- 2346 (trafficking in contraband cigarettes)

United States v. Baker, 63 F.3d 1478 (9th Cir. 1995), cert. denied, 516 U.S. 1097 (1996); United States v. Legrano, 659 F.2d 17 (4th Cir. 1981).

Sections 2421-2424 (relating to transportation for illegal sexual activity)

United States v. Clemones, 577 F.2d 1247 (5th Cir. 1978), cert. denied, 445 U.S. 927 (1980).

3. Federal Title 29 Offenses

Section 1961(1)(C) defines racketeering activity as "any act which is indictable under" 29 U.S.C. § 186 or 29 U.S.C. § 501(c). Because of the "indictable under" language, the same considerations apply here as to the Section 1961(1)(B) offenses, with respect to charging attempts and conspiracies, i.e., because attempts and conspiracies are not expressly included within these statutes, they are not chargeable as RICO predicates.

Representative cases charging Title 29 predicate offenses:

Section 186 (dealing with restrictions on payments and loans to labor organizations)

> United States v. Novak, 443 F.3d 150, 160-62 (2d Cir. 2006), cert. denied, 127 S. Ct. 525 2006); United States v. Carlock, 806 F.2d 835 (5th Cir. 1986); United States v. Pecora, 798 F.2d 614 (3d Cir. 1986), cert. denied, 479 U.S. 1064 (1987); United States v. Cody, 722 F.2d 1052 (2d Cir. 1983), cert. denied, 467 U.S. 1226 (1984); United States v. Kaye, 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977); United States v. Local 1804-1, International Longshoreman's Ass'n, 812 F. Supp. 1303 (S.D.N.Y. 1993); United States v. DiGilio, 667 F. Supp. 191 (D.N.J. 1987).

Section 501(c) (relating to embezzlement from union funds)

> United States v. Gotti, 459 F.3d 296, 302-08 (2d Cir. 2006), cert. denied, 127 S. Ct. 3001 (2007); United States v. Butler, 954 F.2d 114 (2d Cir. 1992); United States v. Boffa, 688 F.2d 919 (3d Cir. 1982), cert. denied, 460 U.S. 1022 (1983); United States v. Thordarson, 646 F.2d 1323 (9th Cir.), cert. denied, 454 U.S. 1055 (1981); United States v. Rubin, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979); United States v. Local 1804-1, International Longshoreman's Ass'n, 812 F. Supp. 1303 (S.D.N.Y. 1993).

4. Generic Federal Offenses

Section 1961(1)(D) defines racketeering activity as follows:

> any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States.

Because this subdivision uses the language "any offense involving," it includes attempts and conspiracies.[47]

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[47] See, e.g., United States v. Darden, 70 F.3d 1507, 1524-25 (8th Cir. 1995) (conspiracy to distribute, and possess with intent to distribute controlled substances constitutes a RICO predicate, but simple possession of cocaine is not a RICO predicate), cert. denied, 517 U.S. 1149 (1996); United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988) (conspiracy to possess and distribute a controlled substance is a RICO predicate act); United States v. Phillips, 664 F.2d 971, 1015 (5th Cir. 1981) (conspiracy to commit offense involving narcotics and dangerous drugs is a RICO predicate (continued...)

One issue that occasionally arises in RICO cases involving federal narcotics violations is whether marijuana offenses are proper RICO predicates. Under the federal drug statutes, marijuana is considered a controlled substance but not a narcotic drug. This problem was resolved in 1994, however, by an amendment to Section 1961(1)(D) substituting "controlled substance or listed chemical" for "narcotics or other dangerous drug." Thus, a marijuana offense occurring after the 1994 amendment may be a proper RICO predicate. Offenses occurring prior to the 1994 amendment may be proper RICO predicates as well: court decisions addressing the propriety of a pre-1994 marijuana offense as a RICO predicate have held in the Government's favor.[48] Accordingly, it is the position of the Criminal Division that marijuana offenses may be proper RICO predicates.[49]

Another issue that has arisen in RICO cases involving federal narcotics offenses is whether mere possession of illegal narcotics for personal consumption is a RICO predicate. At least one court has held that such mere possession is not a proper RICO predicate, but that possession with intent to distribute is a proper RICO predicate. United States v. Darden, 70 F.3d 1507, 1524 (8th

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[47](...continued)
act), cert. denied, 457 U.S. 1136 (1982); United States v. Weisman, 624 F.2d 1118, 1123-24 (2d Cir.) (conspiracy to commit offense involving bankruptcy fraud or securities fraud is a RICO predicate act), cert. denied, 449 U.S. 871 (1980).

[48] See, e.g., United States v. Williams, 809 F.2d 1072 (5th Cir.), cert. denied, 484 U.S. 896 (1987); United States v. Ryland, 806 F.2d 941 (9th Cir. 1986), cert. denied, 48 U.S. 1057 (1987); United States v. Tillett, 763 F.2d 628 (11th Cir. 1984), cert. denied, 472 U.S. 1017 (1985); United States v. Zielie, 734 F.2d 1447, 1462 n.11 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Castellano, 610 F. Supp. 1359, 1424-25 (S.D.N.Y. 1985); United States v. Harvey, 560 F. Supp. 1040, 1050 (S.D. Fla. 1982), aff'd, 789 F.2d 1492 (11th Cir.), cert. denied, 479 U.S. 854 (1986).

[49] Marijuana offenses under state law also may be RICO predicates provided that the charged state marijuana offenses carry a penalty of imprisonment in excess of one year. Section 1961(1)(A) requires that state offenses be punishable by more than one year imprisonment.

Cir. 1995), cert. denied, 517 U.S. 1149 (1996). The Organized Crime and Racketeering Section will not approve possession of a *de minimis* amount of drugs as a RICO predicate. Possession of a larger amount may be approved if it could be inferred from the quantity and other relevant facts that the drugs were for distribution and not merely for personal consumption.

Representative cases charging federal generic predicate offenses:

Title 11 (relating to bankruptcy fraud)

United States v. Weisman, 624 F.2d 1118 (2d Cir.), cert. denied, 449 U.S. 871 (1980); United States v. Tashjian, 660 F.2d 829 (1st Cir.), cert. denied, 454 U.S. 1102 (1981).

Securities Fraud

United States v. Blinder, 10 F.3d 1468 (9th Cir. 1993); United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1983); United States v. Pray, 452 F. Supp. 788 (M.D. Pa. 1978).

Narcotics

United States v. Crosby, 789 F. Supp. 440 (D.D.C. 1992), aff'd, 20 F.3d 480 (D.C. Cir.), cert. denied, 513 U.S. 883 (1994); United States v. Kragness, 830 F.2d 842 (8th Cir. 1987); United States v. Firestone, 816 F.2d 583 (11th Cir.), cert. denied, 484 U.S. 948 (1987); United States v. Zielie, 734 F.2d 1447 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Fernandez, 576 F. Supp. 397 (E.D. Tex. 1983), aff'd, 777 F.2d 248 (5th Cir. 1985), cert. denied, 476 U.S. 1096 (1986).

5. Title 31 Offenses (currency reporting violations)

Section 1961(1)(E), added by amendment October 12, 1984, includes as racketeering activity "any act which is indictable under the Currency and Foreign Transactions Reporting Act." Those violations, codified at 31 U.S.C. §§ 5311-5324, are of considerable use as predicate offenses involving money laundering in narcotics and other prosecutions. In drafting a RICO indictment that includes Title 31 predicate acts, it is important to be aware of the policy against charging several

predicate acts from a single, short-lived criminal transaction.[50] In addition, it is important to be aware of the ex post facto issue that may arise if an indictment alleges Title 31 predicate acts that occurred on or before the dates those offenses were added to the list of RICO predicates.[51]

Representative cases charging Title 31 offenses:

United States v. London, 66 F.3d 1227 (1st Cir. 1995), cert. denied, 517 U.S. 1155 (1996); United States v. Hurley, 63 F.3d 1 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996).

6. Immigration and Nationality Act Offenses

Section 1961(1)(F), added by several amendments in 1996, includes as racketeering activity:

> any act which is indictable under the Immigration and Nationality Act, i.e., section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of aliens for immoral purposes) if the act indictable under such section of such Act was committed for the purpose of financial gain.

These violations are codified, respectively, at 8 U.S.C. §§ 1324, 1327 and 1328. See also discussion of ex post facto issues arising from such amendments in Section VI(F)(4) below.

Representative cases charging Immigration and Nationality Act offenses:

Williams v. Mohawk Indus., Inc., 411 F.3d 1252 (11th Cir. 2005), vacated on other grounds, 547 U.S. 1075 (2006).

7. Terrorism Related Offenses

Section 1961(1)(G), added in 2001, includes as racketeering activity "any act that is indictable under any provision listed in section 2332b(g)(5)(B)" of Title 18, which added approximately 50 offenses to the list of RICO predicate offenses. See Section I(B)(3)(a) above. See

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[50] See Section II(E)(4) and (6) below.

[51] See Section VI(F)(4) below.

also discussion of ex post facto issues arising from such amendments in Section VI(F)(4) below.

Representative cases charging terrorism related offenses:

United States v. Marzook, 426 F. Supp. 2d 820 (N.D. Ill. 2006); United States v. Al-Arian, 308 F. Supp. 2d 1322 (M.D. Fla. 2004), mot. to modify denied, 329 F. Supp. 2d 1294 (M.D. Fla. 2004); United States v. Arnaout, 236 F. Supp. 2d 916 (N.D. Ill. 2003).

B. State

The statutory definition of "state" "means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof." See 18 U.S.C. § 1961(2). The primary importance of this definition is its connection with the state law predicate crimes listed in Section 1961(1)(A) and the definition of "unlawful debt" in Section 1961(6). See, e.g., Doe v. The GAP, Inc., 2001 WL 1842389 at * 6 (D.C. CNMI, Nov. 26, 2001) (holding that offenses under the Commonwealth of the Northern Mariana Islands constitute offenses "chargeable under state law" within the ambit of 18 U.S.C. § 1961(1)(A)). Thus far, the definition of "state" has not been a significant issue in RICO litigation.

C. Person

Section 1961(3) provides that the definition of "person" "includes any individual or entity capable of holding a legal or beneficial interest in property." This definition is highly significant because it determines who may be a defendant subject to criminal charges or a civil suit under

RICO,[52] as well as who may bring a civil RICO suit for treble damages.[53] Clearly, a natural person falls within the definition of "person" under section 1961(3). See Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161-63 (2001).[54] Likewise, RICO's definition of "person" includes a corporation, union, partnership and a sole proprietorship.[55]

As of this writing, it is not settled whether, and under what circumstances, a governmental entity constitutes a "person" within the meaning of Section 1961(3). For example, in Bonanno, 879 F.2d at 21-27, the Second Circuit held that the United States was not a "person" under Section 1961(3), and, therefore, was neither entitled to sue for treble damages under section 1964(c), nor subject to criminal or civil liability under RICO. Accord United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. 1114, 1149 (E.D.N.Y. 1992). However, some courts have held that foreign governmental entities constitute "persons" under Section 1961(3) and may sue for treble damages

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[52] In that regard, 18 U.S.C. § 1962 makes it unlawful, for both criminal and civil purposes, for "any person" to violate Section 1962.

[53] In that regard, 18 U.S.C. § 1964(c) provides that "*[a]ny person* injured in his business or property by reason of a violation of section 1962" may sue for treble damages (emphasis added).

[54] But see United States v. Bonanno Org. Crime Fam. of La Cosa Nostra, 879 F.2d 20, 27-30 (2d Cir. 1989) ("Bonanno") (holding that the Bonanno organized crime family was not a "person" subject to civil suit under RICO).

[55] See, e.g., Living Designs, Inc. v. E.I. DuPont De Nemours & Co., 431 F.3d 353, 361-62 (9th Cir. 2005); United States v. Goldin Indus., Inc., 219 F.3d 1268, 1270-71 (11th Cir. 2000) (en banc); 219 F.3d 1271, 1275-77 (11th Cir. 2000); Nat'l Elec. Benefit Fund v. Heary Bros. Lighting Prot. Co. Inc., 931 F. Supp. 169, 186-87 (W.D.N.Y. 1995); C&W Constr. Co. v. Bhd. of Carpenters and Joiners of America, Local 745, 687 F. Supp. 1453, 1466 (D. Hawaii 1988).

But see United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982) (in dictum, concluding that a corporate division could not be a RICO "person" chargeable as a RICO defendant, but noting that the division could be a RICO "enterprise"), cert. denied, 459 U.S. 1105 (1983).

under civil RICO.[56]

Moreover, some courts have held that a state or municipal government may not be a RICO defendant because a governmental entity is incapable of forming the criminal intent necessary to be liable for the commission of a RICO predicate offense,[57] whereas some courts have held that a governmental entity is a "person" subject to civil suit under RICO.[58] Furthermore, some courts have held that state and other local government entities constitute "persons" under Section 1961(3) and are entitled to sue for treble damages under civil RICO,[59] while other courts have permitted a state

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[56] See, e.g., Republic of the Philippines v. Marcos, 862 F.2d 1355, 1358-59 (9th Cir. 1988); The European Community v. RJR Nabisco, Inc., 150 F. Supp. 2d 456, 486-92 (E.D.N.Y. 2001); The Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc., 103 F. Supp. 2d 134, 146-50 (N.D.N.Y. 2000).

[57] See, e.g., Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996) (affirming dismissal of civil RICO claim against City and County of Honolulu because governmental entities are incapable of forming necessary malicious intent), cert. denied, 520 U.S. 1268 (1997); Frooks v. Town of Cortlandt, 997 F. Supp. 438, 456-57 (S.D.N.Y. 1998) (dismissing civil RICO suit against a town and its employees acting in their official capacities because a municipality cannot form the requisite criminal intent to establish a predicate offense) (collecting cases); Dammon v. Folse, 846 F. Supp. 36, 39 (E.D. La. 1994) (school board is a municipal entity incapable of forming necessary criminal intent); County of Oakland v. City of Detroit, 784 F. Supp. 1275, 1283 (E.D. Mich. 1992) (civil RICO suit dismissed because a municipal corporation is incapable of forming necessary criminal intent). Cf. Binder v. District of Columbia, 1991 WL 11255755 at *7 (D.D.C. May 22, 1991) (holding that the District of Columbia cannot be vicariously liable under civil RICO for the criminal acts of its employee).

[58] See, e.g., County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1305-08 (2d Cir. 1990) (a public utility may constitute a "person" subject to civil suit under RICO); Nu-Life Constr. Corp. v. Bd. of Educ. of New York, 779 F. Supp. 248, 251-52 (E.D.N.Y. 1991) (municipal corporation is a "person" since it can hold interest in property, but plaintiff must still show that defendant had the requisite mens rea to commit predicate acts).

[59] See County of Oakland v. City of Detroit, 866 F.2d 839, 851 (6th Cir. 1989), cert. denied, 497 U.S. 1003 (1990); Illinois Dept. of Rev. v. Phillips, 771 F.2d 312, 316 (7th Cir. 1985); City of Chicago Heights v. LoBue, 841 F. Supp. 819, 822, 823 (N.D. Ill. 1994); City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 541 (E.D.N.Y. 1987).

to sue for treble damages, but did not address the issue whether the state was a "person" within the meaning of 18 U.S.C. § 1964(c).[60] Finally, some courts have held that governmental entities are not "persons" under Section 1961(3) entitled to sue for treble damages under civil RICO.[61]

D. Enterprise

The term "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). The Supreme Court has squarely held that the term "enterprise" encompasses both legitimate and illegitimate enterprises. See United States v. Turkette, 452 U.S. 576 (1981).[62]

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[60] See, e.g., Commonwealth of Pennsylvania v. Cianfrani, 600 F. Supp. 1364, 1369 (E.D. Pa. 1985).

[61] See, e.g., State of Mich. Dept. of Treasury v. Fawaz, 653 F. Supp. 141, 142-43 (E.D. Mich. 1986) (holding that the Revenue Division of the State of Michigan's Treasury Department is not a "person" entitled to sue for treble damages under civil RICO).

[62] See also Odom v. Microsoft Corp., 486 F.3d 541, 548 (9th Cir. 2007) (en banc); United States v. Doherty, 867 F.2d 47, 68 (1st Cir. 1989); United States v. Blackwood, 768 F.2d 131 (7th Cir.), cert. denied, 474 U.S. 1020 (1985); United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Lemm, 680 F.2d 1193, 1198 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); United States v. Bledsoe, 674 F.2d 647, 662 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1983); United States v. Thevis, 665 F.2d 616, 626 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); United States v. Martino, 648 F.2d 367, 380-81 (5th Cir. 1981), rev'd in part on other grounds, 681 F.2d 952 (5th Cir.) (en banc), cert. denied, 456 U.S. 949 (1982); United States v. Clark, 646 F.2d 1259, 1267 n.7 (8th Cir. 1981); United States v. Sutton, 642 F.2d 1001, 1006-09 (6th Cir. 1980) (en banc), cert. denied, 453 U.S. 912 (1981); United States v. Errico, 635 F.2d 152, 155 (2d Cir. 1980), cert. denied, 453 U.S. 911 (1981); United States v. Provenzano, 620 F.2d 985, 992-93 (3d Cir.), cert. denied, 449 U.S. 899 (1980); United States v. Aleman, 609 F.2d 298, 304-05 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Rone, 598 F.2d 564, 568-69 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Swiderski, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), cert. denied, 441 U.S. 993 (1979).

An enterprise, however, cannot be an inanimate object such as a bank account, Guidry v. (continued...)

Prosecution under RICO, however, does not require proof that either the defendant or the enterprise was connected to organized crime. See Section VI(D) below.

1. RICO's Definition of Enterprise Broadly Encompasses Many Types of Enterprises

Courts have given a broad reading to the term "enterprise." Noting that Congress mandated a liberal construction of the RICO statute in order to effectuate its remedial purposes and pointing to the expansive use of the word "includes" in the statutory definition of the term, courts have held that the list of enumerated entities in Section 1961(4) is not exhaustive but merely illustrative.[63] Thus, the term enterprise includes commercial entities such as corporations[64] (both foreign and

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[62](...continued)
Bank of LaPlace, 954 F.2d 278, 283 (5th Cir. 1992), or an apartment building, Elliott v. Foufas, 867 F.2d 877, 881 (5th Cir. 1989).

[63] See, e.g., United States v. Cianci, 378 F.3d 71, 88 (1st Cir. 2004); United States v. London, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (association-in-fact enterprise consisting of bar and check cashing business), cert. denied, 517 U.S. 1155 (1996); United States v. Aimone, 715 F.2d 822, 828 (3d Cir. 1983), cert. denied, 468 U.S. 1217 (1984); United States v. Thevis, 665 F.2d 616, 625 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); United States v. Angelilli, 660 F.2d 23, 31 (2d Cir. 1981), cert. denied, 455 U.S. 945 (1982). See also United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); United States v. Perkins, 596 F. Supp. 528, 530-31 (E.D. Pa.), aff'd, 749 F.2d 28 (3d Cir. 1984), cert. denied, 471 U.S. 1015 (1985). Cf. United States v. Turkette, 452 U.S. 576, 580 (1981) ("[t]here is no restriction upon the associations embraced by the definition [of enterprise]"). See also cases cited in notes 64-79 below.

[64] See, e.g., Odom, 486 F.3d at 548; United States v. Goldin Indus., Inc., 219 F.3d 1268, 1270 (11th Cir. 2000) (en banc); United States v. Kravitz, 738 F.2d 102, 113 (3d Cir. 1984) (health care delivery corporation), cert. denied, 470 U.S. 1052 (1985); United States v. Hartley, 678 F.2d 961, 988 n.43 (11th Cir. 1982) (corporation producing seafood products), cert. denied, 459 U.S. 1170 (1983); United States v. Webster, 639 F.2d 174, 184 n.4 (4th Cir.) (tavern and liquor store), cert. denied, 454 U.S. 857 (1981); United States v. Zemek, 634 F.2d 1159, 1167 (9th Cir. 1980) (taverns), cert. denied, 450 U.S. 916 (1981); United States v. Weisman, 624 F.2d 1118, 1120 (2d Cir.) (theater), cert. denied, 449 U.S. 871 (1980); United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978) (restaurant serving as front for narcotics trafficking), cert. denied, 441 U.S. 933 (1979); United States v. Brown, 583 F.2d 659, 661 (3d Cir. 1978) (auto dealership), cert. denied, 440 U.S.
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domestic),[65] partnerships,[66] sole proprietorships,[67] and cooperatives;[68] benevolent and non-profit organizations such as unions and union benefit funds,[69] schools,[70] and political associations.[71] The

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[64](...continued)
909 (1979); United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977) (bail bond agency).

[65] See, e.g., United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974) (foreign corporation can constitute a RICO enterprise), cert. denied, 419 U.S. 1105 (1975).

[66] See, e.g., United States v. Cauble, 706 F.2d 1322, 1331 (5th Cir. 1983) (limited partnership), cert. denied, 465 U.S. 1005 (1984); United States v. Zang, 703 F.2d 1186, 1194 (10th Cir. 1982) (partnership), cert. denied, 464 U.S. 828 (1983); United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981) (partnership may be enterprise), cert. denied, 454 U.S. 1156 (1982); Eisenberg v. Gagnon, 564 F. Supp. 1347, 1353 (E.D. Pa. 1983) (limited partnership); United States v. Jannotti, 501 F. Supp. 1182, 1185-86 (E.D. Pa. 1980) (law firm operated through payment of bribes), rev'd on other grounds, 673 F.2d 578 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982).

[67] See, e.g., United States v. Benny, 786 F.2d 1410, 1414-15 (9th Cir.), cert. denied, 479 U.S. 1017 (1986); McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985); United States v. Tille, 729 F.2d 615, 618 (9th Cir.), cert. denied, 471 U.S. 1064 (1984); United States v. Melton, 689 F.2d 679, 685 (7th Cir. 1982); State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 676 (N.D. Ind. 1982).

[68] See, e.g., United States v. Bledsoe, 674 F.2d 647, 660 (8th Cir. 1982) (dicta), cert. denied, 459 U.S. 1040 (1983).

[69] See, e.g., United States v. Norton, 867 F.2d 1354, 1359 (11th Cir. 1989) (the Laborers International Union of North America, its subordinate local unions, and its affiliated employee benefit funds); United States v. Robilotto, 828 F.2d 940, 947 (2d Cir. 1987) (Local 294 of the International Brotherhood of Teamsters), cert. denied, 484 U.S. 1011 (1988); United States v. Provenzano, 688 F.2d 194, 199-200 (3d Cir.) (Local 560 of the Teamsters Union), cert. denied, 459 U.S. 1071 (1982); United States v. LeRoy, 687 F.2d 610, 616-17 (2d Cir. 1982) (Local 214 of Laborers International Union of North America), cert. denied, 459 U.S. 1174 (1983); United States v. Scotto, 641 F.2d 47, 51, 54 (2d Cir. 1980) (Local 1814 of the International Longshoremen's Association), cert. denied, 452 U.S. 961 (1981); United States v. Rubin, 559 F.2d 975, 989 (5th Cir. 1977) (unions and employees welfare benefit plans), vacated and remanded, 439 U.S. 810 (1978), aff'd in part and rev'd in part on other grounds, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979); United States v. Kaye, 556 F.2d 855, 861-62 (7th Cir.) (Local 714 of the International Brotherhood of Teamsters), cert. denied, 434 U.S. 921 (1977); United States v. Campanale, 518 F.2d 352, 355 (9th Cir. 1975) (applying RICO without discussion to Local 626 of the International Brotherhood of Teamsters), cert. denied, 423 U.S. 1050 (1976); United States v. Local 560, (continued...)

term enterprise also includes governmental units such as the offices of governors, mayors, state and congressional legislators,[72] courts and judicial offices,[73] police departments and

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[69](...continued)
International Brotherhood of Teamsters, 581 F. Supp. 279, 335 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985) (Local 560 and its benefit fund), cert. denied, 476 U.S. 1140 (1986); United States v. Field, 432 F. Supp. 55, 57-58 (S.D.N.Y. 1977) (International Longshoremen's Association), aff'd, 578 F.2d 1371 (2d Cir.), cert. denied, 439 U.S. 801 (1978); United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977) (applying RICO without discussion to the International Production Service & Sales Employees Union, but dismissing action for failure to establish a pattern of racketeering activity); United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973) (applying RICO to a union representing workers in New York's fur garment manufacturing industry), aff'd, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976).

[70] See, e.g., United States v. Weatherspoon, 581 F.2d 595, 597-98 (7th Cir. 1978) (beauty college approved for veterans' vocational training by the Veterans Administration).

[71] See, e.g., United States v. Marzook, 426 F. Supp. 2d 820, 824-27 (N.D. Ill. 2006) (Hamas, an alleged foreign terrorist organization); Hudson v. LaRouche, 579 F. Supp. 623, 628 (S.D.N.Y. 1983) (unincorporated national political association affiliated with a political candidate).

[72] See, e.g., United States v. Cianci, 378 F.3d 71, 79-88 (1st Cir. 2004) (an association-in-fact of the office of Mayor of Providence, Rhode Island and other city agencies); United States v. Blandford, 33 F.3d 685, 703 (6th Cir.) (Office of the Representative for House District 14 together with individuals employed therein), cert. denied, 514 U.S. 1095 (1995); United States v. McDade, 28 F.3d 283, 295-96 (3d Cir.) (Congressman McDade and his Congressional offices in Washington, D.C. and in the 10th Congressional District of Pennsylvania), cert. denied, 514 U.S. 1003 (1995); United States v. Freeman, 6 F.3d 586, 596-97 (9th Cir. 1993) (Offices of the 49th Assembly District), cert. denied, 511 U.S. 1077 (1994); United States v. Thompson, 685 F.2d 993 (6th Cir. 1982) (en banc) (applying RICO to the Tennessee Governor's Office, but questioning the wisdom of not defining the enterprise in the indictment as a "group of individuals associated in fact that made use of the office of Governor of the State of Tennessee"), cert. denied, 459 U.S. 1072 (1983); United States v. Long, 651 F.2d 239, 241 (4th Cir.) (office of Senator in the South Carolina legislature), cert. denied, 454 U.S. 896 (1981); United States v. Sisk, 476 F. Supp. 1061, 1062-63 (M.D. Tenn. 1979), aff'd, 629 F.2d 1174 (6th Cir. 1980) (Tennessee Governor's Office), cert. denied, 449 U.S. 1084 (1981); see also United States v. Ganim, 225 F. Supp. 2d 145, 160-61 (D. Conn. 2002) (an association-in-fact of the office of Mayor of Bridgeport, Connecticut and other individuals); United States v. Gillock, 445 U.S. 360, 373 n.11 (1979) ("[o]f course, even a member of Congress would not be immune under the federal Speech or Debate Clause from prosecution for the acts which form the basis of the . . . [RICO] charges here"). But see United States v. Mandel, 415 F. Supp. 997, 1020-22 (D. Md. 1976), rev'd on other grounds, 591 F.2d 1347 (4th Cir.), aff'd on reh'g, 602 F.2d
(continued...)

sheriffs' offices,[74] county prosecutors' offices,[75] tax bureaus,[76] fire departments,[77] and executive

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[72](...continued)
653 (4th Cir. 1979) (en banc) (State of Maryland not an "enterprise" for RICO purposes), cert. denied, 445 U.S. 961 (1980). Mandel, however, has been discredited by all courts that have considered the issue, including the Fourth Circuit. See, e.g., United States v. Warner, 498 F.3d 666, 694-95 (7th Cir. 2007); United States v. Angelilli, 660 F.2d 23, 33 n.10 (2d Cir. 1981), cert. denied, 455 U.S. 945 (1982); United States v. Long, 651 F.2d 239, 241 (4th Cir.), cert. denied, 454 U.S. 896 (1981); United States v. Clark, 646 F.2d 1259, 1261-67 (8th Cir. 1981); United States v. Altomare, 625 F.2d 5, 7 n.7 (4th Cir. 1980); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980); see also United States v. Powell, No. 87 CR 872-3 (N.D. Ill. February 27, 1988) (City of Chicago proper enterprise for purposes of RICO); State of New York v. O'Hara, 652 F. Supp. 1049 (W.D.N.Y. 1987) (in civil RICO suit, City of Niagara Falls proper enterprise); Commonwealth v. Cianfrani, 600 F. Supp. 1364 (E.D. Pa. 1985) (Pennsylvania Senate).

[73] See, e.g., United States v. Grubb, 11 F.3d 426, 438 (4th Cir. 1993) (Office of the 7th Judicial Circuit); United States v. Conn, 769 F.2d 420, 424-25 (7th Cir. 1985) (Cook County Circuit Court); United States v. Blackwood, 768 F.2d 131, 137-38 (7th Cir.) (Cook County Circuit Court), cert. denied, 474 U.S. 1020 (1985); United States v. Angelilli, 660 F.2d 23, 30-34 (2d Cir. 1981) (New York City Civil Court), cert. denied, 455 U.S. 945 (1982); United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981) (applying RICO without discussion to Municipal Court of El Paso, Texas), cert. denied, 455 U.S. 949 (1982); United States v. Stratton, 649 F.2d 1066, 1074-75 (5th Cir. 1981) (judicial circuit); United States v. Bacheler, 611 F.2d 443, 450 (3d Cir. 1979) (Philadelphia Traffic Court); United States v. Claville, 2008 WL 686977 (W.D. La. March 12, 2008) (the Judicial Branch of Louisiana government); United States v. Joseph, 526 F. Supp. 504, 507 (E.D. Pa. 1981) (Office of the Clerk of Courts of Lehigh County, Pennsylvania); United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa.), aff'd, 605 F.2d 1199 (3d Cir. 1979) (same), cert. denied, 444 U.S. 1072 (1980).

[74] See, e.g., United States v. DePeri, 778 F.2d 963 (3d Cir. 1985) (Philadelphia Police Department), cert. denied, 475 U.S. 1109 (1986); United States v. Alonso, 740 F.2d 862, 870 (11th Cir. 1984) (Dade County Public Safety Department, Homicide Section), cert. denied, 469 U.S. 1166 (1985); United States v. Ambrose, 740 F.2d 505, 512 (7th Cir. 1984) (Chicago Police Department), cert. denied, 472 U.S. 1017 (1985); United States v. Davis, 707 F.2d 880, 882-83 (6th Cir. 1983) (Sheriff's Office of Mahoning County, Ohio); United States v. Lee Stoller Enterprise, Inc., 652 F.2d 1313, 1316-19 (7th Cir.) (Sheriff's Office of Madison County, Illinois), cert. denied, 454 U.S. 1082 (1981); United States v. Bright, 630 F.2d 804, 829 (5th Cir. 1980) (Sheriff's Office of DeSoto County, Mississippi); United States v. Karas, 624 F.2d 500, 504 (4th Cir. 1980) (Office of County Law Enforcement Officials), cert. denied, 449 U.S. 1078 (1981); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (Sheriff's Department of Wilson County, North Carolina); United States v. Grzywacz, 603 F.2d 682, 685-87 (7th Cir. 1979) (Police Department of Madison, Illinois), cert. denied, 446 U.S. 935 (1980); United States v. Burnsed, 566 F.2d 882 (4th Cir. 1977) (applying RICO without discussion to the Vice Squad of the Charleston, South Carolina Police Department), cert. (continued...)

departments and agencies,[78] as well as municipalities.[79] Indeed, in United States v. Warner, 498 F.3d 666, 694-97 (7th Cir. 2007), the Seventh Circuit held that the State of Illinois was properly charged as the RICO enterprise that was the victim of corrupt office holders' pattern of racketeering activity.

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[74](...continued)
denied, 434 U.S. 1077 (1978); United States v. Brown, 555 F.2d 407, 415-16 (5th Cir. 1977) (Macon, Georgia Municipal Police Department), cert. denied, 435 U.S. 904 (1978); United States v. Cryan, 490 F. Supp. 1234, 1239-44 (D.N.J.) (applying RICO to Sheriff's Office of Essex County, New Jersey, but limiting RICO culpability to only those defendants who actually committed or authorized the acts charged in the indictment), aff'd, 636 F.2d 1211 (3d Cir. 1980).

[75] See, e.g., United States v. Goot, 894 F.2d 231, 239 (7th Cir.), cert. denied, 498 U.S. 811 (1990); United States v. Yonan, 800 F.2d 164, 167-68 (7th Cir. 1986) (Cook County State's Attorney's Office), cert. denied, 479 U.S. 1055 (1987); United States v. Altomare, 625 F.2d 5, 7 n.7 (4th Cir. 1980) (Office of Prosecuting Attorney of Hancock County, West Virginia).

[76] See, e.g., United States v. Burns, 683 F.2d 1056, 1059 n.2 (7th Cir. 1982) (Cook County, Illinois, Board of Tax Appeals), cert. denied, 459 U.S. 1173 (1983); United States v. Frumento, 563 F.2d 1083, 1089-92 (3d Cir. 1977) (Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes), cert. denied, 434 U.S. 1072 (1978).

[77] See, e.g., United States v. Balzano, 916 F.2d 1273, 1290 (7th Cir. 1990) (Chicago Fire Department).

[78] See, e.g., United States v. Urban, 404 F.3d 754, 770-71 (3d Cir. 2005) (the Construction Services Department of Philadelphia Department of Licences and Inspections); United States v. Hocking, 860 F.2d 769, 778 (8th Cir. 1988) (Illinois Department of Transportation); United States v. Dozier, 672 F.2d 531, 543 & n.8 (5th Cir.) (Louisiana Department of Agriculture), cert. denied, 459 U.S. 943 (1982); United States v. Angelilli, 660 F.2d 23, 33 n.10 (2d Cir. 1981), cert. denied, 455 U.S. 945 (1982); United States v. Long, 651 F.2d 239, 241 (4th Cir.), cert. denied, 454 U.S. 896 (1981); United States v. Clark, 646 F.2d 1259, 1261-67 (8th Cir. 1981); United States v. Altomare, 625 F.2d 5, 7 n.7 (4th Cir. 1980); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980); United States v. Davis, 576 F.2d 1065, 1067 (3d Cir.) (warden of county prison), cert. denied, 439 U.S. 836 (1978); State of Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245, 247-48 (D. Md. 1980) (Construction and Building Inspection Division of the Department of Housing and Community Development for the City of Baltimore); United States v. Barber, 476 F. Supp. 182, 191 (S.D. W. Va. 1979) (West Virginia Alcohol Beverage Control Commission).

[79] See, e.g., DeFalco v. Bernas, 244 F.3d 286, 306-09 (2d Cir. 2001) (The Town of Delaware).

2. A RICO Enterprise May Consist of an Association-in-Fact of Legal Entities as Well as an Association of Legal Entities and Individuals

Although RICO's definition of "enterprise," 18 U.S.C. § 1961(4), does not specifically list an association of legal entities, it does not preclude such as association. Section 1961(4) states that the term "enterprise" "includes" the various entities enumerated in that provision. 18 U.S.C. § 1961(4). "In [definitional] provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration." American Surety Co. v. Marotta, 287 U.S. 513, 517 (1933); accord United States v. New York Tel. Co., 434 U.S. 159, 169 & n.15 (1977) (holding that the definition of "property" contained in former Federal Rule of Criminal Procedure 41(h) "does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41," and explaining that, "[w]here the definition of a term in Rule 41(h) was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include'"); cf. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 189 (1941) ("To attribute . . . a [limiting] function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application."); see also *Webster's Third New International Dictionary* 1142 (1993) (defining "include" to mean, *inter alia*, "to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate"). When 18 U.S.C. § 1961 is read as a whole, it is clear that the verb "includes" in Section 1961(4) should be interpreted in that manner, and that the list that follows should be treated as illustrative rather than exclusive.

In accordance with the above-referenced principles, every court of appeals to address the question has agreed that a RICO enterprise may consist of an association-in-fact of legal entities, as

well as an alliance of legal entities and individuals.[80] As one court has noted, the definition of the term "enterprise" is of necessity a shifting one, given the fluid nature of criminal associations.[81]

In Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006), the Supreme Court granted a petition for a writ of certiorari to decide the question whether RICO's definition of "enterprise" encompasses an association of a corporation and individuals. However, the Supreme Court

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[80] See, e.g., Odom, 486 F.3d at 547-553 (two corporations); Living Designs, Inc. v. E.I. Dupont de Nemours, 431 F.3d 353, 361 (9th Cir. 2005) (a corporation, law firms retained by the corporation, and individuals); Cianci, 378 F.3d at 79-85 (the city of Providence, its office of Mayor and other agencies, and individuals); Najjar, 300 F.3d at 484-85 (a sole proprietorship, corporation and individuals); Goldin Indus., Inc., 219 F.3d 1271, 1275-77 (11th Cir. 2000) (several corporations and individuals); United States v. Parise, 159 F.3d 790, 794-95 (3d Cir. 1998) (enterprise consisted of four organizations); United States v. London, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (two or more legal entities), cert. denied, 511 U.S. 1155 (1996); United States v. Console, 13 F.3d 641, 652 (3d Cir. 1993) (law firm and medical practice), cert. denied, 511 U.S. 1076 (1994); United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993) (six corporations); United States v. Butler, 954 F.2d 114, 120 (2d Cir. 1992) (broad enterprise consisting of Local 200, the pension funds, and Local 362); United States v. Collins, 927 F.2d 605 (6th Cir.) (Table) (group of corporations), cert. denied, 502 U.S. 858 (1991); United States v. Masters, 924 F.2d 1362, 1366 (7th Cir.) (law firm, two police departments, and three individuals who are defendants), cert. denied, 500 U.S. 919 (1991); United States v. Stolfi, 889 F.2d 378, 379-80 (2d Cir. 1989) (local union and its welfare benefit fund); United States v. Feldman, 853 F.2d 648, 655-59 (9th Cir. 1988) (association of five corporations and two individuals, including the defendant), cert. denied, 489 U.S. 1030 (1989); United States v. Perholtz, 842 F.2d 343, 352-54 (D.C. Cir.) (group of individuals, corporations, and partnerships), cert. denied, 488 U.S. 821 (1988); United States v. Aimone, 715 F.2d 822, 826 (3d Cir. 1983) (enterprise may be comprised of a combination of "illegal" entities and a group of individuals associated in fact), cert. denied, 468 U.S. 1217 (1984); United States v. Thevis, 665 F.2d 616, 625-26 (5th Cir.) (association of corporations and individuals), cert. denied, 456 U.S. 1008 (1982); United States v. Huber, 603 F.2d 387, 393-94 (2d Cir. 1979) (association of corporations and individuals), cert. denied, 445 U.S. 927 (1980); United States v. Campanale, 518 F.2d 352, 357 n.11 (9th Cir. 1975) (enterprise composed of two corporations and a union), cert. denied, 423 U.S. 1050 (1976) (group of corporations); United States v. Pryba, 674 F. Supp. 1504, 1508 (E.D. Va. 1987) (enterprise could consist of group of individuals and corporations); Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1253 (E.D. Mich. 1987) (group of individuals and corporations proper enterprise).

[81] See, e.g., United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979).

dismissed the petition "as improvidently granted," without deciding that question. Id.[82]

3. Establishing A Legal Enterprise

Usually, there is little difficulty in proving the existence of an enterprise consisting of a legal entity: proof that the entity in question has a legal existence satisfies the enterprise element.[83]

Proof that a RICO enterprise consisting of a governmental office, such as a state office or police department, is a legal entity can be established in various ways. For example, if the governmental office or department was created by statute, regulation, or ordinance, a court can take judicial notice of the statute, regulation, or ordinance authorizing the office or department. If the governmental entity was created by a charter or contract (e.g., a joint task force), the charter or contract should be introduced into evidence. If the governmental entity is incorporated (e.g., a township), the articles of incorporation should be introduced into evidence.

Testimony from the appropriate representative of the governmental entity could establish the existence of hierarchy or organizational structure and functions of the governmental entity, as well as explain the defendant's relationship to the governmental entity and his position or function within the governmental entity. Employment records could also be used to establish the defendant's position in the governmental entity.

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[82] The United States filed an Amicus brief in Mohawk Industies in support of respondents' argument that a RICO enterprise may consist of an association of legal entities and individuals.

[83] See, e.g., Warner, 498 F.3d at 696-97 ("When the enterprise under consideration is a legal entity, the enterprise element is satisfied by the mere proof that the entity does in fact have a legal existence" (quoting James Morrison Mecone, et al; Racketeer Influenced and Corrupt Organizations, 43 Am. Crim. L. Rev. 869, 881 (2006)); United States v. Kirk, 844 F.2d 660, 664 (9th Cir.), cert. denied, 488 U.S. 890 (1988); United States v. Cauble, 706 F.2d 1322, 1340 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

4. Establishing an Association-in-Fact Enterprise -- the Bledsoe Case and Its Progeny

a. The Supreme Court and Numerous Lower Courts have held that an Association-in-Fact Enterprise is Proven by Evidence of an Ongoing Organization and by Evidence that the Various Associates of the Enterprise Function as a Continuing Unit. Proof of Such An Enterprise is Not Defeated Merely Because There is a Gap in its Activity or a Change in its Membership

In United States v. Turkette, 452 U.S. 576 (1981), the Supreme Court explicitly held that the enterprise element and pattern of racketeering element of RICO were separate elements and that an association-in-fact enterprise

> is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity;" it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Id. at 583.

Applying these standards, the Supreme Court rejected the lower court's conclusion that including wholly criminal associations within the definition of the term enterprise would amount to making the "pattern of racketeering activity" the enterprise. The Court found sufficient Government allegations that the enterprise consisted of a "'group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court

proceedings. . . .'" Id. at 579.[84]

Establishing that the members of the enterprise operated together in a coordinated manner in furtherance of a common purpose may be proven by a wide variety of direct and circumstantial evidence including, but not limited to, inferences from the members' commission of similar racketeering acts in furtherance of a shared objective, financial ties, coordination of activities, community of interests and objectives, interlocking nature of the schemes, and overlapping nature of the wrongful conduct.[85] Moreover, such evidence of the existence of the charged enterprise may

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[84] Numerous lower courts have followed Turkette's teachings on the principles governing proof of an association-in-fact enterprise. See, e.g., Odom, 486 F.3d at 548-50; Jones, 455 F.3d at 144; United States v. Olson, 450 F.3d 655, 664 (7th Cir. 2006); Johnson, 440 F.3d at 839-41; United States v. Pipkins, 378 F.3d 1281, 1289 (11th Cir. 2004); Cianci, 378 F.3d at 81-82; United States v. Connolly, 341 F.3d 16, 25-28 (1st Cir. 2003); Najjar, 300 F.3d at 484; United States v. Patrick, 248 F.3d 11, 17-19 (1st Cir. 2001); United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999); United States v. Henderson, 147 F.3d 457, 459 (5th Cir. 1998); United States v. White, 116 F.3d 903, 924-25 n.7 (D.C. Cir. 1997).

[85] See, e.g., Jones, 455 F.3d at 144 ("an association-in-fact is oftentimes more readily proven by what it *does*") (citation omitted); United States v. Owens, 167 F.3d 739, 751 (1st Cir. 1999) (members of drug trafficking enterprise provided other members with financial assistance and coordinated transportation of drugs); Richardson, 167 F.3d at 625 ("Additional evidence of [the enterprise's] organization and continuity comes from the robberies' consistent pattern"); United States v. Davidson, 122 F.3d 531, 535 (8th Cir. 1997) ("The length of these associations, the number and variety of crimes the group jointly committed, and Davidson's financial support of his underlings demonstrates an ongoing association with a common purpose to reap the economic rewards flowing from the crimes, rather than a series of ad hoc relationships"); Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 263-64 (2d Cir. 1995) (jury could infer that two corporations engaged in manufacturing electromagnetic locks were members of an association-in-fact enterprise from their pattern of disseminating false and deceptive statements about a competitor's electromagnetic locks to obtain business); Blinder, 10 F.3d at 1475 ("The essence of the enterprise . . . was the identical means by which the constituent blind pool companies were formed and taken public through Blinder Robinson"); United States v. Perholtz, 842 F.2d 343, 355 (D.C. Cir. 1988) ("The interlocking nature of the schemes and the overlapping nature of the wrongdoing provides sufficient evidence for the jury to conclude that this was a single enterprise. . . . "); United States v. Qaoud, 777 F.2d 1105, 1116-17 (6th Cir. 1985) (holding that the jury could have inferred the existence of the alleged association-in-fact enterprise from the "coordinated nature of the defendants' activity" and that the (continued...)

be based on uncharged unlawful conduct. See Section VI (N) below.

Furthermore, the requisite continuity of the enterprise and of the functioning of its associates is not defeated merely because there is a gap or interruption in the racketeering activities of the enterprise, or the membership of the enterprise changes over time.[86] As the District of Columbia Circuit has stated, "it is not essential that each and every person named in the indictment [as a member of the enterprise] be proven to be a part of the enterprise. The enterprise may exist even if its membership changes over time . . . or if certain defendants are found by the [fact finder] not to

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[85](...continued)
defendants' racketeering acts were facilitated by their nexus to the enterprise); United States v. Griffin, 660 F.2d 996, 1000 (4th Cir. 1981) ("Proof of the existence of an associated-in-fact enterprise requires proof of a 'common purpose' animating its associates"); United States v. Elliott, 571 F.2d 880, 898 (5th Cir. 1978) ("A jury is entitled to infer the existence of an enterprise on the basis of largely or wholly circumstantial evidence."), cert. denied, 439 U.S. 953 (1978). See also cases cited in Section II(D)(4)(b) below.

[86] See, e.g., United States v. Nascimento, 491 F.3d 25, 33-36 (1st Cir. 2007) (rejecting a claim of variance in proof of the enterprise and finding that the evidence established the single alleged enterprise where the indictment alleged that the association-in-fact enterprise existed from July 1996 until September 20, 2004, but the evidence established that the enterprise existed from 1997 to 2001); Olson, 450 F.3d at 664-66 (ruling that the enterprise, the Latin Kings street gang, functioned as a continuous unit where its unlawful activities spanned from 1987 through 2000, even though there was a brief interruption of its activities in the mid-1990's and there was a break-up of its leadership in 1995); Connolly, 341 F.3d at 25-27 (ruling that the alleged association-in-fact enterprise functioned as a continuing unit from September 1975 to September 1998, even though the jury found that all but one of the alleged racketeering acts dating from 1970's and 1980's had not been proven beyond a reasonable doubt, and stating that "the fact that nine of the fourteen enumerated racketeering acts were found 'unproven' does not compel a finding of no continuity in the enterprise. The evidence relating to those acts remained available to the jury in its evaluation of the enterprise element of the RICO charge."); United States v. Church, 955 F.3d 688, 697-700 (11th Cir. 1992) (ruling that the association-in-fact, drug trafficking enterprise functioned as a continuing unit from 1973 to 1986, even though there was a three year gap in the commission of racketeering acts from 1980 to 1983); but see United States v. Morales, 185 F.3d 74, 79-81 (2d Cir. 1999) (ruling that association-in-fact enterprise that engaged in armed robbery and murder did not function as a continuing unit from 1987 to 1996 as alleged when there was a seven year hiatus in unlawful activity during several defendants' incarceration from 1988 to 1995).

have been members at any time." Perholtz, 842 F.2d at 364.[87]

Moreover, it is not necessary to prove "that every member of the enterprise participated in or knew about all its activities." United States v. Cagnina, 697 F.2d 915, 922 (11th Cir. 1983). Accord United States v. Hewes, 729 F.2d 1302, 1310-11 (11th Cir. 1984); United States v. Rastelli, 870 F.2d 822, 827-28 (2d Cir. 1989). Rather, "it is sufficient that the defendant know the general nature of the enterprise and know that the enterprise extends beyond his individual role." Rastelli,

[87] Accord Olson, 450 F.3d at 665 (evidence of a single enterprise was not vitiated by a change in the leadership of the enterprise, the Latin Kings street gang); Smith, 413 F.3d at 1267 (ruling that the enterprise functioned as a continuing unit "even if some individuals left [it] and were replaced by new members at a later date"); United States v. White, 116 F. 3d 903, 925 n.7 (D.C. Cir. 1997) ("Such an association of individuals may retain its status as an enterprise even though the membership of the association changed by the addition or loss of individuals during the course of its existence"); United States v. Mauro, 80 F.3d 73, 77 (2d Cir. 1996) (existence of enterprise not defeated by "changes in membership"); United States v. Nabors, 45 F.3d 238, 240-41 (8th Cir. 1995) ("the personnel of the enterprise may undergo alteration without loss of the enterprise's identity as an enterprise"); United States v. Orena, 32 F.3d 704, 710 (2d Cir. 1994) (ruling that an internal dispute over control of the enterprise did "not signal the end of an enterprise"); Church, 955 F. 2d at 698 (enterprise established where the "personnel of the enterprise was not the same from beginning to end"); United States v. Coonan, 938 F.2d 1553, 1560-61 (2d Cir. 1991) (an association-in-fact enterprise continues to exist even though it undergoes change in leadership); United States v. Weinstein, 762 F. 2d 1522, 1537 n.13 (11th Cir. 1985) (liability for participation in a RICO enterprise does not require "participation of all members throughout the life of the enterprise"); United States v. Hewes, 729 F. 2d 1302, 1317 (11th Cir. 1984) ("The law does not require all members of the RICO enterprise to have maintained their association with it throughout the enterprise's life"); United States v. Riccobene, 709 F.2d 214, 223 (3d Cir. 1983) (that "the various associates function as a continuing unit" "does not mean that individuals cannot leave the group or that new members cannot join at a later time"); United States v. Cagnina, 697 F.2d 915, 921-22 (11th Cir.) ("Although the enterprise grew in membership and its activities became more diverse, these facts do not negate its existence."), cert. denied, 464 U.S. 856 (1983); United States v. Errico, 635 F.2d 152, 155 (2d Cir. 1980) (upholding instruction that membership in an enterprise may change over time), cert. denied, 453 U.S. 911 (1981); United States v. Elliot, 571 F. 2d 880, 898 n.18 (5th Cir. 1978) (existence of enterprise not defeated by insufficient evidence as to one of its alleged members).

870 F.2d at 828.[88] Nor is it necessary to prove that the enterprise or its members acted with criminal intent.[89] Rather, the Government need only establish that the defendant acted with the requisite mens rea. See Section VI(C) below.

b. The Courts of Appeals Have Adopted Somewhat Different Positions Regarding an Enterprise's Structure and its Distinctness from the Alleged Pattern of Racketeering Activity – the Bledsoe Case and its Progeny

Since the Turkette decision, the circuits have issued numerous opinions analyzing the necessary degree of an enterprise's structure and its distinctness from the alleged pattern of racketeering activity. The Eighth Circuit, in United States v. Bledsoe, 674 F.2d 647 (8th Cir.), cert. denied, 459 U.S. 1040 (1983), set a strict standard for measuring the degree of structure and distinctness required before an association-in-fact enterprise is established under RICO. The court construed Turkette to require that the enterprise exhibit three basic characteristics: (1) a common or shared purpose which animates those associated with the enterprise, (2) some continuity of structure and personality, and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity. Id. at 665. As to the third element, the court noted that the distinct structure might be demonstrated by proof that the group engaged in a diverse pattern of crimes or that it had an organizational pattern or system of authority beyond that necessary to perpetrate the

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[88] Accord United States v. Schell, 775 F.2d 559, 568-69 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Tillett, 763 F.2d 628, 631-32 (4th Cir. 1984); Hewes, 729 F.2d at 1310-11; Elliott, 571 F.2d at 897-98; 903-04.

[89] See, e.g., Cianci, 378 F.3d at 82-83; United States v. Feldman, 853 F.2d 648, 657 (9th Cir. 1988).

predicate crimes. Id.[90]

The alleged enterprise in Bledsoe consisted of numerous individuals, including the defendants, who fraudulently sold securities of agricultural cooperatives. Defendants Phillips and Gibson formed a cooperative called UFA-Mo to facilitate the fraudulent scheme and agreed to share illicit profits generated by the scheme, but dissolved their agreement a short time later. Gibson continued to operate UFA-Mo and Phillips formed a new cooperative called PFA. While UFA-Mo and PFA employed some of the same defendants and operated in a similar manner, the two cooperatives were otherwise unrelated. Phillips continued to initiate similar schemes in other states consisting of varied participants, some of whose participation was concealed from other participants. These facts, the court found, demonstrated only that various schemes were conducted using the same modus operandi, that Phillips had initiated these schemes, and that some of the other defendants had some connection with these co-ops. The court held that the association contained insufficient structure, and that the evidence merely demonstrated the existence of separate associations of individuals without any overarching structure or common control. The court, finding no evidence of structure, a pattern of authority or control, continuity in the pattern of association, or a common purpose among all the defendants, reversed the defendants' RICO convictions. Id. at 665-67.

In another influential case, United States v. Riccobene, 709 F.2d 214, 223-24 (3d Cir.), cert. denied, 464 U.S. 849 (1983), the Third Circuit adopted a test similar to the Bledsoe test, holding that

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[90] Thus, the Bledsoe court also rejected "minimal association" as sufficient to prove the existence of an enterprise and required that an enterprise possess a "distinct structure" such as the "command system of a Mafia family" or the "hierarchy, planning and division of profits within a prostitution ring"; an enterprise must be more than an informal group created to perpetrate the acts of racketeering. Bledsoe, 674 F.2d at 665.

the Philadelphia LCN family constituted an association-in-fact enterprise under RICO.[91] Contrary to suggestions in Bledsoe, however, the Third Circuit recognized that the same evidence used to establish the pattern of racketeering activity may also be used to establish the existence of the enterprise.[92]

The Fourth, Seventh, and Tenth Circuits have adopted the Bledsoe/Riccobene approach, requiring that the enterprise have an existence beyond that necessary to establish the pattern of racketeering activity.[93] Like Riccobene, these circuits have also concluded that proof of the existence

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[91] Riccobene, 709 F.2d at 221-22, held that: (1) the enterprise must have an ongoing organization, formal or informal, i.e., various associates of the enterprise must function as a continuing unit; (2) the enterprise must have an existence "separate and apart from the pattern of racketeering activity;" (3) the Government must show a hierarchical or consensual structure within the group for making decisions, and there "must be some mechanism for controlling and directing the affairs of group on an ongoing . . . basis." However, the court also held that it is unnecessary to show that the enterprise has a function wholly unrelated to racketeering activity, only that the enterprise existed beyond that necessary merely to commit each of the racketeering acts.

[92] See n.91 above; see also United States v. Pellulo, 964 F.2d 193, 198, 211-12 (3d Cir. 1992) (holding that Riccobene applies to both "lawful and unlawful" enterprises and that in appropriate cases, enterprise can be inferred from proof of the pattern of racketeering activity). The Third Circuit has repeatedly followed Riccobene. See, e.g., Urban, 404 F.3d at 770; United States v. Irizarry, 341 F.3d 273, 286 (3d Cir. 2003); United States v. McDade, 28 F.3d 283, 295 (3d Cir. 1994), cert. denied, 514 U.S. 1003 (1995); United States v. Console, 13 F.3d 641, 648-52 (3d Cir. 1993), cert. denied, 511 U.S. 1076 (1994).

[93] See, e.g., **Fourth Circuit Cases:** Najjar, 300 F.3d at 484-85 (ruling that a corporation, a sole proprietorship and various individuals comprising the alleged enterprise worked together to further a car theft and sale ring, and hence constituted a RICO enterprise); United States v. Tillett, 763 F.2d 628, 631-32 (4th Cir. 1985) (finding enterprise evidence sufficient where leader and his financiers had common purpose of making money trafficking in illegal marijuana and that operational structure existed despite fact that changes in personnel occurred during conspiracy where evidence showed organization existed in intervals between actual drug importations). **Seventh Circuit Cases:** Limestone Dev. Corp. v. Village of Lemont, Illinois, 520 F.3d 797, 804 (7th Cir. 2008) (upholding the dismissal of a civil RICO complaint for failure to indicate that the enterprise had "a structure of any kind"); Olson, 450 F.3d at 664-68 (holding that the evidence established that the Latin Kings street gang constituted an enterprise because it had: (1) an organized structure that (continued...)

of the enterprise may overlap with the proof of the pattern of racketeering activity.[94]

The Fifth Circuit appears to have taken somewhat different positions on the Bledsoe issue in several cases.[95]

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[93](...continued)
included a leadership that enforced rules and discipline; (2) its members worked together to carry out drug trafficking and other offenses; and (3) its activities continued from 1987 through 2000; and the court rejected the claim that the enterprise ceased to operate merely because there was a brief interruption in its activities in 1995 due to a dispute over its leadership which led to new leaders); United States v. Phillips, 239 F.3d 829, 842-44 (7th Cir. 2001) (ruling that the "Dawg Life" street gang constituted a RICO enterprise for similar reasons); United States v. Korando, 29 F.3d 1114, 1117-19 (7th Cir.) (holding that a RICO enterprise must have structure and goals separate and apart from the predicate acts themselves and structure sufficient to distinguish it from mere conspiracy with continuity of an informal enterprise, but also differentiation of roles could provide necessary structure to satisfy enterprise element; evidence establishing differentiation in roles between participants in the arson ring and the enterprise found sufficient), cert. denied, 513 U.S. 993 (1994); but see Stachon v. United Consumers Club, Inc., 229 F.3d 673, 676-77 (7th Cir. 20002) (affirming the district court's pre-trial dismissal of a private civil RICO complaint for failure to adequately allege the existence of an enterprise). **Tenth Circuit Cases:** Smith, 413 F.3d at 1266-68 (ruling that a street gang known as the King Mafia Disciples constituted a RICO enterprise, applying the Riccobene framework); United States v. Sanders, 928 F.2d 940, 943-44 (10th Cir.) (found enterprise sufficient where evidence established a constant decision making structure with leader in charge of maintaining heroin supplies with other members in charge of street distributions, even though membership changed and the leader instructed his members from prison where the group continued to exist and thrive on the proceeds of heroin sales), cert. denied, 502 U.S. 845 (1991).

[94] See, e.g., United States v. Tillett, 763 F.2d 628, 631-32 (4th Cir. 1985); United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981); United States v. Rogers, 89 F.3d 1326, 1336 (7th Cir.), cert. denied, 519 U.S. 999 (1996); United States v. Sanders, 905 F.2d 940, 944 (10th Cir.), cert. denied, 502 U.S. 845 (1991).

[95] See Crowe v. Henry, 43 F.3d 198, 204-05 (5th Cir. 1995) (holding that plaintiff had successfully pled an ongoing association-in-fact enterprise to operate a farming venture consisting of Crowe and Henry with existence separate and apart from the pattern of racketeering and whose members operated under an hierarchical or consensual decision making structure); United States v. Williams, 809 F.2d 1072, 1094 (5th Cir.) (rejecting Bledsoe and finding sufficient jury instructions complying with Turkette and Elliott, infra, which instructions distinguished between enterprise and racketeering elements and conveyed that jury must find both existence of an enterprise and a pattern of racketeering activity), cert. denied, 484 U.S. 896 (1987); United States v. Elliott, 571 F.2d 880, 898 (5th Cir.) (holding enterprise sufficient where evidence established informal association of (continued...)

The First, Second, Ninth, Eleventh, and District of Columbia Circuits have rejected the more rigid Bledsoe/Riccobene approach, holding instead that an enterprise need not have an ascertainable structure distinct from the pattern of racketeering activity, and that the existence of an enterprise should be evaluated on the totality of the evidence under the principles of Turkette and may be inferred from the evidence establishing the pattern of racketeering activity:

First Circuit Cases:

(1) Nascimento, 491 F.3d at 31-34. The court ruled that a street gang, "Stonehurst Street," constituted an enterprise where its members had a shared set of goals, shared a cache of firearms, self-identified as belonging to an organization, pooled and shared resources, coordinated their activities to carry out numerous acts of violence against other gang members. The Court also noted that "[a]n enterprise is chiefly distinguished from the pattern of racketeering activity by the fact that it possesses some goal or purpose more pervasive and more enduring than the usual gratification that can accrue from the successful completion of each particular criminal act." Id. at 32.

(2) Cianci, 378 F.3d at 81-88. The court ruled that an association of the City of Providence, Rhode Island, its Office of Mayor and other agencies, its Mayor and other individuals constituted an enterprise where corrupt city officials used their official positions in concert to derive unlawful proceeds from the operation of the city and its agencies.

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[95](...continued)
several individuals who carried out diversified criminal activity to make money), cert. denied, 439 U.S. 953 (1978). However, another line of Fifth Circuit cases appear to apply the Bledsoe/Riccobene test without explicitly overruling prior Fifth Circuit cases. See, e.g., Landry v. Airline Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 433-34 (5th Cir.) (holding that pilots who brought civil RICO suit against airline, pilots union, and pilot who represented the union in negotiations with the airline, failed to adequately allege an association-in-fact enterprise), cert. denied, 498 U.S. 895 (1990); Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 748-49 (5th Cir. 1989) (ruling plaintiff demonstrated the enterprise existed separate and apart from the racketeering activity where evidence established that defendants had associated together to commit the same predicate acts on at least one other occasion, indicating enterprise had continuity); Elliott v. Foufas, 867 F.2d 877, 881 (5th Cir. 1989) (holding that plaintiff in civil RICO suit failed to adequately allege the existence of an association-in-fact enterprise because the civil complaint failed to assert continuity--that the association existed for any purpose other than to commit the predicate offenses).

(3) Connolly, 341 F.3d at 22-28. The court ruled that the evidence established the alleged association-in-fact enterprise comprised of a corrupt former FBI agent, several organized crime figures and others, where members of the enterprise bribed the former FBI agent to provide confidential law enforcement information that facilitated the organized crime figures' unlawful activities. The court noted that "there is no requirement under RICO that an enterprise have an 'ascertainable structure.' . . . Hence an 'enterprise' need only be 'a group of persons associated together for a common purpose of engaging in a criminal course of conduct." Id. at 27-28 (citations omitted). The court added that "an enterprise is not merely a related assortment of criminal activities. Rather, there must be some goal - 'a purpose of engaging in a course of conduct' - beyond the isolated benefit that can redound from the commission of each criminal act, and there must be an 'ongoing organization' with 'associates function[ing] as a continuing unit.'" Id. at 25 (citations omitted).

(4) United States v. Patrick, 248 F.3d 11, 17-19 (1st Cir. 2001). The court explicitly rejected Bledsoe's requirement that a RICO enterprise have "an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity . . ." Id. at 18, quoting Bledsoe, 674 F.2d at 665. The court ruled that the evidence established the alleged enterprise, "the Intervale Posse," a gang that distributed cocaine from 1990 to 1996 in the Dorchester neighborhood of Boston, where the enterprise-gang "had colors and signs, it had older members who instructed younger ones, its members referred to the gang as family, and it had 'sessions' where important decisions were made, including decisions about taking action against rival drug dealers." Id. at 19.[96]

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[96] See also United States v. Shea, 211 F.3d 658, 665 (1st Cir. 2000) (citation omitted) (not discussing Bledsoe or Riccobene, but stating that "[n]o magic formula exists for determining when a set of jointly committed crimes adds up to an overarching conspiracy or enterprise; the courts tend to look for common goal, overlap among participants, and a measure of interdependence"; and ruling that the evidence established the alleged association-in-fact enterprise of individuals, whose membership changed over time, who committed a series of armed robberies); United States v. London, 66 F.3d 1227, 1230-31, 1243-45 (1st Cir. 1995) (declining to follow Bledsoe but nevertheless finding enterprise sufficient, even if Bledsoe were applicable, where bar and check cashing business used by defendant to launder money for illegal bookmakers, which also conducted significant amount of legitimate business separate from alleged racketeering activity, functioned as continuing unit and had ascertainable structure distinct from conduct in pattern of racketeering; also rejecting claim of identity between the defendant and the enterprise where business employed at least one other individual in addition to the defendant), cert. denied, 517 U.S. 1155 (1996); Libertad v. Welch, 53 F.3d 428, 444 (1st Cir. 1995) (neither Bledsoe nor Riccobene mentioned in affirming dismissal of RICO against some appellees where record showed nothing more than their participation in one blockade without continued association with other appellees; but finding sufficient evidence of enterprise in the case of two anti-abortion groups who publicly claimed their (continued...)

Second Circuit Cases:

(1) United States v. Jones, 455 F.3d 134, 144-45 (2d Cir. 2006). The court stated that "an association-in-fact [enterprise] is oftentimes more readily proven by what it *does*, rather than by abstract analysis of its structure," quoting United States v. Coonan, 938 F.2d 1553, 1559 (2d Cir. 1991). The court ruled that the evidence established the alleged drug trafficking enterprise which continued its unlawful activities over a substantial period of time, had a division of labor and duties, and had leaders, mid-level supervisors and subordinates.

(2) United States v. Coonan, 938 F.2d 1553, 1559-61 (2d Cir. 1991), cert. denied, 503 U.S. 941 (1992). The court held that "the existence of an association-in-fact is oftentimes is more readily proven by 'what it **does** rather than by abstract analysis of its structure';" and that proof of various racketeering acts may establish the existence of the enterprise. Specifically, the court held that the "Westies," an organized crime group engaged in murder, loansharking, extortion, and drug trafficking, had organization and structure and constituted an enterprise.

(3) United States v. Indelicato, 865 F.2d 1370, 1384 (2d Cir.), cert. denied, 493 U.S. 811 (1989). The court recognized that a RICO enterprise and pattern of racketeering activity are separate elements of a RICO offense, but that these elements may be proven by the same evidence.

(4) United States v. Ferguson, 758 F.2d 843, 847-53 (2d Cir.), cert. denied, 474 U.S. 1032 (1985) (The court held that "RICO charges may be proven even when enterprise and predicate acts are functionally equivalent, and proof used to establish them coalesces").

(5) United States v. Bagaric, 706 F.2d 42, 55-56 (2d Cir.), cert. denied, 464 U.S. 840 (1983). In a prosecution of members of a terrorist organization engaged in acts involving murder and extortion, the court ruled that an enterprise may be established by the same evidence used to prove the pattern of racketeering activity, adding that an enterprise may be "in effect no more than the sum of the predicate acts of racketeering."

(6) United States v. Mazzei, 700 F.2d 85, 88-90 (2d Cir. 1982), cert. denied, 461 U.S. 945 (1983). The court rejected Bledsoe's view that proof of the enterprise and the pattern of racketeering activity be distinct and independent, and approved an

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[96](...continued)
affiliation, had leaders in common, shared a common purpose and information and strategy in obtaining goals, and who participated together in five blockades and announced, more than a year after last blockade, their plans to continue combined efforts).

enterprise consisting of a group of individuals associated together for the common purpose of perpetuating college basketball point shaving scheme, which enterprise functioned as a continuing unit and the enterprise existed separate and apart from the pattern of racketeering activity.

Ninth Circuit Cases:

(1) Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) (en banc). The Ninth Circuit, sitting en banc, explicitly overruled its prior cases indicating that a RICO enterprise must have some structure beyond what is necessary to commit the alleged racketeering acts,[97] and explicitly rejected the approaches set forth in Bledsoe and Riccobene. See Odom, 486 F.3d at 550-51. The en banc court explicitly held that "RICO does not require any particular organizational structure, separate or otherwise." Id. at 551. The Ninth Circuit explained:

> To require that an associated-in-fact enterprise have a structure beyond that necessary to carry out its racketeering activities would be to require precisely what the Court in Turkette held that RICO does **not** require. Such a requirement would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities. In other words, it would require -- as the First Circuit sought to require in Turkette -- that the enterprise have a structure serving both illegitimate and legitimate purposes. But the Court in Turkette held precisely the opposite. It held that a purely criminal enterprise can be an associated-in-fact enterprise within the meaning of RICO.

Id. at 551. The Ninth Circuit concluded that civil RICO complaint had adequately alleged an association-in-fact enterprise comprised of two corporations, Microsoft and Best Buy, in that they allegedly worked together to commit a fraud on consumers. Id. at 552.

The Court explained that the complaint sufficiently alleged "a common purpose of engaging in a course of conduct," stating:

> We first conclude that plaintiffs have sufficiently alleged that defendants Best Buy and Microsoft have associated for "a common purpose of engaging in a course of conduct". . . . According to the complaint, defendants had the common purpose of increasing the

[97] See, e.g., Wagh v. Metris Direct, Inc., 348 F.3d 1102, 1112 (9th Cir. 2003); Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1083-84 (9th Cir. 2000); Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996); United States v. Feldman, 853 F.2d 648, 659-60 (9th Cir. 1988).

> number of people using Microsoft's Internet Service, and doing so by fraudulent means. Best Buy furthered this common purpose by distributing Microsoft Internet Trial CD's and conveying its customers' debit and credit card information to Microsoft. Microsoft then used the information to activate customer accounts. These allegations are more than adequate to establish, if true, that Microsoft and Best Buy had a common purpose of increasing the number of people using Microsoft's Internet service through fraudulent means.

Id. at 552 (internal citation omitted).[98]

Eleventh Circuit Cases:

(1) Williams v. Mohawk Indus. Inc., 465 F.3d 1277, 1283-86 (11th Cir. 2006). The court held that the civil RICO complaint adequately alleged an association-in-fact enterprise comprised of Mohawk Industries, Inc., and various independent agents the corporate defendant hired to recruit, hire and harbor illegal alien workers. The court explained that members of the enterprise shared a common purpose of obtaining illegal workers for Mohawk, and that there is no "requirement that the 'common purpose' of the enterprise be the sole purpose of each and every member of the enterprise." Id. at 1285-86. The Court also noted it was particularly significant to the determination of the existence of an enterprise that the alleged association of individuals furnished a vehicle for the commission of the alleged racketeering acts. Id. at 1285.

(2) Pipkins, 378 F.3d at 1288-94. The court held that the evidence established the alleged enterprise comprised of an association of pimps, who operated in Atlanta and furthered a shared objective to make money from prostituting juveniles, and that there was no requirement that the enterprise be a formally structured group.

(3) United States v. Church, 955 F.2d 688, 698-99 (11th Cir.), cert. denied, 506 U.S. 881 (1992). The court held that the evidence established the enterprise comprised of an association of individuals where the enterprise was devoted to making money from repeated criminal activity and protecting that money by any means necessary even though enterprise's membership was not the same from beginning to end, but "[a]s participants left the enterprise, others joined, each becoming involved in multiple aspects of the enterprise" and there was a three year gap in predicate acts.

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[98] See also United States v. Fernandez, 388 F.3d 1199, 1214, 1223-24 (9th Cir. 2004) (holding that the evidence established the alleged enterprise, comprised of an association of individuals, referred to as "the Mexican Mafia").

(4) United States v. Hewes, 729 F.2d 1302, 1310 (11th Cir. 1984), cert. denied, 469 U.S. 1110 (1985). The court held that the evidence was sufficient to establish an association-in-fact enterprise even though the enterprise consisted of a "group of persons who had committed a variety of unrelated offenses with no agreement as to any particular crime," but who were "associated for the purpose of making money from the repeated criminal activity."

(5) United States v. Cagnina, 697 F.2d 915, 921-22 (11th Cir.), cert. denied, 464 U.S. 856 (1983). The court held that Turkette "did not suggest that the enterprise must have a distinct, formalized structure" and that "[a]lthough both an enterprise and a pattern of racketeering activity must be shown, ... the proof used to establish the two elements may in particular cases coalesce." The court also rejected the Eighth Circuit's requirement that Government must prove an enterprise distinct from evidence showing a pattern of racketeering, and found that the enterprise was adequately established where evidence showed an informal association with a common purpose, i.e., making money from repeated criminal activity, and association functioned several years under leadership of one defendant.

District of Columbia Circuit Cases:

(1) United States v. White, 116 F.3d 903, 923-25 (D.C. Cir.), cert. denied, 522 U.S. 960 (1997). The court held that the evidence established the alleged enterprise where: the enterprise was a drug distribution crew; the crew protected a geographic marketing area and ran centralized crack storage and preparation operations; two defendants occupied supervisory positions over retail-level drug sellers; leaders used others to sell to buyers that they did not know and supplied crack to middle-men who resold it at the retail level; and leaders shared income and cocaine supplies and one leader substituted for primary leader while he was incarcerated.

(2) United States v. Perholtz, 842 F.2d 343, 362-63 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988). The court explicitly rejected Bledsoe and ruled that Turkette was satisfied by evidence that associates who shared a common purpose were "bound together by some form of organization so that they function[ed] as a continuing unit and thus constitut[ed] an enterprise;" and that the existence of enterprise could be inferred from the proof of a pattern of racketeering acts. (internal quotation marks omitted).

The Sixth Circuit has rejected core aspects of the Bledsoe/Riccobene approach,[99] but in some cases has indicated that a RICO enterprise must have some structure.[100]

Moreover, recent Eighth Circuit decisions suggest that it is relaxing its view of the evidence required to establish Bledsoe's third element (i.e., whether the enterprise is distinct and separate from the pattern of racketeering activity). In particular, recent Eighth Circuit decisions appear to focus on evidence demonstrating that the enterprise has an existence beyond that necessary to commit the pattern of racketeering activity, regardless of whether such evidence was also used to establish the commission of the predicate offenses.[101] Most notably, the Eighth Circuit, in United States v.

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[99] See, e.g., United States v. Qaoud, 777 F.2d 1105, 1115-16 (6th Cir. 1985) (holding that, although the enterprise and pattern of racketeering activity are separate elements, they may be proved by same evidence), cert. denied, 475 U.S. 1098 (1986); Hofstetter v. Fletcher, 905 F.2d 897, 902-03 (6th Cir. 1988) (same). A recent district court in the Sixth Circuit has stated that the Sixth Circuit has "squarely rejected" the Bledsoe/Riccobene approach. See United States v. Musbah Hammoud, 2008 WL 2251207 at *2 (E.D. Mich. May 16, 2008).

[100] For example, in Johnson, 440 F.3d at 839-41, the Sixth Circuit quoted the Seventh Circuit's decision in Rogers, 89 F.3d at 1337, stating that there must be "some structure" to an enterprise, "but there need not be much." Johnson, 440 F.3d at 840. The Sixth Circuit, however, added that the proof of the separate elements of an enterprise and a pattern of racketeering activity may coalesce. Id. The court held that the evidence established the alleged enterprise, comprised of an association of individuals who engaged in a pattern of arson, insurance fraud, and murder. The court explained that the enterprise had "a hierarchical decision-making structure and a division of labor among the various players," and its members had a common purpose "to make money" from their unlawful activities. Id. See also Van Den Broeck v. Commonpoint Mortg. Co., 210 F.3d 696, 699-700 (6th Cir. 2000) (affirming the district court's dismissal of a civil RICO complaint for failure to adequately allege an association-in-fact enterprise, stating that "some minimal level of organizational structure between the entities involved" is required); United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000) (noting that the Detroit La Cosa Nostra family, the alleged enterprise, had a "highly structured organization," which was distinct from the alleged pattern of racketeering activity, and constituted an association-in-fact enterprise).

[101] See, e.g., United States v. Crenshaw, 359 F.3d 977, 991-92 (8th Cir. 2004) (holding under the Turkette criteria, that the Rolling 60s Crips constituted an association-in-fact enterprise, without discussing whether the evidence of the enterprise and the pattern of activity may coalesce); United (continued...)

Darden, 70 F.3d 1507, 1521 (8th Cir. 1995), cited United States v. Coonan, 938 F.2d 1553, 1559 (2d Cir. 1991) and United States v. Indelicato, 865 F.2d 1370, 1384 (2d Cir. 1989), for the proposition that the same evidence could establish both the existence of the enterprise and the pattern of

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[101](...continued)
States v. Kehoe, 310 F.3d 579, 586-87 (8th Cir. 2002) (holding under the Turkette criteria that a white supremacist organization known as the Aryan Peoples' Republic constituted an association-in-fact enterprise, without discussing whether the evidence of the enterprise and the pattern of racketeering activity may coalesce); United States v. Keltner, 147 F.3d 662-68, 669 (8th Cir. 1998) (finding enterprise existed separate and apart from pattern where evidence established defendant participated in and directed activities of co-defendants and others, including several burglaries, robberies, attempted murder-for-hire, and acts of retaliation, intimidation and solicitation of perjury to protect identities); United States v. Davidson, 122 F.3d 531, 535 (8th Cir.) (upholding sufficiency of enterprise where "small but prolific" organization involved in stealing property, defrauding insurers, distributing narcotics, and committing arson and murder and leader financed activities of underlings over a period of several years; court found group had a common purpose, pattern of roles and continuing system of authority), cert. denied, 522 U.S. 1034 (1997); Diamond Plus, Inc. v. Kolber, 960 F.2d 765, 769-70 (8th Cir. 1992) (finding enterprise sufficient where attorney and two individuals defrauded plaintiff company and facts established enterprise contained organizational pattern beyond that necessary to perpetrate predicate crimes); United States v. Flynn, 852 F.2d 1045, 1051 (8th Cir.) (finding enterprise sufficient), cert. denied, 488 U.S. 974 (1988); United States v. Leisure, 844 F.2d 1347, 1363 (8th Cir. 1987) (upholding sufficiency of enterprise where members of multi-member group demonstrated common purpose to dominate local labor unions for profit, structure and personnel were continuous and consistent throughout period of racketeering activity; structure in family and social relationships between members and their efforts to gain control of the unions was distinct from the pattern of racketeering activity), cert. denied, 488 U.S. 932 (1988); United States v. Kragness, 830 F.2d 842 (8th Cir. 1987) (enterprise consisting of numerous individuals involved in narcotics distribution organization found sufficient to establish an association-in-fact enterprise where defendants shared common purpose to import, receive, and otherwise deal in narcotics; continuity of structure found sufficient despite some personnel changes because organizational system of authority provided mechanism for directing the group's affairs on continuing, rather than ad hoc basis; enterprise structure distinct from pattern because enterprise had existence beyond that necessary to commit predicate offenses where there was evidence of other activities undertaken by enterprise aside from the commission of pattern of racketeering activity, e.g., investing in assets not exhausted with single drug run but used repeatedly over course of a number of criminal episodes); United States v. Ellison, 793 F.2d 942, 950 (8th Cir.) ("evidence . . . of the enterprise and the pattern of racketeering activity may in some cases coalesce"), cert. denied, 479 U.S. 937 (1986).

racketeering activity.[102]

To the extent that the Eighth Circuit's original position is premised on a requirement that the "enterprise must have an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity," Bledsoe, 674 F.2d at 663, and that the evidence establishing the enterprise must be distinct from the evidence establishing the pattern of racketeering, OCRS believes that the Eighth Circuit was too restrictive. The Supreme Court has clearly stated that while the pattern of racketeering activity and the enterprise are separate **elements** of a RICO violation, the Government need not adduce different **proof** for each element since the proof to establish the enterprise and pattern elements "may in particular cases coalesce." Turkette, 452 U.S. at 583.[103]

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[102] The Darden court also relied on an early Eighth Circuit case applying the Third Circuit's Riccobene test (709 F.2d at 223-24, discussed above), to determine whether the pattern and the enterprise were distinct and separate. See United States v. Kragness, 830 F.2d 842, 857 (8th Cir. 1987) (enterprise structure distinct from pattern because enterprise had existence beyond that necessary to commit predicate offenses).

[103] Indeed, in United States v. Lemm, 680 F.2d at 1199, and United States v. Ellison, 793 F.2d at 950, the Eighth Circuit readily acknowledged that the proof as to these two elements may coalesce in particular cases. See also United States v. White, 116 F.3d 903, 924 (D.C. Cir.) (while the enterprise is an entity separate and apart from the pattern of racketeering activity, the existence of the enterprise may be inferred from proof of the pattern), cert. denied, 522 U.S. 960 (1997); United States v. Rogers, 89 F.3d 1326, 1336 (7th Cir.) (proof of an enterprise is separate and apart from proof of a pattern of racketeering activity, but proof used to establish the enterprise and the racketeering activity may in particular cases coalesce), cert. denied, 519 U.S. 999 (1996); United States v. Coonan, 938 F.2d 1553, 1559-60 (2d Cir. 1991) (holding that "proof of various racketeering acts may be relied on to establish the existence of the charged enterprise"), cert. denied, 502 U.S. 941 (1992); United States v. Sanders, 905 F.2d 940, 944 (10th Cir.) (enterprise may be established by proof that the organization has an existence beyond that which is necessary to commit the predicate acts of racketeering, but the proof establishing the enterprise and the racketeering activity may be the same), cert. denied, 502 U.S. 845 (1991); United States v. Kragness, 830 F.2d 842, 856 and n.11 (8th Cir. 1987); United States v. Mazzei, 700 F.2d 85, 89 (2d Cir.), cert. denied, 461 U.S. 945 (1983); United States v. Bagnariol, 665 F.2d 877, 890-91 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); United States v. Winter, 663 F.2d 1120, 1135 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1982).

Likewise, contrary to some interpretations of Bledsoe, 674 F.2d at 665, Turkette did not require proof that a RICO enterprise have a hierarchical structure or any particular structure "beyond what was necessary to perpetrate the predicate crimes." Rather, to prove an enterprise, Turkette merely required "evidence of an ongoing organization, formal or informal" and evidence that "various associates function as a continuing unit." Turkette, 452 U.S. at 583. See also Odom, 486 F.3d at 551-52 (rejecting a requirement of any particular organizational structure).[104]

The Supreme Court recently resolved this issue in Boyle v. United States, 556 U.S. ___, 129 S. Ct. 2237 (2009), by holding that an association-in-fact enterprise "must have at least 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." Id. at 2244. The Court reiterated its statement from Turkette that although the existence of an enterprise and the pattern are distinct elements, the evidence used to prove these elements "may in particular cases coalesce," id. at 2245 (citing Turkette, 452 U.S. at 583) and that "proof of a pattern of racketeering activity may

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[104] OCRS has long maintained that the approaches taken by the First, Second, Ninth, Eleventh, and District of Columbia Circuits more accurately interpret the requirements of Turkette as to the existence of an association-in-fact enterprise. However, to the extent the Eighth Circuit has attempted to restrain the indiscriminate application of RICO, its warnings should be carefully considered. On several occasions, court have indicated sensitivity to possible Government abuse of the RICO statute. See, e.g., United States v. Robertson, 15 F.3d 862, 877 (9th Cir.) ("The RICO statute seems particularly susceptible to prosecutorial abuse . . . ."), rev'd on other grounds, 514 U.S. 669 (1995); United States v. Flynn, 852 F.2d 1045, 1054 (8th Cir. 1988) (RICO statute has "tremendous potential for guilt by association"); United States v. Russotti, 717 F.2d 27, 34 n.4 (2d Cir.), cert. denied, 465 U.S. 1022 (1984); United States v. Weisman, 624 F.2d 1118, 1123 (2d Cir.), cert. denied, 449 U.S. 871 (1981); United States v. Huber, 603 F.2d 387, 395-96 (2d Cir. 1979) (RICO's broad reach "poses a danger of abuse [through] attempts to apply the statute to situations for which it was not primarily intended"), cert. denied, 445 U.S. 927 (1980); Morin v. Tupin, 835 F. Supp. 126, 132 (S.D.N.Y. 1993) ("Expanding the scope of RICO beyond congressional intent is judicial legislation violative of the separation of powers doctrine established in the United States Constitution." (quoting United States v. Anderson, 626 F.2d 1358, 1365 n.11 (8th Cir. 1980))).

be sufficient in a particular case to permit a jury to infer the existence of an association-in-fact enterprise." Id. at 2247. A further analysis of the Boyle decision and its implications is set forth at Appendix III of this Manual.

5. Variance in Proof from the Alleged Enterprise

The Government need not specify in a RICO indictment whether the enterprise charged is a "legal entity" or a "group of individuals associated in fact," provided that the indictment is otherwise sufficient.[105] If, however, the Government in its indictment and at trial clearly elects one enterprise theory over another, it must prove the existence of the enterprise upon which it has based its case.[106] For example, in one case a RICO conspiracy conviction was reversed on the ground the trial court constructively amended the indictment when the trial court, responding to a question from the jury during deliberations, instructed that the Government was not required to prove that the enterprise was a particular organized crime family, even though the indictment alleged that a specific crime family identified by name was the enterprise.[107]

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[105] See, e.g., United States v. Alonso, 740 F.2d 862, 870 (11th Cir. 1984), cert. denied, 469 U.S. 1166 (1985); United States v. Hartley, 678 F.2d 961, 989 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981); cf. United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (county sheriff's office is either a legal entity or a group of individuals associated in fact); United States v. Brown, 555 F.2d 407, 415 (5th Cir. 1977) (Macon, Georgia Police Department is at least a group associated in fact, and may also be a legal entity), cert. denied, 435 U.S. 904 (1978).

[106] See, e.g., United States v. Cauble, 706 F.2d 1322, 1331 n.16 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Bledsoe, 674 F.2d 647, 660 (8th Cir. 1982) (although a co-op, as a legal entity, could clearly qualify as an enterprise under RICO, the Government cannot argue on appeal that the enterprise was one or more of the cooperatives since the case was not tried on that theory), cert. denied, 459 U.S. 1040 (1983).

[107] See United States v. Weissman, 899 F.2d 1111, 1114-16 (11th Cir. 1990).

In appropriate circumstances, it is for the jury to decide whether there was a material variance in proof from the single enterprise charged in the indictment or whether the proof showed multiple enterprises rather than the single one charged.[108] Evidence of change in membership in the enterprise and temporary disruption and hiatus in the enterprise's criminal activities, however, does not necessarily preclude a finding of a single ongoing enterprise. See cases cited in Section II(D)(4)(a), notes 86 and 87 above.

It is important to note that a single enterprise may be found even where members of an association-in-fact enterprise form opposing factions. For example, in United States v. Orena, 32 F.3d 704, 710 (2d Cir. 1994), the indictment alleged that the RICO enterprise was an association-in-fact consisting of "members and associates of the Colombo Organized Crime Family." The indictment also referred to an internal war between two competing factions of the Colombo Family. On appeal, the defendant argued that the indictment failed to allege the existence of an ongoing enterprise because of the Family's infighting. The Second Circuit concluded, however, that the allegations and subsequent proof of the internecine war presented the question whether the enterprise was sufficiently proven, not whether the enterprise was adequately pled, and held that the enterprise element was sufficiently pled.

The Second Circuit also ruled that the existence of an internal dispute did not necessarily mean the end of the enterprise, especially where control of the enterprise was the objective of the dispute. Orena, 32 F.3d at 710. The court also found the evidence sufficient to establish that the

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[108] See, e.g., United States v. DeFries, 129 F.3d 1293, 1310-11 (D.C. Cir. 1997); United States v. Mauro, 80 F.3d 73,77 (2d Cir. 1996); United States v. Console, 13 F.3d 641, 650 (3d Cir. 1993), cert. denied, 511 U.S. 1076 (1994); United States v. Riccobene, 709 F.2d 214, 222 (3d Cir.), cert. denied, 465 U.S. 849 (1983).

Colombo Family members remained associated together for a common purpose even after the eruption of conflict between the two factions based in part on proof of the enterprise members' expectation of reconciliation after their dispute was settled and the efforts of other crime families to mediate the dispute. Orena, 32 F.3d at 710.[109]

6. Profit-Seeking Motive Is Not Required

In Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) ("Scheidler"), the Supreme Court held that the RICO statute contains no economic motive requirement, thereby overruling the district court's holding that a profit-seeking motive for either the RICO enterprise or predicate acts was required, and reversing the district court's dismissal of the plaintiff's civil RICO claim.[110] In reaching this decision, the Supreme Court observed that the enterprise in Sections 1962(a) and (b) might "very well be a profit-seeking entity," id. at 259, but that the RICO statute does not mandate that either the enterprise or the racketeering activity have an economic motive. Rather, RICO requires only that the entity be acquired through the use of illegal activity or by money obtained from illegal activities. By contrast, subsection (c) generally describes a "vehicle through which the unlawful pattern of racketeering activity is committed, rather than a victim of that activity." Therefore, the Court reasoned, a subsection (c) association-in-fact enterprise need not have a

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[109] See also Olson, 450 F.3d at 664-66 (ruling that a breakup in the leadership of the Latin Kings enterprise that led to new leadership did not signal the end of the alleged enterprise); United States v. Amato, 15 F.3d 230, 234 (2d Cir. 1994) ("Rivalry and dissension, however violent, do not necessarily signify dissolution of a [RICO] conspiracy. An internal dispute among members of a conspiracy can itself be compelling evidence that the conspiracy is ongoing and that the rivals are members of it.").

[110] See Nat'l Org. for Women v. Scheidler, 765 F. Supp. 937, 941-44 (N.D. Ill. 1991), aff'd, 968 F.2d 612 (7th Cir. 1992). According to the district court, neither donations made by members of the defendant organization nor the defendants causing economic injuries to the victims (clinics, doctors, and patients) through acts of extortion satisfied the requirement for a profit-making motive.

property interest that could be acquired or an economic motive for engaging in racketeering activity; nor do subsections (a) and (b) direct a contrary conclusion as claimed by respondents and found by the courts below. The Court concluded that neither the definitional language nor the operative language of the RICO statute required that a subsection (c) enterprise have an economic or profit-seeking motive. Id. at 258-59.[111]

The Court also discounted the reliance by the courts below on congressional findings, noting that rather than limiting the prosecutions to [traditional] "'organized crime . . . Congress . . . . enact[ed] a more general statute . . . . which, although it had organized crime as its focus, was not limited in approach to organized crime.'" Id. at 260 (quoting H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 299, 248 (1989)). Similarly, the Court was not persuaded by the argument that former internal Justice Department guidelines prohibited naming an association as the enterprise unless it had an economic goal, particularly when the 1984 internal guidelines provided that an association-in-fact enterprise be "'directed toward an economic or other identifiable goal.'" Scheidler, 510 U.S. at 250. The Court declined to impose limitations not expressed in the RICO statute, finding instead parallels with the conclusion in Turkette that the statute covered the wholly illegal as well as legitimate enterprise and looked to Turkette's instruction that there was "no restriction upon the associations embraced by the definition" of the enterprise, i.e., the enterprise also includes "any union or group of individuals associated in fact." Id. at 260.

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[111] Accord United States v. Browne, 505 F.3d 1229, 1273 (11th Cir. 2007); Odom, 486 F.3d at 546-547; Diaz v. Gates, 354 F.3d 1169, 1172 (9th Cir. 2004); Handeen v. LeMaire, 112 F.3d 1339, 1351 (8th Cir. 1997); Roma Const. Co. v. Russo, 96 F.3d 566, 578 (1st Cir. 1996); Rogers, 89 F.3d at 1336; Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 266 (3d Cir. 1995), 46 F.3d at 266; United States v. Fiel, 35 F.3d 997, 1003 (4th Cir. 1994); Scheib v. Grant, 22 F.3d 149, 154 (7th Cir. 1994).

The lack of an economic motive requirement is important. It permits the Government to use RICO against groups that do not have a financial purpose--for example, political terrorists and other groups that commit violent crimes, such as murder or bombings, but without an economic motive.

7. A RICO Defendant Must Be Distinct From the Alleged RICO Enterprise Under 18 U.S.C. §§ 1962(c) and (d)

In Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001), the Supreme Court held that "to establish liability under § 1962(c) [of RICO], one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." 533 U.S. at 161. The Court explained that Section 1962(c) "applies to 'person[s]' who are 'employed by or associated with' the 'enterprise.' In ordinary English one speaks of employing, being employed by, or associating with others, not oneself." Id. (citation omitted). Therefore, the Court concluded that a RICO defendant, or "person," must be distinct from the RICO enterprise that the defendant is "associated" with or "employed" by. Id. at 161-62.[112]

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[112] As several courts of appeals have held, Cedric Kushner's requirement that the RICO defendant be distinct from the RICO enterprise does not apply to RICO charges brought under 18 U.S.C. §§ 1962(a) or (b), because those sections, unlike Section 1962(c), do not require that the defendant be "employed by or associated with" the enterprise, and hence the rationale of Cedric Kushner does not apply to Section 1962(a) or (b). See, e.g., Churchill Village v. General Electric, 361 F.3d 566, 573-74 (9th Cir. 2004) (collecting cases); Riverwoods Chappaqua v. Marine Midland Bank, 30 F.3d 339, 345 (2d Cir. 1994); United Mine Workers of Am., 18 F.3d 1161, 1163 (4th Cir. 1994); Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190 (3d Cir. 1993); In re Burzynski, 989 F.2d 733, 743 (5th Cir. 1993); Brittingham v. Mobil Corp., 943 F.2d 297, 303 (3d Cir. 1991); Genty v. Resolution Trust Corp., 937 F.2d 899, 907 (3d Cir. 1991); United States v. Vogt, 910 F.2d 1184, 1197 n.5 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991); Banks v. Wolk, 918 F.2d 418, 421 (3d Cir. 1990); Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990), aff'd after remand, 948 F.2d 1280 (4th Cir. 1991) (Table); Schreiber Distrib. Co. v. Ser-Well Furniture Co., 806 F.2d 1393, 1396-98 (9th Cir. 1986); Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir. 1986); Haroco Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985).

Applying this principle, the Court ruled that the RICO enterprise in Cedric Kushner, a corporation, was distinct from the defendant, a natural person who was the president and sole shareholder of the corporation-enterprise. Id. at 163. The Court stated: "The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in [RICO] that requires more 'separateness' than that." Id. Citing approvingly to McCullough v. Suter, 757 F.2d 142, 144 (7th Cir. 1985), the Court added that the distinctness requirement is satisfied where there is "either formal or practical separateness." 533 U.S. at 163.

In McCullough v. Suter, the Seventh Circuit held that a RICO enterprise consisting of a sole proprietorship with several employees was distinct from the defendant, the individual sole proprietor. 757 F.2d at 143-44. The Seventh Circuit explained:

> But Suter had several people working for him; this made his company an enterprise, and not just a one-man band . . . .
>
> A one-man band that does not incorporate, that merely operates as a proprietorship, gains no legal protections from the form in which it has chosen to do business; the man and the proprietorship really are the same entity in law and fact. But if the man has employees or associates, the enterprise is distinct from him, and it then makes no difference, so far as we can see, what legal form the enterprise takes. The only important thing is that it be either formally (as when there is incorporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual.

Id. at 144.[113]

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[113] In United States v. London, 66 F.3d 1227 (1st Cir. 1995), cert denied, 517 U.S. 1155 (1996), the First Circuit followed McCullough in finding that defendant London's sole proprietorship was an "enterprise," with which he could be associated. The court emphasized that London had at least one other employee and held that no more was required to establish the separation of an enterprise and a defendant under RICO. London, 66 F.3d at 1244-45. Similarly, the Ninth Circuit in United States v. Benny, 786 F.2d 1410 (9th Cir.), cert. denied, 479 U.S. 1017 (1986), affirmed a (continued...)

In accordance with these principles, most courts of appeals have held that the requisite distinctness between the defendant-person and the enterprise is lacking only when there is complete identity between a particular defendant and the enterprise. As the Eleventh Circuit stated, "a defendant can clearly be a person under [Section 1962(c)] and also be **part** of the enterprise. United States v. Goldin Indus., Inc., 219 F.3d 1271, 1275-1276 (11th Cir. 2000) (collecting cases). The prohibition against the unity of person and enterprise applies only when the singular person or entity is defined as both the person and the only entity comprising the enterprise." Id. Accordingly, many courts have concluded in a variety of circumstances that individual RICO defendants are distinct from an enterprise that is broader than any single defendant, notwithstanding that the defendants may collectively comprise the enterprise and may have close relationships among themselves.[114] Indeed,

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[113](...continued)
RICO conviction where one of the defendants was associated with his own business. The court reasoned that the co-defendant's association with the sole proprietorship made it a "troupe, not a one-man show." Benny, 786 F.2d at 1416.

But, in United States v. Yonan, 622 F. Supp. 721, 722-26 (N.D. Ill. 1985), the district court dismissed a Section 1962(c) count against a sole-practitioner attorney who employed one secretary, holding that employing only one secretary was not enough to transform an attorney into an enterprise. The district court also expressed reluctance to follow the Seventh Circuit's ruling in McCullough. The Seventh Circuit did not consider the merits of this holding on appeal. United States v. Yonan, 800 F.2d 164, 165-66 (7th Cir. 1986) (dismissing appeal because Government failed to appeal issue timely), cert. denied, 479 U.S. 1055 (1987). See also Guidry v. Bank of La Place, 954 F.2d 278, 283 (5th Cir. 1992) (distinctness not satisfied where the RICO defendant was the sole employee of his sole proprietorship, the alleged enterprise).

[114] See, e.g., Mohawk Indus., 465 F.3d at 1284 (distinctness requirement satisfied where a corporation was the defendant and the enterprise consisted of an alliance of the corporate defendant and third-party individuals and agencies); Living Designs, Inc., 431 F.3d at 361-62 (distinctness requirement satisfied where the defendant was a corporation and the enterprise consisted of an alliance of the corporate-defendant and law firms employed by the defendant and expert witnesses retained by the law firms); Najjar, 300 F.3d at 484-85 (distinctness requirement satisfied where the defendants were an individual and a corporation and the enterprise consisted of an alliance of the
(continued...)

the typical RICO association-in-fact enterprise includes the group of charged defendants.[115]

However, some courts have failed to properly follow the teachings of Cedric Kushner and its progeny, and have erroneously held, in OCRS' view, that the distinctness requirement was not satisfied where the alleged enterprise was clearly broader than and distinct from each individual

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[114](...continued)
defendants, other individuals and a sole proprietorship); DeFalco, 244 F.3d at 306-08 (distinctness requirement satisfied where the enterprise was the Town of Delaware and the defendants were public officials of the town and two corporations that victimized the town through their racketeering acts); Goldin Indus., 219 F.3d at 1273, 1275-1276 (distinctness requirement satisfied where enterprise consisted of four natural persons and three corporations, all of whom were also defendants); United States v. Fairchild, 189 F.3d 769, 776-777 (8th Cir. 1999) (distinctness requirement satisfied where individual defendants collectively formed the enterprise); United States v. London, 66 F.3d at 1243-1245 (distinctness requirement satisfied where the enterprise consisted of defendant's sole proprietorship and a closely held corporation); Securitron Magnalock Corp., 65 F.3d at 262-263 (a defendant who was an officer, agent, and owner of two corporations is distinct from RICO enterprise consisting of that individual and the corporations); United States v. Nabors, 45 F.3d 238, 240-41 (8th Cir. 1995) (holding that "a 'collective entity is something more than the members of which it is comprised' and that individual members who are members of an enterprise may indeed be found guilty [under RICO] even if the enterprise is made up solely of those defendants"); Atlas Pile Driving Co. v. Dicon Fin. Co., 886 F.2d 986, 995 (8th Cir. 1989) (distinctness requirement satisfied where two corporate members of the association-in-fact enterprise were also defendants); Perholtz, 842 F.2d at 353-54 (distinctness requirement satisfied where the association-in-fact enterprise consisted of corporations, partnerships and individual defendants who were also charged as defendants); Cullen v. Margiotta, 811 F.2d 698, 703, 729-730 (2d Cir. 1987) (distinctness requirement satisfied where enterprise consisted of three entities, all of whom were also defendants), overruled in part on other grounds, Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987).

But see Miller v. Yokohama Tire Corp., 358 F.3d 616, 619-20 (9th Cir. 2004) (holding that a corporate employer could not be held vicariously liable for the conduct of its employees when the employer was the alleged enterprise).

[115] See, e.g., Turkette, 452 U.S. at 578-79; United States v. Torres, 191 F.3d 799, 803, 806 (7th Cir. 1999); United States v. Fairchild, 189 F.3d 769, 777 (8th Cir. 1999); Richardson, 167 F.3d at 625; Nabors, 45 F.3d at 246-41; United States v. Stefan, 784 F.2d 1093, 1103 (11th Cir. 1986); Elliott, 571 F.2d at 898; United States v. Di Gilio, 667 F. Supp. 191, 195 (D.N.J. 1987). See also cases cited in notes 62 and 114 above.

defendant.[116]

Moreover, courts have held that the distinctness requirement is not satisfied where a corporation is the charged defendant and the enterprise "consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant," because if such pleading were allowed, the prohibition on naming the same corporation as both the defendant and the RICO enterprise could be routinely evaded by listing corporate officers and employees as part of the enterprise, without affecting the gravamen of the complaint. See Riverwoods Chappaqua v. Marine Midland Bank, 30 F.3d 339, 344 (2d Cir. 1994) (collecting cases).[117]

Similarly, in Discon, Inc. v. Nynex Corp., 93 F.3d 1055, 1057-58, 1063-64 (2d Cir. 1996), the court held that Section 1962(c)'s distinctness requirement was not satisfied where a holding company and two of its subsidiaries were named as both the RICO defendants and (together with unnamed agents acting within the scope of their agency) the RICO enterprise. The court found that the three corporations, although legally separate entities, were part of a unified corporate structure and were "guided by a single corporate consciousness." Id. at 1064. On those facts, the court of

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[116] See, e.g., Baker v. IBP, Inc., 357 F.3d 665, 691-92 (7th Cir. 2004) (distinctness not satisfied where the alleged enterprise consisted of an association of a corporate defendant and individuals and organizations that helped the corporate defendant recruit and hire illegal alien-workers); Switzer v. Coan, 261 F.3d 985, 992 (10th Cir. 2001) (distinctness not satisfied where the alleged enterprise consisted of numerous individuals who also were charged as RICO defendants); Stachon v. United Consumers Club, Inc., 229 F.3d 673, 676 & n. 3 (7th Cir. 2000) (distinctness not satisfied where a corporation and five of its officers and/or directors were charged as RICO defendants and were also included in the alleged association-in-fact enterprise along with third parties who acted under the direction of the defendants to carry out the alleged scheme to defraud).

[117] Accord Whelan v. Winchester Production Co., 319 F.3d 225, 229-30 (5th Cir. 2003); Bessette v. Avco Fin. Services, Inc., 230 F.3d 439, 449-50 (1st Cir. 2000); Yellow Bus Lines, Inc. v. Local Union 639, 883 F.2d 132, 139-41 (D.C. Cir. 1989).

appeals determined that separate incorporation of the three entities was not dispositve, and the defendants (the three corporations, individually) each should be deemed identical to the alleged RICO enterprise (the three corporations and their unnamed agents, collectively). Id.[118]

However, under the teachings of Cedric Kushner, 533 U.S. at 163, the requisite distinctness can be satisfied by "practical separateness"; therefore, distinctness may be satisfied where the facts establish that a subsidiary is operated with sufficient independence from its legally distinct parent corporation.[119]

8. An Individual May Constitute a RICO Enterprise

RICO's definition of "enterprise" explicitly "includes any individual." 18 U.S.C. § 1961(4). Indeed, in Salinas v. United States, 522 U.S. 52, 65 (1997), the Supreme Court indicated in dictum that a sole individual could also be a RICO enterprise, stating "though an 'enterprise' under § 1962(c) can exist with only one actor to conduct it, in most instances it will be conducted by more than one person or entity . . . ." Therefore, an individual may be a RICO enterprise, provided that the individual is not both a RICO defendant and the alleged RICO enterprise. See United States v.

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[118] Accord Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 934 (7th Cir. 2003); Stachon, 229 F.3d at 678 n.3; Arzuaga-Collazo v. Oriental Federal Sav. Bank, 913 F.2d 5, 6 (1st Cir. 1990).

[119] For example, in Bessette v. Avco Fin. Serv., 230 F.3d 439, 449 (1st Cir. 2000), the First Circuit stated that it "has consistently refrained from adopting a bright line rule that a subsidiary can never be distinct from its parent corporation . . . . [rather it determines] whether the parent's activities are sufficiently distinct from those of the subsidiary at the time that the alleged RICO violations occurred" (citations omitted). The court added that "[i]n most cases, a subsidiary that is under the complete control of the parent company is nothing more than a division of the one entity. Without further allegations, the mere identification of a subsidiary and a parent in a RICO claim fails the distinctiveness requirement." Id. at 449. The court held that the civil complaint's allegations failed to allege sufficient facts to establish the requisite distinctness. Accord Brannon v. Boatmen's First Nat. Bank of Oklahoma, 153 F.3d 1144, 1146-49 (10th Cir. 1998); Emery v. American General Fin., 134 F.3d 1321, 1324-25 (7th Cir. 1998).

DiCaro, 772 F.2d 1314, 1319-20 (7th Cir. 1985), cert. denied, 475 U.S. 1081 (1986).

For example, suppose individuals A and B hired individual C, who operated as a professional "hitman" over a period of time, to murder several persons. In these circumstances, individual C could be the RICO enterprise and individuals A and B could be charged as the RICO defendants. However, as a practical matter it is unnecessary to charge an individual as the RICO enterprise, because in such circumstances the Government could charge A, B, and C as an association-in-fact enterprise.

E. Pattern of Racketeering Activity

The definition of a "pattern of racketeering activity" is one of the most important in the RICO statute because it defines a key element of each substantive RICO offense under Section 1962. Section 1961(5) provides that a pattern of racketeering activity "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

The two violations may both be state offenses, federal offenses, or a combination of the two; they may be violations of the same statute, or of different statutes; and the acts need not have previously been charged.[120] The Supreme Court, however, has concluded that the pattern provision means "there is something to a RICO pattern beyond simply the number of predicate acts involved."

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[120] See, e.g., United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978), modified on other grounds, 590 F.2d 1379 (5th Cir.), cert. denied, 440 U.S. 962 (1979); United States v. Parness, 503 F.2d 430, 441 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Cf. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985) (reversing circuit court's requirement that plaintiff prove prior criminal convictions on underlying predicate offenses in order to bring a civil RICO action under 18 U.S.C. § 1964(c)); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) (same).

See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 238 (1989).

1. Continuity and Relationship - - Sedima, S.P.R.L. and H.J. Inc. v. Northwestern Bell Tel. Co.

In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), the Supreme Court stated that the RICO pattern element required more than merely proving two predicate acts of racketeering. The Court pointed to RICO legislative history indicating that the RICO pattern was not designed to cover merely sporadic or isolated unlawful activity, but rather was intended to cover racketeering activity that demonstrated some "relationship" and "the threat of continuing [unlawful] activity." Id. at 496 n.14. Accordingly, the Supreme Court ruled that proof of such "continuity plus relationship" was required to establish a RICO pattern in addition to proof of two acts of racketeering.

Following Sedima, the Eighth Circuit formulated the strictest test, holding that multiple acts of racketeering activity did not constitute a "pattern" under RICO when the acts were all related to a single scheme or criminal episode.[121] In H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989), the Supreme Court unanimously rejected the Eighth Circuit's multiple-scheme requirement to establish a pattern of racketeering activity and reversed the lower court's affirmation of the dismissal of a civil RICO claim for failure to allege a pattern of racketeering activity. The case involved an alleged bribery scheme by Northwestern Bell designed to illegally influence members of the Minnesota Public Utilities Commission in the performance of their duties as regulators of Northwestern Bell. The Eighth Circuit affirmed the dismissal, holding that the petitioner's allegations were insufficient to establish the requisite "continuity" prong because the complaint alleged only a series of fraudulent acts committed in furtherance of a single scheme to influence the

[121] See H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987), rev'd, 492 U.S. 229 (1989); Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986).

Commissioners. In light of the division among the circuits, the Supreme Court granted certiorari to determine whether proof of multiple separate schemes was necessary to establish a RICO pattern of racketeering activity.

The Supreme Court held that RICO does not require proof of multiple schemes, stating, in part:

> We find no support [for the Eighth Circuit's position] . . . that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes. . . .
>
> The Eighth Circuit's test brings a rigidity to the available methods of proving a pattern that simply is not present in the idea of 'continuity' itself; and it does so, moreover, by introducing a concept – the "scheme" – that appears nowhere in the language or legislative history of the Act.

Id. at 236, 240-41.

The Court concluded that a prosecutor must prove "continuity of racketeering activity, or its threat, simpliciter." Id. at 241. Because the proof could be made in many ways, the Court declined to formulate in the abstract a general test for continuity, but provided the following delineation:

> "Continuity" is both a closed - and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. . . . It is, in either case, centrally a temporal concept and particularly so in the RICO context, where **what** must be continuous, RICO's predicate acts or offenses, and the **relationship** these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the **threat** of continuity is demonstrated. [emphasis in original]
>
> Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the

> field of possibilities--preferring to deal with this issue in the context of concrete factual situations presented for decision--we offer some examples of how this element might be satisfied. **A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit.** Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. **In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes**. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."

Id. at 241-43 (citations omitted)(emphasis added).

Regarding the requisite "relationship," the H.J. Inc. Court ruled that the definition of a "pattern" from the Dangerous Special Offender provision[122] sets forth a proper standard for relatedness between RICO predicate acts. In that respect, the Supreme Court stated:

> A "pattern" is an "arrangement or order of things or activity," . . . . It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or arranged.
>
> . . .
>
> "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

Id. at 238, 240 (citations omitted).

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[122] See 492 U.S. at 238-39, citing Sedima, 473 U.S. at 486-90.

Following the decision in H.J. Inc., courts of appeals have ruled that "continuity" may not turn on the number of racketeering acts charged above the minimum requirement of two acts. Instead, the dispositive issue is whether, in light of the enterprise and the racketeering acts, the facts establish the requisite continuity or threat of continuity of criminal activity. For example, multiple mailings or wire transmissions may not necessarily establish the requisite continuity, especially ones in furtherance of a single, short-lived scheme to defraud involving a single victim, or a discrete transaction.[123]

On the other hand, courts have found that a short-lived course of racketeering activity may establish the requisite continuity and pattern, especially where the activity was conducted by or related to a long term criminal enterprise. See cases cited in Section II(E)(4), notes 135-37 below.

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[123] See, e.g., Jennings v. Auto Meter Prods., Inc., 495 F.3d 466, 472-76 (7th Cir. 2007) (continuity insufficient where the alleged scheme to defraud continued for ten months and there was only one victim); Moon v. Harrison Piping Supply, 465 F.3d 719, 725-27 (6th Cir. 2006) (continuity insufficient where scheme to defraud continued for nine months) (collecting cases); Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1266 (11th Cir. 2004) (stating that "closed-ended continuity cannot be met with allegations of schemes lasting less than a year") (collecting cases); Williams v. Aztar Indiana Gaming Corp., 351 F.3d 294, 298 n.4 (7th Cir. 2004) (ten to twelve months insufficient); Kenda Corp. v. Pot O'Gold Money Leagues, 329 F.3d 216, 232-34 (1st Cir. 2003) (multiple mailings related to a single transaction is insufficient); GE Inv. Private Placement Partners II v. Parker, 247 F.3d 543, 549-50 (4th Cir. 2001) (multiple mailings over two years as part of the sale of a single business insufficient); Vemco, Inc. v. Camardella, 23 F.3d 129 (6th Cir.) (upholding dismissal of RICO claim for lack of pattern where defendant engaged in several different forms of fraud for purpose of defrauding single victim through activities surrounding one project), cert. denied, 513 U.S. 1017 (1994); Thompson v. Paasche, 950 F.2d 306, 311 (6th Cir. 1991) (finding that defendant's fraudulent scheme to sell nineteen lots of land over a few months was an inherently short-term affair, and by its very nature was insufficiently protracted to qualify as a pattern); Parcoil Corp. v. NOWSCO Well Serv. Ltd., 887 F.2d 502 (4th Cir. 1989) (holding that mailing seventeen false reports over four months was not sufficient to establish continuity); Marshall-Silver Const. Co. v. Mendel, 894 F.2d 593 (3d Cir. 1990) (finding pattern lasting from June to December insufficient where it did not threaten future criminal conduct); Sutherland v. O'Malley, 882 F.2d 1196 (7th Cir. 1989) (alleged extortion and mail fraud over five-month period did not pose sufficient threat of continuing criminal activity).

2. To Constitute a Pattern, it is Not Necessary that the Alleged Racketeering Acts Be Similar or Related Directly to Each Other, Rather A Pattern May Consist of Diversified Racketeering Acts Provided that they are Related to the Alleged Enterprise

In adopting the RICO statute, Congress recognized that organized crime engages in "diversified" activities such as "syndicated gambling, loansharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation." See 18 U.S.C. § 1961 note, Congressional Statement of Findings and Purposes, supra. The broad range of crimes included in RICO's definition of "racketeering activity" reflects that recognition. See 18 U.S.C. § 1961(1). Moreover, RICO's legislative history is replete with statements indicating Congressional awareness that organized crime groups engage in a wide variety of criminal conduct.[124] Thus, the Supreme Court has pointed out that Congress intended RICO to cover, inter alia, the diversified criminal activities of organized crime. See H.J. Inc. 492 U.S. at 247. Therefore, it is clear that a requirement that racketeering acts always be similar in nature or be directly related to each other would be flatly contrary to RICO's primary purpose, i.e., to cover the highly diversified criminal activities of organized crime.

In accordance with the foregoing evidence of Congress' intent underlying RICO, every court of appeals that has decided the issue has held that racketeering acts need not be similar, or directly related to each other; rather, it is sufficient that the racketeering acts are related in some way to the

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[124] See, e.g., S.REP. NO. 91-617, at 41 ("gambling, narcotics, loansharking, or other illegal businesses"); 116 Cong. Rec. 586 (1970) (remarks of Sen. McClellen) ("syndicated gambling, the importation . . . and distribution of narcotics, and loansharking"); id. at 591 (remarks of Sen. McClellen) ('narcotics, loansharking, prostitution, and bootlegging"); id. at 601 (remarks of Sen. Hruska) ("gambling, narcotics, and loansharking"; "robbery, larceny, and arson"); id. at 606-607 (remarks of Sen. Byrd) ("[s]yndicated gambling, loansharking, prostitution, narcotics trafficking, and similar illicit enterprises"); id. at 819 (remarks of Sen. Scott) ("gambling, loansharking, narcotics, prostitution, and other forms of vice").

affairs of the charged enterprise. As the Third Circuit explained in United States v. Eufrasio, 935 F.2d 553 (3d Cir. 1991), a pattern may consist of diversified racketeering acts provided that they are related to the alleged enterprise because it

> is consistent with Congress' main objective in enacting RICO: the eradication of organized crime, . . . because it brings the often highly diversified acts of a single organized crime enterprise under RICO's umbrella. Indeed, a criminal enterprise is more, not less, dangerous if it is versatile, flexible, diverse in its objectives and capabilities. . . . Our interpretation of RICO's pattern requirement ensures that separately performed, functionally diverse and directly unrelated predicate acts and offenses will form a pattern under RICO, as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise.

Id. at 566 (internal quotations and citations omitted).[125]

3. The Requisite Relationship of the Racketeering Acts to the Enterprise May Be Established in a Wide Variety of Ways

As for the requisite relationship between the racketeering acts and the enterprise, the Supreme Court stated that "Congress intended to take a flexible approach, and envisaged that a pattern might

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[125] Accord United States v. Corrado, 227 F.3d 543, 554 (6th Cir. 2000) ("The predicate acts do not necessarily need to be directly interrelated; they must, however, be connected to the affairs and operations of the criminal enterprise."); United States v. Locascio, 6 F.3d 924, 943 (2d Cir. 1993) (same); United States v. Minicone, 960 F.2d 1099, 1106 (2d Cir. 1992) (same); United States v. Angiulo, 897 F.2d 1169, 1180 (1st Cir. 1990) (dissimilar racketeering acts involving a conspiracy to murder and conducting an illegal gambling business constitute a pattern when they were committed at the behest of the same organized crime enterprise); United States v. Qaoud, 777 F.2d 1105, 1116 (6th Cir. 1995) (racketeering acts need not be directly interrelated; "all that is necessary is that the acts are connected to the affairs of the enterprise"); United States v. Provenzano, 688 F.2d 194, 200 (3d Cir.) (same), cert. denied, 459 U.S. 1071 (1982); United States v. Thevis, 665 F.2d 616, 625 (5th Cir.) (same), cert. denied, 456 U.S. 100 (1982); United States v. Phillips, 664 F.2d 971, 1011-12 (5th Cir. 1981) (RICO pattern may consist of "different or unrelated crimes" provided that they are "related to the affairs of the enterprise"), cert. denied, 459 U.S. 906 (1982); United States v. Lee Stoller Enterprises, Inc., 652 F.2d 1313, 1319 (7th Cir.) (same), cert. denied, 545 U.S. 1082 (1981); United States v. Weisman, 624 F.2d 1118, 1121-22 (2d Cir.) (same), cert. denied, 449 U.S. 871 (1980); Elliott, 571 F.2d at 899-900 (a RICO pattern may consist of "diversified activity," provided it is related to the affairs of the enterprise).

be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set." H.J. Inc., 492 U.S. at 238. The Supreme Court added that the requisite relationship would be established when the racketeering acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events," but that such was not the exclusive means of establishing the requisite relationship. Id. at 240.

In accordance with Congress' intended flexible approach, the federal courts of appeals have repeatedly held that the racketeering acts need not be similar or directly related to each other; rather, it is sufficient that the racketeering acts are related in some way to the affairs of the charged enterprise,[126] including, for example, that: (1) the racketeering acts furthered the goals of or benefitted the enterprise,[127] (2) the enterprise or the defendant's role in the enterprise enabled the defendant to commit, or facilitated the commission of, the racketeering acts,[128] (3) the racketeering

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[126] See cases cited in note 125 above.

[127] See, e.g., United States v. Delgado, 401 F.3d 290, 298 (5th Cir. 2005); Irizarry, 341 F.3d at 301-02; Kehoe, 310 F.3d at 587; United States v. Polanco, 145 F.3d 536, 541 (2d Cir. 1998); United States v. Wong, 40 F.3d 1347, 1375 (2d Cir. 1994); Minicone, 960 F.2d at 1106-07; Eufrasio, 935 F.2d at 566-67; United States v. Salerno, 868 F.2d 524, 533 (2d Cir. 1989); Indelicato, 865 F.2d at 1384; United States v. Killip, 819 F.2d 1542, 1549-50 (10th Cir. 1987); United States v. Davis, 707 F.2d 880, 883 (6th Cir. 1983); United States v. Zang, 703 F.2d 1186, 1194 (10th Cir. 1982), cert. denied, 464 U.S. 828 (1983); Thevis, 665 F.2d at 625; Phillips, 664 F.2d at 1011-12.

[128] See, e.g., Irizarry, 341 F.3d at 301; Smith, 413 F.3d at 1272; United States v. Bruno, 383 F.3d 65, 84 (2d Cir. 2004); Marino, 277 F.3d 26-28; Corrado, 227 F.3d at 554; United States v. Posada-Rios, 158 F.3d 832, 856-57 (5th Cir. 1998); United States v. Grubb, 11 F.3d 426, 439 (4th Cir. 1993); United States v. Tillem, 906 F.2d 814, 822 (2d Cir. 1990); United States v. Pieper, 854 F.2d 1020, 1026-27 (7th Cir. 1988); Horak, 833 F.2d at 1239-40; United States v. Robilotto, 828 F.2d 940, 947-48 (2d Cir. 1987); United States v. Carter, 721 F.2d 1514, 1526-27 (11th Cir.), cert. denied, 469 U.S. 819 (1984).

acts were committed at the behest of, or on behalf of, the enterprise,[129] or (4) the racketeering acts had the same or similar purposes, results, participants, victims or methods of commission.[130]

4. The Requisite Continuity Also May Be Proven in Several Ways

Regarding the requisite "continuity," the Supreme Court made clear in H.J. Inc., 492 U.S. at 240-243, that a wide variety of proof may establish the required "continuity" and that no single particular method of proof is required. By way of illustration, the H.J. Inc. Court provided several alternative methods of establishing the "continuity" requirement, stating:

> [1] A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.
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> . . .
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> [2] A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity.
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[129] See, e.g., United States v. Daidone, 471 F.3d 371, 373 (2d Cir. 2006); Olson, 450 F.3d at 671; Smith, 413 F.3d at 1272; United States v. Miller, 116 F.3d 641, 676-77 (2d Cir. 1997); Minicone, 960 F.2d at 1107; Angiulo, 897 F.2d at 1180.

[130] See, e.g., Moon v. Piping Supply, 465 F.3d 719, 724 (6th Cir. 2006); United States v. Hively, 437 F.3d 752, 761-62 (8th Cir. 2006); Cianci, 378 F.3d at 88-89; Diaz, 176 F.3d at 93-94; Cosmos Forms Ltd. v. Guardian Life Ins., 113 F.3d 308, 310 (2d Cir. 1997); United States v. Brazel, 102 F.3d 1120, 1137-39 (11th Cir. 1997); United States v. Beasley, 72 F.3d 1518, 1525-26 (11th Cir.), cert. denied, 517 U.S. 1027 (1996); Indelicato, 865 F.2d at 1384; Beauford v. Helmsley, 865 F.2d 1386, 1392 (2d Cir. 1989) (en banc); Zauber, 857 F.2d at 150; United States v. Ruiz, 905 F.2d 499, 504 (1st Cir. 1990).

> [3] In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. **Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime."**
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> . . .
>
> [4] The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."

Id. at 242-243 (emphasis added).

The first method of establishing continuity set forth in H.J. Inc. is often referred to as "closed-ended" continuity. That is, courts have held that the requisite continuity is established for a specific "closed" time period where the predicate racketeering acts extended over a substantial period of time.[131] On the other hand, courts have held that the requisite continuity is lacking when the predicate acts span a relatively short time period, especially less than one year, and pose no threat of continuing unlawful activity.[132]

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[131] See, e.g., United States v. Genova, 333 F.3d 750, 759 (7th Cir. 2003) (several years); Smith, 413 F.3d at 1272 (almost three years); United States v. Coon, 187 F.3d 888, 896 (8th Cir. 1999) (unlawful activities spanned the late 1980's to the early 1990's); Beasley, 72 F.3d at 1526 (five years); Dana Corp. v. Blue Cross and Blue Shield Mutual of N. Ohio, 900 F.2d 882, 886-87 (8th Cir. 1990) (seventeen years); Busby v. Crown Supply, Inc., 896 F.2d 833, 836 (4th Cir. 1990) (more than ten years); Fleet Credit Corp. v. Sion, 893 F.2d 441, (1st Cir. 1990) (four and one half years).

[132] See, e.g., Roger Whitmore's Auto Serv. Inc. v. Lake Country, Ill., 424 F.3d 659, 673 (7th Cir. 2005) (stating that "we have not hesitated to find that closed periods of several months to several years did not qualify as 'substantial' enough to satisfy continuity," and finding two years insufficient); Giuliano v. Fulton, 399 F.3d 381, 388-90 (2d Cir. 2005) (six months insufficient); First Capital Asset Mgmt. v. Satinwood, Inc., 385 F.3d 159, 181 (1st Cir. 2004) ("the mere fact that predicate acts span two years is insufficient, without more"); Turner v. Cook, 362 F.3d 1219, 1231 (continued...)

In the same vein, courts particularly have criticized private litigants' potential abuse of RICO and the mail and wire fraud statutes, through their efforts "to turn garden-variety state law fraud claims into federal RICO actions" by alleging multiple mailings and wire transmissions that neither constitute nor pose a threat of continuing unlawful activity. See Jennings, 495 F.3d at 472 and other cases cited in n.123 above. Indeed, the substantial majority of cases finding the requisite continuity lacking have involved private civil RICO actions (see notes 123 and 132 above), which arguably suggests that courts may be evaluating continuity more strictly in private civil RICO suits than in criminal RICO prosecutions.

Nevertheless, courts have repeatedly found that the requisite continuity was established where a scheme to defraud involved more than one victim and multiple mailings or wire transmissions spanned a substantial period of time, or the scheme posed a threat of continuing unlawful activity.[133]

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[132](...continued)
(9th Cir. 2004) (two months insufficient); Pizzo v. Bekin Van Lines Co., 258 F.3d 629, 632-33 (7th Cir. 2001) (two acts five months apart insufficient); Duran v. Carris, 238 F.3d 1268, 1271 (10th Cir. 2001) (finding insufficient "a closed-ended series of predicate acts constituting a single scheme . . . to accomplish a discrete goal . . . directed at a finite group of individuals . . . 'with no potential to extend to other persons or entities'" (citations omitted)); Wisdom v. First Midwest Bank, 167 F.3d 402, 407 (8th Cir. 1999) (ten months insufficient); see also cases cited in n.123 above.

[133] See, e.g., United States v. Hively, 437 F.3d 752, 761-62 (8th Cir. 2006) (ruling that even if two predicate acts of mailing extending for less than one year was insufficient, there was a sufficient threat of repetition to establish open-ended continuity); Fujisawa Pharm. Co. v. Kapoor, 115 F.3d 1332, 1338 (7th Cir. 1997) (multiple mailings and wire transmissions over six years designed to lure the plaintiff into purchasing $800 million in stock of an otherwise lawful entity controlled by the defendant); United Health Care Corp. v. Am. Trade Ins. Co., 88 F.3d 563, 571-72 (8th Cir. 1996) (multiple acts of mail fraud and wire fraud over two years to fraudulently divert insurance premium payments); Gagan v. Am. Cablevision, Inc., 77 F.3d 951, 962-64 (7th Cir. 1996) (multiple mailings and wire transmissions during four year period to defraud investors in an otherwise legal cable television limited partnership); Uniroyal Goodrich Tire Co. v. Mut. Trading
(continued...)

H.J. Inc.'s second alternative means to establish continuity is referred to as "open-ended" continuity. Courts have found such "open-ended" continuity where the racketeering activity, even

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[133](...continued)
Corp., 63 F.3d 516, 522-24 (7th Cir. 1995) (multiple mailings and wire transmissions during three years to defraud the plaintiff of money through four schemes); Tabas v. Tabas, 47 F.3d 1280, 1293-95 (3d Cir. 1995) (en banc) (multiple mailings during 3½ years to defraud heirs of their interest in a business); Aetna Cas. & Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1560-61 (1st Cir. 1994) (multiple mailings of false insurance claims over two years); Metromedia Co. v. Fugazy, 983 F.2d 350, 368 (2d Cir. 1992) (multiple mailings and wire transmissions to sell otherwise legitimate stock through fraud); Akin v. Q-L Inv., Inc., 959 F.2d 521, 533 (5th Cir. 1992) (multiple mailings over several years containing misrepresentations to sell limited partnership interests); Abell v. Potomac Ins. Co. of Ill., 946 F.2d 1160, 1167 (5th Cir. 1991) (multiple mailings over six years to sell tax-exempt revenue bonds involving more than 500 victims); Landry v. Air Line Pilots Ass'n Int'l, 901 F.2d 404, 428-29, 432-33 (5th Cir. 1990) (multiple acts of mail and wire fraud to defraud the plaintiff-pilots of their jobs and pension benefits by relocation of the pilots' base from New Orleans to El Salvador); Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882, 884-86 (6th Cir. 1990) (multiple mailings of bills and invoices during 17 year period to further scheme to defraud plaintiff through misrepresentations that plaintiff would be receiving the benefit of cost reductions resulting from hospital rebates); Morley v. Cohen, 888 F.2d 1006, 1009-11 (4th Cir. 1989) (multiple mailings and wire transmissions during six year period to sell otherwise legitimate interests in coal mines); Atlas Pile Driving, 886 F.2d at 993-95 (multiple mailings over three years by contractors to defraud subcontractors who provided materials and labor free for housing projects); Fleischhauer v. Feltner, 879 F.2d 1290, 1297-98 (6th Cir. 1989) (multiple mailings and wire transmissions during two year period to defraud 19 plaintiffs in the marketing and selling of film rights to the plaintiffs); Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc., 879 F.2d 10, 18 (2d Cir. 1989) (over 8000 mailings during two year period to defraud plaintiff in connection with construction costs and television studio leases); Beauford v. Helmsley, 865 F.2d 1386, 1391-92 (2d Cir. 1989) (thousands of mailings over several years to defraud purchasers of condominium apartments), vacated, 492 U.S. 914 (in light of H.J. Inc.), adhered to on further consideration, 893 F.2d 1433 (2d Cir. 1989); Blake v. Dierdorff, 856 F.2d 1365, 1368-69 (9th Cir. 1988) (multiple mailings and wire transmissions over 14 months to inflate the price of stock to defraud purchasers); United Energy Owners Comm., Inc. v. United Energy Mgmt. Sys., Inc., 837 F.2d 356, 361 (9th Cir. 1988) ("We conclude that the plaintiffs' allegations of multiple fraudulent acts involving multiple victims over more than one year are sufficiently related and pose a sufficient threat of continuing activity to satisfy the rules. . . ."); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1304 (7th Cir. 1987) (57 acts of mail and wire fraud over a 7 month period to defraud one victim); Sun Sav. and Loan Ass'n v. Dierdorff, 825 F.2d 187, 192-94 (9th Cir. 1987) (four acts of mail fraud occurring over several months to defraud a single victim); Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985) ("[T]he defendant's mailing of nine fraudulent tax returns . . . over a nine month period constitutes a pattern of racketeering.").

if short-lived, poses a threat of continuing unlawful activity.[134]

In accordance with H.J. Inc.'s third alternative means of establishing the requisite continuity, courts have frequently found sufficient continuity where even a few, short-lived racketeering acts were committed in furtherance of the affairs of a criminal enterprise that existed for a considerable time period. This is especially the case where the RICO enterprise is an organized crime group, such as an LCN crime family. As the Second Circuit, siting en banc, perceptively explained in Indelicato, 865 F.2d at 1384, where three simultaneous murders were committed "at the behest of an organized crime group, [involving the LCN], that fact would tend to belie any notion that the racketeering acts were sporadic or isolated."[135]

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[134] See, e.g., Hively, 437 F.3d at 762; Delgado, 401 F.3d at 298; De Falco, 244 F.3d at 320-24; United States v. Torres, 191 F.3d 799, 807-08 (7th Cir. 1999); Richardson, 167 F.3d at 626; United States v. Keltner, 147 F.3d 662, 669 (8th Cir. 1998); United States v. Shenberg, 89 F.3d 1461, 1471 (11th Cir. 1996).

[135] See also Connolly, 341 F.3d at 30 (finding sufficient continuity where four racketeering acts "were part of an ongoing criminal enterprise undertaken to facilitate future criminal acts by other members of that enterprise"); United States v. Diaz, 176 F.3d 52, 93-94 (2d Cir. 1999) (sufficient continuity where two simultaneous murders committed in furtherance of an ongoing drug distribution enterprise); United States v. Darden, 70 F.3d 1507, 1524-25 (8th Cir. 1995) (finding pattern sufficient where the defendant's two racketeering acts of possession of narcotics with intent to distribute and conspiracy to distribute narcotics were committed as part of a broader ongoing drug distribution network); United States v. Church, 955 F.2d 688, 694-95 (11th Cir. 1990) (defendant's participation in two sales of cocaine over a three-month period satisfied the continuity requirement where it was pursuant to a drug enterprise that existed over thirteen years); Minicone, 960 F.2d at 1106-07 (finding sufficient continuity where two predicate acts involving extortion and an illegal gambling business were committed as part of defendant's long-term association with an organized crime group); Eufrasio, 935 F.2d at 564-66 (finding sufficient continuity where three racketeering acts were committed to further, and at the behest of, the Philadelphia LCN family); Angiulo, 897 F.2d at 1180 (finding a pattern where the racketeering acts were committed at the behest of the New England LCN family); United States v. Hobson, 893 F.2d 1267, 1269 (11th Cir. 1990) (on remand following H.J. Inc., 492 U.S. 229, the court held that the defendant's two racketeering acts for aiding and abetting importation of a load of marijuana and aiding and abetting the possession with intent to distribute that same load of marijuana established the requisite threat of continuity because they (continued...)

Likewise, pursuant to H.J. Inc.'s fourth illustration, courts have found that the requisite continuity was established where the racketeering acts were "a regular way of conducting defendant's ongoing legitimate business." H.J. Inc., 492 U.S. at 243.[136]

Moreover, the requisite continuity may be proven by facts external to a defendant's own racketeering acts, such as the nature of the enterprise and racketeering activities by other members or associates of the enterprise,[137] including evidence of uncharged crimes.[138]

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[135](...continued)
were committed pursuant to an ongoing scheme of drug trafficking); cf. United States v. Aulicino, 44 F.3d 1102, 1110-14 (2d Cir. 1995) (where the acts of the defendant or the enterprise were inherently unlawful and were in pursuit of unlawful goals, courts have generally concluded that the requisite threat of continuity has been established, even if the period of racketeering activity was short; finding therefore that pattern occurring over relativity short period of three-and-one half months was sufficient in case involving a kidnapping ring).

[136] See, e.g., DeFalco, 244 F.3d at 324 (2nd Cir.) ("there was sufficient evidence from which a reasonable jury could conclude that the escalating nature of [contractors' threats of adverse action on a real property development project] indicated that they had no intention of stopping once they met some immediate goal"); United States v. Khan, 53 F.3d 507, 515 (2d Cir. 1995) (rejecting the defendant's claim of lack of continuity because he worked at a clinic for only nine weeks where the clinic regularly engaged in defrauding Medicaid through multiple acts of mail fraud); United States v. Maloney, 71 F.3d 645, 661-662 (7th Cir. 1995)(finding continuity where defendant judge's bribes and concealment were "a regular way of conducting [his] ongoing legitimate business."); Shields Enters., Inc. v. First Chicago Corp., 975 F.2d 1290, 1296 (7th Cir. 1992) ("Evidence that a defendant resorted to extortion every time it encountered resistance to its goals for an enterprise could persuade a reasonable jury that extortion is the defendant's 'regular way . . . of conducting or participating in the enterprise.'" (quoting H.J. Inc., 492 U.S. at 243)); Ticor Title Ins. Co. v. Florida, 937 F.2d 447, 450-51 (9th Cir. 1991) (three acts of forgery within a 13-month period established a pattern where they were similar and it reflected that it was the defendant's regular way of conducting business); see also cases cited in n.133 above.

[137] See, e.g., United States v. Richardson, 167 F.3d at 625-26 (continuity may be established by the totality of all the codefendants' unlawful conduct); Tabas v. Tabas, 47 F.3d 1280, 1294-95 (3d Cir. 1995) (en banc) (continuity based on mail fraud predicates may be established by the overall nature of the underlying fraudulent scheme in addition to the alleged predicate acts); United States v. Busacca, 936 F.2d 232, 238 (6th Cir. 1991) (The defendant, a union president and trustee of a benefit fund, embezzled $258,435 from the fund by issuing six checks to himself over a two and one
(continued...)

5. At Least One Racketeering Act Must Have Been Committed After October 15, 1970 and the Last Racketeering Act Must Have Been Committed Within Ten Years of a Prior Act

The statutory definition of a "pattern" also sets forth technical requirements regarding the time when the predicate acts were committed. To avoid violating the Ex Post Facto Clause,[139] the RICO statute requires that one act have been committed after October 15, 1970, the effective date of RICO.[140] See Section VI (F)(4) below. Also, the last act must have been committed within ten years of a prior act, excluding any period of imprisonment. This ten-year requirement has occasionally led to the mistaken view that RICO has a ten-year limitations period. See Section VI(Q) below. In fact, this requirement means only that the last racketeering act must have occurred within ten years after commission of a prior racketeering act that is essential to establish the requisite

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[137](...continued)
half month period. The court said that "the threat of continuity need not be established solely by reference to the predicate acts alone; facts external to the predicate acts may, and indeed should be considered." Id. at 238. The court found the requisite threat of continuity from the defendant's control of the union and the fund, the acts of concealment and disregard for proper procedures, and that there was nothing to stop the defendant's unlawful conduct until he was found liable.); Hobson, 893 F.2d at 1269 (continuity established where the defendant's two racketeering acts for importation of a load of marijuana and possession of the **same** load of marijuana were committed pursuant to an enterprise's ongoing drug trafficking); United States v. Kaplan, 886 F.2d 536, 543 (2d Cir. 1989) (continuity may be established by "external facts" in addition to the defendant's racketeering acts and the nature of the enterprise).

[138] See cases cited in Section VI(N) below.

[139] U.S. Const. art. I, § 9, cl. 3.

[140] In a case that alleges predicate acts occurring before the October 15, 1970, effective date of RICO, the jury must be instructed that it must find that the defendant committed at least one predicate act after the effective date. At least one conviction has been reversed because of failure to observe this requirement. United States v. Brown, 555 F.2d 407, 418-21 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978).

two acts.[141] For example, if only two racketeering acts constitute the pattern and the first act occurred in 1995, the last act must have occurred within ten years after 1995. If more than two acts constitute the pattern, it is permissible to have a time span longer than ten years between the first and last racketeering acts as long as the last racketeering act is within ten years of the prior racketeering act.[142]

Courts have held that the requirement that one act of racketeering be committed after the effective date of RICO eliminates any ex post facto problems, even if some acts of racketeering occurred before the effective date. See Section VI(F)(4) below. As a practical matter, this requirement is not likely to present problems for prosecutions in the twenty-first century. However, a related problem exists with respect to predicate offenses added to the RICO statute by amendment over the past several years.[143] For example, effective October 26, 2001, the Patriot Act added approximately 50 offenses to RICO's definition of racketeering activity. See Section I(B)(3)(a) above. The question may arise whether a RICO indictment returned after October 26, 2001 may include racketeering activity that violates the newly included statutes when that activity occurred on or before October 26, 2001, the effective date of the Patriot Act amendment. It is the policy of the Criminal Division that at least one act of racketeering charging the newly added predicate offense must have occurred after the effective date of any amendment adding any pre-existing statute. Otherwise, as a general rule, the Criminal Division will not approve charging any racketeering act

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[141] See United States v. Pungitore, 910 F.2d 1084, 1129 n.63 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991).

[142] See Pungitore, 910 F.2d at 1129 n.63.

[143] See Section I(B)(3) and (4) above and Section VI(F)(4) below.

pre-dating the amendment.

6. Single Episode Rule

In response to case law[144] and concerns that continuity may be deficient arising from the potential use of a single, isolated transaction to establish a defendant's pattern of racketeering activity, the Organized Crime and Racketeering Section developed a policy referred to as the "single episode rule." Although the courts have not mandated a single-episode rule (see pp. 94-95 above), OCRS will continue to implement its single episode policy, to ensure that the requisite continuity is satisfied.[145]

a. Single Episode Rule

The single episode rule is as follows:

> When a single act or course of conduct may be charged as multiple offenses or counts under the law governing those particular offenses, it will be presumed that multiple racketeering acts may be charged corresponding to those multiple offenses.

Thus, the single episode rule creates a presumption in favor of charging multiple predicate acts when the law permits charging multiple offenses or multiple counts for a given act or course of

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[144] See, e.g., United States v. Biaggi, 909 F.2d 662, 685-87 (2d Cir. 1990) (holding that the two offenses of bribery and obstruction of justice by falsely denying acceptance of that bribe constituted "sporadic criminal activity" that was insufficient to establish the requisite continuity), cert. denied, 499 U.S. 904 (1991); Computer Serv. v. Ash, Baptie & Co., 883 F.2d 48 (7th Cir. 1989) (rejecting contention that each instance of alleged unauthorized copying of computer software was a separate predicate act; crimes were more like installments of one crime, and not a pattern of racketeering activity); United States v. Phillips, 664 F.2d 971, 1038-39 (5th Cir. 1981)(holding that possession with intent to distribute and distribution of marijuana could not be separate predicate crimes because the two crimes would merge into a single violation of 21 U.S.C. § 841(a)), cert. denied, 457 U.S. 1136 (1982).

[145] The application of these guidelines necessarily depends on the facts of each case and rigid adherence to these should not be expected. In addition, prosecutors are urged to contact OCRS if continuity and single episode policy issues are likely to arise in a prosecution.

conduct. Most courts addressing this issue in criminal cases held that two offenses can be separate RICO predicates if they were prosecutable as individual offenses.[146] The principal exception to the single episode rule is as follows:

> When a single discrete short-lived course of conduct or act gives rise to multiple offenses, those offenses must be subpredicated and multiple racketeering acts may not be charged.

It bears emphasis that, in most instances where the law permits multiple offenses to be charged for a single course of conduct or a single act, OCRS will permit charging multiple racketeering acts corresponding to the permissible offenses. The exception to the general rule is intended to be a narrow exception that covers truly short-lived sporadic activity which may not be

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[146] See United States v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985) (three separate attempted murders), cert. denied, 474 U.S. 1100 (1986); United States v. Pepe, 747 F.2d 632, 661-63 (11th Cir. 1984) (using extortionate means to collect extension of credit in violation of 18 U.S.C. § 894 and traveling in interstate commerce with intent to carry out the same extortionate collection in violation of 18 U.S.C. § 1952); United States v. Bascaro, 742 F.2d 1335, 1360-61 (11th Cir. 1984) (importation of and possession with intent to distribute marijuana), cert. denied, 472 U.S. 1017 (1985); United States v. McManigal, 708 F.2d 276, 282 (7th Cir.) (mailings in furtherance of same mail fraud scheme), vacated on other grounds, 464 U.S. 979 (1983), modified on other grounds on remand, 723 F.2d 580 (7th Cir. 1983); United States v. Starnes, 644 F.2d 673, 678 (7th Cir.) (Travel Act, arson, and mail fraud charges all related to a single arson scheme), cert. denied, 454 U.S. 826 (1981); United States v. Phillips, 664 F.2d 971, 1039 (5th Cir. 1981) (attempted drug importation and related travel in aid of racketeering), cert. denied, 457 U.S. 1136 (1982); United States v. Colacurcio, 659 F.2d 684, 688 n.4 (5th Cir. 1981) (multiple briberies), cert. denied, 455 U.S. 1002 (1982); United States v. Welch, 656 F.2d 1039, 1069 (5th Cir. 1981) (conspiracy to facilitate gambling under 18 U.S.C. § 1511 and accepting bribes to permit gambling in violation of state law), cert. denied, 456 U.S. 915 (1982); United States v. Martino, 648 F.2d 367, 402-03 (5th Cir. 1981) (arson and related acts of mail fraud), cert. denied, 456 U.S. 949 (1982); United States v. Morelli, 643 F.2d 402, 411-12 (6th Cir.) (telephone call in violation of wire fraud statute and related wiring of money), cert. denied, 453 U.S. 912 (1981); United States v. Karas, 624 F.2d 500, 504 (4th Cir. 1980) (payment of a bribe in three installments), cert. denied, 449 U.S. 1078 (1981); United States v. Weatherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978) (multiple mailings in furtherance of same overall scheme to defraud); United States v. Roemer, 703 F.2d 805 (5th Cir.) (mail fraud and wire fraud acts related to the same bribery scheme), cert. denied, 464 U.S. 935 (1983). But see cases cited in n.126 above.

charged as multiple predicate acts.

The following examples illustrate the single episode rule and the general exception, but are not intended to be exhaustive. Rather, the examples are intended to give some guidance. Of course, each case must be considered on its own particular facts.

b. Examples Where Multiple Racketeering Acts May Be Charged

The following are a few examples of circumstances that often arise where it will be presumed that multiple racketeering acts may be charged, provided that the law governing the particular offenses at issue allows charging multiple offenses or counts:

(1) Concealment money laundering offense and the offense for the specified unlawful activity that generated the money that was laundered.

(2) Multiple money laundering transactions arising from the same scheme or related schemes, but multiple financial transactions moving the same sum of money must be subpredicated under one predicate act. For example, defendant deposits $10,000 into a bank account, then transfers it shortly thereafter to another account. The conduct may not be charged as multiple predicate acts.

(3) Gambling offense and an offense involving the collection of the debt that arose from the gambling activity.

(4) A conspiracy and its object offenses where the conspiracy is broader than any of the object offenses.

a. For example, a conspiracy to murder rival LCN or gang members and four murders pursuant to that conspiracy may constitute five predicate acts.

b. Also, e.g., a broad ongoing conspiracy to distribute drugs and four separate acts of distribution may constitute five predicate acts.

(5) Importation and distribution of the same load of drugs where the transactions are part of an ongoing, more extensive drug trafficking network.

(6) Ongoing extortion or bribe schemes involving the same victim or bribe recipient in which the defendant repeatedly bribes or extorts the victim over a period of time may constitute separate racketeering acts for each payment.

a. For example, the defendant periodically collects "juice" payments from a drug dealer, operator of a gambling business, or a legitimate businessman. Multiple racketeering acts for each payment will likely be permitted.

b. Multiple payments under the "installment" theory of bribery or extortion, however, may not be charged as multiple predicate acts. See section c(2) below.

(7) Interstate travel (ITAR--18 U.S.C. § 1952) or transportation of stolen goods taken by fraud (18 U.S.C. § 2314) and the criminal activity that underlies the interstate travel or that resulted in the goods being transported may constitute separate racketeering acts.

(8) Alien smuggling and related offenses of extortion, robbery, extortionate credit transactions (ECT) and kidnapping generally may constitute separate racketeering acts.

(9) Kidnapping, robbery and extortion of the same victim may generally be charged as separate racketeering acts, but where the kidnapping is of very brief duration and is incidental to the robbery or extortion, the kidnapping may not be charged as a separate racketeering act. For example, in some states, a brief detention for only the few minutes it may take to rob the victim may constitute kidnapping and robbery. In such circumstances, the kidnapping may not be charged as a separate racketeering act. The brief detention that underlies the kidnapping is no more than is necessary to carry out the robbery or extortion, since such offenses must involve some degree of interference with the victim's freedom of movement.

c. Examples Where Multiple Racketeering Acts May Not Be Charged

The following are a few of the circumstances that often arise where separate racketeering acts may not be charged, but where subpredicate acts may be charged:

(1) A single act or very short-lived course of conduct that gives rise to multiple offenses must be charged as one racketeering act:

a. A defendant enters a bank, points a gun at the bank teller, robs the bank and shoots the teller, wounding the teller. The robbery, shooting, and use of a gun (assuming a RICO predicate applied) may not be charged as separate racketeering acts, but may be charged as subpredicates.

b. A single short-lived act of arson that causes physical injury and property damage and ensuing offenses, such as the arson, use of explosive devices, and

offenses causing injury and damage may not be charged as separate racketeering acts, but may be charged as subpredicates.

c. Distribution and possession with intent to distribute the same load of drugs may not be charged as separate racketeering acts.

(2) Bribery or extortion of a sum of money under the installment theory of payment: for example, the defendant demands a bribe or makes an extortionate demand in the amount of $10,000, but agrees to accept $1,000 a month. The ten payments may not be charged as ten racketeering acts, but must be charged as one predicate act.

(3) Multiple mailings or wire transmissions pursuant to a single discrete scheme to defraud the same victim may not be charged as multiple predicate acts, but depending on the particular facts, multiple racketeering acts may be charged where there is more than one victim; or even where it involves the same victim, and the mailing or wire transmission at issue has a particular significance, rather than being one of many such routine mailings or wire transmissions to execute the scheme to defraud.

(4) A narrow conspiracy to achieve a single-object offense and the object offense may not be charged as multiple racketeering acts: for example, a conspiracy to rob bank X and the robbery of bank X may not be charged as separate racketeering acts.

(5) A telephone call to facilitate a specific drug transaction and the subsequent transaction may not be charged as separate racketeering acts although separate racketeering acts may be charged for drug transactions and a telephone call where the telephone call does not relate to a specific drug transaction that is already charged as a separate racketeering act.

d. Conclusion

Simply put, to determine whether multiple predicate acts may be charged for a single act or course of conduct, if the law governing the offenses at issue allows charging multiple offenses or multiple counts, then it will be presumed that multiple predicate acts may be charged, unless the circumstances fall within the narrow exception designed to preclude short-lived sporadic activity from being charged as multiple predicate acts.

It cannot be overemphasized, however, that even if numerous racketeering acts are charged, in some instances the requisite continuity or threat of continuity may be lacking nonetheless.

Therefore, OCRS will carefully analyze the facts of each case to determine whether the requisite continuity or threat of continuity has been established.

Of course, approval may be granted if the single-episode problem is remedied. One remedy is to drop one of the overlapping predicates. Another remedy is to charge the overlapping predicates as sub-parts of a single predicate act. If this remedy is employed, however, the indictment should be worded to clearly show that one or more of the sub-parts amount to only one racketeering act. With regard to special verdict forms, discussed in Section VI(L) below, they should set forth the jury's unanimous decision with respect to each sub-predicate.

F. Unlawful Debt

1. Collection of Unlawful Debt Provides an Alternative Ground for RICO Liability

Participating in the affairs of an enterprise through the "collection of unlawful debt" is an alternative ground for imposing liability under 18 U.S.C. §§ 1962(c) and (d). Likewise, acquiring or maintaining an interest in an enterprise through the "collection of an unlawful debt" is an alternative ground for imposing liability under 18 U.S.C. §§ 1962(a) and (b). In such cases, the Government's is not required to establish that a defendant engaged, or conspired to engage, in a pattern of racketeering activity since the alternative ground of "collection of unlawful debt" is sufficient to establish liability under 18 U.S.C. § 1962(a), (b), (c), or (d).[147]

[147] See, e.g., Tocco, 200 F.3d at 426; Mauro, 80 F.3d at 75; Oreto, 37 F.3d at 751; United States v. Weiner, 3 F.3d 17, 23-24 (1st Cir. 1993); United States v. Aucoin, 964 F.2d 1492, 1495 (5th Cir.), cert. denied, 506 U.S. 1023 (1992); United States v. Giovanelli, 945 F.2d 479, 490-91 (2d Cir. 1991); Eufrasio, 935 F.2d at 558 n.3, 576 & n.28; Pungitore, 910 F.2d at 1097 & n.1; Angiulo, 847 F.2d at 964; Pepe, 747 F.2d at 673; United States v. Battle, 473 F. Supp. 2d 1185, 1211-12 (S.D. Fla. 2006); United States v. Megale, 363 F. Supp. 2d 359, 363-64 & n.5 (D. Conn. 2005).

Moreover, a single RICO count may include both alternative grounds for liability, i.e., a pattern of racketeering activity and collection of unlawful debt,[148] or each alternative ground may be the basis for a separate RICO count.[149]

2. The Unlawful Debt Must Be Incurred in Connection With the Business of Gambling or Lending Money at a Usurious Rate

Section 1961(6) defines "unlawful debt" as follows:

> "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

a. Unlawful Debts Incurred in Connection with a Gambling Business

Although courts have held that a single act of collection of an unlawful gambling debt is sufficient to satisfy Section 1961(6),[150] the debt, nevertheless, must have been "incurred in connection with the business of [unlawful] gambling." 18 U.S.C. § 1961(6). See United States v. Salinas, 564 F.2d 688, 691 (5th Cir. 1977) (noting that Congress intended Section 1961(6) to address "the business of gambling"), cert. denied, 435 U.S. 951 (1978); cf. Durante Bros. and Sons, Inc. v.

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[148] See, e.g., Mauro, 80 F.3d at 75; Angiulo, 847 F.2d at 960, 964; United States v. Biasucci, 786 F.2d 504, 506 n.1 (2d Cir.), cert. denied, 479 U.S. 827 (1986); Pepe, 747 F.2d at 673.

[149] See, e.g., Tocco, 200 F.3d at 426; Battle, 473 F. Supp. 2d at 1211; Cf. Pepe, 747 F.2d at 673.

[150] See, e.g., Tocco, 200 F.3d at 426; Giovannelli, 945 F.2d at 490.

Flushing Nat'l Bank, 755 F.2d 239, 250 (2d Cir. 1985) (discussed in Section II(F)(2)(b) below).[151] However, the applicable state or federal statute need not "specifically bar the business of gambling;" rather it is sufficient that the particular statute prohibits the activity charged. See Salinas, 564 F.2d at 690-91.

Moreover, the applicable state or federal offense that makes the gambling activity unlawful need not carry a penalty of more than one year as is required by RICO's definition of "racketeering activity," under Section 1961(1)(A), for a predicate offense in violation of state law. See Aucoin, 964 F.2d at 1495-96.

b. Unlawful Debts Incurred in Connection with the Business of Lending Money at Usurious Rates

To establish that an unlawful debt was incurred or contracted in connection with the business of lending money at a usurious rate, the Government must establish that:

> [1] the debt was unenforceable in whole or in part because of state or federal laws relating to usury, [2] the debt was incurred in connection with "the business of lending money. . . at a [usurious] rate," and [3] the usurious rate was at least twice the enforceable rate.

Durante Bros., 755 F.2d at 248 (quoting 18 U.S.C. § 1961(6)).[152]

As is the case with the collection of unlawful debts incurred in a gambling business, collection of a single usurious debt is sufficient to satisfy Section 1961(6),[153] provided that it was

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[151] For example, it would be sufficient where the Government established only a single specific collection of an unlawful gambling debt and a witness testified, or other evidence established, that the single gambling debt was collected as part of a broader gambling business.

[152] Accord Cannarozzi v. Fiumara, 371 F.3d 1, 4 (1st Cir. 2004); Nolen v. Nucentrix Broadband Networks Inc., 293 F.3d 926, 929 (5th Cir. 2002).

[153] See, e.g., Weiner, 3 F.3d at 23-24; Eufrasio, 935 F.2d at 576; United States v. Vastola, (continued...)

incurred in connection with "the business of lending money . . . at a rate usurious . . . where the usurious rate is at least twice the enforceable rate." 18 U.S.C. § 1961(6). As one court explained:

> [T]he legislative history indicates that the purpose of requiring, in the definition of "unlawful debt," that the usurious rate be at least twice the enforceable rate was "to limit the effect of this definition to cases of clear "loansharking" . . . . The requirement that the loan have been incurred in connection with "the business of" making usurious loans seems aimed at the same goal, i.e., the exclusion from the scope of the statute of occasional [and sporadic] usurious transactions by one not in the business of loansharking.

Durante Bros., 755 F.2d at 250 (citations omitted).

Moreover, the Government is not required to prove that the defendant knew the specific rates charged on usurious loans or all the details of the illegal activity, as long as the defendant knew that the debt was unlawful and that the rate charged was at least twice the legally enforceable rate.[154] Nor must the Government prove that extortionate activity was used in the collection of the unlawful debt.[155]

G. Racketeering Investigator, Racketeering Investigation, Documentary Material, and Attorney General

The terms "racketeering investigator," "racketeering investigation," "documentary material," and "Attorney General" are defined in 18 U.S.C. §§ 1961(7), (8), (9), and (10), respectively. These terms relate to matters involving the Government's enforcement of civil RICO, 18 U.S.C. § 1964, and are discussed in OCRS' Civil RICO Manual (Oct. 2007) at 114-29.

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[153](...continued)
899 F.2d 211, 228-29 and n.23 (3d Cir.), cert. granted and vacated on other grounds, 497 U.S. 1001 (1990); Megale, 363 F. Supp. at 363.

[154] See, e.g., Biasucci, 786 F.2d at 512.

[155] See, e.g., Vastola, 899 F.2d at 226 n.18.

III

RICO OFFENSES -- SECTION 1962

There are four distinct violations under the RICO statute that are set forth in the four subsections of Section 1962. All four subsections incorporate the basic elements of "enterprise" and "pattern of racketeering activity," discussed in Sections II(D) and (E) above. However, the various offenses are quite different in the ways they combine those elements.

A. Section 1962(a) - Acquire An Interest In An Enterprise With Racketeering Income

Section 1962(a) provides, in part:

> (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.

In order to establish a violation of Section 1962(a), the Government must prove the following elements beyond a reasonable doubt:

1. Existence of an enterprise;
2. The enterprise engaged in, or its activities affected, interstate or foreign commerce;
3. The defendant derived income, 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;
4. The defendant used or invested, directly or indirectly, any part of that income, or the proceeds of that income, in the acquisition of an interest in, or the establishment or operation of, the enterprise.[156]

This provision makes it illegal to invest the proceeds of racketeering activity in an enterprise that

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[156] See, e.g., Abraham v. Singh, 480 F.3d 351, 356-57 (5th Cir. 2007); St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 441 (5th Cir. 2000); United States v. Vogt, 910 F.2d 1184, 1194 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991); Cauble, 706 F.2d at 1331.

affects interstate commerce.[157] A classic example is a narcotics dealer using the proceeds of his narcotics trafficking acts to invest in or operate a legitimate business.[158]

Several important issues arise in applying this section. First, as noted in connection with the discussion of the "enterprise" element, some courts have held that, unlike the situation under Section 1962(c), the defendant and the enterprise can be the same entity for purposes of a Section 1962(a) violation.[159]

Next, it is not entirely clear from the face of the statute whether a violation of Section 1962(a) requires a defendant to have "participated as a principal" in the underlying pattern of racketeering activity. The issue may arise, for example, where an attorney or financial adviser assists a narcotics dealer in investing racketeering proceeds in an enterprise. Depending on how the language of Section 1962(a) is interpreted, the adviser may or may not be liable as a RICO violator. However,

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[157] See, e.g., Brittingham v. Mobil Corp., 943 F.2d 297, 303 (3d Cir. 1991); Jiffy Lube Intern., Inc. v. Jiffy Lube of Pennsylvania, Inc., 848 F. Supp. 569, 582 (E.D. Pa. 1994)(legislative history indicates that primary purpose of provision was to halt investment of racketeering proceeds into legitimate businesses).

[158] See, e.g., Cauble, 706 F.2d at 1342-43.

[159] See, e.g., Genty v. Resolution Trust Corp., 937 F.2d 899, 907 (3d Cir. 1991) ("[w]here . . . a corporate 'person' is also the 'enterprise' through which the alleged racketeering activity occurred, liability can arise only under sections 1962(a) or (b)" because § 1962(c) requires that "the 'persons' liable and the 'enterprise' be distinct entities. . . . Sections 1962(a) and (b), on the other hand, do not require such separate identity."); Temple University v. Salla Bros., Inc., 656 F. Supp. 97, 103 (E.D. Pa. 1986) (under Section 1962(a), "the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. This approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity." (quoting Haroco, Inc. v. Am. Nat'l Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985)); Abelson v. Strong, 644 F. Supp. 524, 534 (D. Mass. 1986) (corporation could be held liable under § 1962(a) for using the proceeds of racketeering activity in its operations). See also Section II(D)(7) and cases in n.112 above.

as a matter of policy, a RICO prosecution under Section 1962(a) will not be approved unless the RICO defendant is actually charged with the underlying pattern of racketeering activity. Case law supports this policy, as several courts have interpreted the phrase "participated as a principal" to apply both to collection of an unlawful debt and to a pattern of racketeering activity.[160] For example, in Brady v. Dairy Fresh Products Co., 974 F.2d 1149 (9th Cir. 1992), a group of investors appealed a district court's grant of summary judgment in favor of corporations and individuals involved in various investments. The Brady court found no evidence that the defendants participated as principals in the alleged pattern of racketeering and held that "the person who receives and invests the 'racketeering' income must have participated as a principal in the racketeering activities." Id. at 1152.

Notably, this policy does not mean that in a Section 1962(d) conspiracy to violate Section 1962(a), the defendant must agree personally to commit the charged racketeering acts.[161] Moreover, the policy does not mean that financial advisers can never be prosecuted for assisting a criminal to launder money; under existing precedent, the Government may argue that money launderers can be charged with substantive narcotics violations, on the theory that money laundering is essential to the narcotics trafficking business.[162]

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[160] See, e.g., Genty v. Resolution Trust Corp., 937 F.2d 899, 908 (3d Cir. 1991) (citing cases).

[161] See United States v. Loften, 518 F. Supp. 839, 851-56 (S.D.N.Y. 1981), aff'd, 819 F.2d 1129 (2d Cir. 1987) (attorney who did not participate in the underlying racketeering activity could be liable as a RICO conspirator under section 1962(d) for conspiring to violate section 1962(a)); see also Salinas v. United States, 522 U.S. 52, 63-65 (1997) and Sections III(D)(1) and (2) below.

[162] See, e.g., United States v. Dela Espriella, 781 F.2d 1432, 1436 (9th Cir. 1986); United States v. Orozco-Prada, 732 F.2d 1076, 1080 (2d Cir.), cert. denied, 469 U.S. 845 (1984); United (continued...)

Another issue that arises in connection with Section 1962(a) prosecutions involves the tracing of investment money. Although a defendant may argue that the Government must trace to the enterprise any monies charged as being invested in violation of Section 1962(a), rigorous tracing is not required.[163]

Finally, the term "income" has been construed to have its "common usage and meaning."[164] It also has been held that a Section 1962(a) count is viable even though some of the "dirty" money coming from racketeering activity came from the FBI in an undercover operation.[165]

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[162](...continued)
States v. Barnes, 604 F.2d 121, 154-55 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980). See also United States v. Zambrano, 776 F.2d 1091, 1094-96 (2d Cir. 1985) (aiding and abetting counterfeit credit card conspiracy by supplying items not in themselves illegal).

[163] For example, in Vogt, 910 F.2d at 1194, the court stated that the Government need only establish that the defendant used "some part of the [illegal] proceeds" in the operation or establishment of an enterprise and that "Section 1962(a) does not exact rigorous proof of the exact course of income derived from a pattern of racketeering activity into its ultimate 'use or investment.'" Similarly, in Cauble, 706 F.2d at 1342, the court noted that "the prosecution need prove only that illegally derived funds flowed into the enterprise; it need not follow a trail of specific dollars from a particular criminal act." In United States v. McNary, 620 F.2d 621, 628-29 (7th Cir. 1980), the court upheld a conviction under Section 1962(a), holding that "evidence of indirect investment of the proceeds of racketeering activity into an enterprise affecting interstate commerce is sufficient to establish a violation of Section 1962(a)." In McNary, it was sufficient to prove that the defendant's receipt of an amount of racketeering income permitted him to invest an equivalent amount of money in the enterprise. The requisite nexus between the money and the enterprise can be shown, under Cauble and McNary, by circumstantial evidence. Cf. United States v. Parness, 503 F.2d 430, 436 (2d Cir. 1974) (no need for precise tracing under 18 U.S.C. § 1962(b); circumstantial evidence can suffice), cert. denied, 419 U.S. 1105 (1975); Bachmeir v. Bank of Ravenswood, 663 F. Supp. 1207, 1220 (N.D. Ill. 1987) (fraudulently transferred funds could constitute illegal proceeds under § 1962(a) to support charge against bank); Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 806-07 (E.D. La. 1986) (plaintiff did not have to trace proceeds to establish a § 1962(d) violation). See also Williamson, 224 F.3d at 441-43.

[164] See, e.g., Cauble, 706 F.2d at 1344.

[165] See, e.g., United States v. Gonzales, 620 F. Supp. 1143, 1145 (N.D. Ill. 1985).

B. Section 1962(b) -- Acquire An Interest In An Enterprise Through Racketeering Activity

Section 1962(b) provides:

> 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.

In order to establish a violation of Section 1962(b), the Government must prove the following elements beyond a reasonable doubt:

1. Existence of an enterprise;
2. The enterprise engaged in, or its activities affected, interstate or foreign commerce;
3. The defendant acquired or maintained, directly or indirectly, an interest in or control of the enterprise;
4. The defendant acquired or maintained the interest through a pattern of racketeering activity or through collection of an unlawful debt.[166]

This provision has been the least used of the four RICO subsections. Section 1962(b) essentially makes it unlawful to take over an enterprise that affects interstate commerce through a pattern of racketeering activity or collection of an unlawful debt. The cases under this subsection have involved defendants fraudulently or forcibly acquiring interests in ongoing businesses.[167] Courts have held that a Section 1962(b) claim must allege a specific nexus between control of the named

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[166] See, e.g., Tal v. Hogan, 453 F.3d 1244, 1261 (10th Cir. 2006); Trautz v. Weisman, 809 F. Supp. 239, 245 (S.D.N.Y. 1992).

[167] See, e.g., Biasucci, 786 F.2d at 506-07 (acquisition of interests in and control over four businesses through loansharking activities involving collection of unlawful debts); United States v. Jacobson, 691 F.2d 110, 112 (2d Cir. 1982) (acquisition of bakery's lease as security for usurious loan); United States v. Parness, 503 F.2d 430, 438 (2d Cir. 1974) (acquisition of interest in corporation by illegally preventing owner from paying off loan to avoid foreclosure), cert. denied, 419 U.S. 1105 (1975).

enterprise and the alleged racketeering activity.[168] Although the language of the statute lends itself to broad applications, policy considerations discourage creative use of this subsection. Thus, for example, a Section 1962(b) prosecution probably will not be approved where the leader of an outlaw motorcycle gang "maintained control" of an enterprise through a pattern of murders and extortions that intimidated its members. Such activity is more easily addressed as a Section 1962(c) violation. In general, Section 1962(b) should be reserved for the classic cases involving infiltration of legitimate businesses by organized criminal groups.

In construing the statute, courts have held that the term "interest" is in the nature of a proprietary interest, such as the acquisition of stock, and that the term "control" is in the nature of controlling the acquisition of sufficient stock to affect the composition of a board of directors.[169]

C. Section 1962(c) - Conduct Or Participate In An Enterprise

Section 1962(c) provides:

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[168] See, e.g., Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190 (3d Cir. 1993); South Carolina Elec. & Gas v. Westinghouse Elec., 826 F. Supp. 1549, 1561-62 (D.S.C. 1993); Trautz v. Weisman, 809 F. Supp. at 245.

[169] See, e.g., Whaley v. Auto Club Ins. Ass'n, 891 F. Supp. 1237, 1240-41 (E.D. Mich.); Jacobson, 691 F.2d at 112-13 (term "interest" is broad enough to encompass all property rights in an enterprise, including a lease); Teague v. Bakker, 35 F.3d 978, 994-95 n.23 (4th Cir. 1994)), cert. denied, 513 U.S. 1153 (1995) (upholding a jury instruction that "acquiring an interest in an enterprise" means acquiring stock or ownership equity when the jury was also instructed that the plaintiffs established that the defendant gained "actual day-to-day involvement in the management and operation" of the enterprise); see also Moffatt Enterprises, Inc. v. Borden, Inc., 763 F. Supp. 143, 147 (W.D. Pa. 1990); Tal, 453 F.3d at 1268-1269 ("'Interest in and control of requires more than a general interest in the results of its actions, or the ability to influence the enterprise through deceit . . . . Rather, it requires some ownership of the enterprise or an ability to exercise dominion over it."); Cf. Ikuno v. Yip, 912 F.2d 306, 310 (9th Cir. 1990) ("control within the meaning of section 1962(b need not be formal control and 'need not be the kind of control that is obtained, for example, by acquiring a majority of stock of a corporation.'" (citation omitted)).

> 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.

In order to establish a violation of Section 1962(c), the Government must prove the following elements beyond a reasonable doubt:

1. Existence of an enterprise;
2. The enterprise engaged in, or its activities affected, interstate or foreign commerce;
3. The defendant was employed by or was associated with the enterprise;
4. The defendant conducted or participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and
5. The defendant participated in the affairs of the enterprise through a pattern of racketeering activity or collection of unlawful debt.[170]

This provision is by far the most often used, and consequently the most important, of the substantive RICO offenses.

1. The Enterprise Element

The Enterprise element is discussed in Section II(D) above.

2. The Requisite Effect on Interstate or Foreign Commerce

The element involving the requisite effect on interstate or foreign commerce is discussed in Section VI(G) below.

3. The Pattern of Racketeering Activity Element and Collection of Unlawful Debt

Section 1962(c)'s requirement that a defendant participate in an enterprise through either a "pattern of racketeering activity" or "collection of unlawful debt" is discussed in Sections II(E) and (F) above.

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[170] See, e.g., Sedima, 473 U.S. at 496-97; Smith, 413 F.3d at 1265-66; United States v. Posada-Rios, 158 F.3d 832, 855 (5th Cir. 1998); United States v. Hoyle, 122 F.3d 48, 50 (D.C. Cir. 1997); Starrett, 55 F.3d at 1541; Console, 13 F.3d at 652-53; United States v. Alvarez, 860 F.2d 801, 818 (7th Cir. 1988).

4. Employed By or Associated With an Enterprise

Section 1962(c) also requires proof that the defendant "was employed by or associated with" the alleged enterprise. In the case of a legitimate enterprise, a defendant's employment by the enterprise can be established by evidence that he or she was on the payroll, had an ownership interest in the enterprise, or held some position in the enterprise.[171] It also is not very difficult to establish that a defendant is "associated with" a legitimate business. For example, a body shop owner is "associated with" an insurance company being defrauded,[172] and in cases involving bribery, a sheriff is "associated with" the vendor bribing him,[173] and a judge is "associated with" his or her judicial office or the court.[174]

In the case of an association-in-fact enterprise, the issue of a defendant's association with the enterprise merges into the issue of the enterprise's identity. Thus, if the evidence adequately establishes the existence of an association-in-fact enterprise consisting of all the defendants, each defendant is necessarily "associated with" the enterprise.

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[171] See, e.g., United States v. Gabriele, 63 F.3d 61, 68 (1st Cir. 1995) (defendant integral to carrying out operations of enterprise was employed by the enterprise); Console, 13 F.3d at 654 (partner of law firm was employed by or associated with the enterprise-firm).

[172] See, e.g., Aetna Casualty Surety Co., 43 F.3d at 1557 (persons who were either insureds or claimants under automobile policies or owners or operators of body shop involved in repairing insured automobiles were "associated with" the insurer for purposes of RICO liability).

[173] See, e.g., United States v. Mokol, 957 F.2d 1410, 1416-18 (7th Cir.) (deputy sheriff who accepted bribes in exchange for providing police protection was "associated with" amusement company which operated illegal gambling business), cert. denied, 506 U.S. 899 (1992).

[174] See, e.g., United States v. Grubb, 11 F.3d 426, 438-39 (4th Cir. 1993) (state judge was charged with using his judicial office to influence elections by illegally raising campaign contributions. The court stated that "[w]e also have a defendant who undeniably is employed by and operates or manages the enterprise within the meaning of Reves v. Ernst & Young." (citation omitted)).

For example, in United States v. Marino, 277 F.3d 11 (1st Cir. 2002), the court upheld a jury instruction that a person is associated with an association-in-fact enterprise

> if he knowingly participates, directly or indirectly, in the conduct of the affairs of an enterprise. One need not have an official position in the enterprise to be associated with it. One need not formally align himself with an enterprise to associate with it. Association may be by means of an informal or loose relationship. To associate has its plain meaning . . . . "Associated" means to be joined, often in a loose relationship, as a partner, fellow worker, colleague, friend, companion, or ally. Thus, although a person's role in the enterprise may be very minor, a person will still be associated with the enterprise if he knowingly joins with a group of individuals associated in fact who constitute the enterprise.

Id. at 33. Accord Delgado, 401 F.3d at 297; Elliott, 571 F.2d at 903 ("the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise").[175]

Ordinarily, the indictment will allege that the enterprise consists of all the RICO defendants and, in some cases, other persons known and unknown to the grand jury. In a case where a given defendant is not alleged to be a member of the enterprise, his or her association with the enterprise is not very difficult to establish. Given that the defendant must commit at least two acts of racketeering activity in order to be charged with a substantive violation of RICO, and often is charged with more than two racketeering acts, proof of these acts often will establish his or her association with the enterprise. However, it is preferable to introduce additional proof of the defendant's association in order to defeat a defense argument that this element has not been established separately from the pattern of racketeering activity.[176]

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[175] See also Orena, 32 F.3d at 710 (finding defendants "associated with" organized crime family despite internal family dispute).

[176] See discussion in Sections II(D) and (E) above.

5. Conduct or Participate in the Conduct of the Enterprise's Affairs -- Reves Test

Section 1962(c) requires proof that each defendant did "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs." In Reves v. Ernst & Young, 507 U.S. 170 (1993), the Supreme Court addressed this element, holding that a defendant is not liable for a substantive RICO violation under 18 U.S.C. § 1962(c) unless the defendant "participate[s] in the operation or management of the enterprise itself." Id. at 185.[177]

In describing its "operation or management" test, the Supreme Court stated:

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs.

Reves, 507 U.S. at 179. Applying the "operation or management" test, the Court found defendant Ernst & Young's participation in the financial audits of an enterprise was insufficient to establish that it played any part in directing the affairs of the enterprise, and hence, it could not be liable under Section 1962(c).[178]

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[177] The defendant in Reves was Ernst & Young, a firm that provided accounting services to the alleged RICO enterprise, a farmer's cooperative. The defendant was not an employee or member of the enterprise, but rather, was an outsider that was merely "associated with" the enterprise. The plaintiffs alleged Ernst & Young misled investors by preparing and explaining the cooperative's financial information through a pattern of false and misleading statements, particularly regarding the fair market value of the cooperative's principal asset, a gasohol plant. Reves, 507 U.S. at 172-77.

[178] In that regard, the Supreme Court stated:

> Thus, we only could conclude that Arthur Young participated in the operation or management of the Co-op itself if Arthur Young's failure to tell the Co-op's board that the [gasohol] plant should have been given its fair market value constituted such participation. We think that Arthur Young's failure in this respect is not sufficient to give rise

(continued...)

Although the Supreme Court clearly indicated that the dispositive factor for liability under Section 1962(c) is whether the defendant had "some part in directing the enterprise's affairs," the Court explicitly declined to decide what degree of direction of the enterprise's affairs was sufficient. Reves, 507 U.S. at 184 n.9. Nevertheless, the Supreme Court made several statements indicating that it was not adopting an unduly restrictive test that would limit RICO liability to persons who performed significant roles in directing the enterprise's affairs.

For example, the Court found that "RICO liability is not limited to those with primary responsibility for the enterprise's affairs," and therefore, "we disagree with the suggestion of the Court of Appeals for the District of Columbia Circuit that § 1962(c) requires **significant control** over or within an enterprise." Reves, 507 U.S. at 179 n.4 (citing Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc) (emphasis added in Reves). The Court further stated:

> We agree that liability under § 1962(c) is not limited to upper management, but we disagree that the "operation or management" test is inconsistent with this proposition. An enterprise is "operated" not just by upper management but also by **lower-rung** participants in the enterprise who are under the **direction** of upper management. An enterprise also might be "operated" or "managed" by others "**associated with**" the enterprise who exert control over it as, for example, by bribery.

Reves, 507 U.S. at 184 (emphasis added) (footnote omitted).

Furthermore, the Court noted that subsections (a) and (b) of Section 1962 were broader than subsection (c), in that subsections (a) and (b) were not restricted to persons "employed by or associated with" an enterprise as was subsection (c), and hence, (a) and (b) also applied to outsiders.

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[178](...continued)
to liability under § 1962(c).

Reves, 507 U.S. at 186.

The Court added:

> § 1962(c) cannot be interpreted to reach complete "outsiders" because liability depends on showing that the defendants conducted or participated in the conduct of the "**enterprise's** affairs," not just their **own** affairs. Of course, "outsiders" may be liable under § 1962(c) if they are "associated with" an enterprise and participate in the conduct of **its** affairs--that is, participate in the operation or management of the enterprise itself . . . .

Reves, 507 U.S. at 185.

Thus, under the Reves test, Section 1962(c) liability attaches to an insider or outsider of an enterprise who has some part in directing the enterprise's affairs, such as exerting control over it by bribery, and liability also attaches to "lower rung participants in the enterprise who are under the direction of upper management." Id. at 184.

Following Reves, the circuit courts have made it clear that a defendant need not be among the enterprise's "control group" to be liable for a substantive RICO violation; rather, it may be sufficient that a defendant intentionally perform acts that are related to, and foster, the operation or management of the enterprise.[179] As one court explained:

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[179] See, e.g., Urban, 404 F.3d at 769-70 (stating that "the 'operation or management' test does not limit RICO liability to upper management because 'an enterprise is operated not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management'"; and holding that Reves liability encompassed city employees who performed plumbing inspections and related work for the city's Construction Services Department, the alleged enterprise) (internal quotation marks and citations omitted); Delgado, 401 F.3d at 297-98 (same); First Capital Asset Mgmt. v. Satinwood, Inc., 385 F.3d 159, 176 (2d Cir. 2004) ("'RICO liability is not limited to those with primary responsibility for the enterprise's affairs'" (citation omitted)); Baisch v. Gallina, 346 F.3d 366, 376 (2d Cir. 2003) (same and adding that "[o]ne is liable under RICO if he or she has 'discretionary authority in carrying out the instructions of the [enterprises'] principals'") (citations omitted); DeFalco, 244 F.3d at 309 (ruling that RICO liability "is not limited to those with primary responsibility" or "to those with a formal position in the enterprise," and finding that there was sufficient evidence to satisfy the Reves test where the defendant instructed others to facilitate commission of racketeering activity) (internal quotation marks and citations omitted); United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998) (continued...)

[179](...continued)
(finding that Reves does not require that the defendant have decision-making power, only that defendant "take part in" the operation of the enterprise, and holding that the defendant was liable under Reves since he bought multi-kilogram amounts of cocaine from the drug enterprise on a regular basis); United States v. To, 144 F.3d 737, 747 (11th Cir. 1998) (holding that Reves test was satisfied by evidence that the defendant planned and carried out a robbery with other members of an Asian crime gang that committed a series of robberies targeting Asian-American business owners and managers); United States v. Houlihan, 92 F.3d 1271, 1298 (1st Cir. 1996) (upholding instruction that jury could find defendant participated in conduct of enterprise even though he had no part in the management or control of enterprise where defendant was an "insider" integral to carrying out enterprise racketeering activity), cert. denied, 519 U.S. 1118 (1997); United States v. Workman, 80 F.3d 688, 695-98 (2d Cir.) (reversal not required of instruction that "conduct and participate" includes acts "helpful" in operation of enterprise in light of compelling proof that one defendant was important figure in enterprise's drug trafficking network and another had participated in murder conspiracy and was major street level narcotics trafficker for enterprise), cert. denied, 519 U.S. 938 (1996); United States v. Masotto, 73 F.3d 1233, 1237-39 (2d Cir.) (failure to give Reves "operation and management" instruction harmless error when evidence established defendant was leader of an LCN crew), cert. denied, 519 U.S. 810 (1996); Maloney, 71 F.3d at 660-61 (denying Reves challenge by defendant who claimed he was conducting his own affairs through acts of obstruction); Darden, 70 F.3d at 1542-43 (holding Reves was satisfied by evidence that the defendant participated in several murders and murder conspiracies and at least three drug trafficking transactions in an association-in-fact drug enterprise; confirming that the defendant need not participate in control of enterprise as lower rung participation may satisfy Reves); United States v. Hurley, 63 F.3d 1, 8-9 (1st Cir. 1995) (evidence that defendants were employees of the enterprise who helped carry out its illegal activities satisfied Reves), cert. denied, 517 U.S. 1105 (1996); Jaguar Cars, Inc., 46 F.3d at 269 (holding corporate officers and employees liable under Section 1962(c) as persons operating and managing the affairs of the corporate enterprise); Aetna Cas. Sur. Co., 43 F.3d at 1559-60 (finding that by acting with purpose of inducing insurer to make payments on false claims, automobile repair shop, its employees and insurance claimants exerted sufficient control to satisfy Reves); Wong, 40 F.3d at 1371-74 (Reves test satisfied by evidence that defendants were members of a gang, the "Green Dragons," and that they committed various crimes of violence "at the core of the criminal activities of the Green Dragons," the alleged enterprise, even though they were not the leaders of the enterprise); Oreto, 37 F.3d at 751-53 (finding that Congress intended to reach all who participated in the conduct of the enterprise, whether they were "generals or foot soldiers" and holding that Reves test was satisfied by evidence that the defendant collected extortion payments under the direction of leaders of an extortion collection enterprise); Napoli v. United States, 32 F.3d 31, 36 (2d Cir. 1994) (overwhelming evidence that attorneys, although "of counsel" to the law firm enterprise, were not merely providing peripheral advice, but participated in the core activities that constituted the affairs of the firm), cert. denied, 513 U.S. 1110, reh'g granted, 45 F.3d 680, 683 (2d Cir.) (upholding convictions of law firm investigators who were "lower-rung participants" whose racketeering activities were conducted "under the direction of upper management"), cert. denied, 514 U.S. 1084
(continued...)

"The terms 'conduct' and 'participate' in the conduct of the affairs of the enterprise include the intentional and deliberate performance of acts, functions, or duties which are related to the operation or management of the enterprise." United States v. Weiner, 3 F.3d 17, 23-24 (1st Cir. 1993) (finding that use of "include" in jury instruction did not amount to plain error) (internal quotation marks omitted).

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[179](...continued)
(1995); United States v. Thai, 29 F.3d 785, 816 (2d Cir.) (finding liable defendant Quang who ordered and organized a series of robberies because "plainly he was not at the bottom of the management chain" of an enterprise involved in robberies), cert. denied, 513 U.S. 977 (1994); United States v. Grubb, 11 F.3d 426, 439 n.24 (4th Cir. 1993) (holding state judge participated in the operation or management of the enterprise, his judicial office); Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 380 (6th Cir. 1993) (finding life insurance company exercised sufficient control over the affairs of the enterprise (which sold insurance policies for several companies) to withstand scrutiny under Reves), cert. denied, 510 U.S. 1193 (1994); Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1541-42 (10th Cir. 1993) (finding sufficient evidence to support jury's verdict that insurance parent company participated in the conduct of RICO enterprise). But see United States v. Swan, 250 F.3d 495, 499 (7th Cir. 2001) (reversing defendant's substantive RICO conviction for failure to prove he participated in the operation or management of the enterprise); Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996) (finding that mayor who received bribes from real estate developer did not manage the enterprise but had been controlled by the enterprise); Webster v. Omnitrition Int. Inc., 79 F.3d 776, 788 (9th Cir.) (holding that an attorney in a purely ministerial role was not liable under RICO), cert. denied, 519 U.S. 865 (1996); United States v. Viola, 35 F.3d 37, 41 (2d Cir. 1994) (finding defendant who performed light clean-up and maintenance work for leader of drug and stolen property distribution enterprise did not have a "part in directing the enterprise's affairs"), cert. denied, 513 U.S. 1198 (1995); Azrielli v. Cohen Law Offices, 21 F.3d 512, 521 (2d Cir. 1994) (holding that an attorney representing other defendants and who had no role in the conception, creation, or execution of fraudulent stock scheme did not participate in management or direction of enterprise); Baumer v. Pachl, 8 F.3d 1341, 1343-46 (9th Cir. 1993) (finding that preparation of two letters, a partnership agreement, and assistance in a Chapter 7 proceeding did not impute liability under Reves); Stone v. Kirk, 8 F.3d 1079, 1093 (6th Cir. 1993) (holding that a sales representative for a recording company engaged in pattern of racketeering activity when he repeatedly violated the anti-fraud provisions of the securities laws, but did not participate in operation or management of the company); Univ. of Maryland v. Peat, Marwick, Main, 996 F.2d 1534, 1539 (3d Cir. 1993) (finding that providing goods and services that ultimately benefitted the enterprise did not result in RICO liability); Nolte v. Pearson, 994 F.2d 1311, 1317 (8th Cir. 1993) (finding no evidence that attorneys participated in the operation or management of the enterprise).

Likewise, numerous courts have held that Reves is satisfied by evidence that lower-rung members of an enterprise who, at the direction of higher-ups in the enterprise, implemented decisions, or committed racketeering acts which furthered the integral goals of the enterprise. See, e.g., Shryock, 342 F.3d at 986 (ruling that the defendant "clearly participated in the operation and management of the Mexican Mafia [enterprise] because he served as a messenger between incarcerated members and members on the street, and helped organize criminal activities on behalf of the organization"); United States v. Warneke, 310 F.3d 542, 548-49 (7th Cir. 2002) (holding that the defendant participated in the operation or management of the enterprise, the Outlaws Motorcycle Club, because he committed murders and other racketeering acts on behalf of the enterprise); United States v. Parise, 159 F.3d 790, 796 (3d Cir. 1998) ("[T]he [Reves] Court made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control." The Parise court held that Reves liability extended to an investigator for a law firm who paid kickbacks to union (the enterprise) agents to obtain personal injury cases for the law firm under the direction of the union's president); United States v. Shifman, 124 F.3d 31, 35-36 (1st Cir. 1997) (defendant "set up" and referred prospective debtors to the leaders of a loanshark enterprise), cert. denied, 522 U.S. 1116 (1998); Hurley, 63 F.3d at 9 (defendants were employees of the enterprise who assisted higher-ups in money laundering activities); Starrett, 55 F.3d at 1548 ("[W]e agree with the First Circuit that one may be liable under the operation or management test by knowingly implementing decisions, as well as by making them." (internal quotation marks and citation omitted)); Wong, 40 F.3d at 1371-75 (defendants included low level members of the Green Dragons organized group (the enterprise) who participated in acts of extortion and kidnapping. The

court stated "Reves makes it clear that a defendant can act under the direction of superiors in a RICO enterprise and still 'participate' in the operation of the enterprise within the meaning of § 1962(c)."); Oreto, 37 F.3d at 750-753 (defendant participated in the collection of loans by extortionate means on behalf of the loansharking enterprise; the court noted, id. at 750, that "nothing in [Reves] precludes our holding that one may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them", and that "foot soldiers" may also be liable under RICO.); see also cases cited in n.179 above.

Some courts have also emphasized that Reves primarily was concerned with imposing RICO liability for "outsiders" of an enterprise who may only remotely assist the enterprise's affairs. For example, in Oreto, 37 F.3d at 743, the indictment alleged that the RICO enterprise consisted of a group of individuals who were charged with 74 acts of extortionate lending or collection transactions and 62 acts of usurious lending. Defendant Oreto, Jr. contended that the evidence did not satisfy Reves because he was not a leader of the enterprise and "was a mere collector for a short period of time" who was involved in only four of the charged transactions. Oreto, 37 F.3d at 753. The court rejected this claim, stating that RICO "requires neither that a defendant share in the enterprise's profits nor participate for an extended period of time, so long as the predicate act requirement is met." Id. The court further explained:

> Reves is a case about the liability of **outsiders** who may assist the enterprise's affairs. Special care is required in translating Reves' concern with "horizontal" connections–focusing on the liability of an outside adviser– into the "vertical" question of how far RICO liability may extend within the enterprise but down the organizational ladder. In our view, the reason the accountants were not liable in Reves is that, while they were undeniably involved in the enterprise's decisions, they neither made those decisions nor carried them out; in other words, the accountants were outside the chain of command through which the enterprise's affairs were conducted.

Oreto, 37 F.3d at 750.

Similarly, in United States v. Gabriele, 63 F.3d 61 (1st Cir. 1995), the First Circuit rejected defendant Gabriele's claim that the evidence did not satisfy Reves because he was merely a low-rung employee in an extensive money laundering enterprise. The enterprise was led by Gabriele's co-conspirator, Stephen Saccoccia, who, from the mid-1980's until late 1991, laundered over $136 million for Colombian drug traffickers through thousands of diverse transactions. Defendant Gabriele had helped Saccoccia transfer large sums of cash and was convicted of offenses involving six monetary transactions carried out on behalf of the Saccoccia-led enterprise. The Court found the evidence sufficient to satisfy Reves, stating that:

> The government introduced ample evidence . . . that Gabriele, unlike the accounting firm in Reves, was not an independent "outsider" but a full-fledged "employee" of the Saccoccia enterprise . . . . Even employees not engaged in **directing** the operations of the RICO enterprise are criminally liable if they are "plainly integral to carrying [it] out."

Gabriele, 63 F.3d at 68 (citations omitted).

6. "Through" a Pattern of Racketeering Activity

Section 1962(c) also requires proof that a defendant did conduct or participate in the conduct of the enterprise's affairs "**through** a pattern of racketeering activity or collection of unlawful debt." (emphasis added). This requirement substantially overlaps with the "relationship" component of the requisite "pattern of racketeering activity." In that respect, the requisite relationship of the racketeering acts to the enterprise may be established in a variety of ways, including that the defendant's membership in the enterprise enabled or facilitated his commission of the racketeering acts, the racketeering acts were committed at the behest of or on behalf of the enterprise, or the racketeering acts furthered the goals of or benefitted the enterprise. See Section II(E)(3) above.

Likewise, such nexus of the racketeering acts to the enterprise may also establish that the defendant participated in the affairs of the enterprise "through" a pattern of racketeering activity. For example, in Marino, the First Circuit explained:

> It is clear that by using the word "through," Congress intended some connection between the defendant's predicate acts and the enterprise. The question before us is whether Marino participated in the operations of the Patriarca Family [the alleged enterprise] **through** the drug trafficking conspiracy. Black's Law Dictionary defines the word "through" as "[b]y means of, in consequence of, by reason of." Black's Law Dictionary 1481 (6th ed. 1990). The Oxford English Dictionary defines "through" as meaning, among other things, "[i]ndicating medium, means, agency or instrument: By means of, by the action of. . . . By the instrumentality of." XVIII Oxford English Dictionary 11 (2d ed. 1989). Each of these phrases offers a way of proving the participation or conduct was "through a pattern of racketeering activity." A sufficient nexus or relationship exists between the racketeering acts and the enterprise if the defendant was able to commit the predicate acts by means of, by consequences of, by reason of, by the agency of, or by the instrumentality of his association with the enterprise.
>
> The requirement "through a pattern of racketeering activity" has been met in several situations. When the defendant uses his position in the enterprise to commit the racketeering acts, the "through" requirement is fulfilled. See, e.g., United States v. Grubb, 11 F.3d 426, 439-40 (4th Cir. 1993) ("the affairs of the enterprise were conducted through a pattern of racketeering activities" because "the record show[ed] beyond doubt that the power and prestige of [defendant's] office placed him in a position to perform the discrete, corrupt and fraudulent acts of which he was convicted and which make up the RICO predicate offenses"); United States v. Ruiz, 905 F.2d 499, 504 (1st Cir. 1990) (holding that sufficient relationship between the predicate acts and the enterprise existed where defendant's ability to commit the crimes was "inextricably intertwined with his authority and activities as an employee of [the police department]"). In addition, when the resources, property, or facilities of the enterprise are used by the defendant to commit the predicate acts, the "through" requirement is fulfilled. See, e.g., Grubb, 11 F.3d at 439 ("[C]onsidering the fact that [defendant] physically used his judicial office . . . i.e., the telephones and the physical office itself . . . a sufficient nexus is established."); Ruiz, 905 F.2d at 504 (use of enterprise resources such as data and inside information contributed to establishing a sufficient nexus); United States v. Carter, 721 F.2d 1514, 1527 (11th Cir. 1984) (use of a dairy farm's land, employees, and office in drug smuggling created a nexus between the smuggling and the farm); United States v. Webster, 669 F.2d 185 (4th Cir. 1982) (help from club employees and use of club telephone and property established sufficient nexus between enterprise and racketeering activity).

277 F.3d at 27-28. (footnote omitted).[180] The court held that the evidence sufficiently established that the defendants participated in the Patriarca Family enterprise "through" a pattern of racketeering activity, stating:

> The evidence here was sufficient to meet the "through" requirement connecting the predicate act to the enterprise. Jurors, mindful of the adage that you are known by the company you keep, could easily infer that the drug conspiracy had sufficient nexus to the Patriarca Family. All of Marino's fellow drug conspirators were Carrozza faction members, and Ciampi owned the club where the members tended to hang out and store their drugs. The conspirators supplied drugs to each other for distribution to customers and gave free cocaine to members of the Family to reward them for shootings. Further, coconspirator Romano handled things for both Carrozza and Joseph Russo, a capo and former consigliere of the Family. Romano used the names of Carrozza and Russo to collect money for cocaine distribution. This is but the clearest example of the conspirators' positions in the Patriarca Family facilitating their commission of the drug trafficking conspiracy.

Id. at 28.[181]

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[180] The First Circuit added:

> It is not necessary to make other showings in order to fulfill the "through" requirement. It is unnecessary for the pattern of racketeering to have benefitted the enterprise in any way. Grubb, 11 F.3d at 439. The pattern of racketeering activity does not have to "affect the everyday operations of the enterprise," United States v. Starrett, 55 F.3d 1525, 1542 (11th Cir. 1995), and the defendant need not have channeled the proceeds of the racketeering activity into the enterprise. United States v. Kovic, 684 F.2d 512, 517 (7th Cir. 1982).

Marino, 277 F.3d at 28. Although it is unnecessary for the pattern of racketeering activity to have benefitted the enterprise, such nexus is sufficient to establish the requisite relationship of the racketeering acts to the enterprise. See Section II(E)(3), n.127 above.

[181] See also Starrett, 55 F.3d at 1542 (noting that the "through" requirement may be proven by evidence that establishes the "relationship" component of the requisite pattern of racketeering activity); Grubb, 11 F.3d at 439-40 (the "through" requirement established by evidence that the defendant's membership in the enterprise enabled him to commit the racketeering acts); Carter, 721 F.2d at 1526-27 (holding that the "through" requirement requires only a nexus between the enterprise and the racketeering acts, and that the requisite relationship was established by evidence that the (continued...)

The "through" requirement is by no means a mere formality. In some cases, RICO prosecutions have failed because the Government did not establish a sufficient nexus between the affairs of the enterprise and the pattern of racketeering activity.[182]

D. Section 1962(d) - RICO Conspiracy to Violate Section 1962(c)

The RICO conspiracy provision, 18 U.S.C. § 1962(d), makes it a crime to conspire to violate any of the three substantive provisions of RICO set forth in 18 U.S.C. § 1962(a), (b), and (c). This Section focuses on a conspiracy to violate Section 1962(c), which by far is the most frequently alleged RICO conspiracy offense.

1. Elements of a Criminal RICO Conspiracy Under Sections 1962(c) and (d); No Requirement of Either an Agreement Personally to Commit Two Racketeering Acts or the Commission of an Overt Act

To establish a criminal conspiracy violation under 18 U.S.C. § 1962(d), the United States

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[181](...continued)
enterprise made possible or facilitated the defendant's commission of the racketeering acts) (collecting cases); see also cases cited in Section II(E)(3) above.

[182] See, e.g., United States v. Erwin, 793 F.2d 656, 671 (5th Cir.) (finding, as an alternate ground for reversing a RICO conspiracy conviction, that defendant's racketeering activity was not connected to the affairs of the narcotics enterprise alleged where facts established little more than defendant was an independent dealer to multiple suppliers), cert. denied, 479 U.S. 991 (1986); United States v. Nerone, 563 F.2d 836, 851-52 (7th Cir. 1977) (finding that the Government failed to attach significance to the word "through," included in both the statute and the indictment, and reversing a RICO conviction for failure to show sufficient connection between mobile-home park enterprise and gambling operation conducted on its premises), cert. denied, 435 U.S. 951 (1978); United States v. Dennis, 458 F. Supp. 197, 198 (E.D. Mo. 1978) (dismissing a RICO count for insufficient nexus between the enterprise and predicate acts where the indictment alleged that the defendant conducted the affairs of the General Motors Corporation through collection of unlawful debts by making usurious loans to fellow employees), aff'd on other grounds, 625 F.2d 782 (8th Cir. 1980); see also United States v. Rainone, 32 F.3d 1203, 1209 (7th Cir. 1994) (upholding a RICO conviction, but finding arsons were "outside activity" unrelated to RICO conspiracy even though defendant had permission from enterprise leader to engage in outside activities), cert. denied, 515 U.S. 1102 (1995).

must prove each of the following elements:

1. The existence of an enterprise [or that an enterprise would exist];
2. That the enterprise was [or would be] engaged in, or its activities affected [or would affect], interstate or foreign commerce; and
3. That each defendant knowingly agreed that a conspirator [which may include the defendant him/herself] would commit a violation of 18 U.S.C. § 1962(c).[183]

The enterprise element and the interstate commerce nexus element are discussed in Sections II(D) above and VI(G) below, respectively. This Section addresses the third element, proof of a RICO conspiracy agreement. Although a substantive RICO offense requires proof that each defendant committed at least two racketeering acts, it is settled law that to establish a criminal RICO conspiracy charge the United States is not required to prove that any defendant committed any racketeering act[184] or any overt act.[185] "The RICO conspiracy provision, then, is even more

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[183] See, e.g., Salinas, 522 U.S. at 62-65; Delgado, 401 F.3d at 296; Pipkins, 378 F.3d at 1288; Posada-Rios, 158 F.3d at 857; To, 144 F.3d at 744; Pungitore, 910 F.2d at 1117.

[184] See, e.g., Salinas, 522 U.S. at 63; United States v. Ciccone, 312 F.3d 535, 542 (2d Cir. 2002); United States v. Zauber, 857 F.2d 137, 148 (3d Cir. 1988); United States v. Caporale, 806 F.2d 1487, 1515 (11th Cir. 1986); United States v. Teitler, 802 F.2d 606, 612-13 (2d Cir. 1986) (collecting cases); Neapolitan, 791 F.2d at 498; United States v. Adams, 759 F.2d 1099, 1116 (3d Cir. 1985); Brooklier, 685 F.2d at 1222-23; United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981).

However, to establish a civil RICO conspiracy cause of action under 18 U.S.C. § 1964(c) for "[a]ny person injured in his business or property by reason of a violation of section 1962," a private plaintiff must prove that injury to his business or property was caused by an unlawful racketeering act committed by the defendant. See Beck v. Prupis, 529 U.S. 494 (2000) (internal quotation marks omitted).

[185] See, e.g., Salinas, 522 U.S. at 63; Smith, 413 F.3d at 1265; United States v. Corrado, 286 F.3d 934, 937 (6th Cir. 2002); Glecier, 923 F.2d at 500; Gonzalez, 921 F.2d at 1547-48; United States v. Torres Lopez, 851 F.2d 520, 525 (1st Cir. 1988); Persico, 832 F.2d at 713.

comprehensive than the general conspiracy offense in [18 U.S.C.] § 371."[186]

Moreover, in Salinas v. United States, 522 U.S. 52, 61-66 (1997), the Supreme Court held that to establish a RICO conspiracy offense under Section 1962(d), there is no requirement that the defendant "himself committed or agreed to commit the two predicate acts requisite for a substantive RICO offense under § 1962(c)." Id. at 61. The Supreme Court explained:

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.

Id. at 63-64 (citations omitted). The Court added that:

> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.
>
> It makes no difference that the substantive offense under § 1962(c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.

Id. at 65 (citation omitted).[187]

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[186] Salinas, 522 U.S. at 63.

[187] See also To, 144 F.3d at 744-46 (proof that the defendants either personally agreed to commit two racketeering acts or agreed to an overall objective of the conspiracy knowing that other persons were conspiring to participate in the same enterprise through a pattern of racketeering activity was sufficient to sustain RICO conspiracy conviction); United States v. Vaccaro, 115 F.3d (continued...)

2. There Are Two Alternative Ways to Establish a Conspiratorial Agreement to Violate RICO

Thus, under Salinas and its progeny, there are two alternative ways to establish a conspiratorial agreement to violate RICO. As the court in United States v. Nguyen, 255 F.3d 1335 (11th Cir. 2001), cert. denied, 534 U.S. 1032 (2001), succinctly stated:

> In order to be guilty of a RICO conspiracy, a defendant must either agree to [personally] commit two predicate acts or agree to participate in the conduct of the enterprise with the knowledge and intent that other members of the conspiracy would commit at least two predicate acts in furtherance of the enterprise.

Id. at 1341.[188] "If the government can prove an agreement on an overall objective, it need not prove a defendant personally agreed to commit two predicate acts." United States v. Abbell, 271 F.3d 1286, 1299 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002); accord Smith, 413 F.3d at 1272; Delgado, 401 F.3d at 296; To, 144 F.3d at 744; Starrett, 55 F.3d at 1544.

To prove the conspiratorial agreement under the first method, the Government must prove that the defendant personally agreed to commit at least two racketeering acts in furtherance of the conduct of the affairs of the enterprise. See cases cited in n.184 above. In that regard, where "the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of an agreement to do so is unmistakable." Elliott, 571 F.2d at 903; accord United States v. Ashman, 979 F.2d 469, 492

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[187](...continued)
1211, 1221 (5th Cir. 1997) (to be guilty of a RICO conspiracy, the conspirator must simply agree to the objective of a violation of RICO; he need not agree to personally violate the statute), cert. denied, 522 U.S. 1047 (1998); Neapolitan, 791 F.2d at 498 (agreeing to a prescribed objective is sufficient).

[188] Accord Delgado, 401 F.3d at 296; Pipkins, 378 F.3d at 1288; United States v. Abbell, 271 F.3d 1286, 1299 (11th Cir. 2001); Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 964 (7th Cir. 2000); To, 144 F.3d at 744; United States v. Brazel, 102 F.3d 1120, 1138 (11th Cir. 1997); United States v. Shenberg, 89 F.3d 1461, 1471 (11th Cir. 1996).

(7th Cir. 1992); Crockett, 979 F.2d at 1218; United States v. Carlock, 806 F.2d at 535, 547 (5th Cir. 1986); United States v. Melton, 689 F.2d 679, 683 (7th Cir. 1982); United States v. Sutherland, 656 F.2d 1181, 1187 n.4 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982).

In Salinas, 522 U.S. at 63-66, the Supreme Court made clear that while evidence of such an agreement to commit two racketeering acts is sufficient to establish a RICO conspiracy, RICO does not require the plaintiff to prove that the defendant agreed to personally commit two predicate acts of racketeering. It bears repeating (see Section III(D)(1) above), that the Supreme Court explained a second alternative way to prove a RICO conspiracy, stating:

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253-254 (1940). The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. See Pinkerton v. United States, 328 U.S. 640, 646 (1946) ("And so long as the partnership in crime continues, the partners act for each other in carrying it forward"). If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators. As Justice Holmes observed: "[P]lainly a person may conspire for the commission of a crime by a third person." United States v. Holte, 236 U.S. 140, 144 (1915).
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> . . .
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> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.
>
> . . .
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> It makes no difference that the substantive offense under § 1962(c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit

> us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.

Salinas, 522 U.S. at 63-65 (alteration in original).

> Thus, to prove a RICO conspiracy under the Salinas alternative,
>
> [t]he focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts. . . .
>
> The government can prove [such] an agreement on an overall objective "by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity."

Starrett, 55 F.3d at 1543-44 (citation omitted).[189] Hence, it is sufficient "that the defendant agree to the commission of [at least] two predicate acts [by any conspirator] on behalf of the conspiracy." MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 980 (7th Cir. 1995), quoting Neapolitan, 791 F.2d at 498; accord Brouwer, 199 F.3d at 964; United States v. Quintanilla, 2 F.3d 1469, 1484 (7th Cir. 1993).[190] It is also sufficient that the defendant knowingly agreed to facilitate the commission of at least two racketeering acts constituting a pattern to be committed by any member of the conspiracy; and thus adopted the goal of facilitating a RICO violation. See, e.g, Smith, 413 F.3d at 1272; United States v. Fernandez, 388 F.3d 1199, 1230 (9th Cir. 2004); Baisch

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[189] Accord Delgado, 401 F.3d at 296; Posada-Rios, 158 F.3d at 857; To, 144 F.3d at 744; Brazel, 102 F.3d at 1138; Shenberg, 89 F.3d at 1471.

[190] Moreover, the indictment need not specify the predicate racketeering acts that the defendant agreed would be committed by some member of the conspiracy in furtherance of the conduct of the affairs of the enterprise. Rather, it is sufficient to allege that it was agreed that multiple violations of a specific statutory provision which qualifies as a RICO racketeering act would be committed. See, e.g., Glecier, 923 F.2d at 499-500; Crockett, 979 F.2d at 1208-09; Phillips, 874 F.2d at 125-28 & n.4; see also Section V(B)(3)(b) below.

v. Gallina, 346 F.3d 366, 376-77 (2d Cir. 2003); Ciccone, 312 F.3d at 542; Warneke, 310 F.3d at 547.

Moreover, "[r]egardless of the method used to prove the agreement, the government does not have to establish that each conspirator explicitly agreed with every other conspirator to commit the substantive RICO crime described in the indictment, or knew his fellow conspirators, or was aware of all the details of the conspiracy. That each conspirator may have contemplated participating in different and unrelated crimes is irrelevant." Starrett, 55 F.3d at 1544 (internal quotation marks and citations deleted).[191] Rather, to establish sufficient knowledge, it is only required that the defendant "know the general nature of the conspiracy and that the conspiracy extends beyond his individual role." Rastelli, 870 F.2d at 828 (collecting cases).[192] Furthermore, "[b]ecause conspirators normally attempt to conceal their conduct, the elements of a conspiracy offense may be established solely by circumstantial evidence. The agreement, a defendant's guilty knowledge and a defendant's participation in the conspiracy all may be inferred from the development and collocation of circumstances." Posada-Rios, 158 F.3d at 857 (citations and internal quotation marks omitted). Accord cases cited in notes 189 & 192 above.

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[191] Accord Zichettello, 208 F.3d at 100; To, 144 F.3d at 744; Castro, 89 F.3d at 1451; United States v. Ruiz, 905 F.2d 499, 505 (1st Cir. 1990); Rastelli, 870 F.2d at 828 (collecting cases); Sutherland, 656 F.2d at 1190-91; United States v. Rosenthal, 793 F.2d 1214, 1228 (11th Cir. 1986); United States v. De Peri, 778 F.2d 963, 975 (3d Cir. 1985), cert. denied, 475 U.S. 1110 (1986); Elliott, 571 F.2d at 902-03; see also Section II(E)(2) above.

[192] Accord Fernandez, 388 F.3d at 1230; Zichettello, 208 F.3d at 100; Brazel, 102 F.3d at 1138; Hurley, 63 F.3d at 10; Viola, 35 F.3d at 44; Eufrasio, 935 F.2d at 577 n.29; United States v. Valera, 845 F.2d 923, 929 (11th Cir.), cert. denied, 490 U.S. 1046 (1989); Rosenthal, 793 F.2d at 1228; De Peri, 778 F.2d at 975; Elliott, 571 F.2d at 903-04.

Moreover, it is well-established that proof of a conspiracy is not defeated merely because membership in the conspiracy changes and some defendants cease to participate in it.[193] In addition, each co-conspirator is liable for the acts of all other co-conspirators undertaken in furtherance of the conspiracy both prior to and subsequent to the co-conspirator's joining the conspiracy even if the conspirator did not participate in, or was unaware of, such acts.[194] Moreover, such liability remains even if the defendant has ceased his participation in the conspiracy.[195]

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[193] See, e.g., United States v. Garcia, 785 F.2d 214, 225 (8th Cir. 1986) ("An agreement may include the performance of many transactions, and new parties may join or old parties terminate their relationship with the conspiracy at any time."); United States v. Warner, 690 F.2d 545, 549 n.7 (6th Cir. 1982); United States v. Varelli, 407 F.2d 735, 742 (7th Cir. 1969); United States v. Boyd, 595 F.2d 120, 123 (3d Cir. 1978); United States v. Klein, 515 F.2d 751, 753 (3d Cir. 1975); United States v. Bates, 600 F.2d 505, 509 (5th Cir. 1979) ("Nor does a single conspiracy become several merely because of personnel changes."); United States v. Michel, 588 F.2d 986 (5th Cir. 1979), cert. denied, 444 U.S. 825 (1979); United States v. Lemm, 680 F.2d 1193, 1199 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983) (for RICO conspiracy, continuity may be met even with changes in personnel or even when different individuals manage the affairs of the enterprise); United States v. Tillett, 763 F.2d 628, 631-32 (4th Cir. 1985) (personnel change does not prevent RICO conspiracy); United States v. Bello-Perez, 977 F.2d 664, 668 (1st Cir. 1992) ("What was essential is that the criminal 'goal or overall plan' have persisted without fundamental alteration, notwithstanding variations in personnel and their roles."); United States v. Kelley, 849 F.2d 999, 1003 (6th Cir.), cert. denied, 488 U.S. 982 (1988) (single conspiracy can be found even where "the cast of characters changed over the course of the enterprise"); United States v. Nasse, 432 F.2d 1293, 1297-98 (7th Cir. 1970), cert. denied. 401 U.S. 938 (1971); United States v. Sepalveda, 15 F.3d 1161, 1191 (1st Cir.) ("[I]n a unitary conspiracy it is not necessary that the membership remain static . . . .") (citing United States v. Perholtz, 842 F.2d 343, 364 (D.C. Cir. 1988)); United States v. Bryant, 364 F.2d 598, 603 (4th Cir. 1966) ("The addition of new members to a conspiracy or the withdrawal of old ones from it does not change the status of the other conspirators.") (quoting Poliafico v. United States, 237 F.2d 97, 104 (6th Cir. 1956)); United States v. Shorter, 54 F.3d 1248, 1254-55 (7th Cir.), cert. denied, 516 U.S. 896 (1995). See also cases cited in Section II(D)(4)(a) above.

[194] See, e.g., Salinas, 522 U.S. at 63-64; Pinkerton v. United States, 328 U.S. 640, 646-47 (1946); Starrett, 55 F.3d at 1544; Aetna Cas. Sur. Co., 43 F.3d at 1562; Pungitore, 910 F. 2d at 1145-48; Rosenthal, 793 F.2d at 1228; United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975), cert. denied, 425 U.S. 961 (1976).

[195] See, e.g., United States v. Thomas, 114 F.3d 228, 267-68 (D.C. Cir. 1997); United States (continued...)

3. A Defendant May Be Liable for a RICO Conspiracy Offense Even if the Defendant Did Not Participate In the Operation or Management of the Enterprise

As noted above in Section III(C)(5), in Reves, 507 U.S. at 185, the Supreme Court held that a defendant is not liable for a **substantive RICO violation** under 18 U.S.C. § 1962(c) unless the defendant "participates in the operation or management of the enterprise itself." Reves did not involve a RICO conspiracy offense and its requirement that a defendant himself participate in the operation or management of the enterprise does not apply to a RICO conspiracy offense because it is well settled that a defendant may be liable for a conspiracy to violate a law even if he may not be liable for a substantive violation of the law because he does not fall within the category of persons who could commit the substantive offense directly.[196]

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[195](...continued)
v. Nava-Salazar, 30 F.3d 788, 799 (7th Cir. 1994), cert. denied, 513 U.S. 1002 (1994); United States v. Loya, 807 F. 2d 1483, 1493 (9th Cir. 1987); United States v. Read, 658 F.2d 1225, 1239-40 (7th Cir. 1981). See also Section VI(Q) below.

[196] For example, the Hobbs Act, 18 U.S.C. § 1951, makes it a crime for public officials to extort property under "color of official right." Nevertheless, private citizens have been convicted of Hobbs Act conspiracy, i.e., extortion under "color of official right," where they have conspired with public officials to violate the Hobbs Act even though they are not within the class of persons who may be liable for the substantive Hobbs Act violation. See, e.g., United States v. Collins, 78 F.3d 1021, 1031-32 (6th Cir.), cert. denied, 519 U.S. 872 (1996); United States v. Torcasio, 959 F.2d 503, 505-06 (4th Cir. 1992); United States v. Marcy, 777 F. Supp. 1393, 1396-97 (N.D. Ill. 1991). See also United States v. Jones, 938 F.2d 737, 741-42 (7th Cir. 1991) (conspiracy charge legally sufficient against defendant who was not a financial institution, although underlying substantive statutes, 31 U.S.C. §§ 5313, 5322, proscribe the failure to file Currency Transaction Reports with the Internal Revenue Service only by financial institutions); United States v. Hayes, 827 F.2d 469, 472-73 (9th Cir. 1987) (same); United States v. Sans, 731 F.2d 1521, 1531-32 (11th Cir. 1984) (defendant could be convicted of conspiracy to defraud United States, in violation of Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 1058, 1081, although he was not a specified party required to file reports under the Act), cert. denied, 469 U.S. 1111 (1985).

In Salinas, the Supreme Court squarely applied this principle to RICO cases. As explained in Sections III(D)(1) and (2) above, in Salinas, the Supreme Court held that even though a defendant may not be liable for a substantive RICO violation under 18 U.S.C. § 1962(c) unless he himself committed at least two racketeering acts, a defendant, nevertheless, may be liable for a RICO conspiracy offense even if he did not himself commit or agree to commit at least two racketeering acts. Id. at 61-65. In reaching this conclusion, the Supreme Court relied upon two well-established tenets of conspiracy law which also govern Section 1962(d). The Supreme Court first observed that "a person may conspire for the commission of a crime by a third person." Id. at 64, quoting United States v. Holte, 236 U.S. 140, 144 (1915). The Salinas Court also recognized that "[a] person . . . may be liable for conspiracy even though he was incapable of committing the substantive offense." Id. at 64, citing United States v. Rabinowich, 238 U.S. 78, 86 (1915); see also cases cited in n.196 above.

Thus, the rationale of Salinas and the long-standing tenets of conspiracy law which it relied upon compel the conclusion that a defendant may be liable for a conspiracy to violate RICO even if he is not among the class of persons who could commit the substantive RICO offense (i.e., a defendant who participates in the operation or management of the enterprise). **Rather, it is sufficient that the defendant knowingly agree to facilitate a scheme that would, if completed, constitute a substantive violation of RICO involving at least one other conspirator who would participate in the operation or management of the enterprise.**

Consistent with Salinas, every court of appeals that has decided the issue (i.e., the Second, Third, Fifth, Seventh, Ninth, and Eleventh Circuits) has held that a defendant may be liable for a RICO conspiracy offense under 18 U.S.C. § 1962(d) even if that defendant did not personally operate

or manage the RICO enterprise himself, or conspire to personally do so. See Napoli v. United States, 45 F.3d 680, 683-84 (2d Cir. 1995) (Reves does not apply to Section 1962(d) RICO conspiracy conviction), cert. denied, 514 U.S. 1084 (1995); United States v. Viola, 35 F.3d 37, 42-43 (2d Cir. 1994) ("A defendant can be guilty of [violation of Section 1962(d) for] conspiring to violate a law [Section 1962(c)], **even if he is not among the class of persons who could commit the crime directly**.") (emphasis added) abrogated on other grounds by Salinas v. United States, 522 U.S. 52 (1997); Smith v. Berg, 247 F.3d 532, 537-38 (3d Cir. 2001) (holding that "Salinas makes 'clear that § 1962(c) liability is not a prerequisite to § 1962(d) liability,'" and therefore "a defendant may be held liable for conspiracy to violate section 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise" by another person); Posada-Rios, 158 F.3d at 857 ("We conclude that the better-reasoned rule is the one adopted by the Second, Seventh, and Eleventh Circuits, especially in light of the Supreme Court's recent decision in Salinas" that the Reves operation or management test does not apply to RICO conspiracy charges); MCM Partners, 62 F.3d at 979 ("A defendant may conspire to violate section 1962(c) **even if that defendant could not be characterized as an operator or manager of a RICO enterprise under Reves**.") (emphasis added); United States v. Quintanilla, 2 F.3d 1469, 1484-85 (7th Cir. 1993) (same); United States v. Warneke, 310 F.3d 542, 547-48 (7th Cir. 2002) (holding that to establish a RICO conspiracy, it is not required that the defendant himself "directed, managed, or otherwise conducted the enterprise"; rather it is sufficient that "the conspirator joins forces with someone **else** who manages or operates the enterprise. Section 1962(d) is not limited to a conspiracy among the top dogs"); United States v. Fernandez, 388 F.3d 1199, 1230 (9th Cir. 2004) (holding that Salinas rendered the Ninth Circuit's prior decisions requiring that a defendant "conspired to operate or

manage the enterprise herself" invalid, and instead holding that "a defendant is guilty of conspiracy to violate § 1962(c) if the evidence showed that she 'knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise'") (quoting Smith v. Berg, 247 F.3d at 538); United States v. Castro, 89 F.3d 1443, 1452 (11th Cir. 1996) ("[T]he Reves 'operation or management' test does not apply to section 1962(d) convictions."); Starrett, 55 F.3d at 1547-48 ("[W]e agree with the Second and Seventh Circuits that the Supreme Court's Reves test does not apply to a conviction for RICO conspiracy.").[197]

The proper scope of Section 1962(d) with respect to the Reves "operation or management" test is succinctly stated by the Seventh Circuit in Quintanilla:

> [Section] 1962(d) liability is not coterminous with liability under § 1962(c). It follows that the Supreme Court's decision in Reves does not disturb [the defendant's] conviction for RICO conspiracy. Reves addressed only the extent of conduct or participation necessary to violate a substantive provision of the statute; the holding in that case did not address the principles of conspiracy law undergirding § 1962(d).
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> "[T]o hold that under § 1962(d) [the government] must show that an alleged coconspirator was capable of violating the substantive offense under § 1962(c), that is, that he participated to the extent required by Reves, 'would add an element to RICO conspiracy that Congress did not direct.'"

2 F.3d at 1485 (citations omitted).

4. The Prohibition Against Intracorporate Conspiracies Under The Antitrust Laws Does Not Apply To RICO Conspiracies

In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that a parent corporation "and its wholly owned subsidiary are incapable of conspiring with each

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[197] In United States v. Thomas, 114 F.3d 228, 242-43 (D.C. Cir.), cert. denied, 522 U.S. 1033 (1997), the District of Columbia Circuit found it unnecessary to decide whether Reves' requirement that a defendant participate in the operation or management of the enterprise applied to a RICO conspiracy charge because the evidence sufficiently established such participation by the defendant.

other for purposes of § 1 of the Sherman Act [15 U.S.C. § 1]." 467 U.S. at 777. But, the Supreme Court rested its decision in Copperweld on the Sherman Act's distinctive intent and purpose. Section 1 of the Sherman Act prevents two or more enterprises from joining their economic power to restrain trade; it does not apply to unilateral action by a single enterprise. See id. at 771-775. Because Congress recognized that a prohibition on unilateral action could impede the ability of a single enterprise to compete in the marketplace, the Court held in Copperweld that Section 1 of the Sherman Act does not apply to intra-enterprise agreements. Id. at 775 ("Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.").

However, numerous courts have held that these antitrust considerations simply do not apply to RICO. For example, in Haroco v. American National Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985), the court ruled that Copperweld did not apply to civil RICO conspiracy charges, explaining that "the Sherman Act is premised, as RICO is not, on the 'basic distinction between concerted and independent action.' The policy considerations discussed in Copperweld therefore do not apply to RICO, which is targeted primarily at the profits from patterns of racketeering activity." 747 F.2d at 403 n.22 (citations omitted). Similarly, in Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989), the court stated:

> Since a subsidiary and its parent theoretically have a community of interest, a conspiracy "in restraint of trade" between them poses no threat to the goals of antitrust law – protecting competition. In contrast, intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits.

875 F.2d at 1281 (citations omitted). In accordance with the foregoing reasoning, numerous courts have likewise ruled that the rationale of Copperweld does not apply to either criminal RICO charges

or civil RICO claims, and that, therefore, a RICO conspiracy claim properly applies to a conspiracy between a parent corporation and its subsidiary, between affiliated corporations, or between a corporation and its own officers and representatives.[198]

5. RICO Conspiracy Principles are Essentially the Same as Traditional Conspiracy Principles, But There May Be A Difference in the Admission of Co-Conspirator Statements

A RICO conspiracy offense, just like other conspiracy offenses, is an inchoate offense that does not require the commission of the offense or offenses that are the objectives of the conspiratorial agreement. See Sections III (D)(1) and (2) above. Moreover, neither RICO nor other conspiracy offenses require proof that the defendant knew or was aware of all his fellow conspirators, was aware of or involved in all the aspects of the conspiracy, or explicitly agreed with every other conspirator to commit the substantive offense or offenses that are the objectives of the

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[198] For cases holding that Copperweld's prohibition on intracorporate conspiracies does not apply to criminal RICO conspiracy charges or other criminal conspiracy charges, see, e.g., United States v. Hughes Aircraft Co., 20 F. 3d 974, 979 (9th Cir. 1994) (collecting cases), cert. denied, 513 U.S. 987 (1994); Crockett, 979 F.2d at 1218 n.12.

For civil cases similarly holding, see, e.g., Webster v. Omnitrition Int'l, Inc., 79 F.3d 776, 787 (9th Cir. 1996), cert. denied, 519 U.S. 865 (1996); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166-67 (3d Cir. 1989); Fed. Reserve Bank of S.F. v. HK Sys., Inc., No. C-95-1190 MHP, 1997 WL 765952, at **3-4 (N.D. Cal. Nov. 12, 1997); N. Shore Med. Ctr., Ltd. v. Evanston Hosp. Corp., No. 92 C 6533, 1996 WL 435192, at *3 (N.D. Ill. July 31, 1996); Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., No. 95-1698, 1996 WL 135336, at *5 (E.D. Pa. Mar. 19, 1996); Bowman v. W. Auto Supply Co., 773 F. Supp. 174, 180 (W.D. Mo. 1991), rev'd on other grounds, 985 F. 2d 383 (8th Cir. 1993); Dun-Rite Tool & Fabricating Co. v. Am. Nat'l Bank of DeKalb, No. 89 C 20370, 1991 WL 293092, at *5 (N.D. Ill. Apr. 11, 1991); Rouse v. Rouse, No. 89-CV-597, 1990 WL 160194, at *14 (N.D.N.Y. Oct. 17, 1990); Atlass v. Tex. Air Corp., Civ. A. No. 88-9637, 1989 WL 51724, at *5 (E.D. Pa. May 10, 1989); Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1135 (D.N.J. 1989); Pandick Inc. v. Rooney, 632 F. Supp. 1430, 1435-36 (N.D. Ill. 1986); Callan v. State Chemical Mfg. Co., 584 F. Supp. 619, 623 (E.D. Pa. 1984); Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1307 n.9 (D. Colo. 1984); Mauriber v. Shearson/Am. Express, Inc., 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983).

conspiracy. See cases cited in Section III(D)(2), notes 189, 191 & 192 above. As with traditional conspiracy law, RICO conspiracy law also requires more than "mere presence" or "mere knowledge" of the unlawful activity involved. "Rather, it is necessary to introduce some evidence of participation in the conspiracy in order to sustain a conviction." Locascio, 6 F.3d at 944; accord United States v. Melvin, 91 F.3d 1218, 1225 (9th Cir. 1996); Morgano, 39 F.3d at 1376-77. Likewise, the same principles govern the issues of withdrawal from a RICO conspiracy as from a traditional conspiracy offense. See Section VI(Q) below. Thus, RICO did not alter the traditional, general principles of conspiracy law. See generally Sutherland, 656 F.2d at 1190-93; Elliott, 571 F.2d at 898, 903-04.

However, a RICO conspiracy offense does not require proof of an overt act,[199] and is far more comprehensive than a traditional conspiracy offense under 18 U.S.C. § 371 or other federal statutes. In that regard, a RICO conspiracy offense is not limited to a single or a few discrete objective offenses as is typically the case in traditional conspiracy charges, but rather, RICO makes it a crime to conspire to commit a substantive RICO offense. A substantive RICO offense broadly encompasses numerous, diversified state and federal predicate offenses, provided they are related to the affairs of the alleged enterprise. See Sections II(A) and (E)(2) above. Thus, RICO did not create a new law of conspiracy; rather, RICO merely created a new substantive offense to be the object of a conspiracy under traditional principles; that is, to conspire to participate in the affairs of an enterprise through a pattern of racketeering activity. See, e.g., Sutherland, 656 F.2d at 1193 ("What RICO does is to provide a new criminal objective by defining a new substantive crime."); accord Elliott, 571 F.2d at 901-04.

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[199] See cases cited in Section III(D)(1), n.185 above.

Thus, a RICO conspiracy's potential breadth is derived from the interplay of two elements unique to RICO – the existence of an "enterprise" and a "pattern of racketeering activity." As noted above, a RICO conspiracy may include highly diversified unlawful racketeering acts that are not directly related to each other, as long as they are related to the alleged enterprise. Because of a RICO conspiracy's potential breadth, the Second Circuit has indicated that the traditional rules governing admission of co-conspirator statements may apply somewhat differently to RICO conspiracy offenses.

For example, in United States v. Tellier, 83 F. 3d 578, 580-81 (2d Cir.), cert. denied, 519 U.S. 955 (1996), three individuals burglarized a marijuana dealer's apartment, taking eight pounds of marijuana. Two of the burglars were Orlando Rodriguez and Robin Tellier, the defendant's brother. They decided to sell the marijuana. The Government maintained that the defendant was involved in the selling process. The defendant was convicted of RICO substantive and conspiracy charges based upon two racketeering acts, one of which was a conspiracy to distribute stolen marijuana. The Government admitted that the only evidence linking defendant Tellier to the marijuana conspiracy was the testimony of Rodriguez (who had participated in the theft of the marijuana) that the defendant's brother had told Rodriquez that the defendant sold the stolen marijuana.

The Second Circuit stated that, although under Bourjaily v. United States, 483 U.S. 171 (1987), the trial court may consider the hearsay statement itself in determining its admissibility, "[s]ince Bourjaily, all circuits addressing the issue have explicitly held, absent **some** independent, corroborating evidence of defendant's knowledge of and participation in the conspiracy, the out-of-court statements remain inadmissible." 83 F.3d at 580 (citing United States v. Clark, 18 F.3d 1337,

1341-42 (6th Cir.), cert. denied, 513 U.S. 852 (1994)). The Second Circuit concluded that, since the hearsay statement of the defendant's brother was the only evidence implicating the defendant in the marijuana conspiracy, the required corroboration was lacking, and hence the hearsay statement was inadmissible against the defendant on the marijuana conspiracy. Therefore, the evidence against him on that racketeering act was insufficient.

The court then held that the disputed hearsay statement was not admissible against the defendant to prove the RICO conspiracy charge because the Government did not prove the defendant's membership in the RICO conspiracy. This was so because, in light of the inadequate proof on the marijuana conspiracy predicate act, the Government had failed to prove that the defendant had agreed to participate in two racketeering acts as charged in the indictment. Id. at 581. However, Tellier left open the question in a RICO conspiracy case whether the corroboration is sufficient if it merely connects the defendant to the overall RICO conspiracy or enterprise, or whether it must corroborate the defendant's knowledge of, and participation in, the particular predicate act for which admission of the co-conspirator statement at issue is sought. United States v. Gigante, 166 F. 3d 75, 82-83 (2d Cir. 1999), cert. denied, 528 U.S. 1114 (2000) answered that question, ruling that as a general proposition the corroboration must link the defendant to the predicate act to which the co-conspirator statement relates.

The RICO enterprise in Gigante was an association-in-fact comprised of the Genovese, Gambino, Luchese, and Colombo LCN families, and Local 560 of the Ornamental and Architectural Ironworkers Union, along with the window manufacturing and installment companies that sought control of the window replacement market in the New York metropolitan area. The district court had found that "there is a general overriding conspiracy among all of these alleged Mafia groups,"

and then admitted several co-conspirator statements "based solely on this finding of a general conspiracy." 166 F.3d at 83. The Second Circuit stated that:

> This was error. The district court's rationale would allow the admission of any statement by any member of the Mafia regarding any criminal behavior of any other member of the Mafia. This is not to say that there can never be a conspiracy comprising many different Mafia families; however, it must be a conspiracy with some specific criminal goal in addition to a general conspiracy to be members of the Mafia. It is the unity of interests stemming from a specific shared criminal task that justifies Rule 801(d)(2)(E) in the first place--organized crime membership alone does not suffice.

166 F.3d at 83.

To limit the potential scope of Rule 801(d)(2)(E) in RICO LCN cases, the Second Circuit set forth the following rule:

> The district court in each instance must find the existence of a specific criminal conspiracy beyond the general existence of the Mafia. **And when a RICO conspiracy is charged, the defendant must be linked to an individual predicate act by more than hearsay alone before a statement related to that act is admissible against the defendant under Rule 801(d)(2)(E).** See Tellier, 83 F.3d at 581.

166 F.3d at 82-83 (emphasis added).

Applying this rule, the Second Circuit upheld the admission of co-conspirators' statements that Gigante was aware of and had approved of plots to murder Peter Savino and John Gotti, stating that:

> [T]here was substantial corroborating evidence that could support findings by Judge Weinstein that Gigante was boss of the Genovese family, that the Genovese family was involved in the conspiracies to murder Savino and Gotti, and that Gigante, as boss, was necessarily involved in these conspiracies.

166 F.3d at 83. The circuit court's opinion does not identify this corroboration evidence; however, the district court opinion summarized the evidence as follows:

> Testimony revealed that Mr. Gigante and other Commission members agreed that those who murdered [Paul] Castellano had to be hunted down and killed as punishment for the unsanctioned murder. When it was learned that the Gotti brothers, with the help of Gravano, were responsible for Castellano's death, arrangements were made by Mr. Gigante and the rest of the Commission to kill John and Gene Gotti.
>
> . . .
>
> Savino had been ordered killed by Mr. Gigante because he had become a government informant.

United States v. Gigante, 982 F. Supp. 140, 151-52 (E.D.N.Y. 1997).

The Second Circuit also held that the trial court had erroneously admitted a tape recording of co-conspirators John Gotti and Sammy Gravano and others discussing a conspiracy to murder Corky Vastola and stating that they needed to obtain Gigante's permission to use one of Gigante's men to kill Vastola, who was a member of another family. 166 F.3d at 83. The evidence indicated that Gigante refused his permission. The Government argued in its brief that it is because La Cosa Nostra and its rules were in force that Gigante's approval was needed and solicited. That his refusal was obeyed also confirmed his role and power in La Cosa Nostra.

The Second Circuit rejected this argument, stating that "these [tape recorded] discussions were not 'in furtherance' of a specific criminal purpose, and the fact that Gigante might have conspired with Gotti and Gravano to commit other crimes on other occasions is irrelevant." Id. at 83. The Second Circuit went on to hold that the admission of these and any other co-conspirator statements (which were not specified) that were erroneously admitted was harmless error. Id.

In United States v. Russo, 302 F.3d 37, 43-47 (2d Cir. 2002), cert. denied, 537 U.S. 1112 (2003), the Second Circuit explained its decision in Gigante. In Russo, defendants Andrew Russo and Dennis Hickey were not charged with RICO offenses; rather, they were charged with obstruction

of justice and conspiracy to obstruct justice arising from their efforts to contact a juror in a prior RICO prosecution of members of the Colombo LCN family, and their efforts to cause a witness to evade a grand jury subpoena in connection with the earlier RICO investigation. The defendants argued that under Gigante, the hearsay testimony of Mario Parlagreco, a Colombo family associate, that he was told by others who were not members of the Colombo family, that defendant Andrew Russo was a captain in the Colombo family and that defendant Hickey was with the Colombo family was not admissible as a co-conspirator statement in furtherance of a conspiracy. The Second Circuit explained its ruling in Gigante, stating:

> Where evidence is offered against a defendant consisting of a declaration by an alleged co-conspirator in furtherance of some criminal act, we explained that the court "in each instance must find the existence [between the defendant and the declarant] of a specific criminal conspiracy [to do that criminal act.]" Id. at 82. The "general existence of the Mafia" does not suffice. Id. We observed that the district court's expansive rationale "would allow the admission of any statement by any member of the Mafia regarding any criminal behavior of any other member of the Mafia [against the latter]. Id. at 83. This was unacceptable when the speaker and the defendant were not jointly engaged in the criminal venture that was being advanced by the speaker.

Russo, 302 F.3d at 44 (alterations in original). The Second Circuit rejected the defendants' reliance upon this rationale of Gigante, stating:

> Seizing on an isolated statement in Gigante, taken out of context, defendants interpret the discussion as narrowing the co-conspirator exception, providing that joint membership in a criminal organization can *never* serve as its basis. This misunderstands the nature of the exception and misreads the Gigante opinion. Gigante did not purport to establish an arbitrary rule excluding conspiracies to operate a criminal organization from eligibility to serve as the basis for the co-conspiractor-in-furtherance exception. It merely required that the conditions for the exception be observed. The point of the observation in Gigante was that a declarant's statement made in furtherance of a criminal act – a murder in that case – is not admissible against the defendant under the co-conspirator exception unless the defendant was associated with the declarant in a conspiracy or joint venture having that criminal act as its objective. An association between the defendant and

> the declarant in some other venture – and in particular a general association between them in the Mafia – will not suffice.

Id. at 44.[200] Applying the rationale of Gigante, the Second Circuit upheld the admission of the disputed testimony, stating:

> The statements at issue here were quite different from the statements discussed in Gigante. The Gigante statements, as noted, were in furtherance of a planned murder; the defendant Gigante, however, was not involved with the speakers in a conspiracy to commit that murder. We therefore found that the conditions necessary to the exception were not satisfied. The common membership among the speakers and the defendant in the Mafia was not sufficient to justify admission against the defendant of statements of the speakers in furtherance of a murder they planned.
>
> Here, in contrast, the defendant and the declarant were involved together in a conspiracy to maintain an organized crime syndicate, and the declarant's statement furthered the maintenance of the syndicate by giving associated persons information about its membership. Such an organization cannot function properly unless its members and persons who do business with it understand its membership, leadership and structure. The operation of such a syndicate requires that information be passed among interested persons, advising them of the membership and the hierarchy. Joseph Russo's statements quoted by Parlagreco, identifying Hickey as being with the Colombo group, were of that nature. They furthered a conspiratorial objective in which Russo and Hickey were jointly engaged with Joseph Russo – the objective of informing members of the Colombo family concerning the identities of person affiliated with the family.

Russo, 302 F.3d at 46 (footnote omitted).[201]

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[200] The Second Circuit also rejected the defendants' related argument that Parlagreco's disputed testimony was irrelevant and prejudicial, finding that the disputed testimony was relevant to prove the defendants' motivations for their actions and stake in obstructing the Government's investigation. Russo, 302 F.3d at 43.

[201] See also Marino, 277 F.3d at 24-26 (distinguishing Gigante, and ruling that statements about the structure, activities and members of the New England LCN family made by members of a faction of the New England LCN family at war with the defendants' faction were admissible as co-conspirator statements in furtherance of the larger umbrella conspiracy involving the operation of the New England LCN family).

The full implications of the Second Circuit's decisions in this area are not clear at this juncture. Therefore, prosecutors, especially in the Second Circuit, should closely watch for developments in the Second Circuit's evolving doctrine on the admission of co-conspirator statements in RICO cases.

6. Other Issues in RICO Conspiracy Cases

a. Variance: Single and Multiple Conspiracies and Severance and Misjoinder

Issues involving whether the evidence at trial established separate, multiple conspiracies that constitute a variance from the single RICO conspiracy alleged in the indictment and related issues of severance and misjoinder are discussed in Sections V(C)(3) and (4) below.

b. Statute of Limitations and Withdrawal

Issues involving the statute of limitations and withdrawal from a RICO conspiracy are discussed in Section VI(Q) below.

c. Conspiracy to Conspire

Courts have repeatedly rejected claims that conspiracy offenses may not constitute predicate racketeering acts under RICO conspiracy charges because such pleadings would constitute impermissible "conspiracies to conspire." See cases cited in notes 20 and 21 in Section II(A) above, and Section V(C)(2) below. This is so because, in part, a RICO conspiracy is not a conspiracy to commit the alleged predicate racketeering acts; rather, a RICO conspiracy offense is a conspiracy to participate in the affairs of an enterprise through a pattern of racketeering activity. See, e.g, Sutherland, 656 F.2d at 1192-93; Elliott, 571 F.2d at 902-04; see also Section IV(C)(5) and cases cited at pp. 181-83 and n. 219 below.

IV

PENALTIES – SECTION 1963

A. Permissible Sentences Pursuant to 18 U.S.C. § 1963

18 U.S.C. § 1963(a) provides, in relevant part, that "[w]hoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment) . . . ." Accordingly, in many cases the maximum penalty shall be 20 years of imprisonment, unless an underlying predicate offense would carry with it a penalty of life in prison.

There are three potential interpretations of the above provision. First, it is possible that the statute sets forth a maximum penalty of 20 years' imprisonment, except that in a case where a racketeering act provides for a life maximum, the defendant "shall be . . . imprisoned . . . for life." In other words, where a racketeering act provides for a life maximum, a defendant is subject to a mandatory life imprisonment, but not a term of years between 20 years and life. A second reading of the statute is to interpret the entire provision as dealing with maximum sentences, such that the typical maximum sentence for a RICO conviction is 20 years' imprisonment, except where an underlying racketeering act carries a life sentence, in which case the defendant is subject to a maximum (though not mandatory) life sentence. This reading focuses on the clear legislative intent to set a maximum sentence in the first part of the statute ("imprisoned not more than 20 years") and the continuing reference to maximum terms in the description of the underlying racketeering act ("for which the maximum penalty includes life imprisonment"), and assumes that the provision should be read to mean that the words "or for life" include the earlier phrase "not more than." A third possible interpretation is that the typical maximum sentence is 20 years' imprisonment, and in

the case of a life-maximum racketeering act, the judge may impose a life sentence – but nothing in between – and the judge is not required to impose life.

By memorandum dated March 4, 2002, the Department of Justice adopted the second interpretation of the RICO penalty provision. Rather than limiting a court to sentencing a defendant to up to 20 years' imprisonment, or life, but nothing in between, the Criminal Division has interpreted the statutory language as meaning "not more than 20 years" in typical cases, or "not more than life imprisonment" where the underlying racketeering activity includes life imprisonment. This interpretation essentially avoids inflexible and sometimes incongruous results, and allows judges to be more flexible in their sentencing of defendants who have committed aggravated RICO violations. Moreover, this interpretation is consistent with Congress' intent in adopting RICO to create powerful, enhanced sanctions for unlawful racketeering activity. See Section I(B)(1) above.

Courts generally have followed the Justice Department's interpretation of the above provisions and, where defendants were found to have committed a predicate violation carrying a possible life sentence, those defendants have been sentenced to greater than 20 years' imprisonment, but less than life. See, e.g., United States v. Fernandez, 388 F.3d 1199, 1257 (9th Cir. 2004) (upholding 262 month sentence); United States v. Fields, 325 F.3d 286, 287-89 (D.C. Cir. 2003) (292 month sentence upheld, and described as "well within the life maximum" for the RICO count); United States v. Allen, 45 Fed. Appx. 402, 404-405 (6th Cir. 2002) (unpublished) (upholding 360 month sentence for RICO conviction); United States v. Bernard, 10 Fed. Appx. 18, 19 (2d Cir. 2001) (upholding 405 month sentence).

B. Apprendi v. New Jersey and its Progeny

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. In Apprendi, the defendant entered into a plea agreement under which he pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of the third-degree offense of unlawful possession of an anti-personnel bomb. Under the state law, the second-degree offenses carried a penalty of five to 10 years' imprisonment and the third-degree offense carried a penalty of between three and five years. The state additionally reserved the right to request the court to "enhance" the petitioner's sentence in accordance with a state hate crime statute which provides for an "extended term" of imprisonment if the judge finds by a preponderance of the evidence that the defendant's crime had the purpose of intimidating an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. The petitioner conversely reserved the right to challenge the hate crimes sentence enhancement as a violation of the Constitution. The judge's finding of a basis of enhancement would have the effect of transforming a 20-year sentence into a 50-year sentence. Following an evidentiary hearing at sentencing, the judge found by a preponderance of the evidence that the enhanced "hate crime" penalty provisions applied, and accordingly sentenced the defendant to a 12-year term of imprisonment for the shooting, and to shorter concurrent sentences on the other two counts. State appellate courts, finding that the hate crime enhancement was a "sentencing factor" and not an element of the underlying offense, affirmed the sentence and the constitutional validity of the statute.

The Supreme Court struck down the New Jersey hate crimes statute, finding that it was unconstitutional for a legislature to remove the assessment of facts that might increase the prescribed range of penalties for a defendant without a finding by a jury. Id. at 490. It held that except for a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Id.

On December 28, 2000, the Department of Justice issued a memorandum to all federal prosecutors, instructing them as to the policy regarding the application of Apprendi to RICO and Section 1959 prosecutions.[202] That memorandum makes explicit that although Apprendi is not implicated in Section 1959 prosecutions,[203] prosecutions under Section 1961 et seq. involve potential Apprendi issues, raising certain issues of pleading and proof.

Apprendi concerns are not implicated where a defendant is sentenced to less than 20 years' incarceration for a RICO conviction. See, e.g., United States v. Corrado, 227 F.3d 528, 542 (6th Cir. 2000) (enhanced sentences for RICO conspiracy convictions did not trigger Apprendi because they came short of an unenhanced twenty-year maximum); United States v. Nguyen, 255 F.3d 1335, 1344 n.13 (11th Cir. 2001).

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[202] Memorandum from Assistant Att'y Gen. James K. Robinson, Criminal Division Apprendi Guidance re RICO and Section 1959 (Dec. 28, 2000), http://10.173.2.12/usao/eousa/ole/usabook/narc/apprendi/1228memo.htm [herinafter Apprendi RICO Memo]. This policy is binding on all federal prosecutors in order to obtain approval of RICO and Section 1959 prosecutions.

[203] As set forth in that memorandum, because 18 U.S.C. § 1959 explicitly imposes maximum penalties for each type of underlying crime of violence (enumerated in 18 U.S.C. § 1959(a)(1) through (6)) and does not increase the penalty upon proof of an additional matter, there is no situation in which an additional fact would "increase the penalty for a crime beyond the prescribed statutory maximum" in violation of Apprendi.

However, where the Government seeks to obtain a sentence of more than the twenty year statutory maximum, Apprendi does apply. In such cases, OCRS will not approve the applicable RICO count unless: (1) the count charges against the defendant a racketeering act for which the penalty includes life imprisonment; (2) the racketeering act charges the necessary facts to trigger the life imprisonment penalty, tracking that portion of the statute that sets forth the factors supporting a penalty of life imprisonment; and (3) the racketeering act cites the appropriate statute or statutes the racketeering act violates.

Accordingly, where a jury fails to find that a RICO defendant had committed any predicate act with a potential penalty of life imprisonment, the defendant's maximum exposure is 20 years' imprisonment, see Nguyen, 255 F.3d at 1343-44, or forty years' imprisonment for a defendant convicted of both substantive RICO and RICO conspiracy offenses. Id.

In order to obtain a life sentence for a RICO defendant based on a life-eligible RICO predicate offense, the indictment must track the charging language of the underlying statute. Note that this is in contrast to prosecutions charging violations of Section 1959. The difference exists because Section 1959 explicitly imposes the maximum penalty for each type of underlying crime of violence, and does not increase the penalty upon proof of an additional matter. Accordingly, for Section 1959 prosecutions, there will never be a scenario in which an additional fact would, in the terms of Apprendi, "increase the penalty for a crime beyond the prescribed statutory maximum."[204]

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[204] Apprendi, 530 U.S. 466 at 525; see also Duarte v. United States, 289 F. Supp. 2d 487, 491 (S.D.N.Y. 2003) (violation of 18 U.S.C. § 1959(a)(1) authorizes life sentence, and "[n]o additional judicial fact finding was necessary to impose a life sentence"). Importantly, however, under Apprendi, the six subsections specifying various violent crimes under Section 1959 carrying different penalties should be treated as creating separate offenses, each of which must be charged in the indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.

A series of cases from the United States Court of Appeals for the District of Columbia is instructive in demonstrating the impact of Apprendi on RICO cases.[205] For example, in United States v. Fields, 242 F.3d 393 (D.C. Cir. 2001) ("Fields I"), one of the defendants, Johnson, was convicted of narcotics conspiracy, RICO conspiracy, kidnaping, and other offenses. At trial, the jury was not charged with determining, and did not determine, drug quantities. Nevertheless, at sentencing, the judge found by a preponderance of the evidence that significant drug quantities should be attributed to Johnson. Initially, based on these findings, and pursuant to 21 U.S.C. §§ 841 and 846, the district court sentenced Johnson to life imprisonment for the drug conspiracy count. The United States Court of Appeals for the District of Columbia Circuit reversed on Apprendi grounds. Fields I, 242 F.3d at 396-97.

In Fields I, the Government argued that the life sentence could be upheld because, as District of Columbia law for armed kidnaping provided for a maximum sentence of life imprisonment, the life sentence was available for the RICO convictions pursuant to 18 U.S.C. § 1963(a). 242 F.3d at 397. The court of appeals rejected this argument, explaining that while the sentence may be permissible on the RICO conspiracy count, neither the presentence investigation report, nor the sentencing court "relied on this rationale in imposing the life sentences." Id.

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[205] United States v. Fields (Fields I), 242 F.3d 393 (D.C. Cir. 2001) (holding that defendants' sentences for narcotics conspiracy violated Apprendi); United States v. Fields (Fields II), 251 F.3d 1041 (D.C. Cir. 2001) (on rehearing, acknowledging that "there is some loose language in Fields I which can be read to exceed the bounds" of Apprendi, and clarifying that Apprendi applies to those findings triggering a higher statutory maximum but not to those that merely affect a sentence below the statutory maximum); United States v. Fields (Fields III), 325 F.3d 286 (D.C. Cir. 2003) (district court did not violate Apprendi when it combined Guidelines provisions increasing sentence on basis of drug quantities found by preponderance of evidence with statutory maximum of life imprisonment derived from a RICO conviction).

On the Government's petition for a rehearing, the Circuit Court acknowledged that "there is some loose language in Fields I which can be read to exceed the bounds of the Supreme Court's holding in Apprendi." Fields II, 251 F.3d 1041, 1043 (D.C. Cir. 2001). Reiterating Fields I's holding that, where the jury did not determine the requisite drug quantity for an enhanced sentence, Apprendi prevented a sentence above the prescribed statutory maximum. Id. at 1043. However, the court in Fields II acknowledged that Fields I erroneously stated that the increase of the defendant's base offense level (based on drug quantity) and the leadership role adjustment "must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt." Fields I, 242 F.3d at 398. The court in Fields II explained that "[t]hese passages overstate the holding of Apprendi," and that "Apprendi does not apply to sentencing findings that elevate a defendant's sentence within the applicable statutory limits. . . . In other words, Apprendi does not apply to enhancements under the Sentencing Guidelines when the resulting sentence remains within the statutory maximum." Fields II, 251 F.3d at 1043-44 (citation omitted). Nevertheless, the court of appeals concluded (and the Government conceded), that the trial court committed plain error because it imposed life sentences on the drug conspiracy count even without any jury finding to establish drug quantity. Id. at 1044.

After providing this clarification and revision of its earlier holding, the appellate court then revisited the Government's claim that the sentence could not be overturned "because the life sentence on RICO conspiracy was a 'statutorily available sentence' under Apprendi." Id. at 1045. The Circuit Court rejected this position, explaining that upholding the sentence on this basis would have required the appellate court to be guided by "idle speculation as to the sentence that might be imposed by the district court on remand." Fields II, 251 F.3d at 1046 (citations omitted). However, the court remarked that the Government would be allowed to argue that the life sentence should be

imposed on the RICO conspiracy count based on the armed kidnaping predicate. Id.

Following a remand, the district court reduced Johnson's sentence on the drug counts to 240 months' imprisonment. For the armed kidnaping and the RICO conspiracy charge, the court imposed a sentence of 292 months' imprisonment. On appeal, the District of Columbia Circuit noted that the 292 month sentence was "well within the life maximum." Fields III, 325 F.3d at 288. Concluding that the district court did not violate Apprendi when it combined Sentencing Guidelines provisions increasing the sentence on the basis of drug quantities that the court found by a preponderance of evidence with the statutory maximum of life imprisonment derived from the RICO conviction, the court explained:

> Sentence maximums depend on convictions, and convictions depend on findings by a jury (unless waived) of the elements of an offense. Where the drug quantity alters the substantive offense, as it can under 21 U.S.C. §§ 841 and 846, Apprendi applies. But there is no reason to apply Apprendi to drug quantities affecting the RICO armed kidnapping sentence, as they are not an element of that offense. Rather, such quantities may be proven, like all sentence-affecting facts that are not elements of the offense of conviction, by a preponderance of the evidence. In this sense, the drug quantities are treated like any other "relevant conduct" under U.S.S.G. § 1B1.3, which can be found by the court under a preponderance standard.

Id. at 289 (citations and internal ellipses omitted). Similarly, in United States v. Warneke, 310 F.3d 542 (7th Cir. 2002), the court held that, for six of the defendants, the life sentences on RICO charges were consistent with Apprendi because the jury returned special verdicts showing "that the jury found, beyond a reasonable doubt, events [predicate acts, including murder] that justify a punishment as high as life imprisonment." Id. at 549.

By contrast, the life sentence of the seventh defendant, Warneke, was problematic under Apprendi. With respect to this defendant, the special verdict form referred to a racketeering act (Act 20) containing two subparts: conspiracy to commit murder (Act 20A-which did not carry a life

sentence) and premeditated murder (Act 20B- which did carry a life sentence). While the verdict form required the jury to determine if the defendant had committed Racketeering Act 20, it did not ask whether he committed Act 20A or 20B (or both). The court found that because the defendant did not make an Apprendi-like argument in the district court, and because the defendant did not ask for a special verdict distinguishing Act 20A from Act 20B, only plain error could justify reversal of the district court's decision. The court found that the district court did not commit plain error in sentencing Warneke to life imprisonment as the record demonstrated that Warneke was the brains behind the planning of the murder, and he did not dispute the evidence of its planning. 310 F.3d at 550.

Furthermore, with respect to yet another defendant, who pleaded guilty, the court stated that his exposure could exceed twenty years, because the predicate acts to which this defendant confessed as part of his plea exposed him to a life sentence. Id. at 550. See also United States v. Shryock, 342 F.3d 948 (9th Cir. 2003) (as for several defendants, life sentences permissible under Apprendi because underlying predicates found by the jury carried life sentences; as to defendant R. Hernandez, Government conceded error because defendant's underlying predicates carried maximum of twenty years each).

C. Application of Sentencing Guidelines to RICO

1. United States v. Booker and its Progeny

Within the past several years, federal sentencing law has changed dramatically. In United States v. Booker, 543 U.S. 220 (2005), the Supreme Court found the mandatory nature of the Federal

Sentencing Guidelines incompatible with the Sixth Amendment.[206]

[206] In Booker, the respondent was found guilty of violating 21 U.S.C. §841(a)(1) after a jury heard evidence that he had 92.5 grams of crack cocaine in his duffel bag. Given Booker's criminal history and the quantity of drugs that the jury found, the Sentencing Guidelines required the district court to sentence Booker to 210 to 262 months in prison. During a post-trial proceeding, however, the district court found by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack cocaine and was guilty of obstructing justice. As the Sentencing Guidelines required additional prison time given the district court's findings, the judge imposed a 360 - month sentence.

On appeal, the Seventh Circuit found that the district court's application of the Sentencing Guidelines conflicted with Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that except for a prior conviction, any other fact "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.") The court relied upon Blakely v. Washington, 542 U.S. 296 (2004) (holding that the "statutory maximum" under Apprendi is the maximum sentence that a judge can impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.") Id. at 304. The Court of Appeals found that Booker's sentence violated his Sixth Amendment right and remanded the district court to sentence him within the sentencing range supported by the jury's findings or to hold a separate sentencing hearing before a jury. Id. at 305, 304.

This case was consolidated on appeal with another case, United States v. Fanfan, 542 U.S. 963 (2004). In that case, respondent Fanfan was charged with conspiracy to distribute and possess with intent to distribute at least 500 grams of cocaine. During the sentencing hearing, the district court found additional facts by a preponderance of the evidence for which the Guidelines would authorize a sentence enhancement, transforming his potential sentence from five or six years to fifteen or sixteen years. The judge, however, concluded that he could not enhance Fanfan's sentence by imposing a sentence on respondent that was not based solely on the jury verdict in the case under Blakely. In response to the trial court's ruling, the Government filed a petition for a writ of certiorari with the Supreme Court.

In taking up Booker's and Fanfan's cases, the Supreme Court examined whether the Sixth Amendment is violated by an enhanced sentence under the Sentencing Guidelines based on the sentencing judge's determination of a fact that was not found by the jury or admitted by the defendant. It then examined whether, if the Sixth Amendment was violated in a case where the Guidelines require the court to find a sentence-enhancing fact, the Guidelines as a whole would be inapplicable as a matter of severability analysis. Booker, 543 U.S. at 747. The Court found that whenever a judge seeks to impose a sentence which is not based only on the facts contained in the jury verdict or that the defendant has admitted, the Sixth Amendment is implicated.

The Court did not take the additional step of requiring the Government to plead and prove
(continued...)

In Rita v. United States, 127 S. Ct. 2456 (2007), the Supreme Court held that federal appellate courts may apply a nonbinding presumption of reasonableness to a district court sentence that is within a properly-calculated Sentencing Guidelines range. The Court added that application of such a presumption of reasonableness comports with the Sixth Amendment and Apprendi, even if it increases the likelihood that the sentencing judge rather than the jury will find sentencing facts.[207]

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[206](...continued)
to a jury that an enhancement was required. It did, however, hold that the statute making the Guidelines mandatory (18 U.S.C. § 3553 (b) (1)) and the provision which established standards of review on appeal (18 U.S.C. § 3742) were severable from the statutory guidelines scheme. Accordingly, the Guidelines became "effectively advisory." Booker, 543 U.S. at 245. Sentencing judges must now consider the range provided by the Guidelines, but are also allowed to "tailor the sentence in light of other statutory concerns" that include the factors listed in 18 U.S.C. § 3553(a). Id. at 245-46. The resulting sentences can be reviewed on appeal for "unreasonableness." Id. at 260-61. As a result, the Court made the Guidelines advisory, rather than mandatory, by severing and excising 18 U.S.C. § 3553(b)(1), which required judges to follow the Guidelines, and § 3742(e), which set a de novo standard of review on appeal. Id. at 246, 258-60. A sentencing court must consider the Guidelines ranges but may tailor the sentence in light of other statutory concerns. Id. at 245. The Court held that the proper standard of appellate review for sentencing decisions is the deferential abuse-of-discretion standard. Id. at 261.

[207] In Rita, the defendant was convicted of various federal offenses, including making false statements, perjury, and obstruction of justice, for which the Sentencing Guidelines prescribed a range of thirty-three to forty-one months of imprisonment. At sentencing, the defendant argued for a below-Guidelines sentence based on his poor health, prior military service, and fear of retaliation while in prison. Sentencing the defendant to the low end of the Guidelines range, the district court disagreed, explaining that the Guidelines sentence was "appropriate;" on appeal, the United States Court of Appeals for the Fourth Circuit concluded that a sentence within a properly calculated Guidelines range is "presumptively reasonable." 127 S. Ct. at 2462.

It is important to note that, in Rita, the Supreme Court made clear that the presumption of reasonableness: (1) is not binding; and (2) applies only on appeal. See 127 S. Ct. at 2465. ("We repeat that the presumption before us is an appellate court presumption. . . . [T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.")

Following Rita, in Gall v. United States, 128 S. Ct. 586 (2007), the Supreme Court held that although federal appellate courts must apply a presumption of reasonableness to a district court sentence that falls within a properly-calculated Sentencing Guidelines range, a presumption of unreasonableness does not apply to sentences outside the Guidelines range. Id. at 597. Rather, the appellate court is limited to determining whether district court "sentencing decisions are 'reasonable.'" Id. at 594. The Court explained:

> In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of deviation from the Guidelines. We reject, however, an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justification required for a specific sentence.

Id. at 594-95.[208]

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[208] In Gall, the defendant pleaded guilty to conspiring to distribute ecstasy. At sentencing, the defendant argued that he should be given a below-Guidelines sentence given his withdrawal from the conspiracy several years prior to being indicted, his lack of a significant criminal history, and his abstention from recent drug use. Agreeing, the district court sentenced Gall to a probation term of 36 months, well below the 30 to 37 months of imprisonment called for in the advisory Guidelines range. After the government appealed the sentence, the United States Court of Appeals for the Seventh Circuit reversed and remanded for sentencing, stressing that under prior circuit precedent, United States v. Claiborne, 439 F.3d 479 (8th Cir. 2006) (holding that a sentence outside of the Guidelines range must be supported by a justification that "is proportional to the extent of the difference between the advisory range and the sentence imposed"), the disparity between probation and the lower limits of the advisory Guidelines of 30 months of imprisonment was "extraordinary" and that it was not supported by extraordinary circumstances. The Supreme Court rejected the reasoning of the circuit court (and overruled Claiborne), holding that in reviewing the reasonableness of a sentence outside of the Guidelines range, although appellate courts may take the degree of variance into account and consider the extent of deviation, they should not apply a "rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." Gall, 128 S. Ct. at 595. Thus, affirming the initial sentence of probation, the Supreme Court found no abuse of discretion in the trial court's ruling or procedural error.

Despite this substantial series of changes to federal sentencing law, what has not changed is that, throughout even the most recent post-Booker decisions, courts are required to begin with a calculation of the proper range under the Sentencing Guidelines. See, e.g., Booker, 543 U.S. at 245; Rita, 127 S. Ct. at 2464; Gall, 128 S. Ct. at 596 ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."). In short, although the Guidelines sentencing calculation is no longer the last word in determining the defendant's overall sentence, the calculation remains the first word.[209]

2. Calculating Base Offense Level and Relevant Conduct

The United States Sentencing Commission has issued Sentencing Guidelines for RICO offenses that are applicable to crimes committed after November 1, 1987. The base offense level for a RICO violation is the offense level applicable to the underlying racketeering activity, or nineteen, whichever is greater. U.S.S.G. § 2E1.1.[210] If there is more than one type of underlying racketeering activity, the Commentary provides that courts should treat each underlying offense as if contained in a separate count of conviction, and that if the underlying racketeering acts are state

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[209] See also Memorandum from Acting Deputy Att'y Gen. Craig S. Morford and the Criminal Appellate Section on Rita v. United States (Aug. 24, 2007), http://10.173.2.12/usao/eousa/ole/usabook/ussg/20070824.htm.

[210] See also United States v. Sacco, 899 F.2d 149, 150 (2d Cir. 1990); United States v. Olson, 22 F.3d 783, 786-87 (8th Cir. 1994) (reversing district court's decision to sentence RICO defendant at base level lower than nineteen, the minimum required by the sentencing guidelines); United States v. Butt, 955 F.2d 77, 89 (1st Cir. 1992) ("the comparison between subsections (a)(1) and (a)(2) mandated by § 2E1.1 merely ensures that a RICO defendant will not receive a **lesser** sentence than would attach to the underlying acts, simply by virtue of [defendant's] having committed them in furtherance of a racketeering scheme") (emphasis added); United States v. Butler, 954 F.2d 114, 120-22 (2d Cir. 1992) (same); United States v. Morgano, 39 F.3d 1358, 1369-71 (7th Cir. 1994) (defendant's base level offense for RICO is nineteen, even if his predicate offenses by themselves would have lower score because § 2E1.16(a) "establishes a mandatory minimum offense level of 19" for RICO).

law violations, use the closest federal offense analogue. The Introductory Commentary states that the offense level "usually will be determined by the offense level of the underlying conduct."[211]

The underlying activity for a RICO conviction includes both charged racketeering acts as well as other uncharged activity, so long as such activity is within the scope of, and in furtherance of, the criminal activity, and is also reasonably foreseeable to the defendant. Thus, pursuant to Section 2E1.1 of the Guidelines, as well as the Guidelines principles governing relevant conduct under Section 1B1.3, the "underlying racketeering activity" that determines the base offense level for a RICO violation consists of "any act, whether or not charged against defendant personally, that qualifies as a RICO predicate under 18 U.S.C. § 1961(1) and is otherwise relevant under § 1B1.3." United States v. Carrozza, 4 F.3d 70, 77 (1st Cir. 1993) (footnote omitted).[212]

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[211] U.S. SENTENCING GUIDELINES MANUAL ch. 2, pt. E.1, introductory cmt. (2007).

[212] In Carrozza, the court went on to hold that in determining defendant Patriarca's base offense level for a RICO conspiracy conviction, the sentencing court may consider murders that either were not charged against the defendant in the indictment, or were not charged at all in the indictment, provided that the murders were reasonably foreseeable to the defendant and were in furtherance of the jointly undertaken criminal activity. Id. at 74-78.

However, the court also held that because the murders did not constitute the charged conduct that provided the basis for Patriarca's conviction, he could not be sentenced to life imprisonment, but rather his sentence would be limited to the statutory maximum penalty of 20 years. The court explained that "[t]he RICO statute sets the maximum prison sentence at 20 years unless 'the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment.'" Id. at 81 (quoting 18 U.S.C. § 1963(a)). In this case, because Patriarca's "violation" was not based on any of the uncharged murders, the maximum penalty of life imprisonment did not apply. See id. ("the statutory maximum sentence must be determined by the conduct alleged within the four corners of the indictment"). Note also that this result, allowing the uncharged conduct that is later proven to a judge at sentencing to affect the Guidelines range but not the statutory maximum, is consistent with the rule in Apprendi discussed in Section IV(B) above. See also United States v. Flemmi, 245 F.3d 24, 30 n.4 (1st Cir. 2001) ("To be sure, a sentencing judge may consider uncharged predicate acts in a RICO case, ... but the judge nonetheless must stay below the maximum penalty allowed under the charges delineated in the indictment and (continued...)

Other courts have generally followed this principle, allowing not only uncharged conduct but even conduct for which a defendant has been tried and acquitted to be included as relevant conduct. See, e.g., United States v. Mercado, 474 F.3d 654, 655-57 (9th Cir. 2007) (affirming sentences in RICO conspiracy prosecution where sentences were based on criminal conduct charged in indictment, but found not proved beyond a reasonable doubt; moreover, such considerations were not problematic under Booker: "the constitutional propriety of a sentencing court's consideration of conduct which underlay an acquitted charge existed before creation of the Guidelines and continues to exist today, despite the possibility that it would not exist if the Guidelines were mandatory, which they are not."), cert. denied, 128 S. Ct. 1736 (2008); United States v. Campbell, 491 F.3d 1306, 1314-15 (11th Cir. 2007) (because defendant's sentence did not exceed maximum authorized by the jury verdict finding defendant guilty of tax violations, sentencing court may consider conduct underlying RICO and bribery charges on which defendant was acquitted); United States v. Clay, 483 F.3d 739 (11th Cir. 2007); United States v. Thai, 29 F.3d 785, 819-20 (2d Cir. 1994) (court properly considered acts of violence not charged as predicate acts as relevant conduct since they were in furtherance of the RICO conspiracy); United States v. Darden, 70 F.3d 1507, 1544-45 (8th Cir. 1995) (murder with which others were charged but proven by a preponderance of evidence to have been aided and abetted by defendant held as "relevant conduct" of defendant for which he is accountable); United States v. Hurley, 374 F.3d 38, 39 (1st Cir. 2004) (district judge properly employed money

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[212](...continued)
submitted to the jury." (citations omitted)).

There is certain language in Carrozza that states that the uncharged conduct must actually "qualif[y] as a RICO predicate act under 18 U.S.C. § 1961(1)" in order to constitute relevant conduct under Section 1B1.3. 4 F.3d at 77. This language is clearly dicta, as there was no dispute that the uncharged activity in that case (murders) qualified as RICO predicates.

laundering guideline in sentencing appellants on RICO conspiracy count as the cross reference in § 2E1.1 could properly encompass relevant conduct for which a defendant had not been convicted); United States v. Marino, 277 F.3d 11, 38 (1st Cir. 2002) (district court's consideration of defendant's attempted murder of rival, for which the jury did not convict him, and finding that defendant's drug conspiracy involved over 500 grams of cocaine, where jury did not specify a quantity, was not problematic under Apprendi because defendant's sentence did not exceed statutory maximum), cert. denied, 536 U.S. 948 (2002); United States v. Tocco, 306 F.3d 279 (6th Cir. 2002) (in RICO conspiracy case, racketeering activity by the defendant's coconspirators was relevant conduct for sentencing purposes), cert. denied, 539 U.S. 926 (2003); United States v. Ruggiero, 100 F.3d 284 (2d Cir. 1996) (court properly considered defendants' additional kidnappings not included in charge).

a. Analogous Offenses

Where the underlying RICO charge involves a violation of state law (such as state law murder statutes), the Guidelines require the district court to apply "the offense level corresponding to the most analogous federal offense." U.S.S.G. §2E1.1 cmt. n.2. For example, in United States v. Minicone, 960 F.2d 1099, 1110 (2d Cir. 1992), cert. denied, 503 U.S. 950 (1992), the defendant was convicted of violating the RICO conspiracy statute, 18 U.S.C. § 1962(d), based on his involvement in the enterprise's gambling activity and the murder of a rival. At trial, the jury was not asked to find premeditation when convicting him for the RICO conspiracy that involved the racketeering activity of second degree murder under the New York Penal Code. On appeal, the defendant argued that the district judge erred in using the Guideline provision for the federal offense of first-degree murder, U.S.S.G. § 2A1.1. The Second Circuit Court of Appeals disagreed, noting that, per the commentary of U.S.S.G. 2E1.1, the court should use the most analogous federal offense,

and that in this case, the district court properly analogized the definition of first-degree murder in 18 U.S.C. § 1111. Id. at 1110; see also United States v. Carr, 424 F.3d 213, 231 (2d Cir. 2005) (noting that "the absence of reference to premeditation or malice aforethought [in the state law] does not mean that federal first degree murder is not the most analogous federal offense." (citations omitted)), cert. denied, 546 U.S. 1221 (2006); United States v. Miller, 116 F.3d 641, 677-78 (2d Cir. 1997) (upholding district court's application of U.S.S.G. §§ 2X2.1 and 2A1.1 (aiding and abetting first degree murder), as it was closest offense to defendant's underlying RICO activity (criminal facilitation under New York state law) dealt with by Guidelines), cert. denied, 524 U.S. 905 (1998).

b. Grouping

As described previously, Guidelines Section 2E1.1 provides that the offense level for a RICO conviction is nineteen or the offense level of the underlying conduct, whichever is greater. Furthermore, Sentencing Guidelines comment n.1 provides that, at sentencing, the court is to "treat each underlying offense as if contained in a separate count of conviction" U.S.S.G. §2E1.1 cmt. n.1, and must apply Chapter Three, Parts A through D.

Part D of Chapter Three of the Sentencing Guidelines provides the grouping principles, by which multiple counts of conviction are, after a series of steps outlined in Sections 3D1.2, 1.3, and 1.4, aggregated to determine the combined offense level. Section 3D1.1(a) provides that:

> When a defendant has been convicted of more than one count, the court shall:
>
> (1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups") by applying the rules specified in § 3D1.2.
>
> (2) Determine the offense level applicable to each Group by applying the rules specified in § 3D1.3.

(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in § 3D1.4.

U.S.S.G. § 301.1(a).

The grouping rules of the Sentencing Guidelines apply also to the predicate acts underlying a RICO conviction, not just to the counts in the indictment. See, e.g., Nguyen, 255 F.3d at 1344 (noting that because the Guidelines instruct that the underlying predicates should be treated "as if contained in a separate count of conviction," and because Section 3.D must be applied by the sentencing court, "[t]he plain language of the Guidelines therefore clearly indicates that a sentencing court must apply the grouping rules, where applicable, to determine a defendant's offense level for underlying racketeering conduct.") Thus, simply because the underlying predicates constitute a "pattern of racketeering activity" for purposes of establishing a RICO violation, this does not require that the predicate offenses will group together for purposes of sentencing analysis. Id.; see also United States v. Fiorelli, 133 F.3d 218, 220 (3rd Cir. 1998) (noting that grouping under U.S.S.G. § 3D1.2 was not appropriate where the underlying extortion violations were extortion offenses, involved different victims and no count involved conduct that was treated as a specific offense characteristic in, or adjunct to, another count); Morgano, 39 F.3d at 1380 (court also properly refused to group predicate offense for extortion with related gambling offenses since they did not involve the same harm); United States v. Ruggiero, 100 F.3d 284, 292 (2d Cir. 1996) (defendants' kidnappings underlying RICO convictions not subject to grouping under § 3D1.2).

3. Enhancements and Adjustments

a. Role in the Offense

Obviously, a common sentencing enhancement in RICO prosecutions is the "role in the offense" enhancement set forth in USSG § 3B1.1. See, e.g., Gotti, 459 F.3d at 347-350 (district court did not commit clear error in changing its mind that a leadership role enhancement was warranted for acting crime boss of Gambino Family, instead subsequently concluding that the four-level "organizer/leader" enhancement would be inappropriate because the evidence "strongly suggested that Peter Gotti did not exhibit typical leadership characteristics that one would expect of the acting boss of a New York crime family, but was simply filling a power vacuum brought about by the incarceration of other members of the Gotti family . . . ."); United States v. Hanhardt, 361 F.3d 382, 393-394 (7th Cir. 2004) (upholding defendant's "organizer/leader" enhancement where he and another defendant "exercised decision-making authority," organized and planned the activities of the enterprise, and "recruited and supervised knowing accomplices and unknowing participants to assist" in the illegal activities). Moreover, such enhancements are imposed based on the defendant's position or role in the overall conspiracy or RICO enterprise -- not necessarily on any specific underlying conduct. See, e.g., United States v. Damico, 99 F.3d 1431, 1435-38 (7th Cir. 1996) (even though RICO defendant's base offense level was calculated by reference to underlying extortion conduct (which carried the highest offense level of the defendant's underlying offenses), and defendant was not a manager/leader with respect to those charges, "role in offense" adjustment was based upon defendant's leadership role in the overall RICO conspiracy); United States v. Coon, 187 F.3d 888, 899 (8th Cir. 1999) (§ 3B1.1 adjustment is applied to a RICO offense by looking at the overall RICO conspiracy and all its relevant conduct).

On rare occasions, some courts have held that RICO defendants may qualify for a minor or minimal role sentencing adjustment.[213] Importantly, however, the Guidelines indicate that such reductions apply only to the defendant "who plays a part in committing the offense that makes him substantially less culpable than the average participant" (USSG § 3B1.2 Commentary Note 3(A)), and the courts have been clear that "[t]he intent of the Guidelines is not to 'reward' a guilty defendant with an adjustment merely because his coconspirators were even more culpable." United States v. Lopez, 937 F.2d 716, 728 (2d Cir. 1991). Often, courts reject invitations, or reverse decisions, to reduce a defendant's sentence on such a basis for RICO defendants.[214]

Moreover, the defendant bears the burden of proof in qualifying for a mitigating role reduction. See, e.g., United States v. Carpenter, 252 F.3d 230, 234 (2d Cir. 2001); United States v. Hanhardt, 361 F.3d 382, 394-95 (7th Cir. 2004); Posada-Rios, 158 F.3d at 880.

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[213] See, e.g., Olson, 22 F.3d at 787 (upholding district court's decrease of offense levels under § 3B1.2 for defendants as minor or minimal participants because these defendants "played lesser roles as [the lead defendant's] soldiers"); Hurley, 63 F.3d at 20 (noting that while defendant was given minor role adjustment for his limited role in RICO conspiracy, he should not be given minimal participant adjustment).

[214] See, e.g., United States v. Ali, 508 F.3d 136, 152 (3d Cir. 2007) (noting that the sentencing court failed to explain how defendant's minor role in offense was exceptional); United States v. Edwards, 214 Fed. Appx. 57, 65-66 (2d Cir. 2007) (rejecting defendant's claim to entitlement to a "minor role" reduction for his allegedly lesser role in the drug trafficking activities of the enterprise, because "[t]he 'offense' for which the reduction is available is the RICO conspiracy as a whole, and not any individual predicate act," and where the defendant was equally culpable as other participants); United States v. Hanhardt, 361 F.3d 382, 395 (7th Cir. 2004) (upholding denial of § 3B1.2 reduction for RICO defendant, and noting that defendant's claim "that he is significantly less culpable than the others because he did not participate in all of the conspiratorial activity is not enough to meet his burden."); United States v. Nguyen, 255 F.3d 1335, 1345 (11th Cir. 2001) (although defendant was a member of the RICO enterprise for a short period of time compared to other participants, "he knew and understood the scope of the enterprise's activities," and his "knowledge of the operation, coupled with his conduct," justified the court's finding that the defendant was not entitled to a sentencing reduction).

b. Upward departures for association with organized crime

Courts may choose to impose an upward departure from the Sentencing Guidelines for a defendant's ties to organized crime. The Seventh Circuit, in particular, has made a practice of enhancing organized criminals' sentences. In United States v. Schweihs, 971 F.2d 1302 (7th Cir. 1992), the Seventh Circuit affirmed the sentencing judge's seven-point upward departure because the Guidelines had not taken into account the use of organized crime connections in violations of the Hobbs Act. Id. at 1316-17. The sentencing judge analogized the use of organized crime to the discharging of a firearm, a five-level increase, but considered organized crime worse because of its "widespread societal implications." Id.; see also United States v. Aleman, No. 90 CR 87-12, 1992 WL 390912 *9 (N.D. Ill. Dec. 16, 1992) (affirming a six-point upward departure for defendant's involvement in organized crime, resulting in defendant receiving sentence length agreed upon by plea).

More typically, as in United States v. Rainone, 32 F.3d 1203, 1208-09 (7th Cir. 1994), sentencing courts in the Seventh Circuit will impose a two-point enhancement for involvement with organized crime. Judge Richard Posner found that the Sentencing Commission's base offense level assigned to RICO convictions, U.S.S.G. § 2E1.1(a)(1), does not reflect involvement in organized crime because a RICO "enterprise" encompasses a wide range of associations, such as minor gangs or corrupted unions. Id. at 1208-09. He therefore affirmed a two-point increase for engaging in organized crime. Id.; see also Damico, 99 F.3d at 1439 (affirming a two-point upward departure for defendant sentenced for a predicate act under U.S.S.G. § 2E1.1(a)(2) who was also involved in organized crime "[A] defendant's involvement in organized crime is not reflected in the base offense level assigned to him . . . regardless of whether the base offense level is established under subsection

(a)(1) or (a)(2) of the RICO guideline . . . ."); United States v. Zizzo, 120 F.3d 1338, 1360-61 (7th Cir. 1997); United States v. Hanhardt, 361 F.3d 382, 392-94 (7th Cir. 2004) ("Where membership in or association with the Outfit is used to further the criminal activity for which a defendant is convicted, an upward departure under the guidelines is appropriate.").

Other circuits have also approved of sentence enhancements for organized crime. In United States v. Chance, 306 F.3d 356 (6th Cir. 2002), the Sixth Circuit ruled that the district court properly considered the defendant's acceptance of bribes from organized crime figures in determining whether to upwardly depart from his base sentence for a RICO conviction. Id. at 395.[215]

4. Additional Guidelines Considerations

a. RICO Offenses Are "Straddle" Offenses

RICO violations, including substantive RICO offenses, are continuing offenses, and may therefore "straddle" the Guidelines date without violating the Ex Post Facto Clause.[216] See, e.g.,

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[215] See also United States v. Ossai, 485 F.3d 25, 33 (1st Cir. 2007) (recognizing organized crime as a legitimate cause for upward departure in sentencing for a Hobbs Act violation); cf. Bellomo v. United States, 344 F. Supp. 2d 429, 430-31 (2d Cir. 2004) (noting defendant's stipulation to an upward departure for his involvement in organized crime as part of a plea agreement); United States v. Cammisano, 917 F.2d 1057, 1064 (8th Cir. 1990) (declining to decide the issue for lack of sufficiently corroborated evidence, but acknowledging that "perhaps in appropriate circumstances ties to organized crime might provide a basis for upward departure"); United States v. Fatico, 458 F. Supp. 388, 409, 412-13 (E.D. NY 1978) (before the passage of the Federal Sentencing Guidelines, finding that defendant's organized crime ties warranted an increased sentence); "[t]he issue of membership in an organized crime family may be even more important than a prior conviction" in sentencing).

[216] United States v. Robertson, 73 F.3d 249 (9th Cir. 1996). The court held that "a RICO violation under § 1962(a) may constitute a continuing offense for purposes of the [sentencing Guidelines] straddle analysis if the Government demonstrates use or investment of proceeds in acquiring or operating the enterprise both before and after November 1, 1987." Id. at 252. However, the court held that the sentencing guidelines did not apply because the government did not prove any such use or investment of proceeds after November 1, 1987. Id. at 252-53.

United States v. Moscony, 927 F.2d 742, 754-56 (3d Cir. 1991); United States v. Butler, 954 F.2d 114, 120-21 (2d Cir. 1992); United States v. Eisen, 974 F.2d 246, 268-269 (2d Cir. 1992) (RICO conspiracy); United States v. Jackson, 983 F.2d 757, 771 (7th Cir. 1993); see also Section VI(F)(4), below.

Similarly, where the dates for a series of offenses "straddle" a change in the Sentencing Guidelines, the commentary provides that the date of the last offense should control. Accordingly, "where a harsher Guideline becomes effective during the course of a conspiracy, a defendant who does not withdraw from the conspiracy before the effective date of the more severe Guideline should be sentenced pursuant to the more recent Guideline." United States v. Korando, 29 F.3d 1114, 1120 (citing United States v. Jackson, 983 F.2d 757, 771 (7th Cir. 1993)).

b. Consecutive Sentencing

Courts have upheld consecutive sentences for RICO substantive and conspiracy offenses, see cases cited in Section VI(P)(1)(a) below, as well as for violations of two substantive RICO subsections. Likewise, courts have permitted consecutive sentences for a RICO conviction as well as for a conviction of an underlying predicate offense. See Section VI(P)(1)(a) below. Indeed, one court has commented that "Congress clearly intended to permit, and perhaps sought to encourage, the imposition of cumulative sentences for RICO offenses and the underlying crimes." United States v. Kragness, 830 F.2d 842, 864 (8th Cir. 1987) (citing United States v. Sutton, 700 F.2d at 1081); and United States v. Truglio, 731 F.2d 1123, 1129-30 (4th Cir. 1984); see also United States v. Deshaw, 974 F.2d 667, 672 (5th Cir. 1992) ("each provision [RICO and the underlying predicate] is unambiguous and authorizes punishment for a violation of its terms."); United States v. Baker, 63 F.3d 1478, 1494 (9th Cir. 1995); United States v. Grayson, 795 F.2d 278, 286 (3d Cir. 1986)

("Congress intended to permit the imposition of cumulative sentences for both RICO and the underlying predicate offense."); United States v. Thomas, 757 F.2d 1359, 1369-1370 (2d Cir. 1985) (same); United States v. Mitchell, 777 F.2d 248, 264 (5th Cir. 1985).

Under the Guidelines, there is a preference for concurrent sentences unless consecutive sentences are necessary to achieve the applicable Guideline range. See § 5G1.2(c)-(d); see also Morgano, 39 F.3d at 1365-69; United States v. Velasquez, 304 F.3d 237, 241 (3d Cir. 2002) ("Generally, sentences imposed at the same time run concurrently unless a statute mandates or a court orders otherwise."); United States v. Becker, 36 F.3d 708 (7th Cir. 1994). Nevertheless, despite this preference, "undoubtedly a sentencing court enjoys broad discretion in deciding whether Guidelines and pre-Guidelines sentencing will run concurrently or consecutively." Morgano, 39 F.3d at 1366.

5. Sentencing for RICO Conspiracy Counts

Section 1B1.2(d) of the Sentencing Guidelines provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." USSG § 1B1.2(d). Additionally, Comment 4 to this subsection further states that "[p]articular care must be taken in applying subsection (d)" because of certain cases which do not specify the object, or objects, of the conspiracy. Id. cmt. n4. In such cases, the commentary provides, Section 1B1.2(d) "should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as trier of fact, would convict the defendant of conspiring to commit

that object offense."[217] Id.

One issue that has arisen in the case law occurs when a jury has convicted a defendant of a RICO conspiracy offense by a general verdict (or if the defendant pleads guilty to a RICO conspiracy offense), and it cannot be determined which specific predicate acts the defendant agreed would be committed in furtherance of the conspiracy. In such circumstances, the circuits are split as to what standard of proof – preponderance of the evidence or beyond a reasonable doubt – is required for the sentencing court to determine agreement to the commission of a specific racketeering act.

The Eleventh Circuit has concluded that the beyond a reasonable doubt standard applies. In United States v. Farese, 248 F.3d 1056 (11th Cir. 2001), the Court of Appeals for the Eleventh Circuit explained that Sentencing Guideline 2E1.1 provides that the base offense level for a RICO conviction is the larger of nineteen or the offense level applicable to the underlying racketeering activity. Id. at 1059. However, "[i]t will not always be clear what the underlying racketeering activity is under U.S.S.G. § 2E1.1(a) for the purpose of calculating the defendant's offense level, because the jury's verdict or the guilty plea may not specify which of the offenses listed in the indictment was the object of the conspiracy." Id. at 1060. In such situations, reasoned the court, the sentencing court should turn to Section 1B1.2(d), and Comment 4 of that section, which instructs

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[217] Furthermore, Amendment 75 of the United States Sentencing Guidelines, Appendix C, states:

> A higher standard of proof should govern the creation of what is, in effect, a new count of conviction for the purposes of Chapter Three, Part D (Multiple Counts). Because the guidelines do not explicitly establish standards of proof, the proposed new application note calls upon the court to determine which offense(s) was the object of the conspiracy as if it were sitting as a trier of fact.

U.S.S.G. Appendix C, amend. 75 (Nov. 1, 1989).

that where the verdict (or plea) does not establish the offense which was the object of the conspiracy, "subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense." Id. at 1061 (quoting U.S.S.G. § 1B1.2(d), cmt. n.4). Finally, the court interpreted the phrase "were it sitting as trier of fact" to demand that "the district court must find beyond a reasonable doubt that the defendant conspired to commit a particular object offense before the court can sentence the defendant on the basis of that offense." Id. at 1060-61. Subsequent Eleventh Circuit cases have reiterated this principle. [218]

However, in United States v. Corrado, 227 F.3d 528, 541 (6th Cir. 2000), the Sixth Circuit disagreed, holding that U.S.S.G. § 1B1.2 did not apply because a RICO conspiracy offense is "not a multi-object conspiracy." Id. Rather, a "RICO conspiracy . . . is considered a single object conspiracy with that object being the violation of RICO." Id. at 541-42. (quoting United States v. Carrozza, 4 F.3d 70, 79 (1st Cir. 1993)). The Sixth Circuit further explained:

> Thus, the underlying acts of racketeering in a RICO conspiracy are not considered to be the objects of the conspiracy, but simply conduct that is relevant to the central objective - participating in a criminal enterprise. The existence of relevant conduct is determined at sentencing by a preponderance of the evidence.

Corrado, 227 F.3d at 542; accord Carrozza, 4 F.3d 70, 77-80; cf. United States v. Darden, 70 F.3d 1507, 1545 (8th Cir. 1995) (holding that the sentencing court considers uncharged relevant conduct

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[218] See, e.g., United States v. Nguyen, 255 F.3d 1335, 1341-42 (11th Cir. 2001) (vacating sentence in RICO conspiracy case where court determined unspecified predicate offense under preponderance standard, increasing defendant's offense levels); United States v. McKinley, 995 F.2d 1020, 1026 (11th Cir. 1993) (noting that the commentary to the Guidelines made clear that when a jury verdict is ambiguous as to the offenses that are the object of the conspiracy, court must use beyond reasonable doubt standard); United States v. DiGiorgio, 193 F.3d 1175, 1177-78 (11th Cir. 1999) (extending the McKinley rule to 1962(d) and 1959(a)(5) prosecutions).

proven by a preponderance of the evidence). Thus, the different approach involves not only the burden of proof, but also the precise inquiry to be determined – i.e., "relevant conduct" versus whether the predicate offense at issue was an object of the RICO conspiracy.

Assuming there are no Apprendi issues which would require the jury to decide a factual matter under the beyond a reasonable doubt standard, OCRS recommends that prosecutors argue to the district court the following:

Urge the district court to rule as a threshold matter that the decisions of the First and Sixth Circuits in Carrozza and Corrado are correct and that the preponderance test governs for the reasons set forth in those cases. As applied to RICO conspiracy prosecutions, the conclusion of Farese and Nguyen is incorrect for several reasons. First, OCRS agrees with the holdings of the First and Sixth Circuits in their conclusion that U.S.S.G. § 1B1.2 does not apply because this section was "enacted to deal with multiple object conspiracies charged in a single count." Id. at 541. However, a RICO conspiracy is "not a multi-object conspiracy," but rather "is considered a single object conspiracy with that object being the violation of RICO." Corrrado, 227 F.3d at 541-42, quoting Carrozza, 4 F.3d at 79, and citing United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.1984) ("A RICO conspiracy under § 1962(d) based on separate conspiracies as predicate offenses is not merely a 'conspiracy to conspire' as alleged by appellants, but is an overall conspiracy to violate a substantive provision of RICO . . . .").

In a variety of contexts, courts have remarked that the object of a RICO conspiracy under Section 1962(d) is not the agreement to commit the charged racketeering acts; rather, the single objective of a RICO conspiracy is the agreement for the commission of a substantive RICO offense. See, e.g., Ruggiero, 726 F.2d at 923; United States v. Irizarry, 341 F.3d 273, 292 n.7 (3d Cir. 2003);

United States v. Pungitore, 910 F.2d 1084, 1135 (3d Cir. 1990) ("the RICO conspiracy and the predicate conspiracy are distinct offenses with entirely different objectives."); United States v. Fernandez, 388 F.3d 1199, 1260 n.45 (9th Cir. 2004); United States v. Ashman, 979 F.2d 469, 485 (7th Cir. 1992) ("The goal of a RICO conspiracy is a violation of RICO.") (quoting United States v. Neapolitan, 791 F.2d 489, 496 (7th Cir. 1986)); United States v. Zemek, 634 F.2d 1159, 1170 (9th Cir. 1980) ("The essence of a RICO conspiracy is not an agreement to commit predicate crimes but an agreement to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering."); United States v. Carrozza, 4 F.3d 70, 79 (1st Cir. 1993); accord Sutherland, 656 F.2d at 1192-93; Elliott, 571 F.2d at 902-04. In effect, by treating a RICO conspiracy offense as a multi-object conspiracy for nothing more than the commission of the underlying predicate acts, the Eleventh Circuit rule overextends the reach of U.S.S.G. Section 1B1.2(d) and disregards both the purpose and the structure of the RICO conspiracy offense.[219]

However, in addition to arguing for the Carrozza standard, in order to avoid unnecessary appellate litigation, the prosecutor should also ask the district court to apply the beyond a reasonable doubt standard as applied in Farese. If the district court concludes that the government proved

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[219] See also United States v. Massey, 89 F.3d 1433, 1440-41 (11th Cir. 1996), cert. denied, 519 U.S. 1127(1997); United States v. Marmolejo, 89 F.3d 1185, 1196 (5th Cir. 1996), aff'd sub nom. Salinas v. United States, 522 U.S. 52 (1997); United States v. Maloney, 71 F.3d 645, 664 (7th Cir. 1995), cert. denied, 519 U.S. 927 (1996); United States v. Antar, 53 F.3d 568, 580-81 (3d Cir. 1995); United States v. Viola, 35 F.3d 37, 43 (2d Cir. 1994), cert. denied, 513 U.S. 1198 (1995); Baumer v. Pachl, 8 F.3d 1341, 1346 (9th Cir. 1993); United States v. Church, 955 F.2d 688, 694 (11th Cir. 1992); United States v. Glecier, 923 F.2d 496, 500 (7th Cir. 1991), cert. denied, 502 U.S. 810 (1991); United States v. Pyrba, 900 F.2d 748, 760 (4th Cir.), cert. denied, 498 U.S. 924 (1990); United States v. Phillips, 874 F.2d 123, 127-30 & n.4 (3d Cir. 1989); United States v. Joseph, 835 F.2d 1149, 1151-52 (6th Cir. 1987); United States v. Neapolitan, 791 F.2d 489, 497-98 (7th Cir.), cert. denied, 479 U.S. 940 (1986); United States v. Carter, 721 F.2d 1514, 1529 (11th Cir. 1984), United States v. Riccobene, 709 F.2d 214, 224-26 (3d Cir. 1983).

beyond a reasonable doubt that the defendant agreed that the predicate act would be committed in furtherance of the RICO conspiracy by a coconspirator, then under either standard the sentence should be upheld on appellate review. If, however, the district court is unable to make such a finding, then the prosecutor should ask the district court to apply Corrado and Carrozza to find by a preponderance of the evidence that commission of the predicate offense was reasonably foreseeable to the defendant.

Of course, ambiguity in the jury's verdict can be avoided by obtaining a special verdict as to whether a defendant agreed to the commission of each specific racketeering act. However, in some circumstances, such as in a Glecier RICO conspiracy, a prosecutor may not want such a special verdict as to each specific racketeering act. As described in Section V(B)(3)(b) below, under a Glecier RICO conspiracy, the indictment need not allege specific racketeering acts and the jury is not required to find that a defendant agreed to the commission of a specific racketeering act. Glecier, 923 F.2d at 500. Rather, the indictment may allege that a defendant agreed that a conspirator would commit at least two acts of racketeering activity, as defined in 18 U.S.C. § 1961(1), in the conduct of the affairs of the RICO enterprise, and a jury need find only that a defendant agreed that a member of the RICO conspiracy would commit at least two of the statutory violations alleged as racketeering activity in furtherance of the objectives of the RICO conspiracy. Id.; see also United States v. Phillips, 874 F.2d 123, 128-30 (3d Cir. 1989). Therefore, in a Glecier RICO conspiracy it is not necessary for the jury to return a special verdict as to which specific racketeering acts the defendant agreed would be committed. Consequently, as a practical matter, the approach discussed above over which there is a conflict would be used mostly in Glecier RICO conspiracies.

D. RICO Forfeiture

The RICO statute's forfeiture provisions, 18 U.S.C. §§ 1963(a)(1)-(3), are comprehensive and authorize the forfeiture of not only proceeds and interests obtained by the defendant from any racketeering activity but also all of the defendant's various interests in the charged "enterprise."[220] The relationship between the defendant and the enterprise can thus result in sweeping forfeitures. In cases where the defendant is the sole owner of the enterprise, or in which the enterprise is a company that is also named as a defendant, the entire company may be subject to forfeiture under the RICO statute, subject only to the limits imposed by the Eighth Amendment. See Sections IV(D)(4) and (10) below. Similarly, RICO forfeiture is not limited by either the Sentencing

[220] See, e.g., Angiulo, 897 F.2d at 1211 ("[A]ny interests **in** an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether some portion of the enterprise is not tainted by the racketeering activity"); Porcelli, 865 F.2d at 1364 ("[A] RICO enterprise found in violation of section 1962(c) is indivisible and is forfeitable in its entirety"); cert. denied, 493 U.S. 810 (1989); United States v. Busher, 817 F.2d 1409, 1413 (9th Cir. 1987) ("[F]orfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted person's entire interest in the enterprise") (citation omitted); United States v. Anderson, 782 F.2d 908, 918 (11th Cir. 1986) ("A defendant's conviction under the RICO statute subjects **all** his interests in the enterprise to forfeiture 'regardless of whether those assets were themselves "tainted" by use in connection with the racketeering activity'"), (quoting Cauble, 706 F.2d at 1359); United States v. Hosseini, 504 F. Supp. 2d 376, 381, 382-83 (N.D. Ill. 2007) (if defendant uses his car dealership to sell cars to drug dealers in violation of RICO, the dealership is forfeitable in its entirety even though defendant also conducted some legitimate business); Najjar, 300 F.3d at 485-86 (all of the assets of a corporation convicted of a RICO offense are subject to forfeiture under section 1963), cert. denied, 537 U.S. 1094 (2002); United States v. Cianci, 218 F.Supp.2d 232, 236 (D.R.I. 2002) (defendant's entire interest in enterprise is forfeitable under section 1963(a)(2)(A) whether or not it was obtained illegally); United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank), 956 F. Supp. 5, 12 (D.D.C. 1997) (even untainted property received by the enterprise **after** the racketeering activity had ceased is subject to forfeiture under subsection (a)(2)(A) because "**all** of a RICO defendant's interests in an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether some portion of the enterprise is untainted by racketeering activity"); but see United States v. Modi, 178 F. Supp. 2d 658 (W.D. Va. 2001) (in health care fraud RICO case, upon conviction Government entitled only to forfeiture of income derived from fraud scheme but not legitimate income derived from the RICO enterprise).

Guidelines or any other sentencing limitation.[221] Because of the potential scope of RICO's forfeiture provisions, it is OCRS' policy to apply them with circumspection.

1. Section 1963(a)–Criminal Penalty

After the first Congress abolished the penalty of "corruption of the blood" for all convictions and judgments,[222] criminal forfeitures were unheard of in the United States for 180 years (although the first Congress did enact civil forfeitures under the customs laws). In 1970, Congress resurrected the criminal forfeiture concept by inserting forfeiture provisions into two federal criminal statutes:

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[221] See, e.g., United States v. Keene, 341 F.3d 78, 85-86 (1st Cir. 2003) (Apprendi is inapplicable to criminal forfeiture proceedings because forfeiture is an aspect of "sentencing" rather than a "separate charge."); United States v. McAuliffe, 490 F.3d 526, 540 (6th Cir. 2007) (Booker does not apply to criminal forfeiture, following Hall, infra); United States v. Alamoudi, 452 F.3d 310, 314 (4th Cir. 2006) (there can be no Booker violation unless the law imposes a maximum above which a sentence may not rise; there is no statutory (or Guidelines) maximum for criminal forfeiture; rather, such forfeitures are indeterminate and open-ended. Therefore, "a forfeiture order can never violate Booker."); United States v. Hively, 437 F.3d 752, 763 (8th Cir. 2006) (Booker does not apply to a RICO forfeiture; the Booker court specifically held that forfeitures under section 3554 remain "perfectly valid") (citation omitted); United States v. Fruchter, 411 F.3d 377, 382 (2d Cir. 2005) (Booker and Blakely do not apply to criminal forfeiture for two reasons: because the Supreme Court expressly stated in Booker that its decision did not affect forfeiture under 18 U.S.C. § 3554, and because Booker applies only to a determinate sentencing system in which the jury's verdict mandates a sentence within a specific range. Criminal forfeiture is not a determinate system.); United States v. Hall, 411 F.3d 651, 654-55 (6th Cir. 2005) (same; Booker merely extended Apprendi to the sentencing guidelines and redefined what constitutes the statutory maximum, but the guidelines do not apply to forfeiture, and the forfeiture statutes contain no statutory maximum. Forfeiture is a form of indeterminate sentencing "which has never presented a Sixth Amendment problem."); United States v. Messino, 382 F.3d 704, 713 (7th Cir. 2004) ("The criminal forfeiture provisions do not include a statutory maximum; they are open-ended in that **all** property representing proceeds of criminal activity is subject to forfeiture. Therefore . . . Blakely, like Apprendi, does not apply to forfeiture proceedings.") (citations omitted).

[222] Stat. 117, ch. 9, § 24 (codified at 18 U.S.C. § 3563) (repealed by Pub. L. 98-473, 98 Stat. 1987 (1984)) (effective Nov. 1, 1986)).

RICO and the Continuing Criminal Enterprise (CCE) statute.[223] The forfeiture provisions in these two statutes are in personam actions directed against a criminal defendant and, hence, apply only after the defendant is convicted of the underlying RICO or CCE offense.[224] The similarity between the two statutes' procedural provisions was such that Congress eventually amended 28 U.S.C. § 2461(c) to make the CCE's forfeiture statute, 21 U.S.C. § 853, the primary statute regarding federal criminal forfeiture procedures.[225] Even before that amendment, however, decisions involving RICO forfeitures under 18 U.S.C. § 1963 and drug forfeitures under 21 U.S.C. § 853 were virtually interchangeable.[226]

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[223] 21 U.S.C. § 848. See United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979) (recognizing RICO as the first modern federal criminal statute to impose forfeiture as a criminal sanction directly against an individual defendant), cert. denied, 445 U.S. 927 (1980).

[224] See, e.g., United States v. Lazarenko, 476 F.3d 642, 647 (9th Cir. 2007) (criminal forfeiture operates in personam against a defendant; it is part of his punishment following conviction); United States v. Vampire Nation, 451 F.3d 189, 202 (3d Cir. 2006) (a criminal forfeiture order is a judgment in personam against the defendant; this distinguishes the forfeiture judgment in a criminal case from the in rem judgment in a civil forfeiture case); Saccocia, 354 F.3d at 15 ("Forfeiture is an in personam criminal remedy, targeted primarily at the defendant who committed the criminal offense." (citing United States v. Lester, 85 F.3d 1409 at 1414 n.8 (9th Cir. 1996)); Riley, 78 F.3d at 370 ("RICO's criminal forfeiture is an in personam remedy to punish the RICO defendants."); Conner, 752 F.2d at 576 (quoting Cauble).

[225] See 28 U.S.C. 2461(c); USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. 109-177, § 410. It should be noted, however, that this amendment applies only to the **procedures** governing criminal forfeiture, and does not affect the **bases** for RICO forfeiture embodied in 18 U.S.C. § 1963(a).

[226] Long before the 2006 legislative clarification of 28 U.S.C. § 2461(c) mentioned above, numerous courts held that, because the criminal forfeiture provisions under the RICO statute, 18 U.S.C. § 1963, and the narcotics statute, 21 U.S.C. § 853, are so similar, case law interpreting the latter is persuasive in construing the parallel provisions of the former, and vice versa. See, e.g., United States v. Totaro, 345 F.3d 989, 994 (8th Cir. 2003); United States v. Gilbert, 244 F.3d 888, 907, n.47 (11th Cir. 2001); United States v. White, 116 F.3d 948, 950 (1st Cir. 1997) ("[C]ourts consistently have construed the RICO forfeiture statute, 18 U.S.C. § 1963, and the statute governing (continued...)

Unlike civil in rem forfeiture statutes requiring separate civil proceedings against the property,[227] the RICO and CCE statutes impose forfeiture directly on an individual as part of the defendant's sentence after his conviction. A corollary to this in personam nature of criminal forfeiture is that only the defendant's property can be forfeited pursuant to his conviction.[228] However, as discussed more fully in Section IV(D) below, property determined to be held by merely

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[226](...continued)
drug-related forfeitures, 21 U.S.C. § 853, in pari passu. We join these courts in holding that case law under 18 U.S.C. § 1963 is persuasive in construing 21 U.S.C. § 853, and vice versa." (citations omitted)); United States v. McHan, 101 F.3d 1027, 1042 (4th Cir. 1996) ("we generally construe the drug and RICO forfeiture statutes similarly"); United States v. Libretti, 38 F.3d 523, 528, n.6 (10th Cir. 1994), aff'd 516 U.S. 29 (1995); United States v. Ripinsky, 20 F.3d 359, 362 n.3 (9th Cir. 1994); United States v. Lavin, 942 F.2d 177, 185, n.9 (3d Cir. 1991); see also United States v. Benevento, 663 F. Supp. 1115, 1118, n.2 (S.D.N.Y. 1987), aff'd per curiam, 836 F.2d 129 (2d Cir.1988) (citing decision under RICO forfeiture statute in construing narcotics forfeiture statute, reasoning that "[t]he forfeiture provision of the Comprehensive Drug Abuse Prevention Act parallels that of amended RICO").

[227] See, e.g., 19 U.S.C. §§ 1595-1624 (customs forfeiture statutes); 21 U.S.C. §§ 881-85 (narcotics forfeiture statutes); 49 U.S.C. §§ 781-82 (carriers transporting contraband articles--forfeiture statutes).

[228] See, e.g., De Almeida v. United States, 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not limited to property owned by the defendant; "it reaches **any** property that is 'involved' in the offense" but the ancillary proceeding serves to ensure that property belonging to third parties who have been excluded from the criminal proceeding is not inadvertently forfeited); United States v. Nava, 404 F.3d 1119, 1124 (9th Cir. 2005) (explaining the difference between civil and criminal forfeiture; because criminal forfeiture is in personam, only the defendant's property can be forfeited; because defendant's daughter was the true owner and not merely a nominee, she was entitled to prevail in the ancillary proceeding); United States v. Cherry, 330 F.3d 658, 670 (4th Cir. 2003) (criminal forfeiture constitutes part of the sentence and is used to enhance the punishment of a defendant who has already been convicted of a particular offense; if the underlying conviction is vacated, the forfeiture based on that conviction must be vacated as well); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Chawla), 46 F.3d 1185, 1190 (D.C. Cir. 1995) ("only the property of the defendant (including property held by a third party pursuant to a voidable transaction) can be confiscated in a RICO proceeding").

"straw" owners is subject to forfeiture[229] and, in the case of corporate ownership, the court may disregard the corporate form to forfeit property of the defendant if the corporate structure is not genuine.[230]

As a result of amendments to the RICO statute in the Comprehensive Crime Control Act of 1984, the RICO forfeiture statute now has three distinct sections. Section 1963(a) provides that:

> [w]hoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law–
>
> (1) any interest the person has acquired or maintained in violation of section 1962;
>
> (2) any –
>
> (A) interest in;
> (B) security of;
> (C) claim against; or
> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

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[229] See, e.g., United States v. Totaro, 345 F.3d 989, 995-96 (8th Cir. 2003) (if claimant were a mere straw, she could not contest the forfeiture notwithstanding her bare legal title; but wife who lived on the property and raised her family there was not a mere straw).

[230] See, e.g., United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Banco Central Del Uruguay), 977 F. Supp. 27, 32-33 (D.D.C. 1997) (under RICO, court may disregard corporate form and order the forfeiture of alter ego's assets as part of preliminary order of forfeiture based solely on information in the Government's affidavit; but alter ego may challenge the forfeiture in the ancillary proceeding); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of ICIC Investments), 795 F. Supp. 477, 479 (D.D.C. 1992) (under RICO, assets of corporation that was alter ego of named corporate defendant are subject to forfeiture).

> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.
>
> The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection . . . .[231]

The following sections will analyze each of these provisions.

2. Section 1963(a)(1)–Interest Acquired Or Maintained - "But For" Test

Section 1963(a)(1) provides that anyone who violates any provision of Section 1962 must forfeit to the United States "any interest the person has acquired or maintained in violation of section 1962." Section 1963(a)(1) clearly applies to any interest, legitimate or illegitimate, which the defendant acquired or maintained either in the course of engaging in racketeering activity or as the result of racketeering activity in violation of 18 U.S.C. § 1962.[232] For example, if a defendant uses

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[231] Pursuant to this last paragraph, statutory forfeiture is **mandatory**, subject to Eighth Amendment limitations. See, e.g., Alexander v. United States, 509 U.S. 544, 562 (1993) ("a RICO conviction subjects the violator not only to traditional, though stringent, criminal fines and prison terms, but also mandatory forfeiture under [section] 1963"); United States v. Corrado, 227 F.3d 543, 522 (6th Cir. 2000) (Corrado I) (forfeiture is a mandatory aspect of the sentence); United States v. Corrado, 286 F.3d 934, 937 (6th Cir. 2002) (Corrado II) (same); United States v. Corrado, 304 F.3d 593, 610 (6th Cir. 2002) (Corrado III) (same); United States v. Basciano, 2007 WL 29439, at *1 (E.D.N.Y. 2007) (following Corrado; RICO forfeiture is mandatory); United States v. DeFries, 909 F. Supp. 13, 15 (D.D.C. 1995) (the court has no discretion to withhold forfeiture or adjust the amount; the court's role is "merely to ascertain if the requisite nexus exists"), rev'd on other grounds, 43 F.3d 707 (D.C. Cir. 1997); see also Section IV(D)(10) below.

[232] See, e.g., United States v. West, 877 F.2d 281, 292 (4th Cir. 1989) (by using automobile as collateral for drug purchases, defendant "maintained" it in violation of RICO, making it forfeitable under 18 U.S.C. § 1963(a)(1)), cert. denied, 493 U.S. 959 (1989); United States v. Horak, 833 F.2d 1235, 1242-44 (7th Cir. 1987) (holding that the defendant's job was "acquired and maintained" through racketeering activity, and remanding the case to district court to determine whether defendant's salary, bonuses, and pension and profit-sharing plans were "acquired and maintained" (continued...)

extortion in the course of his racketeering activity to obtain ownership or control over a legitimate business, his interest in that business may be forfeited.[233]

A plain reading of Section 1963(a)(1) indicates that the interest to be forfeited must have been acquired or maintained as a result of the racketeering violation. However, the courts have not uniformly specified what degree of causality is required to establish that the forfeited property was acquired or maintained as a result of the racketeering activity. Some courts have held that there must be a "but for" relationship between the offense and the acquisition or maintenance of the interest.[234] However, in United States v. DeFries, 129 F.3d 1293, 1312-13 (D.C. Cir. 1997), the court ruled that the "but for" test requires only an adequate "causal link between the property forfeited and the RICO violation" that should be determined on the facts of each case.[235] Another court has stated that the

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[232](...continued)
as a result of racketeering activity).

[233] See, e.g., United States v. Corrado, 227 F.3d 543 (6th Cir. 2000) (remand to impose forfeitures based on defendants' conviction for RICO conspiracy involving extortionate credit activities and collections, obstruction of justice, witness tampering, extortion, illegal gambling, violent offenses, and acquiring concealed interests in Las Vegas gambling facilities).

[234] See, e.g., United States v. Cianci, 218 F. Supp. 2d 232, 235 (D.R.I. 2002) (district court imposes forfeiture upon finding that defendants would not have obtained $250,000 "but for" defendants' participation in RICO conspiracy); Angiulo, 897 F.2d at 1213 (reversing forfeiture of property obtained before the defendant committed his second racketeering act); United States v. Ofchinick, 883 F.2d 1172, 1183-1184 (3d Cir. 1989) (holding that the Government failed its burden of proving that the defendant's "racketeering activities were a cause in fact of his acquisition of or maintenance of an ownership interest in the [forfeited] stock"); Horak, 833 F.2d 1235, 1242 (remanded to determine whether defendant's salaries and bonuses subject to forfeiture were obtained solely from unlawfully obtained contract or were in part obtained through lawful activities).

[235] Id. at 1313. In DeFries, the defendant argued that the Government failed to establish an adequate causal nexus between the defendants' unlawful union ballot tampering scheme and the salaries they obtained as union officers following their successful elections, because the Government did not prove that the election results would have been different absent the alleged election fraud. (continued...)

amount subject to forfeiture pursuant to Section 1963(a)(1) need not be directly linked or traced to specific racketeering acts, but should merely reflect the scope of the offense.[236]

Prior to the enactment of Section 1963(a)(3) in 1984, it was not settled whether Section 1963(a)(1) would apply to forfeiture of income or cash proceeds derived from racketeering activity.[237] This issue was resolved by the Supreme Court when, in Russello v. United States, 464 U.S. 16 (1983), the Court held that an "interest" a defendant "acquired or maintained in violation of Section 1962" subject to forfeiture under Section 1963(a)(1) included a defendant's proceeds derived from any violation of Section 1962. Id. at 22. Under Russello, Section 1963(a)(1) is applicable to violations of any subsection of Section 1962 and is not limited to violations of Sections 1962(a) or (b). However, in October 1984, while Russello was pending before the Court, Congress

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[235](...continued)
The court of appeals rejected this argument, finding a sufficient causal nexus because the fraudulent activities were extensive and infected the entire union election process. DeFries, 129 F.3d at 1313. See United States v. McKay, 506 F. Supp. 2d 1206, 1211-12 (S.D. Fla. 2007), aff'd per curiam, 2008 WL 2751298 (11th Cir. July 16, 2008).

[236] See United States v. Faulkner, 17 F.3d 745, 775 (5th Cir.), cert. denied, 513 U.S. 870 (1994). In Faulkner, three defendants involved in fraudulent real-estate scheme, which caused the collapse of a savings and loan, were convicted under RICO and ordered to forfeit $40 million, $38 million, and $22 million, respectively, pursuant to Section 1963(a)(1). These amounts reflected monies received by the defendants, their companies, and their families, but were "acquired or maintained" as a result of the racketeering violation because the defendants controlled the disbursements of the proceeds of the land transactions and directed the disbursements after the funds were deposited in an account of the defendant's choosing. Id. But cf. United States v. Riley, 78 F.3d 367, 370-71 (8th Cir. 1996) (where RICO enterprise was an association-in-fact of several companies, allegation that the defendant used the enterprise to violate RICO is not sufficient to make the entire enterprise subject to forfeiture under Section 1963(a); only the defendant's interest in the enterprise, and not the enterprise itself, was forfeitable because RICO forfeiture is in personam).

[237] Compare United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980) (proceeds from racketeering activity not subject to forfeiture); with United States v. Martino, 681 F.2d 952 (5th Cir. 1982) (proceeds subject to forfeiture), aff'd sub nom. Russello v. United States, 464 U.S. 16 (1983).

enacted Section 1963(a)(3) and specifically included proceeds or property derived from proceeds as forfeitable interests under RICO, which essentially codified Russello's eventual holding source for 1963(a)(3) enactments.[238] The Organized Crime and Racketeering Section recommends that the indictment allege both Section 1963(a)(1) and Section 1963(a)(3) when the forfeiture of proceeds is sought.

3. Section 1963(a)(2) -- Interests in and/or Property Affording Influence Over an Enterprise

Section 1963(a)(2) includes under its forfeiture provisions any:

> (A) interest in;
> (B) security of;
> (C) claim against; or
> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 . . . .

Section 1963(a)(2) is directed toward the forfeiture of the defendant's sources of power over an enterprise. Under Section 1963(a)(2), when a defendant has conducted the affairs of an enterprise in violation of Section 1962, the defendant's entire interest in the enterprise may be forfeited, subject to the court's Eighth Amendment proportionality review, even though some parts of the enterprise may not be "tainted" by racketeering activity.[239]

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[238] See Section IV(D)(4) below for further discussion regarding forfeiture of proceeds under Section 1963(a)(3).

[239] See, e.g., United States v. Segal, 495 F.3d 826, 838-39 (7th Cir. 2007) (defendant's entire interest in the enterprise is forfeitable under section 1963(a)(2); jury should never have been asked what portion of defendant's interest was tainted, and its finding that only sixty percent was tainted was properly ignored by the court); United States v. Sarbello, 985 F.2d 716, 724 & n.13 (3d Cir. (continued...)

[239](...continued)
1993) (criminal forfeiture under RICO must be subjected to a proportionality test under the Eighth Amendment because 100% of a defendant's interest in the enterprise is subject to forfeiture under section 1963(a)(2)(A), even if those "interests are acquired legitimately and the enterprise is primarily engaged in legitimate activity"); Angiulo, 897 F.2d at 1211 ("Any interests **in** an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether some portion of the enterprise is not tainted by the racketeering activity."); Porcelli, 865 F.2d at 1364 ("A RICO enterprise found in violation of section 1962(c) is indivisible and is forfeitable in its entirety."); United States v. Busher, 817 F.2d 1409, 1413 (9th Cir. 1987) ("forfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted person's entire interest in the enterprise;" remanding to district court for determination of proportionality under Eight Amendment); United States v. Anderson, 782 F.2d 908, 918 (11th Cir. 1986) ("A defendant's conviction under the RICO statute subjects **all** his interests in the enterprise to forfeiture 'regardless of whether those assets were themselves "tainted" by use in connection with the racketeering activity'") (quoting Cauble, 706 F.2d at 1359); United States v. Washington, 782 F.2d 807 (9th Cir.), modified on other grounds, 797 F.2d 1461, 1476-77 (9th Cir. 1986) (interests purchased with the funds from a corporate enterprise that were in an individual defendant's name are interests in the enterprise and therefore subject to forfeiture under Section 1963(a)(2); United States v. Hosseini, 504 F. Supp. 2d 376, 381-83 (N.D. Ill. 2007) (following Segal; if defendant uses his car dealership to sell cars to drug dealers in violation of RICO, the dealership is forfeitable in its entirety even though defendant also conducted some legitimate business); United States v. Najjar, 300 F.3d 466, 485 (4th Cir. 2002) (all assets of corporation convicted of RICO offense subject to forfeiture under section 1963); Cianci, 218 F. Supp. 2d at 235 (defendant's entire interest in enterprise forfeitable under section 1963(a)(2)(A) whether or not obtained illegally); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Pacific Bank), 956 F. Supp. 5, 12 (D.D.C. 1997) (even untainted property received by the enterprise after the racketeering activity had ceased is subject to forfeiture under subsection (a)(2)(A) because "**all** of a RICO defendant's interests in an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether some portion of the enterprise is untainted by racketeering activity"); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Banque Indosuez), 961 F. Supp. 282, 286 (D.D.C. 1997) (claimant cannot assert fact that wire transfer was received by defendant after criminal activity ceased as ground for challenging order of forfeiture); United States v. BCCI Holdings (Luxembourg), S.A. (Petitions of Bank Austria), 1997 WL 695668 at *7 (D.D.C. 1997) (property acquired after defendant's property was restrained pretrial could be forfeited, but property acquired after entry of the preliminary order of forfeiture could not), order amended on reconsideration by 994 F. Supp. 18 (D.D.C. 1997); United States v. Walsh, 700 F.2d 846, 857 (2d Cir.), cert. denied, 464 U.S. 825 (1983) (Government was under no obligation to present evidence of degree to which engineering firm's assets were "tainted" by illegal activities and therefore subject to RICO forfeiture); United States v. Tunnell, 667 F.2d 1182, 1188 (5th Cir. 1982) (motel subject to forfeiture for RICO violation); see also Section IV(D)(10) below regarding Eighth Amendment forfeiture analysis; but see United States v. Modi, 178 F. Supp. 2d 658, 662-63 (W.D.
(continued...)

While subsections A, B, and C of Section 1963(a)(2) are limited to interests in, securities of, or claims against the enterprise, subsection D is much broader and makes forfeitable any property or contractual right affording a source of influence over an enterprise. Under subsection D, any property or interest of a defendant that is not directly part of an enterprise, but which allows the defendant to exert control or influence over the enterprise, is subject to forfeiture.[240] Such interests might include voting rights in securities of an enterprise, a management contract between the defendant and the enterprise, or even the right to hold a political or union office.[241] Moreover, subsection D applies to instrumentalities used in the offense, such as buildings or vehicles used in narcotics transactions, or an interest in a bank involved in laundering drug money, if these interests afforded a source of influence over the illegal enterprise.[242] These forfeitures are subject to the

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[239](...continued)
Va. 2001) (in a RICO case based on heath care fraud, Government is entitled upon conviction to forfeit only the income derived from the fraud scheme, and not legitimate income derived from the RICO enterprise).

[240] See United States v. Thevis, 474 F. Supp. 134, 144 (N.D. Ga. 1979), aff'd, 665 F.2d 616 (5th Cir.), cert. denied, 459 U.S. 825 (1982) (though phrase "property or contractual right of any kind affording a source of influence over . . . any enterprise" is broad, it is neither vague nor ambiguous, and not unconstitutional); but see United States v. Veliotis, 586 F. Supp. 1512, 1518-19 (S.D.N.Y. 1984) (finding error in Government's forfeiture theory under § 1963(a)(2) when the asset was forfeitable under § 1963(a)(1)).

[241] See, e.g., United States v. Rubin, 559 F.2d 975 (5th Cir. 1977) (affirming forfeiture of defendant's positions in various union entities), vacated and remanded on other grounds, 439 U.S. 810 (1978), cert. denied, 444 U.S. 864 (1979).

[242] See, e.g., United States v. West, 877 F.2d 281, 292 (4th Cir. 1989) (two houses used for storage and sales of drugs afforded defendant a source of influence over enterprise), cert. denied, 493 U.S. 959 (1989); United States v. Zielie, 734 F.2d 1447, 1458-59 (11th Cir. 1984) (Government successfully forfeited property that was used for storing marijuana and for counting money from (continued...)

court's determination of the extent to which they actually afford a source of influence over the enterprise, the so-called "taint" analysis. In United States v. McKeithen, 822 F.2d 310 (2d Cir. 1987), a CCE forfeiture case, the appellate court held that where a set of buildings only partially (forty-three percent) afforded a defendant a source of influence over an enterprise, the buildings should be subdivided so that forfeiture would be proportional. Id. at 312-15. OCRS generally supports such apportionments in RICO cases as a matter of policy, in order to avoid the issue of excessive forfeitures on appeal.

Moreover, it is noteworthy that aspects of the district court's decision in United States v. Horak, 633 F. Supp. 190, 198-200 (N.D. Ill. 1986), aff'd in part, vacated in part, 833 F.2d 1235 (7th Cir 1987), is no longer good law. In Horak, the trial court ruled that the punctuation and grammar of Section 1963(a)(2) required that the phrase "affording a source of influence over" be read to modify all prongs of Section 1963(a)(2), so that an "interest in" the enterprise is not subject to forfeiture unless it also affords the defendant a source of influence over the enterprise. Id. Although this interpretation was arguably inconsistent with the plain language of the statute, the appellate court declined to order forfeiture of the defendant's interest in the enterprise. The 1984 Amendments to RICO's forfeiture provisions modified § 1963(a) in such a way as to make clear that "affording a source of influence over" only applies to § 1963(a)(2)(D). P.L. 98-473 § 302. In a similar vein, however, in United States v. Ragonese, 607 F. Supp. 649, 652 (S.D. Fla. 1985), aff'd, 784 F.2d 403 (11th Cir. 1986), the court determined that the defendant's interest in an apartment complex did not

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[242](...continued)
marijuana sales); United States v. Rudaj, 2006 WL 1876664, at *3-4 (S.D.N.Y. 2006) (real property where defendants met to conduct racketeering activity is forfeitable under section 1963(a)(2)(D) as property affording a source of influence over RICO enterprise).

afford him a source of influence over the enterprise because the defendant disapproved of drug dealings there, and instead, actually made improvements to the building and used it as a tax shelter. Id.

4. Section 1963(a)(3) -- Proceeds Derived From Racketeering Activity

a. Under RICO, Gross Proceeds are Subject to Forfeiture

As noted above, Section 1963(a)(3) was added to RICO in 1984, and it specifically includes forfeiture of proceeds or property derived from proceeds obtained in violation of RICO. Because of this specificity, any proceeds subject to forfeiture should be alleged under this subsection as well as Section 1963(a)(1).[243] The effect of a forfeiture order involving proceeds is similar to that of a money judgment, in that a defendant is required to forfeit the amount of illicit proceeds as determined by the court even if the funds used to satisfy the forfeiture are not tainted or if the defendant no longer possesses the tainted funds.[244] This money-judgment enforcement procedure obviates the need for tracing the defendant's assets to be forfeited to criminal activity. If the defendant cannot provide funds to satisfy the forfeiture, the court may order forfeiture of substitute assets up to the value of the forfeited proceeds if substitute asset forfeitures were included in the

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[243] See, e.g., McKay, 506 F. Supp. 2d at 1212-13 (per curiam) (salary of union official who gained office through ballot tampering is forfeitable as proceeds of RICO offense); United States v. Argie, 907 F.2d 627, 629 (7th Cir. 1990) (holding that portion of car lease received as payment for unlawful debt was forfeitable under 18 U.S.C. § 1963(a)(3)); United States v. Bloome, 777 F. Supp. 208, 210 (E.D.N.Y. 1991) (section 1963(a)(3) forfeiture is not limited to cash proceeds; jewelry and watches stolen in robberies were also forfeitable under this section).

[244] See, e.g., United States v. Edwards, 303 F.3d 606, 643-44 (5th Cir. 2002) (upholding forfeiture of $1.8 million pursuant to jury's finding that amount to be proceeds obtained by RICO defendants), cert. denied, 548 U.S. 908 (2006); United States v. Segal, 339 F. Supp. 2d 1039, 1050 (N.D. Ill. 2004) (even proceeds squandered by defendant on "wine, women, and song" are subject to forfeiture because such monies represent racketeering profits; jury finding of proceeds amount was supported by evidence, obviating dollar-for-dollar tracing).

indictment's forfeiture pleadings. In that instance, unlike a money judgment, the forfeiture of substitute assets permits the Government to seize and forfeit the substituted assets.[245]

As noted above, while Russello was pending before the Supreme Court, Congress amended RICO's forfeiture provision, 18 U.S.C. § 1963(a), to expressly provide for the forfeiture of proceeds derived from racketeering activity, and to make clear that such forfeiture includes "gross" proceeds and is not limited to "net proceeds." In that regard, the Senate Report regarding this amendment states:

> [T]he term 'proceeds' has been used [in 18 U.S.C. § 1963] in lieu of the term 'profits' in order to alleviate the unreasonable burden on the [G]overnment of proving net profits. It should not be necessary for the prosecutor to prove what the defendant's over head expenses were.
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> . . .
>
> The ambiguity regarding forfeiture of proceeds is resolved.

See S. Rep. No. 98-225 at 199 (1983).

Moreover, forfeiture of gross proceeds, rather than net proceeds, is consistent with RICO's primary purpose "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." United States v. Simmons, 154 F.3d 765, 771 (8th Cir. 1998) (quoting Russello, 464 U.S. at 26 (1983)); see also Section I(B)(1) above.

In accordance with this legislative history and congressional intent in enacting the "proceeds" forfeiture amendment, most courts have held that "gross" proceeds are subject to forfeiture under Section 1963(a)(3).[246]

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[245] See Section IV(D)(6) below regarding substitute assets.

[246] See, e.g., United States v. Simmons, 154 F.3d 765, 770-71 (8th Cir. 1998) (defendant liable for gross amount of bribe money and not allowed to deduct overhead expenses); United States (continued...)

Notwithstanding this substantial authority, the Seventh Circuit has stood alone in permitting the forfeiture of only net proceeds in RICO cases.[247] The Seventh's Circuit's view regarding net proceeds assumed particular legal significance in United States v. Santos, 128 S. Ct. 2020 (2008). There, the Supreme Court affirmed the Seventh Circuit's holding that, under the federal money-laundering statute (18 U.S.C. § 1956), the term "proceeds" means "profits," and not "receipts." Id. at 2025. The Supreme Court reached this conclusion by first determining that the term "proceeds" was undefined in the statute, and that ordinary dictionary meanings included both gross and net proceeds. Id. at 2024. The Court then applied the rule of lenity, favoring the defendant. Id. at 2025.

It is OCRS' view that the Santos decision's definition of "proceeds" under § 1956 is readily distinguishable from the definition of "proceeds" that are subject to forfeiture under § 1963(a)(3). As discussed above, the legislative history of § 1963(a)(3), enacted in 1984 to address the proceeds issue arising from the lower court's decision in Russello, confirms that "proceeds"

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[246](...continued)
v. DeFries, 129 F.3d 1293, 1314-15 & n.16 (D.C. Cir. 1997) (RICO forfeiture includes federal taxes paid on salaries earned through racketeering activity); United States v. McHan, 101 F.3d 1027, 1042-43 (4th Cir. 1996) (legislative history of 18 U.S.C. § 1963 reveals that Congress intended that it should not be necessary for a prosecutor to prove the amount of a defendant's overhead expenses); United States v. Hurley, 63 F.3d 1, 21-22 (1st Cir. 1995) (holding that the above-quoted legislative history demonstrates that gross proceeds are forfeitable under Section 1963); United States v. Lizza Industries, Inc., 775 F.2d 492, 498-99 (2d Cir. 1985) (district court refused to deduct overhead operating expenses or taxes paid on profits received from illegal bid rigging contracts, although direct costs incurred in performing the contracts were deducted), cert. denied, 475 U.S. 1082 (1986). But see United States v. Riley, 78 F.3d 367, 371 (8th Cir. 1996) (stating in dictum that "'proceeds' means something less than the gross receipts of a defendant's insurance business because an insurer's gross receipts would include, for example, amounts needed to pay policy holder claims").

[247] See United States v. Genova, 333 F.3d 750 (7th Cir. 2003) (reaffirming United States v. Masters, 924 F.2d 1362 (7th Cir. 1991) (only net proceeds obtained by RICO defendants are subject to forfeiture)), cert. denied, 500 U.S. 919 (1991) . For the reasons stated in the text above, OCRS maintains that these decisions were wrongly decided.

under Section 1963(a)(3) is not limited to "net profits," but rather includes gross receipts. In this vein, although Justice Stevens concurred in the application of the rule of lenity in Santos, his separate concurring opinion expressly differentiated organized crime cases from the money-laundering offense at issue, stating that "the legislative history of § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales . . . . Thus, I cannot agree with the plurality that the rule of lenity must apply to the definition of 'proceeds' for these types of unlawful activities." Santos 128 S. Ct. at 2032 & n.3 (Stevens, J., concurring). Because Justice Stevens' concurring opinion provided the deciding vote in Santos' 5-4 decision, his remarks regarding "proceeds" in RICO prosecutions are part of the holding, and should be construed in that manner.

Moreover, the plurality opinion in Santos based its decision in part on the doctrine of merger because of the unique relationship between the laundering of monies and the underlying "specified unlawful activity" that gives rise to the proceeds to be laundered. In Santos, the money-laundering conviction at issue arose from the defendant's operation of a lottery in violation of 18 U.S.C. § 1955 and his subsequent laundering of the monies generated from the lottery. In refusing the Government's definition of "proceeds" as "gross proceeds," the plurality opinion stated that

> [i]f we accepted the Government's invitation to speculate about congressional purpose, we would also have to confront and explain the strange consequence of the "receipts" interpretation, which respondents have described as a "merger problem." If "proceeds" meant "receipts," nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery. Since few lotteries, if any, will not pay their winners, the statute criminalizing illegal lotteries, 18 U.S.C. § 1955, would "merge" with the money-laundering statute. Congress evidently decided that lottery operators ordinarily deserve up to 5 years of imprisonment, § 1955(a), but as a result of merger they would face an additional 20 years, § 1956(a)(1).

Santos 128 S. Ct. 2026 (internal citations omitted). However valid this observation might be with regard to money laundering, the merger doctrine has no place in RICO practice because of the wholly different statutory scheme established by 18 U.S.C. § 1962: there can be no merger of the predicate acts of racketeering and the racketeering offense itself. See Section VI(P)(1)(a) and (b) below. Thus, the forfeiture of gross proceeds under RICO does not raise the specter of imposing greater punishment for related offenses that are subject to the merger doctrine. Furthermore, as stated above, forfeiture of all of the defendant's receipts derived from his unlawful activity is consistent with the longstanding rule of law that a wrongdoer can never acquire a legitimate interest in his unlawful gains.

For all of these reasons, OCRS maintains that gross proceeds are subject to forfeiture under Section 1963(a), and, therefore, prosecutors should continue to seek the forfeiture of gross proceeds under § 1963(a)(3).[248] Challenges to the forfeiture of gross proceeds under RICO that cite Santos should be contested and distinguished on the bases set out above.

b. Under RICO, Defendants Are Jointly and Severally Liable for the Total Amount of Forfeiture Declared

Every court that has considered the issue has held that each defendant convicted on a RICO charge is jointly and severally liable for the entire amount of forfeiture that was reasonably foreseeable to the defendant.[249] As the Eighth Circuit stated in United States v. Simmons, 154 F.3d

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[248] Of course, a contrary rule applies in the Seventh Circuit (see n.247 above) until the Seventh Circuit's erroneous view is set aside.

[249] See, e.g., United States v. Gotti, 459 F.3d 296, 347 (2d Cir. 2006) (following Fruchter [below]; in a RICO case, each co-defendant is liable for the full amount of the proceeds of the racketeering activity foreseeable to him); United States v. Hively, 437 F.3d 752, 763 (8th Cir. 2006) (RICO defendant is liable for the proceeds of the entire scheme, not just the proceeds of the two (continued...)

765, 769-70 (8th Cir. 1998) (internal citations omitted):

> Codefendants are properly held jointly and severally liable for the [forfeiture of] proceeds of a RICO enterprise. The government is not required to prove the specific portion of proceeds for which each defendant is responsible. Such a requirement would allow defendants "to mask the allocation of the proceeds to avoid forfeiting them altogether."[250]

c. Other Issues Involving the Forfeiture of Proceeds

The Eleventh Circuit has held that property subject to forfeiture under Section 1963(a)(3) is limited to property that a defendant obtains directly or indirectly as a result of racketeering activity.[251] Under this holding, a defendant's interest in property is not forfeitable as proceeds where the

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[249](...continued)
predicate acts on which he was convicted); United States v. Fruchter, 411 F.3d 377, 384 (2d Cir. 2005) (RICO defendant is liable for forfeiture of all proceeds of the offense foreseeable to him including proceeds traceable to conduct committed by others and on which he was personally acquitted); Edwards, 303 F.3d at 643 (following Corrado II [below]; defendant, who was not personally involved in one part of the racketeering activity, is jointly and severally liable for money judgment that included the proceeds of that part of the offense because codefendant's commission of it was foreseeable to him); United States v. Corrado, 227 F.3d 543, 554-55 (6th Cir. 2000) (Corrado I) (all defendants in a RICO case are jointly and severally liable for the total amount derived from the scheme; the Government is not required to show that the defendants shared the proceeds of the offense among themselves, nor to establish how much was distributed to a particular defendant); United States v. Corrado, 286 F.3d 934, 938 (6th Cir. 2002) (Corrado II) (same; because person who collected the proceeds was able to do so because of his participation in a scheme, all members of the scheme are jointly and severally liable).

[250] Accord United States v. Infelise, 159 F.3d 300, 301 (7th Cir. 1998); United States v. Hurley, 63 F.3d 1, 22 (1st Cir. 1998); United States v. Saccoccia, 58 F.3d 754, 785 (1st Cir. 1995); United States v. Masters, 924 F.2d 1362, 1369-70 (7th Cir.), cert. denied, 500 U.S. 919 (1991); Fleischhauer v. Feltner, 879 F.2d 1290, 1301 (6th Cir. 1989), cert. denied, 493 U.S. 1074 (1990); United States v. Benevento, 836 F.2d 129, 130 (2d Cir.), cert. denied, 486 U.S. 1043 (1988); United States v. Caporale, 806 F.2d 1487, 1506-09 (11th Cir. 1986), cert. denied, 482 U.S. 917 (1987); United States v. Bloom, 777 F. Supp. 208, 211 (E.D.N.Y. 1991); United States v. Wilson, 742 F. Supp. 905, 909 (E.D. Pa. 1989), aff'd, 909 F. 2d 1478 (3d Cir.), cert. denied, 498 U.S. 1016 (1990).

[251] See United States v. Kramer, 73 F.3d 1067, 1076 (11th Cir.), cert. denied, 519 U.S. 1011 (1996).

defendant acquired the interest prior to the time of the racketeering acts charged in the indictment. It should be noted, however, that such an interest might be subject to forfeiture under Section 1963(a)(2) if it constituted an interest in or afforded a source of influence over the enterprise. Prosecutors are reminded to consider all available theories of forfeiture in order to avoid narrowing the scope of forfeiture unnecessarily.

It should also be noted that, with regard to proceeds, "double counting" or "double recovery" through forfeiture is not permissible and, therefore, it is improper to forfeit more than the total value of the defendant's unlawfully-obtained proceeds.[252] For example, if the defendant obtains proceeds from an offense, he may be made to forfeit the total value of those proceeds or ordered to forfeit property traceable to those proceeds, but he cannot be ordered to forfeit the sum of both. (Those assets traceable to, e.g., purchased with, the ill-gotten gains are a subset of the illicit proceeds.).[253] But this calculation does not mitigate the forfeiture of assets that have appreciated. If the defendant receives $1 million in proceeds and spends that full amount on real estate that has appreciated in

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[252] See United States v. Acosta, 881 F.2d 1039 (11th Cir. 1989) (ordering lower court on remand to reduce defendant's forfeiture to those proceeds attributable to racketeering activities).

[253] See, e.g., Segal, 495 F.3d 826, 839-40 (7th Cir. 2007) (if defendant invested a portion of the proceeds of his offense in a business, and the business itself is forfeited, the money judgment forfeiting the proceeds must be adjusted to eliminate double counting of the portion already forfeited as part of the business); United States v. Hawkey, 148 F.3d 920, 928 (8th Cir. 1998) (if property is subject to forfeiture as property traceable to the offense, it is forfeitable in full, including any appreciation in value since the time the property became subject to forfeiture); United States v. Hosseini, 504 F. Supp. 2d 376, 385-86 (N.D. Ill. 2007) (following Segal; to the extent that the funds involved in defendant's money laundering and structuring offense were invested in an asset– defendant's business– that is already subject to forfeiture under RICO, the Government must show that the forfeitable property left the business and benefitted defendants personally in order to justify any recovery in addition to the business.).

value to $1.5 million at the time of forfeiture, the full value of the property is subject to forfeiture.[254] In those instances, the appreciation represents additional proceeds received by the defendant, which may be included in the total amount of proceeds subject to forfeiture. However, if the defendant is found liable to pay a money judgment under two separate forfeiture theories in the same case, but the judgment relates to the same monies – e.g., the proceeds of a RICO offense and the property "involved in" the laundering of the RICO proceeds under 18 U.S.C. § 982 (the money-laundering forfeiture statute) – the judgments are concurrent.[255]

In proceeds cases, the assets sought for forfeiture should be traced and calculated with as much specificity as possible. But the Government may prove the amount the defendant received as proceeds by circumstantial evidence.[256] In formulating the amount of proceeds to be forfeited, it is generally helpful to use the "net worth" method of circumstantial proof to establish that the

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[254] See, e.g., United States v. Hill, 46 Fed. Appx. 838, 839 (6th Cir. 2002) (following Hawkey, 148 F.3d at 928; stock that appreciates in value is forfeitable as property traceable to the originally forfeitable shares); United States v. Betancourt, 422 F.3d 240 (5th Cir. 2005) (following Hill; if defendant buys a lottery ticket with drug proceeds, the lottery winnings are traceable to the offense even though the value of the ticket appreciated enormously when it turned out to contain the winning number).

[255] See, e.g., United States v. Brown, 2006 WL 898043, at *4 (E.D.N.Y. 2006) (if the defendant is found liable to pay a money judgment under two different theories in the same case, but the judgments relate to the same funds, the judgments are concurrent).

[256] See e.g., United States v. Pierre, 484 F.3d 75, 86 (1st Cir. 2007) (evidence that the defendant sold $3,000 worth of drugs per week for more than 3 years was sufficient to support a $500,000 money judgment); United States v. Odom, 2007 WL 2433957, at *7 (S.D. Miss. 2007) (Government establishes amount of money judgment by multiplying number of kilos of cocaine defendant admitted to distributing by the estimated street value of the cocaine). But see United States v. Vasquez-Ruiz, 2002 WL 1880127 at **4-5 (N.D. Ill. 2002) (the Government has the burden of proving the amount of forfeiture by a preponderance of the evidence; if the court has no basis for calculating the amount to be forfeited, Government has not met its burden), rev'd on other grounds, 502 F.3d 700 (7th Cir. 2007).

defendant had no legitimate or alternative sources of income, making the calculated amount of proceeds subject to forfeiture.[257] However, it must be kept in mind that, unlike drug-forfeiture statutes, Section 1963 does not include a presumption that assets obtained during the period of illegal activity are forfeitable, thus lessening the value of net-worth calculations in RICO cases.[258]

Finally, with regard to proceeds, defendants may have invested ill-gotten gains in certain types of retirement accounts or (as is common in labor-racketeering cases) union pension plans. Notwithstanding the defendant's criminal misconduct, such accounts may be shielded from forfeiture by the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1168,[259] though the Government has been successful in obtaining forfeiture of such assets in some circumstances.[260] Prosecutors are urged to confer with OCRS' Labor Racketeering Unit to assess

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[257] See, e.g., United States v. Nelson, 851 F.2d 976, 980-981 (7th Cir. 1988) (upholding net worth approach for CCE forfeiture); United States v. Harvey, 560 F. Supp. 1040, 1089-90 (S.D. Fla. 1983) (based on a net worth analysis, court granted a restraining order in CCE case preventing the defendant from selling or transferring his interest in thirteen specific assets), aff'd, 789 F.2d 1492 (11th Cir.), cert. denied, 479 U.S. 854 (1986); United States v. Lewis, 759 F.2d 1316, 1327-29 (8th Cir.) (upholding CCE forfeiture using net worth theory), cert. denied, 474 U.S. 994 (1985).

[258] Cf. 21 U.S.C. § 853(d) (creating rebuttable presumption in drug-forfeiture cases). Under the 2006 amendment to 28 U.S.C. § 2461 regarding the primacy of 21 U.S.C. § 853 forfeiture procedures, as described in Section IV(D)(1) above, § 853(d)'s presumption was expressly exempted from use under other criminal forfeiture statutes, including RICO.

[259] See, e.g., United States v. Jewell, 538 F. Supp.2d 1087, 1092 (E.D. Ark. 2008) (following Weiss [infra] and rejecting the Government's argument that there is an exception to the anti-alienation provision for cases where a person uses a pension plan as a means of laundering criminal proceeds); United States v. All Funds Distributed to Weiss, 345 F.3d 49, 56-57 (2d Cir. 2003) (anti-alienation provision in ERISA bars forfeiture while the funds are held in a valid ERISA-protected pension plan).

[260] See, e.g., United States v. Infelise, 159 F.3d 300, 305-06 (7th Cir. 1998) (defendant's IRA is subject to forfeiture notwithstanding provision in ERISA stating that such accounts are "non-forfeitable"); United States v. Bollin, 264 F.3d 391, 423 (4th Cir. 2001) (Georgia law exempting (continued...)

forfeiture of such assets.

5. Pre-trial Restraints

a. General Considerations

A critical step in the forfeiture process involves preserving the availability of the property subject to forfeiture. When a defendant or prospective defendant learns that his assets may be subject to forfeiture, the defendant may dispose of or transfer assets to conceal them from the Government in an attempt to avoid forfeiture. Such attempts often involve transfers of various assets to an attorney, ostensibly in anticipation of attorney fees.[261] To prevent disposal of forfeitable property, 18 U.S.C. § 1963(d) authorizes district courts to enter restraining orders or take other action necessary to preserve the availability of the property for forfeiture. **The United States Attorneys' Manual requires that all proposed restraining orders under § 1963(d) be reviewed and approved by OCRS before being submitted to any federal judge or magistrate for consideration.** See USAM § 9-2.400; Criminal Resource Manual at § 2084.

Historically, challenges on the ground that the entry of a pre-trial restraining order is inconsistent with the presumption of innocence were rejected by most courts.[262] Prior to the

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[260](...continued)
IRAs from forfeiture was meant to shield such accounts from creditors attempting to collect debts; because a criminal forfeiture judgment is not a debt, but is part of defendant's sentence, the state law did not apply; even if it did apply, it could not insulate the account from federal forfeiture under the Supremacy Clause); United States v. Vondette, 352 F.3d 772, 775 (2d Cir. 2003) (ERISA does not bar the criminal forfeiture of the defendant's IRA as a substitute asset; interpreting Weiss as holding that IRAs are not shielded from civil forfeiture either).

[261] See, e.g., United States v. Long, 654 F.2d 911, 913 (3d Cir. 1981); United States v. Bello, 470 F. Supp. 723, 724 (S.D. Cal. 1979).

[262] See, e.g., United States v. Ferrantino, 738 F.2d 109, 111 (6th Cir. 1983); United States (continued...)

previously-discussed 1984 amendments,[263] RICO contained no guidelines for courts to follow in implementing pre-trial restraining orders. As a result, courts differed as to whether an adversarial hearing on the propriety of a restraining order was constitutionally mandated as a matter of due process,[264] and if so, what kind of evidence would be allowed[265] and what burden the Government needed to meet to sustain the order.[266] The 1984 amendments, which included the enactment of

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[262](...continued)
v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975), appeal dismissed, 556 F.2d 569 (3d Cir. 1977); United States v. Bello, 470 F. Supp. 723, 724-25 (S.D. Cal. 1979). But see United States v. Crozier, 777 F.2d 1376, 1383-84 (9th Cir. 1985) (holding parts of 1984 CCE forfeiture amendments unconstitutional because they permit freezing of assets without providing a hearing to defendants or third parties); United States v. Mandel, 408 F. Supp. 679, 682 (D. Md. 1976) ("entry of a restraining order at this time . . . would be substantially prejudicial to the defendants").

[263] See Sections IV(D)(2) and (4) above, regarding the codification of § 1963(a)(3).

[264] Compare United States v. Unimex, 991 F.2d 546, 547, 551 (9th Cir. 1993) (finding as unconstitutional conviction where court ordered forfeiture without an evidentiary hearing effectively prevented corporation from retaining counsel at trial), and United States v. Crozier, 674 F.2d 1293, 1298 (9th Cir. 1982), vacated, 468 U.S. 1206 (1984), on remand, 777 F.2d 1376 (9th Cir. 1985) (sanctions under civil and criminal statutes involve questions of due process), with United States v. Scalzitti, 408 F. Supp. 1014, 1015 (W.D. Pa. 1975), appeal dismissed, 556 F.2d 569 (3d Cir. 1977) (defendant's "contention that he has been deprived of his property without due process is premature").

[265] Compare United States v. Spilotro, 680 F.2d 612, 619 n.4 (9th Cir. 1982) (barring hearsay from evidentiary hearing on restraining order) with United States v. Harvey, 560 F. Supp. 1040, 1087-88 (S.D. Fla. 1982) (permitting hearsay in hearing on pretrial restraining order).

[266] Compare Harvey, 560 F. Supp. at 1087-89 (S.D. Fla. 1983) (Government must establish by a preponderance of the evidence that it is likely to convince a jury beyond a reasonable doubt that the defendant is guilty of violating RICO or CCE and that the property at issue is subject to forfeiture) with United States v. Veliotis, 586 F. Supp. 1512, 1521 (S.D.N.Y. 1984) (Government must demonstrate probable cause to believe that defendant's property is subject to forfeiture); see also United States v. Beckham, 562 F. Supp. 488, 490 (E.D. Mich. 1983) (Government must prove by clear and convincing evidence that the property was involved in a RICO violation, that it would be subject to forfeiture under the statute, and that there are "reasonable grounds to believe that [the] defendant is likely to make the property inaccessible to the Government prior to the conclusion of the trial"); United States v. Mandel, 408 F. Supp. 679, 681-82 (D. Md. 1976) (applying factors (continued...)

§ 1963(d),[267] specified and broadened the authority of the courts to take pre-trial measures, but left unresolved related issues, such as the Government's burden of proof when seeking a temporary restraining order for potentially forfeitable property.[268]

Section 1963, provides as follows:

> (d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section–
>
> > (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or
> >
> > (B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that–

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[266](...continued)
governing issuance of a preliminary injunction in a civil case to guide decision as to entry of a restraining order under RICO).

[267] See S. Rep. No. 98-225, 98th Cong., 1st Sess. 202 (1983); see generally Pub. L. No. 98-473, § 302 and related legislative reports.

[268] See, e.g., United States v. Riley, 78 F.3d 367, 370 (8th Cir. 1996) ("[T]he government must demonstrate in a hearing that the RICO defendant is likely guilty and that the property to be restrained is subject to criminal forfeiture. . . . The preconviction restraining order should include specific findings permitting an appellate court to determine whether the property restrained is subject to forfeiture."); United States v. Thier, 801 F.2d 1463, 1470 (5th Cir. 1986) (grand jury findings contained in indictment have weight, but are rebuttable on issue of commission of offense and forfeitability of assets), modified, 809 F.2d 249 (1987); United States v. Perholtz, 622 F. Supp. 1253, 1259 (D.D.C. 1985) (Government must show "substantial likelihood that . . . . failure to enter order will result in property being destroyed, removed . . . , or otherwise made unavailable for forfeiture and . . . that the need to preserve the availability of the property outweighs the hardship" on defendant).

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

> (2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.
>
> (3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

Under these provisions, a prosecutor can seek a pre-trial restraining order under any one of three circumstances, each with its own due-process requirements.

b. Constitutional Considerations

The Senate Report regarding the 1984 amendments to RICO's forfeiture provisions adding § 1963(d) states that the "probable cause established in the indictment or information is, in itself, a sufficient basis for issuance of a restraining order."[269] This statement responded to a series of cases

[269] S. Rep. No. 98-225, 98th Cong., 1st Sess. 202 (1983). See also United States v. Musson, 802 F.2d 384, 386-87 (10th Cir. 1986) (indictment supplied sufficient probable cause necessary for (continued...)

holding that the due process clause requires an evidentiary hearing conducted on the issue of probable cause before a restraining order can be issued, with probable cause to be determined under Fed. R. Civ. P. 65's "substantial likelihood of success on the merits" standard.[270]

Thereafter, the Supreme Court decided United States v. Monsanto, 491 U.S. 600 (1989). In Monsanto, the defendant was indicted under RICO and federal drug statutes for directing a large-scale heroin-distribution enterprise. The indictment also sought forfeiture of certain assets and, after the indictment was unsealed, the district court granted the Government's ex parte motion under 21 U.S.C. § 853(e)(1)(A) – identical to RICO's § 1963(d)(1)(A) – for an order freezing those assets pending trial. The defendant moved to vacate the order to permit him to use the frozen assets to retain counsel. The district court denied the motion, but the court of appeals sitting en banc ultimately ordered that the restraining order be modified to permit the restrained assets to be used to pay the defendant's attorney's fees. The Supreme Court reversed and remanded, holding that nothing in § 853 created any exception for the forfeiture of attorney's fees.[271] The Court also held that a defendant's assets may be frozen before conviction based on a finding of probable cause to believe the assets are forfeitable, though it expressly declined to consider whether due process requires a hearing before imposition of a pre-trial restraining order.[272]

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[269](...continued)
restraint).

[270] See, e.g., United States v. Crozier, 777 F.2d 1376, 1384 (9th Cir. 1985) (Rule 65 governs hearing on pretrial restraining orders); United States v. Thier, 801 F.2d 1463, 1468 (5th Cir. 1986).

[271] See also discussion of attorney-fee forfeiture in Section IV(D)(13), below.

[272] Monsanto, 491 U.S. at 615 & n.10, (comparing United States v. $8,850, 461 U.S. 555, (1983) and Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)).

Applying Monsanto to pretrial restraint of assets and the due-process issue, many courts have held that the trial court may rely on the grand jury's probable--cause determination.[273] But the Second Circuit, upon reconsidering Monsanto after the Supreme Court's remand of the case, held that while a pretrial restraining order may be issued ex parte,[274] grand jury determinations of probable cause – as to both the offense and the forfeitability of the property – may be reconsidered by the district courts in ruling upon the continuation of post-indictment restraining orders.[275]

In the wake of these decisions, courts first initially took various approaches to the due process issue. In one instance, a court held that due process considerations may permit third parties whose property is subject to restraint to be heard on the reasonableness of the restraint, even though Section 1963(i) provides that third parties generally may not litigate their interest in property prior to the entry of the order of forfeiture.[276] In that case, a non-RICO defendant held funds jointly with her husband, who was a RICO defendant. While the third party could not challenge the validity of the

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[273] See, e.g., United States v. Jamieson, 427 F.3d 394, 405-06 (6th Cir. 2005) (initial issuance of restraining order may be based on grand jury's finding of probable cause) (see Jones, below); United States v. Bollin, 264 F.3d 391, 421 (4th Cir. 2001) (the grand jury's finding of probable cause is sufficient to satisfy the Government's burden); In re Billman, 915 F.2d 916, 919 (4th Cir. 1990) (same); United States v. Jones, 160 F.3d 641, 647-48 (10th Cir. 1998) (defendant may challenge grand jury's finding of probable cause to believe the restrained property is traceable to the offense, but he may not challenge the grand jury's finding of probable cause regarding the underlying crime); United States v. Moya-Gomez, 860 F.2d 706, 729 (7th Cir. 1988) (pre-Monsanto; court limits inquiry to forfeiture issues; court does not look behind grand jury's finding with respect to the underlying crime).

[274] See, e.g., United States v. Monsanto, 924 F.2d 1186, 1193 (2d Cir. 1991) ("notice and a hearing need not occur before an ex parte restraining order is entered pursuant to section 853(e)(1)(A)"); United States v. Bissell, 866 F.2d 1343, 1352 (11th Cir. 1989) (same).

[275] See Monsanto, 924 F.2d at 1202.

[276] See United States v. Siegal, 974 F. Supp. 55, 58 (D. Mass. 1997).

indictment, the district court held that, based in part on the complexity of the trial and the expected length of the proceedings, due process afforded third parties a limited but timely pretrial opportunity to challenge the restraining order as "clearly improper" on the ground that the property was not available for forfeiture. The district court also held that, under Section 1963, the court had the statutory discretion to modify a restraining order if it is "clearly improper" in light of the congressional goals of preserving only that property which is available for forfeiture.

More recently, a trend has emerged holding that a post-restraint, pretrial hearing is required only if the Sixth Amendment right to counsel is implicated by the restraint, and only if the defendant makes a prima facie showing that there is no probable cause for the forfeiture of the restrained property. First, in United States v. Jones, 160 F.3d 641, 647 (10th Cir. 1998), the Tenth Circuit held that the defendant has the initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, and that there is a bona fide reason to believe the restraining order should not have been entered. Thereafter, in United States v. Farmer, 274 F.3d 800, 804-05 (4th Cir. 2001), the Fourth Circuit followed Jones and held that a defendant is entitled to a pretrial hearing when property is seized for civil forfeiture if he demonstrates that he has no other assets available to hire counsel in the related criminal case. However, the court found that Due Process requires a pre-trial hearing to determine only whether the defendant lacks any other assets to hire counsel and, if so, whether there is probable cause to believe the restrained assets are subject to forfeiture. Id. at 805-806. These procedures, known as the "Jones-Farmer" rule, have gained general acceptance since Jones and Farmer were decided.[277]

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[277] See e.g., United States v. Holy Land Found. for Relief and Dev., 493 F.3d 469, 475 (5th Cir. 2007) (*en banc*) (not expressly adopting Jones-Farmer but citing Jones with approval and (continued...)

Taking Monsanto and Jones-Farmer together, what has emerged is a two-step process: first the court determines if the defendant satisfies the Jones-Farmer requirements; if so, the court then conducts a Monsanto hearing to determine if the Government has probable cause as to some, all or part of the restrained property.[278] The Federal Rules of Evidence do not apply at such a hearing.[279]

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[277](...continued)
holding that a post-restraint hearing is not necessary in every case, but may be required when the defendant "needs the restrained assets to pay for legal defense on associated criminal charges, or to cover ordinary and reasonable living expenses); United States v. Yusuf, 199 Fed. Appx. 127, 132-33 (3d Cir. 2006) (following Jones, Farmer, and Jamieson [infra]; district court must require defendants to show that they can satisfy the two Jones requirements, and then may release funds for attorneys fees only if the Government fails to establish probable cause); United States v. Wittig, 333 F. Supp. 2d 1048, 1050-51 (D. Kan. 2004) (upon showing that defendant satisfied both Jones criteria, court conducts probable cause hearing); United States v. Causey, 309 F. Supp. 2d 917, 926-27 (S.D. Tex. 2004) (following Jones and Jamieson; defendant must meet both Jones requirements before he is entitled to challenge the pretrial restraining order on any ground, including the presence of probable cause and the application of the Ex Post Facto Clause); United States v. St. George, 241 F. Supp. 2d 875, 878-80 (E.D. Tenn. 2003) (following Jones; defendant must make threshold showing that she lacks alternative source of funds to retain counsel *and* that there is reason to believe there is no probable cause for the forfeiture of the restrained property; denying hearing to defendant who failed to make second showing); United States v. Jamieson, 189 F. Supp. 2d 754, 757-58 (N.D. Ohio 2002) (same, following Jones; to satisfy Sixth Amendment requirement, defendant must show he has no access to funds from friends or family; Government has right to rebut showing of lack of funds if hearing is granted), aff'd, 427 F.3d 394, 407 (6th Cir. 2005) (approving district court's decision to apply Jones, and noting that court gave defendant second chance to satisfy Jones and had Government put on a witness to establish probable cause); United States v. Ziadeh, 230 F. Supp. 2d 702, 703-04 (E.D. Va. 2002) (following Farmer; no hearing if defendant has other assets available to pay counsel; that the restrained property was substitute assets makes no difference in the Fourth Circuit).

[278] See, e.g., Jamieson, 427 F.3d at 405 (Government established probable cause at *Monsanto* hearing, so property remained restrained and court appointed Criminal Justice Act counsel to represent defendant at trial and authorized $100,000 for investigative expenses and expert witnesses); United States v. Yusuf, 199 Fed. Appx. 127, 132 n.3, 133 (3d Cir. 2006) (following Jamieson; if the Government establishes probable cause, the property must remain under restraint; the defendant's Sixth Amendment right to obtain counsel of his choice applies only to the use of his own legitimate, nonforfeitable funds); United States v. Melrose East Subdivision, 357 F.3d 493, 500 (5th Cir. 2004) ("[N]either due process, nor the Sixth Amendment right to counsel, requires that assets needed to pay an attorney be exempted from restraining orders or, ultimately, from forfeiture. (continued...)

However, the courts are divided on which party bears the burden of proof.[280] Prosecutors are cautioned to review relevant caselaw in their respective circuits on that question.

The Jones-Farmer approach is not yet universally accepted.[281] Nonetheless, the trend is

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[278](...continued)
. . . [R]ather, the constitutional requirement . . . is simply a requirement that the district court in certain circumstances hold a hearing on the restraining order and make a determination that the assets are properly subject to forfeiture.") (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623-35 (1989) and Monsanto, 491 U.S. at 616).

[279] See, e.g., Monsanto, 924 F.2d at 1199 ("[O]ur ruling that a district court would not be bound by the Federal Rules of Evidence at a post-indictment, pretrial hearing deals with the problem of premature disclosure of Government witnesses . . . . "); Jamieson, 189 F. Supp. 2d at 757-58 (Federal Rules of Evidence do not strictly apply at hearing challenging restraining order).

[280] See, e.g., United States v. Bollin, 264 F.3d 391, 421 (4th Cir. 2001) (to sustain a pretrial restraining order, the Government's burden is to establish probable cause to believe that the property is subject to forfeiture); United States v. Jones, 160 F.3d 641, 647 (10th Cir. 1998) (the Government has ultimate burden of establishing probable cause on forfeitability issue in pretrial hearing, but only after defendant makes prima facie showing that he has bona fide reason to believe the property is *not* traceable to the offense); Monsanto, 924 F.2d at 1194 (the Supreme Court's decisions in Monsanto and Caplin & Drysdale "compel a defendant to establish lack of probable cause either as to guilt or forfeitability of restrained assets in order to obtain any relief from a pretrial restraint"); Farmer, 274 F.3d at 805 (defendant who challenges pretrial restraint of forfeitable property has burden of establishing that he has no other assets available to hire counsel and rebutting Government's claim that it has probable cause for restraint of the property); United States v. Wingerter, 369 F. Supp. 2d 799, 808 (E.D. Va. 2005) (at Monsanto hearing, defendant has burden of proving by preponderance of the evidence that Government lacks probable cause to believe defendant committed the offense or that the property is subject to forfeiture).

[281] For example, the Seventh Circuit has to date passed on the question, see United States v. Kirschenbaum, 156 F.3d 784, 792-93 (7th Cir. 1998) (hearing is required when defendant raises Sixth Amendment issue and demonstrates lack of alternative source of funds to hire counsel, but whether post-restraint hearing is required by Fifth Amendment due process when there is no Sixth Amendment issue is an open question), while the Eleventh Circuit does not require a post-restraint hearing in any event.). See United States v. Bissell, 866 F.2d 1343, 1354 (11th Cir. 1989) (no post-restraint hearing required, even if the Sixth Amendment is implicated); United States v. St. Pierre, 950 F. Supp. 334, 338-39 (M.D. Fla. 1996) (following Bissell; defendant has ample opportunity to challenge forfeiture at trial); In Re Protective Order on Intergroup Inv. Corp. Account at Mega Bank, 790 F. Supp. 1140, 1142-43 (S.D. Fla. 1992). But see United States v. Register, 182 F.3d 820, 835 (continued...)

clearly toward the Jones-Farmer rule, and it is OCRS' view that Jones-Farmer is consistent with long-held practice in racketeering cases. It should be noted that, as a policy matter, OCRS requires that the temporary restraining order be drafted to permit the defendant's access, upon motion to the court and with notice to the United States, to reasonable living expenses[282] and, in certain cases involving legitimate businesses, to reasonable business expenses, and that Government counsel should not oppose a defendant's reasonable requests for such provisions. In the spirit of such policies, the Jones-Farmer rule appears to be a reasonable accommodation of the scope of RICO forfeitures and a defendant's due process rights, as the emergence of the Jones-Farmer rule serves to highlight courts' sensitivities regarding a defendant's Fifth and Sixth Amendment rights. **It is the policy of the Organized Crime and Racketeering Section that restraint of assets affecting any defendant's Sixth Amendment right to counsel be approached cautiously, and prosecutors are strongly urged to confer with OCRS if the issue is raised on motion by a defendant after indictment.**

While a pre-trial restraining order is an effective means of preventing the defendant from liquidating or otherwise removing forfeitable property from the court's jurisdiction, the decision as to whether a pre-trial restraining order should be sought usually involves balancing between the need to separate the defendant from his illegally acquired property and the need to protect innocent third persons. Because such orders can have, or appear to have, a substantial negative impact on

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[281](...continued)
(11th Cir. 1999) (dicta) (noting that the Eleventh Circuit is the only court to hold that no post-restraint hearing is required even if the Sixth Amendment rights are implicated, and suggesting Bissell may need to be revisited).

[282] See United States v. Madeoy, 652 F. Supp. 371, 376 (D.D.C. 1987).

individuals and entities who may not have committed any wrongdoing, the Criminal Division in mid-1989 issued guidelines to ensure that the pre-trial RICO temporary restraining order provisions are used fairly.[283] Under these guidelines, before seeking a temporary restraining order, a prosecutor must make a careful assessment of whether freezing the defendant's assets would do more damage than good when the interests of innocent persons are weighed in the balance. This assessment is particularly important when a legitimate business is involved. In addition, the prosecutor must make certain public statements that clarify the exact nature of the restraints being sought to minimize the negative impact on legitimate interests. Also, under the guidelines (and as noted above), the United States Attorneys' offices are required to timely submit any proposed RICO Temporary Restraining Order to the Organized Crime and Racketeering Section for review and approval prior to filing the TRO.[284]

One appellate court initially held that potential substitute assets held by an vindicated third party could be restrained pre-trial.[285] However, every court that has since considered that issue has denied the restraint of potential substitute assets due to the language of Section 1963(d)(1), which does not expressly incorporate the substitute asset provisions of Section 1963(m).[286] In those circuits

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[283] See Criminal Resource Manual at § 2084.

[284] Similarly, if the Government contemplates seizing or restraining an ongoing business, consultation with the Asset Forefiture and Money Laundering Section is mandatory.

[285] See In re Billman, 915 F.2d 916, 920-21 (4th Cir. 1990), cert. denied, 500 U.S. 952 (1991); see also United States v. Regan, 858 F.2d 115, 121 (2d Cir. 1988) (holding limited to pretrial restraint of proceeds by United States v. Gotti, 155 F.3d 144 (2d Cir. 1998)).

[286] See United States v. Gotti, 155 F.3d 144, 147 (2d Cir. 1998); United States v. Riley, 78 F.3d 367, 371-72 (8th Cir. 1996); United States v. Ripinsky, 20 F.3d 359, 362-63 (9th Cir. 1994); In re Assets of Martin, 1 F.3d 1351, 1357-61 (3d Cir. 1993); United States v. Floyd, 992 F.2d 498, (continued...)

that do not permit pretrial restraint, prosecutors may ask the court to require the execution of a satisfactory performance bond equal to the value of the substitute assets.

In any event, if a court requires a hearing regarding the issuance of a restraining order, the prosecutor may be faced with a strategic decision, i.e., whether to chance premature disclosure of the Government's case or forego the restraining order. Although Section 1963(d)(3) was enacted to ease the Government's burden by providing that a court may receive and consider evidence and information at a pre-trial hearing that would be inadmissible under the Federal Rules of Evidence, thereby allowing for the presentation of hearsay evidence, the court's inquiry can make obtaining a restraining order potentially risky to the Government's case in chief. Accordingly, the prosecutor's decision whether to pursue a pre-trial restraining order after a court orders a hearing depends on a case-by-case analysis of the nature and circumstances of the case and the requirements placed on the Government by the court.

c. When to file a pre-trial restraining order

The prosecutor can seek a pre-trial restraining order at one of three stages. Each of these circumstances is discussed below.

i. Upon the filing of an indictment or information

Under Section 1963(d)(1)(A), a court may take appropriate action upon the filing of an indictment or information that charges a violation of Section 1962 and alleges that property sought to be forfeited would, in the event of conviction, be subject to forfeiture. For example, the court may, at the Government's request, issue an order enjoining a defendant from destroying, concealing,

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[286](...continued)
502 (5th Cir. 1993) (construing 21 U.S.C. § 853). See also United States v. Field, 62 F.3d 246, 248-49 (8th Cir. 1995) (construing 18 U.S.C. § 982).

or transferring any property that is subject to forfeiture. Notably, one court has held that such an order cannot be issued to restrain property that is not itself subject to forfeiture, even though that property may later be used to satisfy a forfeiture judgment under the fungibility doctrine.[287] A court may, however, impose reasonable restraints on third parties, such as banks, when necessary to preserve the status quo.[288] Of course, any restraint must be tailored to cause the least intrusion possible and should be sought only when absolutely necessary.

The Senate Report on the 1984 amendments states that the "probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order."[289] This statement responded to a series of Ninth Circuit cases beginning with United States v. Crozier, 674 F.2d 1293, 1297-98 (9th Cir. 1982), vacated, 486 U.S. 1206 (1984), on remand, 777 F.2d 1376 (9th Cir. 1985), which held that the due process clause requires an evidentiary hearing on the issue of probable cause where a trial court issues an ex parte restraining order.[290]

However, many due process issues can be avoided simply by employing legal alternatives to restraining the property. In a 1993 civil forfeiture case, the Supreme Court held that (absent

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[287] See United States v. Chinn, 687 F. Supp. 125, 127 (S.D.N.Y. 1988).

[288] See Regan, 858 F.2d at 119-22.

[289] S. Rep. No. 98-225, 98th Cong., 1st Sess. 202 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3385; see also United States v. Musson, 802 F.2d 384, 387 (10th Cir. 1986) (indictment supplied probable cause for restraint).

[290] The Ninth Circuit has since modified its position concerning hearings required to restrain assets necessary to pay attorney's fees. The defendant must first show the need to use the assets to retain counsel. After such a need is established, a hearing is required, where the moving papers, including affidavits, are sufficiently specific and detailed to permit the court to conclude that a claim is present. Only if the allegations are sufficient and a factual basis is raised is a hearing required. United States v. Unimex, Inc., 991 F.2d 546, 551 (9th Cir. 1993).

exigent circumstances) the seizure of a real property always requires notice to the property owner and an opportunity to be heard as a matter of due process.[291] Notwithstanding the apparent breadth of this decision, however, the Court in dicta suggested alternatives to the Government's seizing real property, notably the use of a lis pendens under relevant state law. The Court drew a distinction between a "seizure" and a lis pendens, in that the latter merely puts the world on notice of the Government's claimed interest in the property but otherwise does not impair the owner's use and enjoyment of the real property. Because use of the lis pendens avoids the due process issue entirely,[292] filing a notice of lis pendens either with a copy of the indictment attached or by express reference to the existing indictment and posting a copy at the property site (the "post and walk" method) has become the prevalent method of preserving real property for forfeiture,[293] and obviates the need for a hearing unless a third party can demonstrate that the lis pendens itself imposes extreme hardship. However, there is some question as to whether a lis pendens can be filed against a real property that is not directly forfeitable, but might be forfeited later as a substitute asset.[294]

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[291] See United States v. James Daniel Good Real Property, 510 U.S. 43, 59, 61 (1993).

[292] See, e.g., Aronson v. City of Akron, 116 F.3d 804, 811-12 (6th Cir. 1997) ("The mere filing of an ordinary lien or lis pendens notice simply does not represent the sort of 'grievous loss' . . . that necessitates propr notice and an opportunity to be heard."); United States v. St. Pierre, 950 F. Supp. 334, 337 (M.D. Fla. 1996) (because lis pendens is not a taking, filing lis pendens without prior notice did not violate defendant's due process rights); United States v. Register, 182 F.3d 820, 836 (11th Cir. 1999) (because filing lis pendens does not implicate due process rights, no post-trial hearing required to determine if lis pendens should be removed); United States v. Borne, 2003 WL 22836059, at *3 (E.D. La. 2003) (same).

[293] See Aronson v. City of Akron, 116 F.3d 804, 810 (6th Cir. 1997) (because lis pendens is not a taking, filing lis pendens without prior notice did not violate defendant's due process).

[294] Compare United States v. Jewell, 538 F. Supp.2d 1087, 1093-94 (E.D. Ark. 2008) (a lis pendens is not a restraining order; it does not prevent a property owner from selling his property nor (continued...)

Prosecutors are cautioned that state law is often determinative on that issue, and should research the topic accordingly.

ii. Prior to filing an indictment

Section 1963(d)(1)(B) provides for pre-indictment restraining orders under certain circumstances. First, as discussed above, there must be notice to persons appearing to have an interest in the property and an opportunity for a hearing. This is often the case in situations in which the defendant is aware of the of the Government's ongoing investigation, and often involves the defendant's ownership of a business or corporation. Second, the court must determine that:

> 1) there is a substantial probability that the United States will prevail on the issue of forfeiture;
> 2) failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and
> 3) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

Pre-indictment orders obtained under Section 1963(d)(1)(B) are effective for ninety days unless the order is extended for good cause or an indictment or information is filed within that time.

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[294](...continued)
interfere with his use and enjoyment of his property; it is merely a notice to potential buyers of the Government's interest), United States v. Woods, 436 F. Supp. 2d 753, 754-55 (E.D.N.C. 2006) (to file a lis pendens, all the Government must show is that an action affecting title to the property has commenced; a criminal forfeiture case naming the property as a substitute asset is such an action); United States v. Hyde, 287 F. Supp. 2d 1095, 1097 (N.D. Cal. 2003) (assuming without deciding that a lis pendens can be filed on a substitute asset) (citing United States v. Field, 867 F. Supp. 869, 873 (D. Minn. 1994)), with United States v. Jarvis, 499 F.3d 1196, 1203 (10th Cir. 2007) (under New Mexico law, a lis pendens may only be filed on property involved in pending litigation; it may not be used merely to secure a future money judgment; substitute assets are not involved in the pending criminal case except to the extent they may be used to satisfy a money judgment; therefore a lis pendens cannot be filed against such property), and United States v. Kramer, 2006 WL 3545026, at *10-11 (E.D.N.Y. 2006) (under New York law, lis pendens may only be filed on property in which plaintiff asserts a preexisting interest that will be established at trial; it cannot be filed on property plaintiff hopes to obtain in satisfaction of a money judgment; therefore lis pendens may not be filed on property forfeitable only as a substitute asset).

iii. Ex parte pre-indictment restraining order

A temporary ex parte pre-indictment restraining order may be obtained by the Government pursuant to Section 1963(d)(2) if the Government can demonstrate that:

1) there is probable cause to believe that the property involved is subject to forfeiture; and
2) the provision of notice will jeopardize the availability of the property for forfeiture.

A temporary restraining order under Section 1963(d)(2) is valid for only ten days, unless extended for good cause or the party against whom it is entered consents to an extension. Section 1963(d)(2) also provides that, where a hearing is requested concerning the ex parte order, it must be held at the earliest possible time and prior to the expiration of the temporary order.[295] **NOTE**: **Prosecutors are required to obtain approval from the Organized Crime and Racketeering Section prior to making ex parte application for temporary restraining orders or similar relief under the criminal RICO statute**.[296]

d. Final Considerations

Finally, as noted above, only the Fourth Circuit permits the restraint of potential substitute assets. In other circuits, the Government must make an informed decision whether to name potential substitute assets in the indictment. Identifying such assets effectively notifies the defendant of exactly which assets the Government will seek if the underlying forfeiture cannot be satisfied, thus affording the defendant an opportunity to transfer those items in an attempt to defeat eventual

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[295] See United States v. Lewis, 759 F.2d 1316, 1324-25 (8th Cir.) (sharply criticizing, in dicta, trial court's issuance of an ex parte temporary restraining order in a CCE case), cert. denied, 474 U.S. 994 (1985).

[296] For cases involving TROs under other criminal forfeiture provisions, contact the Asset Forfeiture and Money Laundering Section. See United States Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress (December 1984).

forfeiture. Absent some means of restraining such assets, listing potential substitute assets in the indictment may be of little value. However, if real property represents a potentially valuable substitute asset, the Government should consider naming the property in the indictment and filing a lis pendens against it, subject to the cautions enumerated in Section IV(D)(5)(c)(i) above regarding lis pendens and state law. If a third party then buys the property from the defendant, the Government could seek to void the transfer and obtain forfeiture because the buyer had constructive knowledge of the Government's asserted interest.

6. Substitute Assets

Section 1963(m), in pertinent part, provides that

> [i]f any property [subject to forfeiture], as a result of any act or omission of the defendant –
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> > (1) cannot be located upon the exercise of due diligence;
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> > (2) has been transferred or sold to, or deposited with, a third party;
> >
> > (3) has been placed beyond the jurisdiction of the court;
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> > (4) has been substantially diminished in value; or
> >
> > (5) has been commingled with other property which cannot be divided without difficulty;
>
> the court shall order the forfeiture of any other property of the defendant up to the value of any property [subject to forfeiture].

This provision, known as the "substitute assets" provision per its companion section in 21 U.S.C. § 853(p), permits the forfeiture of a defendant's otherwise untainted assets when he has dissipated or otherwise disposed of directly forfeitable property of any kind. As previously discussed in Section

IV(D)(4)(a), substitute assets also provide a means to enforce "money judgment" forfeitures ordered pursuant to Section 1963(a)(3). If the court enters an order of forfeiture in the amount of the defendant's illicit proceeds proved at trial and the defendant cannot pay that amount, the Government may seek the forfeiture of substitute assets – that is, other property of the defendant's not tainted by criminal activity – up to the amount of proceeds ordered forfeited.[297] In order to comply with Federal Rules of Criminal Procedure 7(c)(2) and 32.2, the exact statutory provisions of Section 1963(m) should be included in the indictment's forfeiture pleadings in order to put the defendant on notice of the Government's intent to seek such forfeitures. Such language also puts all potential parties on notice of the Government's intent and may be of particular legal significance in defeating claims by persons who have received tainted assets from the defendant after indictment.

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[297] See, e.g., United States v. Weiss, 467 F.3d 1300, 1307 (11th Cir. 2006) (affirming forfeiture of substitute asset to satisfy $3.1 million money judgment); United States v. Segal, 339 F. Supp. 2d 1039, 1050 (N.D. Ill. 2004) (following Ginsburg [infra]; that defendant did not retain the $30 million in racketeering proceeds does not mean that the court cannot impose a money judgment in that amount); United States v. Edwards, 303 F.3d 606, 643-44 (5th Cir. 2002) (court enters money judgment for amount jury found to be proceeds of racketeering activity); United States v. Corrado, 227 F.3d 543, 558 (6th Cir. 2000) (Corrado I) (remanding case to the district court to enter money judgment for the amount derived from a RICO offense); United States v. Robilotto, 828 F.2d 940, 949 (2d Cir. 1987) (following Conner [below] and Ginsburg to permit money judgment for the amount of the illegal proceeds regardless of whether defendant retained the proceeds); United States v. Navarro-Ordas, 770 F.2d 959, 969 (11th Cir. 1985) (court may enter "personal money judgment" against the defendant for the amount of the illegally obtained proceeds); United States v. Conner, 752 F.2d 566, 576-77 (11th Cir. 1985) (because criminal forfeiture is in personam, it follows defendant; it is a money judgment against the defendant for the amount of money that came into his hands illegally; the Government is not required to trace the money to any specific asset); United States v. Amend, 791 F.2d 1120, 1127 (4th Cir. 1986) (criminal forfeiture is a personal judgment that requires the defendant to pay the total amount derived from the criminal activity "regardless of whether the specific dollars received from that activity are still in his possession"); United States v. Ginsburg, 773 F.2d 798, 801-02 (7th Cir. 1985) (en banc) (same); United States v. Basciano, 2007 WL 29439, at *2-4 (E.D.N.Y. 2007) (defendants are jointly and severally liable for money judgment based on reasonable estimate of the proceeds of their various racketeering activities; estimate does not have to be precise, but cannot be "overly speculative"; following Corrado).

As discussed in Section IV(D)(5)(b) above, only the Fourth Circuit currently permits the pretrial restraint of potential substitute assets. In other circuits, the Government must make an informed decision whether to name potential substitute assets in the indictment. Identifying such assets effectively notifies the defendant of exactly which assets the Government will seek if the underlying forfeiture cannot be satisfied, thus affording the defendant an opportunity to transfer those items in an attempt to defeat eventual forfeiture. Absent some means of restraining such assets, listing potential substitute assets in the indictment may be of little value. However, if real property represents a potentially valuable substitute asset, the Government should consider naming the property in the indictment and filing a lis pendens against it, though prosecutors are cautioned that courts are split on whether lis pendens may be filed in such circumstances.[298] If a third party then buys the property from the defendant, the Government may later seek to void the transfer and obtain forfeiture because the buyer had constructive knowledge of the Government's asserted interest, with ownership to be resolved in the subsequent ancillary claims proceedings.[299]

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[298] Compare United States v. Jewell, 538 F. Supp.2d 1087, 1093-94 (E.D. Ark. Mar. 6, 2008) (a lis pendens is not a restraining order; it does not prevent a property owner from selling his property nor interfere with his use and enjoyment of his property; it is merely a notice to potential buyers of the Government's interest), and United States v. Hyde, 287 F. Supp. 2d 1095, 1097-99 (N.D. Cal. 2003) (assuming without deciding that a lis pendens can be filed on a substitute asset) (citing United States v. Field, 867 F. Supp. 869, 873 (D. Minn. 1994)), with United States v. Jarvis, 499 F.3d 1196, 1203 (10th Cir. 2007) (under New Mexico law, a lis pendens may only be filed on property involved in pending litigation; it may not be used merely to secure a future money judgment; substitute assets are not involved in the pending criminal case except to the extent they may be used to satisfy a money judgment; therefore a lis pendens cannot be filed against such property) (citations omitted), and United States v. Parrett, 469 F. Supp. 2d 489, 493-94 (S.D. Ohio 2007) (district court assumes without analysis that lis pendens is the same as a restraining order, and that cases prohibiting pretrial restraint of substitute assets therefore prohibit filing lis pendens on substitute real property).

[299] See, e.g., United States v. McCorkle, 321 F.3d 1292, 1294 (11th Cir. 2003) (describing (continued...)

If the issue of forfeiture is presented to the jury for its special verdict (see Section VI(L) below), no mention of substitute assets is made, because under Section 1963(m) it is solely within the court's authority to order the forfeiture of substitute assets.[300] The issue of substitute assets can only be reached either after the jury renders a special verdict or a similar determination by the court that certain assets of the defendant are subject to forfeiture under 1963(a), e.g., as proceeds of racketeering activity or property affording a source of influence over the enterprise. If those assets are not available by the defendant's act or omission per 1963(m), only then may substitute assets be sought for forfeiture.

If the jury has ordered forfeiture and those assets are unavailable through the defendant's acts or omissions, the Government should file a motion for forfeiture of substitute assets. The motion should include, as an attachment, an affidavit stating that the forfeited property is unavailable, that the unavailability is due to the defendant's actions within one of the statutory categories of Section 1963(m), that the defendant has an interest in the asset to be substituted, and the approximate value

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[299](...continued)
procedure for obtaining a special verdict under section 853(c) against forfeitable property in the hands of a third party, and allowing third party to contest forfeiture in ancillary proceeding); id. at 1295, 1298-99 (third party may be ordered to deposit property named in preliminary order of forfeiture in the registry of court pending ancillary proceeding; refusal to due so may result in contempt).

[300] See, e.g., United States v. Alamoudi, 452 F.3d 310, 314 (4th Cir. 2006) (there is no right to have a jury determine the forfeitability of substitute assets; Booker does not apply because an order forfeiting substitute assets does not increase the amount of forfeiture); United States v. Candelaria-Silva, 166 F.3d 19, 43 (1st Cir. 1999) (forfeiture of substitute assets is solely a matter for the court; the defendant's only right is to have the jury determine the amount of the money judgment, which puts an upper limit on the amount that may be forfeited as a substitute asset); United States v. Thompson, 837 F. Supp. 585, 586 (S.D.N.Y. 1993) (court, not jury, orders forfeiture of substitute assets); United States v. Hurley, 63 F.3d 1, 23 (1st Cir. 1995) ("the statute says that an order substituting assets is to be made by 'the court'").

of the substitute asset.[301] The affidavit may be executed by either the Government's counsel or a case agent.[302] If post-trial depositions have been taken, relevant excerpts may be provided to the court.

Note that if substitute assets are declared forfeited by the court, the Government must still carry out the ancillary claims process. See Section IV(D)(11) below.

7. Drafting Forfeiture Allegations

Rule 7(c)(2) of the Federal Rules of Criminal Procedure provides that

> [n]o judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

Fed. R. Crim. P. 7(c)(2). Similarly, Federal Rule of Criminal Procedure 32.2(a), which took effect in December 2002, provides that

> [a] court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.[303]

By including the proposed forfeiture in the indictment or information, the defendant is put on notice

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[301] See, e.g., United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999) (the Government satisfied requirements of Section 853(p) by submitting motion and affidavit reciting its efforts to trace defendant's drug proceeds).

[302] See, e.g., United States v. Alamoudi, 452 F.3d 310, 315-16 (4th Cir. 2006) (courts interpret section 853(p) liberally to prevent defendants from frustrating the forfeiture laws; it is sufficient if a law enforcement agent submits that she has searched for the missing assets and that despite the exercise of due diligence she has been unable to find them).

[303] Rule 32.2 was intended to replace Rule 7(c)(2), but the intended deletion of the latter did not occur, apparently through administrative error. The discussion herein addresses Rule 32.2 except where explicitly noted.

of the forfeitures that may be imposed if convicted of the underlying charge. Conversely, as explicity stated in both rules, the Government cannot seek forfeiture if the indictment is devoid of any forfeiture pleadings that would provide the defendant notice of the Government's intent.

Under the older Rule 7(c)(2), courts routinely sustained forfeiture pleadings that merely tracked the language of the pertinent forfeiture statute without specifying any particular assets that were subject to forfeiture ("barebones" pleadings).[304] Nor were the forfeiture pleadings required to allege the defendant's interest in any particular asset.[305] However, Rule 7(f) permits the defendant to seek a bill of particulars with respect to the indictment or information, and bills of particular thus became a routine matter in forfeiture practice as a means to clarify the nature of the forfeitures at

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[304] See, e.g., United States v. Diaz, 190 F.3d 1247, 1257-58 (11th Cir. 1999) (the Government complies with Rule 7(c)(2) and due process if the indictment tracks language of the forfeiture statute and the Government informs defendant of its intent to forfeit specific asset after the guilty verdict and before the forfeiture phase of the trial begins); DeFries, 129 F.3d at 1315 n.17 (not necessary to specify in either the indictment or a bill of particulars that the Government sought forfeiture of defendant's salary; to comply with Rule 7(c), the Government need only put defendant on notice that it would seek to forfeit everything subject to forfeiture under the applicable statute, such as all property "acquired or maintained" as a result of a RICO violation); United States v. Amend, 791 F.2d 1120, 1125 (4th Cir. 1986), cert. denied, 479 U.S. 930 (1986) ("the essential purpose of [Rule 7(c)(2)] is to provide persons with adequate notice of the extent to which forfeiture is sought"); United States v. Grammatikos, 633 F.2d 1013, 1024 (2d Cir. 1980) ("The plain language of Rule 7(c)(2) requires only that the extent of the interest or property subject to forfeiture be alleged . . . . [I]ts principle objective is to provide persons facing such charges with notice that forfeiture will be sought."); United States v. Moffitt, Zwerling & Kemler, 83 F.3d 660, 664-65 (4th Cir. 1996), aff'g 846 F. Supp. 463 (E.D. Va. 1994) (Moffitt I) (indictment need not list each asset subject to forfeiture).

[305] See, e.g., United States v. Loe, 248 F.3d 449, 464 (5th Cir. 2001) (indictment that named the real property that was subject to forfeiture was sufficient; not necessary for Government to allege that defendant held only 52.6 % interest in the property, as was later established at trial); United States v. Fisk, 255 F. Supp. 2d 694, 705 (E.D. Mich. 2003) (indictment need not allege that defendant has an interest in the property to be forfeited).

issue.[306] Notably, because forfeiture allegations are merely notice pleadings, they may be clarified or even supplemented by a bill of particulars filed by the Government, with the trial court's approval.[307] When used in this fashion, the Government can correct errors in the initial forfeiture allegations (such as flawed VIN numbers or property descriptions) without having to supersede the indictment. Bills of particulars are also useful in cases where specific forfeitable assets are identified after the indictment has been returned. If, for example, the indictment named several vehicles for forfeiture as proceeds of the defendant's crime and another vehicle is subsequently identified, the Government, with the court's permission,[308] can file a bill of particulars naming the newly-discovered vehicle for forfeiture without having to supersede the indictment. Courts have continued to sustain "barebones" pleadings under Rule 32.2[309] but, although Rule 32.2 contains no similar provision for bills of particulars, courts continue to employ bills of particular with regard to

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[306] See, e.g., United States v. Vasquez-Ruiz, 136 F. Supp. 2d 941, 944 (N.D. Ill. 2001) (Rule 7(c)(2) does not require list of specific items subject to forfeiture in the indictment, but Government must provide bill of particulars listing all property, including substitute assets, subject to forfeiture thirty days before trial); Moffitt, Zwerling & Kemler, 83 F.3d at 665 (4th Cir. 1996) (though indictment need not list each asset subject to forfeiture, this can be done with bill of particulars pursuant to Rule 7(c)).

[307] See , e.g., Amend, 791 F.2d at 1125; Grammatikos, 633 F.2d at 1024; United States v. Ianniello, 621 F. Supp. 1455, 1478-79 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986).

[308] Fed. R. Crim. P. 7(f) ("**The court may direct** the filing of a bill of particulars . . . .") (emphasis added). The Government must obtain leave of court to file a bill of particulars.

[309] See, e.g., United States v. Lazarenko, 504 F. Supp. 2d 791, 796-97 (N.D. Cal. 2007) (Rule 32.2(a) requires only that the indictment give the defendant notice of the forfeiture in generic terms; that the Government did not itemize the property subject to forfeiture until much later was of no moment; older cases holding that property had to be listed in the indictment are no longer good law); United States v. Iacaboni, 221 F. Supp. 2d 104, 110 (D. Mass. 2002) (Rule 32.2(a) makes clear that an itemized list of property need not appear in the indictment; tracking language of section 982(a)(1) was sufficient), aff'd, 363 F.3d 1 (1st Cir. 2004).

forfeiture pleadings.[310]

Though "barebones" forfeiture pleadings have been sustained by the courts, it should be noted that the failure to include specific assets in the indictment will preclude the Government from relying on the indictment to obtain a post-indictment restraining order. See Section IV(D)(8) below.

In drafting forfeiture allegations, the wording of the RICO statute should be followed as closely as possible,[311] and the forfeiture allegations should clearly state the forfeiture theory (i.e., Section 1963(a)(1), (2) or (3)) applicable to each interest. As previously noted, property can be subject to forfeiture under more than one subsection of Section 1963(a). By specifying the forfeiture theory applicable to each asset, each theory of forfeiture can then be considered by the jury in rendering special verdicts of forfeiture, discussed below. If certain interests or property cannot be described with specificity, it is better to include them in the forfeiture allegations to the extent possible (such as a street address without the attendant plat description), subject to later clarification

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[310] See, e.g., United States v. Davis, 177 F. Supp. 2d 470, 484-85 (E.D. Va. 2001) (approving Government's naming automobile as subject to forfeiture in a bill of particulars where indictment used general language tracking the forfeiture statute), aff'd, 63 Fed. Appx. 76, 2003 WL 1871050 (4th Cir. 2003); United States v. Decay, 2002 WL 1767423, at *1 (E.D. La. July 30, 2002) (forfeiture allegation that tracks section 853(a), combined with bill of particulars naming vehicle and specific amount of cash, gave defendant adequate notice of the forfeiture).

[311] See, e.g., United States v. Silvious, 512 F.3d 364, 369 (7th Cir. 2008) (Government's acknowledged error in citing section 982 instead of sections 981 and 2461(c) in a mail fraud case did not deprive defendant of his right to notice under Rule 32.2(a)); United States v. Iacaboni, 221 F. Supp. 2d 104, 110 (D. Mass. 2002) (Rule 32.2(a) makes clear that itemized list of property need not appear in the indictment; tracking language of section 982(a)(1) was sufficient), aff'd, 363 F.3d 1 (1st Cir. 2004); United States v. Diaz, 190 F.3d 1247, 1257-58 (11th Cir. 1999) (Government complies with Rule 7(c)(2) and due process if the indictment tracks the language of the forfeiture statute); United States v. Sarbello, 985 F.2d 716, 719 (3d Cir. 1992) ("conclusory forfeiture allegation in the indictment that recognizably tracks the language of the applicable criminal forfeiture statute satisfies Rule 7(c)(2); minor incongruities in the tracking of allegations under RICO § 1963 will not fatally flaw forfeiture notice").

by a bill of particular as necessary.

As a matter of policy, OCRS much prefers specificity in RICO forfeiture pleadings both in order to obtain pretrial restraint as necessary and as it reflects upon the substance of the Government's pre-indictment forfeiture investigation. This is particularly true with regard to money judgments, so as to avoid accusations of misuse of RICO's far-reaching forfeiture provisions. While specificity is preferred, appropriate qualification language should be used to describe certain assets such as the sum of the defendant's RICO proceeds, e.g., "approximately $500,000" or "at least $2 million in U.S. currency" to account for variances in proof at trial.[312]

With regard to substitute assets, it is sufficient to recite the provisions of § 1963(m) without listing particular potential substitute assets.[313] The exception to this premise is the Fourth Circuit,

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[312] See, e.g., United States v. Rosin, 263 Fed. Appx. 116, 2008 WL 142037 (11th Cir. Jan. 16, 2008) (in determining the amount of the money judgment, district court was not limited to the amount specified in the forfeiture allegation in the indictment); United States v. Segal, 495 F.3d 826, 838-40 (7th Cir. 2007) (because the forfeiture notice used terms like "at least" and "including but not limited to" in describing the proceeds subject to forfeiture, the indictment did not limit the forfeiture to any specific figure or assets); United States v. McKay, 506 F. Supp. 2d 1206, 1211 (S.D. Fla. 2007) (Government is not required to specify the amount of the money judgment it will be seeking in the indictment); United States v. Descent, 292 F.3d 703, 706 (11th Cir. 2002) (because forfeiture is part of sentencing, modification of amount Government is seeking as money judgment is not an improper amendment to the indictment); United States v. Navarro-Ordas, 770 F.2d 959, 969 n.19 (11th Cir. 1985) (Rule 7(c) does not require notice to defendant that he will be subject to a money judgment).

[313] See, e.g., United States v. Misla-Aldarondo, 478 F.3d 52, 75 (1st Cir. 2007) (to obtain forfeiture of substitute assets, the Government need only show that the requirements of section 853(p) are satisfied; there is no requirement of prior notice in the indictment or elsewhere; prosecutor's disavowal at sentencing of intent to seek forfeiture of substitute asset therefore does not preclude the Government from doing so); United States v. Hatcher, 323 F.3d 666, 673 (8th Cir. 2003) (generally, a defendant must have notice of what property the Government seeks to forfeit so that he can challenge the existence of any nexus between the property and the offense; but as there is no such defense to the forfeiture of substitute assets, there is no need for prior notice of what assets will be forfeited as substitute property); United States v. Bollin, 264 F.3d 391, 422 n.21 (4th Cir.
(continued...)

where pretrial restraint of potential substitute assets is permitted, and the listing of potential substitute assets can serve as a basis for such restraint.[314]

8. Trial Procedures Regarding Forfeitures

a. Contested cases

As previously noted, forfeiture under Section 1963 is dependent on the defendant's conviction on a RICO charge. The forfeiture phase of the trial is bifurcated from the determination of guilt phase and occurs only after a guilty verdict is returned.[315] Trial procedures regarding forfeiture are governed by Rule 32.2, Federal Rules of Criminal Procedure summarized as follows.

Rule 32.2(b)(1) requires that, "[a]s soon as practicable after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute."[316] With regard to specific assets set out in the indictment,

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[313](...continued)
2001) (substitute assets need not be listed in the indictment); Infelise, 938 F. Supp. at 1369 n.9 (Rule 7(c)(2) does not require listing of property to be forfeited as substitute assets; sufficient for the Government to allege it sought to forfeit $3.7 million in proceeds); United States v. Bellomo, 954 F. Supp. 630, 652 (S.D.N.Y. 1997) (substitute assets allegation in the indictment, plus bill of particulars, give defendant adequate notice).

[314] See In re Billman, 915 F.2d 920 (4th Cir. 1990), cert. denied, 500 U.S. 952 (1991).

[315] See United States v. Dolney, 2005 WL 1076269, at *10 (E.D.N.Y. May 3, 2005) (denying defendant's motion to combine guilt and forfeiture phases; Rule 32.2(b) makes clear that the trial must be bifurcated).

[316] See, e.g., United States v. Bennett, 423 F.3d 271, 275 (3d Cir. 2005) (describing the (continued...)

the court must determine "whether the government has established the requisite nexus between the property and the offense." Id. Similarly, with regard to a money judgment, the court must determine the amount of money the defendant will be ordered to forfeit. In either case, the court may rely on the evidence already introduced at trial.[317] If the defendant contests the forfeiture, the court may consider "evidence or information" presented by either the Government or the defense in a post-trial hearing, including hearsay.[318]

Although there is no constitutional right to a jury trial during the forfeiture phase of a trial,[319]

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[316](...continued)
procedures required by Rule 32.2(b) in detail); United States v. Yeje-Cabrera, 430 F.3d 1, 15 (1st Cir. 2005) (explaining history of Rule 32.2 and its predecessor).

[317] See, e.g., United States v. Capoccia, 503 F.3d 103, 109 (2d Cir. 2007) (the court may rely on evidence from the guilt phase of the trial, even if the forfeiture is contested; it is not necessary for the Government to reintroduce that evidence in the forfeiture hearing); United States v. Schlesinger, 396 F. Supp. 2d 267, 271 (E.D.N.Y. 2005) (under Rule 32.2(b)(1), the court determines the amount of the money judgment, or whether there is a sufficient nexus between the property and the offense of conviction, based on evidence in the record of the criminal trial or evidence presented at a hearing after the verdict), aff'd, 514 F.3d 277 (2d Cir. 2008); United States v. Stathakis, 2008 WL 413782, at *10 (E.D.N.Y. 2008) (to determine amount of money judgment, court relies on evidence admitted at trial as well as evidence introduced in the evidentiary hearing conducted after the Government moved for a preliminary order of forfeiture).

[318] See, e.g., United States v. Capoccia, 503 F.3d 103, 109-10 (2d Cir. 2007) (Rule 32.2(b)(1) allows the court to consider "evidence or information," making it clear that the court may consider hearsay; this is consistent with forfeiture being part of the sentencing process where hearsay is admissible).

[319] See, e.g., United States v. Tedder, 403 F.3d 836, 841 (7th Cir. 2005), cert. denied, 546 U.S. 1075 (2005) (a defendant has no Sixth Amendment right to have the jury determine what property is subject to forfeiture; the Supreme Court's decision on that issue was not altered by Apprendi or Booker; therefore, the district court's disregard of the jury's special verdict and its recalculation of the amount subject to forfeiture did not violate defendant's Sixth Amendment rights); United States v. Segal, 339 F. Supp. 2d 1039, 1043 n.3 (N.D. Ill. 2004) (ignoring the jury's answers to questions on the special verdict form that were surplusage does not deprive the defendant of any constitutional right because he had no Sixth Amendment right to a jury on the forfeiture issue
(continued...)

Rule 32.2 (b)(4) provides that "[u]pon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Prosecutors are thus cautioned to insure that the trial jury is not prematurely discharged, in order to avoid having to re-present all of the trial evidence that will serve as the basis for forfeiture. As with the nexus determination being made by the court, the jury may consider evidence presented by either the Government or the defense in a post-trial hearing. However, it must be specifically noted that the jury's function on forfeiture is limited to the nexus issue, and without regard to any third-party interests in the property.[320] For that reason, jury instructions should be used and forfeiture verdict forms should be submitted to the jury limiting their finding to that question, e.g., "Does the evidence establish a nexus between the defendant's offense under [Count 1] and [Asset #1] warranting forfeiture of that asset?" And, as in the guilt phase of the trial, the jury must be unanimous as to each of its forfeiture findings.[321]

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[319](...continued)
in the first place), aff'd 495 F.3d 826 (7th Cir. 2007); see also Libretti v. United States, 516 U.S. 29 (1995) (forfeiture is part of sentencing, not an element of the criminal offense).

[320] See, e.g., United States v. Cherry, 330 F.3d 658, 669 n.17 (4th Cir. 2003) (court properly instructed the jury that it had to find, by a preponderance of the evidence, that the sum for which the Government was seeking a money judgment fairly represented the amount derived from proceeds that the defendant obtained, directly or indirectly, from the offenses charged); United States v. Brown, 2007 WL 470445, at *5 (M.D. Fla. February 13, 2007) (setting out text of jury instruction and overruling objection to telling the jury that the Government is entitled to a money judgment and that the jury's role is to determine the amount); United States v. Duncan, 2007 WL 3119999, *12 (N.D. Fla. October 24, 2007) (setting out text of instruction allowing jury to base the calculation of a money judgment on the gross proceeds of a drug offense); United States v. Wittig, 2006 WL 13158, at *3 (D. Kan. 2006) (court instructs jury that it is not to concern itself with anyone's ownership interest in the property, "as the jury's responsibility is solely to determine whether the Government has adequately proven the nexus between the offenses and the property").

[321] See, e.g., United States v. Olson, 2003 WL 23120024, at *4 (W.D. Wis. July 11, 2003) (continued...)

b. Guilty Pleas

As demonstrated by the Supreme Court's holding in Libretti v. United States, 516 U.S. 29, 38-39 (1995), the defendant can agree to forfeiture as part of his guilty plea agreement. Although the Court also held that Fed. R. Crim. P. 11 did not require the trial court to make any finding during the plea colloquy that agreed-upon forfeitures are supported by the evidence, the concurring opinions suggested that this is the better practice.[322] Although there is no requirement to list the property to be forfeited in the plea agreement,[323] prudence dictates that the Government should include such information. Further, the defendant can agree not to contest related civil or administrative forfeiture proceedings so as to permit resolution of all such matters in the single criminal proceeding.[324] Similarly, the defendant can agree to forfeit not just the proceeds of his offense but also substitute assets to cover that amount.[325] Conversely, the defendant may also enter a guilty plea but reserve the

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[321](...continued)
(if the Government alleges multiple theories of forfeiture, the court may instruct in the disjunctive, but must advise the jury that it must be unanimous as to the theory or theories it selects).

[322] Libretti, 516 U.S. at 52-55 (concurring opinions of Justice Souter and Justice Ginsburg).

[323] See, e.g., United States v. Pease, 2006 WL 2175271, at *10 (M.D. Fla. July 31, 2006) (items subject to forfeiture need not be listed in the plea agreement; because forfeiture is part of sentencing, it was sufficient for Government to specify the forfeitable property after the plea was accepted and prior to sentencing, and for defendant to have an opportunity at sentencing to say whether he contested the forfeiture of anything listed in the preliminary order).

[324] See, e.g., United States v. Skorniak, 59 F.3d 750, 756 (8th Cir. 1995) (Rule 11 does not apply when defendant, as part of his plea agreement, agrees not to contest a parallel civil forfeiture); United States v. Contents of Account Number 901121707, 36 F. Supp. 2d 614, 615 (S.D.N.Y. 1999) (defendant pleads guilty to structuring offense and agrees not to contest civil forfeiture under section 981(a)(1)(A)); United States v. $15,314, More or Less, in U.S. Currency, 2004 WL 2595937, at *1 (W.D. Tex. 2004) (defendant pleads guilty in criminal case, withdraws claim in parallel civil case, and acknowledges that the property is drug proceeds that belongs solely to him).

[325] See, e.g., United States v. Alamoudi, 452 F.3d 310, 314 (4th Cir. 2006) (defendant's (continued...)

right to contest forfeiture.[326] In any case, if the defendant withdraws his guilty plea, both his plea agreement and the forfeiture are void.[327]

Thus, while guilty plea agreements may be tailored to accommodate the various contingencies described above, prosecutors should take care in drafting guilty plea agreements to insure that all bases for forfeiture and the property to be forfeited are specifically addressed in the text of the agreement. More significantly, prosecutors are cautioned not to waive all or part of the forfeitures involved in a given case both to account for the defendant's criminal liability[328] and to avoid allegations of impropriety. Settlements of criminal forfeiture are governed by USAM § 9-113.000. Similarly, plea agreements in RICO cases require the approval of OCRS, and relevant forfeitures will be reviewed as part of that process.

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[325](...continued)
agreement to forfeit the proceeds of his offense allows the Government to seek the forfeiture of substitute assets pursuant to Rule 32.2(e) and section 853(p), unless the right to do so is expressly waived).

[326] See, e.g., United States v. Silvious, 512 F.3d 364, 369-70 (7th Cir. 2008) (defendant pleads guilty to mail fraud but contests the forfeiture at sentencing on the ground that the Government cited the wrong forfeiture statute in the indictment); United States v. Iacaboni, 363 F.3d 1, 2-3 (1st Cir. 2004) (noting that defendant pled guilty to money laundering and requested bench trial on the forfeiture); United States v. Wallace, 389 F.3d 483 (5th Cir. 2004) (same); United States v. Cunningham, 201 F.3d 20, 23-25 (1st Cir. 2000) (because forfeiture is part of the sentence and not part of the criminal offense, a defendant may plead guilty to the offense and reserve the right to contest the forfeiture).

[327] See, e.g., United States v. Collins, 503 F.3d 616, 618 (7th Cir. 2007) (the district court retains jurisdiction to find defendant in breach of his plea agreement to forfeit property no matter how much time has passed since the plea was entered); United States v. Caldwell, 88 F.3d 522, 526 (8th Cir. 1996) (if defendant withdraws guilty plea, his agreement to the criminal forfeiture is void).

[328] See, e.g., United States v. Imadu, 2007 WL 295515, at *2 (M.D. Fla. Jan. 30, 2007) (district court declines to accept plea to charge that does not adequately reflect the actual conduct; that defendant agreed to forfeit $300,000 is not a sufficient reason to accept the plea).

c. Sentencing and the Preliminary Order of Forfeiture

Once the forfeiture nexus is established (whether by judge or jury), Rule 32.2(b)(2) requires that the court "must promptly enter a preliminary order of forfeiture."[329] The preliminary order should set forth the property to be forfeited, including the specific amount of any pertinent money judgment. Notably, the preliminary order of forfeiture is to be entered without regard to any third-party claimant's interest. Rather, pursuant to Rule 32.2(b)(3), the preliminary order of forfeiture should expressly authorize the United States to seize the specific property subject to forfeiture; to conduct any discovery to identify, locate, or dispose of the property; and to effect publication and notice of the preliminary order of forfeiture in order that third parties may submit claims to forfeited assets. Any such claims are addressed in subsequent ancillary proceedings governed by 18 U.S.C. § 1963(l) and Rule 32.2(c), as discussed in Section IV(D)(11) below.

Most critically, the order of forfeiture becomes final as to the defendant at sentencing, and thus it **must be made part of the sentence and included in the judgment**. See Rule 32.2(b)(3). It is essential that – as with any other element of the defendant's punishment – forfeiture be addressed at sentencing because, otherwise, the forfeiture can be precluded.

If a defendant appeals a conviction or the forfeiture, Rule 32.2(d) provides that the court may stay the order under any terms that will ensure the property remains available pending appellate review. That rule also expressly states that such a stay will not delay any ancillary proceedings on third-party claims.

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[329] See, e.g., United States v. Iacaboni, 239 F. Supp. 2d 119, 120 (D. Mass. 2002) (one-line order directing defendant to forfeit certain property that the district court issued at the conclusion of the criminal trial may or may not satisfy the requirements of Rule 32.2(b)(2); the better practice is to issue a formal preliminary order of forfeiture), aff'd, 363 F.3d 1 (1st Cir. 2004).

9. Burden of Proof

In Libretti v. United States, 516 U.S. 29 (1995), the Supreme Court held that the forfeiture penalties provided pursuant to 21 U.S.C. § 853 were elements of the sentence and were not elements of the drug offense to which the defendant pled guilty. The Supreme Court also held that: (1) Rule 11(f), Fed. R. Crim. P., which requires the district court to determine a factual basis for a plea of guilty to an offense, does not require a district court to inquire into the factual basis for a stipulated forfeiture of assets embodied in a guilty plea agreement regarding a drug offense;[330] and (2) the right to a jury determination of forfeiture pursuant to Rule 31(e), Fed. R. Crim. P., is statutorily based and is not required by the United States Constitution.

Following Libretti, courts generally have ruled that, because forfeiture is part of the sentence and is not an element of the offense, the burden of proof on the issue of RICO forfeiture is a preponderance of the evidence, which governs other sentencing matters, and not proof beyond a reasonable doubt.[331] However, in United States v. Voigt, 89 F. 3d 1050, 1083-84 (3d Cir. 1996),

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[330] But see Libretti 516 U.S. at 52-55 (Justice Souter's and Justice Ginsburg's concurring opinions suggesting the better practice is to address the issue of forfeiture in the course of the defendant's plea colloquy).

[331] See, e.g., United States v. Gaskin, 364 F.3d 438, 461-62 (2d Cir. 2004) (following Bellomo [infra]); United States v. Bellomo, 176 F.3d 580, 595 (2d Cir. 1999) (following DeFries, Patel, and Rogers [all infra]; because forfeiture is part of sentencing, and fact-finding at sentencing is established by a preponderance of the evidence, the preponderance standard applies to criminal forfeiture); United States v. Dicter, 198 F.3d 1284, 1289 (11th Cir. 1999) (because forfeiture is part of sentencing, preponderance standard applies to all section 853(a) forfeitures); United States v. Garcia-Guizar, 160 F.3d 511, 518 (9th Cir. 1998) (preponderance standard is constitutional because criminal forfeiture is not a separate offense, but only an additional penalty for an offense that was established beyond a reasonable doubt); United States v. Patel, 131 F.3d 1195, 1200 (7th Cir. 1997) (burden of proof in section 853 cases is preponderance of the evidence because criminal forfeiture is part of the sentence under Libretti); United States v. DeFries, 129 F.3d 1293, 1312-13 (D.C. Cir. 1997) (same); United States v. Rogers, 102 F.3d 641, 648 (1st Cir. 1996) (same); United States v. (continued...)

decided after Libretti, the Third Circuit in dictum reaffirmed its pre-Libretti decision in Pellulo, 14 F. 3d at 901-06, that as a matter of statutory construction the proof beyond a reasonable doubt standard applies to RICO forfeiture, even though the Third Circuit went on to hold that the preponderance of the evidence standard applies to money laundering related forfeiture pursuant to 18 U.S.C. § 982(a)(1). In light of this continuing conflict, prosecutors in the Third Circuit should consult with the Organized Crime and Racketeering Section before seeking RICO forfeiture under a standard less than beyond a reasonable doubt.

10. Eighth Amendment Considerations

The Eighth Amendment of the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Supreme Court has held that the Excessive Fines Clause applies to both civil in rem forfeitures and to criminal in personam forfeitures.

In Alexander v. United States, 509 U.S. 544 (1993), the defendant was convicted of tax offenses, 17 substantive obscenity offenses, three RICO offenses and other charges. The evidence

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[331](...continued)
Schlesinger, 396 F. Supp. 2d 267, 271 (E.D.N.Y. 2005) ("it is well-settled in the Second Circuit that once the defendant is convicted of an offense on proof beyond a reasonable doubt, the Government is only required to establish the forfeitability of the property…by a preponderance of the evidence"); United States v. Cianci, 218 F. Supp. 2d 232, 234-35 (D.R.I. 2002) (whether defendant committed a RICO offense must be determined by a jury using the reasonable doubt standard; determining what property is forfeitable because of that offense is for the court to decide by preponderance of the evidence); cf. United States v. Houlihan, 92 F.3d 1271, 1299 n. 33 (1st Cir. 1996) (indicating, without deciding, that the preponderance of the evidence test may apply to RICO forfeitures).

Prior to Libretti, the following courts either ruled or implied that the burden of proof for RICO forfeiture was proof beyond a reasonable doubt: United States v. Pellulo, 14 F.3d 881, 901-06 (3d Cir. 1994); United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987); United States v. Cauble, 706 F. 2d 1322, 1347-48 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Pryba, 674 F. Supp. 1518, 1521 (E.D. Va. 1987).

showed that the defendant had sold adult entertainment materials through 13 retail stores, generating millions of dollars in annual revenues. "As a basis for the obscenity and RICO convictions, the jury determined that four magazines and three video tapes were obscene." Id. at 547. The defendant was sentenced to six years in prison, a $100,000 fine and ordered to pay the cost of prosecution, incarceration, and supervised release. Following the jury's forfeiture verdict, the district court ordered the defendant to forfeit "10 pieces of commercial real estate and 31 current or former businesses, all of which had been used to conduct his racketeering enterprise . . . and almost $9 million in moneys acquired through racketeering activity." Id. at 548.

The defendant argued that this forfeiture order, considered with his six year prison sentence and $100,000 fine, was disproportionate to the gravity of his offense and therefore violated the Eighth Amendment, either as "cruel and unusual punishment" or as an "excessive fine." The Supreme Court held that the "in personam criminal forfeiture" was analogous to a fine and therefore the forfeiture "should be analyzed under the Excessive Fines Clause" of the Eighth Amendment, and not under the Cruel and Unusual Punishment Clause. Id. at 558-59. The Supreme Court remanded to the Eighth Circuit the issue whether the forfeiture at issue constituted an "excessive fine" under the Eighth Amendment, but did not articulate a comprehensive standard to govern the lower court's decision in that regard. However, the Court stated that:

> It is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question of whether or not the forfeiture was "excessive" must be considered.

Id. at 559. In a related case, United States v. Austin, 509 U.S. 602 (1993), decided the same day as Alexander, the Supreme Court held that the Eighth Amendment's Excessive Fines Clause applied to a civil in rem forfeiture of a mobile home and auto body shop that were used to facilitate drug

transactions under 21 U.S.C. § 881(a)(4) and (a)(7). The Court indicated that a forfeiture which "serves solely a remedial purpose" does not constitute punishment within the coverage of the Eighth Amendment, but that since the forfeiture at issue included a punitive purpose to punish those involved in drug trafficking and was not solely remedial, the Eighth Amendment applied. Id. at 619-22.[332] The Supreme Court explicitly declined to adopt a particular test to determine whether a civil forfeiture violates the Excessive Fines Clause of the Eighth Amendment, but instead remanded the case to the lower court to formulate an appropriate standard. Id. at 622.[333]

Thereafter, in United States v. Bajakajian, 524 U.S. 321 (1998), the Supreme Court held that the forfeiture of $357,144, with which the defendant was attempting to leave the United States without reporting as required by 31 U.S.C. § 5316(a)(1)(h), upon his conviction for violating the

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[332] However, the Court stated that "the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society." Austin, 509 U.S. at 621. The Court also stated that it had previously "upheld the forfeiture of goods involved in customs violations as 'a reasonable form of liquidated damages.'" Id. (citation omitted). The Court indicated that such forfeiture is remedial, and hence not punishment, insofar as it correlates to "damages sustained by society or to the cost of enforcing the law." Id. (citation omitted).

[333] In his concurring opinion in Austin, Justice Scalia indicated that the excessiveness analysis for a civil in rem forfeiture may be different from that applicable to monetary fines and criminal in personam forfeitures. Id. at 627. Justice Scalia stated that the sole measure of whether an in rem forfeiture was excessive in violation of the Eighth Amendment should be the relationship between the forfeited property and the offense. Id. at 627-28. Justice Scalia stated, in relevant part, that:

> Unlike monetary fines, statutory **in rem** forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been "tainted" by unlawful use, to which issue the value of the property is irrelevant . . . . The question is not how much the confiscated property is worth, but whether the confiscated property has a close relationship to the offense.

Id. at 627-28 (emphasis added).

reporting requirement was "grossly disproportionate to the gravity of [the] defendant's offense" and constituted an excessive fine in violation of the Eighth Amendment. Id. at 334. The Supreme Court explained that the lower courts "must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." Id. at 336-37.

In applying this standard and concluding that the forfeiture was unconstitutional, the Supreme Court found it significant that: (1) the defendant's violation was unrelated to any other illegal activities [and] "[t]he money was the proceeds of legal activity and was to be used to repay a lawful debt"; (2) the maximum sentence that could have been imposed under the Sentencing Guidelines was six months imprisonment and a $5,000 fine; and (3) the harm that the defendant caused was "minimal"; there was no fraud or loss to the government. Id. at 338-39.[334]

In the wake of these Supreme Court decisions, lower courts have drawn certain distinctions between the forfeiture of certain types of property in developing appropriate Eighth Amendment standards. These various approaches, which encompass both criminal and civil forfeiture law, are summarized as follows.

First, federal courts of appeals have repeatedly held in both criminal and civil forfeiture cases that forfeiture of unlawfully obtained proceeds (as distinguished from forfeiture of lawfully obtained property used in, or to facilitate, a crime) merely deprives the wrongdoer of his unlawful gains to

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[334] However, the Supreme Court distinguished "traditional civil in rem forfeitures that . . . were historically considered nonpunitive," and hence are "outside the domain of the Excessive Fines Clause." 524 U.S. at 330-31. The Court explained that such civil in rem forfeitures that do not implicate the Excessive Fines Clause include: (1) forfeiture directed at the "guilty property" itself, wholly unaffected by any in personam criminal proceeding; (2) "forfeiture of goods imported in violation of customs laws" id. at 330-31; and (3) 'Instrumentality' forfeitures . . . limited to the property actually used to commit an offense." Id. at 333 n.8.

which he has no right, and therefore such proceeds forfeiture can never constitute punishment or an excessive fine within the meaning of the Eighth Amendment. This principle and its wide acceptance were noted in United States v. Real Prop. Located at 22 Santa Barbara Dr., 264 F.3d 860 (9th Cir. 2001), where the court stated that

> [f]orfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity' [and hence] . . . criminal proceeds represent the paradigmatic example of "guilty property," the forfeiture of which has been traditionally regarded as non-punitive, we follow the Seventh, Eighth, and Tenth Circuits and hold that the excessive fines clause of the Eighth Amendment does not apply to [such forfeiture of crime proceeds].

Id. at 874-75 (first alteration in original; citations omitted).[335]

With regard to forfeiture of other assets such as facilitating property, the courts have applied Bajakajian through various Eighth Amendment tests in the course of both criminal and civil forfeiture. For example, some cases use the Sentencing Guidelines or the maximum statutory fine (or both) to measure the gravity of the offense.[336] Some courts incorporate various other factors into

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[335] Accord United States v. Candelaria-Silva, 166 F.3d 19, 44 (1st Cir. 1999); United States v. One Parcel of Real Property Described as Lot 41, Berryhill Farm Estates, 128 F.3d 1386, 1395 (10th Cir. 1997); United States v. Alexander, 108 F.3d 853, 855, 858 (8th Cir. 1997); Smith v. United States, 76 F.3d 879, 882 (7th Cir. 1996); United States v. $21,282.00 in U.S. Currency, 47 F.3d 972, 973 (8th Cir. 1995); United States v. Wild, 47 F.3d 669, 674 n.11 (4th Cir. 1995); United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994); United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994); United States v. Horak, 833 F.2d 1235, 1246 n.4 (7th Cir. 1987) (dictum); United States v. $288,930.00 in U.S. Currency, 838 F. Supp. 367, 370 (N.D. Ill. 1993). Cf. United States v. Loe, 248 F.3d 449, 464 (5th Cir. 2001) ("The court ordered [the defendant] to forfeit only so much of the property as was purchased with illegally obtained funds – money that she had no right to in the first place"), cert. denied, 534 U.S. 974 (2001).

[336] See, e.g., United States v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005) (forfeiture of a $900,000 residence does not violate the Excessive Fines Clause where the maximum fine under the applicable statute and Sentencing Guidelines was more than six times that amount; the sentimental value of the property does not factor into the Eighth Amendment analysis); United States v. One (continued...)

the analysis, such as the loss or harm to the victim, the value of drugs sold, the nexus of the property to the offense, or the duration and nature of the offense.[337] And courts have held that the nature of

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[336](...continued)
Parcel…45 Claremont St., 395 F.3d 1, 6 (1st Cir. 2004) (forfeiture of family home where defendant's wife and children reside not grossly disproportional to drug offense measured by value of drugs sold and maximum statutory term of imprisonment and fine); United States v. Bernitt, 392 F.3d 873, 880-81 (7th Cir. 2004) (forfeiture of defendant's farm, worth $115,000, was not grossly disproportional to the gravity of the offense of manufacturing marijuana, which carries a maximum statutory sentence of 40 years and a $2 million fine); United States v. $100,348.00 in U.S. Currency, 354 F.3d 1110, 1122 (9th Cir. 2004) ("the maximum penalties under the Sentencing Guidelines should be given greater weight than the statutory maximum because the Guidelines take into account the specific culpability of the offender"); United States v. Carpenter, 317 F.3d 618, 627-28 (6th Cir. 2003) (court should compare the value of the property not to the street value of the drugs actually confiscated on the property, but to the scope and sophistication of the entire drug operation; court may also look to the maximum fine as one factor in determining the gravity of the offense; forfeiture that is within the range specified by the Sentencing Guidelines—when the fines that could have been imposed on each codefendant are added together—is not grossly disproportional to the offense); *aff'd en banc*, 360 F.3d 591 (6th Cir. 2004); United States v. Riedl, 82 Fed. Appx. 538, 540 (9th Cir. 2003) (forfeiture 12 times the prescribed guidelines fine but within the aggregate statutory fine for five money laundering offenses was not excessive); United States v. Moyer, 313 F.3d 1082, 1086-87 (8th Cir. 2002) (forfeiture of amount laundered in money laundering case almost certainly not excessive if it is only half of the maximum fine that could have been imposed under the sentencing guidelines); United States v. Sherman, 262 F.3d 784, 795 (8th Cir. 2001) (forfeiture of residence not excessive where value of house [$750,000] was less than the maximum fine under the sentencing guidelines; following Wilton Manors [infra]); United States v. 817 N.E. 29th Drive, Wilton Manors, 175 F.3d 1304, 1309-10 (11th Cir. 1999) (if the value of the property is less than the maximum statutory fine, a "strong presumption" arises that the forfeiture is constitutional; if the value of the property is within or near the permissible range of fines under the Sentencing Guidelines, the forfeiture "almost certainly" is nonexcessive).

[337] See, e.g., Von Hofe v. United States, 492 F.3d 175, 182 (2d Cir. 2007) (establishing a 3-part test including: 1) the seriousness of the crime, measured by the punishments available and other factors, 2) the nexus between the property and the offense, including the deliberate nature of the use and temporal and spatial extent of the use, and 3) the culpability of each claimant); United States v. Ortiz-Cintron, 461 F.3d 78 (1st Cir. 2006) (forfeiture of a defendant's $33,000 in equity in a residence used to facilitate a drug offense is not excessive where the maximum fine for the offense was much larger than the equity, and where the "expansive forfeiture statute" clearly indicates that Congress considered the offense to be very serious); United States v. Dodge Caravan Grand SE/Sport Van, 387 F.3d 758, 764 (8th Cir. 2004) (remanding to the district court to consider not only the value of the property compared to the maximum fine under the sentencing guidelines, but to consider more than a dozen other factors as well); United States v. Collado, 348 F.3d 323, 328 (2d Cir. 2003) (considering the "essence of the crime" and its relation to other criminal conduct, whether claimant

(continued...)

the property and the personal circumstances of the property owner should be irrelevant.[338] The same is true with respect to third-party claimants -- courts have held that the culpability of the claimant is irrelevant, and that the forfeiture is measured against the gravity of the crime, not the gravity of the claimant's role in the crime.[339] Other courts consider the culpability of the claimant to be one of the factors in the Eighth Amendment analysis,[340] but even if the third party's culpability is taken

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[337](...continued)
fit the class of persons for whom the statute was designed, the maximum sentence and fine, and the nature of the harm caused); Moyer, 313 F.3d at 1086 (even if harm to the victim were the appropriate measure of the gravity of the offense, forfeiture of an amount equal to twice the victim's loss is not grossly disproportional); United States v. DeGregory, 480 F. Supp. 2d 1302, 1304-05 (S.D. Fla. 2006) (forfeiture of two airplanes with combined value of $150,000 not excessive either in terms of the maximum fine or the nature of the offense: importation of radioactive iridium); United States v. One 1998 Tractor, 288 F. Supp. 2d 710, 715 (W.D. Va. 2003) (forfeiture of truck used to transport contraband cigarettes not excessive; the offense was more serious than Bajakajian's reporting offense because it involved affirmative acts rather than a single omission and created more harm than a reporting offense by depriving the Government of tax revenue).

[338] See, e.g., Wilton Manors, 175 F.3d at 1311 (the personal characteristics of the owner, the character of his/her property, and the value of any remaining assets are irrelevant); United States v. Dicter, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) (forfeiture of a medical license is not unconstitutionally excessive; the personal impact of the forfeiture on a specific defendant is not one of the factors the court considers in determining if a forfeiture is excessive under Bajakajian).

[339] See, e.g., United States v. One Parcel…10380 SW 28th Street, 214 F.3d 1291, 1295 (11th Cir. 2000) (forfeiture of residence worth $119,000 not excessive when compared to maximum statutory fine of $4 million; comparison is to the gravity of the wrongdoer's offense, not to the conduct of the claimant-spouse); United States v. Lot Numbered One of the Lavaland Annex, 256 F.3d 949, 958 (10th Cir. 2001) (the measure of the gravity of the offense for purposes of the application of the Excessive Fines Clause is not the culpability of the third party owner of the property, but the seriousness of the crime that gave rise to the forfeiture in the first place).

[340] See, e.g., Von Hofe, 492 F.3d at 186-189 (the purpose of forfeiting a third party's interest is to punish the third party for allowing her property to be used illegally; therefore, when the forfeiture is directed at the third party's interest, the comparison between the forfeiture and the "gravity of the offense" must focus on the third party's role in the offense, not on the offense itself; forfeiture of a non-innocent spouse's one-half interest in the family home would be excessive because the spouse's only offense was to turn a blind eye to her husband's marijuana growing activity).

into account, the forfeiture of the third party's interests will not be excessive if the third party played more than a minimal role in the offense.[341]

In RICO cases, courts have not hesitated to impose substantial forfeitures over Eighth Amendment objections.[342] Such cases are consistent both with RICO's statutory scheme and Congress' clear intent that RICO forfeitures be applied broadly.

11. Ancillary Claims Proceedings

Section 1963(l) (which is lower case "L" of this provision) establishes the post-conviction procedures known as the "ancillary claims process," under which third parties may assert claims to forfeited property. Rule 32.2, Fed. R. Crim. P. augments § 1963(l) regarding these processes. While the complexities of ancillary claims litigation is beyond the scope of this Manual, the general procedures are summarized as follows.

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[341] See, e.g., Collado, 348 F.3d at 328 (forfeiture of grocery store owned by drug dealer's mother did not violate the Excessive Fines Clause where mother helped shield son from the law); distinguished in Von Hofe, 492 F.3d at 188-89; United States v. One Parcel…45 Claremont St., 395 F.3d 1, 6 (1st Cir. 2004) (taking third party's personal participation in setting up drug deals into account in holding that forfeiture of her interest did not violate the Eighth Amendment).

[342] See, e.g., Segal, 495 F.3d 826, 840 (7th Cir. 2007) (forfeiture of defendant's entire interest in the RICO enterprise, including portion untainted by the criminal activity, was not excessive in light of the massive, long-running scheme involving millions of dollars); United States v. Najjar, 300 F.3d 466, 486 (4th Cir. 2002) (forfeiture of entire business and all of its assets under RICO was not excessive where the business was "conceived in crime and performed little or no legitimate business activity"); United States v. Hosseini, 504 F. Supp. 2d 376, 381 (N.D. Ill. 2007) (forfeiture of defendant's entire interest in his car dealership was not disproportional to his offense, even though he conducted some legitimate business, where the use of the business to sell cars to drug dealers was a serious offense that "thoroughly tainted" the business over a long period of time).

Under the provisions of Section 1963(l)(1)-(3), following the entry of a preliminary order of forfeiture and the seizure of the forfeited property, the Government must publish a public notice of the order of forfeiture and of its intent to dispose of the property.[343] The Government may also, to the extent practicable, provide direct written notice to any third parties known to have an interest in the forfeited property.[344] Within thirty days after the last publication of notice or actual receipt of notice, any party other than the defendant may petition the court for a hearing to determine the validity of his or her interest in the property.[345] There is no particular format for the petition, but it must be signed by the petitioner (not counsel) under penalty of perjury and it must set forth the "nature and extent of the petitioner's right, title, or interest in the property."[346] No hearing is necessary if the court can dismiss the claim on the pleadings for lack of standing or failure to state a claim.[347] Untimely and defective claims may also be dismissed without a hearing.[348]

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[343] 18 U.S.C. § 1963(l)(1).

[344] See, e.g., United States v. Gilbert, 244 F.3d 888, 910 (11th Cir. 2001) (Government's obligation to give constructive notice through publication, and preferably direct notice to known third parties, is a "vital requirement" because rights of third parties who do not file claims are automatically extinguished).

[345] 18 U.S.C. § 1963(l)(2).

[346] 18 U.S.C. § 1963(l)(3); see, e.g., United States v. Speed Joyeros, S.A., 410 F. Supp. 2d 121, 124 (E.D.N.Y. 2006) (petition filed by counsel and verified by a CPA but not by the petitioners themselves does not comply with section 853(n)(3) [identical to § 1963(l)(3)]; the "substantial danger of false claims in forfeiture proceedings" requires strict compliance with the requirement that the claimant sign the petition personally under penalty of perjury); United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Richard Eline), 916 F. Supp. 1286, 1289 (D.D.C. 1996)(a petition containing random legal phrases and a blanket statement that $6 million belongs to the claimant did not state a proper claim and may be dismissed).

[347] See Fed. R. Crim. P. 32.2(c)(1)(a); see, e.g., United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of General Creditors), 919 F. Supp. 31, 36 (D.D.C. 1996)(holding that court may dismiss the petition if the party failed to allege all elements necessary for recovery, (continued...)

Ancillary claims proceedings are essentially civil in nature and, before the adoption of Rule 32.2, courts generally conducted such proceedings under the Federal Rules of Civil Procedure.[349] Rule 32.2 now expressly provides for the use of those rules.[350] If a hearing is necessary, it should be held within thirty days of the filing of the petition if practicable.[351] The court may hold a consolidated hearing to resolve all or several petitions arising out of a single case or a single related issue. At the hearing, both the petitioner and the United States may present evidence and witnesses, and cross-examine witnesses who appear. The court may also consider relevant portions of the

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(...continued)
including those related to standing).

[348] See United States v. BCCI Holdings (Luxembourg) S.A. (Petition of B. Gray Gibbs), 916 F. Supp. 1270 (D.D.C. 1996)(dismissing claim as untimely under Section 1962(l)(2)); United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Richard Eline), 916 F. Supp. 1286, 1289 (D.D.C. 1996)(dismissing claim for failure to set forth nature and extent of legal interest as required by Section 1963(l)(3)). But see United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Indozuez Bank), 916 F. Supp. 1276, 1284-85 (D.D.C. 1996)(court may "equitably toll" time for filing claim if claimant demonstrates due diligence).

[349] See, e.g., United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d 36, 54 (D.D.C. 1999) (because the ancillary proceeding is essentially civil in nature, the court applies Fed. R. Civ. P. 12 and 56 to allow dispositive motions, permits civil discovery, and follows Rule 54(b) to allow appeals by third parties from denial of claims);

[350] See Fed. R. Crim. P. 32.2(c)(1)(B).

[351] 18 U.S.C. § 1963(l)(4); see, e.g., BCCI Holdings (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d at 54 (where there are multiple third party claims and resolving them all in 30 days is impractical, court orders the Government to group claims into categories and file dispositive motions against categories of claims addressing issues common to most claims first and leaving esoteric issues to later); United States v. Kramer, 912 F.2d 1257, 1260-61 (11th Cir. 1990)(error for district court not to hold a hearing within statutory thirty-day period or a reasonable time thereafter; court cannot continue restraint on property ad infinitum without a showing of necessity).

criminal trial record.[352]

In order to prevail, the petitioner, who has the burden of proof, must establish by a preponderance of the evidence either: (1) that he had a legal right, title, or an interest in the property[353] superior to the defendant's interest at the time of the acts giving rise to the forfeiture;[354] or (2) that he is a bona fide purchaser for value of the property and at the time of the purchase did not know that the property was subject to forfeiture.[355] If, after the hearing, the court determines that the petitioner has a legal right or interest in the property that renders the order of forfeiture invalid in whole or in part, the court will amend the order of forfeiture in accordance with its

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[352] 18 U.S.C. § 1963(l)(5); see, e.g., United States v. Morgan, 224 F.3d 339, 345 (4th Cir. 2000) (in conducting the ancillary proceeding, district court properly considered the evidence and testimony presented in the criminal trial and the jury's verdict, as well as the petition filed in the ancillary proceeding, the Government's response, and the evidence presented in the hearing); United States v. Cohen, 243 Fed. Appx. 531, 533-34 (11th Cir. 2007) (pursuant to section 853(n)(5), the district court was entitled to consider the testimony of a witness who gave evidence in the forfeiture phase of the trial, even though the claimant had no opportunity to cross-examine the witness at that time; there is no due process violation because claimant could have called the witness herself in the ancillary proceeding).

[353] The court must look to state property law to determine the nature of the claimant's legal interest. See United States v. Infelise, 938 F. Supp. 1352, 1357 (N.D. Ill. 1996)(state law determined whether the defendant's wife and children have a superior interest to the government based upon express oral trust); United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank), 941 F. Supp. 180, 189 (D.D.C. 1996)(court looks to state banking law to determine whether claimant bank has a legal interest in defendant-depositor property under right of set-off).

[354] Nominal ownership is not sufficient to establish a superior interest. See United States v. Infelise, 938 F. Supp. 1352, 1368-69 (N.D. Ill. 1996)(defendant's wife and mother-in-law were straw owners who were unable to establish a superior legal interest under Section 1963(l)(6)(A)).

[355] 18 U.S.C. § 1963(l)(6). See also United States v. Mageean, 649 F. Supp. 820, 822-24 (D. Nev. 1986) (tort claimants from airplane crash lacked any interest in forfeited plane, but creditors had interest under Section 1963(l)); see also United States v. Reckmeyer, 628 F. Supp. 616, 621-23 (E.D. Va. 1986) (in CCE forfeiture, court construed provisions liberally and awarded some assets to third parties claiming good faith lack of knowledge of criminal activity when defendant's entire estate was forfeited).

determination.[356]

The standards of Section 1963(l)(6) for prevailing in the criminal ancillary claims process are substantially higher than those for civil forfeiture claimants. First, unlike civil forfeiture's lesser standing requirements which permit claimants to assert equitable claims,[357] criminal forfeiture claimants must demonstrate a legal right, title, or interest in the forfeited property. Second, a claimant who acquired ownership of forfeitable property after the property was tainted by the defendant's crime must show both that 1) the claimant is a "bona fide purchaser for value" of the property, and 2) at the time of purchase, the claimant had no knowledge of the property's forfeitability – in other words, the claimant must have acquired the property through a commercially reasonable, arms-length transaction.

For many years after the enactment of the criminal forfeiture statutes, these claims provisions were subject to various interpretations. However, in 1991, the United States filed RICO charges against the Bank of Credit and Commerce International, S.A. ("BCCI") and its officers for offenses in the United States relating to the bank's fraudulent international activities. Pursuant to a plea agreement, BCCI agreed to forfeit all of its assets in the United States, which initially totaled approximately $347 million. Approximately 77 claimants immediately filed over $1 billion in claims to the forfeited assets under Section 1963(l). Several subsequent rounds of forfeiture eventually totaled approximately $1.2 billion in forfeited assets, with 175 claims ultimately filed.

Given the enormity of the forfeiture claims and complexity of the legal issues involved, the

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[356] See Fed. R. Crim. P. 32(c)(2).

[357] See United States v. A Parcel of Land Known as 92 Buena Vista Ave., 507 U.S. 111, 124 (1993) (mere donees have standing to assert innocent owner defense).

BCCI ancillary claims process became, as the trial court later described in entering its final order of forfeiture, "a crucible for modern forfeiture law."[358] In over 40 published decisions, the trial court reconciled earlier ancillary claims decisions under RICO and related statutes and established numerous precedents in forfeiture proceedings.

Notably, none of the trial court's decisions was disturbed on appeal. One BCCI appellate case, which actually extended the trial court's holding, involved three petitions – two from persons claiming to represent a class of worldwide depositors and one from a person appointed by Sierra Leone as conservator over BCCI's affairs in that country.[359] All three petitioners alleged that they had a right superior to the government's based on a constructive trust theory; the class petitioners alleged that they had superior rights based upon their status as general creditors. The District of Columbia Circuit held that while third parties could assert equitable as well as legal interests in the property, a constructive trust, a legal fiction imposed by a court, could not be used to defeat the government's forfeiture claim.[360] The court further held that a general creditor "can never have an interest in specific forfeited property, no matter what the relative size of his claim vis-a-vis the value of the defendant's post-forfeiture estate."[361] Finally, sustaining several of the trial court's related

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[358] See United States v. BCCI Holdings (Luxembourg) S.A. et al., 69 F. Supp. 2d 36, 43 (D.D.C. 1999).

[359] United States v. BCCI Holdings (Luxembourg), S.A., 46 F.3d 1185, 1190 (D.C. Cir.), cert. denied, 515 U.S. 1160 (1995).

[360] BCCI Holdings, 46 F.3d at 1190-91. But see United States v. Schwimmer, 968 F.2d 1570, 1581-83 (2d Cir. 1992)(applying Section 1963(l)(6)(A) to constructive trusts, but finding that a constructive trust theory did not warrant remission because the trial court could not trace the assets ordered forfeited into the trust).

[361] BCCI Holdings, 46 F.3d at 1191; see also United States v. BCCI Holdings (Luxembourg), (continued...)

holdings, the appellate court held that a general creditor is not a bona fide purchaser for value and lacks standing.

While various BCCI ancillary claims cases are cited throughout this Manual for specific holdings relative to the forfeiture process, the trial court's final opinion in the case, United States v. BCCI Holdings (Luxembourg) S.A. et al. (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d 36 (D.D.C. 1999), serves both as an excellent guide to the criminal forfeiture claims process and as an index to the case's various decisions. Prosecutors who anticipate forfeiture claims in criminal cases, particularly in complex prosecutions, will find the court's final opinion especially helpful in planning case forfeiture strategies.

Following a court's disposition of all petitions filed under Section 1963(l), the United States has clear title to the forfeited property and may warrant good title to any subsequent purchaser or transferee. The Attorney General may direct the disposition of the property by sale or any other commercially feasible means. Neither the defendant nor any person acting in concert with or on his behalf is eligible to purchase the forfeited property. See 18 U.S.C. § 1963(f).

12. The Relation-Back Doctrine

Section 1963(c) provides that

> [a]ll right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant

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[361](...continued)
S.A. (Petition of General Secretariate of the Organization of American States), 73 F.3d 403, 405-06 (D.C. Cir.)(holding that bank depositors were general creditors who had no particular interest in assets ordered forfeited, unless the depositors could establish that they had a secured judgment against the debtor and a perfected lien against a particular item), cert. denied, 117 S. Ct. 50 (1996).

> to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

This section is known as the "relation back" doctrine, under which the Government's interest "relates back" to the time of the underlying offense that results in forfeiture. Historically, the government occasionally relied on identical provisions in civil forfeiture statutes to seek dismissal of civil forfeiture claims by arguing that such claimants had no standing because the government already "owned" the property by operation of the relation back doctrine. This practice was put to rest by the Supreme Court in United States v. A Parcel of Land Known as 92 Buena Vista, 507 U.S. 111 (1993), which held that the relation back doctrine takes effect only after forfeiture is awarded to the government but that, once the Government obtains title to the property through forfeiture, that title is deemed to relate back to the date of the criminal acts that gave rise to forfeiture.

The relation back doctrine can serve to defeat attempts by a defendant to defeat or avoid forfeiture through the transfer of forfeitable property to third parties. Because 18 U.S.C. § 1963(i) bars third parties from intervening in the criminal trial or filing a lawsuit to assert an interest in forfeitable property, the post-forfeiture ancillary claims procedures of 18 U.S.C. § 1963(l) serve as the only method for claimants to litigate their interests.[362] In those proceedings, as noted in § 1963(c)

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[362] See, e.g., United States v. Bennett, 252 F.3d 559, 563-65 (2d Cir. 2001) (the procedure for recovering criminal proceeds transferred by a defendant to a third party is codified at sections 853(c) and (n)(6)(B) [identical to §§ 1963(c) and (l)(6)(B); the Government forfeits the property in the criminal case, subject to the third party's right to contest the forfeiture in the ancillary proceeding); United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement, 69 F. Supp. 2d 36, 42 ("under section 1963(i), third parties must wait until a preliminary order of forfeiture is entered, and then raise specific challenges to the forfeiture – to the extent that they have legal interests in the forfeited property – by filing petitions pursuant to section 1963(l)"); United States v. BCCI Holdings (Luxembourg) S.A. et al., 46 F.3d 1185, 1190 (D.C. Cir. 1995) ("Congress intended that as far as [the ancillary claims process] is concerned, a third party's (continued...)

above, claimants who obtain property subject to forfeiture after the offense giving rise to forfeiture has occurred must establish that they are bona fide purchasers for value who were reasonably without knowledge of the property's criminal taint. In that context, the relation back doctrine can serve to defeat such claims.[363] In the case of property traceable to forfeitable property, the Government's interest vests when the forfeitable property is converted into a new form.[364]

13. Forfeiture of Attorney's Fees

Property subject to forfeiture pursuant to 18 U.S.C. § 1963(a) can include attorney's fees paid by the RICO defendants. **However, pursuant to Sections 9-119.104 and 9-119.200-203 of the United States Attorneys' Manual and the Criminal Resource Manual § 2304, et seq., "no**

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[362](...continued)
claim is to be measured not as it might appear at the time of litigation, but rather as it existed at the time the illegal acts were committed."); United States v. BCCI Holdings (Luxembourg) S.A. (In re Oppenheimer & Co.), 1992 WL 44321 (D.D.C. February 10,1992) (the RICO forfeiture statute "creates an orderly scheme for the resolution of nonparty claims to forfeited property, and prevents non-parties from disrupting that scheme").

[363] See, e.g., United States v. Lazarenko, 476 F.3d 642, 647 (9th Cir. 2007) (under the relation back doctrine, the Government's interest in the property vests at the time the defendant commits the crime; "otherwise, a defendant could attempt to avoid criminal forfeiture by transferring his property to another party before conviction"); United States v. Totaro, 345 F.3d 989, 996 (8th Cir. 2003) (defendant's attempt to insulate his criminal proceeds from forfeiture by using them to pay off the mortgage on wife's property and make improvements thereto are void under the relation back doctrine; wife is entitled to recover only what she owned before criminal proceeds were invested in her property); United States v. Barnette, 129 F.3d 1179 (11th Cir. 1997) (defendant remained obligated to forfeit value of stock he transferred to his wife to avoid forfeiture); United States v. Johnston, 13 F. Supp. 2d 1316, 1318 (M.D. Fla. 1998) (attempt by defendant's partners to transfer all partnership assets to third party to frustrate the Government's right to forfeit defendant's 25 percent interest was void; the Government's motion to set aside transfer granted).

[364] See, e.g., United States v. Carrie, 206 Fed. Appx. 920, 922-23 (11th Cir. 2006) (claimant used drug proceeds to acquire a liquor license; because Government's interest in the proceeds had already vested, its interest in the liquor license vested as soon as defendant acquired it).

criminal or civil forfeiture proceeding may be instituted to forfeit an asset transferred to an attorney as fees for legal services without the prior approval of the Assistant Attorney General, Criminal Division." These provisions also set forth procedures and policies governing such forfeiture proceedings that must be followed. See also USAM § 9-113.600 ("Any agreement to exempt an asset from forfeiture so that it can be transferred to an attorney as fees must be approved by the Assistant Attorney General for the Criminal Division.")

In United States v. Monsanto, 491 U.S. 600 (1989) and Caplan & Drysdale v. United States, 491 U.S. 617 (1989), the Supreme Court held that there was no exemption from 21 U.S.C. § 853's forfeiture or pretrial restraining order provisions for assets that a defendant wishes to use to retain an attorney, and that such restraining orders and forfeiture did not violate a defendant's Sixth Amendment right to counsel or the Fifth Amendment guarantee of due process.[365]

To be sure, forfeiture of attorney's fees is a sensitive matter. In one noteworthy case, a defendant paid over $100,000 in attorney fees with money found to constitute drug proceeds that was forfeitable pursuant to 21 U.S.C. § 853. See In re Moffitt, Zwerling & Kemler, P.C., 864 F. Supp. 527 (E.D. Va. 1994). The court found that the law firm accepting the fees did not meet its burden of proving that the firm, when it accepted payment, was without reasonable cause to believe the payments were subject to forfeiture. The firm dissipated most of the payment, however, and the court could not compel the law firm to forfeit substitute assets. Thus, forfeiture was limited to those proceeds that were in the law firm's possession – only $3,695. In a related decision, the Fourth Circuit held that the Government could recover property traceable to the forfeited property but

[365] Pursuant to Criminal Resource Manual § 2084, **all** proposed restraining orders in RICO cases seeking forfeiture of any kind must be approved by the Organized Crime and Racketeering Section. See USAM § 9-2.400 (Prior Approvals Chart).

transferred to a third party and that the Government could conduct discovery to locate the traceable property.[366] See also cases discussed in Section IV(C)(5)(b) above.

Prosecutors are advised to check the latest decisions in their circuits for further development of the law in this area, and to carefully follow the governing guidelines.

[366] See In re Moffitt, Zwerling & Kemler, P.C., 83 F.3d 660, 670-671 (4th Cir. 1996), cert. denied, 519 U.S. 1101 (1997). See also United States v. Friedman, 849 F. 2d 1488, 1490 (D.C. Cir. 1988) (denying request for release of forfeited assets to pay for indigent defendant's attorney to represent him on appeal from his conviction because defendant had no right to have counsel of choice appointed and paid for with Government funds).

V

GUIDELINES FOR THE USE OF RICO AND DRAFTING A RICO INDICTMENT

A. RICO Policy

RICO did not make criminal any conduct not previously a crime. Rather, RICO created new substantive and conspiracy offenses based, in part, on racketeering offenses that were already punishable under existing state and federal statutes. Since RICO encompasses a variety of state and federal offenses that can serve as predicate acts of racketeering, RICO can be used in wide-ranging circumstances. While RICO provides an effective and versatile tool for prosecuting criminal activity, injudicious use of RICO may reduce its impact in cases where it is truly warranted. See n.104 above. For this reason, it is the policy of the Criminal Division that RICO be selectively and uniformly used. In order to ensure uniformity, all RICO criminal and civil actions brought by the United States must receive prior approval from the Organized Crime and Racketeering Section in Washington, D.C., in accordance with the approval guidelines at Section 9-110.100 et seq. of the United States Attorneys' Manual. See Section I(C) above. The guidelines, which are reprinted at Appendix I(A) of this Manual, were drafted with careful consideration to comments received from the Advisory Committee to the United States Attorneys.[367]

Not every case that meets the requirements of a RICO violation will be authorized for prosecution. For example, a RICO count should not be added to a routine mail or wire fraud indictment unless there is sufficient reason for doing so. RICO should be invoked only in those cases where it meets a need or serves a special purpose that would not be met by a non-RICO

[367] Memorandum of the United States Attorneys' Manual Staff, Executive Office for United States Attorneys (January 30, 1981) at 1.

prosecution on the underlying charges. Prosecutors should use discretion in requesting RICO authorization and should seek to include a RICO violation in an indictment only if one or more of the following factors is present:

1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that a prosecution limited to the underlying charges would not;

2. a RICO prosecution would provide the basis for an appropriate sentence under all of the circumstances of the case;

3. a RICO charge could combine related offenses which would otherwise be prosecuted separately in different jurisdictions;

4. RICO is necessary for a successful prosecution of the Government's case against the defendant or a co-defendant;

5. use of RICO would provide a reasonable expectation of forfeiture that is not grossly disproportionate to the underlying criminal conduct;

6. the case consists of violations of state law, but local law enforcement officials are unlikely or unable to successfully prosecute the case in which the federal government has a significant interest; or

7. the case consists of violations of state law but involves prosecution of significant political or government individuals, which may pose special problems for the local prosecutor.

The last two requirements reflect the principle that the prosecution of state crimes is primarily the responsibility of state authorities. RICO should be used to prosecute what are essentially violations of state law only if there is sufficient reason for doing so.

If, after reviewing the case, a prosecutor believes that use of the RICO statute is warranted, a prosecutive memorandum and a copy of the proposed indictment, information, civil or criminal complaint, TRO or preliminary restraining order, or civil investigative demand must be sent to the Organized Crime and Racketeering Section for approval in accordance with the provisions of

Chapter 110 of Title 9 of the United States Attorneys' Manual. See Section I(C) above and Appendix I(A).

B. Drafting a RICO Indictment

1. General Principles Governing Sufficiency of an Indictment

While every indictment must be drafted according to the nature of the individual case, there are certain guidelines that, if followed, will facilitate the RICO review process and ensure a properly drafted indictment. These guidelines were developed from successful prosecutions and are intended to promote effective RICO indictments that, in turn, should promote favorable developments in RICO case law. Sample RICO indictments are available from the OCRS staff.

As a general rule, a count charging either a RICO substantive or conspiracy violation is sufficient when it: (1) tracks the governing statutory language as to all the essential elements of the charged offenses, "(2) 'fairly informs a defendant of the charge against which he must defend' and (3) 'enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" United States v. Titterington, 374 F.3d 453, 456 (6th Cir. 2004), (quoting Hamling v. United States, 418 U.S. 87, 117 (1974)).[368] Accordingly, it is not necessary to allege evidentiary

[368] Accord Fernandez, 388 F.3d at 1217-18; Cianci, 378 F.3d at 81; Torres, 191 F.3d at 805; Nabors, 45 F.3d at 239-40; Blinder, 10 F.3d at 1471; Glecier, 923 F.2d at 499-500; United States v. Mitchell, 777 F.2d 248, 259 (5th Cir. 1985); Diecidue, 603 F.2d at 546-47; United States v. Cuong Gia Lee, 310 F. Supp. 2d 763, 772 (E.D. Va. 2004); United States v. Triumph Capital Group, Inc., 260 F. Supp. 2d 444, 448 (D. Conn. 2002); United States v. Ganim, 225 F. Supp. 2d 145, 149 (D. Conn. 2002). See also Rule 7(c), Fed.R.Crim.P.

details,[369] or negate exceptions or defenses to the charged offense.[370]

2. Drafting a RICO Substantive Count

a. Alleging the Racketeering Violation

A substantive RICO count should include a paragraph under the heading "Racketeering Violation," preferably in the beginning portion of the count, that identifies all the defendants charged with the substantive RICO count and briefly tracks RICO's statutory language as to all the requisite elements.[371] Greater details should be included in subsequent paragraphs, as appropriate.

b. Alleging the RICO Enterprise

The substantive RICO count should also include a separate paragraph or paragraphs, under the heading "The Enterprise," that clearly describes the alleged enterprise. Although it is not necessary to specify whether the enterprise is a legal entity or an association-in-fact,[372] it is preferable to do so. When the enterprise is an association-in-fact, the "enterprise" allegations should:

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[369] See, e.g., Nabors, 45 F.3d at 240-41; Cauble, 706 F.2d at 1334; Diecidue, 603 F.2d at 547.

[370] See, e.g., Titterington, 374 F.3d at 456 (collecting cases).

[371] For example:

> In or about January 1, 2000 to January 1, 2008, in the District of Columbia and elsewhere, the defendants A, B, and C, being persons employed by and associated with an enterprise, as described more fully in paragraph _____ below, which enterprise was engaged in, and the activities of which affected, interstate and foreign commerce, did unlawfully and knowingly conduct and participate, directly and indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity, as set forth in paragraphs _____ below.

See, e.g., Cianci, 378 F.3d at 79-80.

[372] See cases cited in n.105 above.

(1) clearly identify all the known components of the enterprise that the prosecutor intends to prove at trial;[373] (2) specify the principal shared purposes or objectives of the enterprise, and (3) set forth the principal means and methods members of the enterprise used to achieve those objectives.

Moreover, although the Government must prove that the enterprise had an ongoing organization and that its members functioned as a continuing unit in order to establish an association-in-fact enterprise (see Section II(D)(4) above), courts in criminal cases have held that such matters themselves are not elements of the offense; rather, they are evidentiary details to be proven at trial, and need not be specifically alleged in the indictment.[374] **However, it is the policy of OCRS to include such allegations in the RICO count**.

Likewise, although the Government must prove that each defendant participated in the operation or management of the enterprise within the meaning of Reves, 507 U.S. 170, and its progeny (see Section III (C)(5) above), courts in criminal cases have held that such matters are evidentiary details to be proven at trial, and need not be specifically alleged in the indictment.[375] **However, it is the policy of OCRS that such allegations be included in the indictment as well as allegations, under a heading "Roles of the Defendants," that specify the defendants'**

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[373] In appropriate circumstances, it is permissible to allege that the enterprise included "others known and unknown." See, e.g., Nabors, 45 F.3d at 240.

[374] See, e.g., Nabors, 45 F.3d at 240-41; United States v. Urso, 369 F. Supp. 2d 254, 260 (E.D.N.Y. 2005); Triumph Capital Group, Inc., 260 F. Supp. 2d at 454-55; Ganim, 225 F. Supp. 2d at 161-62; cf. Cianci, 378 F.3d at 79-82; Torres, 191 F.3d at 805-06.

[375] See, e.g., Triumph Capital Group, 260 F. Supp. 2d at 455; United States v. Fruchter, 104 F. Supp. 2d 289, 297-98 (S.D.N.Y. 2000); United States v. Elson, 968 F. Supp. 900, 906 (S.D.N.Y. 1997); cf. Mitchell, 777 F.2d at 259 (finding sufficient allegations that the enterprise was "a group of individuals associated in fact, to promote and facilitate the illegal importation and smuggling of multi-ton quantities of marijuana").

principal roles in the enterprise.

c. Alleging the Pattern of Racketeering Activity

If the alleged pattern of racketeering activity in a substantive RICO count consists of offenses that are also alleged in separate counts of the indictment, these counts may be incorporated by reference into the RICO count. See 7(c)(1), Fed. R. Crim. P. ("A count may incorporate by reference an allegation made in another count.").

If the racketeering acts consist of state offenses, or federal offenses that are not incorporated from separate counts, then they must be alleged in the RICO count. In such a case, each racketeering act should be alleged as if it were a separate count of an indictment: i.e., the act should include venue, the date of the offense, the names of the defendants charged with that offense, the elements of the charge against the defendants, and citation to the statutory violation.[376] However, when racketeering offenses in violation of state law are alleged, RICO does not incorporate state pleading requirements unless they are elements of the offense. See cases cited in n.26 above.

Each racketeering act must be distinguished with a number or letter of the alphabet so that the structure of the pattern of racketeering is evident. This also avoids jury confusion. Additionally, if any of the acts of racketeering are divided into sub-parts ("sub-predicated") to solve single episode problems (see Section II(E)(6) above), care should be taken to ensure that the sub-parts are not

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[376] Failure to adequately allege a predicate racketeering act could lead to dismissal of that act. See, e.g., United States v. McDonnell, 696 F. Supp. 356, 358-59 (N.D. Ill. 1988) (dismissing a racketeering act that alleged multiple acts of bribery over a three-year period, which did not name the payors or the cases the bribes were meant to influence); Neopolitan, 791 F.2d at 500-01 (defendant entitled to an indictment that states all elements of charged offense, informs defendant of the nature of the charge so that a defense can be prepared and enables defendant to evaluate double jeopardy concerns). It is also important to consider state defenses that would render the conduct alleged unchargeable as an act of racketeering. See, e.g., United States v. Fiore, 178 F.3d 917, 923 (7th Cir. 1999); United States v. Allen, 155 F.3d 35, 43-44 (2d Cir. 1998).

treated as independent acts of racketeering.[377] The Organized Crime and Racketeering Section will recommend appropriate language to introduce this concept to the jury.

If there are multiple defendants who are not charged with each of the racketeering acts, it is useful, but not required, to incorporate a chart (to follow the RICO count) indicating the acts with which each defendant is charged. The chart may make it easier for the judge and the jury to grasp the nature of the RICO violation.

The scope of the RICO allegations should be confined to the facts of the case, especially with respect to organized crime figures or other persons who may, during the course of their criminal careers, be charged in more than one RICO indictment. This rule is most important in RICO conspiracy counts and in allegations relating to venue and to dates of the RICO offense.

The pattern of racketeering activity should be drafted to allege that it "consists of," rather than "includes," the acts of racketeering to avoid double jeopardy problems in the event a RICO defendant is charged with a subsequent RICO violation,[378] and to clearly indicate the charged predicate acts that may be relied upon to establish the requisite pattern of racketeering activity.[379]

Moreover, although the Government must prove "continuity plus relationship," that is, that the racketeering acts themselves involve, or pose a threat of, long-term racketeering activity, and are related to the alleged enterprise (see Section II(E)(1)-(4) above), such matters themselves are not

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[377] See, e.g., United States v. Kragness, 830 F.2d 842, 860-61 (8th Cir. 1987); see also Section V(C)(2) below.

[378] See Section VI(P)(1) below.

[379] Some courts have held that only acts of racketeering specifically alleged in the RICO count may constitute the requisite minimum two racketeering acts to support a RICO conviction. See, e.g., United States v. Neapolitan, 791 F.2d at 500-01; Cauble, 706 F.2d at 1344.

elements of the offense; rather, they are evidentiary details to be proven at trial and need not be alleged in the indictment.[380] **However, it is the policy of OCRS to at least include allegations that would support an inference of the requisite "continuity plus relationship."** See, e.g., Cuong Gia Lee, 310 F. Supp. 2d at 776-77.

d. Alleging the Requisite Nexus to Interstate or Foreign Commerce

Although the Government must prove that the enterprise was either engaged in, or its activities affected, interstate or foreign commerce (see Section VI(G) below), the indictment need not set forth the details of how such commerce was affected; rather, it is sufficient to track the statutory language, alleging that the enterprise was engaged in, or its activities affected, interstate and/or foreign commerce.[381]

3. Whether to Charge, and Drafting, a RICO Conspiracy Count

a. Whether to Charge a RICO Conspiracy Count

Prosecutors often ask whether it is preferable to charge a Section 1962(c) substantive RICO offense or a Section 1962(d) RICO conspiracy offense, or both. The advantages of charging a RICO conspiracy offense are the advantages associated with general conspiracy prosecutions–-ease of joinder,[382] as well as the fact that district courts will more readily admit coconspirators' statements.[383]

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[380] See, e.g., Torres, 191 F.2d at 806-07; Palumbo Bros., 145 F.3d at 877-78; United States v. Boylan, 898 F.2d 230, 250 (1st Cir. 1990); Urso, 369 F. Supp. 2d at 260; Cuong Gia Lee, 310 F. Supp. 2d at 775; Triumph Capital Group, 260 F. Supp. 2d at 453; cf. United States v. Gordon, 380 F. Supp. 2d 356, 364 (D. Del. 2005).

[381] See, e.g., Fernandez, 388 F.3d at 1217-18; United States v. Doherty, 867 F.2d 47, 68 (1st Cir. 1989); Martino, 648 F.2d at 381; Diecidue, 603 F.2d at 547; Malatesta, 583 F.2d at 754-56; United States v. Kaye, 586 F. Supp. 1395, 1399 (N.D. Ill. 1984).

[382] See, e.g., Darden, 70 F.3d at 1526-28; United States v. Faulkner, 17 F.3d 745, 758-59 (5th (continued...)

Charging a RICO substantive offense may also facilitate joinder. In addition, as in other conspiracy prosecutions, it is not necessary to show that any conspirator actually committed the substantive violation--only that the defendant agreed that a conspirator would do so. See Section III(D)(1) above. Possible disadvantages to charging a RICO conspiracy offense are the danger of confusing the jury with the added complexities of instructions on conspiracy law and the need to prove an additional element: that is, each defendant agreed with at least one other conspirator to commit the substantive RICO offense. Conversely, the advantage of charging a substantive RICO offense is that it is somewhat more concrete and understandable than a RICO conspiracy offense. In practice, many prosecutors choose to charge both the RICO conspiracy and the substantive offenses, which has the effect of potentially leading to consecutive sentences for the two counts. See Section VI(P)(1)(a) below.

b. Drafting a RICO Conspiracy Count

As noted in Section III(D)(2) above, there are two alternative ways to allege and prove a RICO conspiracy offense under Section 1962(d). Under the first alternative, the RICO conspiracy count should allege that the defendant agreed to commit at least two of the alleged racketeering acts.[384]

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[382](...continued)
Cir.), cert. denied, 513 U.S. 870 (1994); United States v. Amato, 15 F.3d 230, 236-37 (2d Cir. 1994); United States v. Sanders, 929 F.2d 1466, 1469-70 (10th Cir.), cert. denied, 502 U.S. 846 (1991); see also Section V(C)(4) below.

[383] See, e.g., Orena, 32 F.3d at 711-14 (affirming district court's admission of testimony concerning the overall affairs of the Colombo Family, the RICO enterprise, during internal "war" between enterprise members).

[384] Cf. Abbell, 271 F.3d at 1299; United States v. Haworth, 941 F. Supp. 1057, 1061-62 (continued...)

If both a substantive RICO count and a RICO conspiracy count are charged, the enterprise and the pattern of racketeering activity elements from the substantive RICO count may be incorporated by reference into the RICO conspiracy count. This approach is preferable to incorporating portions of the RICO conspiracy count into the RICO substantive count because conspiratorial agreements and other features of RICO conspiracy law may be mistakenly viewed by the court as an additional element of the substantive RICO count to be proved in the government's case-in-chief. Such unnecessary and improper language may also confuse the jury. For the same reasons, it is preferable to position the RICO substantive count before the RICO conspiracy count in the indictment, although some prosecutors decide to place the RICO conspiracy count first.

As noted in Section III(D)(2) above, under the second alternative way to allege and prove a RICO conspiracy charge, it is not necessary to allege or prove that the defendant agreed to personally commit two racketeering acts; rather, it is sufficient to allege and prove that the defendant agreed to further an endeavor, which if completed, would satisfy all the elements of a substantive RICO offense, and agreed that at least one member of the conspiracy would commit at least two racketeering acts in furtherance of the enterprise's affairs. Therefore, to adequately allege a RICO conspiracy count under the second alternative, it is not necessary to either allege that the defendant agreed to personally commit any racketeering act, or to allege specific racketeering acts that were the objectives of the RICO conspiracy. Rather, it is sufficient to allege that it was a part of the RICO conspiracy that the defendant agreed that a conspirator, which could be the defendant himself, would commit at least two acts of racketeering activity in the conduct of the affairs of the enterprise and

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[384](...continued)
(D.N.M. 1996).

to include sufficient allegations to inform the defendant of the nature of the charge. Such RICO conspiracy charges are often referred to as "Glecier" RICO conspiracy charges, due to the Glecier case discussed below.

In Glecier, 923 F.2d 496 498-500 (7th Cir.), cert. denied, 502 U.S. 810 (1991), the RICO conspiracy count did not allege that the defendant committed, or personally agreed to commit, any specific predicate racketeering act. Rather, the RICO conspiracy count alleged that during the specified time period, the defendant agreed "to conduct and participate in the conduct of the affairs of [the enterprise], directly and indirectly, through a pattern of racketeering activity, as that term is defined in [18 U.S.C. § 1961], **said racketeering activity consisting of multiple acts involving bribery under [the applicable state statute]**." Id. at 498 (emphasis added). The Seventh Circuit held that these allegations were sufficient to allege a RICO conspiracy and that the indictment need not allege "overt acts" or "specific predicate acts that the defendant agreed personally to commit." Id. at 500 (citing United States v. Neapolitan, 791 F.2d 489, 495-98 (7th Cir. 1986)). The Seventh Circuit added:

> By specifying the time period during which the alleged conspiracy operated, the locations and courts, the principal actors, and with some detail, the specific types of predicate crimes to be committed and the *modus operandi* of the conspiracy, the indictment adequately enabled [the defendant] to prepare a defense.

Id. at 500.[385]

Similarly, in United States v. Phillips, 874 F.2d 123, 127-28 & n.4 (3d Cir. 1989), the Third Circuit held that a RICO conspiracy count need not allege specific racketeering acts the defendant

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[385] Accord Crockett, 979 F.2d at 1208-10 (holding that Glecier RICO conspiracy charges need not allege specific racketeering acts, but noting that the RICO conspiracy count, nonetheless, "alleged acts of violence carried out during a specific period of time for specific purposes in furtherance of the delineated activities of the RICO enterprise," id. at 1209).

agreed to commit; but rather, the count was sufficient because it alleged "a pattern of racketeering activity consisting of multiple acts of bribery and extortion . . . that occurred within the time frame of the conspiracy." Id. at 127. The Third Circuit added that the jury was not limited to consideration of the specific racketeering acts listed in the substantive RICO count, but rather "the jury was free to consider any act of bribery and extortion that occurred within the time frame of the conspiracy." Id. at 127. The court also stated that it was "initially troubled by the sufficiency of [the RICO conspiracy count] because of its failure to" allege specific racketeering acts; however, the court found that the indictment provided adequate notice by its references to the statutory violations, the specific time period of the crimes, and inclusion of the conduct underlying the racketeering offenses in overt acts alleged in the RICO conspiracy count. Id. at 127-28, nn. 4 & 5.

In United States v. Sutherland, 656 F.2d 1181, 1197 (5th Cir. 1981), the Fifth Circuit, likewise, rejected a "lack of specificity" challenge to a RICO conspiracy count where it identified the pattern of racketeering activity as "a number of bribes that occurred between November 1975 and January 1980," "to have occurred in the Western District of Texas," and the count cited and tracked the applicable bribery statute.

Although these cases do not require that a "Glecier" RICO conspiracy count allege specific racketeering acts, they nonetheless indicate that failure to provide adequate notice of the scope of the alleged racketeering activity could pose problems.[386] Moreover, such lack of adequate notice of

[386] Cf. United States v. Davidoff, 845 F.2d 1151, 1154-55 (2d Cir. 1988) (RICO conspiracy conviction reversed for lack of adequate notice where government proved extortionate racketeering activity not alleged in indictment and not provided in a bill of particulars); see also Neapolitan, 791 F.2d at 500-01(upholding a RICO conspiracy conviction, but noting that "the failure to specify the underlying criminal activity in the indictment can effectively preclude the exact identification of what is being charged").

the racketeering activity that is the basis of the RICO conspiracy charge could also provoke a double jeopardy challenge against subsequent RICO prosecutions because it may be unclear exactly what conduct was charged in the earlier RICO conspiracy case. See Section VI(P)(1) below.

Because of these concerns about adequate notice expressed in the above-referenced cases, it is the policy of OCRS that a "Glecier" RICO conspiracy count identify the specific types of racketeering offenses (i.e., extortion, murder, etc.) that the conspirators agreed would be committed and cite the appropriate statutory violations, and include other allegations to provide adequate notice of the scope of the alleged racketeering activity.

Moreover, although a RICO conspiracy offense does not require proof of an overt act (see Section III(D)(1) above), it may be desirable to include overt acts in the indictment in order to present a full picture of the scope of the conspiracy. It is important to note in drafting the indictment that an overt act is **not** an allegation of a racketeering act. The indictment **must** allege that the defendants conspired to conduct the affairs of the enterprise through a pattern of racketeering activity; it **may** allege the commission of overt acts in furtherance of the conspiracy. An act of racketeering must be a violation of one or more of the offenses listed in 18 U.S.C. § 1961. An overt act should be a discrete action, for example, a meeting, a conversation, or other distinct event. Although it may be criminal in nature, the overt act, unlike a racketeering act, should not be alleged as a criminal offense.

For example, if a defendant is accused of conspiring to extort payment of a gambling debt as part of his pattern of racketeering activity, an overt act might allege that on a particular date "the defendant struck the victim." It would be unnecessary, and inappropriate, to couch this physical act in the legal charging language of 18 U.S.C. § 894. Rather, an overt act relates to a specific discrete

act or event, almost invariably physical in nature, that does not encompass statutory terminology, legal conclusions or multiple acts.

C. Other Indictment Drafting Related Issues

1. Multiplicity

Multiplicity is the charging of a single offense in several counts. This issue may arise when defendants are charged with RICO substantive and conspiracy offenses, and with underlying predicate offenses in non-RICO counts. The danger of such "multiplicity" is that it may lead to multiple sentences for a single offense or may prejudice the defendant by creating the impression that several offenses were committed where there was but one. Courts repeatedly have held that RICO substantive and RICO conspiracy charges require proof of facts different from a single underlying predicate offense.[387] Accordingly, such charges do not implicate multiplicity issues and separate convictions and sentences are permissible for each charge.[388]

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[387] See, e.g., United States v. Aleman, 609 F.2d 298, 306 (7th Cir. 1979) (RICO, RICO conspiracy, and interstate transportation of stolen property), cert. denied, 445 U.S. 946 (1980); United States v. Moore, 811 F. Supp. 112, 116-17 (W.D.N.Y. 1992); United States v. Dellacroce, 625 F. Supp. 1387, 1391-92 (E.D.N.Y. 1986) (RICO and RICO conspiracy); United States v. Persico, 621 F. Supp. 842, 856 (S.D.N.Y. 1985) (RICO and RICO conspiracy), aff'd on other grounds, 832 F.2d 705 (2d Cir. 1987); United States v. Castellano, 610 F. Supp. 1359, 1392-96 (S.D.N.Y. 1985) (RICO and RICO conspiracy); United States v. Standard Drywall Corp., 617 F. Supp. 1283 (E.D.N.Y. 1985) (RICO conspiracy and 18 U.S.C. § 371 conspiracy to defraud the United States); United States v. Gambale, 610 F. Supp. 1515, 1546 (D. Mass. 1985) (RICO, RICO conspiracy, gambling, obstruction of justice, and loansharking); United States v. Boffa, 513 F. Supp. 444, 476 (D. Del. 1980) (RICO, RICO conspiracy, and Taft-Hartley violations); United States v. DePalma, 461 F. Supp. 778, 786 (S.D.N.Y. 1978) (RICO, securities fraud, and bankruptcy fraud). See also cases cited in Section VI(P)(1) below.

[388] See, e.g., United States v. Baker, 63 F.3d 1478, 1494 (9th Cir. 1995), cert. denied, 516 U.S. 1097 (1996) (multiple convictions and sentences for violating RICO conspiracy and predicate offense of conspiring to traffic in contraband did not violate double jeopardy or constitute multiplicitous pleading); Angiulo, 897 F.2d at 1206-07 (upheld charging five predicate acts for five (continued...)

2. Duplicity

Duplicity is the joining of two or more distinct and separate offenses into a single count. The two principal problems posed by a duplicitous pleading are: (1) a general verdict of not guilty does not reveal whether the jury found the defendant not guilty of one crime or not guilty of both; (2) a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both. See, e.g., Pungitore, 910 F.2d at 1135. The duplicity argument has not been raised often in the RICO context.

In Diecidue, 603 F.2d at 546, defendants challenged a RICO conspiracy count, arguing that it was duplicitous because it allegedly charged multiple conspiracies to form an enterprise and to commit the offenses that comprised the alleged pattern of racketeering activity. The Fifth Circuit found that the RICO conspiracy count was not duplicitous because the various disputed offenses were "merely descriptive of the single overall agreement" to conduct and participate in the conduct of an enterprise's affairs through a pattern of racketeering activity. See also United States v. Yarbrough, 852 F.2d 1522 (9th Cir.) (not duplicitous for RICO count to charge multiple predicate acts concerning the same conduct), cert. denied, 488 U.S. 866 (1988).

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[388](...continued)
separate gambling businesses since they were not one overall gambling business); Cauble, 706 F.2d at 1334-1335 (charges of investment in the enterprise and conduct of the enterprise are different offenses and not multiplicitous); United States v. Boffa, 688 F.2d 919, 935-36 (3d Cir. 1982) (four monthly payments for a lease of a car constituted four Taft-Hartley predicate acts; pleading not multiplicitous), cert. denied, 460 U.S. 1022 (1983); United States v. Carrozza, 728 F. Supp. 266, 273-275 (S.D.N.Y. 1990)(five separate conspiracy counts relating to ECT were not multiplicitous since each count required different proof; likewise, two gambling counts were not multiplicitous since one involved sports gambling, the other numbers gambling and the time periods were different).

Similarly, it is not error for a RICO conspiracy count to allege predicate acts of racketeering that are in themselves conspiracies because a RICO conspiracy and the predicate conspiracies are distinct offenses with different objectives. The objective of a RICO conspiracy is to participate in the affairs of an enterprise through a pattern of racketeering activity, and, hence, to agree to further the overall objective of the RICO enterprise and its conspiratorial members. In contrast, the objective of the conspiracy charged as an act of racketeering is confined to the goals and commission of that particular discrete offense.[389]

Moreover, in Pepe, 747 F.2d 632, defendants argued that the indictment was unclear and duplicitous because the substantive RICO count presented alternate grounds for RICO liability--a pattern of racketeering activity and also the collection of unlawful debt. While the court agreed that alleging the two RICO prongs in separate counts could simplify matters, it held that the use of alternative grounds of RICO liability did not contravene the RICO statute or any of the defendants' constitutional rights. Pepe, 747 F.2d at 673.[390]

The duplicity argument also may arise where an act of racketeering consists of several sub-parts or sub-predicate acts. For example, a single racketeering act may consist of two alternatives, murder of a victim and conspiracy to murder that same victim. Such pleading is not duplicitous, especially where each alternative is separately alleged and numbered, i.e., racketeering act 1(A) for

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[389] See cases cited in nn. 20 & 21 and at pages 181-83 above and nn.219, 393 below.

[390] See also United States v. Moore, 811 F. Supp. 112, 115-16 (W.D.N.Y. 1992) (allowing two theories of RICO liability--unlawful debt collection and a pattern of racketeering based on providing usurious loans); United States v. Vastola, 670 F. Supp. 1244, 1253-54 (D.N.J. 1987) (allowing two Section 1962(c) counts, one based on pattern of racketeering and the other on unlawful debt collection).

the murder charge and 1(B) for the conspiracy to murder charge.[391]

3. Variance: Single and Multiple Conspiracies

A material variance between an indictment and the Government's evidence at trial may be created when the indictment alleges a single overall conspiracy, but the evidence at trial shows multiple separate conspiracies that do not include the charged single overall conspiracy. If a defendant can show that such a variance affected his or her "substantial" rights, a new trial may be warranted.[392]

Defendants frequently have raised variance arguments to attack RICO conspiracy convictions because RICO conspiracy counts typically charge numerous defendants and a wide variety of

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[391] See, e.g., Pungitore, 910 F.2d at 1135-36 (holding that, even if charging alternative theories of murder, attempt, and conspiracy to murder under one act of racketeering constituted duplicitous pleading, no prejudicial error occurred where special verdicts were used and jury decided on sub-predicates unanimously); United States v. Biaggi, 675 F. Supp. 790, 799 (S.D.N.Y. 1987) (court refused to dismiss subpredicated racketeering act charging extortion, bribery, mail fraud and receipt of a gratuity arising from same conduct where any duplicity problem could be solved by use of a special verdict form and adequate jury instructions); United States v. Dellacroce, 625 F. Supp. 1387, 1390-91 (E.D.N.Y. 1986) (potential duplicity problem solved by instructing jury that it may not find guilt based on one of the racketeering acts charged unless the jurors all agree on at least one of the proposed alternative theories of culpability); Castellano, 610 F. Supp. at 1424 (by joining several criminal acts arising out of a single event in one racketeering act, the government protects the defendant from being found guilty of a pattern of racketeering activity based on a single episode and a special verdict form will specify which acts the jury found unanimously); see also United States v. Jennings, 842 F.2d 159 (6th Cir. 1988) (Government may show that two predicate acts occurred although they are pleaded in one count; here, two separate telephone calls made in furtherance of unlawful narcotics activity). Cf. United States v. Kragness, 830 F.2d 842, 860-61 (8th Cir. 1987) (sub-predicates could have been treated as multiple racketeering acts).

During the RICO review process, every effort is made to identify and adequately specify "acts of racketeering." Once an act of racketeering consisting of "sub-predicates" has been approved, the prosecution may not thereafter argue to the court or to the jury, that each sub-predicate constitutes one act of racketeering.

[392] See, e.g., Starrett, 55 F.3d at 1552-53; Quintanilla, 2 F.3d at 1480-81; Sutherland, 656 F.2d at 1189; see also cases cited in notes 393 and 394 below.

criminal activities, and, in many cases, not every defendant is involved in every act of racketeering. Specifically, defendants frequently have argued that there was a variance in proof at trial from the charged RICO conspiracy because: (1) the alleged pattern of racketeering activity included diversified racketeering acts that were not directly related to each other; (2) racketeering acts included conspiracy offenses which would constitute impermissible conspiracies to conspire; and/or (3) the alleged racketeering activity arguably involved sub-agreements that constitute separate, multiple conspiracies. Courts, however, in the substantial majority of RICO cases, have rejected these arguments because Congress specifically designed RICO to allow inclusion of highly diversified racketeering acts not directly related to each other in the same RICO count that most likely could not have been included in the same count prior to the adoption of RICO (see Section II(E)(2) above), and a RICO conspiracy offense is not a conspiracy to commit the alleged predicate acts, and, hence, is not a conspiracy to conspire. Rather, a RICO conspiracy offense is a conspiracy to participate in the affairs of an enterprise through a pattern of racketeering activity.

For example, in Elliott, 571 F.2d at 900-05, the Fifth Circuit rejected the claim that the proof at trial established a variance from the charged RICO conspiracy because it included highly diversified racketeering acts not directly related to each other, including conspiracy offenses. The court stated that "[a]pplying pre-RICO conspiracy concepts to the facts of this case, we doubt that a single conspiracy could be demonstrated" because the racketeering acts were too diverse and not directly related to each other. Id. at 902. However, the court explained:

> The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that

each crime was intended to further the enterprise's affairs.

Id. at 902-03. The court concluded that the effect of RICO "is to free the government from the strictures of the multiple conspiracy doctrine and to allow the joint trial of many persons accused of diversified crimes" when the defendants agreed to participate in the affairs of the same enterprise through such diversified crimes that relate to that same enterprise. Id. at 900; see also Sutherland, 656 F.2d at 1192-93 ("a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single 'enterprise' conspiracy" when the defendants agreed to participate in the affairs of the same enterprise through those series of racketeering acts).

Accordingly, a pattern of diverse racketeering acts, sub-agreements and conspiracy offenses that might otherwise constitute acts in furtherance of separate, multiple conspiracies may be joined in a single RICO conspiracy count if the Government proves that the defendants agreed to participate in the affairs of the **same** enterprise through a pattern of racketeering activity and such racketeering acts relate to the **same** enterprise.[393]

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[393] See, e.g., Smith, 413 F.3d at 1275-76 (finding a single RICO conspiracy where five different racketeering acts furthered the goals of the charged enterprise); Fernandez, 388 F.3d at 1226-28 & n.18 (finding a single RICO conspiracy where diverse predicate acts, including several conspiracies, benefitted the same enterprise and its members); Shea, 211 F.3d at 664-65 (finding that various predicate acts involving robbery and conspiracies were part of a single, overarching RICO conspiracy); Castro, 89 F.3d at 1450-51 (finding a single RICO conspiracy that included diversified racketeering activity); Maloney, 71 F.3d at 664 (Government's evidence establishing a series of agreements between a judge and differing third parties, with common objective being to corrupt the court system, was evidence of a single RICO conspiracy rather than multiple conspiracies); Carrozza, 4 F.3d at 79 (for Sentencing Guidelines purposes, a RICO conspiracy is treated as a single enterprise conspiracy even when evidence demonstrates a series of agreements which would constitute multiple conspiracies under pre-RICO law); Alvarez, 860 F.2d at 818-21 (evidence showed that defendant participated in the affairs of overall conspiracy, not just smaller conspiracy); United States v. Friedman, 854 F.2d 535 (2d Cir. 1988) (fact that various defendants participated in affairs of enterprise through different crimes did not mean that there were multiple conspiracies, as long as all acts furthered the enterprise's affairs), cert. denied, 490 U.S. 1004 (1989); United States v. Ashman, (continued...)

Although most RICO conspiracies meet the "single conspiracy" requirement, courts have found multiple conspiracies in a few cases. For example, in Sutherland, 656 F.2d at 1189-94, the Fifth Circuit found that a RICO conspiracy count consisted of two separate, unrelated schemes to bribe a judge. Nonetheless, the court upheld the convictions after finding that the variance did not affect the "substantial" rights of the defendants. Similarly, in United States v. Bright, 630 F.2d 804 (5th Cir. 1980), the Fifth Circuit found that one defendant was not a member of the alleged conspiracy, but, instead, was part of a limited conspiracy with one other defendant. Again, the court held that the variance did not require the conviction to be reversed because the differences between the indictment and the proof presented at trial did not affect the defendant's "substantial" rights.[394]

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[393](...continued)
979 F.2d 469, 483-85 (7th Cir. 1992) (upheld jury's finding of single RICO conspiracy involving 10 defendants and 320 counts arising from numerous fraudulent acts by traders and brokers of soybean futures contracts at the Chicago Board of Trade); Boylan, 898 F.2d at 244-48 (finding a single RICO conspiracy arising from extensive scheme of different acts of bribery of police officers and related activity); Ruggiero, 726 F.2d at 923 (a RICO conspiracy, supported by acts of racketeering activity that are in themselves conspiracies, does not violate the prohibition against conviction for multiple conspiracies when the indictment charges a single conspiracy); Riccobene, 709 F.2d at 217-18, 226-27 (finding a single RICO conspiracy that encompassed diversified racketeering acts committed by different members of the enterprise); United States v. McDade, 827 F. Supp. 1153, 1183 (E.D. Pa. 1993), aff'd in part, 28 F.3d 283 (3d Cir. 1994), cert. denied. 514 U.S. 1003 (1995); United States v. Walters, 711 F. Supp. 1435 (N.D. Ill. 1989) (court rejected defense argument that alleging multiple conspiracies as predicate acts amounted to improperly alleging multiple conspiracies); United States v. McCollom, 651 F. Supp. 1217 (N.D. Ill.) (denying defendant's severance motion and holding that although there were related conspiracies, there was one grand overall scheme), aff'd on other grounds, 815 F.2d 1087 (7th Cir. 1987); United States v. Persico, 621 F. Supp. 842, 856-57 (S.D.N.Y. 1985) (a RICO conspiracy is broader than a conspiracy to commit a particular crime); see also cases cited in notes 20 and 21 above, holding that a RICO conspiracy count may include conspiracy offenses as predicate racketeering acts.

[394] See also United States v. Manzella, 782 F.2d 533, 539 (5th Cir.) (although evidence supported existence of two small conspiracies rather than one overall conspiracy, the variance was harmless because there was no actual prejudice to the defendants), cert. denied, 476 U.S. 1123 (1986); but see United States v. Cryan, 490 F. Supp. 1234 (D.N.J.)(district court dismissed an (continued...)

4. Severance, Misjoinder, and Prejudicial Spillover

The issues of severance and misjoinder arise in RICO cases just as they do in any large-scale criminal prosecution, and, as in any prosecution, Rule 8 of the Federal Rules of Criminal Procedure governs the joinder of both defendants and offenses. Rule 8(b) provides:

> The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 8(b). The requirements of Rule 8(b) are satisfied when each defendant participated in the affairs of the same enterprise through the commission of the alleged predicate racketeering acts that relate to that same enterprise even when the defendants were charged with different racketeering acts.[395] Moreover, under Rule 8(b), non-RICO counts may be joined with RICO counts when the non-RICO counts relate to the activities of the alleged enterprise, even if the defendant was not charged in the RICO count.[396]

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[394](...continued)
improperly charged RICO conspiracy count because it could not conclude which of two conspiracies found by the court was intended to be indicted by grand jury), aff'd without opinion, 636 F.2d 1211 (3d Cir. 1980).

[395] See, e.g., Irizarry, 341 F.3d at 287-90; Richardson, 167 F.3d at 624-25; Krout, 66 F.3d at 1429; Faulkner, 17 F.3d at 758-60; Eufrasio, 935 F.2d at 567; Boylan, 898 F.2d at 244-47; United States v. Zannino, 895 F.2d 1, 16 (1st Cir. 1990); Friedman, 854 F.2d at 63-64; Killip, 819 F.2d at 1547; Caporale, 806 F.2d at 1509-11; Teitler, 802 F.2d at 615-17; United States v. Russo, 796 F.2d 1443, 1449-50 (11th Cir. 1986); O'Malley, 796 F.2d at 859; Bagaric, 706 F.2d at 69; United States v. Kabbaby, 672 F.2d 857, 860-61 (11th Cir. 1982); Phillips, 664 F.2d at 1016; United States v. Welch, 656 F.2d 1039, 1048-54 (5th Cir. 1981); Bright, 630 F.2d at 812-13; United States v. Persico, 621 F. Supp. 842, 850-55 (S.D.N.Y. 1985), aff'd on other grounds, 832 F.2d 705 (2d Cir. 1987).

[396] See, e.g., United States v. Carson, 455 F.3d 336, 372-74 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 1351 (2007); United States v. York, 428 F.3d 1325, 1333-34 (11th Cir. 2005), cert. (continued...)

Where defendants properly have been joined under Rule 8, ordinarily, all the defendants should be tried together. As the Supreme Court explained:

> There is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials play a vital role in the criminal justice system. They promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

Zafiro v. United States, 506 U.S. 534, 537 (1993) (citing Richardson v. Marsh, 481 U.S. 200, 209-10 (1987)).[397]

Given the preference in federal courts for joint trials, Rule 14, Fed.R.Crim.P. permits a district court to grant a severance "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro, 506 U.S. 539.[398] Moreover, even when the risk of prejudice is high, a severance should not be granted where "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." Zafiro, 506 U.S. at 539.

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[396](...continued)
denied, 548 U.S. 908 (2006); Irizarry, 341 F.3d at 290; United States v. Houle, 237 F.3d 71, 74-75 (1st Cir. 2001); Baltas, 236 F.3d at 33; Posada-Rios, 158 F.3d at 862-63; Darden, 70 F.3d at 1526; Krout, 66 F.3d at 1429; Faulkner, 17 F.3d at 758-60; Amato, 15 F.3d at 236-37; United States v. Beale, 921 F.2d at 1412, 1429 (11th Cir. 1991); Biaggi, 909 F.2d at 675-76; United States v. Cerrone, 907 F.2d 332, 340-42 (2d Cir. 1990); Boylan, 898 F.2d at 244-47; United States v. Hogan, 886 F.2d 1497, 1506-08 (7th Cir. 1989); Kragness, 830 F.2d at 861-62; Manzella, 782 F.2d at 539-41; United States v. Arocena, 778 F.2d 943, 949 (2d Cir. 1985); Qaoud, 777 F.2d at 1118; Kopituk, 690 F.2d at 1312-14; United States v. Lemm, 680 F.2d 1193, 1204-05 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); Weisman, 624 F.2d at 1129.

[397] Accord United States v. Gardiner, 463 F.3d 445, 472 (6th Cir. 2006); Urban, 404 F.2d at 775; Najjar, 300 F.3d at 473.

[398] Accord Gardiner, 463 F.3d at 473; Carson, 455 F.3d at 374; Olson, 450 F.3d at 677; Fernandez, 388 F.3d at 1241.

In accordance with these principles, courts repeatedly have rejected severance claims in RICO cases involving alleged disparity of the evidence, particular evidence was admissible only against some defendants, prejudicial spillover from acquittals on some counts or claims that a defendant had a better chance at an acquittal in a severed trial, especially where the jury was instructed to consider the evidence separately against each defendant, or given another curative instruction.[399]

For example, in United States v. Stillo, 57 F.3d 553, 557 (7th Cir. 1995), the Seventh Circuit upheld the joinder of defendants even though one of the defendants claimed that he was prejudiced by evidence of pervasive corruption from predicate RICO offenses in which he was not involved. The court opined that the defendant failed to rebut the presumption that a jury can capably sort through the evidence and follow a court's limiting instructions to consider each defendant separately.

Similarly, in United States v. Le Compte, 599 F.2d 81 (5th Cir. 1979), cert. denied, 445 U.S. 927 (1980), two defendants argued on appeal that they were the victims of prejudicial spillover from testimony concerning the acts of co-defendants. The Fifth Circuit affirmed their convictions, holding that "the Constitution does not require that in a charge of group crime a trial be free of any prejudice

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[399] See, e.g., Gardiner, 463 F.3d at 472-73; Carson, 455 F.3d at 374-75; Olson, 450 F.3d at 677-78; York, 428 F.3d at 1333-34; Urban, 404 F.3d at 775-76; Fernandez, 388 F.3d at 1241-46; United States v. Hamilton, 334 F.3d 170, 182-85 (2d Cir. 2003); Najjar, 300 F.3d at 473-74; United States v. Phillips, 239 F.3d 829, 837-39 (7th Cir. 2001); Houle, 237 F.3d at 75-77; Baltas, 236 F.3d at 32-35; Tocco, 200 F.3d at 413-14; Diaz, 176 F.3d at 103-04; Posada-Rios, 158 F.3d at 863; Darden, 70 F.3d at 1526-27; Krout, 66 F.3d at 1429-30; Starrett, 55 F.3d at 1553-54; Faulkner, 17 F.3d at 758-60; Amato, 15 F.3d at 236-37; Console, 13 F.3d at 655; Locascio, 6 F.3d at 947-48; United States v. Freeman, 6 F.3d 586, 598-99 (9th Cir. 1993); Crockett, 979 F.3d at 1217-18; United States v. DiNome, 954 F.2d 839, 841-42 (2d Cir. 1992); LeQuire, 943 F.2d at 1562-63; Eufrasio, 935 F.2d at 566-71; Boylan, 898 F.2d at 24-47; United States v. Casamento, 887 F.2d 1141, 1149-54 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990); Russo, 796 F.2d at 1449-50; United States v. Lee Stoller Enter. Inc., 652 F.2d 1313, 1319-20 (7th Cir. 1981), cert. denied, 454 U.S. 1082 (1981).

but only that the potential for transferability of guilt be minimized to the extent possible." Id. at 82. Moreover, in Eufrasio, 935 F.2d at 567-69, the Third Circuit rejected the defendants' claim of prejudicial joinder because their codefendant was charged with a predicate act involving murder in which they had no knowledge or involvement.

However, in United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), the First Circuit reversed the convictions of two defendants on a RICO conspiracy count and then found that it must also reverse the defendants' convictions on two independent substantive counts. The court reasoned that it was too prejudicial to the defendants, whose involvement in the enterprise was limited, to be tried on the two substantive counts when there was extensive, unrelated evidence introduced at the trial involving a massive race-fixing RICO conspiracy. Id. at 1138-39.[400]

At least two district courts have granted a defendant's severance motion due to the complexity of the case.[401] By contrast, the Second Circuit, in affirming convictions in the massive "Pizza

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[400] See also United States v. Guiliano, 644 F.2d 85 (2d Cir. 1981), where the two defendants were convicted of RICO and two predicate counts of bankruptcy fraud. The appellate court reversed one of the bankruptcy fraud counts of one of the defendants for lack of evidence, which resulted in reversal of his RICO conviction as well. The court then ordered a retrial of his second bankruptcy fraud count because the prejudicial effect of "tarring a defendant with the label of 'racketeer' tainted the conviction on an otherwise valid count." Id. at 89. Also, in United States v. Caldwell, 594 F. Supp. 548, 552-53 (N.D. Ga. 1984), the court, sua sponte, divided the indictment for trial because of the number of conspiracy counts, witnesses, and defendants, in order to avoid juror confusion regarding each alleged offense.

[401] See United States v. Vastola, 670 F. Supp. 1244, 1262-63 (D.N.J. 1987) (separated RICO and non-RICO defendants); United States v. Gallo, 668 F. Supp. 736, 749-50 (E.D.N.Y. 1987) (held joinder proper, but severed case due to unmanageable complexity). The Gallo case involved the RICO prosecution of sixteen members of the Gambino LCN Family. In considering the defendants' motions for severance, the district court examined a number of factors to determine whether "substantial prejudice" would result from a joint trial: the complexity of the indictment; the (continued...)

Connection" prosecution, held that the seventeen-month trial of 21 defendants with more than 275 witnesses was not so complex as to violate due process. In recognition of the disadvantages of such trials, the Second Circuit in its supervisory capacity established rules for future complex multi-defendant cases in that circuit: (1) the district court must elicit a good-faith estimate of trial time from the prosecutor; (2) if the trial time is likely to exceed four months, the prosecutor must provide the court with a reasoned basis for concluding that a joint trial is proper; (3) the judge must consider separate trials, particularly for peripheral defendants; and (4) the prosecutor would be required to make an especially compelling justification for a joint trial of more than ten defendants.[402]

Despite these rulings, courts generally have rejected severance claims in RICO cases (see n.399 above), even in complex RICO "mega-trials."[403]

5. Surplusage

On occasion, particularly in organized crime cases, RICO defendants have argued that the inclusion of certain terms in the indictment such as "mob," "mafia," "racketeering," and "capo," or identifying an organized crime family, was prejudicial, and that courts should strike those terms as surplusage. Courts have frequently rejected such claim where the terms are relevant, and have a

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[401](...continued)
estimated length of trial; disparity in the amount or types of proof offered against the defendants; disparity in the degree of involvement by defendants in the overall scheme; possible conflicts between various defense theories and trial strategies; and, particularly, the prejudice from evidence admissible against some defendants but inadmissible as to other defendants. After weighing these factors, the court determined that a single jury could not render a fair verdict as to all defendants and granted, in part, the motions for severance.

[402] See Casamento, 887 F.2d at 1149-54.

[403] See, e.g., Fernandez, 388 F.3d at 1241-44; Tocco, 200 F.3d at 413-14 & n.5; Posada-Rios, 158 F.3d at 863-64; Darden, 70 F.3d at 1526-27; Manzella, 782 F.2d at 540-41.

legitimate, evidentiary purpose, such as where such terms identify the alleged enterprise or a component of it, describe a defendant's role in the enterprise or unlawful schemes, or are otherwise relevant.[404] One court, however, expressed concern where the indictment named a criminal enterprise based on a defendant's name (the "Vastola Organization"). Although the court did not reverse the convictions, it urged the use of caution in future cases to avoid undue prejudice. See United States v. Vastola, 899 F.2d 211, 232 (3d Cir. 1990).

[404] See, e.g., Tocco, 200 F.3d at 413 n.4; United States v. Scarpa, 913 F.2d 993, 1011-13 (2d Cir. 1990); Urso, 369 F. Supp. 2d at 270; United States v. Salvagno, 306 F. Supp. 2d 258, 268 (N.D.N.Y. 2004); United States v. Bellomo, 263 F. Supp. 2d 561, 585 (E.D.N.Y. 2003); United States v. Vastola, 670 F. Supp. 1244, 1255-56 (D.N.J. 1987); United States v. Rastelli, 653 F. Supp. 1034, 1055-56 (E.D.N.Y. 1986); United States v. Santoro, 647 F. Supp. 153, 177 (E.D.N.Y. 1986), aff'd, 880 F.2d 1319 (2d Cir. 1989); United States v. Dellacroce, 625 F. Supp. 1387, 1392 (E.D.N.Y. 1986); United States v. Ianniello, 621 F. Supp. 1455, 1479 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987); United States v. Persico, 621 F. Supp. 842, 860-61 (S.D.N.Y. 1985); United States v. Gambale, 610 F. Supp. 1515, 1544-45 (D. Mass. 1985); United States v. Castellano, 610 F. Supp. 1359, 1428-29 (S.D.N.Y. 1985).

In Vastola, 670 F. Supp. at 1255-56, the court granted motions to strike parts of the preamble to the indictment containing information not contained in the body of the indictment, the word "loansharking," and terms "and others," "and with others," and "other criminal means"; but refused to strike the term "racketeering." Id. at 1255.

VI

OTHER ISSUES IN CRIMINAL RICO CASES

A. Liberal Construction Clause

Section 904(a) of Title IX of the Organized Crime Control Act of 1970 (Pub. L. 91-452, 84 Stat. 947, enacting RICO), states that "the provision of this title shall be liberally construed to effectuate its remedial purposes." Referring to this provision, the Supreme Court has stated in both civil and criminal cases that RICO must be liberally construed to achieve its remedial purposes.[405] In accordance with Congress' mandate that RICO be liberally construed, the Supreme Court in Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131 (2008), recently rejected civil litigants' argument that civil RICO claims based upon mail fraud racketeering acts should be narrowly construed to require first-party justifiable reliance on defendants' alleged misrepresentations "to avoid the 'over-federalization' of traditional state-law [fraud] claims." Id. at 2145. The Supreme Court explained:

> Whatever the merits of petitioners' arguments as a policy matter, we are not at liberty to rewrite RICO to reflect their – or our – views of good policy. We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe. See, e.g., National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 252, 114 S. Ct. 798, 127 L.Ed.2d 99 (1994) (rejecting the argument that "RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an

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[405] See, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 492 n.10, 497-98 (1985); Russello v. United States, 464 U.S. 16, 27 (1983); United States v. Turkette, 452 U.S. 576, 587, n.10 (1981). See also Odom v. Microsoft Corp., 486 F.3d 541, 545-47 (9th Cir. 2007) (en banc); United States v. Cianci, 378 F.3d 71, 88 (1st Cir. 2004); United States v. Corrado, 227 F.3d 543, 551 (6th Cir. 2000); Southway v. Central Bank of Nigeria, 198 F.3d 1210, 1216 (10th Cir. 1999); Tabas v. Tabas, 47 F.3d 1280, 1291, 1293 (3d Cir. 1995); United States v. Floyd, 992 F.2d 498, 501 (5th Cir. 1993); see United States v. Perholtz, 842 F.2d 343, 353 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); United States v. Neapolitan, 791 F.2d 489, 495 (7th Cir.), cert. denied, 479 U.S. 939 (1986); United States v. Frumento, 563 F.2d 1083, 1091 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978).

> economic purpose"); H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 244, 109 S. Ct. 2893, 106 L.Ed.2d 195 (1989) (rejecting "the argument for reading an organized crime limitation into RICO's pattern concept"); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 481, 105 S. Ct. 3275, 87 L.Ed.2d 346 (1985) (rejecting the view that RICO provides a private right of action "only against defendants who had been convicted on criminal charges, and only where there had occurred a 'racketeering injury' ").

Id.

However, in Reves v. Ernst & Young, 507 U.S. 170, 183 (1993), the Supreme Court ruled that the liberal construction provision "is not an invitation to apply RICO to new purposes that Congress never intended." The Court reasoned that the clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." Id. at 184. (citations omitted).[406]

With these limitations in mind, prosecutors can use the liberal construction clause to argue for favorable interpretations of RICO provisions in order to achieve RICO's remedial purpose. See cases cited in n.405 above.

B. Wharton's Rule

Defendants have unsuccessfully argued that separate convictions for RICO substantive and conspiracy offenses are barred by "Wharton's Rule." As the Supreme Court explained in Iannelli v. United States, 420 U.S. 770, 785-86 (1975), Wharton's Rule creates a rebuttable presumption that, "absent legislative intent to the contrary," a conspiracy offense merges into a substantive offense "that **require[s]** concerted criminal activity, a plurality of criminal agents." Id. at 785 (emphasis added). The Supreme Court added that it "adopted a narrow construction of [Wharton's] Rule that focuses on the statutory requirements of the substantive offense rather than the evidence offered to

[406] See also Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 274 (1992) (refusing to use liberal construction clause to expand standing of RICO civil plaintiffs).

prove those elements at trial." Id. at 780. Moreover, the Court noted that some federal courts of appeals have recognized a third-party exception, holding that Wharton's Rule is inapplicable where the conspiracy offense involved more persons than required for the commission of the substantive offense. Id. at 775-76, 782 n.15.[407]

Under the foregoing principles, every court that has decided the issue has held that Wharton's Rule does not require merger of RICO substantive and conspiracy convictions on one or more of the following three independent grounds:[408] First, since a substantive RICO offense may be committed by a single person, a substantive RICO offense does not **require** concert of action, and, hence, Wharton's Rule is inapplicable to RICO offenses. Second, even assuming arguendo that the RICO substantive offense required concert of action of at least two persons, Wharton's Rule does not apply where the RICO conspiracy offense involved more participants than required for the commission of the substantive offense (i.e., more than two persons). Third, even if Wharton's Rule otherwise applied, the legislative history underlying RICO conclusively establishes that Congress intended to create "new" and "enhanced sanctions" to eradicate organized crime, and therefore Congress did not

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[407] The Iannelli Court held that since Congress did not intend the two offenses to merge, Wharton's Rule did not bar separate convictions for conducting a gambling business, in violation of 18 U.S.C. § 1955, and conspiring to commit that offense, in violation of 18 U.S.C. § 371, even though the substantive gambling offense required the participation of "five or more persons."

[408] See, e.g., United States v. Nascimento, 491 F.3d 25, 48-49 (1st Cir. 2007), cert. denied, 128 S. Ct. 1738 (2008); United States v. Marino, 277 F.3d 11, 39 (1st Cir. 2002) (collecting cases); United States v. Morgano, 39 F.3d 1358, 1366-67 (7th Cir. 1994); United States v. Pungitore, 910 F.2d 1084, 1108 n.24 (3d Cir. 1990); United States v. Rone, 598 F.2d 564, 569-71 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Ohlson, 552 F.2d 1347, 1348-50 (9th Cir. 1977); United States v. Dote, 150 F. Supp. 2d 935, 941-42 (N.D. Ill. 2001); Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc., 29 F. Supp. 2d 801, 818-19 (N.D. Ohio 1998); United States v. Gambale, 610 F. Supp. 1515, 1546-47 (D. Mass. 1985); United States v. Hawkins, 516 F. Supp. 1204, 1206-08 (M.D. Ga. 1981); United States v. Boffa, 513 F. Supp. 444, 477-78 (D. Del. 1980). See also cases cited in notes in Section VI(P)(1)(a) below.

intend to merge RICO substantive and conspiracy convictions, which would be inconsistent with its intent in adopting RICO. See generally Russello v. United States, 464 U.S. 16, 26-28 (1983); United States v. Turkette, 452 U.S. 576, 586-93 (1981); see also Section I(B)(1) above.

C. Mens Rea

Every court that has considered the issue has held that RICO does not require any **mens rea** or scienter element beyond what the predicate offenses require.[409] Therefore, wilfulness or other specific intent is not an element of a RICO offense; however, if any of the predicate offenses require proof of wilfulness or specific intent then such requirement must be met regarding that predicate offense.[410] Nevertheless, it is the policy of the Organized Crime and Racketeering Section to allege and prove at least that the RICO defendant acted knowingly or intentionally to eliminate any issue that the RICO defendant did not have a requisite criminal intent.

Moreover, in the civil context, courts usually have held that government entities, such as municipal corporations, cannot be RICO defendants because they cannot form the requisite specific intent to satisfy the **mens rea** requirement of a predicate offense.[411] Nor can the necessary intent of

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[409] See e.g., United States v. Baker, 63 F.3d 1478, 1492-93 (9th Cir. 1995); United States v. Hill, 55 F.3d 1197, 1203-04 (6th Cir. 1995); United States v. Blinder, 10 F.3d 1468, 1477 (9th Cir. 1993); United States v. Biasucci, 786 F.2d 504, 512-13 (2d Cir. 1986); United States v. Pepe, 747 F.2d 632, 675-76 (11th Cir. 1984); United States v. Scotto, 641 F.2d 47, 55-56 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir.), cert. denied, 449 U.S. 833 (1980); Interstate Flagging, Inc., v. Town of Darien, 283 F. Supp. 2d 641, 645 (D. Conn. 2003). Cf. Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 949 (11th Cir. 1997).

[410] See e.g., Baker, 63 F.3d at 1492-93; Scotto, 641 F.2d at 55-56. Moreover, knowledge of the federal nature of a RICO offense is not an element of RICO. See Baker, 63 F.3d at 1491 n.16.

[411] See, e.g., Lancaster Comty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 404 (9th Cir. 1991); Genty v. Resolution Trust Corp., 937 F.2d 899, 909-14 (3d Cir. 1991); Interstate (continued...)

a government entity's agents be imputed to the entity under a respondeat superior theory.[412] However, courts have not addressed this issue in a criminal setting.

D. RICO Does Not Require Any Connection to Organized Crime

In 1989, the Supreme Court squarely held that RICO does not require any proof that a RICO defendant or a RICO offense had any nexus to "organized crime." See H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 243-49 (1989). Thus, the Supreme Court stated that "the argument for reading an organized crime limitation into RICO . . . . finds no support in the Act's text, and is at odds with the tenor of its legislative history." Id. at 244. The Supreme Court added that "[t]he occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." Id. at 248. Accord Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 260 (1994). Accordingly, the lower courts have uniformly held that RICO does not require any nexus to organized crime.[413]

(...continued)
Flagging, Inc.v. Town of Darien, 283 F. Supp. 2d 641, 645-46 (D. Conn. 2003); Rini v. Zwirn, 886 F. Supp. 270, 294-95 (E.D.N.Y. 1995); Nu-Life Const. Corp. v. Board of Educ. of New York, 779 F. Supp. 248, 251 (E.D.N.Y. 1991). See also Section II(C) above.

[412] See, e.g., Lancaster Comty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 404-405 (9th Cir. 1991); Genty v. Resolution Trust Corp., 937 F.2d 899, 908-914 (3d Cir. 1991); Nu-Life Constr. Corp. v. Board of Educ. of New York, 779 F. Supp. 248, 251 (E.D.N.Y. 1991); cf. Tryco Trucking Co. v. Belk Stores Servs., 634 F. Supp. 1327, 1334 (W.D.N.C. 1986) ("RICO envisions respondeat superior liability.").

[413] See, e.g., United States v. Aucoin, 964 F.2d 1492, 1496 (5th Cir.), cert. denied, 506 U.S. 1023 (1992); United States v. Ruiz, 905 F.2d 499, 503 (1st Cir. 1990); Plains Resources, Inc. v. Gable, 782 F.2d 883, 886-87 (10th Cir. 1986); United States v. Hunt, 749 F.2d 1078, 1088 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). See also United States v. Gottesman, 724 F.2d 1517, (continued...)

Indeed, one district court noted that if application of RICO were limited solely to members of organized crime, it would probably be unconstitutional. See United States v. Mandel, 415 F. Supp. 997, 1018-19 (D. Md. 1976). RICO proscribes specific conduct, not the status of being involved in organized crime. In fact, RICO does not even contain a definition of organized crime.

E. Criminal RICO Applies Extraterritorially

1. General Principles of Extraterritoriality

The principle of "extraterritoriality" permits a sovereign nation to criminalize conduct that occurs outside the nation's territorial limits. It is well established that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). Significantly, "[t]here is no constitutional bar to the extraterritorial application of penal laws." Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984); accord United States v. Neil, 312 F.3d 419, 421 (9th Cir. 2002); United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994); United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991).

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[413](...continued)
1521 (11th Cir. 1984); Moss v. Morgan Stanley Inc., 719 F.2d 5, 21 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984); Bennett v. Berg, 685 F.2d 1053, 1063-64 (8th Cir.), aff'd in part, rev'd in part, 710 F.2d 1361 (8th Cir. 1982), cert. denied, 464 U.S. 1008 (1983); United States v. Bledsoe, 674 F.2d 647, 662-63 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1984); United States v. Uni Oil, Inc., 646 F.2d 946, 953 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982); United States v. Aleman, 609 F.2d 298, 303 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

Moreover, the Patriot Act amendments added at least 50 terrorism-related predicate offenses to RICO (See Section I(B)(3) above), which further evinces Congress' intent to not confine RICO to organized crime matters.

The Supreme Court has explained that whether Congress has exercised its authority to apply a statute beyond its territorial boundaries "is a matter of statutory construction." Arabian Am. Oil Co., 499 U.S. at 248. Several principles of statutory construction govern that question. First, it is presumed "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Id. at 248 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)); accord Smith v. United States, 507 U.S. 194, 204-05 (1993). This presumption protects against "unintended clashes between our laws and those of other nations which could result in international discord," and it also rests on the notion that when Congress legislates, it "is primarily concerned with domestic conditions." Arabian Am. Oil Co., 499 U.S. at 248 (quoting Foley Bros., 336 U.S. at 285); accord Carnero v. Boston Scientific Corp., 433 F.3d 1, 7 (1st Cir. 2006). Express intent is not necessary to overcome this presumption. Rather, Congress' intent to apply a law extraterritorially may be gleaned from the law's legislative history, the purposes to be achieved, the interests of the United States, or by considering the nature of the proscribed conduct. See, e.g., United States v. Bowman, 260 U.S. 94, 97-98 (1922) ("The necessary **locus**, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.").[414]

For example, in Bowman, the Supreme Court explained that the presumption against extraterritorial application of law:

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[414] See also United States v. Kim, 246 F.3d 186, 189 (2d Cir. 2001) (affirming that to determine Congressional intent, a court is allowed to "consider all available evidence about the meaning of the statute, including its text, structure, and legislative history") (quotations and citations omitted); accord Carnero, 433 F.3d at 7.

> should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their **locus** to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the **locus** shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

Bowman, 260 U.S. at 98 (emphasis added).

If it is determined as a matter of statutory construction that Congress intended to apply a penal statute extraterritorially, then considerations of international law pertain. As a general rule, Congressional legislation should not "'be construed to violate the law of nations if any other possible construction remains.'" McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (quoting Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804); accord F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004). "Nonetheless, in fashioning the reach of our criminal law, Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law." United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003) (internal quotations and citations omitted); accord United States v. Rainey, 232 U.S. 310, 316-17 (1914); United States v. Cohen, 427 F.3d 164, 168 (2d Cir. 2005); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

International law recognizes five principal bases upon which a nation may exercise its criminal jurisdiction over citizens and non-citizens for conduct committed outside that nation's

territorial limits:

> (1) the "objective territorial principle," which provides for jurisdiction over conduct committed outside a State's borders that has, or is intended to have, a substantial effect within its territory; (2) the "nationality principle," which provides for jurisdiction over extraterritorial acts committed by a State's own citizen; (3) the "protective principle," which provides for jurisdiction over acts committed outside the State that harm the State's interests; (4) the "passive personality principle," which provides for jurisdiction over acts that harm a State's citizens abroad; and (5) the "universality principle," which provides for jurisdiction over extraterritorial acts by a citizen or non-citizen that are so heinous as to be universally condemned by all civilized nations.

Yousef, 327 F.3d at 91 n.24; accord Vazquez-Velasco, 15 F.3d at 840; Chua Han Mow, 730 F.2d at 1311 (collecting cases).[415]

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[415] Pursuant to the foregoing authority, courts have applied penal laws extraterritorially in a variety of circumstances, including where sovereign interests of the United States or its citizens may be adversely affected. See, e.g., United States v. Delgado-Garcia, 374 F.3d 1337, 1343-51 (D.C. Cir. 2004) (holding that the offense of conspiracy to encourage and induce aliens illegally to enter the United States, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(v), (a)(1)(A)(iv), and (a)(1)(B)(I), and attempting to bring unauthorized aliens to the United States, in violation of 8 U.S.C. §§ 1324(a)(2) and (a)(2)(B)(ii), apply extraterritorially); United States v. Cohen, 427 F.3d 164, 168 (2d Cir. 2005) (drug conspiracy laws); Yousef, 327 F.3d at 79-82, 86-98 (conspiracy to bomb United States - flag aircraft that served routes in southeast Asia, in violation of 18 U.S.C. § 32(a)); United States v. Plummer, 221 F.3d 1298, 1304-06 (11th Cir. 2000) (attempt under 18 U.S.C. § 545, which proscribes smuggling of goods into the United States); Vasquez-Velasco, 15 F.3d at 839-41 (holding that 18 U.S.C. § 1959 applied extraterritorially to the murder in Mexico of United States citizens, mistakenly believed to be DEA agents who were investigating the defendant's drug trafficking enterprise); United States v. Chen, 2 F.3d 330, 332-34 (9th Cir. 1993) (alien smuggling and other immigration laws apply extraterritorially); United States v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992) (holding that murder and kidnapping of a DEA agent and a DEA informant in aid of a drug-trafficking enterprise, in violation of 18 U.S.C. § 1959, applied extraterritorially); Felix-Gutierrez, 940 F.2d at 1203-06 (holding that under 18 U.S.C. § 3, accessory after the fact to those crimes applied extraterritorially); United States v. Layton, 855 F.2d 1388, 1394 (9th Cir. 1988) (applying 18 U.S.C. § 356, which proscribes killing of any member of Congress, extraterritorially to the murder of a Congressman in a foreign country); United States v. Wright-Barker, 784 F.2d 161, 166-68 (3rd Cir. 1986) (extraterritorial application of drug statutes warranted because failure to apply statutes in such fashion would greatly diminish statutes' utility and effectiveness); Chua Han Mow, (continued...)

2. Extraterritorial Application of Criminal RICO is Not Implicated Where the Alleged Racketeering Activity Occurred in the United States

As a general rule, where the conduct establishing the essential elements of an offense occurred primarily in the United States, the issue of whether the offense applies extraterritorially is not presented; hence, there is no need to determine whether the offense applies extraterritorially merely because relevant evidence of conduct occurring outside the United States is introduced.[416]

For example, in Pasquantino v. United States, 544 U.S. 349 (2005), the Supreme Court affirmed the defendants' convictions for a scheme to defraud the Government of Canada of liquor importation tax revenues, in violation of the wire fraud statute, 18 U.S.C. § 1343. The Supreme Court rejected the defendants' argument that such application of the wire fraud statute gave it extraterritorial effect, explaining:

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[415](...continued)
730 F.2d at 1311-13 (applying drug conspiracy and distribution statutes (21 U.S.C. §§ 846 and 963) extraterritorially where foreign national engaged in conspiracy to smuggle drugs into the United States although defendant's conduct occurred entirely outside the United States, "[n]oting that drug smuggling compromises a sovereign's control of its own borders") (quoting United States v. Schmucker-Bula, 609 F.2d 399, 403 (7th Cir. 1980)); United States v. Bin Laden, 92 F. Supp. 2d 189, 191-204 (S.D.N.Y. 2000) (holding that 18 U.S.C. §§ 844 (f)(1), (f)(3), (h) and (n), 942(c), 930(c), 1114 and 2155 apply extraterritorially to schemes to murder United States nationals, to destroy United States buildings and property and to destroy United States defense facilities).

[416] See, e.g., Pasquantino v. United States, 544 U.S. 349, 371 (2005); Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 531-32 (D.C. Cir. 1993); Republic of Philippines v. Marcos, 862 F.2d 1355, 1358-59 (9th Cir. 1988) (en banc); United States v. Black, 469 F. Supp. 2d 513, 545 (N.D. Ill. 2006); United States v. Marzook, 426 F. Supp. 2d 820, 826 (N.D. Ill. 2006); Johnson Elec. N. Am. v. Mabuchi Motor Am. Corp., 98 F. Supp. 2d 480, 485 (S.D.N.Y. 2000); Kensington Int'l Ltd. v. Societe Nationale Despetroles do Congo, 2006 WL 846351 at **2-3 (S.D.N.Y. March 31, 2006); United States v. Approx. $25,681,268.80 in Funds, 1999 WL 1080370 at *3 (S.D.N.Y. Nov. 30, 1999); Thai Airways Int'l Ltd. v. United Aviation Leasing, 842 F. Supp. 1567, 1571 (S.D.N.Y. 1994), aff'd, 59 F.3d 20 (2d Cir. 1995); C.A. Westel de Venezuela v. Am. Tel. and Tel. Co., 1992 WL 209641 at **17-20 (S.D.N.Y. Aug. 17, 1992).

> [defendants] used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States . . . . This domestic element of [defendants'] conduct is what the Government is punishing in this prosecution . . . .

Id. at 371.[417]

Similarly, courts have repeatedly held in RICO cases that where the alleged predicate acts occurred in the United States, such application of RICO does not give RICO extraterritorial effect even though relevant conduct also occurred outside the United States.[418] Therefore, the extraterritorial application of criminal RICO is not implicated where the alleged racketeering activity occurred in the United States.

3. Criminal RICO Applies Extraterritorially at Least Where the Alleged Racketeering Offenses Apply Extraterritorially

"The RICO statute is silent as to any extraterritorial application." North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996); accord Kim, 246 F.3d at 190. Therefore, the general principles discussed in Section VI (E)(1) above must be applied to determine whether, and under what circumstances, criminal RICO applies extraterritorially. Applying those principles, it is clear

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[417] Courts have also frequently held that the mail fraud statute, 18 U.S.C. § 1341, applies to use of the United States mails for mailings between the United States and a foreign country, and that the wire fraud statute, 18 U.S.C. § 1343, likewise applies to wire transmissions between the United States and a foreign country. See, e.g., United States v. Welch, 327 F.3d 1081, 1104 (10th Cir. 2003); United States v. Kim, 246 F.3d 186, 190 (2d Cir. 2001); United States v. Gonzalez, 748 F.2d 74, 78-79 (2d Cir. 1984); United States v. Tinkel, 331 F.2d 204, 205-06 (2d Cir. 1964); Johnson Elec. N. Am., Inc., 98 F. Supp. 2d at 484-86; Thai Airways Int'l Ltd., 842 F. Supp. at 1571; United States v. Approximately $25,829,681.80 in Funds, 1999 WL 1080370 at * 3 (S.D.N.Y. Nov. 30, 1999); C.A. Westel de Venezuela, 1992 WL 209641 at **17-20.

[418] See, e.g., Black, 469 F. Supp. 2d at 545; Marzook, 426 F. Supp. 2d at 826; Johnson Elec. N. Am., 98 F. Supp. 2d at 485; Thai Airways Int'l Ltd., 842 F. Supp. at 1571; Kensington Int'l Ltd. v. Societe Nationale Despetroles do Congo, 2006 WL 846351 at *12-13 (S.D.N.Y. March 31, 2006); United States v. Approximately $25,829,681.80 in Funds, 1999 WL 1080370 at ** 3-4 (S.D.N.Y. Nov. 30, 1999); C.A. Westel de Venezuela, 1992 WL 209641 at * 17-20.

that criminal RICO applies extraterritorially where the alleged racketeering offenses apply extraterritorially.

First, in Pasquantino, 544 U.S. at 371-72, the Supreme Court observed that because the wire fraud statute, 18 U.S.C. § 1343, "punishes frauds executed 'in interstate or foreign commerce,'" it "is surely not a statute in which Congress had only 'domestic concerns in mind.'" Id. (citations omitted). RICO, like the wire fraud statute, proscribes specified conduct by "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(c). This requirement indicates that Congress did not design RICO with only domestic concerns in mind.[419]

More fundamentally, as the Supreme Court has observed, when the "probable place" for the commission of an offense lies outside the United States this indicates that Congress intended to apply that offense extraterritorially. See Bowman, 260 U.S. at 99; accord Delgado-Garcia, 374 F.3d at 1345; United States v. Plummer, 221 F.3d 1298, 1305 (11th Cir. 2000). Because RICO's definition of "racketeering activity," 18 U.S.C. § 1961(1), includes many predicate offenses that typically are committed outside the United States, Congress seemingly intended to apply RICO extraterritorially. For example, courts have held, or Congress explicitly indicated, that the following RICO predicate offenses under 18 U.S.C. §§ 1961(1) (B), (D), (E), (F), and (G) apply extraterritorially:

> **18 U.S.C. § 1961(1)(B)** provides that "any act which is indictable under any of the [listed] provisions of Title 18" may constitute a RICO predicate act of racketeering, including the following offenses that apply extraterritorially:

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[419] However, RICO's reference to foreign commerce may not be sufficient by itself to overcome the presumption against extraterritorial application of a statute. See Arabian Am. Oil Co., 499 U.S. at 251-52; Neiman v. Dryclean U.S.A. Franchise Co., 178 F.3d 1126, 1129 (11th Cir. 1999).

18 U.S.C. § 1341 relating to mail fraud. Cf. United States v. Tinkel, 331 F.2d 204, 205-06 (2d Cir. 1964); United States v. Welch, 327 F.3d 1081, 1104 (10th Cir. 2003).

18 U.S.C. § 1343 relating to wire fraud involving a "wire, radio, or television communication in interstate or foreign commerce." See, e.g., Collazos v. United States, 368 F.3d 190, 200 (2d Cir. 2004); Kim, 246 F.3d at 190-91.

18 U.S.C. §§ 1461-65 relating to obscene matter. See, e.g., United States v. Brewer, 2001 WL 1525197 (A.F. Ct. Crim. App. 2001).

18 U.S.C. § 1512 relating to tampering with a witness, victim or an informant. See, e.g., United States v. Fisher, 494 F.3d 5, 8-9 (1st Cir. 2007) (ruling that § 1512 applied to a murder occurring in Canada since 18 U.S.C. § 1512(h) explicitly provides for extraterritorial application of § 1512); accord Alvarez-Machain v. United States, 331 F.3d 604, 625 n. 25 (9th Cir. 2003); Black, 469 F. Supp. 2d at 544; United States v. Carnes, 113 F. Supp. 2d 1145, 1151 n.3 (E.D. Mich. 2000).

18 U.S.C. § 1513 relating to retaliating against a witness, victim or informant. See, e.g., Carnero v. Boston Scientific Corp., 433 F.3d 1, 10 (1st Cir. 2006) (noting that 18 U.S.C. § 1513(d) explicitly provides for extraterritorial application of Section 1513); accord Alvarez-Machain, 331 F.3d at 625 n.25.

18 U.S.C. § 1542 relating to false statement in application and use of a passport. See, e.g., United States v. Morgan, 1998 WL 764054 (N.M. Ct. Crim. App. Oct. 30, 1998).

18 U.S.C. § 1546 relating to fraud and misuse of visas, permits and other documents. See, e.g., United States v. Pizzarusso, 388 F.2d 8, 9-10 (2d Cir. 1968); United States v. Bin Laden, 92 F. Supp. 2d 189, 194, 197 (S.D.N.Y. 2000).

18 U.S.C. § 1591 relating to sex trafficking of children or by force, fraud or coercion. See, e.g., Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 1002-03 (S.D. Ind. 2007).

18 U.S.C. § 1951 relating to interference with interstate or foreign commerce. See, e.g., United States v. Inigo, 925 F.2d 641, 648-50 (3d Cir. 1991) (holding that the Hobbs Act applied to a scheme to extort $10,000,000 from a corporation engaged in interstate and foreign commerce in the United States and elsewhere even though "most of the conduct alleged took place in Europe and South America;" id. at 648).

18 U.S.C. § 1956 relating to laundering of monetary instruments. 18 U.S.C. § 1956(f) explicitly provides for extraterritorial application of Section 1956. See, e.g., United States v. Bodner, 342 F. Supp. 2d 176, 191 (S.D.N.Y. 2004).

18 U.S.C. § 1957 relating to engaging in monetary transactions in property derived from specified unlawful activity. 18 U.S.C. § 1957(d)(2) provides for extraterritorial application of Section 1957 offenses under some circumstances.

18 U.S.C. §§ 2251, 2251A and 2252 and 2260 relating to sexual exploitation of children. See, e.g., United States v. Harvey, 2 F.3d 1318, 1327-29 (3d Cir. 1993); United States v. Thomas, 893 F.2d 1066, 1069 (9th Cir. 1990).

18 U.S.C. §§ 2314 and 2315 relating to transportation, transfer or sale of stolen property in interstate or foreign commerce. See, e.g., United States v. Goldberg, 830 F.2d 459, 461-65 (3d Cir. 1987); United States v. McClain, 545 F.2d 988, 992-95 (5th Cir. 1997); cf. United States v. Rabin, 316 F.2d 564, 566-67 (7th Cir. 1963); United States v. Greco, 298 F.2d 247, 251 (2d Cir. 1962).

18 U.S.C. § 2421 relating to transporting any person in interstate or foreign commerce to engage in prostitution. Cf. United States v. Mack, 112 F.2d 290, 291-92 (2d Cir. 1940).

18 U.S.C. § 2422 relating to coercing any person to travel in interstate or foreign commerce to engage in prostitution. See, e.g., United States v. Heisler, 2005 WL 995677 at **4-5 (N.M. Ct. Crim. App. April 29, 2005).

18 U.S.C. § 2423 relating to transportation of any minor in interstate or foreign commerce to engage in prostitution. See, e.g., United States v. Clark, 435 F.3d 1100, 1106-07 (9th Cir. 2006); cf. United States v. Bredimus, 352 F.3d 200, 204-08 (5th Cir. 2003); United States v. Strevell, 2006 WL 1697529 (11th Cir. June 20, 2006); United States v. Bianchi, 2007 WL 1521123 (E.D. Pa. May 22, 2007).

18 U.S.C. § 175 relating to prohibitions with respect to biological weapons. 18 U.S.C. § 175(b) explicitly provides for extraterritorial jurisdiction of section 175. See, e.g., United States v. Alvarez-Machain, 331 F.3d 604, 625 n.25 (9th Cir. 2003); United States v. Corey, 232 F.3d 1166, 1185 n.3 (9th Cir. 2000); Nieman v. Dryclean U.S.A. Franchise Co., 178 F.3d 1126, 1129 (11th Cir. 1999).

18 U.S.C. § 1961(1)(D) provides that "any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in controlled substance or listed chemical (as defined in Section 102 of the Controlled Substances Act)" may constitute a RICO predicate act of racketeering, including the following offenses that apply extraterritorially: See, e.g., United States v. Larsen, 952 F.2d 1099, 1101 (9th Cir. 1991) (possession of drugs with intent to distribute, in violation of 21 U.S.C. § 841(a)(1)); United States v. Wright-Barker, 784 F.2d 161, 166-67 (3d Cir. 1986) (same and conspiracy to import drugs, in violation of 21 U.S.C. § § 952(a), 960(a)(1), 963, and possession of drugs outside the United States with intent to import them into the United States, in violation of 21 U.S.C.

§§ 955 a(d)(1), 960(a)(2)); United States v. Orozco-Prada, 732 F.2d 1076, 1087-88 (2d Cir. 1984) (possession of drugs outside the United States with intent to distribute them in the United States, in violation of 21 U.S.C. § 841(a)(1)); Chua Han Mow v. United States, 730 F.2d 1308, 1311-12 (9th Cir. 1984) (conspiracy to import drugs into United States, in violation of 21 U.S.C. § § 846 and 963); United States v. Cadena, 585 F.2d 1252, 1257-58 (5th Cir. 1979) (same)); United States v. Noriega, 746 F. Supp. 1506, 1512-19 (S.D. Fla. 1990) (same and other narcotics offenses).

18 U.S.C. § 1961(1)(F) provides that "any act which is indictable under the Immigration and Nationality Act, Section 274 (relating to bringing in and harboring certain aliens) [8 U.S.C. § 1324], Section 277 (relating to aiding or assisting certain aliens to enter the United States) [8 U.S.C. § 1327], or Section 278 (relating to importation of alien for immoral purpose) [8 U.S.C. § 1328]" may constitute a RICO predicate act of racketeering including the following offenses that apply extraterritorially. See, e.g., United States v. Delgado-Garcia, 374 F.3d 1337, 1343-51 (D.C. Cir. 2004) (holding that the offense of conspiracy to encourage and induce aliens illegally to enter the United States, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(v), (a)(1)(A)(iv), and (a)(1)(B)(I), and attempting to bring unauthorized aliens to the United States, in violation of 8 U.S.C. §§ 1324(a)(2) and (a)(2)(B)(ii), apply extraterritorially); United States v. Chen, 2 F.3d 330, 332-34 (9th Cir. 1993) (conspiring to smuggle aliens into the United States, in violation of 18 U.S.C. §§ 371 and 1324(a)(1)).

18 U.S.C. § 1961(1)(G) provides that "any act that is indictable under any provision listed in section 2332b(g)(5)(B)" of Title 18, may constitute a RICO predicate act of racketeering, including the following offenses that apply extraterritorially:

18 U.S.C. § 37(b) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 37(a).

18 U.S.C. § 229(c) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 229(a).

18 U.S.C. § 351(i) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 351.

18 U.S.C. § 831(c) explicitly provides for extraterritorial jurisdiction of certain offenses under 18 U.S.C. § 831.

18 U.S.C. § 832(b) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 832.

18 U.S.C. § 956 explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 956.

18 U.S.C. § 1116(c) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 1116(a).

18 U.S.C. § 1203 explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 1203.

18 U.S.C. § 1751(K) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 1751.

18 U.S.C. § 2280(b) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 2280.

18 U.S.C. § 2281(b) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 2281.

18 U.S.C. § 2332 explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 2332.

18 U.S.C. § 2332a(b) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 2332a.

18 U.S.C. § 2332b(e) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 2332b(a).

18 U.S.C. § 2332f(b)(2) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 2332f(a).

18 U.S.C. § 2332g(b) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 2332g(a).

18 U.S.C. § 2332h(b) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 2332h(a).

18 U.S.C. § 2339B(d) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 2339B(a).

18 U.S.C. § 2339(C)(b) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 2339C(a).

18 U.S.C. § 2339D(b) explicitly provides for extraterritorial jurisdiction of offenses under 18 U.S.C. § 2339D.

18 U.S.C. § 2340A explicitly provides for extraterritorial jurisdiction for offenses under that section.

42 U.S.C. § 2122(b) explicitly provides for extraterritorial jurisdiction of offenses under 42 U.S.C. § 2122(a).

49 U.S.C. § 46501(2) defines the term "special aircraft jurisdiction of the United States" and provides for extraterritorial jurisdiction, under the specified circumstances, of offenses under 42 U.S.C. § 46502(a) (aircraft piracy) for aircraft in the special aircraft jurisdiction.

49 U.S.C. § 46502(b)(2) provides for extraterritorial jurisdiction of offenses under 49 U.S.C. § 46502(b)(1)(air piracy) for aircraft outside of the special aircraft jurisdiction.

49 U.S.C. § 46501(2) provides for extraterritorial jurisdiction of offenses under 49 U.S.C. § 46504 (interference with flight crew and attendants) for aircraft in the special aircraft jurisdiction of the United States.

49 U.S.C. § 46501(2) provides for extraterritorial jurisdiction of offenses under 49 U.S.C. § 46506 (application of certain criminal laws to act on aircraft if homicide or attempted homicide is involved) and the aircraft is in the special aircraft jurisdiction of the United States.

21 U.S.C. § 960a(b) provides for extraterritorial jurisdiction of offenses under 21 U.S.C. § 960a(a)(foreign terrorist organizations, terrorist persons and groups (narco-terrorism)).

Moreover, many RICO predicate offenses on their face indicate that they apply to conduct occurring outside the United States, at least in part, including the following:

18 U.S.C. § 1426(d), (e) and (f) (relating to bringing certain documents or other items into the United States).

18 U.S.C. § 1462 (relating to importation of obscene material).

18 U.S.C. § 1543 (relating to forgery or false use of passport).

18 U.S.C. § 1544 (relating to misuse of a passport).

18 U.S.C. § 1582 (relating to causing a vessel to sail from the United States "for the purpose of procuring any person from any foreign kingdom or country to be transported and held, or otherwise disposed of as a slave, or held to service, or labor"); cf. United States v. Gooding, 25 U.S. 460 (1827) (upholding indictment under 1818 predecessor statute to section 1582 of ship owner who caused his ships to be equipped in Baltimore, Maryland to obtain slaves in Africa to be transported to

Cuba).

18 U.S.C. § 1583 (relating to enticing or inducing a person into slavery); cf. United States v. Musery, 726 F.2d 1448 (9th Cir. 1984) (approving an indictment charging defendants with unlawfully holding Indonesian servants against their will by enticing them to travel to the United States and withholding their passports), abrogated on other grounds, United States v. Kozminski, 487 U.S. 931 (1988).

18 U.S.C. § 1584 (relating to bringing to the United States any person held in involuntary servitude).

18 U.S.C. § 1585 (relating to seizure, detention or transportation of slaves from foreign shores); cf. United States v. Westervelt, 28 F. Cas. 529 (C.C. S.D.N.Y. 1861) (No. 16, 668) (upholding indictment under the 1820 predecessor statute to section 1585 of an American citizen, crew member on a foreign vessel that traveled from England to Africa where it received 800 Africans with the intent to make them slaves).

18 U.S.C. § 1586 (relating to service on vessels involved in the slave trade, including "the transportation of slaves from any foreign country or place to another"); cf. United States v. Morris, 39 U.S. 464 (1840) (upholding an indictment under the 1800 predecessor statute to section 1586 of a United States citizen for serving as a crew member on a United States vessel that traveled from Cuba to Africa for the purpose of receiving and transporting slaves from Africa to other countries).

18 U.S.C. § 1588 (relating to the transportation of slaves from the United States to any other place).

18 U.S.C. § 1952 (relating to interstate and foreign travel or transportation in aid of racketeering enterprises. See, e.g., United States v. Orozco-Prada, 732 F.2d 1076-1079-82 (2d Cir. 1984) (upholding § 1952 conviction of the head of an organization that received large amounts of cash from cities within and outside the United States, which funds were ultimately transferred into accounts outside the United States); United States v. Noriega, 746 F. Supp. 1506, 1518 (S.D. Fla. 1990) (holding that 18 U.S.C. § 1952(a)(3) applies extraterritorially).

18 U.S.C. § 1953 (relating to transportation of wagering paraphernalia in interstate or foreign commerce.). See, e.g., United States v. Baker, 241 F. Supp. 272 (M.D. Pa. 1965) (upholding conviction for sending lottery paraphernalia from the United States to Haiti).

That the substantial majority of RICO's predicate racketeering offenses apply extraterritorially or indicate that they apply to conduct outside the United States compels the

conclusion that Congress likewise intended a pattern of those predicate offenses under RICO to apply extraterritorially.[420]

For example, in United States v. Noriega, 746 F. Supp. 1506, 1512-19 (S.D. Fla. 1990), the court held that RICO applied extraterritorially to defendant Noriega's drug trafficking offenses that occurred almost entirely in Panama,[421] stating that RICO's Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970), 91st Cong., 2d Sess., evinced Congress' intent to apply RICO expansively to reach unlawful conduct occurring outside the United States. Noriega, 746 F. Supp. at 1516-17. In that respect, the court observed that Congress stated it intended RICO to provide

> new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place **on all available fronts**.

Noriega, 746 F. Supp. at 1517, quoting S. Rep. No. 91-617, p. 76 (emphasis in original). The court concluded:

> Given the Act's broad construction and equally broad goal of eliminating the harmful consequences of organized crime, it is apparent that Congress was concerned with the effects and not the locus of racketeering activities. The Act thus permits no

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[420] Cf. Bin Laden, 92 F. Supp. 2d at 197 (observing that "a statute that is ancillary to a substantive offense statute will be presumed to have extraterritorial effect if the underlying substantive statute is first determined to have extraterritorial effect"); accord United States v. Felix-Gutierrez, 940 F.2d 1200, 1204-05 (9th Cir. 1991); Chua Han Mow, 730 F.2d at 1311 (collecting cases).

[421] The pattern of racketeering activity charged against defendant Noriega under RICO included the following offenses that the court ruled applied extraterritorially: (1) conspiracy to import and distribute cocaine into the United States, in violation of 21 U.S.C. § 963; (2) distributing and aiding and abetting the distribution of cocaine, intending that it be imported into the United States, in violation of 21 U.S.C. § 959 and 18 U.S.C. § 2; (3) importing a controlled substance into the United States from a place outside thereof, in violation of 21 U.S.C. § 952; (4) causing foreign travel and the use of facilities in foreign and interstate commerce to promote unlawful drug trafficking, in violation of 18 U.S.C. § 1952(a)(3). Noriega, 746 F. Supp. at 1515-18.

> inference that it was intended to apply only to conduct within the United States. Such a narrow construction would frustrate RICO's purpose by allowing persons engaged in racketeering activities directed at the United States to escape RICO's bite simply by moving their operations abroad. . . . Keeping in mind Congress' specific instruction that RICO be applied liberally to effect its remedial purpose, the Court cannot suppose that RICO does not reach such harmful conduct simply because it is extraterritorial in nature. **As long as the racketeering activities produce effects or are intended to produce effects in this country, RICO applies.**

Noriega, 746 F. Supp. at 1517 (emphasis added).

In sum, criminal RICO applies extraterritorially at least where alleged predicate racketeering offenses apply extraterritorially.

4. Civil RICO Applies Extraterritorially in Some Circumstances

In civil RICO cases, courts have recognized that Congress intended RICO to apply extraterritorially.[422] For example, in Doe I v. State of Israel, 400 F. Supp. 2d 86, 115 (D.D.C. 2005). The court explained that Congress intended to apply RICO extraterritorially stating:

> Congress sought to eradicate the substantial and detrimental economic consequences that plague the United States as a result of organized crime activity. See RICO

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[422] See, e.g., Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988)(holding that the district court had jurisdiction over a civil RICO suit brought by the Republic of the Philippines against defendants, Ferdinand Marcos, formerly the President of the Philippines, and his wife, alleging that the defendants had fraudulently obtained over $11 million in the Philippines, and had invested and concealed those unlawful proceeds in the United States to the injury of the Republic of the Philippines). But see Jose v. M/V Fir Grove, 801 F. Supp. 349, 354-58 (D. Or. 1991), holding that RICO did not apply extraterritorially to a civil suit where all

> the allegedly fraudulent conduct regarding misrepresentation of the applicable pay scales took place in the Philippines and Japan, the plaintiffs are all from the Philippines, the defendants are all from Japan or the Philippines, and the only connection to the United States is that the Fir Grove sailed to the U.S. to pick up shipments of logs . . . .

Id. at 354. Thus, the court concluded that the defendant's alleged unlawful conduct lacked sufficient effects upon the United States. Id. at 357-58.

> Statement of Findings and Purpose, Pub.L. No. 91-452, 84 Stat. 922 (1970), 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 1073, 1073. Inferentially, Congress also sought to eradicate the effects of such activity on our domestic security. See Noriega, 746 F. Supp. at 1517. As the example has been framed, the United States surely would exercise jurisdiction to "prosecute a person standing in Canada who fires a bullet across the border which strikes a second person standing in the United States." Id. at 1512-13. Many modern criminal organizations have an international infrastructure, and the crimes (as well as their effects) transcend national borders. Activities traditionally associated with organized crime, such as wire fraud and money laundering, may originate from a different continent than the ultimate place of impact of the crime, and intermediate actors may be located in yet a third place. The nationality of the criminal enterprise or the locus of the racketeering activity alone, then, should not limit RICO's grasp. See id. at 1517. Rather, it appears that Congress focused on the character of the activity – things in the nature of classic organized crime – and the substantial, deleterious effects that such activity has on the United States.

Id. at 115.

The court, however, concluded that Congress did not intend RICO to apply extraterritorially "to cases like this one." Id. at 115. In Doe I, plaintiffs, "an assortment of anonymous Palestinians living in Israel or the West Bank, or more recently in the United States," filed a civil RICO action against various defendants, including the sovereign State of Israel, the Israeli General Security Service, the Israeli military, high-ranking Israeli government officials and others. Id. at 95-97. Plaintiffs alleged that, among other matters, various defendants engaged in a pattern of racketeering activity involving attempted murder, threats of murder, arson and extortion, to drive plaintiffs from their land in the West Bank and that other defendants facilitated this pattern of racketeering activity through raising funds to support such activities. Id. at 99, 117-18. Thus, plaintiff alleged that defendants deprived him of his "real property [in the West Bank], which is not suited to 'movement' in commerce." Id. at 117 n.10.

The court concluded that civil RICO did not apply to such conduct committed outside the United States, stating:

> [RICO] may not be transformed into an avenue through which to litigate the political crises of the global community. The activity at issue must, at minimum, produce or be intended to produce effects in this country. . . . There is no indication that Congress ever contemplated that RICO would lay the foundation for individual citizens to invalidate a foreign sovereign's internal policies and national security during a persistent armed conflict. And even if such evidence did exist, it still would not support an extraterritorial application of RICO to solely personal harms suffered overseas that only marginally – and tangentially – impact American commerce.

Id. at 116.

Moreover, in civil RICO cases involving fraud brought by private litigants, courts have employed two tests adapted from antitrust and securities violations cases. Under the "conduct" test, courts have applied civil RICO extraterritorially where the plaintiff demonstrates: "(1) that 'conduct material to the completion of the fraud occurred in the United States,' and that (2) the U.S. conduct was the 'direct cause of the alleged injury'" to the plaintiff. Norex Petroleum Ltd. v. Access Indus., Inc., 2007 WL 2766731 at *4 (S.D.N.Y. Sept. 24, 2007). Under the effects test, civil RICO applies extraterritorially "whenever a predominantly foreign transaction has substantial effects within the United States" or "when extraterritorial conduct is intended to and actually does have a detrimental effect" upon the United States plaintiff's business or property. Id. (citations omitted).[423]

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[423] For civil RICO cases applying the "conduct" and "effects" tests to determine whether civil RICO applied extraterritorially to the particular facts at issue, see Liquidation Comm'n of Banco Intercontinental, S.A. v. Alvarez Renta, 2008 WL 2446320, at * 7 (June 19, 2008) (civil "RICO may apply extraterritorially if conduct material to the completion of the racketeering occurs in the United States, or if significant effects of the racketeering are felt here"; and holding neither test was satisfied); Doe I v. Unocal Corp., 395 F.3d 932, 960-62 (9th Cir. 2002) (civil RICO not applied extraterritorially); Poulos v. Caesars World, Inc., 379 F.3d 654, 662-64 (9th Cir. 2004) (civil RICO applied extraterritorially); Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1216-18 (10th Cir. 1999) (same); N. S. Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051-52 (2d Cir. 1996) (civil RICO not applied extraterritorially); Butte Mining PLC v. Smith, 76 F.3d 287, 290-92 (9th Cir. 1996); (civil RICO not applied extraterritorially); United States v. Philip Morris USA, Inc., 477 F. Supp. 2d 191, 196-98 (D.D.C. 2007) (civil RICO applied extraterritorially); Norex Petroleum Ltd., 2007 WL 2766731 (civil RICO not applied extraterritorially).

However, the "conduct" and "effects" tests do not necessarily govern whether criminal RICO applies extraterritorially. In the civil RICO suits for treble damages under 18 U.S.C. § 1964(c), where courts apply the "conduct" and "effects" tests, a plaintiff must establish that a defendant committed a violation of the RICO statute, and that such RICO violation was the proximate cause of injury to the plaintiff's business or property. See, e.g., Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 457-58 (2006); Beck v. Prupis, 529 U.S. 494, 496-503 (2000); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992). But, proof of such proximate causation is not an element of criminal RICO charges (or for civil RICO suits brought by the government). Therefore, where "conduct" consisting of racketeering predicate offenses is substantially committed in the United States, courts have jurisdiction to consider such criminal RICO charges regardless of whether such conduct caused direct injury to any victim, and such application of criminal RICO does not even implicate RICO's extraterritorial application. See Section VI(E)(2) above. Moreover, under criminal RICO, it is immaterial whether racketeering offenses committed outside the United States have a detrimental effect on any victim's business or property; rather, it is dispositive that criminal RICO applies extraterritorially when the alleged racketeering offenses apply extraterritorially, as explained above.

F. Constitutional Challenges to RICO

1. Vagueness Challenges

In H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989), the Supreme Court reversed the Eighth Circuit's holding that required proof of multiple schemes in order to establish the pattern-of-racketeering element of RICO. In a concurring opinion written by Justice Scalia, four Justices expressed their concern about the difficulty in defining a pattern of racketeering activity

stating:

> No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

492 U.S. at 255-56 (Scalia, J., concurring).

This comment has prompted numerous defendants to attack the RICO statute on vagueness grounds. Those attacks have not fared well in the courts. All ten of the federal courts of appeals that have addressed the issue since H.J. Inc. was decided have rejected the RICO vagueness argument. These courts have held that vagueness claims must be considered on the facts of the particular case in which the claim is asserted; in each case the court found that the defendants had adequate notice that their conduct fell within the proscriptions of RICO and that consequently their vagueness challenges, including to RICO's requirements of an enterprise and pattern of racketeering activity, were meritless.[424]

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[424] See e.g., United States v. Angiulo, 897 F. 2d 1169, 1178-1180 (1st Cir. 1990), cert denied, 498 U.S. 845 (1990); United States v. Oreto, 37 F.3d 739, 752 (1st Cir. 1994); United States v. Coiro, 922 F.2d 1008, 1017 (2d Cir. 1991); United States v. Coonan, 938 F. 2d 1553, 1561-62 (2d Cir. 1991), cert. denied, 503 U.S. 941 (1992); United States v. Pungitore, 910 F.2d 1084, 1102-05 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991); United States v. Woods, 915 F.2d 854, 862-64 (3d Cir. 1990); United States v. Borromeo, 954 F.2d 245, 248 (4th Cir. 1992); United States v. Bennett, 984 F.2d 597, 605-07 (4th Cir.), cert. denied, 508 U.S. 945 (1993); United States v. Aucoin, 964 F.2d 1492, 1497-98 (5th Cir. 1992); United States v. Krout, 66 F.3d 1420, 1432 (5th Cir. 1995), cert. denied, 516 U.S. 1136 (1996); Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1104-1109 (6th Cir. 1995), cert. denied, 516 U.S. 1158 (1996); United States v. Griffith, 85 F.3d 284, 287-88 (7th Cir. 1996); United States v. Korando, 29 F.3d 1114, 1119 (7th Cir. 1994); United States v. Glecier, 923 F.2d 496, 497-98 n.1 (7th Cir. 1991); United States v. Masters, 924 F.2d 1362, 1367 (7th Cir. 1991); United States v. Sanders, 962 F.2d 660, 678 (7th Cir. 1992); United States v. Ashman, 979 F. 2d 469, 487 (7th Cir. 1992), cert. denied, 510 U.S. 814 (1993); United States v. Dischner, 974 F. 2d 1502, 1508-1510 (9th Cir. 1992), cert. denied, 507 U.S. 923 (1993); United States v. Freeman, 6 F.3d 586, 597 (9th Cir. 1993); United States v. Blinder, 10 F.3d 1468, 1475 (9th Cir. 1993); United States v. Keltner, 147 F. 3d 662, 667 (8th Cir.), cert. denied, 525 U.S. 1032 (1998); United States (continued...)

Indeed, as the Supreme Court has admonished, "'[t]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" Sedima, 473 U.S. at 499 (quoting Haroco, Inc. v. Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (1984)). Accord Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. at 262; United States v. Palumbo Bros. Inc., 145 F.3d 850, 868 (7th Cir. 1998).

2. Tenth Amendment Challenges

Defendants also have challenged the constitutionality of RICO prosecutions on the ground that they infringed upon powers the Tenth Amendment reserved to the States. For example, in United States v. Kehoe, 310 F.3d 579, 588 (8th Cir. 2002), the court rejected the defendant's claim that by prosecuting him in federal court under RICO for three murders in violation of state law, the

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[424](...continued)
v. Van Dorn, 925 F.2d 1331, 1334 n. 2 (11th Cir. 1991); Cox v. Administrator U.S. Steel & Carnegie, 17 F. 3d 1386, 1398 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995). See also, United States v. Warner, 292 F. Supp. 2d 1051, 1067-68 (N.D. Ill. 2003); United States v. Bellomo, 263 F. Supp. 2d 561, 581-82 (E.D.N.Y. 2003); United States v. Triumph Capital Group, Inc., 260 F. Supp. 2d 470, 475-77 (D. Conn. 2003).

Although the Tenth Circuit has not yet decided the issue, two district courts in that circuit have rejected vagueness contentions. See United States v. Haworth, 941 F. Supp. 1057, 1059-1060 (D.N.M. 1996); Schrag v. Dinges, 788 F. Supp. 1543, 1552-1555 (D. Kan. 1992). The District of Columbia Circuit has not discussed the vagueness question since H.J. Inc. was decided. Prior to H.J. Inc., however, that court of appeals rejected claims of vagueness and overbreadth. See United States v. Swiderski, 593 F. 2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979). See also Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 57-58 (1989) (Indiana's RICO law, modeled after the federal RICO statute, not unconstitutionally vague as applied to obscenity predicate offenses.).

Only one court has sustained a vagueness argument. In Firestone v. Galbreth, 747 F. Supp. 1556, 1581 (S.D. Ohio 1990), the district court ruled that in a private civil lawsuit the pattern requirement was unconstitutionally vague as to the defendants. On appeal, the Sixth Circuit declined to review the holding because it determined that the only defendants who had raised the issue lacked standing to do so. Firestone, 976 F.2d 279, 285 (6th Cir. 1992). No other court supports the district court's decision in Firestone. See Bseirani v. Mahshie, 881 F. Supp. 778, 787 (N.D.N.Y. 1995).

federal government "improperly encroach[ed] upon state sovereignty." The court explained that "[b]ecause a RICO violation is a 'discrete offense that can be prosecuted separately from its underlying predicate offenses,' it necessarily follows that RICO does not bar a state from prosecuting an individual for the state law crimes, which may serve as predicate acts for the RICO offenses," and thus does not violate the Tenth Amendment. Id. (citations omitted).

Similarly, in United States v. Freeman, 6 F.3d 586, 597-98 (9th Cir. 1993), cert. denied, 511 U.S. 1077 (1994), the court of appeals rejected a contention that prosecuting a state legislative aide for a bribery scheme infringed upon the state's right to control its electoral processes. Moreover, in United States v. Vignola, 464 F. Supp. 1091, 1098-99 (E.D. Pa.), aff'd, 605 F.2d 1199 (3d Cir. 1979), cert. denied, 444 U.S. 1072 (1980), the court ruled that Congress had the power to regulate intrastate activities that had an effect on interstate commerce. The Vignola court reasoned that since there was a rational basis for believing that state racketeering activities affected interstate commerce, using RICO to regulate those intrastate activities was permissible. The court concluded that Congress had properly exercised its federal commerce power when enacting RICO and rejected the defendant's claim that RICO did not properly cover his receipt of bribes as a purely local traffic court judge. Id. at 1099; see also Section VI(G) below.

In United States v. Martino, 648 F.2d 367 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982), defendants argued that the RICO statute intruded upon state sovereignty because it did not require that each act of racketeering affect interstate commerce. The Martino court found that this argument ignored the essence of Section 1962(c) violations, which involve conducting an enterprise's affairs through a pattern of racketeering activity, rather than merely committing racketeering crimes. The court of appeals reasoned that, where an enterprise engaged in or affected interstate commerce and

the acts of racketeering were related to the operation of the enterprise, the acts were chargeable under the federal RICO statute even though the individual acts of racketeering may not have affected interstate commerce. Martino, 648 F. 2d at 381.

3. First Amendment Challenges

In Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 57-60 (1989), the Supreme Court held that the Indiana RICO statute, patterned after the federal RICO statute, was not unconstitutionally vague as applied to obscenity predicate offenses where the predicate offenses complied with the governing Supreme Court standards, and that the state RICO criminal penalties were not so "draconian" so as to chill First Amendment rights.[425]

4. Ex Post Facto Challenges

The Ex Post Facto Clause of the United States Constitution Art. I, § 10, prohibits Congress from "punish[ing] as a crime an act previously committed, which was innocent when done," or "mak[ing] more burdensome the punishment for a crime, after its commission . . . . " Collins v. Youngblood, 497 U.S. 37, 52 (1990). It has long been the law that it does not violate the Ex Post

[425] See also United States v. Freeman, 6 F.3d 586, 597-98 (9th Cir. 1993) (RICO's application to state legislative bribery scheme did not infringe on California's control of its electoral process or chill First Amendment rights regarding solicitation of campaign contributions); United States v. Jenkins, 974 F.2d 32, 34-35 (5th Cir. 1992) (First Amendment not violated by pre-trial restraining order prohibiting defendants from selling or transferring their assets, which order exempted defendants' operation of any lawful business in a lawful manner, including the sale of allegedly obscene materials); United States v. Pryba, 900 F.2d 748, 755 (4th Cir. 1990) (RICO forfeiture of non-obscene expressive materials acquired in violation of RICO did not violate First Amendment); United States v. Yarbrough, 852 F.2d 1522, 1540-41 (9th Cir. 1988) (white supremacist's RICO conspiracy conviction did not violate his First Amendment rights of political advocacy and association). Cf. Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348-49 (3d Cir.) (upholding private civil suit for damages, but noting that the First Amendment would preclude a RICO suit based solely on expression of dissenting political opinions), cert. denied, 493 U.S. 901 (1989).

Facto Clause to impose criminal liability for a course of conduct that was lawful when it began, but which continued after a statute made such conduct unlawful.[426]

Congress was well aware of the foregoing Ex Post Facto principles when it enacted RICO and explicitly provided that a RICO offense may include predicate acts committed before RICO's effective date. In that regard, RICO's definition of "pattern of racketeering activity" provides:

> "[P]attern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . .

18 U.S.C. § 1961(5). In explaining this RICO provision, the Senate Judiciary Committee Report stated:

> One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against ex post facto laws, and bills of attainder. Anyone who has engaged in the prohibited activities before the effective date of the [RICO] legislation is on prior notice that only one further act may trigger the increased penalties and new remedies of this chapter.

S. REP. NO. 91-617, at 158.

Thus, in enacting RICO, Congress explicitly provided that predicate offenses that were committed prior to RICO's effective date may be included in the charged pattern of racketeering activity, provided that at least one racketeering act was committed after RICO's effective date.

In accordance with Congress' intent in enacting RICO and with well-settled Ex Post Facto principles, every court that has considered the question has held that it does not violate the Ex Post Facto Clause to include racketeering acts committed before RICO's effective date, provided that in the case of a RICO substantive charge, at least one racketeering act was committed after RICO's

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[426] See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 342 (1897); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 107-108 (1909).

effective date, and in the case of a RICO conspiracy charge, the conspiracy and the defendant's membership in it continued after RICO's effective date.[427] As the Ninth Circuit explained:

> [A]ppellants were not convicted of conspiracy under 18 U.S.C. § 1962(d) for acts committed prior to October 15, 1970 [RICO's effective date]; rather they were convicted for having performed post-October 15, 1970, acts in furtherance of their continued racketeering conspiracy after being put on notice that these subsequent acts would combine with prior racketeering acts to produce the racketeering pattern against which this section is directed.

Campanale, 518 F.2d at 365.

In the same vein, the Ex Post Facto Clause is not violated by charging a racketeering act where the underlying conduct began before the racketeering act was added to RICO, but continued after the racketeering act was added to RICO. See, e.g., United States v. Alkins, 925 F. 2d 541, 548-49 (2d Cir. 1991) (mail fraud). Cf. United States v. Vaccaro, 115 F.3d 1211, 1220-21 (5th Cir. 1997), cert. denied, 522 U.S. 1047 (1998).

Likewise, the courts have held that the Ex Post Facto Clause is not violated by application of a revised sentencing guideline to a RICO violation that disadvantages a defendant where the RICO offense began prior to the effective date of the guideline revision but continued after its effective date.[428]

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[427] See, e.g., United States v. Caporale, 806 F.2d 1487, 1516 (11th Cir. 1986); United States v. Boffa, 688 F.2d 919, 937 (3d Cir. 1982); United States v. Brown, 555 F.2d 407, 416-17 (5th Cir. 1977); United States v. Ohlson, 552 F.2d 1347, 1348-50 (9th Cir. 1977); United States v. Campanale, 518 F.2d 352, 364-65 (9th Cir. 1975); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir. 1978) (Table); United States v. Al-Arian, 308 F. Supp. 2d 1322, 1347-48 (M.D. Fla. 2004); United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976), rev'd on other grounds, 591 F.2d 1347 (4th Cir. 1979). But see United States v. De La Mata, 266 F.3d 1275, 1289-91 (11th Cir. 2001) (bank fraud completed before the enactment of the bank fraud statute violated Ex Post Facto Clause).

[428] See, e.g., United States v. Gardiner, 463 F.3d 445, 462-64 (6th Cir. 2006); see also (continued...)

Moreover, although depriving one charged with a crime of a defense available according to law at the time when the criminal conduct was committed may violate the Ex Post Facto Clause, "extending a limitation period before a given prosecution is [time-] barred does not violate the ex post facto clause" because "[o]nly statutes withdrawing defenses related to the essential elements of a crime, or to matters which a defendant might plead as justification or excuse" violate the Ex Post Facto Clause. United States v. De La Mata, 266 F.3d 1275, 1286 (11th Cir. 2001); see also United States v. Reed, 924 F. 2d 1014, 1016-17 (11th Cir. 1991) (holding that application of forfeiture amendments allowing for substitution of assets to a RICO offense that was committed prior to the adoption of the amendments did not violate the Ex Post Facto Clause because it was a mere procedural change that did not change the quantum of punishment or add any new penalty).

G. Effect on Interstate or Foreign Commerce

RICO requires in each case evidence that the alleged enterprise be engaged in or its activities affect interstate or foreign commerce. See 18 U.S.C. § 1962. This Section discusses the Supreme Court's jurisprudence construing Congress' authority under the Commerce Clause of the Constitution to enact criminal statutes proscribing interstate conduct and intrastate conduct that affects interstate commerce. OCRS concludes that RICO constitutes a valid exercise of Congress' Commerce Clause powers on its face and as typically applied. Moreover, OCRS maintains that the "substantial effects" test applies only to the legal issue of whether a statute that regulates wholly **intra**state activity lies within Congress' Commerce Clause powers, which is solely for a court to

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[428](...continued)
United States v. Hurley, 63 F.3d 1, 19-20 (1st Cir. 1995); United States v. Korando, 29 F.3d 1114, 1119-20 (7th Cir. 1994); United States v. Eisen, 974 F.2d 246, 268-69 (2d Cir. 1992); United States v. Minicone, 960 F.2d 1099, 1111 (2d Cir. 1992); United States v. Moscony, 927 F.2d 742, 755 (3d Cir. 1991) (discussing but not deciding post-enactment conduct issues).

decide, whereas the "de minimis" test applies as a matter of statutory construction to the fact-bound issue whether the evidence in any particular case is sufficient to establish RICO's required interstate nexus, which is for a jury to decide. This Section also discusses numerous RICO cases upholding jury instructions and the sufficiency of the evidence to establish RICO's required interstate nexus under the "de minimis" test.

1. Some Recent Supreme Court Cases Express Limitations Upon Congress' Authority Under the Commerce Clause

Congress' authority to prohibit RICO violations stems from the Commerce Clause of the Constitution, Article I, § 8, cl. 3, which provides that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . . " For many years the Supreme Court interpreted Congress' authority under the Commerce Clause very broadly to include regulation of **intra**state conduct that affected interstate commerce, as well as interstate commerce itself. Wickard v. Filburn, 317 U.S. 111 (1942), is the landmark case in that regard. In Wickard, the plaintiff filed a complaint to enjoin enforcement against him of the marketing penalty imposed by the Agricultural Adjustment Act of 1938 ("AAA") as amended in 1941, upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. Plaintiff was allowed a 1941 wheat crop acreage of 11.1 acres, whereas he sowed 23 acres, and harvested 239 bushels of wheat from the 11.9 acres in excess of the allotment. The AAA extended federal regulation to production of wheat not intended for commerce but wholly for consumption on the farm, and therefore, penalties did not depend upon whether any part of the wheat was sold or intended to be sold. The Supreme Court stated that Congress' authority to regulate interstate commerce

> extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

Id. at 124 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

The Court added that "[w]hether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of" Congress' power under the Commerce Clause. Wickard, 317 U.S. at 124. Rather, the Court stated that

> even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Id. at 125. Thus, Wickard set forth a broad interpretation of Congress' Commerce Clause powers.[429]

However, in several recent cases, beginning with United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court has eschewed expanding the scope of Congress' legislative authority under the Commerce Clause. In Lopez, the Supreme Court held that 18 U.S.C. § 922(q)(1)(A), which makes it a crime for "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," exceeds Congress' Commerce Clause authority. Id. at 567. The Court identified "three broad categories of activity that Congress may regulate under its commerce power":

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may

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[429] Attached are summaries of 29 Supreme Court decisions in civil cases (Appendix II (A)) and 18 Supreme Court decisions in criminal cases (Appendix II (B)) decided after Wickard v. Filburn involving Congress' authority under the Commerce Clause.

> come only from intrastate activities. [Third], Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Id. at 558-59 (citations omitted).

Applying these three categories, the Court stated that the first two categories clearly did not apply to the gun statute at issue, leaving only the third category. Id. at 559. Under the third category the Court noted that

> [W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining, Hodel, [452 U.S. 264 (1981)], intrastate extortionate credit transactions, Perez, [402 U.S. 146 (1971)], restaurants utilizing substantial interstate supplies, McClung, [379 U.S. 294 (1964)], inns and hotels catering to interstate guests, Heart of Atlanta Motel, [379 U.S. 241 (1964)] and production and consumption of homegrown wheat, Wickard v. Filburn, 317 U.S. 111 (1942). These examples are by no means exhaustive, but the pattern is clear. **Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.**

Id. at 559-60 (emphasis added).

However, the Court concluded that the gun statute could not be justified under the third category because the statute "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms"; nor was the statute "an essential part of a larger regulation of economic activity . . . . ." Id. at 561. The Court concluded that the gun statute "cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Id. The Court added that "[a]dmittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty." Id. at 566. Nevertheless, the Court stated that such uncertainty is a necessary price to pay to enforce the Constitution's system of enumerated powers. Id.

The government argued that possession of a firearm in a local school zone substantially affects interstate commerce because such possession might result in violent crime and "the costs of violent crime are substantial . . . [and it] reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe." The government further argued that violent crime has "an adverse effect on classroom learning [which], in turn, represents a substantial threat to trade and commerce." Id. at 563-65. The Court rejected these arguments, finding the analysis too attenuated. Moreover, the Court rejected these arguments because their acceptance would, in effect, eliminate any limitations the Commerce Clause imposes on federal police power in derogation of the dual system of government created by the Constitution. In that respect, the Court stated:

> Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.
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> . . .
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> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a **general police power** of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. **The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. Gibbons v. Ogden, [22 U.S. 1, 95 (1824)], and that there never will be a distinction between what is truly national and what is truly local, cf. Jones & Laughlin Steel, [301 U.S. 1, 30 (1937)]. This we are unwilling to do.**

Id. at 564, 567-68 (citation omitted) (emphasis added).

The Court also noted that "§ 922(q) contains no jurisdictional element that would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce," id. at 561, and "neither the statute nor its legislative history contains express congressional findings

regarding the effects upon interstate commerce of gun possession in a school zone." Id. at 562 (internal quotation marks omitted).

Similarly, in United States v. Morrison, 529 U.S. 598 (2000), the Supreme Court held that Congress lacked authority under the Commerce Clause to enact 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated crimes of violence. The Government argued that the statute was a proper exercise of Congress' Commerce Clause power because it regulated "those activities that substantially affect interstate commerce." Id. at 609 (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995)). The Supreme Court rejected this argument, applying the analysis set forth in United States v. Lopez, supra. First, the Court noted that whether the activity at issue is "economic" in nature is central to its Commerce Clause analysis. Morrison, 529 U.S. at 610. The Court added that:

> Lopez's review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

Id. at 611. However, the Court concluded that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." Id. at 613. The Court added:

> While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, **thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature**.

Id. (emphasis added).

The Court also found it important that the statute contained no express jurisdictional element requiring an explicit connection with or effect on interstate commerce which **may** establish that the statute is a proper enactment under the Commerce Clause power. Id. at 612-13.

The Court acknowledged that the statute at issue was supported by numerous findings by Congress regarding the effects on interstate commerce by gender-based crimes of violence. Id. at 614-15.[430] The Supreme Court, however, stated that such Congressional findings are not sufficient, by themselves, to sustain the constitutionality of Commerce Clause legislation since whether particular activity affects interstate commerce to sustain the constitutionality of a statute "is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." Id. at 614, quoting Lopez, 514 U.S. at 557 n.2. The Court also rejected Congress' findings because they were based on an attenuated "but-for causal chain" of analysis rejected in Lopez. The Court stated:

> If accepted, [such] reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Id. at 615. Significantly, the Court concluded:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment

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[430] In that regard, the Court quoted from the House Conference Report, stating that Congress found that gender-motivated violence affects interstate commerce

> by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

Id. at 615, quoting H.R. Conf. Rep. No. 103-711, at 385 (1994); accord S. REP. NO. 103-138, at 54 (1993).

> of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. See, e.g., Cohens v. Virginia, 6 Wheat. 264, 426, 428 (1821) (Marshall, C.J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear . . . that congress cannot punish felonies generally"). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims. See, e.g., Lopez, 514 U.S. at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power"); id. at 584-585 (Thomas, J. concurring) ("[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), 596-597, and n.6 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).

Id. at 617-19 (footnote and citations omitted).

However, in Gonzales v. Raich, 545 U.S. 1 (2005), the Supreme Court relied upon Wickard v. Filburn, supra, to uphold the regulation of intrastate, non-commercial cultivation and possession of marijuana because of its potential effect on the interstate market for marijuana. In Raich, California's Compassionate Use Act authorized limited marijuana use for medical purposes. Respondents were California residents who used doctor-recommended marijuana for serious medical conditions. After DEA agents seized and destroyed all six of respondents' cannabis plants, respondents brought an action seeking injunctive and declarative relief prohibiting the enforcement of the federal Controlled Substances Act (CSA) to the extent that it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. The district court denied respondents' motion for a preliminary injunction, but the Ninth Circuit reversed, finding that they had demonstrated a strong likelihood of success on the claim that the CSA is an unconstitutional exercise of Congress' Commerce Clause authority **as applied** to the intrastate, non-commercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient physician pursuant to valid California state law. Id. at 5-9. The Ninth Circuit's majority opinion

"placed heavy reliance" on the Supreme Court's decisions in Lopez, 514 U.S. 549 and Morrison, 529 U.S. 598. See Raich, 545 U.S. at 9.

The Supreme Court reversed, holding that the "CSA is a valid exercise of federal power, **even as applied to the troubling facts of this case**." Id. (emphasis added). The Supreme Court stated that its

> case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. . . . [And] when "'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence.'"

Id. at 17. The Court relied heavily upon Wickard v. Filburn, 317 U.S. 111 (1942), stating that Wickard "establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." Raich, 545 U.S. at 18.

Applying the foregoing principles, the Supreme Court held that enactment of the CSA was within Congress' authority under the Commerce Clause. First, the Court explained that under Wickard, it was immaterial that respondents' cultivation and possession of marijuana was entirely instrastate activity and not itself "commercial" because respondents' activities were "quintessentially economic," id. at 25, and were part of a class of economic activity which if left outside the regulatory scheme would affect price and market conditions for marijuana. Id. at 18-20. In that respect, the Supreme Court distinguished Lopez and Morrison which involved regulation of activities that were

not "economic" in nature. Id. at 25.[431] Second, the Court found that the fact that respondents' own impact on the market was "trivial by itself" was not a sufficient reason to remove them from the scope of federal regulation because Congress may regulate "all those whose aggregated production was significant." Id. at 20. Moreover, the Court ruled that it was immaterial that "Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market," noting that the Court has "never required Congress to make particularized findings in order to legislate . . . ." Id. at 21. Significantly, the Court added that it "need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." Id. at 22.[432]

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[431] It is also noteworthy that Raich involved a challenge that a statute was unconstitutional "as applied" to the particular circumstances at issue, whereas Lopez and Morrison involved "facial" constitutional challenges.

[432] Raich is consistent with the Supreme Court's earlier decisions. See, e.g., Perez v. United States, 402 U.S. 146 (1971). In Perez, the defendant was convicted of "loan-sharking" activities, i.e., unlawfully using extortionate means in collecting and attempting to collect an extension of credit, in violation of 18 U.S.C. §§ 891 et seq. The statute did not require a nexus to interstate commerce, and therefore the defendant argued that Congress had exceeded its Commerce Clause authority by prohibiting the local, intrastate activity of loan-sharking.

The Supreme Court rejected this argument on the ground that Congress made adequate findings that the "class" of loanshark activity had a substantial affect on interstate commerce, including that loan-sharking was the second largest source of revenue for organized crime which exceeded $350 million a year and causes takeovers of legitimate businesses by organized crime. Id. at 155-56. The Court explained:

> In emphasis of our position that it was the **class of activities** regulated that was the measure, we acknowledged that Congress appropriately considered the "total incidence" of the practice on commerce.
>
> Where the **class of activities** is regulated and that class is within the reach of federal

(continued...)

2. General Principles Arising from These Recent Supreme Court Decisions

These recent decisions establish several paramount principles in the Supreme Court's Commerce Clause jurisprudence. First, the Supreme Court has emphasized that whether the regulated activity at issue involves "commercial or economic" activity is central to its Commerce Clause analysis, at least regarding whether Congress has a rational basis to conclude that wholly **intra**state conduct has a substantial effect on interstate commerce. The Supreme Court has also indicated its reluctance to interpret the Commerce Clause and federal statutes in such a way as to permit federal regulation of conduct that traditionally has been the domain of the States' exercise of their police power, such as criminalizing wholly intrastate, non-economic, violent conduct. In particular, the Court has ruled that, as a general rule, Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Morrison, 529 U.S. at 617 (Scalia, J. concurring).

However, the Supreme Court has held that Congress' Commerce Clause authority extends to the regulation of wholly intrastate activity that is not itself commercial when Congress rationally concludes that such intrastate activity involves economic activity that considered in the aggregate would have a substantial effect in interstate commerce. Therefore, the critical distinction is that Congress' Commerce Clause authority may be based on the aggregate effect of wholly intrastate

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[432](...continued)
power, the courts have no power "to excise, as trivial, individual instances" of the class.

Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce.

Id. at 154 (citations omitted) (emphasis added). See also Wickard, 317 U.S. at 124.

"economic activity," but as a general rule may not be based on the aggregate effect of wholly intrastate, non-economic or non-commercial activity.

This general rule, however, may not be absolute. Congress' Commerce Clause powers may, in some circumstances, extend to the regulation of wholly intrastate, non-economic and non-commercial activities when such regulation is necessary and proper for the regulation of economic activity that in a substantial way would effect interstate commerce. As Justice Scalia explained in his concurring opinion in Raich:

> As we implicitly acknowledged in Lopez, however, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in Lopez was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S. at 561. This statement referred to those cases permitting the regulation of intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power." Wrightwood Dairy Co., [315 U.S. 110, 119 (1942)]; see also United States v. Darby, 312 U.S. 100, 118-119 (1941); Shreveport Rate Cases, [234 U.S. 342, 353 (1914)]. As the Court put it in Wrightwood Dairy, where Congress has the authority to enact a regulation of interstate commerce, "it possesses every power needed to make the regulation effective." 315 U.S. at 118-119.
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> Although this power "to make . . . regulation effective" commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. Moreover, as the passage from Lopez quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. See Lopez, [514 U.S. at 561]. The relevant question is simply whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power. See Darby, [312 U.S. at 121].

Raich, 545 U.S. at 36 (Scalia, J. concurring) (footnote omitted).

Similarly, in Morrison, 529 U.S. at 613, the Supreme Court stated that it "need not adopt a categorical rule against aggregating the effects of any noneconomic activity[,]" but that thus far the Supreme Court has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." Therefore, the Supreme Court has not categorically ruled out upholding Congress' Commerce Clause powers to regulate wholly intrastate, non-economic activity based on its aggregate effects on interstate commerce.

The Supreme Court also has explicitly ruled that a court "need not determine whether [wholly intrastate] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding," Raich, 545 U.S. at 22,[433] and that such decision "is ultimately a judicial rather than a legislative question . . . ." Morrison, 529 U.S. at 614 (quoting Lopez, 514 U.S. at 557 n.2).

3. The "Substantial Effects" Test Applies to the Legal Issue of Whether a Statute Lies Within Congress' Authority under the Commerce Clause. By contrast, the "De Minimis" Test Determines Whether the Evidence is Sufficient in a Particular Case to Establish a Requisite Nexus to Interstate Commerce Required Under a Statutory Offense. The First Question is a Legal Question to be Decided by the Court, and the Second is a Fact-bound Issue Primarily for the Jury to Decide

a. There are fundamental distinctions between the analysis of Congress' authority under the Commerce Clause to enact a statute, on the one hand, and the analysis, on the other hand, of whether evidence in a particular case is sufficient to establish a jurisdictional element of an offense involving an effect on, or nexus to, interstate commerce. The former analysis involves issues of constitutional law, that is, whether a statute is constitutional on its face or as applied, which a Court

[433] Accord United States v. Stewart, 451 F.3d 1071, 1075, 1077 (9th Cir. 2006) ("[W]e do not require the government to prove that [wholly intrastate] activities *actually* affected interstate commerce; we merely inquire whether Congress had a rational basis for so concluding.").

may decide based upon "legislative facts" that usually are not proven as evidentiary facts during the litigation. Such "legislative facts" include the statute's legislative history, prior judicial decisions, analysis of the regulated activity's effect on commerce that may be contained in law review articles, treatises, etc., and the aggregate effect of the class of similar cases or conduct on interstate commerce. Indeed, as noted above, in Morrison, 529 U.S. at 614, the Supreme Court pointedly stated that whether particular activity affects interstate commerce to sustain the constitutionality of a statute "is ultimately a judicial . . . question." Therefore, the "substantial effects" test applies to "facial" and "as applied" constitutional challenges to statutes enacted under Congress' Commerce Clause powers. On the other hand, a fact-finder's determination in a particular case of the sufficiency of the evidence to establish a requisite jurisdictional element of a nexus to interstate commerce is limited to consideration of the specific evidence proven at trial and the theories of sufficiency presented to the jury in the trial court's instructions and the parties' jury arguments.

It is particularly significant that the Supreme Court has **never** applied the "substantial effects" test to determine whether the evidence is sufficient in a particular case to establish a statutorily required nexus to interstate commerce, but rather has applied the "substantial effects" test **only** to determine whether a statute regulating wholly intrastate activity falls within Congress' Commerce Clause powers. See United States v. Robertson, 514 U.S. 669, 671 (1995) (noting that the "substantial effects" test "was developed in [the Supreme Court's] jurisprudence to define the extent of Congress' power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects"); see also App. II (A) and (B).

However, some courts and litigants have confused the two distinct inquiries. For example, in some cases, courts and litigants have erroneously applied the "substantial effects" test set forth

in Wickard v. Filburn to determine whether the evidence was sufficient in a particular robbery prosecution to establish an effect on interstate commerce as required by the Hobbs Act (18 U.S.C. § 1951), and therefore have argued that the requisite effect on interstate commerce was established by aggregating the effect on interstate commerce by the class of all intrastate robberies. See, e.g., United States v. Jennings, 195 F.3d 795, 800 (5th Cir. 1999).

To determine whether Congress has the authority under the Commerce Clause to enact a statute, the Supreme Court has identified three categories of activity that Congress may regulate under its Commerce Clause power.[434] Each of these three categories clearly involve issues of law for a court, not a jury, to decide. "First, Congress may regulate the use of the channels of interstate commerce." Lopez, 514 U.S. at 558. As examples of this first category, the Supreme Court in Lopez pointed to United States v. Darby, 312 U.S. 100, 113-14 (1941) and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255-57 (1964), which noted that interstate commerce subject to regulation under the Commerce Clause includes the interstate shipment of goods, both legal and illegal, and the interstate transportation of passengers.[435]

Under the second category, the Supreme Court said that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Lopez, 514 U.S. at 558. As

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[434] See Morrison, 529 U.S. at 610-13; Lopez, 514 U.S. at 558-60.

[435] See also Cleveland v. United States, 329 U.S. 14, 19 (1946) (upholding the defendant's Mann Act conviction for interstate transportation of a woman for immoral, non-commercial purposes). Accord Caminetti v. United States, 242 U.S. 470, 491-93 (1917); United States v. Hill, 248 U.S. 420, 423-24 (1919) (upholding the defendant's conviction for traveling interstate with one quart of liquor meant solely for personal consumption, holding that even the "transportation of one's own goods from state to state is interstate commerce, and, as such, subject to the regulatory power of Congress").

examples of this second category, the Supreme Court in Lopez pointed to the Shreveport Rate Cases, 234 U.S. 342 (1914), which upheld federal regulation of **intra**state rates for interstate railroad carriers where necessary to prevent discrimination against interstate commerce by interstate carriers, and to Southern Railway Co. v. United States, 222 U.S. 20 (1911), which upheld application of safety regulations regarding railway cars on any railway that is a highway of interstate commerce even if the particular railway car was used only in **intra**state commerce. As additional examples of the second category, the Court also pointed to statutes dealing with the destruction of aircraft (18 U.S.C. § 32) and the thefts from interstate shipments (18 U.S.C. § 659).

Regarding the third category of activity subject to regulation under the Commerce Clause, the Supreme Court in Lopez stated that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." 514 U.S. at 558-59 (citation omitted) . As examples of the third category, the Lopez Court pointed to NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), which upheld the National Labor Relations Act, with its broad regulatory scheme over labor relations, including intrastate activities that had a substantial effect on interstate commerce. Lopez, 514 U.S. at 555. The Supreme Court listed other examples including "the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of home grown wheat." Lopez, 514 U.S. at 559-60 (citations omitted).

The "substantial effects" test is probably the broadest category subject to Congress' Commerce Clause authority. However, there are limitations on its application. First, as noted above, the Supreme Court has observed that "[t]he 'affecting commerce' test was developed in our

jurisprudence to define the extent of Congress' power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects." Robertson, 514 U.S. at 671. Therefore, the "substantial effects" on commerce test does not apply to the first two categories of activity that are subject to Congress' commerce powers, that is, the "use of the channels of interstate commerce" and "the instrumentalities of interstate commerce." See, e.g., Reno v. Condon, 528 U.S. 141, 148-49 (2000); Robertson, 514 U.S. at 671; United States v. Page, 167 F.3d 325, 334-35 (6th Cir. 1999); United States v. Harrington, 108 F.3d 1460, 1470 (D.C. Cir. 1997); United States v. Atcheson, 94 F.3d 1237, 1242-43 (9th Cir. 1996). Accordingly, when regulated activity falls within either the first or second category, the activity is subject to Congress' Commerce Clause powers, and consequently it is not necessary to determine whether the regulated activity has a substantial effect on interstate commerce.

In sum, the "substantial effects" test applies to the issue of law whether Congress has the constitutional authority under the Commerce Clause to regulate wholly **intra**state activity, and does not apply to the fact-bound issue whether the evidence in a particular case is sufficient to establish beyond a reasonable doubt the interstate nexus element of a criminal offense.

b. Two recent decisions illustrate the conflict over whether the substantial effects test applies to determining the sufficiency of the evidence to establish RICO's statutory requirement that the alleged enterprise be engaged in, or its activities, affect interstate or foreign commerce. See 18 U.S.C. § 1962(c). In Waucaush v. United States, 380 F.3d 251, 256 (6th Cir. 2004), the Sixth Circuit held that "where the enterprise itself did not engage in economic activity, a minimal effect

on commerce will not do";[436] rather, the Government must establish sufficient evidence for a reasonable jury to conclude that the enterprise's activities had "substantial effects on interstate commerce." Id. at 258. In Waucaush, the indictment alleged that the enterprise consisted of a violent street gang, the Cash Flow Posse ("CFP"), operating in Detroit, Michigan, and that the defendant violated RICO by murdering and conspiring to murder two rival gang members. The defendant moved to dismiss the indictment on the ground that the alleged racketeering acts committed by members of the enterprise did not establish a requisite substantial effect on interstate commerce. Id. at 253. The district court rejected the defendant's argument, informing the defendant "that a purely intrastate act of violence that had only minimal, indirect effects on interstate commerce could" satisfy RICO's required interstate nexus. Id. at 258. The defendant then pled guilty to conspiring to violate RICO under the district court's interpretation of RICO's interstate nexus requirement.

The Sixth Circuit vacated the defendant's guilty plea on the ground that he established that he was actually innocent of violating RICO because the factual basis for his guilty plea did not establish the requisite substantial effects on interstate commerce as a matter of law. Id. at 254-63.

The Government argued "that the CFP's intrastate acts of violence substantially affected commerce because the murder of rival gang members prevented them from selling drugs," and it relied on an opinion of an Illinois court indicating that an Illinois Chapter of one of the CFP's targeted gangs had been involved in selling drugs in Illinois. Id. at 256-57. The Sixth Circuit ruled that such evidence was insufficient to establish the requisite affect on interstate commerce, stating:

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[436] The Sixth Circuit stated that only a de minimis effect on interstate commerce is required when "the enterprise itself had engaged in economic activity . . . ." Waucaush, 380 F.3d at 255.

> That the Detroit-area victims belonged to a gang whose affiliates in Illinois sold an unknown quantity of drugs with an unknown frequency at an unknown point in time tells us nothing about whether and to what extent drugs were sold by the Detroit gang members targeted by the CFP.

Id. at 257. The Court added that even if "some of the people that the CFP killed were drug dealers, we have no evidence that they were dealing drugs or carrying drug money when they were killed, or that their deaths significantly disrupted the interstate market for drugs." Id.

The Government also relied on evidence "that in 1996, some of [CFP's] members talked over gang business while in Mexico City." Id. The Sixth Circuit found this evidence insufficient, stating that "[i]f we were to label these occasional acts of interstate commerce as 'substantial,' federal authority under the Commerce Clause would be virtually limitless." Id.

The Sixth Circuit stated that it interpreted RICO to require evidence of a substantial effect on interstate commerce where the alleged RICO enterprise engaged solely in intrastate, non-economic violent conduct to "avoid interpreting a statute to prohibit conduct which Congress may not constitutionally regulate . . . ." Id. at 255. Therefore, the Sixth Circuit implied, but did not squarely rule, that Congress lacked authority under the Commerce Clause to apply RICO to wholly intrastate, non-economic violent conduct that lacked a substantial effect on interstate commerce.

In United States v. Nascimento, 491 F.3d 25, 30-31 (1st Cir. 2007), the alleged RICO enterprise consisted of a violent street gang, "Stonehurst," whose base of operation was Stonehurst Street in the Dorchester section of Boston, Massachusetts. The indictment alleged that the defendants committed nearly two dozen instances of murder and assault with intent to murder members of a rival street gang. The enterprise, as in Waucaush, was not engaged in economic activity. However, the First Circuit explicitly refused to follow Waucaush for several reasons. Nascimento, 491 F.3d at 30, 38. First, the First Circuit noted that "[t]here is nothing in either

[RICO's] statutory language or the legislative history" that supports the view expressed in Waucaush that RICO's requirement that the activities of the charged enterprise "affect interstate or foreign commerce" means "different things as applied to different types of enterprises." Id. at 37. Rather, the First Circuit held that as a matter of statutory construction, RICO requires only a de minimis effect on interstate commerce in all cases. Id. at 37-40.[437] Accord United States v. Frega, 179 F.3d 793, 800 (9th Cir. 1999) (holding that a de minimis impact on interstate commerce is sufficient to establish RICO's required interstate commerce nexus and that "Lopez's 'substantial effects' test is inapplicable"); United States v. Juvenile Male, 118 F.3d 1344, 1347-49 (9th Cir. 1997) (same); United States v. Maloney, 71 F.3d 645, 662-63 (7th Cir. 1995) (same).

Moreover, the First Circuit relied heavily on Gonzales v. Raich, supra, in holding that application of RICO to enterprises engaged in intrastate non-economic, violent conduct did not exceed Congress' authority under the Commerce Clause because the regulation of such enterprises was a subset of RICO's broader regulation of enterprises and their activities that Congress has rationally decided has a substantial effect on interstate commerce. Nascimento, 491 F.3d at 40-43. The First Circuit stated:

> Thus, the class of activity is the relevant unit of analysis and, within wide limits, it is Congress – not the courts – that decides how to define a class of activity. All that is necessary to deflect a Commerce Clause challenge to a general regulatory statute is a showing that the statute itself deals rationally with a class of activity that has a substantial relationship to interstate or foreign commerce. See Maryland v. Wirtz,

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[437] The First Circuit found that the following evidence established the requisite de minimis effect on interstate commerce: (1) the Stonehurst enterprise kept an arsenal of at least nine different firearms to be used by enterprise members in carrying out the enterprise's affairs; all but one of the firearms had been manufactured outside of Massachusetts, and thus had moved in interstate commerce; (2) an enterprise member traveled interstate to obtain one of the firearms for use in carrying out the enterprise's affairs, and (3) enterprise members communicated with each other by cell phones to keep abreast of, and carry out, enterprise activities. Nascimento, 491 F.3d at 44-45.

> 392 U.S. 183, 196 n.27 (1968). The intrastate or noneconomic character of individual instances within that class is of no consequence. See id. This core principle is fully applicable to criminal statutes. See Perez v. United States, 402 U.S. 146, 154 (1971) (cited with approval in Lopez, 514 U.S. at 558).

Id. at 42-43. Waucaush, which was decided before Raich, erroneously failed to follow the above quoted principles that were not only set forth in Raich, but also were set forth in much earlier cases in Wickard v. Filburn, supra, and Perez, supra.

OCRS maintains that Waucaush was wrongly decided not only for the reasons stated in Nascimento, but also because, as explained above: (1) the substantial effects test applies only to the legal issue of whether a statute's regulation of wholly intrastate activity constitutes a valid exercise of Congress' Commerce Clause powers which is solely for a court to decide, and does not apply to the statutory construction issue whether the evidence is sufficient in a particular case to establish a statutorily required effect on interstate commerce, and (2) Waucaush mistakenly ruled that the Government was required to prove that the regulation of wholly intrastate activities at issue had an actual substantial effect on interstate commerce, whereas the Government is required only to establish that Congress had a rational basis for so concluding.

4. RICO Constitutes a Valid Exercise of Congress' Commerce Clause Powers on Its Face and as Typically Applied, Even as Applied to Wholly Intrastate, Non-Economic Activities

Although RICO is not limited to interstate or commercial or economic criminal conduct, its focus is on such conduct that substantially affects interstate commerce. In that regard, RICO's enterprise element, 18 U.S.C. § 1961(4), includes many entities that typically are engaged in interstate commerce, such as corporations, labor unions and other legal entities. Similarly, RICO's required pattern of racketeering activity includes many offenses (see 18 U.S.C. § 1961(1)) that involve interstate activity or economic activity that affects interstate commerce, such as narcotics

trafficking (21 U.S.C. §§ 841 et seq.); conducting illegal gambling businesses (18 U.S.C. § 1955); Interstate Travel in Aid of Racketeering (18 U.S.C. § 1952); money laundering (18 U.S.C. §§ 1956, 1957); interstate transportation of wagering paraphernalia (18 U.S.C. § 1953); interstate transportation of stolen goods (18 U.S.C. § 2314); theft from interstate shipment (18 U.S.C. § 659); wire fraud (18 U.S.C. § 1343); financial institution fraud (18 U.S.C. § 1344); robbery or extortion that affects interstate commerce (18 U.S.C. § 1951); use of interstate commerce facilities in the commission of murder-for-hire (18 U.S.C. § 1958); interstate transportation of stolen motor vehicles (18 U.S.C. §§ 2314 and 2315); trafficking in contraband cigarettes (18 U.S.C. §§ 2341-46), etc. Cf. Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 256-60 (1994).

Moreover, RICO's legislative history is replete with Congressional findings that RICO was designed to address the substantial adverse effects on interstate commerce caused by organized crime's infiltration of legitimate businesses, labor unions, and other illegal conduct that falls within RICO's scope. See, e.g., S. Rep. No. 617, 91st Cong., 1st Sess. at 1-2, 76-83 (1969). See also H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 246-49 (1989); Russello v. United States, 464 U.S. 16, 26-28 (1983); United States v. Turkette, 452 U.S. 576, 586-89 (1981). For example, in Turkette, the Supreme Court stated:

> The statement of findings that prefaces the Organized Crime Control Act of 1970 reveals the pervasiveness of the problem that Congress was addressing by this enactment:
>
> "The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business

> and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . . ."

452 U.S. at 588 (quoting 84 Stat. 922-23).

Indeed, the Senate Report states that RICO's remedies were designed to do whatever "is necessary to free the channels of commerce from predatory activities." S. Rep. No. 617, 91st Cong., 1st Sess. at 81 and 160 (1969). Accord H.R. Rep. No. 1549, 91st Cong., 2d Sess. at 57 (1970). As the Supreme Court observed,

> Congress emphasized the need to fashion new remedies in order to achieve its far-reaching objectives. See S. Rep. No. 91-617, p. 76 (1969).
>
> "What is needed here. . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." Id. at 79.

Russello, 464 U.S. at 27. Manifestly, Congress rationally designed RICO to address a broad class of unlawful activity that has a substantial effect on interstate and foreign commerce.

Furthermore, RICO requires proof in each case that the alleged RICO enterprise "is engaged in, or the activities of which affect, interstate or foreign commerce" (see 18 U.S.C. § 1962), which weighs heavily in favor of finding that RICO constitutes a valid exercise of Congress' Commerce Clause powers. See, e.g., Morrison, 529 U.S. at 612-13; Lopez, 514 U.S. at 561; United States v. Marino, 277 F.3d 11, 34 (1st Cir. 2002); United States v. Thomas, 114 F.3d 228, 253 (D.C. Cir. 1997); United States v. Maloney, 71 F.3d 645, 663 (7th Cir. 1995).

In all these circumstances, RICO constitutes a valid exercise of Congress' Commerce Clause powers on its face and as typically applied, under all three categories of activity that Congress may regulate under the Commerce Clause that were identified in Lopez, 514 U.S. at 558-59; see also Section VI (G)(1) above. Accord Nascimento, 491 F.3d at 40-43; Frega, 179 F.3d at 800-01. For example, RICO proscribes various racketeering activities to protect "the channels of interstate commerce" and "the instrumentalities of interstate commerce," or persons or things in interstate commerce.[438]

Moreover, RICO does not necessarily exceed Congress' Commerce Clause powers even when applied to enterprises involving intrastate, violent, non-economic unlawful conduct because, as the court held in Nascimento, 491 F.3d at 40-43, when a statute such as RICO regulates a "class of activities" that has a substantial effect on interstate commerce, it is of no consequence that an individual instance arising under such a statute involves purely intrastate activities having a trivial impact on interstate commerce. See, e.g., Raich, 545 U.S. at 17; Perez, 402 U.S. at 154; Wickard, 317 U.S. at 124; cf. White, 116 F.3d at 926; Maloney, 71 F.3d at 663.[439] In that regard, it is

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[438] See, e.g., the RICO predicate racketeering offenses noted above in Section VI (G)(4).

[439] See also Alabama-Tombigbee Rivers Coalition v. Kempthorne, 477 F.3d 1250, 1273 (11th Cir. 2007) (upholding "the constitutionality of Congress authorizing the Fish and Wildlife Service to list a purely intrastate species as endangered under the Endangered Species Act" since Congress had a rational basis to conclude the class of regulated intrastate activity had a substantial effect on interstate commerce); United States v. Stewart, 451 F.3d 1071 (9th Cir. 2006) (holding that 18 U.S.C. § 922(o), which makes it illegal to transfer or possess a machine gun and which did not require a nexus to interstate commerce, did not exceed Congress' Commerce Clause powers when applied to the possession of a homemade machine gun because Congress had a rational basis to conclude that the federal regulation of such homemade weapons "fits within a larger scheme for the regulation of interstate commerce in firearms." id. at 1076); United States v. Smith, 459 F.3d 1276, 1284-85 (11th Cir. 2006) (holding that Congress had authority under the Commerce Clause to apply 18 U.S.C. § 2251(a) and 2252A(a)(5)(B) to defendant's wholly intrastate production and possessing (continued...)

particularly significant that, as noted above in this Section, RICO extends to a considerably broader array of unlawful interstate activities and economic related offenses that substantially effect interstate commerce than any other statutory scheme upheld under the Commerce Clause by the Supreme Court. See Appendix II (A) and (B). Indeed, under the teachings of Perez, 402 U.S. at 155-56, even eliminating RICO's requirement of an effect on interstate commerce in each case would not render RICO unconstitutional under the Commerce Clause because RICO extends to a broad class of activities that has a substantial effect on interstate commerce.[440]

5. RICO's Interstate Nexus Requirement May Be Met by Evidence That Either the Alleged RICO Enterprise was Engaged in, or its Activities Had a de minimis Effect on, Interstate Commerce

RICO, 18 U.S.C. § 1962 (a), (b), and (c), require that the alleged enterprise be "engaged in, **or** the activities of which affect, interstate or foreign commerce." (emphasis added).

a. In United States v. Robertson, 514 U.S. 669 (1995), a post-Lopez decision, the Supreme Court addressed the provision that the charged enterprise be "engaged in" interstate commerce. In Robertson, the defendant was convicted of a RICO violation, 18 U.S.C. § 1962(a), for investing proceeds of racketeering activity in an enterprise "which is engaged in, or the activities of which affect, interstate or foreign commerce." § 1962(a). The Supreme Court held that the Government established sufficient evidence that the enterprise, a gold mine in Alaska, engaged in

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[439](...continued)
of child pornography since Congress had a rational basis to conclude that the cumulative effect of the regulated conduct would substantially affect interstate commerce); United States v. Forrest, 429 F.3d 73, 78-79 (4th Cir. 2005) (same).

[440] However, even though RICO may constitute a valid exercise of Congress' Commerce Clause powers when applied to local, violent noneconomic activity, the text of RICO, 18 U.S.C. § 1962, nevertheless, requires evidence in each case that the charged enterprise be engaged in, or its activities affect, interstate or foreign commerce. See Section VI(G)(5) below.

interstate commerce by evidence that: (1) some of the $100,000 in equipment was purchased in California and transported to Alaska for use in the mine's operations; (2) "on more than one occasion, Robertson sought workers from out of state and brought them to Alaska to work in the mine[,]" and (3) "Robertson, the mine's sole proprietor, took $30,000 worth of gold, or 15% of the mine's total output, with him out of the State." Id. at 671.

Because the Court found that the evidence was sufficient to establish that the enterprise was "engaged in" interstate commerce, it explicitly stated that it need not consider "whether the activities of the [enterprise] 'affected' interstate commerce." Id. at 671. Robertson explicitly makes it clear that evidence that a RICO enterprise is "engaged in" interstate commerce is sufficient by itself to establish RICO's required nexus to interstate commerce, and, therefore, it is not necessary to consider whether the enterprise or its activities "affect" interstate commerce.[441] Consequently, in appropriate cases the Government should emphasize the evidence that the enterprise is engaged in interstate commerce, which is often the case, particularly where the enterprise includes or consists of legal entities such as corporations, labor unions, partnerships and sole proprietorships. Even illegal enterprises frequently are engaged in interstate commerce. For example, many LCN families conduct their activities in more than one state and engage in many illegal, commercial, interstate activities, such as narcotics trafficking, conducting illegal gambling businesses, interstate transportation of stolen goods, securities fraud, interstate loansharking and unlawful debt collection, etc.[442]

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[441] See also United States v. Pipkins, 378 F.3d 1281, 1294-95 (11th Cir. 2004); United States v. Riddle, 249 F.3d 529, 536-37 (6th Cir. 2001).

[442] See, e.g., United States v. Chance, 306 F.3d 356, 374-76 (6th Cir. 2002); Riddle, 249 F.3d (continued...)

Moreover, since RICO requires proof that the enterprise "**is engaged in**" interstate or foreign commerce, **or** the enterprise's activities "affect" interstate or foreign commerce, the Government is not limited to proof that the charged racketeering acts affect interstate or foreign commerce. Rather, the Government may rely on proof that the enterprise is engaged in, or its activities as a whole, affect interstate commerce.[443]

b. Prior to the Supreme Court's 1995 decision in Lopez, supra, federal courts of appeals had uniformly held that the requisite effect on interstate commerce was established under the "de minimis" test.[444] After the Lopez decision, the courts of appeals have continued to uphold the

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[442](...continued)
at 537.

[443] See, e.g., United States v. Fernandez, 388 F.3d 1199, 1250 (9th Cir. 2004); United States v. Juvenile Male, 118 F.3d 1344, 1349-50 (9th Cir. 1997).

[444] See, e.g., United States v. Farmer, 924 F.2d 647, 651 (7th Cir. 1991) (interstate commerce nexus satisfied where cocaine was flown directly from South America to Illinois and where drug scales used in Illinois were manufactured in New Jersey); United States v. Norton, 867 F.2d 1354 (11th Cir. 1989) (effect on commerce sufficient where labor organizations represented many employees in building industry, and union officials traveled interstate in furtherance of the conspiracy); United States v. Doherty, 867 F.2d 47 (1st Cir. 1989) (in case involving thefts of police exams, effect on interstate commerce shown by evidence that out-of-state consultant developed and graded some of the exams); United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988) (use of interstate telephone system and use of supplies purchased from companies in other states); United States v. Alvarez, 860 F.2d 801 (7th Cir. 1988) (heroin came from another country); United States v. Murphy, 768 F.2d 1518, 1531 (7th Cir. 1985) (evidence that bribes paid to judge depleted assets of lawyers who paid them and that lawyers regularly purchased items in interstate commerce, including law books, envelopes and stationery, established that bribes touched commerce "in any degree," and thus met interstate commerce requirement of the Hobbs Act); United States v. Robinson, 763 F.2d 778, 791 (6th Cir. 1985) (alcohol sold by defendants to liquor dealer had been manufactured out of state was sufficient to affect interstate commerce); United States v. McManigal, 708 F.2d 276, 283 (7th Cir.), vacated on other grounds, 464 U.S. 979 (1983) (property tax assessment reductions obtained by defendant for two clients who did interstate business, as well as clients' payment of defendant's fees, both actually and potentially altered funds available to clients to purchase goods and services in interstate commerce, thus supporting finding that enterprise
(continued...)

sufficiency of the evidence of RICO's required effect on interstate commerce under the "de minimis" test, except for Waucaush which is discussed above.[445]

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[444](...continued)
consisting of law offices with which defendant was associated affected interstate commerce); United States v. Dickens, 695 F.2d 765, 781 (3d Cir. 1983) (testimony at trial showed that the enterprise's activities included racketeering acts – bank robbery – which admittedly had an impact on interstate commerce); United States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981) (interstate activities charged as predicate offenses can be used to support the interstate connection of the enterprise); United States v. Allen, 656 F.2d 964 (4th Cir. 1981) (supplies used in defendant's bookmaking operations which originated outside Maryland provided a sufficient nexus between the enterprise and interstate commerce); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981) (activities of the Third Judicial Circuit – the enterprise – affected commerce as out-of-state litigants appeared before the Third Circuit; a Third Judicial Circuit state attorney was at times involved in extradition proceedings, and the Third Judicial Circuit Clerk's Office purchased office supplies from outside the state); United States v. Barton, 647 F.2d 224, 233-34 (2d Cir. 1981) (association-in-fact enterprise engaged in bombing of buildings that were used for commercial activities); United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979) (requisite effect on interstate commerce "would exist if the jury found either: (1) that the company operated by the murder victim . . . bought steel manufactured outside the state of California, (2) that defendants received and cashed . . . Social Security checks which were issued in Alabama, or (3) that the defendants engaged in the extortionate collection of debts").

[445] See, e.g., Nascimento, 491 F.3d at 43-45 (ruling that the following evidence established the requisite de minimis effect on interstate commerce: (1) the Stonehurst enterprise, a violent street gang, kept an arsenal of at least nine different firearms to be used by enterprise members in carrying out the enterprise's affairs; all but one of the firearms had been manufactured outside of Massachusetts, and thus had moved in interstate commerce; (2) an enterprise member traveled interstate to obtain one of the firearms for use in carrying out the enterprise's affairs, and (3) enterprise members communicated with each other by cell phones to keep abreast of, and carry out, enterprise activities); United States v. Gardiner, 463 F.3d 445, 458-59 (6th Cir. 2006) (racketeering activity included unlawfully securing contracts through paying for interstate trips for enterprise members and other benefits); United States v. Johnson, 440 F.3d 832, 841-42 (6th Cir. 2006) (holding that the predicate acts in an insurance fraud and arson scheme affected interstate commerce in three ways: "(1) one of the houses purchased and then burned was bought in an interstate real estate transaction, (2) several of the houses that were burned were insured by out-of-state insurance companies, and (3) various interstate telephone calls, facsimiles, and mailings were made with respect to several of the purchases and the related insurance claims"); United States v. Smith, 413 F.3d 1253, 1273-74 (10th Cir. 2005) (requisite de minimis effect established when the street gang enterprise engaged in drug trafficking and robberies of drug dealers); United States v. Urban, 404 F.3d 754, 761-67 (3d Cir. 2005) (de minimis effect established by depletion of assets of a business (continued...)

[445](...continued)
engaged in interstate commerce through extortion); United States v. Delgado, 401 F.3d 290, 297 (5th Cir. 2005) (the enterprise engaged in trafficking in drugs obtained outside the United States and enterprise members used the instrumentalities of interstate commerce to conduct the enterprise's affairs, including telephones, pagers, Western Union and the United States Postal Service); Fernandez, 388 F.3d at 1249 (requisite de minimis effect established where enterprise engaged in drug trafficking); Pipkins, 378 F.3d at 1294-95 (members of the enterprise: (1) used instrumentalities of interstate commerce – pagers, telephones, cell phones and the internet to conduct the enterprise's affairs; (2) used automobiles and interstate highways to transport underage prostitutes across state lines; (3) recruited prostitutes from states outside the forum state; and (4) provided prostitutes with condoms manufactured out of state), vacated on other grounds, 544 U.S. 902 (2005); United States v. Shryock, 342 F.3d 948, 984-85 (9th Cir. 2003) (requisite de minimis effect where "(1) Appellants engaged in extensive drug trafficking; (2) firearms manufactured outside California were found at [defendant's] residence; (3) several Appellants sold narcotics grown outside California; (4) [two defendants] had discussions with Mexican drug traffickers regarding their possible involvement in an impending narcotics transaction; (5) [one defendant] was involved in a telephone call from Oregon to California that discussed illegal activities; and (6) [one defendant] made a comment regarding a future letter he might receive from out of state"); Chance, 306 F.3d at 373-75 (members of the enterprise extorted money from a victim, whose company sold fireworks in interstate commerce, and accepted bribes to travel outside of the forum state to gamble, and the enterprise involved members of the Pittsburgh La Cosa Nostra, which was outside the forum state, and proceeds of the enterprise's illegal gambling operations were transferred across state lines); Marino, 277 F.3d at 34-35 (holding that only a de minimis effect, not a substantial effect, on interstate commerce must be established); Riddle, 249 F.3d at 537 (the requisite de minimis effect established where the Ohio based enterprise: (1) involved the Pittsburgh LCN family, (2) purchased lottery tickets in Pennsylvania to protect against illegal gambling losses in Ohio, (3) sold in Pennsylvania a ring taken from an Ohio murder victim, and (4) extorted money from a victim who sold fireworks in New York); De Falco v. Bernas, 244 F.3d 286, 309 (2d Cir. 2001) (the defendant's extortionate demands caused the plaintiff to break an $8,800 contract with an out-of-state lumber company, and the regular business of the Town of Delaware, the enterprise, affected interstate commerce); United States v. Keltner, 147 F.3d 662, 669 (8th Cir. 1998) (finding sufficient evidence because "[b]oth defendants made repeated trips between Arkansas, Oklahoma, Texas and Louisiana. Three of the predicate acts occurred outside the state of Arkansas: the Tulsa bank robbery, interstate transportation of stolen property, wire fraud and mail fraud"); Juvenile Male, 118 F.3d at 1349-50 (the enterprise robbed $10,000 from a Subway sandwich franchise which sent a portion of its profits to its out-of-state headquarters and which purchased goods from out-of-state suppliers); Miller, 116 F.3d at 673-74 (enterprise engaged in distribution of cocaine produced outside the United States); United States v. Griffith, 85 F.3d 284, 285-86 (7th Cir. 1996) (enterprise conducted an interstate prostitution business); United States v. Beasley, 72 F.3d 1518, 1526 (11th Cir. 1996) (effect on commerce sufficient where religious cult tried to establish national and international influence by distributing its publications using its own truck and the mails and members traveled interstate
(continued...)

6. Jury Instructions on Effect on Interstate Commerce and Knowledge

In accordance with the foregoing authority, courts of appeals have frequently upheld jury instructions that the Government need only prove that the activities of the charged RICO enterprise had a de minimis effect on interstate commence to satisfy RICO's jurisdictional nexus to interstate or foreign commerce.[446] Moreover, courts have held that the Government is not required to prove that the defendant knew or should have known that the RICO enterprise's activities had an effect on interstate commerce.[447]

H. A RICO Enterprise May Be the Victim of A Defendant's Racketeering Activity

Dictum in several cases has given rise to the claim that under 18 U.S.C. §§ 1962 (c) and (d), a RICO enterprise may not be the victim of a defendant's racketeering activity. For example, in National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 262 (1994) ("Scheidler I"), the Supreme Court explicitly held that RICO does not require proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. In reaching that holding, the Supreme Court stated in dictum that:

> [T]he "enterprise" in subsection (c) [of 18 U.S.C. § 1962] connotes **generally** the vehicle through which the unlawful pattern of racketeering activity is committed,

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[445](...continued)
extensively); Maloney, 71 F.3d at 663 (evidence that the enterprise, the Circuit Court of Cook County, "'directly engaged in the . . . acquisition of goods and services in interstate commerce,' through its purchase of law books and computer equipment").

[446] See, e.g., Smith, 413 F.3d at 1273-74; Fernandez, 388 F.3d at 1248-49; Shryock, 342 F.3d at 984; Marino, 277 F.3d at 34-35; United States v. White, 116 F.3d 903, 925-26 & n.8 (D.C. Cir. 1997); Miller, 116 F.3d at 673-74; Maloney, 71 F.3d at 662-64; United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979).

[447] See, e.g., Smith, 413 F.3d at 1275; Miller, 116 F.3d at 673; United States v. Conn, 769 F.2d 420, 423-24 (7th Cir. 1985).

rather than the victim of that activity.

Scheidler I, 510 U.S. at 259 (emphasis added).

As courts have recognized,[448] the above quoted passage is plainly dictum since the issues presented in Scheidler I and the Court's holding did not involve the issue of whether a RICO enterprise may be the victim of a defendant's racketeering activity. Moreover, it does not follow that a RICO enterprise may never be the victim of a defendant's racketeering activity even if, as a statistical matter, a RICO enterprise "generally" is the vehicle through which the unlawful pattern of racketeering activity is committed.

In Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 262-269 (3d Cir. 1995), the Third Circuit affirmed a private civil RICO lawsuit by the plaintiff, Jaguar Cars, Inc., against three owners of a Jaguar dealership, Royal Oaks Motor Car Co. Inc., the alleged RICO enterprise, alleging that the three defendants perpetrated a scheme to defraud the plaintiff by submitting fraudulent warranty claims to Jaguar through their jointly owned Jaguar dealership, the RICO enterprise. The Third Circuit held that the three defendants, who were owners and officers of the corporate enterprise, were "legally distinct" from the corporate enterprise, and hence the complaint alleged a valid RICO claim. Jaguar Cars, 46 F.3d at 268. In reaching that holding on the issue of "distinctness," the Third Circuit stated in dictum that it would be inconsistent with Scheidler I for the alleged RICO enterprise to be the victim of the defendants' racketeering activity. See Jaguar Cars, 46 F.3d at 266-267.[449]

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[448] See cases cited in note 450 below.

[449] A few district court decisions in the Third Circuit have also followed the dictum in Jaguar Cars. See, e.g., United States v. Gordon, 380 F. Supp. 2d 356, 364 (D. Del. 2005) (assuming (continued...)

Significantly, after Jaguar Cars was decided, the Supreme Court clarified its dictum in Scheidler I that Jaguar Cars relied upon. In Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 164 (2001), the Supreme Court stated:

> The Court has held that RICO both protects a legitimate "enterprise" from those who would use unlawful acts to **victimize** it, United States v. Turkette, 452 U.S. 576, 591 (1981), and also protects the public from those who would unlawfully use an "enterprise" (whether legitimate or illegitimate) as a "vehicle" through which "unlawful . . . activity is committed," National Organization for Women, Inc., 510 U.S. [249,] 259 (1994).

533 U.S. at 164 (emphasis added). Thus, contrary to the dictum in Jaguar Cars, the Supreme Court explicitly recognized that a RICO enterprise such as a legitimate entity may be the victim of a

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[449](...continued)
arguendo "that the same entity cannot be both the enterprise and the victim"), rev'd, 183 Fed. Appx. 202 (3d Cir. 2006); Kaiser v. Stewart, 965 F. Supp. 684, 687 n.4 (E.D. Pa. 1997); United States v. Stewart, 955 F. Supp. 385, 387 (E.D. Pa. 1997). Other courts, however, have rejected such dictum. See cases cited in n.450 below. Indeed, in RICO cases after Jaguar Cars, the Third Circuit itself has approved RICO charges where the alleged RICO enterprise was the victim of the defendants' racketeering activity. See, e.g., United States v. Gordon, 183 Fed. Appx. 202 (3d Cir. 2006) (the RICO enterprise was the New Castle County of Delaware that was the victim of its employees' racketeering activity); United States v. Antico, 275 F.3d 245, 248-54 (3d Cir. 2001) (the RICO enterprise was the Department of Licenses and Inspections for the City of Philadelphia that was the victim of its corrupt employees' racketeering activity).

Moreover, some courts have indicated that an enterprise may not be the victim of the alleged racketeering activity where it would violate the rule against identity between the RICO defendant and the enterprise (see Section II(D)(7) above), such as where a corporate defendant would be held vicariously liable for the racketeering activity of its employees that victimize the corporate enterprise. See, e.g., Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1403-06 (11th Cir. 1994); Liguid Air Corp. v. Rogers, 834 F.2d 1297, 1306 (7th Cir. 1987), cert. denied, 492 U.S. 917 (1989); Haroco v. Am. Nat'l B&T Co. of Chicago, 747 F.2d 384, 401-02 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985); Weaver v. Mobile Diagnostech, Inc., 2007 WL 1830712, at **10-11 (W.D. Pa. June 25, 2007); Moses v. Martin, 360 F. Supp. 2d 533, 551 (S.D.N.Y. 2004); Manhattan Telecommunications Corp. v. Dial America Marketing, 156 F. Supp. 2d 376, 382-83 (S.D.N.Y. 2001); Thomas v. Ross, 9 F. Supp. 2d 547, 556-57, n.3 (D. Md. 1998). These cases recognize that their rationale does not apply where the RICO defendant is distinct from the enterprise.

defendant's racketeering activity.

Moreover, the text of RICO's definition of "enterprise," RICO's legislative history, and numerous decisions conclusively establish that a RICO enterprise may be the victim of a defendant's racketeering activity under Section 1962(c) and (d). In that regard, 18 U.S.C. § 1961(4) provides that an "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 . . . ." There is nothing in the text of this provision or in RICO to preclude finding the enterprise as a victim.

As noted above, RICO's definition of an "enterprise," 18 U.S.C. § 1961(4), includes a "corporation," "labor union" and "other legal entity." RICO's legislative history firmly establishes that Congress designed RICO to redress the victimization of these types of enterprises by organized crime and other illegal ventures. See Section I(B)(1) above. For example, the Senate Report regarding RICO states:

> INFILTRATION OF LEGITIMATE BUSINESSES
>
> In most cities, organized crime now dominates the fields of jukebox and vending machine distribution. Racketeers in one midwestern city control, or have large interests in 89 businesses with total assets of more than $800 million and annual receipts in excess of $900 million. Laundry services, liquor and beer distribution, nightclubs, food wholesaling, record manufacturing, the garment industry and a host of other legitimate lines of endeavor have been invaded and taken over. The Special Committee to Investigate Organized Crime in Interstate Commerce, under the leadership of Senator Estes Kefauver, noted in 1951 that the following industries have been invaded: advertising, amusement, appliances, automobile, baking, ballrooms, bowling alleys, banking, basketball, boxing, cigarette distribution, coal, communications, construction, drugstores, electrical equipment, florists, food, football, garment, gas, hotels, import-export, insurance, jukebox, laundry, liquor, loan, news services, newspapers, oil, paper products, radio, real estate, restaurants, scrap, shipping, steel surplus, television, theaters, and transportation.
>
> Often it is the small or marginal businessman who is most easily subject to invasion by organized crime. Organized crime seems to act like a vulture that preys on those otherwise made vulnerable by many of the economic developments of the last half

century.

S. REP. No. 91-617 at 76-77 (footnotes omitted). Regarding the victimization of labor unions, the Senate Report states:

> Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here.

Id. at 78 (footnote omitted).

In the face of such substantial evidence of organized crime's victimization of corporations, labor unions and other legitimate entities, Congress stated:

> [The RICO statute] has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce. It seeks to achieve this objective by the fashioning of new criminal and civil remedies and investigative procedures.
>
> . . .
>
> Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels from all illicit activity.

Id. at 76, 79.

Thus, Congress explicitly stated that RICO was designed to eliminate the victimization of enterprises, including corporations, labor unions and other legitimate entities. It is, therefore, not surprising that courts have repeatedly held that a RICO enterprise may be the victim of the defendant's racketeering activity, and have rejected the dicta in Scheidler I and Jaguar Cars

suggesting to the contrary.[450]

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[450] See, e.g., United States v. Browne, 505 F.3d 1229, 1272-73 (11th Cir. 2007) (holding that a RICO enterprise may be the victim of a defendant's racketeering activity and rejecting dicta in Scheidler I and Jaguar Cars suggesting to the contrary); United States v. Warner, 498 F.3d 666, 695-96 (7th Cir. 2007) (holding that the State of Illinois could serve as the alleged RICO enterprise, noting that it was the victim of the racketeering activity of the state's former Governor and associates, and stating that "many RICO enterprises" are victims of the alleged racketeering activity); United States v. Cianci, 378 F.3d 71, 84-88 & n.9 (1st Cir. 2004) (upholding RICO enterprise consisting of an association of a city, the office of its mayor and other city governmental units that were the victims of the racketeering activity of the city's mayor and other officials); Goldin Industries Inc., 219 F.3d at 1270-71 (noting that the RICO "enterprise itself is often a passive instrument or victim of the racketeering activity") (quoting Bennett v. United States Trust Co. of New York, 770 F.2d 308, 315 (2d Cir. 1985)); Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1557 (1st Cir. 1994) ("Under § 1961 an enterprise may include a legitimate entity like Aetna as the victim of the racketeering activity."); United States v. Boylan, 898 F.2d 230, 236-37 (1st Cir. 1990) (victim enterprise was the Boston Police Department), cert. denied, 498 U.S. 849 (1990); Provenzano, 688 F.2d at 200 (noting that the fact that the union enterprise was harmed by the racketeering activity "rather than benefitted does not remove the conduct from RICO's ambit"); United States v. Kovic, 684 F.2d 512, 516-17 (7th Cir. 1982) (holding that the RICO enterprise, the Chicago Police Department, could be "the victim of the racketeering activity"), cert. denied, 459 U.S. 972 (1982); Bates v. Northwestern Human Services, Inc., 466 F. Supp. 2d 69, 78 (D.D.C. 2006) ("A RICO enterprise may therefore be either a 'victim' or a 'tool' of the persons who conduct its affairs to achieve criminal objectives"); McLaughlin Equipment Co. v. Servaas, 2004 WL 1629603, at *34 (S.D. Ind. Feb. 18, 2004) (recognizing that an enterprise may be a victim of the racketeering activity); United States v. Fawell, 2003 WL 21544239, at * 1 (N.D. Ill. July 9, 2003) (same); United States v. Warner, 292 F. Supp. 2d 1051, 1067 (N.D. Ill. 2003) (rejecting claim that "a RICO victim cannot be part of the alleged enterprise"); In re Pharmaceutical Industry Average Wholesale Price Litigation, 263 F. Supp. 2d 172, 185 (D. Ma. 2003) ("The major purpose of RICO is to protect legitimate business enterprises from infiltration by racketeers. The enterprise element may be satisfied by alleging a legitimate enterprise that was victimized by a racketeering scheme.") (collecting cases) (citation omitted); Bulkmatic Transport Co. v. Pappas, 2001 WL 882039, at * 7 (S.D.N.Y. May 11, 2001); Dornberger v. Metropolitan Life Ins. Co., 961 F. Supp. 506, 524 (S.D.N.Y. 1997); LaSalle Bank Lake View v. Seguban, 937 F. Supp. 1309, 1322-23 (N.D. Ill. 1996) (holding that a RICO enterprise may be the victim of the alleged racketeering activity and rejecting as dicta statements implying the contrary in Scheidler I and Jaguar Cars); Com-Tech Assoc. v. Computer Assoc. Int'l, 753 F. Supp. 1078, 1088 (E.D.N.Y. 1990) (ruling that it is permissible for the alleged enterprise to be a victim of the alleged racketeering activity), aff'd, 938 F.2d 1574 (2d Cir. 1991); Shapo v. Engle, 1999 WL 1045086, at **8-9 (N.D. Ill. Nov. 12, 1999) (holding that a RICO enterprise may be the victim of the alleged racketeering activity and rejecting as dicta statements implying the contrary in Scheidler I and Jaguar Cars); Hansel 'N Gretel Brand, Inc. v. Savitsky, 1997 WL 543088 at *3 (S.D.N.Y. Sept. 3, 1997) (same); Anton Motors v. Powers, 644 F.

(continued...)

Moreover, the Government has brought numerous RICO prosecutions where governmental entities either constituted or were part of the alleged enterprise and also were the victims of the alleged racketeering activity. See Section II(D)(1) above. Likewise, the Government has brought numerous civil RICO lawsuits where labor unions either constituted or were part of the enterprise and also were the victims of the defendant's racketeering activity.[451] Also, as the Supreme Court stated in Reves v. Ernst & Young, 507 U.S. 170 (1993), discussed in Section III(C)(5), above, "[a]n enterprise . . . might be 'operated' or 'managed' by others 'associated with' the enterprise who exert control over it as, for example, by bribery." Id. at 184. Indeed, as the Supreme Court implicitly recognized, in such cases, the enterprise might not be the principal wrongdoer itself, and, insofar as others (i.e., defendants) might "exert control" over it, and enterprise might in fact be the victim of wrongdoing.

Furthermore, 18 U.S.C. § 1962(a) prohibits, in relevant part, anyone to use or invest proceeds of racketeering activity "in acquisition of any interest in, or the establishment or operation of, any enterprise . . . ." Similarly, 18 U.S.C. § 1962(b) makes it unlawful "to acquire or maintain, directly or indirectly, any interest in or control of any enterprise" through a pattern of racketeering activity. Thus, Sections 1962(a) and (b) on their face provide that the RICO enterprise may be the victim of racketeering activity. See, e.g., Lockheed Martin Corp. v. Boeing, 357 F. Supp. 2d 1350, 1368 (M.D. Fla. 2005); Browne v. Abdelhak, 2000 WL 1201889, at *11 (E.D. Pa. Aug. 23, 2000); Dow

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[450](...continued)
Supp. 299, 301 (D. Md. 1986) ("The enterprise may be a . . . victim of the [racketeering] activities.").

[451] See OCRS' Civil RICO Manual (October 2007) at 216-221 and its Appendix B at 1-2, 13-15, 19-21, 27-29, 33-35, 43-47, 79-80, 82-84, 95-97, 110-12, 120-22, 133-35, 139-41, 147-49, 157-59, 190-93, 208-11, 220-22, 228-30, 239-41, 243-46.

Chem. Co. v. Exxon, 30 F. Supp. 2d 673, 698 (D. Del. 1998).

In sum, the text of RICO, its legislative history, and case law firmly establish that a RICO enterprise may be the victim of a defendant's racketeering activity.

I. Generic Offenses - Determining Whether A Particular State Offense Constitutes A Predicate Act of Racketeering Under RICO

1. A State Offense Falls Within the "Generic" Definition of a State Offense Referenced in 18 U.S.C. § 1961(1)(A) When That State Offense Substantially Corresponds to the Essential Elements Under the Prevailing Definition of the Offense When RICO Was Enacted in 1970

RICO's definition of "racketeering activity," 18 U.S.C. § 1961(1)(A), provides that a predicate act of racketeering includes:

> any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in Section 102 of the Controlled Substance Act [i.e., 21 U.S.C. § 802], which is chargeable under State law and punishable by imprisonment for more than one year . . . .

This definition does not identify specific state statutes that may provide the basis for a RICO predicate act of racketeering. Rather, the Senate and House Reports regarding RICO explained that "[t]he state offenses are included by **generic designation**." S. REP. NO. 91-617, at 158 (emphasis added); H.R. REP. NO. 1549, 91st Cong. 2d Sess., at 56 (1970).[452] "Courts construing [RICO] have

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[452] For a discussion of "generic" state offenses under RICO, see Raney v. Allstate Ins. Co., 370 F.3d 1086, 1088 n.2 (11th Cir. 2004); United States v. Pimentel, 346 F.3d 285, 302-05 (2d Cir. 2003); United States v. Kehoe, 310 F.3d 579, 588 (8th Cir. 2002); United States v. Marino, 277 F.3d 11, 29-31 (1st Cir. 2002); United States v. Carrillo, 229 F.3d 177, 182-86 (2d Cir. 2000); United States v. Miller, 116 F.3d 641, 674-75 (2d Cir. 1997); United States v. Kotvas, 941 F.2d 1141, 1145-46 (11th Cir. 1991); United States v. Coonan, 938 F.2d 1553, 1563-64 (2d Cir. 1991); United States v. Kaplan, 886 F.2d 536, 541-42 (2d Cir. 1989); United States v. Friedman, 854 F.2d 535, 565-66 (2d Cir. 1988); United States v. Casamayor, 837 F.2d 1509, 1514-15 (11th Cir. 1988); United States v. Garner, 837 F.2d 1404, 1417-18 (7th Cir. 1987); United States v. Erwin,793 F.2d 656, 669 (5th Cir. 1986); United States v. Paone, 782 F.2d 386, 393-94 (2d Cir. 1986); United States v. (continued...)

found that the references to state law serve a definitional purpose, to identify generally the kind of activity made illegal by [RICO]." United States v. Salinas, 564 F.2d 688, 690 (5th Cir. 1977). Accord United States v. Bagaric, 706 F.2d 42, 62-63 (2d Cir. 1983); United States v. Frumento, 563 F.2d 1083, 1087 n.8 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1997). "Thus, under RICO, the conduct on which the federal charge is based must only be typical of the serious crime dealt with by the state statute." United States v. Triumph Capital Group, Inc., 260 F. Supp. 2d 444, 456 (D. Conn. 2002) (collecting cases).

To determine whether a particular predicate state law violation incorporated into a federal statute, such as RICO, falls within the "generic definition" of a particular type of offense, the Supreme Court has examined analogous provisions of the Model Penal Code and state and federal statutes existing at the time Congress enacted the federal statute at issue to determine the prevailing definition of the offense at that time. For example, RICO's definition of "racketeering activity" (18 U.S.C. § 1961(1)(A)) includes "any act or threat involving . . . extortion, . . . which is chargeable under state law." Scheidler v. National Organization for Women, Inc., 537 U.S. 393 (2003),

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[452](...continued)
Watchmaker, 761 F.2d 1459, 1468-69 (11th Cir. 1985); United States v. Licavoli, 725 F.2d 1040, 1044-47 (6th Cir. 1984); United States v. Bagaric, 706 F.2d 42, 62-63 (2d Cir. 1983); United States v. Welch, 656 F.2d 1039, 1058-59 (5th Cir. 1981); United States v. Malatesta, 583 F.2d 748, 757-58 (5th Cir. 1978), mod. on other grounds, 590 F.2d 1379 (5th Cir. 1979) (en banc); United States v. Salinas, 564 F.2d 688, 690 (5th Cir. 1977); United States v. Frumento, 563 F.2d 1083, 1087-88 (3d Cir. 1977); United States v. Brown, 555 F.2d 407, 418 & n.22 (5th Cir. 1977); United States v. Revel, 493 F.2d 1, 3 (5th Cir. 1974); United States v. Triumph Capital Group, Inc., 260 F. Supp. 2d 444, 455-57 (D. Conn. 2002); United States v. Genova, 187 F. Supp. 2d 1015, 1019-21 & n.4 (N.D. Ill. 2002), aff'd in part and rev'd in part, 333 F.3d 750, 757-59 (7th Cir. 2003). These cases are discussed in the text of this Section. See also OCRS' Manual: Violent Crimes in Aid of Racketeering 18 U.S.C. § 1959: A Manual for Federal Prosecutors (December 2006) ("OCRS" Section 1959 Manual") at 18-81, which analyzes the "generic" crimes of violence underlying 18 U.S.C. § 1959.

presented an issue whether a state extortion statute could constitute a RICO predicate offense under Section 1961(1)(A). The Supreme Court ruled that Congress intended RICO's definition of racketeering activity to encompass violations under state law that fall within "generic" definitions of these types of offenses. Scheidler, 537 U.S. at 409-410.

The Supreme Court determined the generic definition of the predicate crime "extortion" as follows:

> [W]here as here the Model Penal Code and a majority of States recognize the crime of extortion as requiring a party to obtain or to seek to obtain property, as the Hobbs Act requires, the state extortion offense for purposes of RICO must have a similar requirement.
>
> Because [the defendants] did not obtain or attempt to obtain [plaintiffs'] property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed.

Scheidler, 537 U.S. at 410.

The Scheidler Court stated, 537 U.S. at 409-410, that its analysis in that regard was consistent with its decision in Nardello v. United States, 393 U.S. 286 (1969), where the Court determined the meaning of generic "extortion" under state law incorporated into the federal Travel Act, 18 U.S.C. § 1952, by examining analogous provisions in the Model Penal Code and state statutes in existence at about the time Congress enacted the Travel Act. In Nardello, 393 U.S. at 290, 295-96, the Court concluded that generic "extortion" meant "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats," and that a statutory offense that included these elements fell within the generic definition of extortion regardless of the state's classification of the statute or its labels.

Similarly, in Perrin v. United States, 444 U.S. 37, 42 (1979), the Supreme Court ruled that "we look to the ordinary meaning of the term 'bribery' at the time Congress enacted the [Travel Act]

in 1961" to determine whether a particular state offense involving commercial bribery was encompassed by the "generic" definition of "bribery." Therefore, the Supreme Court concluded that "generic" bribery as of 1961 included commercial bribery because by 1961, 14 states had "outlawed commercial bribery generally," and "[a]n additional 28 had adopted more narrow statutes outlawing corrupt payments to influence private duties in particular fields, including bribery of agents, common carrier and telegraph company employees, labor officials, bank employees, and participants in sporting events." Id. at 44.

Moreover, Taylor v. United States, 495 U.S. 575, 595, 602 (1990), presented the issue whether the defendant's prior conviction for second degree burglary under Missouri law fell within the generic definition of burglary, and therefore could be used as a prior "burglary" conviction to enhance the defendant's sentence pursuant to 18 U.S.C. §§ 922(g)(1) and 924(e). The Supreme Court ruled that the generic definition of an offense is determined by examining the prevailing definition at the time the federal statute at issue was enacted, and that a statutory offense involving burglary constitutes "generic" burglary if "**its statutory definition substantially corresponds to 'generic' burglary** . . . ." 495 U.S. at 602 (emphasis added). The Supreme Court explained that Congress intended a "categorical approach" to determine whether a statutory offense falls within a generic definition, which focuses on the statute's "specific elements," and not on the underlying factual circumstances or whether the state statute used the same label as the generic definition. Taylor, 495 U.S. at 588-90.

The Supreme Court found that **generic** burglary "contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 598. However, the Supreme Court could not determine whether the

elements of the state burglary offense upon which the defendant was convicted substantially conformed to generic burglary because the Missouri burglary offense at issue was broader than generic burglary. Therefore, the Supreme Court remanded the matter to determine whether the defendant's prior conviction was for an offense that fell within generic burglary. Id. at 602.

The Supreme Court explained the framework for making that determination, stating:

> If the state statute is **narrower** than the generic view, e.g., in cases of burglary convictions in common-law States or convictions of first-degree or aggravated burglary, there is no problem, because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary. And if the defendant was convicted of burglary in a State where the generic definition has been adopted, with minor variations in terminology, then the trial court need find only that the state statute corresponds in substance to the generic meaning of burglary.

Id. at 599 (emphasis added). But, in Taylor, the state statute that underlay the defendant's conviction was broader than generic burglary, which raised the specter that the defendant may have been convicted of an offense based on elements that did not substantially correspond to generic burglary. In such cases, the Supreme Court stated that the reviewing court must determine whether "the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." Id. at 602.

Similarly, Shepard v. United States, 544 U.S. 13 (2005), involved the issue whether the defendant's prior convictions, based on his guilty pleas to state "burglary" offenses in violation of Massachusetts law, constituted generic burglary, which could provide the basis for an enhanced sentence. Because Massachusetts law defines "burglary" more broadly than generic burglary as construed in Taylor, supra, by extending it to entries into boats and cars, the courts had to determine how the federal sentencing court might tell whether a prior burglary conviction was for the "generic" burglary offense.

The district court had rejected the government's argument that the sentencing court could examine police reports submitted by the police with applications for issuance of the complaints to determine whether the defendant's guilty plea was to an offense that constitutes generic burglary. Therefore, the district court refused to enhance the defendant's sentence based upon his prior burglary conviction. On appeal, the First Circuit vacated the sentence and ruled that the complaint applications and police reports may count as "sufficiently reliable evidence for determining whether a defendant's plea of guilty constitutes an admission to generically violent crime . . . ." United States v. Shepard, 231 F.3d 56, 67 (1st Cir. 2000).

The Supreme Court reversed and remanded for further proceedings in light of its holding. The Supreme Court stated that "[i]n this case, the offenses charged in state complaints were broader than generic burglary, and there were of course no jury instructions that might have narrowed the charges to the generic limit" since the defendant had pled guilty. Shepard, 544 U.S. at 17. The Supreme Court rejected the government's argument that "a sentencing court can look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary." Id. at 16. Rather, the Court explicitly held that "a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Id.

The foregoing authority makes clear that the determination of whether a state statutory offense falls within the generic definition of state crimes referenced in 18 U.S.C. § 1961(1)(A) involves a pure issue of statutory construction that can be resolved prior to indictment and turns on whether the **statutory elements** of the offense, and not the factual circumstances of the specific case,

substantially correspond to the generic definition of the crime as of 1970 when RICO was enacted. Once it has been determined that a statutory offense falls within the generic definition of a crime under Section 1961(1)(A), and hence the **statutory** offense qualifies as a RICO predicate offense, a second distinct issue may arise: that is, whether the defendant's conviction rested on an offense that fell within the generic definition of the particular crime at issue. This second issue, which does not involve a pure issue of statutory construction, cannot be conclusively resolved prior to indictment since it involves examination of the circumstances at trial. However, this issue may be anticipated when drafting the indictment. The prosecutor should ensure that the RICO count alleges a violation of a statutory offense that falls within the generic definition of the offense, and allege the requisite elements of that generic offense.

Thus, when the state statutory offense that served as the basis for the defendant's conviction is **broader** than the generic definition of a particular offense, it may be necessary to examine the particular circumstances of the case, such as the charging documents and the jury instructions, to determine whether the particular offense upon which the defendant was convicted fell within the generic definition of the crime. For example, suppose a defendant were convicted of a statutory violation, "theft by extortion and other means," that satisfied the generic definition of "extortion" in that its elements included obtaining property from another by the wrongful use of force, fear or threats, but was broader than the generic definition of extortion because it also included "theft by false statements," which falls outside the ambit of generic extortion. If there were a general verdict, the defendant might argue that he was convicted of theft by false statements and not theft by extortion. In such circumstances, the reviewing court must examine the charging documents and jury instructions to determine whether the defendant was convicted of "theft by extortion."

2. Generic State Offenses Under RICO Involving Murder, Extortion and Bribery

Applying the foregoing principles, "generic murder" under Section 1961(1)(A) consists of three alternative classifications of murder: (1) intentional, knowingly, or purposeful murder; (2) murder committed recklessly under circumstances manifesting extreme indifference to the value of human life; or (3) felony-murder. Therefore, any state statutory offense that includes elements that substantially conform to any one (or more) of these three classifications of murder falls within the generic definition of murder prevailing in 1970 and may constitute a crime of "murder" within the ambit of Section 1961(1)(A).[453] However, this generic definition of murder does not include manslaughter or negligent homicide, or accessory to murder after the fact, as those offenses are typically defined, because such offenses do not require the requisite mens rea for generic murder as set forth above.[454]

As discussed in Section VI(I)(1) above, the Supreme Court has determined that "generic" extortion under RICO consists of obtaining or seeking to obtain property from another person whose consent was induced by the wrongful use of force, fear, or threats.

Turning to "generic bribery," it is particularly significant that Section 240.1 (Bribery in

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[453] See OCRS' Section 1959 Manual at 38-42; see also RICO cases charging state murder predicate offenses cited in Section II (A)(1)(a) above.

[454] See, e.g., United States v. Diaz, 176 F.3d 52, 100-101 (2d Cir. 1999) (holding that manslaughter is not a lesser included offense of RICO or Section 1959 murder and therefore lower court's refusal to instruct the jury on manslaughter as a lesser included offense for all the alleged murders in the case was not error); accord United States v. Petrucelli, 97 Fed. Appx. 355, 360 (2d Cir. 2004); United States v. Colon, 1 Fed. Appx. 20, 22 (2d Cir. 2001); United States v. Nieves, 210 F.3d 356 (2d Cir. 2000) (Table). Cf. United States v. Innie, 7 F.3d 840, 849-52 (9th Cir. 1993) (holding that the offense of accessory after the fact to murder was not a crime of violence under 18 U.S.C. § 16(a) because it "does not require, as an element, the use, attempted use, or threatened use of physical force against the person or property of another").

Official and Political matters) of the Model Penal Code in 1970 defined "bribery" as follows:

> A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:
>
> (1) any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or
>
> (2) any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or
>
> (3) any benefit as consideration for a violation of a known legal duty as public servant or party official.
>
> It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

Model Penal Code § 240.1 (1980).[455] The Explanatory Note to Section 240.1, explained that:

> The bribery offense abandons the usual focus upon "corrupt" agreements or a "corrupt" intent and instead spells out with more particularity the kinds of arrangements that are prohibited. . . . The offense is defined so as not to require proof of an actual agreement or mutual understanding. It thus reaches the inchoate behavior of either party accompanied by a purpose to achieve the prohibited understanding.

Id.

Moreover, in about 1970, at least 45 states and the District of Columbia had offenses with substantially similar definitions of bribery.[456] Furthermore, as noted in Section VI(I)(1) above, in

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[455] The Proposed Official Draft of the MPC was completed in 1962. See Herbert Wechsler, Foreword to Model Penal Code (U.L.A.), at 5 (1985). In 1980, a final version of Part II of the MPC (definitions of specific crimes) with comments was published. Id. at 6. A final version of Part I of the MPC (general provisions) with comments was completed in 1984 and published in 1985. Id.

[456] ALASKA STAT. § 11.30.040; .050 (1970); ARK. CODE ANN. § 41-901; 902 (1964) (repealed 1976); ARIZ. REV. STAT. ANN. §§ 13-281, 282; 284, 287 (West 1971); CAL. PENAL CODE §§ 92, 93 (West 1955) (amended 1976); COL. REV. STAT. § 40-8-302 (1970); CONN. GEN. STAT. §§ 53-147, (continued...)

considering a statute enacted prior to 1970, the Supreme Court concluded that "commercial" bribery fell within "generic" bribery. See Perrin, 444 U.S. at 39-45. In that respect, the Perrin Court held that the following state definition of "commercial bribery" fell within the definition of generic bribery:

> Commercial bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any private agent, employee or fiduciary, without the knowledge and consent of the principal or employer, with the intent to influence such agent's, employee's, or fiduciary's action in relation to the principal's or employer's affairs.

Perrin, 444 U.S. at 39 n.3.

Based on the foregoing authority, in OCRS' view, a person's conduct falls within the definition of "generic" bribery prevailing in 1970 when RICO was enacted when:

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[456](...continued)
148, 149 (West 1958) (repealed 1971); DEL. CONST. art. II, § 22; D.C. CODE § 22-702 (1967 & Supp. 1971); FLA. STAT. ANN. § 838.01; .011; .012; .02; .03 (West 1965) (repealed 1974); GA. CODE ANN. § 26-2301; 2305 (1969); HAW. REV. STAT. §§ 725-1, 725-2 (1955); IDAHO CODE ANN. § 18-1301; 1302; 1304 (1948) (repealed 1972); ILL. COMP. STAT. ANN. § 38/33-1 (West 1970); IND. CODE § 10-601; 602 (LexisNexis 1975) (documenting amendments to the 1955 codification); IOWA CODE § 739.1; 739.12 (1966) (repealed 1976); KAN. STAT. ANN. § 21-801-805; 824 (1964) (repealed effective July 1, 1970, replaced by KAN. STAT. ANN. § 21-3901 (1970)); KY. REV. STAT. ANN. § 432.350 (West 1963) (repealed 1975); LA. REV. STAT. ANN. § 14:118; 120 (1950); ME. REV. STAT. ANN. TIT. 17, § 601; 605; 606; 608 (1964); MD. CODE ANN. § 27-23; 25 (LexisNexis 1957); MASS. GEN. LAWS ANN. Ch. 271, § 39; 39A (West 1970); MICH. COMP. LAWS § 750.117-120 (1970); MINN. STAT. § 609.42; 425 (1963); MISS. CODE ANN. § 2027 (1942); MO. REV. STAT. § 558.010 (1963); NEB. REV. STAT. § 28-703; 706; 710; 710.01 (1964); NEV. REV. STAT. § 197.010; .020; .030; .040 (1969); N.H. REV. STAT. ANN. § 587.25-.28 (1955); N.M. STAT. ANN. § 40A-24-1; 2; 3 (West 1970); N.Y. § 200.00; 200.10 (McKinney 1970); N.C. GEN. STAT. § 14-217; 219; 220 (1969); N.D. CENT. CODE § 12-12-01; 02; 04 (1960); OHIO REV. CODE ANN. § 2917.01; .03; .05; .06 (Anderson 1953); OKLA. STAT. ANN. tit. 21 §§ 384; 399; 400 (West 1967); OR. REV. STAT. §§ 162.220; .230; .240 (1953-1971); PA. STAT. ANN. tit. 18 § 4303 (West 1963); R.I. GEN. LAWS §§ 11-7-1; 2; 3; 4; 9 (1969); S.C. CODE ANN. § 16-9-211; 212; 217; 220; 240 (Law. Co-op. 1962); S.D. COMPILED LAWS § 2-4-11 (1967); TENN. CODE. ANN. §§ 39-801 to 39-825 (1956); TEX. PENAL CODE ANN. art. 158 (1957); VT. STAT. ANN. tit. 13 §§ 1101-1104 (1958); VA. CODE ANN. §§ 18.1-278 to 18.1-282 (Michie 1960); WASH. REV. CODE ANN. §§ 9.18.010-9.18.060 (West 1961); W. VA. CODE ANN. §§ 61-5A-3 (Michie 1970); WI. STAT. § 946.10; 946.61 (1969).

> a person gives, offers, confers or agrees to confer upon another person, or a person solicits, accepts or agrees to accept from another person: any benefit having pecuniary value as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion, as a public servant, or a person gives, offers, confers or agrees to confer upon a private agent, employee or fiduciary, or a private agent, employee or fiduciary solicits, accepts, or agrees to accept from another person, any benefit having pecuniary value, without the knowledge and consent of the principal or employer, with the intent to influence such agent's, employee's or fiduciary's action in relation to the principal's or employer's affairs.

Thus, "generic" bribery encompasses "commercial bribery" as well as bribery of public officials.

Accordingly, courts in RICO cases have held that state bribery statutes that were substantially similar to the definition of "generic" bribery referenced in the above paragraph may provide the basis for a RICO predicate racketeering act.[457]

It is especially significant to bear in mind that it is immaterial whether the state statute at issue uses the same labels or terms as the list of state crimes under Section 1961(1)(A). Likewise, it is not dispositive that the defendant's underlying misconduct violated the generic definition of the particular crime at issue. Rather, **the dispositive issue is whether the required elements of the state statute at issue substantially conform to the generic definitions in 1970** of "murder, kidnapping, gambling, arson, robbery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . ." See 18 U.S.C. § 1961(1)(A).

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[457] See, e.g., United States v. Frega, 179 F.3d 793, 805-06 & n.12 (9th Cir. 1999); United States v. Eisen, 974 F.2d 246, 254-56 (2d Cir. 1992); United States v. Kotvas, 941 F.2d 1141, 1145-46 (11th Cir. 1991); United States v. Kaplan, 886 F.2d 536, 540-42 (2d Cir. 1989); United States v. Garner, 837 F.2d 1404, 1417-19 (7th Cir. 1987); United States v. Welch, 656 F.2d 1039, 1057-58 (5th Cir. 1981). Cf. United States v. Triumph Capital Group, Inc., 260 F. Supp. 2d 444, 455-57 (D. Conn. 2002).

3. Once It Is Determined That a Particular State Offense Qualifies as a RICO Predicate Act of Racketeering, the Government Must Prove All the Requisite Elements of that Particular State Offense.

Once it has been concluded that the particular state statute at issue properly may be used as the basis for a RICO predicate racketeering act, a highly significant issue arises: whether it is necessary to instruct the jury that to convict the defendant on the RICO charge, the government must prove the requisite elements of the state offense that is alleged as a RICO predicate offense.

Initially, the Second Circuit had ruled that because RICO and 18 U.S.C. § 1959 incorporate "generic definitions" of the covered state predicate offenses, it was not necessary to allege in the indictment, or instruct the jury on, all the requisite elements of the state predicate offense.[458] However, the Second Circuit has retreated from that position and has pointedly warned that the failure to prove, and instruct the jury on, all the requisite elements of the state law violation used for the basis of a RICO or Section 1959 charge may lead to reversible error.[459] As the Second Circuit

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[458] See, e.g., United States v. Bagaric, 706 F.2d 42, 62-63 (2d Cir.), cert. denied, 464 U.S. 840 (1983) (trial court not required to instruct the jury on the elements of the alleged state law violations involving murder, arson, and extortion); United States v. Orena, 32 F.3d 704, 714 (2d Cir. 1994) (not required to allege in the indictment an overt act as required under the predicate state law murder violations); United States v. Miller, 116 F.3d 641, 675 (2d Cir. 1997) (holding that RICO's reference to state crimes was not intended to incorporate elements of state crimes, but only to provide a general substantive frame of reference); See also United States v. Diaz, 176 F.3d 52, 96 (2d Cir. 1999) (same rule for Section 1959 and therefore government was not required to prove an overt act as required under Connecticut law to establish a conspiracy to assault resulting in serious bodily injury). See also United States v. Tolliver, 61 F.3d 1189, 1208-09 (5th Cir. 1995) (finding any error in failing to instruct the jury on the elements of murder under Louisiana law to be harmless).

[459] See, e.g., United States v. Pimentel, 346 F.3d 285, 301-305 (2d Cir. 2003); United States v. Carrillo, 229 F.3d 177, 182-86 (2d Cir. 2000); United States v. Feliciano, 223 F.3d 102, 115 (2d Cir. 2000). On the particular facts of these cases, the Second Circuit found any error in failing to instruct the jury on the elements of the underlying state violations was harmless error. But see United States v. Dhinsa, 243 F.3d 635, 672-74 (2d Cir. 2001) (defendant's Section 1959 conviction (continued...)

explained in United States v. Carrillo, 229 F.3d 177 (2d Cir. 2000):

> If the conduct proved at trial did not satisfy the elements of the offense as defined by state law, a jury could not find that the defendant had committed the state law offense charged as a predicate act of racketeering. Likewise, even assuming evidence from which a jury **could** find a violation of state law, if the defendant's acts as found by the jury did not include all the essential elements of the state law offense, by definition, no state offense would have been found. It is difficult to see (notwithstanding the statements in Diaz) how the defendant could be properly convicted if the conduct found by the jury did not include all the elements of the state offense since RICO requires that the defendant have committed predicate acts "chargeable under state law." If a district judge failed to charge a jury on the state law elements of the crime constituting a racketeering act, neither we nor the district judge could know what were the factual determinations on which the jury based its verdict. Thus, we would be unable to determine what the jury decided the defendant actually did, and whether, under the jury's findings, the defendant committed the state law offense charged as a racketeering act.

Carrillo, 229 F.3d at 183-184.

OCRS agrees with the Second Circuit's analysis in Carrillo. Therefore, when a RICO charge is based upon a violation of state law that satisfies the generic definition of the predicate racketeering offense referenced in Section 1961(1)(A), the Government must prove, and the jury must be instructed on, all the requisite elements of that state offense.[460] However, it remains good law under RICO that references in the indictment to the state law predicate violations do not incorporate state procedural and evidentiary rules, such as requiring corroboration for witness accomplices, discovery,

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[459](...continued)
based on alleged threat to murder his victim in violation of state law (N.Y. Penal Law § 135.65) reversed for failure to prove all the requisite elements of New York State Penal Law § 135.65 "coercion in the first degree.").

[460] Moreover, as noted in Section VI(I)(1) above, to avoid the problems noted in Taylor, 495 U.S. 575 and Shepard, 544 U.S. 13, whenever a state statutory violation used as a RICO 1961(1)(A) predicate is broader than the generic definition of the state offense referenced in Section 1961(1)(A), the jury should be specifically instructed that to convict it must find all the elements that are necessary to satisfy the generic definition of the particular state violation charged.

statute of limitations, etc. See cases cited in Section II (A)(1) and note 26 above.

J. As a General Rule RICO is Not Preempted by Other Statutes

The issue whether other statutes pre-empt RICO charges has arisen in both civil and criminal RICO cases. This issue is addressed in OCRS' Civil RICO Manual (Oct. 2007) at 272-82. Briefly, RICO was designed to augment existing civil and criminal remedies, and therefore, RICO, as a general rule is not pre-empted by other, even more specific statutes. See id. at 273-74, 276 and notes 289 and 291.

K. RICO and Electronic Surveillance

Section 2516(1)(c) of Title 18, as amended in 1970, permits the interception of any wire, oral, or electronic communications when that interception may provide, or has provided, evidence of any offenses punishable under 18 U.S.C. § 1963. Because a RICO violation is based on violations of other statutes, conduct involving violations of these other statutes can also serve as a basis for electronic surveillance, even if not specifically authorized in 18 U.S.C. § 2516, as long as these other offenses are within the scope of RICO. For example, in United States v. Daly, 535 F.2d 434, 439-40 (8th Cir. 1976), the defendant argued that the wiretap authorization was used for a purpose (mail fraud) not authorized by 18 U.S.C. § 2516. The court rejected this argument because mail fraud is a predicate offense under 18 U.S.C. § 1961 and the wiretap order authorized interception of conversations relating to mail fraud racketeering activities violative of 18 U.S.C. § 1962, which is authorized by section 2516.

Daly underscores the importance of specifying in the wiretap application exactly what offenses form the basis for the interception. In United States v. Carlberg, 602 F. Supp. 583 (W.D. Mich. 1984), RICO and other Title 18 counts were dismissed when the Government used evidence

for its indictment from wiretaps which had been authorized only for Title 21 drug offenses. The court held that 18 U.S.C. § 2517(5) required judicial authorization before the government could use the drug wiretap evidence for purposes of a RICO indictment. Id. at 585. Accordingly, a prosecutor should not use electronic surveillance evidence to prove an offense not specified in the wiretap application without first obtaining a Section 2517(5) order.[461]

L. Special Verdicts and Unanimous Verdicts

1. Special Verdicts and Demonstrating that Defendants' RICO Convictions are Not Vitiated by Acquittals on Some Racketeering Acts

Special verdicts have come to be useful and sometimes even crucial in RICO cases. The viability of a RICO conviction on appeal often hinges on being able to determine which specific separate predicate acts support the jury's conviction on the RICO charge. If one or more of the convictions on the predicate offenses are reversed on appeal, the RICO conviction may also fail if the appellate court cannot determine that each defendant's substantive RICO conviction is supported by at least two valid predicate offenses.[462] In United States v. Ruggiero, 726 F.2d 913, 922-23 (2d

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[461] For extensive discussions of wiretapping in the RICO context, see United States v. Shakur, 560 F. Supp. 347 (S.D.N.Y. 1983); United States v. Dorfman, 542 F. Supp. 345 (N.D. Ill.), aff'd, 737 F.2d 594 (7th Cir. 1984); see also United States v. Van Horn, 789 F.2d 1492, 1503-05 (11th Cir.) (district court's continued review of progress reports and authorizing extensions for surveillance satisfied judicial approval requirement), cert. denied, 479 U.S. 854 (1986); United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985) (upholding validity of wiretap despite failure to obtain Section 2517(5) order for use in RICO case), cert. denied, 474 U.S. 1100 (1986); United States v. Gambale, 610 F. Supp. 1515, 1531-32 (D. Mass. 1985) (wiretap proper even though RICO not named, reasoning any violation of § 2517(5) was harmless).

[462] See, e.g., United States v. Cianci, 378 F.3d 71, 91 (1st Cir. 2004) ("ordinarily, when a jury returns a general verdict of guilty on a *substantive* RICO count and one of the predicate acts is later found to be legally insufficient by a reviewing court, the conviction must be overturned where it is impossible to determine whether two legally sufficient predicate acts support a RICO conviction") (collecting cases); Biaggi, 909 F.2d at 692-93 (reversing a RICO conviction even though special (continued...)

Cir.), cert. denied, 469 U.S. 831 (1984), the court reversed a RICO conspiracy conviction after striking one of the eight acts of racketeering. The court noted that the use of a special verdict would have avoided this result.[463] A similar outcome was avoided in United States v. Pepe, 747 F.2d at 668, because the RICO count incorporated other substantive counts in addition to the acts of racketeering listed in the RICO count. While the Pepe court struck one act of racketeering, the RICO count was affirmed because verdicts on the incorporated counts operated as special verdicts; by finding guilt on those counts, the jury necessarily also found that two predicate acts had been established. Id. Thus, courts frequently have upheld jury's guilty verdicts on RICO counts where they were able to determine that the jury's guilty verdicts rested on sufficient valid predicate acts independent of the invalid or rejected predicate acts.[464]

(...continued)
verdicts clearly established the defendant's commission of two mail fraud predicates, because the jury, if it had heard the evidence that was improperly excluded, might have concluded that the mail fraud acts were not committed as part of a RICO pattern with a nexus to the affairs of a RICO enterprise).

[463] See also United States v. Holzer, 840 F.2d 1343 (7th Cir.) (RICO conviction vacated where jury might have relied on invalid mail fraud counts), cert. denied, 486 U.S. 1035 (1988); United States v. Mandel, 672 F. Supp. 864, 877 (D. Md. 1987) (RICO convictions vacated where in the absence of special verdicts, court could not determine "with a high degree of probability" whether jury relied on valid or invalid mail fraud predicates), aff'd, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989).

[464] See, e.g., United States v. Jones, 455 F.3d 134, 145-46 (2d Cir. 2006) (ruling that even assuming arguendo that the evidence was insufficient as to some racketeering acts, the defendants' RICO convictions were, nevertheless, adequately based on the jury's finding that certain other racketeering acts were proven); Cianci, 378 F.3d at 90-93 (jury's special verdict finding that certain racketeering acts under the RICO substantive count were not proven did not vitiate jury's verdict finding defendants guilty on the RICO conspiracy charge); United States v. Genova, 333 F.3d 750, 759 (7th Cir. 2003) (upholding defendant's RICO conviction where jury's special verdict established that it found several particular racketeering acts that were not tainted by alleged erroneous jury instruction on other racketeering act); United States v. Edwards, 303 F.3d 606, 641-42 (5th Cir.
(continued...)

In view of the above, even though special verdicts are generally not favored in criminal prosecutions, their use has been endorsed in RICO cases.[465] It should be emphasized that the

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2002) (same); United States v. Corrado, 304 F.3d 593, 608 (6th Cir. 2002) (where there is a general verdict "other verdicts of the same jury may serve the function of a special verdict on the predicate acts, where those other verdicts necessarily required a finding that the RICO defendants had committed the predicate acts") (citation omitted); United States v. Najjar, 300 F.3d 466, 480 & n.3 (4th Cir. 2002) (affirming convictions where special verdicts established that the jury convicted on particular offenses untainted by alleged errors affecting other charges); United States v. De La Mata, 266 F.3d 1275, 1290-92 (11th Cir. 2001) (upholding RICO convictions where special verdict established that the jury found over 30 valid racketeering acts in addition to two predicate acts that violated ex post facto protections); United States v. Dhinsa, 243 F.3d 635, 669-70 (2d Cir. 2001) (upholding RICO convictions where special verdict established that the jury found four valid predicate acts that were unaffected by two invalid predicate acts); United States v. Stillo, 57 F.3d 553, 560-61 (7th Cir. 1995) (RICO convictions not vitiated even if one racketeering act was invalid because it rested on two other racketeering acts); United States v. Cardall, 885 F.2d 656, 682-83 (10th Cir. 1989) (upholding RICO conviction on the basis of numerous valid predicate acts, where some were ruled invalid); United States v. Corona, 885 F.2d 766, 774-75 (11th Cir. 1989) (upholding RICO conviction based on Travel Act predicates after mail fraud predicates were found invalid), cert. denied, 494 U.S. 1091 (1990); Callanan v. United States, 881 F.2d 229 (6th Cir. 1989) (where mail fraud racketeering acts were invalidated, analysis of remaining acts allowed court to uphold conviction of one defendant, cert. denied, 494 U.S. 1083 (1990); Brennan v. United States, 867 F.2d 111 (2d Cir.) (valid Travel Act predicates, also charged as counts, "operated like special verdicts"), cert. denied, 490 U.S. 1022 (1989); United States v. Zauber, 857 F.2d 137, 151-54 (3d Cir. 1988) (analysis of evidence showed that jury must have relied on valid racketeering), cert. denied, 489 U.S. 1066 (1989); United States v. Anderson, 809 F.2d 1281, 1284-85 (7th Cir. 1987) (RICO conviction affirmed where jury convicted defendant of four substantive counts also charged as predicates because jury must have relied on two or more of those valid predicates to convict on RICO charges); United States v. Lopez, 803 F.2d 969, 976 (9th Cir. 1986) (upholding RICO conviction where defendant was acquitted on one act; but court determined that jury's guilty verdicts on substantive counts established the requisite number of predicate acts), cert. denied, 481 U.S. 1030 (1987); see also United States v. Paccione, 949 F.2d 1183, 1197-98 (2d Cir. 1991); United States v. Montoya, 945 F.2d 1068, 1077 (9th Cir. 1991); Coonan, 938 F. 2d at 1565; Pungitore, 910 F.2d at 1107-08; Vastola, 899 F.2d at 222-226; Angiulo, 897 F.2d at 1200 n.17; Porcelli, 865 F.2d at 1359; Friedman, 854 F.2d at 581-82.

[465] See, e.g., Console, 13 F.3d at 663-65 (district court did not abuse its discretion in asking jury to return special verdicts as to some predicate acts but not others); Pungitore, 910 F.2d at 1136 (approving special verdicts); United States v. Ruggiero, 726 F.2d 913, 922-23 (2d Cir. 1983) (in dictum, urged other courts to use special verdicts to specify the racketeering acts found by the jury (continued...)

discretionary use of special verdicts in the guilt or innocence phase of the trial must be distinguished from the **mandatory** use of special verdicts in the forfeiture phase of the trial.[466]

2. Unanimous Verdicts

It has long been the general rule that when a jury returns a general guilty verdict on a substantive count charging several criminal acts in the conjunctive, the verdict stands **if the evidence is sufficient with respect to any of the acts charged**, and the jury need not specify which act it found.[467] Similarly, a general guilty verdict on a multiple-object conspiracy offense may not be set

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to avoid unnecessary reversals where some acts are found invalid), cert. denied, 469 U.S. 831 (1984); United States v. Bertoli, 854 F. Supp. 975, 1067-69 (D.N.J.) (use of special verdict forms that contained neither descriptions nor extraneous language was not improperly suggestive, since their use was necessary to indicate which predicate acts were proven), aff'd in part, vacated in part, 40 F.3d 1384 (3d Cir. 1994); but see United States v. Shenberg, 89 F.3d 1461, 1472 (11th Cir. 1996) (denial of request for use of special verdict forms upheld where district court properly instructed the jury on the elements of RICO conspiracy). See also cases cited in note 464 above.

[466] See Fed. R. Crim. P. 32.2(b)(4); see also Section IV(D)(8) above. See generally United States v. Cauble, 706 F.2d 1322, 1347-48 (5th Cir. 1983) (upholding special verdicts on forfeiture issue), cert. denied, 465 U.S. 1005 (1984); United States v. Boffa, 688 F.2d 919, 938-940 (3d Cir. 1982) (same), cert denied, 460 U.S. 1022 (1983); United States v. Tunnell, 667 F.2d 1182 (5th Cir. 1982) (affirming forfeiture of motel used in prostitution enterprise even though special verdict form did not require jury to discern what portion of motel was used for prostitution and what portion was used for legitimate purposes). Cf. United States v. Amend, 791 F.2d 1120 (4th Cir.) (in CCE case, forfeiture of assets specifically listed in special verdict affirmed, while forfeiture of bank account and purebred horse, pursuant to general catch-all category of assets, vacated as impermissible), cert. denied, 479 U.S. 930 (1986).

[467] See, e.g., United States v. Miller, 471 U.S. 130, 136-45 (1985) (evidence established one charged means of executing a mail fraud scheme, but did not establish an alternative charged means); Turner v. United States, 396 U.S. 398, 420-22 (1990) (since the evidence established that the defendant possessed heroin as charged, it was immaterial to the conviction whether evidence established the alternative means of liability that he purchased and distributed the heroin); Anderson v. United States, 170 U.S. 481, 503-04 (1898) (where indictment charged that death occurred through both shooting and drowning, it was immaterial to the validity of the conviction which means the jury found).

aside if the evidence is insufficient to support a conviction as to one of the objects, **provided the evidence is sufficient to support one of the remaining objects**.[468] However, a general guilty verdict is not valid where one of the possible bases for conviction was legally inadequate.[469] Therefore, the result may be different depending on whether the evidence is merely **factually** insufficient to support one basis for conviction, or one basis is **legally defective**.

In accordance with these principles, in Schad v. Arizona, 501 U.S. 624 (1991) (plurality opinion), the Supreme Court upheld the constitutionality of an Arizona statute that permitted a jury to convict a defendant of first-degree murder without requiring unanimity on whether the defendant engaged in premeditated murder or felony murder -- two alternative bases for finding first degree murder. Id. at 644-45. However, the Court concluded that it was impossible to establish a single test for determining when an alternative fact underlying a conviction constituted an element of the offense about which a jury must be unanimous. Id. at 637-38. However, the Court offered three general considerations. First, because decisions about what facts are necessary to constitute the crime, and what facts are mere means, "represent value choices more appropriately made in the first instance by a legislature," a court must give the legislature's choice great deference. Id. at 638. Second, while it would be difficult to challenge a legislature's definition of a crime that has a long history or is in widespread use, a "freakish" definition without an analogue in history would be subject to greater scrutiny. Id. at 640. Third, if two means could rationally be perceived as reflecting equal degrees of blameworthiness, it would support the legislature's judgment to treat them as means rather than elements, but if the two means could not be reasonably viewed as morally equivalent, the

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[468] See Griffin v. United States, 502 U.S. 46, 49, 57 (1991).

[469] See Griffin v. United States, 502 U.S. 46, 51-56 (1991) (collecting cases).

legislature's choice would be more suspect. Id. at 643. Ultimately, a legislature's definition of the elements of the offense "is usually dispositive." Id. at 639 (internal quotation marks omitted).

Thereafter, in Richardson v. United States, 526 U.S. 813 (1999), the Supreme Court held that the jury must be instructed that it must agree unanimously on which particular drug violations constituted the "continuing series of violations" required for conviction for conducting a continuing criminal enterprise ("CCE"), in violation of 21 U.S.C. § 848. Id. at 816. The Court explained that "[t]o hold that each 'violation' here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law. To hold the contrary is not." Id. at 818-19. The Court also noted the CCE statute's breadth argued in favor of requiring unanimity on the specific violations which comprise the series of continuing violations. In that regard, the Court stated that approximately ninety different statutory sections could be alleged as "violations" underlying a CCE charge and that those ninety violations varied widely in seriousness from penalties for removing drug labels to distribution of large quantities of drugs. Id. The Court was troubled by the prospect that in the absence of a unanimity agreement, some jurors would premise the requisite series of violations on relatively minor violations, while other jurors may have found more serious violations. Id. at 819. The Court further explained that the Government's proposed lack of unanimity "risks serious unfairness and lacks support in history or tradition." Id. at 820. The Court also rejected the Government's argument that a jury-unanimity requirement would make it too difficult to prove a CCE violation, stating that the Government could easily rely on evidence of cooperating witnesses "who could point to specific incidents" as well as evidence of controlled buys. Id. at 823. Significantly, the Court added that "a federal jury need not always decide unanimously which of several possible sets of underlying brute

facts make up a particular element . . . ." Id. at 817.[470]

Although the full implications of the Richardson decision for RICO are not yet clear, even before Richardson, it was the policy of the Organized Crime and Racketeering Section that, for RICO substantive offenses, the jury be instructed that it must agree unanimously on which racketeering acts each defendant committed. Therefore, for RICO substantive offenses, the jury should be instructed, whether in a general verdict or a special verdict, that it must be unanimous as to not only all the RICO elements, but also as to which specific racketeering acts each defendant committed.[471]

However, a jury's failure to reach a unanimous decision on a particular predicate act does not constitute an acquittal on that racketeering act; rather, such failure to reach a unanimous verdict results in a hung jury on those racketeering acts. See, e.g., United States v. Gotti, 451 F.3d 133, 137 (2d Cir. 2006) ("Assuming the other elements of the RICO charge were proved to the jury's satisfaction, lack of unanimity as to two predicate acts results in a hung jury and a mistrial, not a judgment of acquittal."); accord United States v. Merlino, 310 F.3d 137, 142-43 (3d Cir. 2002).

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[470] The Richardson Court did not decide whether the jury had to agree unanimously about other elements of the CCE offense such as the identity of which five persons the defendant supervised or the facts that establish the "substantial income" requirement; but the Court said that those elements "differ in respect to language, breadth, tradition, and the other factors we have discussed." Richardson, 526 U.S. at 824.

[471] See, e.g., United States v. Gotti, 451 F.3d 133, 137-38 (2d Cir. 2006) (court assumed arguendo that Richardson's holding applies to RICO's requirement of two racketeering acts); United States v. Carr, 424 F.3d 213, 221-26 (2d Cir. 2005) (approving a jury instruction that the jury cannot convict a defendant on a particular racketeering act unless it unanimously found that the defendant committed that act); Pungitore, 910 F.2d at 1136 (special interrogatories indicated the theory on which jury relied for each predicate act and finding that the district court sufficiently informed the jury of its duty to deliver unanimous verdict as to a particular theory in a multi-part act of racketeering).

Where there are sub-parts or sub-predicates to an act of racketeering, the prosecutor should request a unanimity instruction as to each sub-predicate. If the jury should, for some reason, find a particular racketeering act proven for one RICO count but not for another RICO count, such inconsistency in the verdict should not vitiate the RICO convictions.[472] Indeed, in one case, a court ruled that inconsistent verdicts did not require reversal of a RICO conviction, even though the jury acquitted the defendant of substantive counts that were identical to the RICO predicates.[473]

Thus far, no published decision has decided whether Richardson's jury-unanimity requirement applies to the predicate acts in a RICO conspiracy charge. It may be argued that it does not apply to a RICO conspiracy charge, particularly a Glecier RICO conspiracy charge that does not allege that a defendant personally agreed to commit any specific racketeering act. See Sections III(D)(2) and V(B)(3)(b) above. First, a RICO conspiracy offense, unlike a CCE offense, does not require proof that a defendant commit any predicate act. Indeed, a RICO conspiracy offense does not require proof that a conspirator personally agreed to commit any specific predicate racketeering act. Rather, it is sufficient that the defendant agreed to further or facilitate some of the conduct leading to a substantive RICO offense, and agreed that at least one conspirator would commit at least two racketeering acts in the conduct of the affairs of the enterprise. See Sections III(D)(1) and (2) above.

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[472] See, e.g., United States v. Cianci, 378 F.3d at 90-93; United States v. Biaggi, 705 F. Supp. 864, 865 (S.D.N.Y. 1988), aff'd in part and rev'd in part, 909 F.2d 662 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991); see also United States v. Chang An-Lo, 851 F.2d 547, 559-60 (2d Cir.) (defendants could not attack verdict on ground that RICO conspiracy convictions were inconsistent with RICO substantive acquittals), cert. denied, 488 U.S. 966 (1988).

[473] See United States v. Vastola, 899 F.2d 211, 222-26 (3d Cir. 1990); Cianci, 378 F.3d at 90-92.

Second, in a RICO conspiracy offense, unlike in a CCE offense which is not premised on specific completed violations, it would be anomalous to require a jury to agree unanimously on racketeering acts that have not been committed or even specified.[474] Moreover, under the principles set forth in Schad, Richardson, and Salinas, supra, that Congress in enacting RICO conspiracy did not intend to require proof of an agreement to personally commit a specific racketeering act, militates in favor of concluding that Congress did not intend to create an element of a RICO conspiracy offense requiring jury unanimity on specific racketeering acts to be committed in furtherance of the conspiracy.

Therefore, absent any adverse judicial decisions resolving the Richardson issue, it may be argued that Richardson's jury-unanimity requirement for CCE prosecutions does not apply to predicate acts in a RICO conspiracy charge, especially Glecier-type conspiracy charges. However, it would be prudent to apply the jury-unanimity requirement to non-Glecier conspiracy charges where the RICO conspiracy charge alleges, and the Government's theory of the case pursued at trial was, that the defendant personally agreed to commit specific charged racketeering acts. Moreover, for Glecier conspiracy charges, OCRS strongly recommends that the jury be instructed that in order to convict a defendant of a RICO Glecier conspiracy charge, the jury's verdict must be unanimous as to which type or types of racketeering activity the defendant agreed would be committed: for

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[474] Consider, for example, the following hypothetical: A leader of an LCN family-RICO enterprise recruits an LCN associate to join his extortion crew, telling the associate that the LCN family will pay the associate a weekly salary for his assistance in extorting weekly payments over the next two years from numerous unspecified gamblers, drug dealers, and businesses that are engaged in interstate commerce. The associate agrees to join the LCN crew and assist others to carry out the unspecified extortions, including to commit whatever violence that is necessary. Plainly, the above facts are sufficient to establish a RICO conspiracy between the LCN leader and the associate, and yet there are no specific racketeering acts upon which the jury could unanimously agree.

example, at least two acts of extortion, or drug trafficking, or one of each, or any combination thereof.

Until the Richardson issue is resolved by authoritative decisions, prosecutors are urged to consult with the Organized Crime and Racketeering Section regarding this difficult jury-unanimity issue.

M. Venue

The RICO statute does not contain a specific provision governing venue in criminal cases.[475] Article III of the Constitution requires that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . . ." U.S. Const., art. III, § 2, cl. 3. Furthermore, the Sixth Amendment requires, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const., amend. VI. These constitutional principles are embodied in Fed. R. Crim. P. 18, which provides that "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18.

The Supreme Court has explained that the place where a crime is deemed to have occurred, or the locus delicti, "must be determined from the nature of the crime alleged and the location of the act or acts constituting it." United States v. Cabrales, 524 U.S. 1, 5 (1998) (citation omitted). "In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." United States

[475] The venue provision for civil RICO suits is found in 18 U.S.C. § 1965(a). See OCRS' Civil RICO Manual (October 2007) at 75-96. See also OCRS Section 1959 Manual at 116-119, which discusses venue for a parallel racketeering statute, 18 U.S.C. § 1959.

v. Rodriquez-Moreno, 526 U.S. 275, 279 (1999). Moreover, the principal venue statute, 18 U.S.C. § 3237(a), provides as follows:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Pursuant to 18 U.S.C. § 3237(a), a RICO offense is a "continuing offense," and hence may be brought "in any district in which such offense was begun, continued, or completed."[476] Thus, a RICO prosecution may be brought in any district where some of the enterprise's criminal activity occurred.[477] A RICO charge may include racketeering acts that occurred in districts other than the

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[476] See, e.g., United States v. Aiken, 76 F. Supp. 2d 1346, 1349-51 (S.D. Fla. 1999) (RICO and its closely related offenses under 18 U.S.C. § 1959 are continuing offenses, and therefore venue lies in the Southern District of Florida and the Eastern District of New York for a murder committed in the Eastern District of New York to further a RICO enterprise that operated in that district and in the Southern District of Florida); United States v. DeJesus, 48 F. Supp. 2d 275, 278 (S.D.N.Y. 1998) ("Racketeering offenses under 18 U.S.C. § 1962 are continuing offenses within the meaning of the venue statute."); United States v. Giovanelli, 747 F. Supp. 875, 884 (S.D.N.Y. 1989) (RICO substantive and conspiracy offenses are continuing offenses, and regarding the RICO conspiracy charge "venue may properly be laid in the district in which the conspiratorial agreement was formed or in any district in which an overt act in furtherance of the conspiracy was committed by any of the conspirators.") (citation omitted); see also United States v. Persico, 621 F. Supp. 842, 857-58 (S.D.N.Y. 1985); United States v. Castellano, 610 F. Supp. 1359, 1388-89 (S.D.N.Y. 1985) (venue proper in any district where offense was begun, continued, or completed, even though virtually every racketeering act occurred in another district); United States v. Russo, 646 F. Supp. 816 (S.D.N.Y. 1986) (refusing to transfer indictment charging conspiracy to obstruct justice and obstruction of justice to the Eastern District of New York, where defendants were indicted for RICO); cf. United States v. Pepe, 747 F.2d 632, 664 n.56 (11th Cir. 1984).

[477] See Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 61 (1989) (under state RICO statute patterned after federal RICO statute, there is no requirement that all predicate acts be committed in jurisdiction where prosecution is brought; such a requirement "would essentially turn the RICO statute on its head: barring RICO prosecutions of large national enterprises that commit single predicate offenses in numerous jurisdictions"); Giovanelli, 747 F. Supp. at 884 (venue proper in district where conspiracy was formed or overt act committed and where predicate illegal gambling business conducted); United States v. Long, 697 F. Supp. 651, 655-56 (S.D.N.Y. 1988) (venue (continued...)

district of venue, and if venue for the overall charge is proper, it is not necessary that each defendant participate in conduct within the district of indictment.[478] Venue for a RICO offense also lies in any district where the RICO enterprise conducted business.[479] Moreover, the Government need only establish venue by a preponderance of the evidence,[480] and a venue claim is waived unless it is timely and specifically raised prior to trial.[481]

N. Evidence of Uncharged Crimes is Admissible to Prove the Existence of the Enterprise, a RICO Conspiracy, a Defendant's Participation in Both, Continuity of the Pattern of Racketeering Activity and Other Matters

In RICO cases, courts typically admit evidence of crimes not specifically charged against a defendant or not committed by the defendant. For example, in United States v. Finestone, 816 F.2d 583, 585-87 (11th Cir.), cert. denied, 484 U.S. 948 (1987), the Eleventh Circuit upheld the admission

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(...continued)
proper in district where at least one overt act and one predicate act occurred); United States v. Rastelli, 653 F. Supp. 1034, 1054 (E.D.N.Y. 1986) (venue for a conspiracy charge "lies wherever the overt act or the agreement to conspire took place"); Persico, 621 F. Supp. at 857-58 (conspiracy venue proper in any district where an overt act occurred); see also cases cited in n.476 above.

[478] See, e.g., United States v. Pepe,747 F.2d 632, 660 n.44, 664 n.56 (11th Cir. 1984) (venue in RICO case for extortionate debt collection that occurred in New York proper in Southern District of Florida where other racketeering activities occurred); Persico, 621 F. Supp. at 858 (holding that it makes no difference whether any individual defendant was in the district, as long as the government establishes that the defendant participated in an enterprise that conducted illegal activities in the district); see also United States v. Fry, 413 F. Supp. 1269 (E.D. Mich. 1976) (finding venue proper in CCE case against a defendant who never committed any component crimes in the district, where defendant participated in one component crime, a conspiracy, and some overt acts were committed in the district of indictment), aff'd, 559 F.2d 1221 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); see also cases cited in n.476 above.

[479] See, e.g., Pepe, 747 F.2d at 664 n.56; Aiken, 76 F. Supp. 2d at 1349-51; Persico, 621 F. Supp. at 858.

[480] See, e.g., Pepe, 747 F.2d at 661 n.44; DeJesus, 48 F. Supp. 2d at 278; Giovanelli, 747 F. Supp. at 884.

[481] See, e.g., United States v. Matera, 489 F.3d 115, 124 (2d Cir. 2007).

of evidence of coconspirators' commission of a murder, kidnaping and narcotics trafficking that the RICO defendant did not commit because such evidence: (1) showed the continuation of the RICO conspiracy within the five-year statute of limitations period, (2) was admissible to prove the coconspirators' pattern of racketeering activity, and (3) showed their participation in the RICO conspiracy and overt acts in furtherance of it.[482]

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[482] See also Matera, 489 F.3d at 120-21 (admission of uncharged murders committed by members of the Gambino LCN family to prove the RICO enterprise - the Gambino LCN family); United States v. Baez, 349 F.3d 90, 93-94 (2d Cir. 2003) (admitting evidence of sixteen uncharged robberies to establish the alleged enterprise and conspiracy); United States v. Diaz, 176 F.3d 52, 79 (2d Cir. 1999) (admission of evidence that members of the Latin Kings Street gang, the RICO enterprise, committed uncharged drug trafficking and crimes of violence on behalf of the Latin Kings "to prove the existence, organization and nature of the RICO enterprise, and a pattern of racketeering by each defendant-appellant"); United States v. Richardson, 167 F.3d 621, 625-26 (D.C. Cir. 1999) (continuity may be established by the totality of all the co-defendants' unlawful conduct); United States v. Keltner, 147 F.3d 662, 667-68 (8th Cir. 1998) (uncharged criminal conduct by coconspirator admissible to prove the enterprise); United States v. Salerno, 108 F.3d 730, 738-39 (7th Cir. 1997) (uncharged extortionate collections by defendants admissible to prove the enterprise); United States v. Miller, 116 F.3d 641, 682 (2d Cir. 1997) (admission of evidence of uncharged murders committed by some defendants and other enterprise members to show the existence of the enterprise and acts in furtherance of the conspiracy); United States v. Krout, 66 F.3d 1420, 1425 (5th Cir. 1995) (admission of uncharged murders committed by the defendants was not prejudicial when admitted to establish that murder and extreme violence were part of the enterprise's objectives and manner and means), cert. denied, 516 U.S. 1136 (1996); United States v. DiSalvo, 34 F.3d 1204, 1221 (3d Cir. 1994) (upholding admission of defendant's uncharged acts to establish the existence of the enterprise and the defendant's participation in and knowledge of the enterprise); United States v. Thai, 29 F.3d 785, 812-13 (2d Cir. 1994) (admission of uncharged extortion, robbery and murder plans by defendants to prove the RICO conspiracy and acts in furtherance of it); United States v. Brady, 26 F.3d 282, 286-88 (2d Cir. 1994) (admission of uncharged murders committed by non-defendant members of the Colombo LCN family to prove the Colombo family enterprise and the charged conspiracy by a faction of the Colombo family to kill members of a rival faction of the Colombo family); United States v. Clemente, 22 F.3d 477, 483 (2d Cir.) (upholding admission of defendant's uncharged acts for purpose of establishing existence of RICO enterprise), cert. denied, 513 U.S. 900 (1994); United States v. Coonan, 938 F.2d 1553, 1561 (2d Cir. 1991) (admission of evidence of murders by enterprise members occurring prior to the defendant's joining the enterprise was proper to show the existence of the enterprise), cert. denied, 503 U.S. 941 (1992); United States v. Eufrasio, 935 F.2d 553, 572-73 (3d Cir.) (upholding admission of uncharged murders and other mafia crimes to show the existence and nature of the RICO enterprise and conspiracy), cert. denied, (continued...)

However, admission of uncharged crimes can pose problems in some circumstances. For example, in United States v. Neapolitan, 791 F.2d 489, 501 (7th Cir.), cert. denied, 479 U.S. 940 (1986), the Seventh Circuit ruled that although uncharged crimes committed by the defendant would be admissible to prove the defendant's membership in the RICO conspiracy, it would be error for such uncharged crimes to serve as predicate acts to establish that the defendant committed or agreed to commit the requisite pattern of racketeering activity.[483]

(...continued)
502 U.S. 925 (1991); United States v. Alkins, 925 F.2d 541, 551-53 (2d Cir. 1991) (the requisite continuity may be established against a defendant through evidence of uncharged crimes by other members of the enterprise not charged in the indictment); United States v. Coiro, 922 F.2d 1008, 1017 (2d Cir. 1991) (continuity established where a corrupt attorney's bribery of public officials and money laundering spanning approximately four months was part of a long term drug enterprise that engaged in other unlawful activities that was likely to continue "absent outside intervention"); United States v. Gonzalez, 921 F.2d 1530, 1545-47 (11th Cir. 1991) (uncharged crimes by defendant and other conspirators admissible to prove the enterprise and continuity) (collecting cases); United States v. Link, 921 F.2d 1523, 1527 (11th Cir. 1991) (evidence of continuity was not limited to the defendant's two acts of possession of drugs with the intent to distribute, but rather was adequately established by evidence of other unlawful drug trafficking by other members of the enterprise); United States v. Ellison, 793 F.2d 942, 949 (8th Cir. 1986) (uncharged crimes of violence by other members of the enterprise admitted to establish existence of enterprise), cert. denied, 479 U.S. 937 (1986); United States v. Murphy, 768 F.2d 1518, 1534-35 (7th Cir. 1985) (proper to admit evidence of uncharged bribes paid to defendant to prove overt acts in furtherance of the conspiracy and to prove a common plan and absence of mistake to rebut defendant's character evidence), cert. denied, 475 U.S. 1012 (1986); United States v. Gray, 292 F. Supp. 2d 71, 77-82 (D.D.C. 2003) (holding that evidence of various crimes of violence, drug trafficking, money laundering were properly admitted to prove the charged RICO and drug trafficking conspiracies, the continuing of the pattern of criminal activity and the association of members of the conspiracies and enterprise).

[483] See also United States v. Zingaro, 858 F.2d 94, 98-103 (2d Cir. 1988) (holding that admission of an uncharged loan that did not relate to the loansharking activities specifically charged in the indictment resulted in a constructive amendment of the indictment and was reversible error); United States v. Flynn, 852 F.2d 1045 (8th Cir.) (error, although harmless here, to admit evidence of murders in which defendant did not participate to prove nature of enterprise; this evidence was unnecessary and prejudicial), cert. denied, 488 U.S. 974 (1988); United States v. Davidoff, 845 F.2d 1151 (2d Cir. 1988) (RICO conspiracy conviction reversed where trial court did not require bill of particulars on identity of victims of extortion acts not specified in the indictment even though those
(continued...)

O. Admission of Expert Testimony and Other Evidence Regarding Organized Crime and of Defendants' Nexus to Organized Crime

Courts repeatedly have upheld the admission of expert testimony regarding organized crime matters in RICO cases, particularly where the enterprise is comprised of one or more organized crime groups. Thus, in RICO cases, courts have upheld admission of expert testimony concerning the structure and nature of organized crime groups, their terminology, rules and modus operandi.[484] Courts also have even upheld expert testimony identifying defendants and coconspirators as members of the RICO enterprise and organized crime groups and identifying their positions in the organized crime group.[485]

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[483](...continued)
acts were not used as RICO predicates, but only to prove the nature of the enterprise, and the evidence of the extortions was disclosed to the defendant prior to trial in Jencks Act material); United States v. King, 827 F.2d 864 (1st Cir. 1987) (affirming the district court's deletion of a charged predicate act of murder committed by co-defendants not on trial where under Fed. R. Evid. 403, the probative value of the excluded evidence was substantially outweighed by the danger of unfair prejudice).

[484] See, e.g., United States v. Lombardozzi, 491 F.3d 61, 72-76 (2d Cir. 2007); United States v. Matera, 489 F.3d 115, 121-22 (2d Cir. 2007); United States v. Tocco, 200 F.3d 401, 417-19 (6th Cir. 2000); United States v. Saccoccia, 58 F.3d 754, 774-76 (1st Cir. 1995); Locascio, 6 F.3d at 936-39; United States v. Long, 917 F.2d 691, 701-03 (2d Cir. 1990); Pungitore, 910 F.2d at 1148-49; United States v. Angiulo, 897 F.2d 1169, 1187-90 (1st Cir. 1990); United States v. Angiulo, 847 F.2d 956, 973-75 (1st Cir. 1988); United States v. Daly, 842 F.2d 1380, 1387-89 (2d Cir. 1988); Riccobene, 709 F.2d at 230-31.

[485] See, e.g., Lombardozzi, 491 F.3d at 72-76; Locascio, 6 F.3d at 937-39; Pungitore, 910 F.2d at 1148-49; Angiulo, 897 F.2d at 1187-90; Angiulo, 847 F.2d at 973-75.

It is also noteworthy that in Locascio, 6 F.3d at 937-38, the court rejected the claim that failure to disclose confidential informant information the expert relied upon violated Rule 703, Fed. R. Evid., and the Confrontation Clause of the Sixth Amendment; accord Angiulo, 847 F.2d at 974 (holding that failure to require expert to disclose the identities of informants did not violate the Confrontation Clause or Rule 705, Fed. R. Evid., which authorizes the district court to require disclosure of facts and data underlying the expert's opinion on cross-examination, where the district (continued...)

In the same vein, courts frequently have upheld testimony of lay witnesses and related evidence identifying defendants as members or associates of organized crime as well as other evidence about organized crime to prove the alleged RICO enterprise, the threat of continuing unlawful activity, background to the charged offenses, and for other purposes.[486]

P. Double Jeopardy and Collateral Estoppel

1. Double Jeopardy

The Double Jeopardy Clause is implicated, principally, in three different types of scenarios. The first involves whether a substantive RICO offense is a separate offense from a RICO conspiracy to commit that substantive RICO offense and can be either separately prosecuted or cumulatively punished. The second involves multiple prosecutions for RICO and for offenses that also are charged as racketeering acts underlying the RICO offense. The third deals with charging multiple substantive RICO offenses or multiple RICO conspiracy offenses.

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[485](...continued)
court instructed the expert "that he not answer any questions on direct examination that would be based upon information provided by informants whose identity he could not disclose on cross-examination"); Angiulo, 897 F.2d at 1187-88 (same).

[486] See, e.g., United States v. Gardiner, 463 F.3d 445, 468 (6th Cir. 2006); United States v. Reifler, 446 F.3d 65, 90-93 (2d Cir. 2006); United States v. Russo, 302 F.3d 37, 43 (2d Cir. 2002); United States v. DiSalvo, 34 F.3d 1204, 1213-14 (3d Cir. 1994); United States v. Van Dorn, 925 F.2d 1331, 1337-39 (11th Cir. 1991); United States v. Scarpa, 913 F.2d 993, 1011-13 (2d Cir. 1990); United States v. Caliendo, 910 F.2d 429, 435-36 (7th Cir. 1990); United States v. Salerno, 868 F.2d 524, 534-38 (2d Cir. 1989); United States v. Scopo, 861 F.2d 339, 347-48 (2d Cir. 1988).

a. For Double Jeopardy Purposes, RICO Substantive and Conspiracy Offenses are Separate Offenses From Each Other and From the Underlying Charged Racketeering Acts

It is well established that the test for determining whether two offenses are the "same offense" for Double Jeopardy purposes is the "same-elements" or "Blockburger" test.[487] Thus, the Supreme Court stated:

> [W]here the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. . . . The same-elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.

United States v. Dixon, 509 U.S. 688, 696 (1993) (internal citations omitted).

Every court that has decided the issue has held that under the Blockburger test, a substantive RICO offense and a RICO conspiracy to commit that substantive RICO offense are separate offenses for double jeopardy purposes, and that, therefore, those offenses may be prosecuted consecutively and cumulatively punished.[488] For example, a RICO substantive offense includes an element that

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[487] See Blockburger v. United States, 284 U.S. 299 (1932).

[488] See, e.g., Nascimento, 491 F.3d at 48; Kehoe, 310 F.3d at 587-88; Marino, 277 F.3d at 39; Diaz, 176 F.3d at 115-16; United States v. Sessa, 125 F.3d 68, 71-73 (2d Cir. 1997), cert. denied, 522 U.S. 1065 (1998); United States v. Masters, 978 F.2d 281, 285-86 (7th Cir. 1992), cert. denied, 508 U.S. 906 (1993); Coonan, 938 F.2d at 1566-67; Pungitore, 910 F.2d at 1115-17; United States v. West, 877 F.2d 281, 292 (4th Cir.), cert. denied, 493 U.S. 869 (1989); United States v. Yarbrough, 852 F.2d 1522, 1545 (9th Cir.), cert. denied, 488 U.S. 866 (1988); United States v. Benevento, 836 F.2d 60, 72-73 (2d Cir. 1986); United States v. Callanan, 810 F.2d 544, 545-48 (6th Cir.), cert. denied, 484 U.S. 832 (1987); Biasucci, 786 F.2d at 515-16; Watchmaker, 761 F.2d 1477; United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 2985); United States v. Marrone, 746 F.2d 957, 959 (3d Cir. 1984); Bagaric, 706 F.2d at 63; Cagnina, 697 F.2d at 923; Rone, 598 F.2d at 569-71.

Similarly, RICO violations and violations of 18 U.S.C. § 1959 (Violent Crimes in Aid of Racketeering Activity) arising from the same course of conduct are not the same offenses, and hence may be the basis for successive prosecutions and multiple punishments. See, e.g., Nascimento, 491 (continued...)

each defendant committed at least two racketeering acts, which is not an element of a RICO conspiracy offense. Conversely, a RICO conspiracy offense includes an element that each defendant entered into a conspiratorial agreement to commit a substantive RICO offense, whereas such a conspiratorial agreement is not an element of a substantive RICO offense. See cases cited in note 488 above.

Likewise, courts repeatedly have held that a RICO substantive or conspiracy offense and its underlying predicate racketeering acts are separate offenses for Double Jeopardy purposes and may be consecutively prosecuted and cumulatively punished.[489]

(...continued)
F.3d at 48; Merlino, 310 F.3d at 141; Marino, 277 F.3d at 39; Polanco, 145 F.3d at 542.

In another significant case, United States v. Traficant, 368 F.3d 646, 649-52 (6th Cir. 2004), the court held that the defendant's sentencing on his substantive RICO conviction following his expulsion from the United States House of Representatives for misconduct arising from the course of conduct underlying his RICO conviction did not violate his Double Jeopardy protections. The court stated:

> Because it would thwart the constitutional separation of powers if Congress could shield its members from criminal prosecution by the Executive Branch, we cannot read the Double Jeopardy Clause to include Congress's disciplining its own members.

Id. at 652.

[489] See, e.g., United States v. Luong, 393 F.3d 913, 916-17 (9th Cir. 2004); United States v. Corrado, 304 F.3d 593, 609 n.8 (6th Cir. 2002); Marino, 277 F.3d at 39; Polanco, 145 F.3d at 542-43; United States v. Doyle, 121 F.3d 1078, 1091 (7th Cir. 1997); Baker, 63 F.3d at 1494; Morgano, 39 F.3d at 1365-71; United States v. Crosby, 20 F.3d 480, 483-84 (D.C. Cir. 1994), cert. denied, 514 U.S. 1052 (1995); United States v. Deshaw, 974 F.2d 667, 671 (5th Cir. 1994); Coonan, 938 F.2d at 1566; LeQuire, 931 F.2d at 1540; Gonzalez, 921 F.2d at 1535-39; United States v. Link, 921 F.2d 1522, 1529-30 (11th Cir. 1991); United States v. Beale, 921 F.2d 1412, 1437 (11th Cir. 1991); United States v. Esposito, 912 F.2d 60, 62-67 (3d Cir. 1990); Pungitore, 910 F.2d at 1107-12; Persico, 832 F.2d at 709-12; Kragness, 830 F.2d at 863-64; United States v. Greenleaf, 692 F.2d 182, 189 (1st Cir. 1982); United States v. Hawkins, 658 F.2d 279, 287 (5th Cir. 1991).

b. Under the Dual Sovereignty Doctrine, a RICO Offense and Its Underlying State Predicate Racketeering Offenses May Be Successively Prosecuted and Cumulatively Punished Even if They Do Not Satisfy the Blockburger Test

Pursuant to the Dual Sovereignty Doctrine, neither double jeopardy nor collateral estoppel principles are violated by successive prosecutions or cumulative punishment for a RICO offense and state offenses that are charged as predicate racketeering acts underlying the RICO offense even if they arose from the same conduct and had the same elements. In that regard, the Supreme Court has consistently held that the Double Jeopardy Clause does not bar successive federal and state prosecutions for offenses arising from the same acts. See United States v. Wheeler, 435 U.S. 313 (1978); Abbate v. United States, 359 U.S. 187 (1959); Barkus v. Illinois, 359 U.S. 121 (1959); United States v. Lanza, 260 U.S. 377 (1922). The rationale underlying this rule lies in the concept of "dual sovereignty," which the Supreme Court has summarized as follows:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each . . . . Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy.

Lanza, 260 U.S. at 382.

The Supreme Court also has explicitly held that the Dual Sovereignty Doctrine is not defeated even where there is substantial cooperation between the two sovereignties involved. See Wheeler, 435 U.S. at 319-320; Bartkus, 359 U.S. at 122-123. Indeed, the Supreme Court has noted

that cooperation between the state and federal government "is the conventional practice between [state and federal] prosecutors throughout the country," and was perfectly proper. Bartkus, 359 U.S. at 122-123.

In accordance with the foregoing authority, every court of appeals that has decided the issue has held that under the Dual Sovereignty Doctrine, double jeopardy and collateral estoppel principles are not violated by charging state offenses on which the defendant previously had been acquitted or convicted in state prosecutions as RICO predicate racketeering acts.[490]

c. Proving a Defendant's Prior Conviction on a Predicate Racketeering Act

Although double jeopardy principles do not prohibit the Government from including in a RICO charge a predicate offense on which a defendant was previously convicted, the prosecutor must ensure that the manner of proving the defendant's commission of such a predicate offense does not violate his right to a jury trial. For example, in United States v. Pelullo, 14 F.3d 881, 889-97 (3d Cir. 1994), the Third Circuit held that the district court violated the defendant's right to a jury trial when it instructed the jury that evidence of a judgment of conviction, entered in a prior prosecution finding the defendant guilty of a wire fraud offense that was charged as predicate racketeering act no. 60, established "as a matter of law, the defendant has committed the wire fraud offense described in Racketeering Act 60, " and that the jury need not "consider whether the government has proved this offense." Id. at 887. Thus, the Third Circuit ruled that the district court erred in collaterally

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[490] See, e.g., United States v. Giovanelli, 945 F.2d 479, 491-93 (2d Cir. 1991); Coonan, 938 F.2d at 1562-63; United States v. Farmer, 924 F.2d 647, 649-50 (7th Cir. 1991); Pungitore, 910 F.2d at 1105-07; United States v. Paone, 782 F.2d 386, 396 (2d Cir, 1989); Licavoli, 725 F.2d 1047; United States v. Russotti, 717 F.2d 27, 30-32 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); United States v. Aleman, 609 F.2d 298, 309 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Solano, 605 F.2d 1141, 1142-43 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); Malatesta, 583 F.2d at 757-58; Frumento, 563 F.2d at 1086-89.

estopping the defendant from contesting his commission of the disputed racketeering act.

However, in Tocco, 200 F.3d at 417-18, the Sixth Circuit upheld the district court's admission of a judgment of conviction entered in a prior prosecution, finding the defendant guilty of an offense that was charged as a RICO predicate act. The Sixth Circuit distinguished Pelullo, explaining that the district court did not give a collateral estoppel instruction that foreclosed the defendant from contesting his commission of the disputed racketeering act, as was done in Pelullo, but rather, merely admitted the prior judgment of conviction to be considered by the jury along with other evidence of the defendant's commission of the disputed racketeering act.

It is the policy of OCRS that prosecutors follow the approach approved in Tocco, and not Pelullo, in proving a defendant's prior conviction on a charged predicate racketeering act. That is, the Government retains the burden of proving beyond a reasonable doubt that the defendant committed the racketeering act at issue, and the jury should be instructed that it may consider evidence of the judgment of conviction along with other evidence to determine whether the Government proved that the defendant committed the racketeering act at issue. The jury must not be instructed that the judgment of conviction itself establishes that the defendant committed the racketeering act at issue.

d. Successive RICO Prosecutions

The Blockburger test does not govern the issue whether successive RICO substantive prosecutions or successive RICO conspiracy prosecutions violate double jeopardy protections because in such cases the same statutory violation is involved, and, hence, the statutory elements of the two successive RICO substantive offenses, or the two successive RICO conspiracy offenses, will always be the same. Therefore, most courts apply a multi-factor test focusing on the facts underlying

the two prosecutions, to determine whether the two RICO offenses are separate for double jeopardy purposes. For example, in United States v. Ruggiero, 754 F.2d 927 (11th Cir.), cert. denied, 471 U.S. 1127 (1985), defendants moved to dismiss on double jeopardy grounds a RICO indictment in Florida that arose from conduct used against them in a prior RICO indictment in New York. The issue on appeal was whether the activities set out in the two indictments constituted one pattern of racketeering activity or two different patterns. In conducting its inquiry, the court considered five factors: (1) whether the activities constituting the two "patterns" occurred during the same time period; (2) whether the activities occurred in the same places; (3) whether the activities involved the same persons; (4) whether the two indictments alleged violations of the same criminal statutes; and (5) whether the overall nature and scope of the activities set out in the two indictments were the same. Id. at 932-33. While the court found some overlap between the two prosecutions, including the use of one racketeering act in both patterns of racketeering activity, the court concluded that the indictments charged two different patterns of racketeering activity, and, therefore, did not violate double jeopardy.[491]

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[491] See also United States v. Calabrese, 490 F.3d 575, 577-81 (7th Cir. 2007) (approved pre-trial a second RICO conspiracy prosecution where the time periods and racketeering activities of the two RICO conspiracies overlapped and where the enterprise in the two prosecutions were different "street crews" of the "Chicago Outfit," the Chicago LCN family); United States v. DeCologero, 364 F.3d 12, 15-19 (1st Cir. 2004) (holding that a prior acquittal of defendant DeCologero on a substantive RICO charge for participating in the Patriarca LCN family enterprise through a pattern of racketeering activity occurring from 1989 to 1998 did not bar a subsequent substantive RICO prosecution for participating in the "DeCologero Crew" enterprise that was different from, but was aligned with, the enterprise in the first RICO prosecution, where there was only a "little overlap" in the charged patterns of racketeering activity); United States v. Marren, 890 F.2d 924, 935-36 (7th Cir. 1989) (under five-factor test, upheld successive RICO conspiracy prosecutions where the racketeering acts were different); Pungitore, 910 F.2d at 1112-15 (upholding successive RICO conspiracy prosecutions against defendants where the enterprise was the same, but the predicate acts were different); United States v. Ciancaglini, 858 F.2d 923, 930 (3d Cir. 1988) (same); United States
(continued...)

e. Petite Policy

Although Double Jeopardy principles do not prohibit successive federal RICO prosecutions or successive federal RICO and state prosecutions as set forth above in Sections VI(P)(1)(a), (b) and (d), limitations may apply pursuant to the Department of Justice's **discretionary** "Petite Policy." See USAM § 9-2.031; Petite v. United States, 361 U.S. 529 (1960). Pursuant to the Petite Policy, prior approval of the Assistant Attorney General for the Criminal Division is necessary to bring a RICO charge "based on substantially the same act(s) or transactions involved in a prior state or federal proceeding." USAM § 9-2.031(A). However, the United States Attorney's Manual also provides:

> This policy does not apply, and thus prior approval is not required, where the prior prosecution involved only a minor part of the contemplated federal charges. For example, a federal conspiracy or RICO prosecution may allege overt acts or predicate offenses previously prosecuted as long as those acts or offenses do not represent substantially the whole of the contemplated federal charge, and, in a RICO prosecution, as long as there are a sufficient number of predicate offenses to sustain the RICO charge if the previously prosecuted offenses were excluded.
>
> This policy does not apply, and thus prior approval is not required, where the contemplated federal prosecution could not have been brought in the initial federal prosecution because of, for example, venue restrictions, or joinder or proof problems.

USAM § 9-2.031(B).

(...continued)
v. Langella, 804 F.2d 185, 186-90 (2d Cir. 1986) (upholding successive RICO conspiracy prosecutions against defendants where the enterprises were different and only three of nine predicate acts overlapped); United States v. Ruggiero, 754 F.2d 927, 929-35 (11th Cir. 1985) (upholding successive RICO prosecutions under the five-factor test where, notwithstanding some overlap in the charged patterns of racketeering activity and the participants, the patterns were nonetheless different), cert. denied, 471 U.S. 1127 (1985); Russotti, 717 F.2d at 33 (upholding successive RICO substantive prosecutions where the racketeering acts were different); United States v. Dean, 647 F.2d 779, 788 (8th Cir.) (same), modified on other grounds, 667 F.2d 721 (8th Cir. 1981) (en banc), cert. denied, 456 U.S. 1006 (1982).

2. Collateral Estoppel

Collateral estoppel is a component of double jeopardy protections, and collateral estoppel issues typically arise in RICO prosecutions where a defendant has been acquitted of a RICO charge or a predicate racketeering act in a prior prosecution. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970); accord United States v. Console, 13 F.3d 641, 664 (3d Cir. 1993) ("The double jeopardy clause protects against relitigation of an issue necessarily determined in the defendant's favor by a valid and final judgment.").

Moreover, a defendant bears the burden of demonstrating that the issue of fact whose litigation he seeks to foreclose was actually decided in his favor by a valid and final judgment in an earlier proceeding. See Dowling v. United States, 493 U.S. 342, 350-51 (1990); Console, 13 F.3d at 665, n.28. A defendant's burden in that regard is onerous. "A criminal defendant seeking to benefit from collateral estoppel has the burden of proving 'by clear and convincing evidence that the fact sought to be foreclosed was necessarily determined by the jury against the government in the prior trial.'" United States v. Uselton, 927 F.2d 905, 907 (6th Cir. 1991) (quoting United States v. Benton, 852 F.2d 1456, 1466 (6th Cir. 1988)); accord United States v. Boldin, 818 F.2d 771, 775 (11th Cir. 1987). Thus, "it is not enough that the fact **may** have been determined in the former trial." United States v. Irwin, 787 F.2d 1506, 1515 (11th Cir. 1986). Accord Marino, 200 F.3d at 10-11 (holding that collateral estoppel must be denied where the government and the defendant offer "plausible competing" theories regarding the jury's factual findings at issue); United States v. Lanoue, 137 F.3d 656, 662 (1st Cir. 1998) ("Where it is impossible to determine whether the

particular issue was previously resolved in a defendant's favor, preclusive effect must be denied." (quoting United States v. Aguilar-Aranceta, 957 F.2d 18, 23 (1st Cir. 1992))).

To determine whether the defendant has carried his burden of establishing that a jury in a prior prosecution necessarily resolved a particular fact in his favor, "requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" Ashe, 397 U.S. at 444 (citation deleted); accord Dowling, 493 U.S. at 350; Console, 13 F.3d at 665 n.28. Thus, "[i]f the court concludes that a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose, then collateral estoppel does not apply." Boldin, 818 F.2d at 775.

For example, in United States v. Merlino, 310 F.3d 137, the Third Circuit rejected the defendant's argument that collateral estoppel precluded his Section 1959 prosecution for conspiring to murder, and aiding and abetting the murder of, Joseph Sodano to maintain and increase the defendant's position in the charged enterprise, the Philadelphia LCN family, on the ground that a jury allegedly had found that the defendant did not participate in Sodano's murder in a previous RICO prosecution which charged the defendant with a RICO predicate act for conspiring to murder, and murdering, Joseph Sodano, in furtherance of the affairs of the same enterprise alleged in the Section 1959 prosecution. Id. at 139-140.

In the earlier RICO prosecution, the jury returned a special verdict indicating on the verdict sheet "Not Proven" for defendant Merlino's participation in the Sodano murder predicate act. Therefore, defendant Merlino argued that the jury had acquitted him on that predicate act and Collateral Estoppel precluded the government from relitigating the issue of his participation in the

Sodano murder and murder conspiracy in the subsequent Section 1959 prosecution. During the jury's deliberations, the jury submitted the following question to the district court:

> Racketeering Acts. Once we determine that the defendant has committed one unlawful collection of debt or two or more racketeering acts, do we need to decide proven or not proven on all the racketeering acts?

The judge responded, "Yes."

Id. at 140. Two days later, the jury requested additional clarification on this issue. It sent a note asking:

> If, on a given racketeering act that has no bearing on the count decision we cannot come to a unanimous decision, is it within the law to unanimously decide that the act is "not proven"?

Over the objections of the government, the judge again told them, "Yes."

Id.

The Third Circuit held that the defendant did not carry his burden of establishing that the jury in the earlier RICO trial had acquitted him on the Sodano murder related racketeering act because the jury's verdict was ambiguous in light of the trial court's instructions. The Third Circuit explained:

> [The trial court's second] instruction makes the jury's vote ambiguous because we cannot tell from the face of the verdict sheet whether the vote was unanimously "Not Proven" or whether the jury unanimously decided that they were unable to reach a unanimous decision as to "Proven" or "Not Proven," i.e., whether they were "hung" on that issue.
>
> Only the first of these interpretations of the jury note would bar the current case against Merlino because only the first is a unanimous acquittal and only the first resolves the issue Merlino wants to preclude from consideration in the New Jersey prosecution. The second interpretation of the note is not a unanimous acquittal and therefore is not a final judgment in favor of the defendant. Because Merlino cannot prove which is the actual jury vote, he cannot preclude the issue of his participation in the Sodano murder.

Id. at 143.[492]

Moreover, in Ruggiero, 754 F.2d at 935, defendant Cerasini was acquitted of RICO charges in the Southern District of New York, wherein he was alleged to have been a member of the Bonanno Family of La Cosa Nostra. Thereafter, he and ten others were indicted in the Middle District of Florida on RICO charges with racketeering acts that were different from those contained in the Southern District of New York indictment, but that were alleged to have been committed by members of certain La Cosa Nostra Families, including the Bonanno Family. Cerasini sought dismissal of the Florida indictment, alleging that the previous acquittal constituted a finding that he was not a member of the Bonanno Family. The trial judge refused to dismiss and the court of appeals affirmed, stating that the jury that acquitted Cerasini in New York did not necessarily decide that he was not a member of the Bonanno Family. Rather, the Eleventh Circuit stated that the

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[492] The district court in Merlino erroneously instructed the jury that it could return a verdict of "Not Proven" if it could not reach a unanimous decision. Rather, the correct instruction would have been to inform the jury that it could not return a verdict of "Not Proven" unless it unanimously agreed that the government did not prove beyond a reasonable doubt the racketeering act at issue. If the jury were unable to reach a unanimous decision of either "Proven" or "Not Proven" on a particular racketeering act, then they were "hung" on the act, and a retrial is permissible. See, e.g., Johnson v. Louisiana, 406 U.S. 356, 363 (1972) ("[W]hen a jury in a federal court . . . cannot agree unanimously upon a verdict, the defendant is not acquitted, but is merely given a new trial."); accord United States v. Yeaman, 194 F.3d 442, 453 (3d Cir. 1999); United States v. Scalzitti, 578 F.2d 507, 512 (3d Cir. 1978). When a jury cannot unanimously decide that the defendant is either guilty or not guilty, then the jury is deemed "hung" and a retrial is permissible. See Richardson v. United States, 468 U.S. 317, 324 (1984) ("[W]e have constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause."); Console, 13 F.3d at 664-65 ("[A] response to a special interrogatory regarding an element of a 'hung' count is neither a 'final' judgment nor a determination 'necessary' to a final judgment, such a response would not preclude the government from relitigating an issue.") (footnote omitted); United States v. Gotti, 413 F. Supp. 2d 287, 293-94 (S.D.N.Y. 2005) (holding that a defendant is not entitled to a judgment of acquittal when a jury was unable to unanimously decide whether a defendant had committed at least two racketeering acts underlying a substantive RICO charge; rather a retrial is permissible because the jury was "hung").

previous acquittal could have been based upon a conclusion that, although Cerasini was a member of the Bonanno Family, he did not participate in the particular pattern of racketeering activity alleged in the New York indictment. Id. Therefore, in the Florida prosecution, the Government was not seeking to persuade a second jury to determine anew a fact necessarily decided in the defendant's favor in the New York acquittal.[493]

Q. Statute of Limitations and Withdrawal

A claim that an indictment is time-barred by the applicable statute of limitations, and the related claim that a conspirator withdrew from a conspiracy more than the applicable statute of limitations period before an indictment was brought, constitute affirmative defenses that must be timely raised by a defendant or else they are waived, and the defendant bears the initial burden of establishing those affirmative defenses.[494]

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[493] See also United States v. Luong, 393 F.3d 913, 917-18 (9th Cir. 2004) (holding that the defendant failed to carry his burden of establishing that his prior acquittal on a RICO substantive charge, which included a predicate racketeering act of a conspiracy to commit Hobbs Act robberies of various computer chip companies from January 1, 1995 to April 9, 1996, collaterally estopped his prosecution on conspiracy to commit Hobbs Act robberies of similar companies on January 20 and 25, 1996); United States v. Salerno, 108 F.3d 730, 740-42 (7th Cir. 1997) (at trial on charge of murder in aid of racketeering, where defendant had been previously acquitted of two extortion charges, proof that the racketeering enterprise with which he was associated engaged in extortion was admissible, since in a Section 1959(a)(1) prosecution, a defendant's personal involvement in extortion is irrelevant and is not an ultimate issue); Shenberg, 89 F.3d at 1478-81 (on retrial of a substantive RICO count, collateral estoppel doctrine barred the government from proving acquitted counts that corresponded to various RICO predicate acts; however, collateral estoppel did not bar use of the evidence as to another defendant's RICO conspiracy charge, particularly since actual commission of the predicate act is not an essential element of conspiracy).

[494] See, e.g., Titterington, 374 F.3d at 456-60 (collecting cases); United States v. Spero, 331 F.3d 57, 60 n.2 (2d Cir.), cert. denied, 540 U.S. 819 (2003); United States v. Harriston, 329 F.3d 779, 783 (11th Cir. 2000); Antar, 53 F.3d at 582-83; Finestone, 816 F.2d at 589; United States v. Walsh, 700 F.2d 846, 855-56 (2d Cir.), cert. denied, 464 U.S. 825 (1983).

1. Statute of Limitations Governing a RICO Substantive Offense

The general federal five-year limitations period (18 U.S.C. § 3282) is applicable to RICO prosecutions under each of the subsections of 18 U.S.C. § 1962.[495] Thus, for example, in a substantive RICO charge under Section 1962(c), each defendant must have committed at least one act of racketeering within five years of the date of the indictment.[496] However, pursuant to 18 U.S.C. § 3293, a ten-year statute of limitations applies to RICO charges where the racketeering activity involves a violation of 18 U.S.C. § 1344 -- bank fraud. If there is more than one defendant in the case, the statute of limitations must be satisfied as to each defendant charged under RICO.[497]

Moreover, one court has held that when a substantive RICO count under Section 1962(c) is based on collection of an unlawful debt rather than the commission of a pattern of racketeering

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[495] The statute of limitations generally is calculated using the date when an indictment is "found" under Fed. R. Crim. P. 6(e), and for statute of limitations purposes, an indictment is found when the grand jury returns it. See, e.g., United States v. Bracy, 67 F.3d 1421, 1426 (9th Cir. 1995); United States v. Srulowitz, 819 F.2d 37, 40 (2d Cir.), cert. denied, 479 U.S. 843 (1987); United States v. Southland Corp., 760 F.2d 1366, 1379-80 (2d Cir.), cert. denied, 474 U.S. 825 (1985). Where an indictment is sealed under Fed. R. Crim. P. 6(e)(4), if the defendant can show "substantial actual prejudice occurring between the date of sealing and the date of unsealing, the expiration of the limitations period before the latter event warrants dismissal of the indictment." Srulowitz, 819 F.2d at 40-41 (citing United States v. Muse, 633 F.2d 1041, 1042 (2d Cir. 1980) (en banc), cert. denied, 450 U.S. 984 (1981). Other courts have considered whether the statute of limitations has been tolled in RICO cases. See, e.g., United States v. Madrid, 842 F.2d 1090, 1096 (9th Cir.) (statute tolled where later indictment alleged essentially same facts as first), cert. denied, 488 U.S. 912 (1988); United States v. Robilotto, 828 F.2d 940, 949 (2d Cir. 1987) (superseding indictment made only minor technical changes to indictment, and therefore statute tolled by original indictment even though superseding indictment added a murder predicate act against the defendant), cert. denied, 484 U.S. 1011 (1988).

[496] See, e.g., Frega, 179 F.3d at 808; Darden, 70 F.3d at 1525; Starrett, 55 F.3d at 1544-45; Salerno, 868 F.2d at 534; Torres Lopez, 851 F.2d at 525; Persico, 832 F.2d at 714; United States v. Bethea, 672 F.2d 407, 419 (5th Cir. 1982); Castellano, 610 F. Supp. at 1383-84.

[497] See, e.g., Salerno, 868 F.2d at 534; Torres Lopez, 851 F.2d at 525; Persico, 832 F.2d at 714-15; Castellano, 610 F. Supp. at 1383.

activity, each act of debt collection must have occurred within five years of the indictment. See, e.g., Pepe, 747 F.2d at 663-64 & n.55.

For a substantive RICO charge under Section 1962(a) or 1962(b), the limitations analysis is different from that for cases under Section 1962(c). For example, the gravamen of the Section 1962(a) offense is the use or investment of racketeering income in the operation or establishment of an enterprise. A Section 1962(a) offense is not complete until the use or investment has occurred, which, ordinarily, will be some time after the commission of the racketeering acts that generated the income. Thus, according to one appellate court, the limitations period for a Section 1962(a) offense does not begin to run until the last act of use or investment has occurred. See, e.g., United States v. Vogt, 910 F.2d 1184, 1195-97 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991). A similar analysis should be used for charges under Section 1962(b).

2. Statute of Limitations and Principles of Withdrawal Governing a RICO Conspiracy Charge

As noted in Section III(D)(1) above, to establish a RICO conspiracy charge, it is not necessary to prove that a defendant committed any racketeering act or an overt act in furtherance of the conspiracy. However, a RICO conspiracy offense is deemed timely brought when a defendant has committed a racketeering act or an overt act in furtherance of the RICO conspiracy within five years or ten years of the indictment, depending on which time period applies, even though such proof is not required.[498]

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[498] See, e.g., United States v. LeQuire, 943 F.2d 1554, 1563 & n.17 (11th Cir. 1991), cert. denied, 505 U.S. 1223 (1992); Doherty, 867 F.2d at 60; United States v. Coia, 719 F.2d 1120, 1124-25 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984); Castellano, 610 F. Supp. at 1384; United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir.) (Table), cert. denied, 439 U.S. 801 (1978).

Moreover, the applicable statute of limitations period does not begin to run until a conspiracy offense has ended; as a general rule, a conspiracy offense is presumed to continue until all its conspiratorial objectives have been achieved or abandoned even if the defendant did not commit or agree to commit any racketeering act within five years (or ten if applicable) of the indictment.[499]

Therefore, to prevail on a claim that a RICO conspiracy offense is time-barred by the applicable statute of limitations, the defendant must establish that either the RICO conspiracy offense ended more than five years (or ten if applicable) before the indictment was brought, or the defendant withdrew from the RICO conspiracy more than five years (or ten if applicable) before the indictment was brought.[500] This is so because as the court explained in Battle:

> [P]articipation in a conspiracy is presumed to continue until all activity relating to the conspiracy is ceased. Accordingly, each defendant is presumed to be a participant for the duration of the conspiracy unless he can overcome the presumption by providing his withdrawal. A conspiracy may be deemed to continue as long as its purposes neither have been abandoned nor accomplished.

473 F. Supp. 2d at 1205 (citations omitted).[501]

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[499] See, e.g., United States v. Saadey, 393 F.3d 669, 677 (6th Cir. 2005); Spero, 331 F.3d at 60-61; Harriston, 329 F.3d at 783; Darden, 70 F.3d at 1525; Antar, 53 F.3d at 582; Wong, 40 F.3d at 1367; United States v. Eisen, 974 F.2d 246, 264 (2d Cir. 1992), cert. denied, 507 U.S. 1029 (1993); LeQuire, 943 F.2d at 1563-64; Gonzalez, 921 F.2d at 1548; United States v. West, 877 F.2d 281, 289 (4th Cir.), cert. denied, 493 U.S. 869 (1989); Rastelli, 870 F.2d at 838; Salerno, 868 F.2d at 534; Torres Lopez, 851 F.2d at 525; Persico, 832 F.2d at 713; Finestone, 816 F.2d at 589; Coia, 719 F.2d at 1124-25; Battle, 473 F. Supp. 2d at 1205.

[500] See, e.g., Saadey, 393 F.3d at 677-78; Spero, 331 F.3d at 60-61; Harriston, 329 F.3d at 783-84; Diaz, 176 F.3d at 97-99; Zizzo, 120 F.3d at 1357-58; Antar, 53 F.3d at 582-84; Minicone, 960 F.2d at 1108; LaQuire, 943 F.2d at 1564, Gonzalez, 921 F.2d at 1548; West, 877 F.2d at 289; Finestone, 816 F.2d at 589; Battle, 473 F. Supp. 2d at 1205.

[501] Accord Saadey, 393 F.3d at 677-78; Antar, 53 F.3d at 582; Gonzalez, 921 F.2d at 1548; see also cases cited in notes 499 and 500 above.

To establish such withdrawal, a conspirator has the burden of proving more than mere cessation of his unlawful activities. Rather, a conspirator must also prove either that: (1) he took "affirmative action . . . to disavow or defeat the purpose" of the conspiracy which is communicated in a manner reasonably calculated to reach co-conspirators, or (2) he disclosed the unlawful scheme to the authorities.[502] Moreover, even if a defendant carries his/her initial burden in that regard, the Government may rebut such evidence of withdrawal by evidence that the defendant continued to derive financial benefits from the conspiracy or took other actions to further the goals of the conspiracy.[503]

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[502] Hyde v. United States, 225 U.S. 347, 369 (1912); accord United States v. United States Gypsum Co., 438 U.S. 422, 463-64 (1978); Diaz, 176 F.3d at 98; Maloney, 71 F.3d at 654-55; Antar, 53 F.3d at 582-83; Morgano, 39 F.3d at 1370-71; United States v. Bennett, 984 F.2d 597, 609-10 (4th Cir.), cert. denied, 508 U.S. 945 (1993); Masters, 924 F.2d at 1368; West, 877 F.2d at 289; Finestone, 816 F.2d at 589; Battle, 473 F. Supp. 2d at 1205. See generally United States v. Chambers, 944 F.2d 1253, 1265 (6th Cir. 1991) (defendant's cessation of activities in furtherance of a drug trafficking conspiracy and her admission to the authorities that she sold $100 worth of cocaine, "but otherwise provided little information" did not establish withdrawal. The defendant's "statement is not **a full confession** and, in fact, evidences a lack of cooperation with authorities." (emphasis added)) (superseded on other grounds by statute), cert. denied, 502 U.S. 1112 (1992); United States v. Piper, 298 F.3d 47, 53 (1st Cir. 2002) ("Typically [withdrawal] requires 'either . . . **a full confession to authorities** or a communication by the accused to his co-conspirators that he has abandoned the enterprise and its goals." (citation omitted; emphasis added)); United States v. Wilson, 134 F.3d 855, 863 (7th Cir.) (defendant's limited confession to the authorities and subsequent denials of culpability did not establish "a **full** confession to the authorities" as required to establish withdrawal), cert. denied, 525 U.S. 894 (1998).

[503] See, e.g., United States v. Berger, 224 F.3d 107, 119 (2d Cir. 2000) ("even if the defendant completely severs his or her ties with the enterprise, the defendant still may remain a part of the conspiracy if he or she continues to do acts in furtherance of the conspiracy and continues to receive benefits from the conspiracy's operations," and finding that evidence that the defendant continued to engage in conduct that advanced the goals of the conspiracy refuted withdrawal) (citations omitted); Diaz, 176 F.3d at 98-99 (evidence of the defendant's meetings and discussions with other co-conspirators about conspiratorial matters rebuts withdrawal); Zizzo, 120 F.3d at 1357-58 (defendant's continued receipt of share of the conspiracy's illegal profits demonstrated defendant did not withdraw from the conspiracy); Antar, 53 F.3d at 583-84 (same); United States v. Lash, 937

(continued...)

In accordance with these principles, courts frequently have rejected defendants' claims that a RICO conspiracy offense was time-barred by the applicable statute of limitations, even when the defendant did not commit, or agree to commit any racketeering act, within five years (or ten if applicable) of the indictment.[504] Indeed, courts have noted that it is difficult to establish a withdrawal defense.[505]

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[503](...continued)
F.2d 1077, 1083-1084 (6th Cir. 1991) (even if defendant had withdrawn, from the conspiracy, "his subsequent acts neutralized his withdrawal and indicated his continued acquiescence"), cert. denied, 457 U.S. 1136 (1982); United States v. Phillips, 664 F.2d 971, 1017-18 (5th Cir. 1981) (same); United States v. Lowell, 649 F.2d 950, 954, 957-58 (3d Cir. 1981) (holding that a single telephone conversation in which the defendant cautioned a co-conspirator to be careful because of ongoing investigations was sufficient to rebut the defendant's withdrawal); United States v. Borelli, 336 F.2d 376, 389 (2d Cir. 1964) (holding that "dissolution of the 1950 [drug distribution] partnership would not constitute an effective withdrawal so long as any of the contraband obtained during [the defendant's] partnership was being sold"), cert. denied, 379 U.S. 960 (1965).

[504] See, e.g., cases cited in notes 499 and 500 above.

[505] See, e.g., United States v. Zimmer, 299 F.3d 710, 718 (8th Cir. 2002) ("'[I]t is not easy to withdraw from a criminal conspiracy.' . . . . Zimmer must do more than demonstrate that he undertook no conspiratorial activity after the cut-off date; he must demonstrate that he took affirmative action to withdraw from the conspiracy either by making a clean breast to the authorities or by communicating his withdrawal in a manner reasonably calculated to reach his coconspirators . . . .To make a clean breast of a conspiracy, the conspirator must 'sever all ties to the conspiracy and its fruits, **and** act affirmatively to defeat the conspiracy by confessing to and cooperating with the authorities") (citations omitted); Odom, 252 F.3d at 1299 ("Merely leaving the church grounds did not necessarily end the conspiracy, nor her participation in the conspiracy. Boone took no affirmative acts inconsistent with the conspiracy: she did not put the original fire out; she did not convince the others to leave; and she did not announce to the others that she had changed her mind about the original plan to 'burn the nigger church.' She is, therefore, appropriately liable for the acts of the other members of the conspiracy."); United States v. True, 250 F.3d 410, 425 (6th Cir. 2001) (in price-fixing conspiracy, "even if the conspirators at some point in 1992 agreed to no longer **discuss** pricing and bidding, there was no effective withdrawal by any co-conspirator because they continued to **act** based on their prior discussions . . . ."); United States v. Alred, 144 F.3d 1405, 1415 (11th Cir. 1998) ("the government presented evidence that, while the divorce of Irma and Charlie Alred resulted in competition among some of the coconspirators during the later stages of the conspiracy, the goal of obtaining and distributing marijuana through known sources remained the (continued...)

3. A Timely Brought RICO Charge May Include Predicate Racketeering Offenses That Would be Time-Barred if Brought as Free-Standing Offenses Independent of the RICO Offense

A statute of limitations applies to determine whether the entire charged offense, not subparts of the charged offense, was committed within the applicable statute of limitations period. The relevant offense to examine for any statute of limitations issue is the overarching RICO offense, not the alleged predicate racketeering offenses that comprise part of the overarching RICO offense. Courts uniformly have held in criminal RICO cases that a RICO predicate offense is not an independent count; rather it is part of a single overarching RICO offense. Therefore, as long as the RICO offense is brought within the applicable statute of limitations period, it may include predicate racketeering acts that would be time-barred if brought as free-standing offenses independent of the

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[505](...continued)
same. **Disagreements among participants in a conspiracy does not mean that they have not been and continued to be involved in the overall conspiracy.**" (emphasis added)); United States v. Walls, 70 F.3d 1323, 1327 (D.C. Cir. 1995) ("even if the other co-conspirators had considered expelling Blakney from the conspiracy, she remained a member because she remained loyal to the conspiracy and made no affirmative attempt to withdraw"), cert. denied, 517 U.S. 1147 (1996); Antar, 53 F.3d at 583 ("resignation from the enterprise does not, in and of itself, constitute withdrawal from a conspiracy"); United States v. Nava-Salazar, 30 F.3d 788, 799 (7th Cir.) ("Withdrawal requires that the conspirator make himself 'completely unavailable for the conspiracy's purposes.'") (citation and internal quotation marks omitted), cert. denied, 513 U.S. 1022 (1994); United States v. DePriest, 6 F.3d 1201, 1206-07 (7th Cir. 1993) (despite fact that defendant and coconspirator had "falling out" over a debt from a previous drug transaction, after which the coconspirator determined not to have further drug dealings with the defendant, this did not establish withdrawal: "The burden to prove withdrawal remains firmly on the defendant even when it appears that he has been expelled from the conspiracy."); United States v. Schweihs, 971 F.2d 1302, 1323 (7th Cir. 1992) (that defendant was expelled from conspiracy by a co-conspirator and no longer allowed to play a part in the illegal activities did not establish withdrawal); Minicone, 960 F.2d at 1108 (defendant's "serious falling out" with co-conspirator to the point that the co-conspirator shot at the defendant did not establish withdrawal); United States v. Garrett, 720 F.2d 705, 714 (D.C. Cir. 1983) ("mere cessation of activity in furtherance of the conspiracy does not constitute withdrawal; . . . testimony that defendant had broken off relations completely with co-conspirators did not constitute withdrawal"(internal quotations deleted)).

RICO offense. See, e.g., Starrett, 55 F.3d at 1549-51; Wong, 40 F.3d at 1365-68; Gonzalez, 921 F.2d at 1547-48; Pungitore, 910 F.2d at 1129 n.63; Torres Lopez, 851 F.2d at 522-25; Castellano, 610 F. Supp. at 1383-84; Field, 432 F. Supp. at 59. As the court explained in Wong:

> [I]n the statute-of-limitations context . . . jurisdiction over a single RICO predicate act confers jurisdiction over other predicate acts, including some that could not be prosecuted separately. Because the limitations period is measured from the point at which the crime is complete, . . . a defendant may be liable under substantive RICO for predicate acts the separate prosecution of which would be barred by the applicable statute of limitations, so long as that defendant committed one predicate act within the [applicable] five-year limitations period. . . . Similarly, a defendant is liable for participation in a RICO conspiracy for predicate acts the separate prosecution of which would be time-barred, so long as that defendant has not withdrawn from the conspiracy during the limitations period.

Wong, 40 F.3d at 1367 (citations omitted).

R. RICO Jury Instructions

Contact OCRS' RICO Unit to obtain model RICO jury instructions which OCRS periodically revise in light of recent decisions.

APPENDIX I (A)

United States Attorneys' Manual Sections 9-110.010 to 9-110.900

9-110.000
ORGANIZED CRIME AND RACKETEERING

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9-110.010 Introduction

This chapter focuses on investigations and prosecutions involving RICO, (18 U.S.C. §§ 1961-1968), illegal gambling (18 U.S.C. §§ 1511 and 1955), loansharking (18 U.S.C. §§ 891-896), violent crimes in aid of racketeering (18 U.S.C. § 1959), and gambling ships (18 U.S.C. §§ 1081-1083). The Organized Crime and Racketeering Section of the Criminal Division supervises prosecutions of each of these statutes. For an additional discussion of RICO, see "Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors," available from OCRS.

9-110.100 Racketeer Influenced and Corrupt Organizations (RICO)

On October 15, 1970, the Organized Crime Control Act of 1970 became law. Title IX of the Act is the Racketeer Influenced and Corrupt Organizations Statute (18 U.S.C. §§ 1961-1968), commonly referred to as the "RICO" statute. The purpose of the RICO statute is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S.Rep. No. 617, 91st Cong., 1st Sess. 76 (1969). However, the statute is

sufficiently broad to encompass illegal activities relating to any enterprise affecting interstate or foreign commerce.

Section 1961(10) of Title 18 provides that the Attorney General may designate any department or agency to conduct investigations authorized by the RICO statute and such department or agency may use the investigative provisions of the statute or the investigative power of such department or agency otherwise conferred by law. Absent a specific designation by the Attorney General, jurisdiction to conduct investigations for violations of 18 U.S.C. § 1962 lies with the agency having jurisdiction over the violations constituting the pattern of racketeering activity listed in 18 U.S.C. § 1961.

9-110.101 Division Approval

No RICO criminal indictment or information or civil complaint shall be filed, and no civil investigative demand shall be issued, without the prior approval of the Criminal Division. *See* RICO Guidelines at USAM 9-110.200.

9-110.200 RICO Guidelines Preface

The decision to institute a federal criminal prosecution involves balancing society's interest in effective law enforcement against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned. Despite the broad statutory language of RICO and the legislative intent that the statute". . . shall be liberally construed to effectuate its remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved. Further, the Criminal Division will not approve "imaginative" prosecutions under RICO which are far afield from the congressional purpose of the RICO statute. A RICO count which merely duplicates the elements of proof of traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be approved unless it serves some special RICO purpose. Only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose.

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

9-110.210 Authorization of RICO Prosecution -- The Review Process

The review and approval function for all RICO matters has been centralized within the Organized Crime and Racketeering Section of the Criminal Division. To commence the review process, the *final* draft of the proposed indictment or information and a RICO prosecution memorandum shall be forwarded to the Organized Crime and Racketeering Section. Separate approval is required for superseding indictments or indictments based upon a previously approved information. Attorneys are encouraged to seek guidance from the Organized Crime and Racketeering Section by telephone prior to the time an investigation is undertaken and well before a final indictment and prosecution memorandum are submitted for review. Guidance on preparing the RICO prosecution memorandum is in the Criminal Resource Manual at 2071 et seq.

RICO reviews are handled on a first-in-first-out basis. Accordingly, the submitting attorney must allocate sufficient lead time to permit review, revision, conferences, and the scheduling of the

grand jury. *Unless there is a backlog, 15 working days is usually sufficient.* The review process will not be dispensed with because a grand jury, which is about to expire, has been scheduled to meet to return a RICO indictment. Therefore, submitting attorneys are cautioned to budget their time and to await receipt of approval before scheduling the presentation of the indictment to a grand jury.

If modifications in the indictment are required, they must be made by the submitting attorney before the indictment is returned by the grand jury. Once the modifications have been made and the indictment has been returned, a copy of the indictment filed with the clerk of the court shall be forwarded to Organized Crime and Racketeering Section. If, however, it is determined that the RICO count is inappropriate, the submitting attorney will be advised of the Section's disapproval of the proposed indictment. The submitting attorney may wish to redraft the indictment based upon the Section's review and submit a revised indictment and/or prosecution memorandum at a later date.

9-110.300 RICO Guidelines Policy

It is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the Criminal Division having supervisory responsibility for this statute.

9-110.310 Considerations Prior to Seeking Indictment

Except as hereafter provided, a government attorney should seek approval for a RICO charge only if one or more of the following requirements is present:

1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying charges would not;

2. A RICO prosecution would provide the basis for an appropriate sentence under all the circumstances of the case in a way that prosecution only on the underlying charges would not;

3. A RICO charge could combine related offenses which would otherwise have to be prosecuted separately in different jurisdictions;

4. RICO is necessary for a successful prosecution of the government's case against the defendant or a codefendant;

5. Use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct;

6. The case consists of violations of State law, but local law enforcement officials are unlikely or unable to successfully prosecute the case, in which the federal government has a significant interest;

7. The case consists of violations of State law, but involves prosecution of significant or government individuals, which may pose special problems for the local prosecutor.

The last two requirements reflect the principle that the prosecution of state crimes is primarily the responsibility of state authorities. RICO should be used to prosecute what are essentially violations of state law only if there is a compelling reason to do so. *See also* the Criminal Resource Manual at 2070.

9-110.320 Approval of Organized Crime and Racketeering Section Necessary

A RICO prosecution memorandum and draft indictment, felony information, civil complaint, or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section, Criminal Division, 1001 G Street, N.W., Suite 300, Washington, D.C. 20038, *at least 15 working days prior to the anticipated date of the proposed filing or the seeking of an indictment from the grand jury.*

No criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Racketeering Section,

Criminal Division. Prior authorization from the Criminal Division to conduct a grand jury investigation based upon possible violations of 18 U.S.C. § 1962 is not required.

A RICO prosecution memorandum and draft pleading or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section. It is essential to the careful review which these factually and legally complex cases require that the attorney handling the case in the field not wait to submit the case until the grand jury or the statute of limitations is about to expire. Authorizations based on oral presentations will not be given. See the Criminal Resource Manual at 2071 et seq. for specific guidance.

These guidelines do not limit the authority of the Federal Bureau of Investigation to conduct investigations of suspected violations of RICO. The authority to conduct such investigations is governed by the FBI Guidelines on the Investigation of General Crimes. However, the factors identified here are the criteria by which the Department of Justice will determine whether to approve the proposed RICO. The fact that an investigation was authorized, or that substantial resources were committed to it, will not influence the Department in determining whether an indictment under the RICO statute is appropriate.

Use of RICO in a prosecution, like every other federal criminal statute, is also governed by the Principles of Federal Prosecution. *See* USAM 9-27.000, *et seq*. Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts is not appropriate and would violate the Principles of Federal Prosecution.

9-110.330 Charging RICO Counts

A RICO charge where the predicate acts consist only of state offenses will not be approved except in the following circumstances:

A. Local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the Federal government has significant interest;

B. Significant organized crime involvement exists; or

C. The prosecution of significant political or governmental individuals may pose special problems for local prosecutors.

9-110.400 RICO Prosecution (Pros) Memorandum Format

A well written, carefully organized prosecution memorandum is the greatest guarantee that a RICO prosecution will be authorized quickly and efficiently. See the Criminal Resource Manual at 2071 *et seq.* for specific guidelines on drafting the RICO prosecution memorandum.

Once a RICO indictment has been approved by the Organized Crime and Racketeering Section and has been returned by the grand jury, a copy of a file-stamped copy of the indictment shall be provided to the Section. The Section shall also be notified in writing of any significant rulings which affect the RICO statute--for example, any ruling which results in a dismissal of a RICO count, or any ruling affecting or severing any aspect of the forfeiture provisions under RICO. In addition, copies of RICO motions, jury instructions and briefs filed by the United States Attorney's Office (USAO), as well as the defense, should be forwarded to the Organized Crime and Racketeering Section for retention in a central reference file. The government's briefs and motions will provide assistance to other USAOs handling similar RICO matters.

Once a verdict has been obtained, the USAO shall forward the following information to the Section for retention: (a) the verdict on each count of the indictment; (b) a copy of the judgment of forfeiture; (c) estimated value of the forfeiture; and (d) judgment and sentence(s) received by each RICO defendant.

9-110.600 Syndicated Gambling

See the Criminal Resource Manual at 2085.

9-110.700 Loansharking

Useful information on the prosecution of loansharking is available in the Criminal Resource Manual at 2086 through 2088.

9-110.800 Violent Crimes in Aid of Racketeering Activity (18 U.S.C. § 1959)

Section 1959 makes it a crime to commit any of a list of violent crimes in return for pecuniary compensation from an enterprise engaged in racketeering activity, or for the purpose of joining, remaining with, or advancing in such an enterprise. The listed violent crimes are murder, kidnapping, maiming, assault with a dangerous weapon, assault resulting in serious bodily injury, and threatening to commit a "crime of violence," as defined in 18 U.S.C. § 16. The listed crimes may be violations of State or Federal law. In addition, attempts and conspiracies to commit the listed crimes are covered. The maximum penalty varies with the particular violent crime involved, ranging from a fine and/or three years imprisonment up to a fine and/or life imprisonment, except for any murder occurring on or after September 13, 1994, which are subject to the death penalty.

For any murder occurring on or after September 13, 1994, the prosecutor must comply with the Department's death penalty protocol (*see* USAM 9-10.000).

See approval guidelines at USAM 9-110.811 through 816.

9-110.801 Violent Crimes in Aid of Racketeering (18 U.S.C. § 1959) -- Division Approval

No criminal prosecution under Section 1959 shall be initiated by indictment or information without the prior approval of the Organized Crime and Racketeering Section (OCRS). All requests for approval must be submitted at least 15 days in advance and accompanied by a prosecution memorandum and final proposed indictment.

See approval guidelines at USAM 9-110.811 through 816.

9-110.802 Violent Crimes in Aid of Racketeering (18 U.S.C. § 1959) -- Approval Guidelines

Because Section 1959 reaches conduct within state and local jurisdictions, there is, absent compelling circumstances, a need to avoid encroaching on state and local law enforcement authority. Moreover, Section 1959 complements the RICO statute, 18 U.S.C. §§ 1961-1968, and incorporates RICO concepts and terms, namely "enterprise" and "racketeering activity," and there is a need to maintain consistent applications and interpretations of the elements of RICO. All proposed prosecutions under Section 1959 therefore must be submitted to the Organized Crime and Racketeering Section Criminal Division, for approval in accordance with the following guidelines.

9-110.811 The Review Process for Authorization under Section 1959

The review process for authorization of prosecutions under Section 1959 is similar to that for RICO prosecutions under 18 U.S.C. §§ 1961 to 1968. *See* USAM 9-110.200, *et seq*. To commence the formal review process, submit a final draft of the proposed indictment and a prosecution memorandum to the Organized Crime and Racketeering Section. Before the formal review process begins, prosecuting attorneys are encouraged to consult by telephone the Organized Crime and Racketeering Section in order to obtain preliminary guidance and suggestions.

The review process can be time-consuming because of the likelihood that modifications will be made to the indictment and because of the heavy workload of the reviewing attorneys. Therefore, unless extraordinary circumstances justify a shorter time frame, *a period of 15 working days must be allowed for the review process.*

9-110.812 Specific Guidelines for Section 1959 Prosecutions

A. In deciding whether to approve a prosecution under Section 1959, the Organized Crime and Racketeering Section will analyze the prosecution memorandum and proposed indictment to determine whether there is a legitimate reason the offense cannot or should not be prosecuted by state or local authorities. For example, federal prosecution may be appropriate where local authorities do not have the resources to prosecute, where local authorities are reasonably believed to be corrupt, where local authorities have requested federal participation, or where the offense is closely related to a federal investigation or prosecution. A prosecution will not be authorized over the objection of local authorities in the absence of a compelling reason. Accordingly, every prosecution memorandum must state the views of local authorities with respect to the proposed prosecution, or the reasons for not soliciting them. In addition, the specific factors set forth in the following sections will be considered with respect to all proposed prosecutions.

B. Section 1959 was enacted to combat "contract murders and other violent crimes by organized crime figures." *See* S.Rep. No. 225, 98th Cong., 1st Sess. 304-307, 306 (1983), reprinted in 1984 U.S. Code & Admin. News (U.S.C.A.N.) 3182, 3483-3487. The statutory language is extremely broad, in that it covers such conduct as a threat to commit an assault, and other relatively minor conduct normally prosecuted by local authorities. Thus, although the involvement of traditional organized crime will not be a requirement for approval of proposed prosecutions, a prosecution will not be authorized unless the violent crimes involved are substantial because of the seriousness of injuries, the number of incidents, or other aggravating factors.

C. The statutory definition of "enterprise" also is very broad; it is closely related to the definition of the same term in the RICO statute, 18 U.S.C. § 1961(4). (It should be noted that the definition in section 1959, unlike the RICO definition, includes a requirement of an effect on interstate commerce as part of the definition, and does not include an "individual" within the definition.) No prosecution under section 1959 will be approved unless the enterprise has an identifiable structure and purpose apart from the racketeering activity and crimes of violence it is engaged in, and otherwise meets the standards for a RICO prosecution.

D. The term "racketeering activity" is borrowed directly from the RICO statute, 18 U.S.C. Sec. 1961(1). It will be construed in the same way under Section 1959 as it is under RICO, for purposes of approval. *See* USAM 9-110.100, *et seq.*

9-110.815 Prosecution Memorandum -- Section 1959

Every request for approval of a proposed prosecution under section 1959 must be accompanied by a final draft of a proposed indictment and by a thorough prosecution memorandum. The prosecution memorandum should generally conform to the standards outlined for RICO prosecutions. *See* USAM 9-110.400. The memorandum must contain a concise summary of the facts and a statement of the evidentiary basis for each count, a statement of the applicable law, a discussion of anticipated defenses and unusual legal issues (federal, and where applicable, state), and a statement of justification for using section 1959. It is especially important that the memorandum include a discussion of the nexus between the enterprise and the crime of violence, the defendant's relationship to the enterprise, and the evidentiary basis for each section 1959 count. Submission of a thorough memorandum is particularly important, because of the complexity of the issues involved and because of the statute's similarity to RICO.

9-110.816 Post-Indictment Duties -- Section 1959

Once the indictment or information has been approved and filed, it is the duty of the prosecuting attorney to submit to the Organized Crime and Racketeering Section a copy bearing the seal of the clerk of the court. In addition, the attorney should keep the Organized Crime and Racketeering Section informed of any unusual legal problems that arise in the course of the case, so those problems can be considered in providing guidance to other prosecutors.

9-110.900 The Gambling Ship Act -- 18 U.S.C. §§ 1081 et seq.

See the Criminal Resource Manual at 2089.

APPENDIX I (B)

Tax Division Directive No. 128

Charging Mail Fraud, Wire Fraud, or Bank Fraud Alone or as Predicate Offenses in Cases Involving Tax Administration

TAX DIVISION

DIRECTIVE NO. 128
(Supersedes Directive No. 99)

CHARGING MAIL FRAUD, WIRE FRAUD OR BANK FRAUD ALONE OR AS PREDICATE OFFENSES IN CASES INVOLVING TAX ADMINISTRATION

Tax Division approval is required for any criminal charge if the conduct at issue arises under the internal revenue laws, regardless of the criminal statute(s) used to charge the defendant.[1] Tax Division authorization is required before charging mail fraud, wire fraud or bank fraud alone or as the predicate to a RICO or money laundering charge for any conduct arising under the internal revenue laws, including any charge based on the submission of a document or information to the IRS. Tax Division approval also is required for any charge based on a state tax violation if the case involves parallel federal tax violations.

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1. 28 C.F.R. §0.70(b): "Criminal proceedings arising under the internal revenue laws ... are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Tax Division," with a few specified exceptions.

An offense is considered to arise under the internal revenue laws when it involves (1) an attempt to evade a responsibility imposed by the Internal Revenue Code, (2) an obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes.

The Tax Division may approve mail fraud, wire fraud or bank fraud charges in tax-related cases involving schemes to defraud the government or other persons if there was a large fraud loss or a substantial pattern of conduct and there is a significant benefit to bringing the charges instead of or in addition to Title 26 violations. *See generally* United States Attorneys' Manual (U.S.A.M.) §9-43.100. Absent unusual circumstances, however, the Tax Division will not approve mail or wire fraud charges in cases involving only one person's tax liability, or when all submissions to the IRS were truthful.

Fraud charges should be considered if there is a significant benefit at the charging stage (*e.g.*, supporting forfeiture of the proceeds of a fraud scheme; allowing the government to describe the entire scheme in the indictment); at trial (*e.g.*, ensuring that the court will admit all relevant evidence of the scheme; permitting flexibility in choosing witnesses); or at sentencing (*e.g.*, ensuring that the court can order full restitution). *See id.* §9-27.320(B)(3) ("If the evidence is available, it is proper to consider the tactical advantages of bringing certain charges.").

For example, mail fraud (18 U.S.C. §1341) or wire fraud (18 U.S.C. §1343) charges may be appropriate if the target filed multiple fraudulent returns seeking tax refunds using fictitious names, or using the names of real taxpayers without their knowledge.[2] Fraud charges also may be considered if the target promoted a fraudulent tax scheme.

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2. It was the Tax Division's prior practice to authorize the prosecution of fraudulent refund schemes and fraudulent tax promotions only under 18 U.S.C. §§ 286 (false

claims conspiracy), 287 (false claims), 371 (conspiracy) and 1001 (false statements); and 26 U.S.C. § 7206 (false tax returns). Under this directive, such charges may still be pursued instead of, or in addition to, mail or wire fraud charges.

Bank fraud charges (18 U.S.C. §1344) can be appropriate in the case of a tax fraud scheme that victimized a financial institution. Example: the defendant filed false claims for tax refund and induced a financial institution to approve refund anticipation loans on the basis of the fraudulent information submitted to the IRS.

Racketeering and Money Laundering Charges Based on Tax Offenses

The Tax Division will not authorize the use of mail, wire or bank fraud charges to convert routine tax prosecutions into RICO or money laundering cases. The Tax Division will authorize prosecution of tax-related RICO and money laundering offenses, however, when unusual circumstances warrant it.

A United States Attorney who wishes to charge a RICO violation (18 U.S.C. §1962) in any criminal matter arising under the internal revenue laws – including a predicate act based on a state tax violation, in the case of a parallel federal tax violation – must obtain the authorization of the Tax Division and the Criminal Division's Organized Crime and Racketeering Section. U.S.A.M. §9-110.101.

A United States Attorney who wishes to bring a money laundering charge (18 U.S.C. §1956) based on conduct arising under the internal revenue laws must obtain the authorization of the Tax Division and, if necessary, the Criminal Division's Asset Forfeiture and Money Laundering Section. U.S.A.M. §9-105.300.

Date: October _____, 2004 _____

EILEEN J. O'CONNOR
Assistant Attorney General

APPENDIX II (A)

Summary of Supreme Court Civil Interstate Commerce Clause Cases Since 1942

II (A)
Supreme Court Civil Interstate
Commerce Clause Cases
Since 1942

1. Wickard v. Filburn, 317 U.S. 111 (1942).

The plaintiff filed a complaint to enjoin enforcement against him of the marketing penalty imposed by the Agricultural Adjustment Act of 1938 ("AAA") as amended in 1941, upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. Plaintiff was allowed a 1941 wheat crop acreage of 11.1 acres, whereas he sowed 23 acres, and harvested 239 bushels of wheat from the 11.9 acres in excess of the allotment. The AAA extended federal regulation to production of wheat not intended for commerce but wholly for consumption on the farm, and therefore, penalties did not depend upon whether any part of the wheat was sold or intended to be sold. The Supreme Court stated that Congress' authority to regulate interstate commerce

> extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attaintment of a legitimate end, the effective execution of the granted power to regulate interstate commerce . . . . Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

Id. at 124, quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942).

The Court added that "[w]hether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of" Congress' power under the Commerce Clause. Id. at 124. Rather, the Court stated that

> even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Id. at 125.

Applying these standards, the Court concluded that the AAA did not exceed Congress' power under the Commerce Clause and that its regulation of wholly intrastate consumption of wheat had the requisite substantial effect on interstate commerce because its intrastate consumption affected the price of wheat sold in interstate commerce. In that regard, the Supreme Court explained:

> The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.
>
> . . .
>
> It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

Id. at 127-129 (footnote deleted).

2. Overnight Motor Trans. Co. v. Missel, 316 U.S. 572 (1942).

The Supreme Court held that the regulation of wages and overtime hours in the Fair Labor Standards Act of 1938 was within the Congress' power under the Commerce Clause. The plaintiff, a rate clerk for a common carrier engaged in interstate transportation, was paid a set weekly wage of $25.50 for work weeks that varied from 65 to 80 hours. The plaintiff's weekly wage constituted a sum greater than if he were paid the statutory minimum wage, with time and a half for every hour over 40 per week. The common carrier argued that the private contract specifying a weekly, rather than hourly, wage was "restricted only by the requirement that the wages paid should comply with the minimum wage schedule" of the statute. Id. at 575.

The Court held that the purpose of the statute was not only to raise wages above a minimum standard, but also to regulate the number of hours worked. Citing United States v. Darby, 312 U.S. 100 (1941), the Court found that regulation of overtime hours by payment of

time-and-a-half of the employee's "regular wage" was permissible regulation of **intra**state activities which nonetheless affect interstate commerce so as to make regulation of them an appropriate means to a legitimate end:

> Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length work weeks, by offering opportunities for unfair competition, through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work. Overtime pay will not solve all problems of overtime work, but Congress may properly use it to lessen the irritations.

Overnight, 316 U.S. at 576.

3. Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943).

The Department of Labor attempted to enforce the provisions of the Fair Labor Standards Act against a wholesale paper company which handled products manufactured in other states and served a distribution area that included several states. The company conceded that the employees of its branches that shipped across state lines were covered by the Act, but maintained that the Act did not cover employees of branches that merely received products from out of state. Id. at 565-66.

The Supreme Court held that the Act covered the employees of all the company's branches. The Court found that Congress intended the Act to "extend federal control in this field to the furthest reaches of the channels of interstate commerce." Id. at 567. The Court also noted that the branches at issue received paper products ordered in advance by the company's customers or ordered by the company according to specifications of a particular customer. Under those circumstances, the arrival of those products in the company's warehouse did not complete their interstate movement to the ultimate destination. Since the goods remained "'in commerce'" until they reach "the customers for whom they are intended," the company's warehouse employees were covered by the Act. Id. at 572 ("If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act.").

[Editor's Note: At the time of this decision, retail employees were yet not covered by the Fair Labor Standards Act. The distinction between employees receiving products for delivery to specific customers vs. products held out for general sale was therefore critical. The decision nonetheless reflects the important principle that the continuity of interstate commerce ends when the identified customer receives the goods, and not when they enter the state where the customer resides.]

4. Polish Nat'l Alliance of the United States of North America v. NLRB, 322 U.S. 643 (1944).

In this case, the Supreme Court considered whether the National Labor Relations Board (NLRB) properly asserted its jurisdiction to prevent unfair labor practices "affecting commerce" (29 U.S.C. §§ 152(7), 160) over a fraternal organization that engaged in significant insurance, publishing, and credit activities across state lines. The Court determined that a strike by the organization's employees would carry multiple effects on interstate commerce, and that the NLRB appropriately asserted its jurisdiction, despite the organization's primary focus on its localized fraternal, rather than commercial, activities. Id. at 647-50 (rejecting arguments that business of insurance did not constitute "commerce," and that the states' power to regulate insurance as contracts prevented Congress from asserting national jurisdiction).

The Court recognized its continual "process of adjusting the interacting areas of national and state authority . . ."

> It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity. On the other hand, the old admonition never becomes stale that this Court is concerned with the bounds of legal power and not with the bounds of wisdom in its exercise by Congress. When the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions. The exercise of this practical judgment the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate. Great power was thus given to the Congress: the power of legislation and thereby the power of passing judgment upon the needs of a complex society. Strictly confined though far-reaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised. To hold that Congress could not deem the activities here in question to affect what men of practical affairs would call commerce, and to deem them related to such commerce merely by gossamer threads and not by solid ties, would be to disrespect the judgment that is open to men who have the constitutional power and responsibility to legislate for the Nation.

Id. at 649-51.

5. North American Co. v. SEC, 327 U.S. 686 (1946).

The Public Utility Holding Company Act of 1935 required each public utility holding company engaged in interstate commerce to limit its operation to a single integrated system. The plaintiff, a holding company that owned stock in numerous utility and transportation companies, engaged in significant interstate activities, challenged an SEC order requiring it to divest itself of several stock holdings. Id. at 690-93. The plaintiff argued that the mere ownership of securities could not be considered "commerce" and was thus not subject to Congressional regulatory authority under the Commerce Clause. Id. at 700.

The Court assumed "without deciding that the ownership of securities considered separately and abstractly is not commerce." Id. at 702-03. However, the Court rejected the notion that the case turned on whether the "ownership of securities, considered separately and abstractly," constituted commerce. The Court thereafter identified numerous connections between stock ownership by utility holding companies and interstate commerce permitting the latter's regulation by the SEC: The Court noted that holding companies had not merely owned securities of subsidiaries, but rather they had consisted of a "a far-flung empire of corporations extending from New York to California." Id. at 694. The Court also stated that use of the mails as a channel of commerce were vital to the operation of holding companies' operations, its ability to communicate with far-flung entities, to buy and sell securities, and so forth; and that Congress had made extensive findings on the "evils" in the national economy caused by the holding company format. Id. at 694-95, 702-05 (technical, legal conceptions do not render Congress powerless through its commerce powers to defend the national economy against inimical or destructive forces).

6. Champlin Ref. Co. v. United States, 329 U.S. 29 (1946).

The Supreme Court determined that the Interstate Commerce Commission had jurisdiction over a interstate pipeline company that did not operate as a "common carrier," but merely transported its own products from its refinery directly to customers. The company argued that the terms "all pipeline companies" and "transportation" in the Interstate Commerce Act did not refer to transport of one's own goods. Id. at 32-33. The Court noted that, "[w]hile Champlain technically is transporting its own oil, manufacturing processes have been completed; the oil is not being moved for Champlin's own use. These interstate facilities are operated to put its finished products in the market in interstate commerce at the greatest economic advantage." Id. at 34.

The Court thus again eschewed a technical, legal distinction--that is, whether Champlin qualified as a "common carrier"--in favor of a more organic view of the extent of the entity's participation in the interstate economy. Id. at 35 ("The power of Congress to regulate interstate commerce is not dependent on the technical common carrier statues but is quite as extensive over a private carrier.").

7. American Power & Light Co. v. SEC, 329 U.S. 90 (1946).

The Supreme Court validated the power of the SEC to issue dissolution orders to utility holding companies pursuant to the Public Utility Holding Company Act of 1938, and thus congressional power pursuant to Commerce Clause to regulate those companies. The Court noted that the Act, by its terms, applied only to holding companies in the stream of interstate activity. Following North American Co. v. SEC, 327 U.S. 686 (1946), however, the Court again held that holding companies depend for their very existence on systematic use of the mails and that the holding company system possesses an undeniable interstate character. Id. at 97-98. Where the channels of commerce may be used to "promot[e] or perpetuat[e] economic evils," the Court stated the "Congress is completely uninhibited by the commerce clause in selecting the means considered necessary for bringing about the desired conditions in the channels of interstate commerce. Any limitations are to be found in other sections of the Constitution." Id. at 99-100.

8. United States v. Yellow Cab Co., 332 U.S. 218 (1947).

The Government charged in a civil complaint a conspiracy in violation of §§ 1 and 2 of the Sherman Act to monopolize and restrain trade in interstate commerce in (1) the sale of motor vehicles to be used as taxicabs; (2) furnishing exclusive cab services between rail stations in Chicago; and (3) taxicab services in Chicago, generally.

Sections 1 and 2 of the Sherman Act prohibit any unreasonable restraint of trade in interstate commerce and conspiracy to monopolize "any part" of interstate commerce, respectively. The Court noted that, with respect to the manufacturing and sale conspiracy, the purchase of roughly 5000 cabs in 4 cities was appreciable commerce under any standard. Significantly, however, the Court held that the relative size or significance of commerce involved was immaterial: "[The defendant's] relative position in the field of cab production has no necessary relation to the ability of the [defendants] to conspire to monopolize or restrain, in violation of the Act, an appreciable segment of interstate cab sales. An allegation that such a segment has been or may be monopolized or restrained in sufficient." 332 U.S. at 226.

With respect to cab transport between rail stations, the Court noted that switching train stations in Chicago is a necessary step in interstate travel and, despite the fact that actual trip occurred within one state:

> When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries at one state does not make that portion of the trip any less interstate in character.

Id. at 228.

The Court, however, determined that there was no interstate nexus in the defendants' conspiracy to monopolize taxicab service in Chicago, generally, and that therefore that portion of the complaint did not allege a cause of action under the Sherman Act. While the complaint accurately alleged that many persons use cabs to transport them to and from rail stations when undertaking interstate travel, the Court held that delineation of interstate commerce is driven by practical considerations and that the common understanding of interstate travel was from train station to train station, and not between home and train station. Because the use of a taxi-cab is but one option for arriving at or leaving a train station, it is "quite distinct and separate from the interstate journey." Id. at 232.

9. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

Several growers brought a Sherman antitrust action against refiner/distributers of sugar, and alleged a conspiracy to fix the price paid for sugar beets in an area of Northern California. The Supreme Court held that the admittedly local and **intra**state conspiracy in the pricing of sugar beets could nonetheless effect interstate commerce in the trade of refined sugar. The Court rejected the contention that trade in sugar beets ends, and trade in refined sugar begins, when beets are delivered to the refinery. Such formalistic distinctions in economic processes between "production" "manufacture" and "commerce", were found to be artificial, and no longer valid in light of Wickard and Filburn and the Shreveport Rate cases. Id. at 228-31.
In that regard, the Court stated:

> The artificial and mechanical separation of "production" and "manufacturing" from "commerce" without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority or of the statute.

Id. at 229.

The Court found, as a preliminary matter, that price restrictions in raw materials cause price effects in the finished product and tend inevitably towards reduced competition. The Court further noted that sugar production is vertically integrated and strictly regimented such that growers have little choice but to accept terms dictated by the refiners. In this case, the price for sugar beets offered by refiners was tied by contract to the price for sugar in the interstate market. Id. at 228-29, 238-42.

An integrated view of economic processes, in light of the above factors, permitted the Court's conclusion that restrictions within the admittedly **intra**state trade in sugar beets in Northern California carried the requisite effect on interstate commerce. Id. at 235-36 ("[T]he amount of the nation's sugar industry which the California refiners control [is not] relevant, so

long as control is exercised effectively in the area concerned . . .; it is enough that the individual activity when multiplied into a general practice is subject to federal control, or that it contains a threat to the interstate economy that requires preventive regulation.") (citations omitted).

10. United States v. Public Utilities Com. of Cal., 345 U.S. 295 (1953).

California Electric Power Company produced electricity from hydroelectric project licensed under the Federal Power Act, as amended by the Public Utility Act of 1935. The electricity produced was transmitted to a company substation within California, then transported by its ultimate customers, the Navy Department and Mineral County, Nevada, into Nevada over their own lines for local distribution. Id. at 297-98. The company applied to the California Power Commission, and was granted a tariff increase applicable to the power sold under the above arrangement. The Federal Power Commission, however, issued an order to the company to show cause why its rates for electricity produced under a federal project should not be subject to exclusive federal jurisdiction. Id. at 298-99.

The Federal Power Act applied, by its terms, to the "transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce," but limited its scope "only to those matters which are not subject to regulation by the states." Id. at 299.

Relying on previous decisions, the Supreme Court ruled in favor of federal jurisdiction over the rate dispute. The Court noted it was "firmly established that commerce includes the transportation of public property" and that it was irrelevant that the electricity was transmitted across state borders by the purchasers, rather than the producer. Id. at 300.

As for the self-limitation clause, the Court held that it signified neither an intention to regulate only in absence of state regulation nor an affirmative conferral of Commerce Clause authority back to the states. Instead, the Court read the history of the limitation clause and the subsequent growth of vast interstate utilities, as indicating that it should be read as extending federal regulatory authority over traditional state matters where an individual state, or states, had failed to empower their regulatory agencies to regulate interstate sales of energy. Id. at 304-11.

11. United States v. Shubert, 348 U.S. 222 (1955).

The Government brought a restraint of trade civil action under the Sherman Antitrust Act against defendants who produced, booked, and presented theatrical productions in several states. The complaint alleged that the defendants conspired to use their market power to create a vertical monopoly and to exclude those who would not meet their terms. Id. at 224-26.

The Supreme Court rejected the defendants' argument that the Sherman Act did not cover "the performance of local exhibitions." Id. at 227. The Supreme Court held that productions, booking, and presentation of theater shows constituted "trade or commerce" that is "among the

several States" within the meaning of the Sherman Act. Relying on past cases, the Court found that the business of theater productions constituted a highly-integrated and interstate enterprise, like exhibition of motion pictures, subject to the Sherman Act even though actual performance is a local affair. Id. at 226-30 (distinguishing immunity afforded under previous decisions for live performances of baseball games as unique to that game).

12. Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241 (1964).

The Supreme Court determined that the movement of persons across state lines is "interstate commerce" within the regulatory ambit of Congress, regardless of whether the transportation has a commercial purpose. The appellant, an Atlanta motel that solicited out of state customers, refused black guests, challenged the constitutionality of Title II of the Civil Rights Act which prohibited racial discrimination in public accommodations in which "its operations affect commerce." The phrase "affecting commerce" was further defined as a public accommodation such as an inn, hotel, or motel that provided lodging to "transient guests." Id. at 243-45, 247-48.

The Court observed that interstate travel regardless of its purpose, or whether it is commercial in character, had always been regarded as "commerce," and that a host of activities that impinge upon the right to travel between states have come under congressional jurisdiction by means of the Commerce Clause. The Court further noted the latter-day increased mobility of citizens made interstate travel more frequent and noted the dramatic difficulties faced by black citizens in undertaking such journeys. Id. at 251-57. The Court also stated that the Act's legislative history was "replete with evidence of the burdens that discrimination by race or color places upon interstate commerce." Id. at 252.

Thus, the Court concluded that public accommodations that discriminated upon grounds prohibited by the Act, even if entirely local in character, affected interstate travel and therefore interstate commerce:

> It is said that the operation of the motel here is of a purely local character. But assuming this to be true, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.". . . One need only examine the evidence [of hardship encountered by black citizens] to see that Congress may--as it has--prohibit racial discrimination by motels serving travelers, however "local" their operations may appear.

Id. at 258 (citations omitted).

13. Katzenbach v. McClung, 379 U.S. 294 (1964).

Issued together with Heart of Atlanta Motel, this decision examined whether Section 201(a) of the Civil Rights Act, which purported to cover restaurants that "serve or offer to serve interstate travelers or a substantial portion of the food which it serves . . .has moved in commerce" was valid under the Commerce Clause. In concluding that racial discrimination in restaurants had an effect on commerce, the Court noted that, all factors equal, black citizens spent less on restaurants where segregation was practiced. "This diminutive spending springing from a refusal to serve Negros and their total loss as customers has, regardless of the absence of direct evidence, a close connection to interstate commerce. The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys." Id. at 299-300 (noting that lost business would work to discourage others from establishing restaurants in areas where segregation prevailed). Relying again upon the right to travel between states, the Court noted that inability to drive on the road would naturally discourage travel as "one can hardly travel without eating." Id. at 300.

The Court rejected arguments that the appellant restaurant, a barbecue shack, purchased a minuscule amount of food from out of state when compared with the national volume of commerce in food. Citing Wickard v. Filburn, among others, the Court found that discrimination in restaurants was national in scope; that while the Act focused on the individual establishment's relation to commerce, Congress appropriately considered whether discrimination practiced therein was representative of countless other establishments; and thus that "Congress was not required to await the total dislocation of commerce." Id. at 300-02 (approving congressional method of legislating among class of establishments or activities without necessity of case-by-case showing of affect upon commerce).

14. Maryland v. Wirtz, 392 U.S. 183 (1968).

In 1961 and 1966, Congress amended the Fair Labor Standards Act to cover certain hospitals, institutions, and schools and to remove an exemption for state-operated hospitals, institutions, and schools, respectively. In making those amendments, Congress relied upon the "enterprise" concept of jurisdiction. Under that approach, if a particular enterprise was engaged in commerce, all its employees were covered by the legislation, regardless of whether the particular employees were engaged in commerce or not.

The Supreme Court noted congressional findings that wage competition among interstate firm occurs whether the particular employees are engaged in commerce and that regulation of wages and hours could lead to fewer labor disputes that threaten commerce. And thus, because the enterprise concept did not enlarge the class of employers subject to the Act's provisions, the Court concluded that a rational basis existed for Congress to employ the enterprise approach to meet the Act's purposes. Id. at 188-93.

On the issue of whether operation of state-owned facilities constituted "commerce," the Court reasoned that labor conditions in hospitals and schools undoubtedly affected commerce and that Congress had interfered with state functions with respect to wage policies only insofar it did with respect to private institutions engaged in commerce. The Court thus held that when states undertake economic activity validly regulated under the Commerce Clause when performed by private parties, the state must conform its conduct to federal regulation. Id. at 193-99.

[Editor's Note: The Supreme Court overruled its finding that states and their subdivisions are covered by federal wage and hour laws in National League of Cities v. Usery, 426 U.S. 833 (1975). The Court subsequently overruled National League of Cities in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).]

15. United States v. 12 200-Ft. Reels of Super 8 M.M. Film, 413 U.S. 123 (1973).

The Government appealed a ruling that Section 305(a) the Tariff Act of 1930 (19 U.S.C. § 1305(a)) was unconstitutional as it permitted customs agents to seize obscene material whether it was imported for commercial purposes or not. The Supreme Court held that the provision within the Commerce Clause granting congressional authority to "regulate Commerce with foreign Nations" permitted the seizure of such material even where admittedly destined for private use. Id. at 124-26. In doing so, the Court noted that congressional jurisdiction over foreign, as opposed to interstate, commerce was plenary:

> Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers "[t]o regulate Commerce with foreign Nations." Art. I, § 8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry. The plenary power of Congress to regulate imports is illustrated in a holding of this Court which sustained the validity of an Act of Congress prohibiting the importation of "any film or other pictorial representation of any prize fight . . . designed to be used or [that] may be used for purposes of public exhibition" in view of "the complete power of Congress over foreign and its authority to prohibit the introduction of foreign articles . . . ."

Id. at 125-26 (citation omitted).

16. Allenberg Cotton Co., Inc. v. Pittman, 419 U.S. 20 (1974).

The appellant, a cotton merchant in Memphis, negotiated a forward contract with a grower in Mississippi for the following season's crop for sale to mills outside of Mississippi. Upon the grower's refusal to deliver the crop, the merchant sued for breach of contract in Mississippi courts. The Supreme Court of Mississippi dismissed the suit relying on a state

statute requiring foreign corporations to file and maintain a certificate of authority before instituting and maintaining an action in Mississippi courts. Id. at 21-25.

The Supreme Court rejected the premise of the Mississippi court that because the grower's performance under the contract was completed upon delivery to the Mississippi warehouse, the contract was an **intra**state agreement subject to state-level regulation. The Court found that, while delivery effectively ended the grower's involvement, the use of forwarding contracts like the one at issue, and subsequent hedging of the contract by the merchant on a commodities exchange, integrated their activities within an "intricate interstate marketing system" for commodities with obvious and significant interstate commercial character. The Court also found that the physical delivery itself was essential for completion of numerous interstate commitments as classification and pricing of the cotton, and thus determination of its interstate destination cannot occur before delivery. Id. at 25-30 (finding no distinction in prior cases involving delivery and marketing of wheat and dairy products).

The Court accordingly concluded that "Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause." Id. at 34.

17. Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186 (1974).

Copp Paving manufactured and sold concrete used in construction of interstate highways wholly within the state of California. Copp Paving sued for price discrimination in liquid asphalt when Gulf Oil supplied liquid asphalt at reduced prices to concrete "hot plants" operated by its own subsidiaries. Section 2(a) of the Robinson-Patman Act forbids price discrimination by "any person engaged in commerce, in the course of such commerce where either of any of the purchases involved in such discrimination are in commerce." Section 3 prohibits such persons from making tie-in sales arrangements where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Section 7 of the Clayton Act prohibits acquisitions by corporations "engaged in commerce" of the assets or stock of another such corporation where the effect is to lessen competition in "any line of commerce" in any places. 15 U.S.C. §§ 13(a), 14, and 18.

The Court acknowledged that the plaintiff's contention regarding use of its product to construct an instrumentality of commerce might sufficiently implicate or affect interstate commerce. The Court refused, however, to expand the concept of "in commerce" to those activities which carry only a perceptibly nexus to an instrumentality of commerce:

> The chain of connection has no logical endpoint. The universe of arguably included activities would be broad and its limits nebulous in the extreme. More importantly, to the extent that those limits could be defined at all, the definition would in no way be anchored in the economic realities of interstate markets, the intensely practical concerns that underlie the purposes of the antitrust laws.

> In short, assuming, arguendo, that the facially narrow language of the Clayton and Robinson-Patman Acts was intended to denote something more than the relatively restrictive flow-of-commerce concept, we think the nexus approach would be an irrational way to proceed. The justification for an expansive interpretation of the "in commerce" language, if such an interpretation is viable at all, must rest on a congressional intent that the Acts reach all practices, even those of a local character, harmful to the national marketplace.

Id. at 198-99 (preserving traditional "in commerce" standard in antitrust statutes as separate and more restrictive than full Commerce Clause authority, the absence of which would permit regulation of **intra**state activity where it bears upon or effects interstate commerce).

The Court accordingly determined that the "in commerce" language in the above statutes did not reach Copp Paving's sales and acquisitions and that, even if an "effects" test applied, Copp had failed to show that use of its concrete on interstate highways in fact carried consequences on interstate markets or flow of goods and services between states. Id. at 199-203 (dismissing suit for lack of jurisdiction).

18. Fry v. United States, 421 U.S. 542 (1975).

The Economic Stabilization Act of 1970 authorized the President to institute mandatory controls upon wages and salaries that would be administered by the Pay Board. The Government sued to enforce an order of the Pay Board enjoining a salary increase for Ohio state employees exceeding the controls. The State of Ohio conceded that its wage policies carried an indirect effect on interstate commerce, but argued that the Commerce Clause cannot be read to interfere with sovereign state functions.

The Supreme Court initially noted that the legislative history left no doubt that Congress intended to cover state and local governments within the Act and that wage controls were less intrusive that the wage and hour regulations under the Fair Labor Standards Act. The Court further observed that wage increases to 65,000 workers, though engaged in **intra**state employment, and the resulting wage pressure on private employers, would undoubtedly affect commerce among the states. Id. at 547-48 (finding state sovereignty argument foreclosed by Maryland v. Wirtz, 392 U.S. 183 (1968)).

The Court therefore held that the Act covered Ohio's state employees under Commerce Clause authority and that the state must yield to the federal mandate under the Supremacy Clause. Fry, 421 U.S. at 548.

19. United States v. American Bldg. Maintenance Industries, 422 U.S. 271 (1975).

In this decision, the Supreme Court dismissed a civil anti-trust action contesting a merger and reaffirmed its distinction between **intra**state activities that "affect" interstate commerce and entities "engaged in commerce." Section 7 of the Clayton Act (15 U.S.C. § 18) prohibits mergers between firms "engaged in commerce" that carry anti-competitive effects. The Government had moved to enjoin a merger between an interstate janitorial service and J.E. Benton Management Corp. which supplied janitorial services strictly within the Los Angeles area. Id. at 273-75.

Citing Gulf Oil Corp. v. Copp Paving Co., the Supreme Court reiterated that the language "in commerce" denotes only persons or activities within the flow of interstate commerce. Id. at 276. While the Court acknowledged that the phrase "in commerce" may not carry a uniform meaning within federal legislation, its survey of the use of the phrase revealed that it "was not intended to reach all corporations engaged in activities subject to the federal commerce power." Id. at 271. "To be engaged 'in commerce' within the meaning of § 7, a corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." Id. at 283. The Court concluded that "since the Benton companies did not participate directly in the sale, purchase, or distribution of goods or services in interstate commerce, they were not 'engaged in commerce' within the meaning of § 7 of the Clayton Act." Id. at 285.

20. Hodel v. Indiana, 452 U.S. 314 (1981).

The Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1201 et seq.) establishes, inter alia, special requirements for the conduct of surface coal mining in "prime farmland" or other land historically used as cropland. The district court found the Act to exceed federal authority under the Commerce Clause because it was directed at aspects of surface mining--choice of land, reclamation, and soil replacement-- which have "'no substantial and adverse effect on interstate commerce.'" Id. at 321. The district court also found that the only possible effects on interstate commerce, air and water pollution, were sufficiently addressed by other sections of the Act. Id. at 322-23.

The Supreme Court reversed, reasoning that federal legislation purporting to balance the spheres of economic life are presumptively valid and cannot be invalidated unless "it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." Id. at 323-24. Here, the congressional determination that preservation of local lands designated as "prime farmland" was critical to interstate commerce in agricultural products was well founded and permitted action under the Commerce Clause. Id. at 323-26 (noting that the relative volume of land involved was irrelevant once Commerce Clause jurisdiction is established).

The Court observed that the lower Court had erred in reading the Act's goals as limited only to pollution abatement, and remarked that the federal judiciary generally should not substitute its own assessment of legislative goals and effectiveness for congressional balancing of respective economic interests. Id. at 329.

21. Preseault v. ICC, 494 U.S. 1 (1990).

The National Trails System Act Amendments of 1983 authorized the ICC to preserve existing rights-of-way for future railroad use, known as "rail banking", and to permit interim use of the preserved land for recreational trails. Invoking the "rational basis" test, the Supreme Court determined the Act to be a valid exercise of Commerce Clause authority for the purpose of encouraging the development of recreational trails. Id. at 19.

The petitioners had argued that, under the Act, the ICC could not authorize recreational use of rights-of-way unless it first determined that they were not necessary for future rail use; the objectives of the Act were thus contradictory and accordingly lacked a rational basis. The Court observed, however, that there is no requirement under the Commerce Clause that congressional enactments serve more than one legitimate purpose. Id. at 18. Nor is a regulatory program invalid under the Commerce Clause merely because other measures might better advance the legislative purpose. Id. at 18-19. The Court said, "[T]he history of congressional attempts to address the problem of rail abandonments provides sufficient reason to defer to the legislative judgment . . ." Id. at 19.

22. Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991).

The Supreme Court determined that a plaintiff need not demonstrate an "actual" effect on commerce to maintain an action under Section 1 of the Sherman Act. Because the focus of such an action is the illegal agreement in restraint of trade, the proper jurisdictional test is the potential harm in interstate commerce if the conspiracy were successful. Id. at 330-31.

The plaintiff, an eye surgeon, alleged that the defendant hospital and other clinics conspired to exclude him from the Los Angeles market because he would not observe an unnecessarily costly procedure when performing surgery by distributing an adverse peer-review report concerning the plaintiff. Id. at 324-28. The Court noted that the defendants were engaged in interstate commerce and that its opthamological department served out-of-state patients, and concluded that if the alleged conspiracy were successful, "there [would] be a reduction in ophthamological services in the Los Angeles market." Id. at 331.

The defendants had argued that exclusion of the plaintiff would carry no such effect as other surgeons would fill the void created by his absence. The Court held, however, that in antitrust actions, it is not necessary for a plaintiff to demonstrate that restraint of his trade would produce market-wide effect:

> The competitive significance of respondent's exclusion from the market must be measured, not just by a particularized evaluation of his own practice, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded.

Id. at 332 (relying on fact that peer review process controlling access to market was congressionally mandated and regulated to find effects on commerce).

23. New York v. United States, 505 U.S. 144 (1992).

The Low-Level Radioactive Waste Policy Amendment of 1985 created a three-tiered system of incentives for states to accommodate the cost of radioactive waste generated within their boundaries: 1) a federal tariff placed on waste disposed in other states that would, in part, be returned to states in compliance: 2) a graduated "access surcharge" for use of waste sites by generators from states not in compliance with federal guidelines; and 3) a "take title" provision whereby the state itself becomes the owner of the waste, with full liability, should arrangement for its disposal not be made before federally-imposed deadlines. Id. at 149-54.

The parties agreed that the Commerce Clause permitted Congress to regulate both the generation of radioactive waste and the market in space for its disposal. New York claimed, however, that the Act exceeded powers under the Commerce Clause and violated the Tenth Amendment by commandeering the resources of states themselves to regulate those markets. Id. at 160-61. The Court agreed in principle recognizing that the Commerce Clause "has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." Id. at 162 (distinguishing previous cases, such as Maryland v. Wirtz, 392 U.S. 183 (1986), which merely considered whether states were subject to federal laws of general applicability).

The Court found, however, that Congress may employ several methods to encourage states to regulate in particular way, short of outright coercion, including offering financial incentives, attaching conditions on receipt of federal funds, or providing the choice between federal standards or federal preemption. In each of those instances, however, the state retains the ultimate decision of whether to comply or not. 505 U.S. at 161-68 (discussing historic rejection under principles of federalism of use of state governments as regulatory intermediaries or agents of federal government).

Applying those principles, the Court found the federal tariff to be constitutionally proper because Congress merely conditioned receipt of revenue from the surcharge upon meeting regulatory milestones. Similarly, the access surcharge did not violate state sovereignty as it provides a choice between attainment of self-sufficiency in disposal or greater access fees for generations of waste. Id. at 171-74 (dismissing constitutional challenges to those portions of the Act).

With respect to the take-title provision, however, the Court found that "Congress has crossed the line distinguishing encouragement from coercion." The Court determined that the take-title provision presented the states with a choice between regulating according to the wish of Congress or taking forced title of the waste, and that either option standing alone, would exceed Commerce Clause authority by commandeering state sovereignty. Id. at 174-77. Under the take-title provision, "[a] State may not decline to administer the Federal program. No matter which path the State chooses, it must follow the direction of Congress." Id. at 177.

The Court accordingly held that a "choice" between two unconstitutional options could not itself be constitutional and invalidated the take title provision:

> The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.

Id. at 177.

24. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997).

The Supreme Court invalidated a state property tax exemption for property owned for charitable institutions, which denied the exemption to organizations operated principally for the benefit of non-residents. The petitioner was a summer camp in Maine where 95 per cent of the campers were from out-of-state. Id. at 567-71.

The Court found that the Commerce Clause since its inception has been construed, not only as an express grant of federal authority, but a restriction upon the States, even in absence of federal legislation, from regulating in a manner that impermissibly burdens interstate commerce. Id. at 571-75 ("dormant" Commerce Clause prohibits state regulation that impedes interstate commerce). The Court reasoned that, because many of its campers traveled between states, the camp's operation affected commerce under Heart of Atlanta Motel, and observed if a state statute simply discriminated against non-resident campers or if the tax exemption at issue had been directed at for-profit entities, it would violate the dormant Commerce Clause. Id. 573-75. The Court stated that "State laws discriminating against interstate commerce on their face are 'virtually per se invalid.'" Id. at 575 (citations omitted).

The Court rejected a litany of proposed distinctions by the Maine government, including the "non-commercial" status of charitable or non-profit organization; that the exemption advanced legitimate local purposes which could not be served absent discrimination; that the exemption served as a subsidy for charities which target local residents; or that the exemption was an exercise in a state's recognized ability to favor in-state procedures when acting as a

"market participant." Id. at 577-95.

Accordingly, the Court concluded that the facially-discriminatory tax benefit could not be reconciled with the dormant Commerce Clause and invalidated the exemption.

25. Reno v. Condon, 528 U.S. 141 (2000).

The Court held that the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. §§ 2721-2725, was a proper exercise of Congress' authority to regulate interstate commerce under the Commerce Clause and did not run afoul of federalism principles contained in the Tenth Amendment. The DPPA regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs), which may include a person's name, address, telephone number, social security number, medical information and photograph, as a condition of obtaining a driver's license or registering an automobile. The DPPA generally prohibits any state DMV from disclosing such personal information, absent consent from the driver, subject to several statutory exceptions. The DPPA also regulates the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a state DMV.

South Carolina law conflicts with the DPPA's provisions since South Carolina law permits any person or entity to obtain drivers' personal information, provided the requestor represents that the information will not be used for telephone solicitation. However, South Carolina law allows drivers to prohibit the use of their motor vehicle information for certain commercial activities.

South Carolina sued to enjoin enforcement of the DPPA on the grounds that it violated the Tenth and Eleventh Amendments to the Constitution. The Fourth Circuit agreed.

The Supreme Court first held that the DPPA was a proper exercise of Congress' power under the Commerce Clause. The Court stated:

> The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation. **We therefore need not address the Government's alternative argument that the States' individual, intrastate activities in gathering, maintaining, and distributing drivers' personal information have a sufficiently substantial impact on interstate commerce to create a constitutional base for federal legislation.**

Id. at 148-49 (emphasis added).

The Court went on to hold that the DPPA did not violate the Tenth or Eleventh Amendments because it did not compel "the States in their sovereign capacity to regulate their own citizens," or "to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." Id. at 151. Rather the "DPPA regulates the States as the owners of data bases." Id.

26. United States v. Morrison, 529 U.S. 598 (2000).

The Supreme Court held that Congress lacked authority under the Commerce Clause to enact 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated crimes of violence. The government argued that the statute was a proper exercise of Congress' Commerce Clause power because it regulated "those activities that substantially affect interstate commerce." Id. at 609 (citation omitted).

The Supreme Court rejected this argument, applying the analysis set forth in United States v. Lopez, 514 U.S. 549 (1995). First, the Court noted that whether the activity at issue is "economic" in nature is central to its Commerce Clause analysis. Id. at 610. The Court added that:

> Lopez's review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

Id. at 611.

However, the Court concluded that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." Id. at 613. The Court added:

> While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Id.

Second, the Court found it important that the statute contained no express jurisdictional element requiring an explicit connection with or effect on interstate commerce which **may** establish that the statute is a proper enactment under the Commerce Clause power. Id. at 612-13.

Third, the Court acknowledged that the statute at issue was supported by numerous findings by Congress regarding the effects on interstate commerce by gender-based crimes of violence. Id. at 614-15. In that regard, the Court quoted from the House Conference Report, stating that Congress found that gender -motivated violence affects interstate commerce

> by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

Id. at 615, quoting H.R. Conf. Rep. No. 103-711, at 385. Accord S. Rep. No. 103-138 at 54.

However, the Supreme Court stated that such Congressional findings are not sufficient, by themselves, to sustain the constitutionality of Commerce Clause legislation since whether particular activity affects interstate commerce to sustain the constitutionality of a statute "is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." Id. at 614, quoting Lopez, 514 U.S. at 557, n.2.

The Court then rejected Congress' findings because they were based on an attenuated "but-for causal chain" of analysis rejected in Lopez. The Court stated:

> If accepted, [such] reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a sub set of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Id. at 615.

Significantly, the Court concluded:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local . . .
>
> In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. See,

> e.g., Cohens v. Virginia, 6 Wheat. 264, 426, 428 (1821) (Marshall, C.J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear... that congress cannot punish felonies generally"). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims. See, e.g., Lopez, 514 U.S. at 566 ("The Constitution... withhold[s] from Congress a plenary police power"); Id. at 584-585 (Thomas J. concurring) ("[W]e **always** have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), 596-597, and n.6 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).

Id. at 617-19 (footnote deleted).

27. Solid Waste Agency v. Army Corps. of Engineers, 531 U.S. 159 (2001).

The principal issue involved is whether federal regulation under the Clean Water Act covered intrastate waters, an abandoned sand or gravel pit site, which provided a habitat for Migratory birds. The government argued that the regulations at issue fell "within Congress' power to regulate intrastate activities," on the theory that "the protection of Migratory birds is a 'national interest of very nearly the first magnitude'" and that "millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds." Id. at 173 (citations deleted).

The Court rejected the government's arguments, stating that "[t]hese arguments raise significant constitutional questions" (id.), which implicated a delicate federal-state balance. The Court stated: "We thus read the statute as written to avoid the significant constitutional and federal questions raised by [the government's] interpretations, and therefore reject [the government's interpretation]." Id. at 174.

28. Pierce County Washington v. Guillen, 537 U.S. 129 (2003).

The Supreme Court held that "23 U.S.C. § 409, which protects information 'complied or collected' in connection with certain federal highway safety programs from being discovered or admitted in certain federal or state trials, is a valid exercise of Congress' authority under the [Commerce Clause of the] Constitution." Id. at 132-33, 147. The Court noted that Section 409 was enacted to protect information compiled or collected for purposes of implementing 23 U.S.C. § 152, which provides state and local governments with funding to improve the most dangerous sections of their roads. To be eligible for such funding, a state or local government must undertake a thorough evaluation of its public roads. Id. at 133-34.

The Supreme Court held that Section 409 was a valid exercise of Congress' authority under the Commerce Clause to regulate and protect the channels and instrumentalities of interstate commerce. Id. at 147-48. The Supreme Court explained:

> Congress adopted § 152 to assist state and local governments in reducing hazardous conditions in the Nation's channels of commerce. That effort was impeded, however, by the States' reluctance to comply fully with the requirements of § 152, as such compliance would make state and local governments easier targets for negligence actions by providing would-be plaintiffs a centralized location from which they could obtain much of the evidence necessary for such actions. In view of these circumstances, Congress could reasonably believe that adopting a measure eliminating an unforseen side effect of the information-gathering requirement of § 152 would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads. Consequently, both the original § 409 and the 1995 amendment can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce. As such, they fall within Congress' Commerce Clause power.

Id. at 147.

29. Gonzales v. Raich, 545 U.S. 1 (2005).

California's Compassionate Use Act authorized limited marijuana use for medical purposes. Respondents were California residents who used doctor-recommended marijuana for serious medical conditions. After DEA agents seized and destroyed all six respondents' cannabis plants, respondents brought an action seeking injunctive and declarative relief prohibiting the enforcement of the federal Controlled Substances Act (CSA) to the extent that it prevents them from possessing, obtaining or manufacturing cannabis for their personal medical use. The District Court denied respondents' motion for a preliminary injunction, but the Ninth Circuit reversed, finding that they had demonstrated a strong likelihood of success on the claim that the CSA is an unconstitutional exercise of Congress' Commerce Clause authority **as applied** to the intrastate, non-commercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient physician pursuant to valid California state law. Id. at 5-9. The majority opinion "placed heavy reliance" on the Supreme Court's decisions in United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000). See Gonzales, 545 U.S. at 9.

The Supreme Court reversed, holding that the "CSA is a valid exercise of federal power, even as applied to the troubling facts of this case." Id. The Supreme Court stated that its

> case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce . . . . [and] that when "'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequences.'"

Id. at 17 (citations omitted).

The Court relied heavily upon Wickard v. Filburn, 317 U.S. 111 (1942), stating that Wickard "establishes that Congress can regulate purely instrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." Gonzales, 545 U.S. at 18.

Applying the forgoing principles, the Supreme Court held that enactment of the CSA was within Congress' authority under the Commerce Clause. First, the Court explained that under Wickard, it was immaterial that respondents' cultivation and possession of marijuana was entirely instrastate activity and not itself "commercial" because respondents' activities were "quintessentially economic," id. at 25, and were part of a class of economic activity which if left outside the regulatory scheme would affect price and market conditions for marijuana. Id. at 18-20. Second, the Court found that the fact that respondents' own impact on the market was "trivial by itself" was not a sufficient reason to remove them from the scope of federal regulation because Congress may regulate "all those whose aggregated production was significant." Id. at 20. Moreover, the Court ruled that it was immaterial that "Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market," noting that the Court has "never required Congress to make particularized findings in order to legislate." Id. at 21. Significantly, the Court added that it "need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." Id. at 22 (citation omitted).

APPENDIX II (B)

Summary of Supreme Court Criminal Interstate Commerce Clause Cases Since 1942

II (B)
Supreme Court Criminal Interstate
Commerce Clause Cases
Since 1942

1. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

The lower court had held that "the business of insurance is not commerce" and that therefore the criminal penalties for violating the Sherman Anti-Trust Act did not apply to the insurance business. Id. at 536. The lower court had relied upon earlier Supreme Court decisions which stated that "issuing a policy of insurance is not a transaction of commerce", because insurance policies "are not commodities to be shipped or forwarded from one State to another." Id. at 543, 546.

The Supreme Court reversed, stating that "a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce." Id. at 547. The Court explained the interstate commerce nature of the insurance business which involves "a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts." Id. at 541.

Speaking of the breadth of commerce that falls within the ambit of the Commerce Clause, the Court stated:

> [T]ransactions [may] be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common-carriers or concern the flow of anything more tangible than electrons and information...
>
> The precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition... "Commerce, undoubtably, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and... more States than one."

Id. at 549-51 (citations deleted).

Significantly, the Court added:

> **"No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception on the business of insurance."**

Id. at 553 (emphasis added).

2. Cleveland v. United States, 329 U.S. 14 (1946).

The Court reject a Commerce Clause challenge to the Mann Act (18 U.S.C. § 398), which made it a crime for a man to transport a woman across state lines for any immoral purpose even if the purpose was not commercial. Here the purpose was to make the women his plural wife, and the Court held that the Mann Act applied even though the practice of polygamy was part of the defendant's Mormon religious beliefs. The Court said: "The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices; and the fact that the means used may have 'the quality of police regulations' is not consequential." Id. at 19.

3. United States v. Walsh, 331 U.S. 432 (1947).

The defendant shipped vitamins to a business that "was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of the vitamin." Id. at 433. The defendant was charged with violating the Federal Food, Drug and Cosmetic Act of 1958, which prohibited the giving of a false guaranty that any food, drug, device or cosmetic is not adulterated or misbranded within the meaning of the Act. Id.

The Supreme Court rejected a Commerce Clause challenge, stating that the Act "seeks to keep interstate channels free from deleterious, adulterated and misbranded articles of the specified types." Id. at 434. The Supreme Court added:

> The commerce clause of the Constitution is not to be interpreted so as to deny to Congress the power to make effective its regulation of interstate commerce. Where that effectiveness depends upon a regulation or prohibition attaching regardless of whether the particular transaction in issue is interstate or intrastate in character, **a transaction that concerns a business generally engaged in interstate commerce, Congress may act. Such is this case.**

Id. at 437-38 (emphasis added).

4. United States v. Sullivan, 332 U.S. 689 (1948).

The defendant, a retail druggist, was convicted of violating the Federal Food, Drug and Cosmetic Act of 1938, which prohibited misbranding any drug "while such article is held for sale after shipment in interstate commerce." Id. at 690. After the defendant had received the drugs in an interstate shipment, he removed the drugs from their properly labeled bottle and placed them in another container without proper labels and held them in his drugstore for retail sale to his customers. The Court held that the statute, as applied, was within Congress' Commerce Clause powers since it regulated products that had been shipped in interstate commerce. Id. at 697-98.

5. United States v. Green, 350 U.S. 415 (1956).

The Court held that the Hobbs Act covered an indictment (while was erroneously dismissed prior to trial) which charged a union's agent with attempting to obtain money from an employer, "in the form of wages to be paid for imposed, unwanted, superfluous and fictitious services" through the wrongful use of "actual and threatened force, violence and fear made to said [employer]." Id. at 417. The Court rejected a Commerce Clause challenge, stating "[s]ince in our view the legislation is directed at the protection of interstate commerce against injury from extortion." Id. at 420.

6. Stirone v. United States, 361 U.S. 212 (1960).

The Court reversed the defendant's Hobbs Act (18 U.S.C. § 1951) conviction because of a fatal variance. The only interstate commerce mentioned in the indictment was the importation into Pennsylvania of sand to be used in building a steel plant there; but the trial judge permitted the introduction of evidence to show interference also with the exportation from Pennsylvania of steel to be manufactured in the new plant and he instructed the jury that it could base a conviction upon interference with either the importation of sand or the exportation of steel. The indictment alleged that the defendant extorted money from the victim by the wrongful threats of labor disputes and threats of loss or obstruction of his performance on the contract to supply concrete.

However, the Court noted that the evidence was sufficient to satisfy the Hobbs Act's interstate nexus requirement, stating:

> [The Hobbs] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference "in any way or degree." 18 U.S.C. § 1951(a). Had [the victim's] business been hindered or destroyed, interstate movements of sand to him would have slackened or stopped. The trial jury was entitled to find that commerce was saved from such a blockage by [the victim's] compliance with [defendant's] coercive and illegal demands. It was to free commerce from such destructive

burdens that the Hobbs Act was passed.

Id. at 215.

7. United States v. Guest, 383 U.S. 745 (1966).

The Court held that the Constitution guarantees the right to travel throughout the United States, and "necessarily to use the highways and other instrumentalities of interstate commerce in doing so." Id. at 757. Accordingly, the Court upheld an indictment under 18 U.S.C. § 241 charging the defendant with conspiring to deprive Negro citizens of their constitutional right to engage in interstate travel without discrimination. The Court stated that "the commerce power authorizes Congress to legislate for the protection of individuals from violations of civil rights that impinge on their free movement in interstate commerce." Id. at 759.

8. Rewis v. United States, 401 U.S. 808 (1971).

The Supreme Court reversed the convictions of the defendants for conducting a lottery operation in Florida, near the Georgia border, in violation of the Travel Act (18 U.S.C. § 1952), which prohibits interstate travel with intent to "promote, manage, establish, carry on, or facilitate" certain illegal activity. The Court held that as a matter of statutory construction, "conducting a gambling operation frequented by out-of-state bettors, by itself" does not violate the Travel Act. Id. at 811. The Court explained:

> [The Travel Act] was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another... Given the ease with which citizens of our Nation are able to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of state customers. **In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies.**

Id. at 811-12 (emphasis added). However, the Court stated that because the facts did not present the issue it did not rule on the Government's theory that "there may be occasional situations in which the conduct encouraging interstate patronage so closely approximates the conduct of a principal in a criminal agency relationship that the Travel Act is violated". Id. at 814.

9. Perez v. United States, 402 U.S. 146 (1971).

The defendant was convicted of "loan-sharking" activities, i.e., unlawfully using extortionate means in collecting and attempting to collect an extension of credit, in violation of 18 U.S.C. §§ 891, et seq. The statute did not require a nexus to interstate commerce, and therefore the defendant argued that Congress had exceeded its Commerce Clause authority by prohibiting the local, intrastate activity of loan-sharking.

The Supreme Court rejected this argument on the ground that Congress made adequate findings that the "class" of loanshark activity had a substantial affect on interstate commerce, including that loan-sharking was the second largest source of revenue for organized crime which exceeded $350 million a year and causes takeovers of legitimate businesses by organized crime. Id. at 155-56. The Court explained:

> In emphasis of our position that it was the **class of activities** regulated that was the measure, we acknowledged that Congress appropriately considered the "total incidence" of the practice on commerce...
>
> Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class...
>
> Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce.

Id. at 154 (citations deleted).

10. United States v. Bass, 404 U.S. 336 (1971).

18 U.S.C. App. § 1202(a) makes it a crime for any convicted felon "who receives, possesses or transports in commerce or affecting commerce...any firearm." The Court rejected the government's argument that § 1202(a) banned all possessions and receipts of firearms by convicted felons, and that the interstate nexus requirement extended only to the "transport" alternative and hence no connection to interstate commerce had to be demonstrated in individual cases of possession. Rather, the Supreme Court held that the government must prove that the interstate nexus requirement applied to all three alternatives - possession, receipt or transportation, and that "the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce." Id. at 350. The Court explained that it rejected the government's broader reading of § 1202(a) because, in part, if accepted "the statute would mark a major inroad into a domain traditionally left to the States." Id. at 339.

11. United States v. Orito, 413 U.S. 139 (1973).

The defendant was charged with knowingly transporting obscene material by common carrier in interstate commerce, in violation of 18 U.S.C. § 1462. The Court rejected a challenge to the indictment that under Stanley v. Georgia, 394 U.S. 557 (1969), which held that Congress lacked authority to regulate non-public transportation of obscene material intended solely for the private use of the transporter. The Supreme Court stated:

> [W]e cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because the material is intended for the private use of the transporter.
>
> * * *
>
> "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgement upon the exercise of which the Constitution places no restriction and over which the courts are given no control.... It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature."

413 U.S. at 143-44 (citations deleted).

12. Huddleston v. United States, 415 U.S. 814 (1974).

The Supreme Court held that 18 U.S.C. § 922(a)(6), providing "that it is unlawful knowingly to make a false statement 'in connection with the acquisition...of any firearm...from a... licensed dealer,' covers the redemption of a firearm from a pawnshop." Id. at 815. The Supreme Court also held that

> no interstate commerce nexus need be demonstrated. Congress intended, and properly so, that § 922(a)(6) and (d)(1), in contrast to 18 U.S.C. App. § 1202(a)(1), see United States v. Bass, supra, were to reach transactions that are wholly intrastate, as the Court of Appeals correctly reasoned, "on the theory that such transactions affect interstate commerce."

Id. at 833 (citation deleted).

13. Barrett v. United States, 423 U.S. 212 (1976).

The Supreme Court held that 18 U.S.C. § 922(a), which makes it a crime for a convicted felon, inter alia, "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce", applies to a convicted felon's **intra**state purchase from a retail dealer of a firearm that any time previously, but independently of the felon's receipt, had been transported in interstate commerce from the manufacturer to a distributor and then from the distributor to the dealer.

14. Scarborough v. United States, 431 U.S. 563 (1977).

The Supreme Court held that 18 U.S.C. § 1202(a), which makes it a crime for a convicted felon to possess "in commerce or affecting commerce" any firearm, applies to possession of a firearm that previously traveled at any time in interstate commerce and that the nexus need not be contemporaneous with the possession. Accordingly, the Court went on to hold that § 1202(a) applied, as was the case in Scarborough, where the firearm at issue traveled in interstate commerce even before the defendant became a convicted felon. The Court said that "there is no question that Congress intended no more than a minimal nexus requirement." Id. at 577.

15. Russell v. United States, 471 U.S. 858 (1985).

The defendant was convicted of violating 18 U.S.C. § 844(i), which makes it a crime to maliciously damage or destroy, or attempt to damage or destroy, by means of fire or explosive, "any building . . . used . . . in any activity affecting interstate or foreign commerce." The Supreme Court held that § 844(i) applied to the arson of an apartment building used as rental property.

The Supreme Court stated that the "reference to 'any building . . . used . . . in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause", and is broader than legislation limited to activities "in commerce." Id. at 859 and n. 4.

The Supreme Court added:

> By its terms, however, the statute only applies to property that is "used" in an "activity" that affects commerce. The rental of real estate is unquestionably such an activity. We need not rely on the connection between the market for residential units and "the interstate movement of people," to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within the class.

> Petitioner was renting his apartment building to tenants at the time he attempted to destroy it by fire. The property was therefor being used in an activity affecting commerce within the meaning of § 844(i).

Id. at 862 (footnote deleted).

16. United States v. Lopez, 514 U.S. 549 (1995).

The Supreme Court held that 18 U.S.C. § 922(9)(1)(A), which makes it a crime for "any individual knowingly to posses a firearm at a place that [he] knows . . . is a school zone," exceeds Congress' Commerce Clause authority.

The Court reviewed the development of its Commerce Clause jurisprudence since the mid-1930's that had "greatly expanded the previously defined authority of Congress under that Clause." Id. at 556. However, "the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" Id. at 557, quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

The Court identified "three broad categories of activity that Congress may regulate under its commerce power . . . First, Congress may regulate the use of the channels of interstate commerce . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities . . . [Third], Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce." Id. at 558-59.

Applying these three categories, the Court stated that the first two categories clearly did not apply to the gun statute at issue, leaving only the third category. Id. at 559. Under the third category the Court noted that

> [W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining; Hodel, supra, intrastate extortionate credit transactions, Perez, supra, restaurants utilizing substantial interstate supplies, McClung, supra, inns and hotels catering to interstate guests, Heart of Atlanta Motel, supra and production and consumption of homegrown wheat, Wickard v. Filburn, 317 U.S. 111 (1942). These examples are by no means exhaustive, but the pattern is clear. **Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.**

Id. at 559-60 (emphasis added).

However, the Court concluded that the gun statute could not be justified under the third category because the statute "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms"; nor was the statute "an essential part of a larger regulation of economic activity." Id. at 561. The Court concluded that the gun statute "cannot, therefore, be sustained under our cases upholding regulation of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Id. The court added that: "Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty." Id. at 566. Nevertheless, the Court stated that such uncertainty is a necessary price to pay to enforce the Constitution's system of enumerated powers. Id.

It was argued that possession of a firearm in a local school zone substantially affects interstate commerce because such possession might result in violet crime and "the costs of violent crime are substantial [and] . . . reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe" and also violent crime has "an adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce." Id. at 563-65. The Court rejected these arguments, finding the analysis too attenuated. More fundamentally, the Court rejected these arguments because their acceptance would, in effect, eliminate any limitations the Commerce Clause imposes on federal police power in derogation of the dual system of government created by the Constitution. In that respect the Court stated:

> Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.
>
> . . .
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> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a **general police power** of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action.... **The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. Gibbons v. Ogden, supra, at 195, and that there never will be a distinction between what is truly national and what is truly local, cf. Jones & Laughlin Steel, supra, at 30. This we are unwilling to do.**

Id. at 564, 567-68 (emphasis added).

The Court also noted that "§ 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce" (Id. at 561), and "[n]either the statute nor its legislative history contain[s] "express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." Id. at 562.

17. United States v. Robertson, 514 U.S. 669 (1995).

The defendant was convicted of a RICO violation, 18 U.S.C. § 1962(a), for investing proceeds of racketeering activity in an enterprise "which is engaged in, or the activities of which affect, interstate or foreign commerce." § 1962(a). The Court held that the government established sufficient evidence that the enterprise, a gold mine, engaged in interstate commerce by evidence that: (1) some of the $100,000 in equipment was purchased in California and transported to Alaska for use in the mine's operations; (2) "on more than one occasion, Robertson sought workers from out of state and brought them to Alaska to work in the mine", and (3) "Robertson, the mine's sole proprietor, took $30,000 worth of gold, or 15% of the mine's total output, with him out of the state." Id. at 671.

Because the Court found that the evidence was sufficient to establish that the enterprise was "engaged in" interstate commerce, it explicitly stated that it need not consider "whether the activities of the [enterprise] 'affected' interstate commerce." Id. at 671. Significantly, the Court added that "[t]he 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress' power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects." Id. at 671, citing Wickard v. Filburn, 317 U.S. 111 (1942).

18. Jones v. United States, 529 U.S. 848 (2000).

The defendant tossed a molotov cocktail into a home owned and occupied as a dwelling place for every day living by its owner and was not used for commercial purposes. The defendant was convicted of violating 18 U.S.C. § 844(i), which makes it a federal crime to "maliciously damag[e] or destro[y] . . . by means of fire or an explosive, any building...used in interstate or foreign or in any activity affecting interstate or foreign commerce." The defendant argued that Section 844(i) did not cover arson of a private residence not used for any commercial purposes, and if it so applied the state exceeded Congress' authority under the Commerce Clause.

The government argued that the residence at issue was "used" in activities affecting commerce because: (1) the homeowner "used" the dwelling as collateral to obtain and secure a mortgage from an out-of-state lender and the lender, in turn, "used" the property as security for the home loan; (2) the homeowner "used" the residence to obtain a casuality insurance policy from an out-of-state insurer; and (3) the homeowner "used" the dwelling to receive natural gas from sources outside the state. Id. at 855.

The Supreme Court rejected the government's arguments and interpreted § 844(i) to cover "only property currently [actively] used in commerce or in an activity affecting commerce." Id. at 859. Because the residence at issue was not so used, the Court vacated the defendant's conviction.

The Court stated that its construction of § 844(i) "is in harmony with the guiding principle that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions are avoided, our duty is to adopt the latter.'" Id. at 857 (citations deleted). The Court explained that the Government's interpretation of § 844(i) posed substantial constitutional questions, stating:

> Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce...If such connections sufficed to trigger § 844(i), the statute's limiting language, "used in" any commerce-affecting activity, would have no office.
>
> . . .
>
> Given the concerns brought to the fore in Lopez, it is appropriate to avoid the constitutional question that would arise were we to read § 844(i)to render the "traditionally local criminal conduct" in which petitioner Jones engaged "a matter for federal enforcement.". . . We have cautioned, as well, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in the prosecution of crimes . . . To read § 844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime.

Id. at 857-58. (citations deleted).

APPENDIX III

Guidance Memorandum Regarding

Boyle v. United States,

556 U.S. ___, 129 S. Ct. 2237 (2009)

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

23 September 2009

MEMORANDUM

To: All Strike Force Chiefs and
OCRS Attorneys

From: Bruce G. Ohr, Chief,
Douglas E. Crow, Deputy Chief
Organized Crime
and Racketeering Section

Re: *Boyle v. United States*, 556 U.S. ___, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009)

Please distribute this memorandum regarding the impact of the *Boyle* decision to all of your attorneys.

A. Introduction

In *Boyle v. United States*, 556 U.S. ___, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009), the United States Supreme Court provided further elaboration on the definition of, and what proof is necessary to establish the existence of, a RICO "enterprise" within the meaning of 18 U.S.C. § 1961(4).[1]

At trial, the government proved that Petitioner Edmund Boyle and others engaged in a series of bank thefts (occasionally robberies, but more often burglaries) in several states and transported the stolen monies from these thefts across state lines. Although the group had a

[1] *Boyle* was issued immediately prior to publication of the 2009 version of OCRS' Criminal RICO Manual. Therefore, this memorandum is supplied as Appendix C to that Manual.

"core" membership, others were "recruited from time to time." 129 S. Ct. at 2241. To plan the thefts, the group would meet beforehand to gather instruments (such as walkie-talkies and crowbars) and assign roles, and afterwards the participants in the thefts would usually divide the proceeds. *Id.* As the Court noted, the organization was far from formal: "[t]he group was loosely and informally organized. It does not appear to have had a leader or hierarchy; nor does it appear that the participants ever formulated any long-term master plan or agreement." *Id.*

After trial, the district court instructed the jury as follows:

> The term "enterprise" as used in these instructions may also include a group of people associated in fact, even though this association is not recognized as a legal entity. Indeed, an enterprise need not have a name. Thus, an enterprise need not be a form[al] business entity such as a corporation, but may be merely an informal association of individuals. A group or association of people can be an "enterprise" if, among other requirements, these individuals "associate" together for a purpose of engaging in a course of conduct. Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.
>
> Moreover, you may find an enterprise where an association of individuals, *without structural hierarchy*, forms solely for the purpose of carrying out a pattern of racketeering acts. Such an association of persons may be established by evidence showing an ongoing organization, formal or informal, and . . . by evidence that the people making up the association functioned as a continuing unit. Therefore, in order to establish the existence of such an enterprise, the government must prove that: (1) There is an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose.
>
> Regarding "organization," *it is not necessary that the enterprise have any particular or formal structure*, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise.

Id. at 2242 n.1 (emphases and ellipsis in *Boyle*). In addition, the district court rejected Boyle's proposed instruction that the government was required to prove that an enterprise "'had an

ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts.'" *Id.* at 2242. Boyle was convicted on most of the counts, including the substantive RICO and RICO conspiracy charges. *See id.*

The United States Court of Appeals for the Second Circuit, in an unpublished disposition, affirmed Boyle's conviction and did not specifically address his claims that the instructions were erroneous. *See United States v. Boyle*, 283 Fed. Appx. 825 (2d Cir. 2007). The Supreme Court granted certiorari to decide whether an association-in-fact enterprise must have "'an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.'" 129 S. Ct. at 2244; *see also* 129 S. Ct. 29 (2008) (granting certiorari).

B. The Holding

In a 7-2 decision reaffirming its previous holding and analysis from *United States v. Turkette*, 452 U.S. 576, 580–83 (1981), the Supreme Court affirmed Boyle's conviction, holding that the district court's instructions properly conveyed the meaning of a RICO enterprise and what proof was necessary to establish such an enterprise. 129 S. Ct. at 2247. Justice Alito, writing for the majority, noted that the statutory definition of "enterprise" in § 1961(4) "does not specifically define the outer boundaries of the 'enterprise' concept," and that the definition has a "wide reach," consistent with the statutory command that RICO should be "'liberally construed to effectuate its remedial purposes.'" *Id.* at 2243 (citing § 904(a), 84 Stat. 947, note following 18 U.S.C. § 1961). The Court also compared RICO with other statutes, such as the illegal gambling business statute, 18 U.S.C. § 1955, and the Continuing Criminal Enterprise statute, 21 U.S.C. § 848, noting that Congress did not impose the same strict structural requirements within RICO

as it had with the other statutes. *Id.* at 2246.[2]

Turning to the question granted for certiorari—whether an association-in-fact enterprise must have an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages—the Court divided the question into three: (1) whether an association in fact enterprise must have a "structure"; (2) whether such structure must be "ascertainable"; and (3) whether the structure must "go 'beyond that inherent in the pattern of racketeering activity.'" *Id.* at 2244.

Regarding the first question, the Court agreed that an association-in-fact enterprise must have a structure and must have "at least 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." *Id.* However, because a district court retains "considerable discretion" in choosing the language of its instructions, those particular words are not required. *Id.*

The Petitioner had also requested that the trial court instruct the jury that it must find an "ascertainable structural hierarchy distinct from the charged predicate acts." *Id.* at 2242. Regarding whether structure must be"ascertainable," the Court acknowledged the truism that by telling a jury that it must find an element, therefore the element must be "'ascertainable' or else the jury could not find that it was proved." *Id.* at 2244. However, the Court reasoned, instructing the jury that they needed to "ascertain the existence of an 'ascertainable structure' would have been redundant and potentially misleading." *Id.* at 2245.

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[2] The Court noted that the statutory definition of "enterprise" in 18 U.S.C. § 1961(4) "does not purport to set out an exhaustive definition of the term 'enterprise'" and that "[a]ccordingly, this provision does not foreclose the possibility that the term might include, in addition to the specifically enumerated entities, others that fall within the ordinary meaning of the term 'enterprise.'" *Id.* at 2243 n.2.

Finally, the Court addressed the third question, and the crux of the Petitioner's complaint: whether an enterprise's structure must be "'beyond that inherent in the pattern of racketeering activity.'" *Id.* On this point, the Court turned to (and reiterated) its analysis previously made in *Turkette*: the existence of an enterprise is a distinct element that must be proved, and "'proof of one does not necessarily establish the other.'" *Id.* (quoting *Turkette*, 452 U.S. at 583). As an example, if "several individuals, independently and without coordination," engaged in a pattern of RICO predicate offenses, "[p]roof of these patterns would not be enough to show that the individuals were members of an enterprise." *Id.* at 2245 n.4.

However, the Court stressed that although the pattern does not *necessarily* establish the enterprise, this does not mean that "the existence of an enterprise may *never* be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity". *Id.* at 2245 (emphasis added).[3] Moreover, the Court noted that although "the same evidence may prove two separate elements, this does not mean that the two elements collapse into one." *Id.* at 2246 n.5. Again turning to *Turkette*, the Court stated: "We recognized in *Turkette* that the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.'" *Id.* at 2245 (quoting 452 U.S. at 583).[4] Because this may be a permissible inference in certain cases, the Court reasoned, the

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[3] On this point, the Court reiterated its conclusion that it "made in *Turkette* that proof 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 2247.

[4] Importantly, the Court also rejected the dissent's assertion that a RICO enterprise must be limited to "business-like entities." *Id.* at 2243. The majority reasoned that such an "extratextual requirement" can be divined neither from the text nor the purpose of the statute, and does not flow from the Court's prior cases. *Id.* at 2243 & n.3. Moreover, the Court concluded,

(continued...)

judge did not err in instructing the jury that "'the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.'" *Id.* at 2247 (quoting district court's instruction).

In essence, the Court's opinion in *Boyle* reiterated its holding in *Turkette*, and resisted the arguments of the Petitioner and the dissent to engraft additional, extratextual requirements into the meaning of a RICO "enterprise":

> As we said in *Turkette*, an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group 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. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence.

Id. at 2245.[5]

C. Impact of the *Boyle* Decision

1. Reiteration of the Import of *Turkette*

As explained above, the most significant source of the Court's analysis in *Boyle* was its decision made 28 years previously in *Turkette*. Indeed, while the Court's holding that an

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[4](...continued)
"[n]or is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach." *Id.* at 2245–46.

[5] Because the language of the statute was clear, and noting the "clear but expansive text of the statute," the Court rejected the Petitioner's arguments based on the purposes of the statute, the legislative history, and lenity principles. *Id.* at 2246–47.

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," *id.* at 2244, may initially seem like a marked shift from the Court's previous description of an "enterprise," this is in fact quite consistent with *Turkette*, in which the Court held that the enterprise is comprised of "a group of persons associated together for a common purpose of engaging in a course of conduct," and which "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." 452 U.S. at 583. Moreover, in *Boyle*, as in *Turkette*, the Court noted that while the enterprise and pattern are distinct elements which must be separately proven, the evidence used to prove these separate elements may sometimes "coalesce." 129 S. Ct. at 2245 (quoting *Turkette*, 452 U.S. at 583).

Additionally, it is important to note what the Court stated was *not* required to establish an enterprise:

> a structural "hierarchy," "role differentiation," a "unique *modus operandi*," a "chain of command," "professionalism and sophistication of organization," "diversity and complexity of crimes," "membership dues, rules and regulations," "uncharged or additional crimes aside from predicate acts," an "internal discipline mechanism," "regular meetings regarding enterprise affairs," an "enterprise 'name,'" and "induction or initiation ceremonies and rituals."

129 S. Ct. at 2245 (quoting Petitioner's Briefs and Oral Argument Transcript). Furthermore, the Court indicated that although a RICO enterprise must have some longevity "long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence." *Id.* Additionally, the Court reasoned that RICO is not "limited to groups whose crimes are sophisticated, diverse, complex, or unique;

for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach." *Id.* at 2245–46. Finally, notwithstanding the dissent's insistence that an enterprise must be a "business-like" entity whose "separate existence will generally require evidence of rules, routines, or processes through which the entity maintains its continuing operations and seeks to conceal its illegal acts" or other "organizational elements more comprehensive than those necessary to perform a pattern of predicate acts," *id.* at 2250 (Stevens, J., dissenting), the majority explicitly disavowed the need for such proof. *Id.* at 2243 & n.3.

In essence, the Court in *Boyle* stressed that district courts need look no further than *Turkette* for an explanation of what is required for an association-in-fact enterprise, and that the district court's *Turkette*-based instructions were "correct and adequate." *Id.* at 2247.[6]

2. Rejection of More Restrictive Tests from Some Circuits

As described in the 2009 Criminal RICO Manual, since the Supreme Court's decision in *United States v. Turkette*, 452 U.S. 576 (1981), the circuit courts have had varying interpretations on what constitutes and what is necessary to prove the existence of an "enterprise" within the meaning of 18 U.S.C. § 1961(4). *See* OCRS Criminal RICO Manual (2009) at 61–79. The most restrictive of those interpretations came from *United States v. Bledsoe*, 674 F.2d 647, 665 (8th

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[6] Because *Boyle* turned on an issue of statutory construction, its construction of the "enterprise" element applies to all RICO cases, past, pending and future. *See generally Bousley v. United States*, 523 U.S. 614, 620-21 (1998); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Therefore, we can expect to see habeas corpus petitions from some defendants convicted of RICO violations before *Boyle* was decided. However, because the *Boyle* Court sided with the government and affirmed the district court's instructions (which were based on *Turkette*), we find it highly unlikely that any such cases will be difficult to defend. As always, please contact OCRS if any difficult *Boyle* or other RICO-related issues arise in your cases.

Cir. 1983), in which the Court of Appeals for the Eighth Circuit construed *Turkette* to require that the enterprise exhibit three basic characteristics: (1) a common or shared purpose which animates those associated with the enterprise, (2) some continuity of structure and personality, and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity. *Id.* at 665. As to this third part of the test—and like the Petitioner advocated in *Boyle*—the court stated that "an enterprise must have an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity," and noted that the "distinct structure might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes." *Id.* at 665. Thus, in the view of the Eighth Circuit,"the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering." *Id.* at 664. This aspect of the test is clearly inconsistent with the Supreme Court's decision in *Boyle*. *See* 129 S. Ct. at 2245–46.

Boyle also rejected the restrictive interpretation of the meaning of "enterprise" described by the Court of Appeals for the Third Circuit in *United States v. Riccobene*, 709 F.2d 214 (3rd Cir. 1983). In *Riccobene*, the court held that to determine the existence of an enterprise, the jury must find: (1) that there was an "'ongoing organization'"; (2) "'that the various associates function as a continuing unit'"; and (3) that the enterprise has "an existence 'separate and apart from the pattern of activity in which it engages.'" 709 F.2d at 221 (quoting *Turkette*, 452 U.S. at 583). In explaining these requirements, the *Riccobene* court stated that "[t]here must be some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad

hoc, basis" and it is necessary "that each person perform a role in the group consistent with the organizational structure established . . . and which furthers the activities of the organization." *Id.* at 222–23. By contrast, the *Boyle* Court explicitly stated that an enterprise "need not have a hierarchical structure or a 'chain of command,'" and that "decisions *may* be made on an ad hoc basis and by any number of methods." 129 S. Ct. at 2245 (emphasis added). Moreover, whereas in *Riccobene* the court suggested that the members of the enterprise must "occupy continuing positions within the group," 709 F.2d at 223, the Supreme Court in *Boyle* noted that in an enterprise "[m]embers of the group need not have fixed roles; different members may perform different roles at different times." 129 S. Ct. at 2245. Additionally, in *Riccobene*, the court of appeals insisted that the enterprise must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." 709 F.2d at 224. By contrast, the *Boyle* Court stressed that although the existence of an enterprise was a distinct element that must be separately proven, "the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce,'" 129 S. Ct. at 2245 (quoting *Turkette*, 452 U.S. at 583), and that in some circumstances the proof of a pattern might be sufficient to "permit a jury to infer the existence of an association-in-fact enterprise." *Id.* at 2247. Accordingly, as with *Bledsoe*, this restrictive test put forth in *Riccobene* is incongruous with the holding in *Boyle*. Indeed, the *Boyle* Court noted that the enterprise members in *Boyle* itself never "formulated any long-term master plan or agreement," *id.* at 2241, and went on to state that "a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach," *id.* at 2246.

While neither *Bledsoe* nor *Riccobene* are discussed (or even mentioned) by the Supreme Court, it is clear that these heightened standards and "extratextual" requirements do not survive *Boyle*. Prosecutors should, of course, consider whether the Supreme Court's decision changes the continuing viability of pre-*Boyle* circuit precedents.[7]

Conclusion

Of course, we will not know the nature or scope of *Boyle*'s impact until the district and circuit courts have actually applied the decision.[8] However, OCRS obviously welcomes this decision, because it (1) reiterates the importance of the *Turkette* standard, affirming the government's arguments that this standard sufficiently describes the RICO "enterprise"; (2) makes clear that the evidence used to prove the pattern of racketeering activity may also be used to demonstrate the existence of the enterprise; (3) reaffirms the principle that, in certain cases, the proof of a pattern of racketeering activity may be sufficient to infer the existence of an enterprise; and (4) rejects the arguments for the additional "enterprise" requirements proposed by the Petitioner, the dissenting opinion, and other cases such as *Bledsoe* and *Riccobene*.

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[7] As described in the 2009 Criminal RICO Manual, pp. 67–68, the Fourth, Seventh, and Tenth Circuits had previously adopted some variation of the *Bledsoe/Riccobene* tests.

[8] OCRS is currently considering revisions to its model RICO instructions in light of *Boyle*.