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Interpreting RICO: In Florida, the Rules are Different

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COMMENTARY

INTERPRETING RICO: IN FLORIDA, THE RULES ARE DIFFERENT*

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"Not guilty . . . not guilty . . . not guilty . . ." the jury foreman said over and over again in a low voice. At the defense table, the man described by federal prosecutors as the leader of the nation's most powerful Mafia family smiled and gleefully punched his lawyer on the arm. When the foreman finished his litany, John Gotti and his co-defendants hugged and kissed each other and their lawyers. Then, they stood and applauded as federal marshals escorted the twelve members of the jury from the Brooklyn courtroom.[1]

It was a stunning defeat for the federal prosecutors; the first major courtroom setback in what they described as a campaign to destroy

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* Florida's current tourism promotion slogan.

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1. N.Y. Times, Mar. 14, 1987, at 1, col. 1 (nat'l ed.). After a seven-month trial, Gotti and his co-defendants were acquitted of racketeering and conspiracy. They were accused of carrying out illegal gambling and loan-sharking operations, armed hijackings, and at least two murders over an 18-year period. *Id.*

the hierarchy of organized crime in the New York City area.[2] Since 1970, when Congress presented federal prosecutors with a powerful new weapon called the Racketeer Influenced and Corrupt Organizations Act (RICO),[3] prosecutors have recorded a string of successes in major organized-crime cases across the country.[4]

RICO added tremendous firepower to the federal prosecutors' arsenal. As the most sweeping criminal statute ever passed by Congress,[5] RICO provides severe penalties[6] for persons who commit two or more "racketeering activities," a term incorporating twenty-four separate types of federal crimes and eight types of state felonies.[7] RICO has been applied to a wide variety of criminal activity. Nearly twenty years after its passage, however, its outer limits have not yet been definitely mapped.

In 1977, Florida enacted its own version of RICO.[8] While the federal statute is sweeping, Florida's version is even broader, incorporating far more crimes[9] and providing more severe penalties.[10] How-

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2. *Id.* The underlying weakness in the prosecution's case appeared to be its reliance on turncoat career criminals as key witnesses against Gotti and his co-defendants. Before returning to the courtroom to announce the acquittals, the jury requested another look at the chart listing the lengthy criminal records of seven prosecution witnesses. In exchange for their testimony, those witnesses said they had obtained promises of reduced sentences for their own crimes or financial help in beginning new lives under the witness protection program. Rabb, *Flaw in Gotti Case: Some Have Questioned the Credibility of Key Witnesses for the Government*, N.Y. Times, Mar. 14, 1987, at 9, col. 5 (nat'l ed.).

3. 18 U.S.C. §§ 1961-1968 (1986). RICO, as the provision is popularly known, was enacted by Congress as Title IX of the Organized Crime Control Act of 1970. Pub. L. No. 91-452, 84 Stat. 922 (codified at scattered sections of 18 U.S.C. and 28 U.S.C.).

4. N.Y. Times, Mar. 14, 1987, at 1, col. 1 (nat'l ed.). In the past five years, federal prosecutors have used RICO to convict major organized-crime figures in New York, Boston, Chicago, Milwaukee, and Philadelphia. *Id.*

5. Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 1 (1978).

6. The federal RICO penalties include fines of up to $25,000, imprisonment for as long as 20 years and forfeiture of interests acquired or maintained in violation of RICO. 18 U.S.C. § 1963(a) (1986). The statute also provides broad civil remedies, modeled after the antitrust laws. *Id.* § 1964. However, the civil remedies of RICO are beyond the scope of this commentary.

7. *See* 18 U.S.C. § 1961(1) (1986) (defining "racketeering activity"). *See also infra* notes 57-59.

8. The Florida Racketeer Influenced and Corrupt Organizations Act, ch. 77-334, 1977 Fla. Laws 1399, was originally codified at FLA. STAT. §§ 943.46-.5. In 1981, those sections were renumbered as §§ 895.01-.06.

9. *See infra* notes 61-67.

10. A violation of the Florida RICO Act is a first-degree felony punishable by up to 30 years in prison. FLA. STAT. §§ 895.04(1), 775.082(3)(b) (1987). The maximum prison term under the federal RICO statute is 20 years. 18 U.S.C. § 1963(a) (1986). The basic fines are greater under the federal statute. A federal RICO violator can be fined as much as $25,000. *Id.* Under

ever, because of the basic similarity between the two statutes, Florida courts have looked to federal court decisions for guidance in interpreting the Florida RICO statute.[11]

This commentary compares the federal and Florida RICO statutes and addresses some of the issues arising in the interpretation of the substantive criminal provisions. It argues that Florida courts have incorrectly followed the decisions of federal courts in interpreting the language of the Florida RICO act. The federal RICO law includes a liberal construction provision,[12] while Florida's RICO law is subject to a strict statutory construction rule.[13] However, Florida courts have

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Florida law, the maximum fine for a first-degree felony is $10,000. FLA. STAT. § 775.083(1)(b) (1987). However, the Florida RICO Act allows payment of up to three times the gross value gained or gross loss caused by racketeering activity in lieu of the authorized fine. *Id.* § 895.04(2). The federal RICO statute does not have a similar criminal penalty provision, although it does provide for private treble damage actions by persons injured by racketeering activities. 18 U.S.C. § 1964(a) (1986).

11. *See, e.g.*, Dorsey v. State, 402 So. 2d 1178, 1181-83 (Fla. 1981) (citing 14 federal cases); Bowden v. State, 402 So. 2d 1173, 1174 (Fla. 1981) (citing two federal cases to support its interpretation of "pattern"); State v. Whiddon, 384 So. 2d 1269, 1271-72 (Fla. 1980) (in considering a novel issue, noting the federal courts had examined the sufficiency of charging instrument under the federal RICO statute, "after which the Florida act is closely patterned," and citing a Fifth Circuit case to support its holding); Moorehead v. State, 383 So. 2d 629, 630-31 (Fla. 1980) (citing three federal cases and noting "[t]he Florida legislature incorporated the federal case law by explicitly defining 'pattern of racketeering activities' to include interrelated elements that are not isolated"); Caggiano v. State, 505 So. 2d 482 (Fla. 2d D.C.A. 1987) (citing three federal cases); Finkelstein v. Southeast Bank, 490 So. 2d 976, 979 (Fla. 4th D.C.A. 1986) ("We have looked for guidance in the case law interpreting the federal RICO statute . . . ."); Banderas v. Banco Cent. del Ecuador, 461 So. 2d 265, 269-70 (Fla. 3d D.C.A. 1985) (noting Florida and federal RICO statutes are "nearly identical" and adding, "we can also look to a wealth of material on the federal RICO statute for guidance" before citing 14 federal cases); Carroll v. State, 459 So. 2d 368, 370 (5th D.C.A. 1984) (pointing out that the Eleventh Circuit Court of Appeals, in considering the federal RICO statute, had similarly construed the word "pattern"), *review denied*, 464 So. 2d 554 (Fla. 1985); Di Sangro v. State, 422 So. 2d 14, 15-16 (4th D.C.A. 1982) (three federal cases cited in majority opinion, one in dissent), *review denied*, 434 So. 2d 887 (Fla. 1983); State v. Bowen, 413 So. 2d 798, 799 (1st D.C.A. 1982) (citing two federal cases), *review denied*, 424 So. 2d 760 (Fla. 1983); State v. Belosh, 13 Fla. Supp. 2d 34, 37-40 (4th Judicial Circuit, Duval County, 1985) (citing three federal RICO cases). *See also* Note, *Illegal Assets Once Removed: Easy Avoidance of Civil RICO Remedies*, 16 STETSON L. REV. 439 (1987) (criticizing the *Finkelstein* court's reliance on federal RICO decisions because injunctive relief in pending civil cases is available only to the government while under the Florida law, "any aggrieved person" may seek such relief). *But see* State v. Russo, 493 So. 2d 505 (4th D.C.A.) (rejecting a prosecution argument based on federal case law), *review denied*, 504 So. 2d 768 (Fla. 1986).

12. Organized Crime Control Act of 1970, Pub. L. No. 91 452, § 904(a), 84 Stat. 947 ("provisions of this title shall be liberally construed to effectuate its remedial purpose").

13. FLA. STAT. § 775.021(1) (1987).

overlooked this underlying difference between federal and Florida criminal law. Because the Florida RICO statute is broader in several respects than the federal statute, courts should not apply the liberally construed federal decisions to make it broader.

I. THE POLITICAL BACKDROP OF THE RICO LAWS

Both the federal and Florida RICO statutes were enacted in a political atmosphere that forced lawmakers to promise to be tough on crime. In both Washington and Tallahassee, the outcry for a counterattack on the menace of organized crime drowned out concerns about potential encroachments on fundamental rights of individuals.

Election-year pressures propelled the Organized Crime Control Act of 1970[14] through Congress. This bill, as originally proposed, was criticized as unconstitutional.[15] However, Congressmen admitted there had never been any hope of blocking the passage of the bill in an election year.[16] Acknowledging the political dangers of voting against

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14. The Organized Crime Control Act of 1970 was a broad-based reform bill covering such areas as grand juries, immunity and contempt as well as the RICO provisions. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969). For a comprehensive analysis of the legislative history of RICO, see 1 CORNELL INSTITUTE ON ORGANIZED CRIME, MATERIALS ON RICO 58-105 (1980-81).

15. Emmanuel Celler (D-N.Y.), chairman of the House Judiciary Committee, said some provisions of the bill were unconstitutional. CONGRESSIONAL QUARTERLY, INC., 1970 CQ ALMANAC 545, 546, 550. When he opened the House hearings on the bill, he said: "In our zeal to attack the problem of organized crime, it is imperative that we do not trample on basic constitutional or procedural safeguards. If we do, the cure will prove far more devastating than the illness." *Id.* at 551. William F. Ryan (D-N.Y.) described some provisions of the bill as a "misguided diminution of Fifth Amendment rights which, if they are to be eroded and even abolished, should suffer this fate at the hands of a constitutional amendment, not piecemeal legislation." *Id.* at 554. The New York City Bar Association committee on federal legislation urged a complete revision of the bill, which it described as poorly drafted without regard for constitutional safeguards. *Id.* at 550. The American Civil Liberties Union expressed its disapproval of a number of the RICO provisions. The ACLU also recognized that RICO applied beyond organized crime in the traditional Mafia sense and expressed concern that RICO would infringe on the civil rights of white-collar and political-activist defendants. *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1816, S. 2022, S. 2122 and S. 2292 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 475-77 (1969). For a detailed rejoinder, see McClellan, *The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55 (1970).

16. Judiciary Committee member John Conyers, Jr. (D-Mich.) said on Oct. 7, 1970, the day the House passed its version of the Organized Crime Control Act of 1970, that attempts to block passage on the bill in an election year are futile. A vote against the bill, he said, would be used to label a representative "soft on crime." CONGRESSIONAL QUARTERLY, INC., 1970 CQ ALMANAC 552.

a crime-control measure so near an election,[17] Representative Abner J. Mikva addressed his plea for opposition to the bill to congressmen from safe districts, congressmen who did not wish to return to the House, and those who had "some kind of death wish" about re-election.[18] Senator John McClellan, the bill's sponsor, urged its approval to counteract the rapidly spreading "social poison" of organized crime, which might "well destroy the social, political, economic and moral heart of our nation."[19] Only two days after it came to the floor,[20] the bill sailed through the Senate by a seventy-three to one vote.[21] Although more objections were raised in the House,[22] all attempts to amend the bill on the floor were defeated.[23] The bill was returned to the Senate only two days before the election recess[24] and was passed by voice vote.[25] President Nixon signed it into law three days later.[26]

The Florida Legislature voiced many of the same concerns, but the RICO bill passed through both houses on the wings of misunderstandings and tough-on-crime rhetoric. Much of the debate in the Florida Senate involved the list of crimes included in the definition of "racketeering activity."[27] The list which was eventually approved appears to be a result of half-hearted editing and misunderstandings

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17. The Senate finally approved the bill only two days before its election recess. 116 CONG. REC. 36280-37264 (1970). *See also* CONGRESSIONAL QUARTERLY, INC., 1970 CQ ALMANAC 545 (election year pressure "intense").

18. Mikva (D-Ill.), Conyers (D-Mich.), and Ryan (D-N.Y.) described the Organized Crime Control Act as "another dreary episode in the ponderous assualt on freedom" and opposed its passage. CONGRESSIONAL QUARTERLY, INC., 1970 CQ ALMANAC 552.

19. *Id.* at 550. For similar statements, see 116 CONG. REC. 602 (1970) (Sen. Hruska); *id.* at 603 (Sen. Allot); *id.* at 607 (Sen. Byrd); *id.* at 35191 (Rep. Sisk); *id.* at 35195-96 (Rep. Celler); *id.* at 35199-200 (Rep. St. Germain).

20. CONGRESSIONAL QUARTERLY, INC., 1970 CQ ALMANAC 549. Debate began Jan. 21 and the vote was taken Jan. 23. *Id.*

21. Senator Lee Metcalf (D-Mont.) cast the lone dissenting vote. 116 CONG. REC. 972 (1970). He said he voted against it because it took away the rights of persons charged with crimes. CONGRESSIONAL QUARTERLY, INC., 1970 CQ ALMANAC 549.

22. CONGRESSIONAL QUARTERLY, INC., 1970 CQ ALMANAC 550-53.

23. *Id.* at 552.

24. 116 CONG. REC. 36280-37264 (1970).

25. CONGRESSIONAL QUARTERLY, INC., 1970 CQ ALMANAC 553.

26. 116 CONG. REC. 37264 (1970). The President's signature was expected because he had earlier indicated his support for the bill. *See* Presidential Message on Organized Crime, Apr. 23, 1969, *reprinted in* CONGRESSIONAL QUARTERLY, INC., 1969 CQ ALMANAC 43-A. After signing the bill into law, President Nixon turned to Attorney General John Mitchell and FBI Director J. Edgar Hoover and said, "I give you the tools. You do the job." *Id.* at 545.

27. Note, *Racketeers and Non-Racketeers Alike Should Fear Florida's RICO Act*, 6 FLA. ST. U.L. REV. 483, 495-503 (1978).

about the application of various provisions of the bill. The Florida lawmakers' confusion in handling the bill dilutes the strength of potential RICO interpretive arguments based on legislative intent.

For example, the definition of "racketeering activity" apparently includes far more crimes than the Florida Legislature intended. Senator David McClain expressed concern about the bill's "shotgun approach" of incorporating entire chapters from the Florida Criminal Statutes.[28] However, Robert E. Stone, president of the Florida Prosecuting Attorneys Association, persuaded McClain that his concern was unfounded.[29] Stone contended that language defining "racketeering activity" as "a crime that is chargeable by indictment or information"[30] excluded misdemeanors.[31] Stone, however, was incorrect. Under Florida law, misdemeanors as well as felonies may be charged by indictment or information.[32] Hence, under the RICO statute, a wide variety of misdemeanors is included in "racketeering activity."[33]

Senator Harry Johnston argued that passing two bad checks should not constitute a "pattern of racketeering activity,"[34] but that passing bad checks would trigger RICO only if the illegal proceeds were used "for some purpose toward racketeering."[35] He misunderstood the provision addressing the use of illegal funds. For RICO to apply, the proceeds of racketeering must be used in some enterprise, but they need not be used "for some purpose toward racketeering." Under Florida's RICO statute, therefore, passing two bad checks does constitute a pattern of racketeering activity.[36]

After several senators expressed concerns that RICO could be easily abused,[37] the Judiciary-Criminal Committee[38] cut the bill nearly

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28. *Id.* at 501. *See, e.g.*, FLA. STAT. § 895.02(1)(a)3 (1987) (incorporating the entire chapter which relates to sales of securities). McClain's misunderstanding is all the more notable because the Tampa Republican is a lawyer. A. MORRIS, THE CLERK'S MANUAL 234 (1979).

29. Fla. S., Committee on Judiciary-Civil, tape recording of proceedings (May 20, 1977) (on file with committee), *cited in*, Note, *supra* note 27, at 502.

30. *See* FLA. STAT. § 895.02(1)(a) (1987).

31. Fla. S., Committee on Judiciary-Civil, tape recording of proceedings (May 20, 1977) (on file with committee), *cited in*, Note, *supra* note 27, at 502.

32. FLA. R. CRIM. P. 3.140(a)(2).

33. *See* FLA. STAT. § 895.02(1)(a) (1987). *See also infra* note 62 (listing the crimes incorporated in the definition of "racketeering" activity).

34. Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings (May 9, 1977) (on file with committee), *cited in*, Note, *supra* note 27, at 499. Johnston, a Democrat from West Palm Beach, is also a lawyer. A. MORRIS, THE CLERK'S MANUAL 239 (1983).

35. Fla. S., Committee on Judiciary-Criminal tape recording of proceedings (May 9, 1977) (on file with committee), *cited in*, Note, *supra* note 27, at 499.

36. FLA. STAT. §§ 895.02(1)(a)19, 895.02(4) (1987).

37. Senator Jack Gordon said RICO would "[condone] trampling on liberties of Americans under the guise of fighting organized crime." Florida Times-Union, May 27, 1977, at B2, col.

in half. While some crimes were deleted from the definition of "racketeering activity," many were left intact. The committee's editing defies logic. The committee ostensibly was paring down the definition to include only felonies and some selected misdemeanors which are commonly committed by organized crime operatives.[39] But thirteen entire chapters from Florida's criminal statutes were left in the definition.[40] It is incomprehensible that the committee would spend hours sorting through gambling and prostitution offenses yet allow misdemeanors involving beverage law enforcement, interest and usurious practicies, use of explosives, fraudulent practices, forgery, obstruction of justice, and drug abuse to remain.

In the years since RICO was passed, public clamor for effective crime control measures has increased. Today, one-third of Floridians think crime has increased in their neighborhoods.[41] Many think burgeoning crime is Florida's biggest problem.[42] In the 1986 statewide elections, candidates spent a great deal of time and money convincing voters they would show no mercy to drug peddlers, smugglers, or

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3. Gordon, a Democrat from Miami Beach, is a savings and loan executive, and not a lawyer. A. MORRIS, THE CLERK'S MANUAL 227 (1983). Senator Lori Wilson, a Democrat from Cocoa Beach and a non-lawyer, said:

> In my mind, and I think in the mind of the citizens, racketeering means organized crime, Mafia, whatever you want to call it. Now if I read your definition (of racketeering activity) here though, that's not what we're really thinking about . . . . [F]or instance, if you violate a Florida statute on profanity and you do it more than once . . . you're a racketeer. That doesn't follow to me. Prostitution, of course, that's illegal, but what if you're convicted twice or three or four times on a prostitution charge, does that make you a racketeer if you're working as a sole person?

Fla. S., tape recording of proceedings (May 4, 1977) (on file with secretary of Senate), *cited in*, Note, *supra* note 27, at 496.

38. FLA. S. JOUR. 326-27 (Reg. Sess. 1977).

39. Senator Edgar Dunn, a Democrat from Daytona Beach who was the prime sponsor of RICO, indicated in debate that "racketeering activity" should be limited to felonies. He then qualified that statement by saying, "We're including things that are used by organized crime, like prostitution and gambling in that context. Those really are the only exceptions." Fla. S., Committee on Judiciary-Criminal, tape recordings of proceedings (May 9, 1977) (on file with committee), *cited in*, Note, *supra* note 27, at 497. The Committee apparently relied on testimony by Professor G. Robert Blakey, one of the architects of the federal RICO statute, who identified prostitution, pornography, and gambling as areas in which organized crime might be operating. Fla. S., Committee on Judiciary-Criminal tape recording of proceedings (Mar. 8, 1977) (on file with committee), *cited in*, Note, *supra* note 27, at 499.

40. *Compare* Fla. CS for SB 960, § 2(1)(a) (1977) *with* FLA. STAT. § 895.02(1)(a) (1987).

41. Survey conducted in 1986 by Florida State University's Survey Research Center. Reported by the Associated Press, Mar. 28, 1986.

42. *Id.*

organized crime figures.[43] Candidates frequently mentioned Florida's RICO act, proudly describing it as the toughest in the nation.[44]

In Florida, the land of cocaine cowboys and "Miami Vice," the use of RICO as an effective crime-fighting measure should not be curtailed. Caution should be used, however, in citing the ill-conceived and poorly thought-out comments of legislators ten years ago to support even more expansive interpretations of RICO.

II. SCOPE

The federal RICO Act was intended to attack and mitigate the effects of racketeer infiltration of organizations affecting interstate commerce.[45] The RICO Act, however, has not been so confined in its application. Although various defense arguments contend that "organized crime" must be involved in a RICO violation, federal courts have held consistently that "organized crime" is not an essential ingredient.[46] In an effort to limit abuses in the federal RICO act, the United

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43. *See, e.g.*, Gainesville Sun, Nov. 2, 1986, at B3, col. 4. Candidates' past records on crime also became major campaign issues. On the television talk show, "Florida Forum," taped at Miami's WSVN-TV, opponent Lou Frey kept Bob Martinez on the defensive, highlighting a 24% jump in Tampa's crime rate in 1985, while Martinez was still mayor. At the same time the arrest rate declined, indicating Martinez had failed to come up with effective crime-fighting programs, Frey said. Gainesville Sun, Sept. 27, at A1, col. 5.

44. The RICO issue apparently was raised by Dunn, who was running for attorney general in 1986. *See* Bizzaro, *In Runoff for Attorney General, the Issue is Experience*, Gainesville Sun, Sept. 27, 1986, at C1, col. 1. He frequently boasted of his role in passing the nation's toughest RICO law, and one television commercial showed him accompanying law enforcement officers raiding what appeared to be a crack house.

45. Statement of Findings and Purpose of the Organized Crime Control Act, 84 Stat. 922-23 (1970).

46. *See, e.g.*, United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), *aff'd in part and vacated in part*, 591 F.2d 1347 (4th Cir.), *aff'd en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). The defendant, the governor of Maryland, argued the statute was meant to apply only to situations in which members of traditional organized crime used criminal methods to subvert legitimate businesses or organizations. The court concluded the legislative history of the act shows Congress had taken pains to make a conviction dependent on the behavior involved, rather than the names or associations of the participants. *Id.* at 1018-19. *See also* United States v. Campanale, 518 F.2d 352, 363-64 (9th Cir. 1975) ("The words of the statute are general. They contain no restriction to particular persons."), *cert. denied*, 423 U.S. 1050 (1976); United States v. Amato, 367 F. Supp. 547, 548 (S.D.N.Y. 1973). *But see* Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (limiting RICO to defendants involved in organized crime and holding RICO not applicable to a defendant in a civil action against a telephone answering service in which it was claimed rates were increased arbitrarily in violation of RICO). *Barr* has been criticized by commentators. *See, e.g.*, Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1029 n.91 (1980).

States Justice Department has established a centralized authorization system[47] to protect the "new darling of the prosecutor's nursery."[48]

In addition, the Florida RICO Act has found little application to the traditional organized crime area.[49] In 1985, a Florida appellate court determined that organized crime was not essential to a RICO violation.[50] However, little uniformity or criteria exists in the application of the Florida RICO Act.[51] Because of the traditional independence of Florida's twenty judicial circuits, the Florida RICO Act has been

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47. Atkinson, *supra* note 5, at 16.

48. Judge Learned Hand described conspiracy as the "darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). If Judge Hand were alive today, he might be moved to comment "that the fickle fancy of the prosecutor has turned to RICO." Blakey & Gettings, *supra* note 46, at 1011. Judge Hand's phrase has been updated by others. Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 176 n.52 (1980).

49. *See* Trombley & Alcott, *Racketeer Influenced and Corrupt Organization Act*, in FLORIDA ANTI-FENCING AND RICO ACTS § 7.8 (1983). *See also* GOVERNOR'S COUNCIL ON ORGANIZED CRIME 1983 ANNUAL REPORT 9-17 (1983) (concluding Florida has "a significant organized crime problem"). Of the 27 La Cosa Nostra families in the United States, 16 families are represented in Florida by 438 members or associates. *Id.* at 16-17. The report describes an astonishing variety of criminal activities that these families are involved in, but reports few uses of the Florida RICO statute. *Id.* The majority of the reported cases have involved drug offenses. *See, e.g.*, Dorsey v. State, 402 So. 2d 1178 (Fla. 1981) (unspecified "narcotics ring"); State v. Russo, 493 So. 2d 504 (Fla. 4th D.C.A. 1986) (trafficking in marijuana); Carroll v. State, 459 So. 2d 368 (5th D.C.A. 1984) (trafficking in heroin and sale of cocaine), *review denied*, 464 So. 2d 554 (Fla. 1985); Butler v. State, 456 So. 2d 545 (Fla. 2d D.C.A. 1984) (trafficking in marijuana); Di Sangro v. State, 422 So. 2d 14 (4th D.C.A. 1982) (sale of the tranquilizer Valium), *review denied*, 434 So. 2d 887 (Fla. 1983); Leonard Long v. State, 421 So. 2d 1089 (Fla. 2d D.C.A. 1982) (unspecified controlled substances); Charles Long v. State, 418 So. 2d 1264 (Fla. 2d D.C.A. 1982) (delivery of methaquolone and conspiracy to traffic in cocaine, methaquolone, and marijuana); Beatty v. State, 418 So. 2d 271 (Fla. 2d D.C.A. 1982) (trafficking in marijuana).

50. Banderas v. Banco Cent. del Ecuador, 461 So. 2d 265 (Fla. 3d D.C.A. 1985), the first Florida case to address the issue of a nexus to organized crime, held that no connection to organized crime is required. *Id.* at 269. In two earlier cases, appellants had attempted to attack Florida's RICO statute as overbroad because its list of predicate offenses includes misdemeanors unrelated to organized crime. However, appellants in both cases had been charged with serious crimes and the Florida Supreme Court ruled that they lacked standing to raise the argument. The court did not reach the question of whether a connection to organized crime is necessary. *Id.* at 268. *See* Carlson v. State, 405 So. 2d 173 (Fla. 1981); Moorehead v. State, 383 So. 2d 629 (Fla. 1980). The *Banderas* court relied on a statement by the Florida Supreme Court in Bowden v. State, 402 So. 2d 1173 (Fla. 1981), that the appropriate target of a RICO prosecution is the "professional or career criminal." *Id.* at 1174. The *Banderas* court noted that the *Bowden* court could have used the more restrictive term "member of organized crime" if it had meant to limit the targets of RICO. *Banderas*, 461 So. 2d at 269.

51. Trombley & Alcott, *supra* note 49, at § 7.8.

applied to a host of criminal activities as law enforcement agents seek to experiment with their new weapon in the war on crime.[52]

Although the Florida Act was patterned after the federal legislation,[53] it is significantly broader in coverage, incorporating far more crimes.[54] Several of its definitions were clarified in response to federal court decisions and reach more types of organizations and activities.[55] While the federal RICO statute has been criticized for being overbroad and providing too much potential for prosecutorial abuse,[56] the Florida RICO law presents far greater dangers.

III. DEFINITIONS AND ELEMENTS: "RACKETEERING ACTIVITY"

The breadth of the federal definition of "racketeering activity" pales in comparison to the Florida definition. The federal RICO statute incorporates twenty-four separate types of federal crimes and eight types of state felonies in its definition of "racketeering activities."[57] Only three of these offenses are misdemeanors, two involving bankruptcy fraud[58] and another involving certain payments and loans to labor organizations.[59] Although the federal statute has been criticized as being too broad because it includes minor crimes,[60] Florida's statute covers a far greater number of crimes, many of which are misdemeanors.

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52. *Id.*

53. *See supra* note 3.

54. *See infra* notes 61-67 and accompanying text.

55. *See infra* notes 61-67 & 175 and accompanying text; *see also* Dorsey v. State, 402 So. 2d 1178, 1181 (Fla. 1981) (legislature's specific inclusion of illicit enterprises is intended to avoid the dispute over construction which plagued the federal courts); Moorehead v. State, 383 So. 2d 629, 631 (Fla. 1980) (legislature incorporated federal case law by defining "pattern of racketeering activity" to include interrelated incidents that are not isolated.). *Id.* Florida's improvements were adopted by some other states. *See, e.g.*, Frohnmayer, *RICO: Oregon's Message to Organized Crime*, 18 WILLAMETTE L.J. 1, 7-10 (1982) (describing improvements in Florida's RICO statute that were incorporated into Oregon's RICO Act).

56. *See, e.g.*, Atkinson, *supra* note 5, at 1-2; Tarlow, *supra* note 48, at 176 n.52; Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192, 194-95 (1975). *See also* United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). The Second Circuit noted that "the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended." *Id.* at 395-96.

57. *See* 18 U.S.C. § 1961(1) (1982) (defining "racketeering activity").

58. *Id.* §§ 154, 155.

59. 29 U.S.C. § 186 (1982).

60. *See supra* note 56.

Florida's definition of "racketeering activity" incorporates all the crimes listed in the federal RICO statute,[61] and also includes prohibited activities from seventeen various chapters and thirty sections of the Florida Statutes.[62] Included are such relatively minor offenses as cutting off the ears of hogs, sheep, or cattle before they have been dressed,[63] and storing alcoholic beverages in a place other than a building or room approved by the Division of Alcoholic Beverages and Tobacco.[64]

The number of separate crimes subject to Florida's RICO statute must be increased by including attempts,[65] conspiracies[66] and solicitation, coercion, or intimidation of other persons to commit one of the listed crimes.[67] This provision of Florida's RICO statute creates some difficult conceptual problems,[68] such as conspiracies to conspire and attempts to attempt. The problem arises when a charge is brought under the Florida RICO conspiracy provision,[69] which can be premised on a predicated "racketeering activity" that is itself a conspiracy.[70] In

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61. *See* FLA. STAT. § 895.02(1)(b) (1987). *See also* Rogers v. State, 487 So. 2d 57, 58 (Fla. 3d D.C.A. 1986) (holding that enforcement of the Florida statute, which incorporates the federal offense of mail fraud, does not impair the constitutional supremacy of federal law).

62. FLA. STAT. § 895.02(1)(a) (1987), which incorporates by reference § 210.18 (evasion of payment of cigarette taxes); § 409.325 (public assistance fraud); Chapter 517 (sales of securities); §§ 550.24, 550.35-.36 (dog racing, horse racing, and jai alai frontons); § 551.09 (jai alai frontons); ch. 552 (manufacture, distribution, and use of explosives); ch. 562 (beverage laws); § 655.50 (failure to report currency transactions); ch. 687 (usury); §§ 721.08-.09, .13 (real estate time-sharing plans); ch. 782 (homicide); ch. 784 (assault and battery); ch. 787 (kidnapping); ch. 790 (weapons); §§ 796.01, 796.03-.05, .07 (prostitution); ch. 806 (arson); Chapter 812 (theft, robbery, and related crimes); ch. 815 (computer-related crimes); ch. 817 (fraudulent practices, false pretenses, fraud generally, and credit card crimes); § 827.071 (commercial sexual exploitation of children); ch. 831 (forgery and counterfeiting); ch. 832 (worthless checks); § 836.05 (extortion); ch. 837 (perjury); ch. 838 (bribery and misuse of public office); ch. 843 (obstruction of justice); §§ 847.011-.013, .06-.07 (obscene literature and profanity); §§ 849.09, .14-.15, .23, .25 (gambling); ch. 893 (drug abuse prevention and control); § 914.23 (retaliation against witness, victim, or informant); §§ 918.12-.13 (tampering with jurors, evidence, and witnesses).

63. FLA. STAT. § 817.27 (1987), as prescribed in *id.* § 895.02(1)(a)17.

64. *Id.* § 562.03, as prescribed in *id.* § 895.02(1)(a)7.

65. *Id.* § 895.02(1). *See also id.* § 895.03(4) which makes it unlawful to "conspire or endeavor to violate" any of the substantive RICO provisions.

66. *Id.* §§ 895.02(1), .03(4). *But see* United States v. Weisman, 624 F.2d 1118 (2d Cir.) (conspiracy may be a predicate offense), *cert. denied*, 449 U.S. 871 (1980).

67. FLA. STAT. § 895.02(1) (1987).

68. A.B.A. SEC. CRIM. JUST., REPORT TO THE HOUSE OF DELEGATES 10 (1982) (conspiracy to conspire described as an "illogical concept").

69. FLA. STAT. § 895.03(4) (1987).

70. *Id.* § 895.02(1).

contrast, courts have construed the federal statute to prohibit prosecution for less than actual commission of the specified crimes.[71]

Some federal courts, however, have experienced little difficulty with the idea of a conspiracy to conspire, even though the federal RICO statute does not, unlike its Florida counterpart, expressly create such a crime.[72] In *United States v. Weisman*,[73] the Second Circuit held that conspiracy can be a predicate act of racketeering under one subsection of the definition of "racketeering activity."[74] Section 1961(1)(D) addresses "any offense involving bankruptcy fraud . . . punishable under any law of the United States."[75] The court reasoned that the "any offense" language, which is markedly different from its companion subsections,[76] is broad enough on its face to include conspiracies.[77] The court interpreted the differences in language as an attempt to restrict the conspiracies chargeable as predicate offenses to those listed in section 1961(1)(D).[78] The court rejected the defendant's argument that this reading of the statute would permit the commission of a single substantive offense to result in a RICO violation if a conspiracy to commit that offense were also charged as a predicate act of racketeering.[79]

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71. *See, e.g.*, United States v. Parness, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); United States v. Fineman, 434 F. Supp. 189, 194 (E.D. Pa. 1977); United States v. Amato, 367 F. Supp. 547, 548 (S.D.N.Y. 1973).

72. *Compare* 18 U.S.C. § 1961(1) (1982) *with* FLA. STAT. § 895.02(1) (1987).

73. 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). *See also* United States v. Joseph, 781 F.2d 549 (6th Cir. 1986); United States v. Licavoli, 725 F.2d 1040 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984).

74. *Weisman*, 624 F.2d at 1123. However, the conspiracy counts were not essential to defendant's RICO conviction. He also was charged with 10 other predicate acts of racketeering activity. *Id.* at 1124.

75. 18 U.S.C. § 1961(1)(D) (1982) (emphasis added).

76. *Id.* § 1961(1)(A). This section addresses "any act or threat involving" a variety of crimes "chargeable under state law and punishable by imprisonment for more than one year." *Id.* Other sections use the language "any act which is indictable under" listed provisions of the United States Code. *Id.* §§ 1961(1)(B) and (C).

77. *Weisman*, 624 F.2d at 1124.

78. *Id.* In United States v. Joseph, 781 F.2d 549 (6th Cir. 1986), the Sixth Circuit used similar reasoning to find that conspiracy to gamble could be a predicate offense for a RICO conspiracy. The court noted that conspiracy to gamble is "an act . . . involving . . . gambling" and thus falls within the § 1961(1)(A) definition of "racketeering activity." *Id.* at 555.

79. *Weisman*, 624 F.2d at 1123. Defendant also argued that violations of 18 U.S.C. § 371, the general conspiracy statute, were not listed as RICO predicate offenses, and pointed out that earlier versions of the bill that ultimately became RICO had included conspiracy but the statute as enacted did not. *Weisman*, 624 F.2d at 1123. The court brushed aside these arguments. *Id.* at 1124.

Curiously enough, a Florida court has refused to allow a RICO conviction for a single substantive offense and a conspiracy to commit that offense. This decision, however, was grounded on the definition of a "pattern of racketeering activity."[80] In Florida, a single act and a conspiracy to perform that act do not constitute a RICO pattern. However, this result begs the conceptual question of a conspiracy to conspire.

Florida's courts have not directly addressed the breadth of the state's RICO definition of "racketeering activity." When two defendants[81] attempted to challenge the law by arguing it was unconstitutionally overbroad, the Florida Supreme Court held that the defendants did not have standing to raise the questions because they were charged with serious crimes[82] clearly within the purview of the RICO act.

Nevertheless, Florida's definition of "racketeering activity" is so broad that a person conceivably can be prosecuted for violating RICO when the racketeering activity consists of a series of petty thefts, worthless checks, or alcohol sales to minors. The problem of the breadth of the statute is exacerbated by the consistent refusals of both federal[83] and Florida[84] to limit RICO's scope to defendants involved in organized crime.[85] This is particularly troubling in light of

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80. *See infra* note 132 and accompanying text.

81. Carlson v. State, 405 So. 2d 173 (Fla. 1981); Moorehead v. State, 383 So. 2d 629 (Fla. 1980).

82. *Carlson*, 405 So. 2d at 175 (maintaining a house of prostitution); *Moorehead*, 383 So. 2d at 631 (five auto thefts within two months).

83. *See, e.g.*, United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); United States v. Mandel, 415 F. Supp. 997, 1018 (D. Md. 1976), *aff'd in part and vacated in part*, 591 F.2d 1347 (4th Cir.), *aff'd en banc*, 602 F.2d 653 (1979), *cert. denied*, 445 U.S. 961 (1980); United States v. Amato, 367 F. Supp. 547, 548 (S.D.N.Y. 1973). Few cases even indicate whether the defendants are members of organized crime.

84. Banderas v. Banco Cent. del Ecuador, 461 So. 2d 265, 269-70 (Fla. 3d D.C.A. 1985).

85. *See, e.g.*, United States v. Aleman, 609 F.2d 298, 302-03 (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); United States v. Mandel, 415 F. Supp. 997, 1018 (D. Md. 1976), *aff'd in part and vacated in part*, 591 F.2d 1347 (4th Cir.) *aff'd en banc*, 602 F.2d 653 (1979), *cert. denied*, 445 U.S. 961 (1980). This reading is persuasively supported by Congress' rejection of proposals to incorporate a definition of organized crime into the RICO statute. *See* 116 CONG. REC. 35344 (1970). The Senate rejected, by an 11-62 roll call vote, an amendment offered by Senator Edward Kennedy (D-Mass.) to limit the extended prison terms authorized by the RICO provision to persons convicted of certain organized criminal activity. Kennedy warned that the bill, without his amendment, would allow extended sentences to apply to persons convicted of any form of conspiracy. CONGRESSIONAL QUARTERLY, INC., 1970 CQ ALMANAC 549. By voice vote, the House refused to include in the bill a definition of the Mafia and La Cosa Nostra as organized criminal groups. This amendment, proposed by Representative Mario Biaggi (D-

the committee discussions and the floor debate leading to the passage of Florida's RICO statute, which indicate the legislature intended to confine the definition of "racketeering" activity primarily to felonies. Legislative history suggests that the legislature inadvertently made RICO even broader than it intended.[86]

IV. "PATTERN OF RACKETEERING ACTIVITY"

The concept of a "pattern of racketeering activity" appears in both the federal[87] and Florida[88] RICO acts. The federal statute provides only that " 'pattern of racketeering activity' requires at least two acts of racketeering activity."[89] Some courts and commentators have contended that this provision does not define "pattern" but rather explains how to prove it.[90] Some federal courts have read this provision to call

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N.Y.), would have made membership in either group a federal crime, and it also would have made false accusation of such membership libel. *Id.* at 553. Ironically, senators and representatives who opposed RICO provided some of the most explicit legislative history for the proposition that RICO is not limited to organized crime. Atkinson, *supra* note 5, at 10. Senators Edward Kennedy (D-Mass.) and Philip Hart (D-Mich.) said in their minority statement: "[T]he reach of this bill goes beyond organized crime activity . . . ." S. REP. No. 617, 91st Cong., 1st Sess. 215 (1969). Representatives John Conyers (D-Mich.), Abner Mikva (D-Ill.), and William Ryan (D-N.Y.), in opposing the House bill in committee, said, "Granted we may welcome an organized crime member's conviction, but the titles make no discreet segregation of mobsters. It is a tool to be employed for all." H.R. REP. No. 1549, 91st Cong., 2d Sess. 187 (1970). *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939) (statute penalizing "gangsters" is so vague and uncertain that it violates the due process clause of the fourteenth amendment).

86. Note, *supra* note 27, at 495.

87. 18 U.S.C. § 1961(5) (1982). For federal prosecution, any combination of racketeering acts can constitute a pattern, including a pattern limited to state offenses. *Id.* § 1961(1) and (5). *See, e.g.*, United States v. Frumento, 563 F.2d 1083, 1087 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); United States v. Brown, 555 F.2d 407, 416 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

88. FLA. STAT. § 895.02(4) (1987). It appears that a pattern of only federal offenses violates the Florida RICO Act because of the incorporation of federal offenses in the definition of "racketeering activity." *Id.* § 895.02(1)(b). *See* Banderas v. Banco Cent. del Ecuador, 461 So. 2d 265, 268 (Fla. 3d D.C.A. 1985) (several federal offenses, including mail and wire fraud, were alleged as racketeering acts).

89. 18 U.S.C. § 1961(5) (1986) (adding a statute of limitations).

90. *E.g.*, United States v. Ladmer, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977) (the court pointed out that rather than define "pattern," § 1961(5) explains how to prove it). *See* Tarlow, *supra* note 48, at 210 n.230 (contending that "pattern of racketeering activity" is vulnerable to constitutional challenges on vagueness grounds). *See also* United States v. Field, 432 F. Supp. 55, 60-61 (S.D.N.Y. 1977) (Congress may define "pattern" as commission of two acts within a specified period even though the acts would not constitute a pattern as the term is usually understood), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978). *But see* United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975) (If "pattern of racketeering activity" were undefined, the term would be unmanageable. However, the court asserted that any am-

for more than a simple showing that two acts of racketeering activity occurred. These courts required that the activities be connected with each other by some common scheme, plan, or motive.[91] Legislative history appears to support this interpretation.[92] Courts have found patterns where the separate acts have had similar purposes,[93] results,[94] participants,[95] victims,[96] or methods of commission.[97] In addition, the

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biguity was cured by definitions of "pattern" and "racketeering activity" in § 1961.), *cert denied*, 423 U.S. 1050 (1976).

91. *See, e.g.*, United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). However, the court has since receded from that construction of "pattern." *See* United States v. DePalma, 461 F. Supp. 778, 782 (S.D.N.Y. 1978) (finding that the statute contains no requirement of "relatedness" and holding that "[t]he only relation it deemed necessary for the two predicate acts is that they both be in the conduct of the affairs of the same enterprise"). *See also* United States v. Weisman, 624 F.2d 1118, 1122 (2d Cir.) (holding that the enterprise itself supplies "a significant unifying link" between the predicate offenses that may constitute a "pattern"), *cert. denied*, 449 U.S. 871 (1980). *See also* United States v. Weatherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978) (two related acts — not two separate but related schemes — must be shown); United States v. Parness, 503 F.2d 430 (2d Cir. 1974) (several separate but related acts part of a single scheme to take over a hotel), *cert. denied*, 419 U.S. 1105 (1975). *Parness* has been criticized as "an example of the sweeping nature and potential abuse of RICO." Atkinson, *supra* note 5, at 11-12 ("RICO is too heavy-handed a tool for enforcing the law against a single criminal episode.").

92. The Senate Report on RICO (Organized Crime Control Act of 1969) explained, "The target of Title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combine to produce a pattern." S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969).

93. United States v. DiFrancesco, 604 F.2d 769 (2d Cir. 1979) (activity included multiple acts of arson and use of mails to defraud insurance companies), *rev'd on other grounds*, 449 U.S. 117 (1980); United States v. Clemones, 577 F.2d 1247 (5th Cir. 1978) (activity included interstate transportation of prostitutes and establishment of prostitution business), *cert. denied*, 445 U.S. 927 (1980); United States v. Burnsed, 556 F.2d 882 (4th Cir. 1977) (police accepted money and services of prostitutes in return for protection of illegally operated clubs and gambling establishments), *cert. denied*, 434 U.S. 1077 (1978).

94. United States v. Nacrelli, 468 F. Supp. 241 (E.D. Pa. 1979) (mayor involved in protection racket for gambling activities), *aff'd*, 614 F.2d 771 (3d Cir. 1980).

95. United States v. Morris, 532 F.2d 436 (5th Cir. 1976) (defendants engaged in several card games to defraud tourists over 19-month period).

96. United States v. Chovanec, 467 F. Supp. 41 (S.D.N.Y. 1979) (one victim defrauded six times).

97. United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) (five acts of mail fraud); United States v. Kaye, 556 F.2d 855 (7th Cir. 1977) (union steward received money from employer without performing the duties of union steward for four and one half years), *cert. denied*, 434 U.S. 921 (1977); States v. Brown, 555 F.2d 407 (5th Cir. 1977) (repeated solicitation and acceptance of bribes to protect gambling, prostitution, and illicit manufacture, distribution and sale of whiskey), *cert. denied*, 435 U.S. 904 (1978); United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973) (officials of trade union accepted payments from employers), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

affairs of the enterprise must be conducted "through" the racketeering activity.[98]

The Florida statute, however, provides a more detailed definition by requiring that the two incidents "have the same or similar intents, results, accomplices, victims, or methods of commission or . . . otherwise [be] interrelated by distinguishing characteristics and . . . not isolated incidents."[99] In *Moorehead v. State*,[100] the first RICO case to reach the Florida Supreme Court, the definition of "pattern of racketeering activity" was held to be not unconstitutionally vague.[101]

In *Moorehead*, the appellant argued that persons of ordinary intelligence could not determine when repeated criminal conduct became interrelated.[102] The court noted that federal courts have upheld the less explicit federal definition of a "pattern" against claims of constitutional vagueness by implying a requirement that the acts not be iso-

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98. *See, e.g.*, United States v. Zielie, 734 F.2d 1447, 1463 (11th Cir. 1984) (distribution of marijuana through ongoing organization satisfied "enterprize" requirement) *cert. denied*, 469 U.S. 1216 (1985); United States v. Kovic, 684 F.2d 512 (7th Cir.) (Chicago Police Department can be both the enterprise whose affairs are conducted through a pattern of racketeering activity and the victim of the racketeering activity), *cert. denied*, 459 U.S. 972 (1982); United States v. Mandel, 591 F.2d 1347, 1375 (4th Cir.) ("Without the word 'through,' anyone who used income from a legitimate business to participate in racketeering activity would be guilty of a violation of § 1962(c)."), *aff'd en banc* 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 495 U. S. 961 (1980); United States v. Neron, 563 F.2d 836 (7th Cir. 1977) (RICO indictment dismissed when no link was shown between gambling and mobile home business), *cert. denied*, 435 U.S. 951 (1978). *See generally* Note, *The RICO Nexus Requirement: A "Flexible Linkage,"* 83 MICH. L. REV. 571 (1984) (defines "nexus requirement" of § 1962(c) as the word "through," focusing on the extent that the defendant utilizes the "organizational structure" of the enterprise).

99. FLA. STAT. § 895.02(4) (1987). This language comes from a federal definition of "pattern of criminal conduct" in 18 U.S.C. § 3575, which was enacted, along with the RICO provisions, as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947. This definition was cited in United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), which construed "pattern" as requiring more than accidental or unrelated criminal acts. *Id.* at 613. *But see* United States v. Weisman, 624 F.2d 1118 (2d Cir.) (rejecting the 18 U.S.C. § 3575(e) analogy), *cert. denied*, 449 U.S. 871 (1980). The *Weisman* court noted that when Congress chooses to include language in one statute and not another, it does not intend that the language apply to the statute where the language was not used. *Weisman*, 624 F.2d at 1122-23. *See* General Elec. Co. v. Southern Constr. Co., 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). *See also* Comment, *Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in Its Interpretation*, 27 DE PAUL L. REV. 89, 105-07 (1977) (criticizing *Stofsky*).

100. 383 So. 2d 629 (Fla. 1980).

101. *Id.* at 631.

102. *Id.* at 630. A statute is void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

lated.[103] The Supreme Court recognized that the Florida Legislature had clarified the definition of a "pattern" by inserting a requirement that the predicate offenses be interrelated and not isolated.[104] According to the court, this additional language prevented the statute from being unconstitutionally vague.[105]

One year later, in *Bowden v. State*,[106] the Florida Supreme Court stated that similarity and interrelatedness should be stressed in determining whether a "pattern" is present.[107] However, the court went beyond the statutory definition and held that a "pattern" requires proof that a "continuity of criminal activity" exists.[108] The court asserted that requiring continuity as well as similarity and interrelatedness ensures that targets of RICO prosecutions will be career criminals and not non-racketeers who have committed relatively minor crimes.[109]

The continuity analysis, however, does not necessarily accomplish this goal. For example, it does not preclude the state from compiling a number of similar crimes committed by one person and then prosecuting the individual as an illegal enterprise.[110] The continuity analysis also provides little help when prosecuting a person charged with two racketeering acts arising from the same criminal transaction.[111] Since

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103. *See Moorehead*, 383 So. 2d at 630 (citing United States v. Hawes, 529 F.2d 472 (5th Cir. 1976)). *See also* United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

104. *Moorehead*, 383 So. 2d at 631. The court also contended the Florida Legislature "incorporated the federal case law" by clarifying the definition. *Id.*

105. *Id.*

106. 402 So. 2d 1173 (Fla. 1981).

107. *Id.* at 1174. The *Bowden* court cited United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), even though it was no longer precedent in the Second Circuit by the time *Bowden* was decided. *See supra* note 91.

108. *Bowden*, 402 So. 2d at 1174.

109. *Id.* This determination of the proper targets of RICO prosecutions has been cited by lower courts to support their interpretations of other RICO provisions. *See, e.g.*, State v. Russo, 493 So. 2d 504, 505 (Fla. 4th D.C.A. 1986) (discussing Florida's use of "incidents" rather than "acts" in definition of "pattern of racketeering activity"); Banderas v. Banco Cent. del Ecuador, 461 So. 2d 265, 268-69 (Fla. 3d D.C.A. 1985) (holding that nexus to "organized crime" is not required).

110. *See* State v. Bowen, 413 So. 2d 798 (Fla. 1st D.C.A. 1982) (holding that RICO applies to an individual who purchased gold and silver on three separate occasions because he could be viewed as conducting a sole proprietorship in a pattern of racketeering activity). *See also* Tarlow, *supra* note 48, at 216 ("[t]he continuity analysis would not remedy this problem because it does not require a relationship between the acts except that the racketeering activity be of sufficient quantity and character to pose a threat of continuing activity").

111. *See, e.g.*, State v. Russo, 493 So. 2d 504 (4th D.C.A. 1986) (a single transaction situation, but decided on other grounds), *review denied*, 504 So. 2d 768 (Fla. 1987). *See also*

the analysis does not require a relationship between the acts except that they pose a threat of continuing criminal activity, the defendant can argue the acts were merely sporadic.[112] Consequently, the possibility remains that Florida's RICO statute may be applied incorrectly to non-racketeers who have committed only relatively minor crimes such as possession of explosives without a permit[113] or improper storage of alcoholic beverages.[114]

In two recent civil RICO cases,[115] Florida courts held that the defendants' actions did not constitute a "pattern of racketeering activity." However, the courts did not specify the basis of their holdings. Florida's requirements that the predicate offenses be interrelated and not isolated[116] apparently were the basis for dismissal of RICO allegations in *Gordon v. Etue, Wardlow & Co.*,[117] which held that an isolated incident of an improper audit of financial statements did not establish a pattern of racketeering activity.[118] The basis of the court's decision

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United States v. Weisman, 624 F.2d 1118, 1123 (2d Cir.) (similar facts to *Russo*, decided on different grounds), *cert. denied*, 449 U.S. 871 (1980); United States v. Moeller, 402 F. Supp. 49, 57 (D. Conn. 1975) (emphasizing the "continuity" element in the legislative history to support its criticism of single transaction patterns). *But see* United States v. Parness, 503 F.2d 430 (2d Cir. 1974) (upholding single transaction patterns), *cert. denied*, 419 U.S. 1105 (1975). However, the *Parness* court did acknowledge that some ambiguity might exist. The defendant was charged with multiple violations of 18 U.S.C. § 2314 (1976) based on acts of interstate transportation in furtherance of a scheme to defraud. He argued the "pattern" element was unconstitutionally vague because he could not know whether the RICO requirement of two racketeering acts referred to two fraudulent schemes or two acts of transportation during a single scheme. While noting that in some circumstances application of RICO might be ambiguous, the court said its application to this case was clear and affirmed defendant's conviction. *Id.* at 442.

112. *See* Tarlow, *supra* note 48, at 218-19 (discussing the "continuity" requirement in single transaction situations). *See also* Atkinson, *supra* note 5, at 12 (endorsing the view of single transaction patterns taken in United States v. Moeller, 402 F. Supp. 49 (D. Conn. 1975)).

113. FLA. STAT. § 552.101 (1987), as prescribed in *id.* § 895.02(1)(a)6.

114. *Id.* § 562.03, as prescribed in *id.* § 895.02(1)(a)7.

115. Gordon v. Etue, Wardlaw & Co., 511 So. 2d 384 (Fla. 1st D.C.A. 1987); Finkelstein v. Southeast Bank, 490 So. 2d 976 (Fla. 4th D.C.A. 1986). *But see* Banderas v. Banco Cent. del Ecuador, 461 So. 2d 265 (Fla. 3d D.C.A. 1985) (holding that defendants' "well organized, on-going, systematic, criminal scheme . . . to defraud the government of Ecuador" did satisfy the "pattern" requirement).

116. *See* FLA. STAT. § 895.02(4) (1987).

117. 511 So. 2d 384, 388 (Fla. 1st D.C.A. 1987). In addition to the RICO allegations, plaintiffs alleged common-law fraud, negligence, and violations of the Florida Securities Act. *Id.* at 385. The RICO allegations were based on an allegedly improper audit of the financial statements of a company in which plaintiffs purchased stock. *Id.* at 386. The court held that allegations against the defendant certified public accountants "at best establish . . . an isolated incident of an improper audit." *Id.* at 388. The court distinguished *Banderas* as demonstrating a much higher level of racketeering. *Id.*

118. *Id.*

in *Finkelstein v. Southeast Bank*[119] was not so apparent.[120] The case involved a "boiler room" operation engaged in gem sales. Proceeds from the sales were deposited in the Finkelstein family trust.[121] In concluding that Margaret Finkelstein's actions did not constitute a "pattern of racketeering activity,"[122] the court overlooked the provision applying the RICO law to both indirect and direct acts in furtherance of an enterprise conducted through a "pattern of racketeering activity."[123] The evidence clearly established that Margaret Finkelstein knowingly and willfully received checks from the accounts of companies that defrauded Southeast Bank[124] and deposited those checks in the trust, which was used to protect and conceal the fraudulent scheme.[125] Each time she deposited a check, she committeed an act of racketeering. The *Finkelstein* decision appears to conflict with *Banderas v. Banco Centro del Ecuador*,[126] however, the *Finkelstein* decision may be explainable under the rationale of *State v. Russo*,[127] in which the same court held that two acts which are part of the same transaction constitute only one "incident of racketeering."[128]

V. "INCIDENTS" OR "ACTS"

The federal RICO statute requires two "acts of racketeering activity,"[129] while the Florida law refers to two "incidents of racketeering conduct."[130] One Florida court has perceived this as an "important difference" between the two laws.[131]

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119. 490 So. 2d 976 (Fla. 4th D.C.A. 1986).

120. The opinion quotes the definition of "pattern" in FLA. STAT. § 895.02(4) and then simply states that the evidence in the record does not satisfy that section. *Id.* at 981.

121. *Id.* at 978. Credit card charges for the gem sales were processed at Southeast Bank, which immediately credited the Finkelsteins. When the cardholders complained, Southeast issued credits to their accounts and filed suit against the Paul Finkelstein and other principals in the boiler room operation. Margaret Finkelstein, Paul's wife, was added as a defendant and accused of associating with the principals to sequester the proceeds from the gem sales and the credit card operations. Margaret Finkelstein appealed from an order granting a temporary injunction on disposal of the funds in the Finkelstein family trust and the reported opinion reverses that order. *Id.* at 978-79.

122. *Id.* at 981.

123. *See* FLA. STAT. § 895.03(1) (1987).

124. *See* Southeast Bank v. Thompson & Myers, Inc., No. 84-8712 (CB) (Fla. Cir. Ct., Feb. 27, 1985) (order granting temporary injunction).

125. Finkelstein v. Southeast Bank, No. 85-759 at 8 (Fla. 4th D.C.A. 1986) (appellee's motion for rehearing).

126. 461 So. 2d 265 (Fla. 3d D.C.A. 1985).

127. 493 So. 2d 504 (Fla. 4th D.C.A. 1986). *See infra* notes 129-37 and accompanying text.

128. 493 So. 2d at 505.

129. 18 U.S.C. § 1961(5) (1986).

130. FLA. STAT. § 895.02(4) (1987).

In *State v. Russo*,[132] the Fourth District Court of Appeal interpreted this language to indicate legislative intent to narrow the application of Florida RICO.[133] The court rejected the state's argument, apparently by analogy to double jeopardy principles,[134] that two acts which are part of the same transaction can qualify as separate incidents. Instead, the court viewed trafficking in marijuana and conspiracy to traffic in marijuana as only one "incident."[135]

The *Russo* court determined that the use of "incidents" rather than "acts" narrowed the scope of Florida's RICO statute. This conclusion is suspect since other differences between the two statutes suggest the legislature intended to broaden its law.[136] However, this interpretation does help ensure that only career criminals will be targets of RICO prosecutions.[137]

VI. STATUTE OF LIMITATIONS

A statute of limitations is incorporated in both the federal and Florida definitions of a "pattern of racketeering activity." Under the federal law, one of the predicate acts of racketeering must have occurred after October 15, 1970, the effective date of the statute. In addition, the last predicate act must have occurred within ten years after commission of a prior act of racketeering.[138]

The Florida statute, however, contains a shorter time period. One "incident of racketeering conduct" must have occurred after October

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131. The court found a significant difference between "act" and "incident." The Florida statute's use of the term "racketeering conduct" instead of "racketeering activity" appears to be an inadvertent mistake. The original draft of the bill had used the term "pattern of racketeering conduct" as a heading in its definitional section. This was amended to "pattern of racketeering activity" because the bill defined "racketeering activity," not "racketeering conduct." However, the words "racketeering conduct" were left in the definition itself. FLA. H.R. J. 848 (Reg. Sess. 1977). *See also* Note, *supra* note 27, at 502 n.140.

132. 493 So. 2d 504 (Fla. 4th D.C.A. 1986).

133. *Id.* at 505.

134. The state argued that each alleged offense required "proof of an element that the other does not." *Id.* This language comes from Blockburger v. United States, 284 U.S. 299, 304 (1932), which established the test for determining whether two crimes constitute "the same offense" for double jeopardy purposes.

135. *Russo*, 493 So. 2d at 505. The court affirmed the dismissal of the indictment as legally insufficient. *Id.*

136. *See supra* notes 61-67 & *infra* notes 175-78 and accompanying text; *see also supra* note 44 (Florida's RICO Act described as toughest in the nation).

137. The *Russo* court also noted its interpretation is consistent with the Florida Supreme Court's determination that the proper targets of RICO prosecutions are career criminals. *Russo*, 493 So. 2d at 505 (citing Bowden v. State, 402 So. 2d 1173.(Fla. 1981)). *See supra* note 109.

138. 18 U.S.C. § 1961(5) (1986).

1, 1977, with the last incident occurring within five years of the prior act.[139] This provision conflicts with the general statute of limitations in the state's criminal code[140] which provides a four-year limitation period after the commission of a first-degree felony,[141] and shorter periods for lesser offenses.[142]

Federal courts have held that expiration of a state statute of limitations does not bar a racketeering act from being used in a federal RICO prosecution.[143] These decisions have been applauded because it would be anomalous to have unequal enforcement of a federal statute due to differences in various state statutes of limitations.[144] However, this view fails to recognize that the federal RICO statute actually ensures unequal enforcement by incorporating state substantive laws which vary from one state to another.

In *United States v. Davis*,[145] the Third Circuit held that the words "chargeable under state law" in the definition of the predicate offenses of racketeering activity[146] mean "chargeable at the time the offense was committed."[147] The dissent argued, however, that a state crime not chargeable under state law at the time of filing the RICO indictment could not be used as a predicate offense.[148] The dissenting judge relied on the tenet that criminal statutes are to be construed strictly,[149]

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139. FLA. STAT. § 895.02(4) (1987).

140. Trombley & Alcott, *supra* note 49, at § 7.25.

141. FLA. STAT. § 775.15(2)(a) (1987).

142. The periods of limitations are: three years for any lesser felony, *id.* § 775.15(2)(b); two years for a first-degree misdemeanor, *id.* § 775.15(2)(c); and one year for a lesser misdemeanor, *id.* § 775.15(2)(d). However, the limitation period for a violation of ch. 517, which deals with sales of securities and is listed as a predicate offense for RICO, is five years. *Id.* § 775.15(2)(e). The predicate offenses listed in § 895.02(1) include relatively minor misdemeanors as well as first-degree felonies. *See supra* notes 61-67 and accompanying text.

143. *See, e.g.*, United States v. Davis, 576 F.2d 1065 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978); United States v. Fineman, 434 F. Supp. 189 (E.D. Pa. 1977); United States v. Forsythe, 429 F. Supp. 715 (W.D. Pa.), *rev'd on other grounds*, 560 F.2d 1127 (3d Cir. 1977).

144. Atkinson, *supra* note 5, at 8.

145. 576 F.2d 1065 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978).

146. 18 U.S.C. § 1961(1)(A) (1986) (defining the predicate offenses of "racketeering activity" as a variety of listed crimes that are "chargeable under state law and punishable by imprisonment for more than one year").

147. *Davis*, 576 F.2d at 1067.

148. *Id.* at 1068-71 (Aldisert, J., concurring).

149. *Id.* at 1069 (Aldisert, J., concurring); *see* United States v. Bramblett, 348 U.S. 503, 509 (1954) ("That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority."). *See also infra* notes 216-42.

and pointed to the present tense language of the statute[150] as an indication of Congressional intent.[151]

The Florida RICO statute contains similar language, defining a predicate offense as "any crime which *is* chargeable by indictment or information" under a variety of other Florida statutes.[152] However, Florida courts have not addressed the issue of whether expiration of the four-year general statute of limitations for a serious felony would bar use of the felony as a predicate offense in a RICO prosecution.[153]

The only reported Florida case addressing the RICO statute of limitations involves the statutory requirement that at least one incident of racketeering occur after the effective date of the RICO act.[154] In *State v. Whiddon*,[155] the Florida Supreme Court rejected the prosecution's argument that no specific act need be alleged after the effective date because the defendants were part of an ongoing enterprise.[156] The court affirmed dismissal of the charge and held that the RICO statute requires proof of two predicate offenses, one of which must have occurred after the statute's effective date.[157]

VII. "ENTERPRISE"

Existence of an "enterprise" is a key element[158] in both the federal and Florida RICO statutes.[159] The prosecution must show the defen-

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150. 18 U.S.C. § 1961(1)(A) (1986) ("which *is* chargeable under state law") (emphasis added).

151. *Davis*, 576 F.2d at 1069 (Aldisert, J., concurring).

152. FLA. STAT. § 895.02(1)(a) (1987) (emphasis added).

153. *See supra* Trombley & Alcott, *supra* note 49, at § 7.25 ("Another question left unanswered is whether a discharge for lack of speedy trial upon a racketeering act has the effect of barring the use of that act as a [predicate RICO offense]."). *Cf.* United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978), (RICO prosecution not barred), *aff'd on rehearing*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 440 U.S. 962 (1979).

154. FLA. STAT. § 895.02(4) (1987). The effective date of the RICO statute is Oct. 1, 1977. *Id.*

155. 384 So. 2d 1269 (Fla. 1980).

156. *Id.* at 1271. Defendants had been charged with grand theft, grand larceny, burglary, arson, and arson to defraud. *Id.* at 1270.

157. *Id.* at 1271.

158. Although proof of several elements is necessary for a RICO conviction, the existence of an enterprise may be the most crucial of those elements because the RICO statutes forbid the predicate acts only in relation to an enterprise. *See, e.g.*, Bennett v. Berg, 710 F.2d 1361, 1364-65 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983); United States v. Rogers, 636 F. Supp. 237, 244-45 (D. Colo. 1986). *See also* Atkinson, *supra* note 5, at 12 ("key element"); Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?*, 55 NOTRE DAME LAW. 777, 791 (1980) (concept of enterprise is essential to all the substantive sections of RICO).

159. 18 U.S.C. § 1961(4) (1986) defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." FLA. STAT. § 895.02(3) (1987) defines an "enterprise" as

dant invested in, maintained an interest in, was employed by, or associated with an enterprise affecting interstate commerce.[160]

The meaning of the word "enterprise" was hotly litigated in early federal RICO cases.[161] One of the most frequently debated issues was whether the definition of "enterprise" should include illicit operations. Arguments that wholly illegitimate operations were outside the reach of RICO were usually based on legislative history, which is replete with references to legitimate businesses.[162] Senator John L. McClel-

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> [a]ny individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities.

Id.

160. 18 U.S.C. § 1962 (1986); FLA. STAT. § 895.03 (1987). Although courts have required proof of the interstate element, they have been generally unreceptive to interpretations that place a substantial burden on the government. *See, e.g.*, United States v. Rone, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa.), *aff'd mem.*, 605 F. Supp. 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980). *But see* United States v. Nerone, 563 F.2d 836, 852-53 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978) (conviction reversed because government alleged an illegal gambling operation as the enterprise but failed to offer proof that it affected interstate commerce).

161. Of the 37 cases reported through Dec. 1977, 17 discussed the definition of "enterprise." Atkinson, *supra* note 5, at 12 n.97.

162. However, one commentator does find support for the broad interpretation of "enterprise" in the legislative history. Atkinson, *supra* note 5, at 13. Atkinson cites the Organized Crime Control Act's Statement of Findings and Purpose, which speaks of the need "to seek the eradication of organized crime." 84 Stat. 923 (1970). It does not limit its scope to legitimate businesses. Further, the Senate Report on RICO indicates one of the statute's purposes was to eliminate illegal gambling operations. S. REP. NO. 617, 91st Cong., 1st Sess. 72-73 (1969). It also has been argued that if Congress had intended RICO to apply only to legitimate entities, the title "Racketeer Influenced Organizations" would have sufficed. Instead, Congress indicated that "Corrupt Organizations" are also within the reach of the act. Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 190 (1980). There is some support for this argument in the legislative history. RICO's origin is in a bill entitled "The Criminal Activities Profits Act." S. 1623, 90th Cong., 1st Sess. (1969), 115 CONG. REC. 6995-96 (1969). This bill was redrafted, enlarged, and reintroduced as "The Corrupt Organization Act." S. 1861, 90th Cong., 1st Sess. (1969), 115 CONG. REC. 9512 (1969). This title was thought to be ambiguous because a "corrupt organization" could be either the mob itself or a union taken over by it. So the bill was retitled to clarify its meaning. *See* Blakey & Gettings, *supra* note 46, at 1025-26 n.91. However, the title still can be read two ways: as applying to racketeer influenced organizations as well as corrupt ones, or as applying to organizations that are both racketeer influenced and corrupt. The title of a law should not be considered dispositive in determining its meaning. *See* Caminetti v. United States, 242 U.S. 470 (1917) (holding that the "White Slave Traffic Act" reached beyond commercialized vice to cover bringing a woman across state lines to be defendant's mistress).

lan,[163] the veteran crimefighter and racket-buster who proposed the law, described one of its major purposes as attacking the infiltration of legitimate business by racketeers.[164] President Nixon, in proposing the new law, focused on legitimate businesses.[165] Federal courts, however, were unconvinced by arguments in favor of a restrictive reading of "enterprise." Lower federal courts rebuffed arguments that "enterprise" should not apply to illegal enterprises,[166] governmental units,[167]

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163. McClellan's Senate Select Committee on Improper Activities in the Labor or Management Field spotlighted organized crime in the late 1950s. CONGRESSIONAL QUARTERLY, INC., 1970 CQ ALMANAC 548. Robert Kennedy served as chief counsel to the McClellan committee and made a stepped-up federal effort against organized crime a priority during his years as Attorney General. *Id.* In 1969, McClellan (D-Ark.) chaired the Senate Judiciary Subcommittee on Criminal Laws and Procedures. CONGRESSIONAL QUARTERLY, INC, 1969 CQ ALMANAC 697.

164. McClellan made the statement in floor debate Jan. 21, 1970. CONGRESSIONAL QUARTERLY, INC., 1970 CQ ALMANAC 549.

165. In asking Congress to back up his promise to attack organized crime, President Nixon described one of the ways organized crime has penetrated American life as "[i]t is increasing its enormous holdings and influence in the world of legitimate business." He went on to describe

> [a]n area where we are examining the need for new laws: the infiltration of organized crime into fields of legitimate business. The syndicate-owned business, financed by illegal revenues and operated outside the rules of fair competition of the American market-place, cannot be tolerated in a system of free enterprise. Accordingly, the Attorney General is examining the potential application of the theories underlying our anti-trust laws as a potential new weapon.
>
> The injunction with its powers of contempt and seizure, monetary fines and treble damage actions, and the powers of a forfeiture proceeding, suggest a new panoply of weapons to attack the property of organized crime rather than the unimportant persons (the fronts) who technically head up syndicate-controlled businesses. The arrest, conviction and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those we jail. However, if we can levy fines on their real estate corporations, if we can seek treble damages against their trucking firms and banks, if we can seize the liquor in their warehouses, I think we can strike a critical blow at the organized crime conspiracy.

President's Message on Organized Crime, Apr. 23, 1969, *reprinted in* CONGRESSIONAL QUARTERLY, INC, 1969 CQ ALMANAC 45-A.

166. *See e.g.*, United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977) (prostitution ring), *cert. denied*, 434 U.S. 1020 (1978); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976) (gambling), *cert. denied*, 429 U.S. 1039 (1977); United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976) (rigged card games); United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976) (gambling); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974) (gambling), *cert. denied*, 420 U.S. 925 (1975); United States v. Fineman, 434 F. Supp. 189, 193 (E.D. Pa. 1977) (taking bribes); United States v. Winstead, 421 F. Supp. 295, 296 (N.D. Ill. 1976) (gambling); United States v. Castellano, 416 F. Supp. 125, 128 (E.D. N.Y. 1975) (usury). One court did hold that "enterprise" applies only to legitimate businesses. United States v. Moeller, 402 F.

foreign corporations,[168] or individuals who were not associated with a formal organization.[169] The United States Supreme Court ultimately settled the illegitimate enterprise question by construing the word "enterprise" to include wholly illegitimate entities.[170]

Debate over the meaning of "enterprise" continues. Federal circuits remain in conflict about the proper interpretation of evidence necessary to prove the "enterprise." The Eighth Circuit has held a RICO enterprise must possess an "ascertainable structure" distinct from the association necessary to create a pattern of racketeering activity.[171] Other courts[172] have rejected this assertion, relying instead on dictum in the United States Supreme Court's illegitimate enterprise decision.[173]

Supp. 49, 58-60 (D. Conn. 1975) (burning buildings). However, it was overruled. *Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

167. *See, e.g.*, United States v. Frumento, 563 F.2d 1083, 1092 (3d Cir. 1977) (Pennsylvania Bureau of Cigarette and Beverage Taxes is a RICO "enterprise"), *cert. denied*, 434 U.S. 1072 (1978); United States v. Brown, 555 F.2d 407, 415 (5th Cir. 1977) (police department is a RICO "enterprise"), *cert. denied*, 435 U.S. 904 (1978). *But see* United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976) (State of Maryland is not an "enterprise"), *aff'd in part and vacated in part*, 591 F.2d 1347, *aff'd en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U. S. 961 (1980).

168. United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

169. United States v. Hawes, 529 F.2d 472 (5th Cir. 1976).

170. United States v. Turkette, 452 U.S. 576 (1981).

171. 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, 665 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982); United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). In *Anderson*, the court expressly acknowledged that its position was contrary to *Elliott*. *Anderson*, 626 F.2d at 1372.

172. *See, e.g.*, United States v. Riccobene, 709 F.2d 214, 224 (3d Cir.) (it must be shown that the enterprise "has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses"), *cert. denied*, 464 U.S. 840 (1983); United States v. Mazzei, 700 F.2d 85, 89 (2d Cir.) (proof of separate elements of "enterprise" and "pattern of racketeering activity" need not be separate and distinct so long as it is sufficient to satisfy both elements), *cert. denied*, 461 U.S. 945 (1983); United States v. Winter, 663 F.2d 1120, 1135-36 n.25 (1st Cir. 1981) (rejecting contention that evidence must be distinct), *cert. denied*, 460 U.S. 1011 (1983); United States v. Griffin, 660 F.2d 996, 1000-01 (4th Cir. 1981) (in upholding RICO convictions of gamblers who paid bribes to police officers, court required members to share "common purpose" for which they associated), *cert. denied*, 454 U.S. 1156 (1982). The Ninth Circuit appears to agree that the evidence need not be distinct. United States v. Bagnariol, 665 F.2d 877, 890-91 (9th Cir. 1981) ("the government is not precluded from using the same evidence to establish the element of an enterprise and the element of a pattern of racketeering activity"), *cert. denied*, 456 U.S. 962 (1982). *But cf.* United States v. DeRosa, 670 F.2d 889, 895-96 (9th Cir.) (government proved an enterprise that was wider than the predicate acts), *cert. denied*, 459 U.S. 993 (1982).

173. In United States v. Turkette, 452 U.S. 576 (1981), the Court noted that proof used to establish the "pattern of racketeering activity" element "may in particular cases coalesce"

Florida courts have not yet addressed this issue in reported RICO decisions.[174]

Florida's definition of "enterprise," however, is broader than that found in federal statute. Florida adds sole proprietorships and business trusts, and specifies that illicit and licit enterprises are included, as well as governmental and other entities.[175] In *Dorsey v. State*,[176] the Florida Supreme Court took note of the federal courts' dispute over construction of the definition of "enterprise."[177] The court stated that whatever Congress intended by its definition, "the deliberate insertion of clarifying words in the Florida act has settled the matter in state prosecutions."[178]

Despite the Florida RICO law's broader sweep, one Florida court recently applied the "enterprise" definition rather restrictively. However, *Finkelstein v. Southeast Bank*,[179] a civil RICO case, departs from earlier Florida cases[180] without providing any justification. The *Finkelstein* court held that a family trust allegedly used to sequester

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with the proof offered to establish the " 'enterprise' element of RICO." *Id.* at 583. For citations to this statement, see United States v. Mazzei, 700 F.2d 85, 89 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983).

174. Only four reported Florida cases involve any discussion of the meaning of "enterprise." *See* Dorsey v. State, 402 So. 2d 1178, 1180-81 (Fla. 1981) (statutory preamble emphasizing infiltration of legitimate business as primary purpose of RICO does not justify reading the words "illicit enterprises" out of the definition of "enterprise"); Bowden v. State, 402 So. 2d 1173 (Fla. 1981) (individual or sole proprietorship can be a RICO "enterprise"); Finkelstein v. Southeast Bank, 490 So. 2d 976 (Fla. 4th D.C.A. 1986) (family trust does not constitute a RICO "enterprise"); Banderas v. Banco Cent. del Ecuador, 461 So. 2d 265, 270 n.4 (Fla. 3d D.C.A. 1985) (corporations involved in fraud scheme fall under "enterprise" whether they are legitimate businesses used to launder money or illicit enterprises).

175. FLA. STAT. § 895.02(3) (1987). *But see* Springer v. Florida Dep't of Natural Resources, 485 So. 2d 15 (3d D.C.A.) (holding that a claim for a RICO violation cannot be against the state or its subdivisions), *review denied*, 492 So. 2d 1331 (Fla. 1986).

176. 402 So. 2d 1178 (Fla. 1981).

177. *Id.* at 1181.

178. *Id.* Defendants contended the RICO statute was unconstitutional because the definition of "enterprise" conflicted with the expressions of legislative intent in the uncodified preamble to the statute. *Id.* at 1180. The preamble repeatedly describes the purpose of the RICO statute as prohibiting the "infiltration and corruption of legitimate business." 1977 Fla. Laws 334. The *Dorsey* court commented that even if the preamble were to be viewed as conflicting with the definition of "enterprise," the conflict would present at most a problem of construction and not a constitutional defect. *Dorsey*, 418 So. 2d at 1180.

179. 490 So. 2d 976 (Fla. 4th D.C.A. 1986). The facts of the case are outlined at *supra* note 121.

180. *See, e.g.*, Bowden v. State, 402 So. 2d 1173 (Fla. 1981) (individual can be a RICO "enterprise"); Banderas v. Banco Cent. del Ecuador, 461 So. 2d 265 (Fla. 3d D.C.A. 1985) (corporation used to launder money satisfies "enterprise" requirement).

racketeering profits was not an "enterprise" within the meaning of the Florida RICO statute.[181] Although the court may have been disputing whether a legally established trust or a legally appointed trustee was a legal entity, indisputably the defendants met the definition as individuals. Therefore, whether the trust itself constituted an enterprise or just an interest in the enterprise which was the association in fact, the *Finkelstein* decision seems flawed.[182] Additionally, the kind of "professional criminals" that the Florida RICO Act targets appear to have operated the fraudulent gem sales and credit card operations that were the basis of the RICO allegations in *Finkelstein.*[183] *Finkelstein* does not provide a principled basis for its restrictive reading and, therefore, may contribute to broader interpretations in the future.

Because the enterprise element has thwarted few federal prosecutions,[184] it has not significantly limited the application of the federal RICO statute. Because Florida's definition is even broader, the "enterprise" element will not likely limit application of the Florida statute primarily to racketeers.

VIII. CONSPIRACY

Both the federal and Florida RICO statutes prohibit a conspiracy to violate any of their substantive provisions.[185] Florida's conspiracy provision also outlaws attempts to commit any of the substantive RICO offenses.[186] Under both federal and Florida law, proof of a RICO conspiracy requires two basic elements: (1) two or more persons must agree to commit a substantive RICO offense; and (2) each defendant must willfully become a member of that conspiracy.[187] Despite the

181. *See Finkelstein*, 490 So. 2d at 982; *see also* FLA. STAT. § 895.02(3) (1985).

182. *See* Note, *Illegal Assets Once Removed: Easy Avoidance of Civil RICO Remedies*, 16 STETSON L. REV. 439, 467-68 (1987) (criticizing the *Finkelstein* decision).

183. *See supra* note 121 and accompanying text.

184. *See, e.g.*, United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), *aff'd in part and vacated in part*, 591 F.2d 1347, *aff'd en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); United States v. Moeller, 402 F. Supp. 49 (D. Conn. 1975). The federal courts also have held that the concept of "enterprise" is not unconstitutionally vague. *See also* United States v. Aleman, 609 F.2d 298, 305 (7th Cir. 1979) (although broad in scope, statute is not vague), *cert. denied*, 445 U.S. 946 (1980); United States v. Hawes, 529 F.2d 472, 478-79 (5th Cir. 1976) (statute does not violate due process).

185. 18 U.S.C. § 1962(d) (1986) prohibits a conspiracy to violate § 1962(a), (b), or (c). FLA. STAT. § 895.03(4) (1987) makes it unlawful for any person to "conspire or endeavor to violate" § 895.03(1), (2), or (3).

186. FLA. STAT. § 895.03(4) (1987).

187. *See, e.g.*, United States v. Elliott, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 434 U.S. 1021 (1978); United States v. Campanale, 518 F.2d 352, 363-64 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). There are no reported Florida cases directly on point, but this is accepted by Florida practitioners. *See* Trombley & Alcott, *supra* note 49, at § 7.6.

similarity of language in the federal and Florida statutes, each court systems has approached RICO conspiracy differently. Federal courts have generally been willing to expand the traditional principles of federal conspiracy law in their application to the RICO statute.[188] But Florida courts have continued to view conspiracy more restrictively and with greater suspicion.[189]

In *United States v. Elliott*,[190] the Fifth Circuit Court of Appeals made a radical departure from established conspiracy principles, construing the federal RICO provision as creating an offense fundamentally different from the traditional form of conspiracy.[191] While traditional conspiracy law requires an agreement to participate in a particular crime, a RICO conspiracy arises from an agreement to participate in an enterprise. A RICO conspirator may have no knowledge of some of the enterprise's activities yet still be prosecuted for them. The court reasoned that RICO was intended to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing the traditional principles of federal conspiracy law[192] with the "enterprise" concept.[193] Characterizing the substantive RICO offense as the means by which diverse parties and crimes can be joined together, the court regarded RICO conspiracy as relating to an agreement to participate in the enterprise's affairs, rather than an agreement to commit all of the predicate crimes constituting the enterprise.[194]

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188. *See, e.g.*, United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 434 U.S. 1021 (1978). *See generally* Note, *Conspiracy to Violate RICO: Expanding Traditional Conspiracy Law*, 58 NOTRE DAME L. REV. 587 (1983); Note, Elliott v. United States: *Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 VA. L. REV. 109 (1979). *See also* Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 878 n.227 (1980) ("an extraordinary feat of creativity on the part of the Fifth Circuit"); Tarlow, *supra* note 48, at 245 (*Elliott* established "an offense fundamentally different from the traditional form of conspiracy"). However, not all federal courts have read *Elliott* as an expansion of federal conspiracy law. *See, e.g.*, United States v. Carter, 721 F.2d 1514, 1528-29 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984); United States v. Sutherland, 656 F.2d 1181, 1192-93 (5th Cir. Unit A Sep. 1981), *cert. denied*, 455 U.S. 949, 455 U.S. 991 (1982); United States v. Anderson, 626 F.2d 1358, 1368-69 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). *See generally* Holderman, *Reconciling RICO's Conspiracy and "Group" Enterprise Concepts With Traditional Conspiracy Doctrine*, 52 U. CIN. L. REV. 385 (1983) (analyzing trends in reconciling the RICO "group enterprise" concept with traditional conspiracy doctrine).

189. *See* Beatty v. State, 418 So. 2d 271 (Fla. 2d D.C.A. 1982); *see also* cases cited *infra* note 200.

190. 571 F.2d 880 (5th Cir.), *cert. denied*, 434 U.S. 1021 (1978).

191. *See* Bradley, *supra* note 188, at 878 & n.227, 879; Tarlow, *supra* note 48, at 250.

192. *See* Blumenthal v. United States, 332 U.S. 539 (1947); Kotteakos v. United States, 328 U.S. 750 (1946).

193. *Elliott*, 571 F.2d at 902.

194. *Id.* at 902-03. Six co-defendants participated in more than 20 diverse crimes, which

The *Elliott* interpretation of RICO conspiracy emphasizes that the provision reaches individuals even remotely associated with an enterprise.[195] These remote associates are guilty, even though they do not know the full scope of the conspiracy, because *Elliott* requires only knowledge of the essential nature of the enterprise: making money from repeated criminal activity.[196]

While Florida courts have cited *Elliott* for a variety of propositions,[197] they have not adopted the *Elliott* view of RICO conspiracy. Florida courts, in fact, have avoided directly confronting the substantive issues of RICO conspiracy law. Only three reported Florida cases involve conspiracy to violate RICO, and none was decided on grounds that provide any illumination of the substantive conspiracy issues.[198]

Although the substantive requirements of federal and Florida RICO conspiracy provisions differ somewhat, the more significant difference lies in the way prosecutors have charged conspiracies. Con-

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included burning a nursing home, stealing meat, murdering an informant, stealing a truckload of stolen shirts, and selling illegal drugs. *Id.* at 884-95. Most of the defendants participated in only a few of the crimes, only one defendant was implicated in all of them, and in no one criminal act were all the defendants shown to be acting in concert. *Id.* at 884-96.

195. *Id.* at 903. The court also noted that, because direct evidence of a conspiratorial agreement is unnecessary, the remote associates could be convicted as conspirators on the basis of purely circumstantial evidence. *Id.*

196. *Id.* at 903-04. However, the court failed to reconcile this statement with its earlier assertion that, under traditional conspiracy law, a single conspiracy could not have been charged "[e]ven viewing the 'common objective' of the conspiracy as the raising of revenue through criminal activity." *Id.* at 902.

197. In Dorsey v. State, 402 So. 2d 1178 (Fla. 1981), the court held *Elliott* not controlling on the question of whether the mention of a murder in a trial of several co-defendants was prejudicial error. *Id.* at 1182. The court distinguished *Elliott*, in which the prosecution proved that a murder was committed by two of the co-defendants, from the instant case, in which a murder was not charged against anyone being tried but was referred to in testimony despite defendants' objections. *Id.* The *Dorsey* court found prejudicial error. *Id.* In Beatty v. State, 418 So. 2d 271 (Fla. 2d D.C.A. 1982), the court referred to *Elliott*, which involved a detailed indictment, in holding that the predicate offenses to a RICO charge must be charged with enough detail that the defendant knows what to defend against. *Id.* at 272. In State v. Bowen, 413 So. 2d 798 (1st D.C.A. 1982), *review denied*, 424 So. 2d 760 (Fla. 1983), the court cited *Elliott* for the proposition that even an individual person can be considered a RICO "enterprise." *Id.* at 799. In State v. Whiddon, 384 So. 2d 1269 (Fla. 1980), the court referred to *Elliott* in a discussion of the legal sufficiency of an indictment charging a RICO violation. *Id.* at 1272.

198. *See* Bowden v. State, 402 So. 2d 1173 (Fla. 1981) (holding the RICO statute constitutional without addressing the facts of the case and without saying what proof is necessary for a defendant to be convicted of RICO conspiracy); Ahnin v. State, 505 So. 2d 659 (Fla. 2d D.C.A. 1987) (improper sentencing); Freeman v. State, 503 So. 2d 997 (Fla. 3d D.C.A. 1987) (reversing the disqualification of an attorney who represented a defendant charged with RICO conspiracy).

spiracies to violate RICO are far more common under federal law.[199] In Florida, the typical approach is to use a conspiracy as a predicate offense to establish violation of a substantive RICO offense.[200] However, this approach has not been successful.

District courts of appeal have repeatedly overturned RICO convictions premised on conspiracy offenses.[201] Most of these appellate court decisions relied on *State v. Beatty*,[202] in which the Second District Court of Appeal overturned a RICO conviction because the information was legally insufficient. The information charged that the defendants and several others engaged in at least two incidents of racketeering conduct involving "Conspiracies to Commit Violations of Florida Statute Chapter 893, relating to drug abuse prevention and control."[203] The court noted that informations charging conspiracy are subject to special scrutiny.[204] While acknowledging that the predicate offenses

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199. Some of the more recent RICO conspiracy cases include: United States v. Neapolitan, 791 F.2d 489 (7th Cir.), *cert. denied*, 107 S. Ct. 422 (1986); United States v. Joseph, 781 F.2d 549 (6th Cir. 1986); United States v. Pepe, 747 F.2d 632 (11th Cir. 1984); United States v. Zielie, 734 F.2d 1447, 1462-63 (11th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

200. *See, e.g.*, State v. Russo, 493 So. 2d 504 (Fla. 4th D.C.A. 1986) (conspiracy to traffic in marijuana); Butler v. State, 456 So. 2d 545 (Fla. 2d D.C.A. 1984) (predicate offenses were three counts of conspiracy to traffic in marijuana); Gillen v. State, 421 So. 2d 1089 (Fla. 2d D.C.A. 1982) (conspiracy to traffic in controlled substances); Whitehead v. State, 421 So. 2d 1089 (Fla. 2d D.C.A. 1982) (conspiracy to traffic in controlled substances); Charles Long v. State, 418 So. 2d 1264 (Fla. 2d D.C.A. 1982) (conspiracy to traffic in marijuana); State v. Beatty, 418 So. 2d 271 (Fla. 2d D.C.A. 1982) (conspiracy to traffic in marijuana). *But see* United States v. Weisman, 624 F.2d 1118, 1123 (2d Cir.) (conspiracy may be a predicate offense under the federal RICO law), *cert. denied*, 449 U.S. 871 (1980).

201. *See, e.g.*, State v. Russo, 493 So. 2d 504 (Fla. 4th D.C.A. 1986) (indictment dismissed because trafficking and conspiracy to traffic were held to be same "incident" and the RICO statute requires two "incidents of racketeering activity"); Butler v. State, 456 So. 2d 545 (Fla. 2d D.C.A. 1984) (conspiracy convictions upheld but RICO conviction reversed). For other holdings overturning RICO convictions, see Gillen v. State, 421 So. 2d 1089 (Fla. 2d D.C.A. 1982); Whitehead v. State, 421 So. 2d 1089 (Fla. 2d D.C.A. 1982); Charles Long v. State, 418 So. 2d 1264 (Fla. 2d D.C.A. 1982); Bowers v. State, 418 So. 2d 272 (Fla. 2d D.C.A. 1982).

202. 418 So. 2d 271 (Fla. 2d D.C.A. 1982). The only case which did not rely on *Beatty* in dismissing a RICO conviction premised upon a conspiracy was State v. Russo, 493 So. 2d 504 (Fla. 4th D.C.A. 1986), in which the court held that trafficking in marijuana and conspiracy to traffic constituted only one "incident" of racketeering activity and thus could not support a RICO conviction. *See supra* notes 131-33 and accompanying text.

203. *Beatty*, 418 So. 2d at 272.

204. *Id.* (citing Goldberg v. State, 351 So. 2d 332 (Fla. 1977)). The *Goldberg* court noted that use of the conspiracy charge "has been expanded to dragnet proportions" and asserted that it is the responsibility of the courts to minimize, if not eliminate, its abuses. *Goldberg*, 351 So. 2d at 334. The court also cited with approval two articles critical of conspiracy law: Johnson, *The Unnecessary Charge of Conspiracy*, 61 CALIF. L. REV. 1137 (1973); Klein, *Conspiracy — The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1 (1957). *Goldberg*, 351 So. 2d at 333-34.

underlying a RICO charge need not be alleged with the same specificity as a separately charged crime, the court held that the defendant must be informed of what charges to defend against.[205] The court said that "at the very least" the state should have specified which of "myriad offenses proscribed by Chapter 893" the defendants conspired to commit.[206]

In addition to the federal courts, continued debate about the RICO conspiracy provision, the circuits are split on at least two other conspiracy issues. Several federal circuits have required proof that at least one overt act was committed in furtherance of a RICO conspiracy.[207] These courts adopted the overt act requirement from the general federal conspiracy statute.[208] In other federal circuits, as in Florida,[209] courts have interpreted the RICO statute literally and held

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205. *Beatty*, 418 So. 2d at 272.

206. *Id.* The court distinguished an earlier Florida case, State v. Whiddon, 384 So. 2d 1269 (Fla. 1980), which the state had cited as authority for the proposition that the RICO information need only track the statutory language. *Whiddon* held only that the allegation of a RICO "enterprise" could be properly couched in the language of the statute. *Beatty*, 418 So. 2d at 272. The *Beatty* court also cited United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 434 U.S. 1021 (1978), which involved in indictment alleging a conceptually similar situation but describing the predicate offenses in detail. *See id.* at 895-96.

207. The Fifth, Ninth, and Eleventh Circuits, as well as a federal district court in the Tenth Circuit, have required an overt act. In the Fifth Circuit, the overt act requirement has its roots in United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 434 U.S. 1021 (1978), which implied the overt act need not be a crime. *Id.* at 887 n.5. In United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981), the court noted the overt acts alleged in the indictment were sufficiently connected to the overall scheme. *Id.* at 1073 n.8. The overt act requirement was first clearly announced in United States v. Sutherland, 656 F.2d 1181 (5th Cir. Unit A Sep. 1981), *cert. denied*, 455 U.S. 949, 455 U.S. 991 (1982). *Sutherland* cited, with no explanation, a § 371 conspiracy case. *Id.* at 1186 n.4. *Sutherland*, in turn, was cited without comment on this point in United States v. Phillips, 664 F.2d 971, 1038 (5th Cir. Unit B Dec. 1981), *cert. denied*, 457 U.S. 1136, 459 U.S. 906 (1982); United States v. Marcello, 537 F. Supp. 1364, 1379-80 (E.D. La. 1982), *aff'd*, 703 F.2d 805 (5th Cir.), *cert. denied*, 464 U.S. 935 (1983). A federal district court in the Tenth Circuit cited *Sutherland* in holding that a conspiracy requires, at a minimum, proof of one overt act. Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1307 (D. Colo. 1984) (civil RICO case). The Ninth Circuit in United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980), *cert. denied*, 450 U.S. 916, 450 U.S. 985, 452 U.S. 905 (1981), implied an overt act requirement in its statement that the overt act need not be criminal. *Id.* at 1173 n.18. The Eleventh Circuit, in an early RICO case, appeared to require an overt act but later held to the contrary. *See infra* note 210.

208. 18 U.S.C. § 371 (1982).

209. *See, e.g.*, King v. State, 104 So. 2d 730 (Fla. 1958); Ramirez v. State, 371 So. 2d 1063 (Fla. 3d D.C.A. 1979) (describing as "well-settled" that conspiracy in Florida consists of an agreement and an intention to commit an offense), *review denied*, 383 So. 2d 1201 (Fla. 1980). *See also* FLA. STAT. § 777.04(3) (1987) (Florida's general conspiracy statute).

that it does not require an overt act.[210] The legislative history of the federal RICO statute tends to support this later position.[211]

Federal circuits also are divided over the agreement necessary to support a RICO conspiracy. Some require an agreement to commit personally two acts of racketeering activity.[212] Others hold that being a party to an agreement that another person commit two acts of racketeering activity is sufficient.[213] Over published dissents, the Supreme Court denied certiorari on two cases[214] that would resolve this conflict.[215] Florida courts have not addressed this question.

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210. The Second and Eleventh Circuits, as well as a federal district court in the Third Circuit, have read the statute literally and held that it does not require an overt act. In United States v. Barton, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981), the Second Circuit compared provisions which mention no overt act. The *Barton* court cited Singer v. United States, 323 U.S. 338, 340-42 (1945), in which the Supreme Court distinguished the general conspiracy statute from the conspiracy provision of the Selective Training and Service Act of 1940, 50 U.S.C. § 311 (expired Mar. 31, 1947). *Barton*, 647 F.2d at 237. A federal district court in the Third Circuit made a similar comparison in United States v. Forsythe, 429 F. Supp. 715 (W.D. Pa.), *rev'd on other grounds*, 560 F.2d 1127 (3d Cir. 1977). The *Forsythe* court compared the RICO conspiracy provision to the Sherman Antitrust Act conspiracy provision, 15 U.S.C. § 1 (1982), noting that both incorporate the elements of common law conspiracy, which does not require an overt act, rather than those of § 371. Otherwise, the *Forsythe* court concluded, the RICO conspiracy provision would be "otiose, as merely repetitious of the general conspiracy statute." *Forsythe*, 429 F. Supp. at 720 n.2. The Eleventh Circuit no longer requires an overt act. In United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), the court approved, without comment, a jury instruction requiring an overt act. *Id.* at 974-75. But in United States v. Coia, 719 F.2d 1120 (11th Cir. 1983), *cert. denied*, 466 U.S. 973 (1984), the court held that overt acts are not required to find a conspiracy to violate RICO. *Id.* at 1123. The court reaffirmed this holding in United States v. Pepe, 747 F.2d 632, 645 n.8 (11th Cir. 1984) (citing *Coia* and P. MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES § 4.02(2)(d) (1983 Supp.)).

211. In its report on RICO, the Senate Judiciary Committee expressly referred to Singer v. United States, 323 U.S. 338, 340-42 (1945), which distinguished another special federal conspiracy provision from the general federal conspiracy statute. S. REP. NO. 617, 91st Cong., 1st Sess. 159 (1969).

212. *See, e.g.*, United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983).

213. *See, e.g.*, United States v. Carter, 721 F.2d 1514, 1529-31 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984).

214. Messino v. United States, 107 S. Ct. 421, (1986) (a Seventh Circuit case); Adams v. United States, 474 U.S. 971 (1985) (a Third Circuit case).

215. Justice White dissented in Messino v. United States, 107 S. Ct. 421 (1986); Adams v. United States, 474 U.S. 971, (1985). He was joined by Chief Justice Burger in *Adams*. Justice White noted that even the government's interpretation of the RICO conspiracy provision has not been consistent. *Adams*, 106 S. Ct. at 336-37. In United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983), the government conceded that a conviction

IX. THE UNDERLYING DIFFERENCE: FLORIDA'S STRICT CONSTRUCTION REQUIREMENT

Because of the similarity between the Florida and federal RICO statutes, Florida courts have looked to federal cases for guidance in interpreting Florida law.[216] However, all of the reported Florida RICO decisions have overlooked one underlying difference between federal and Florida criminal law: federal RICO's liberal construction clause versus Florida's strict construction requirement.

Congress included a unique liberal construction clause in the federal RICO statute,[217] directing that "the provisions of this title shall be liberally construed to effectuate its remedial purposes.[218] With a few exceptions,[219] federal courts have faithfully followed this directive and interpreted RICO broadly.[220] Commentators have criticized the liberal construction provision, however, asserting that the statute is ambiguous and spreads the criminal net too wide.[221]

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for RICO conspiracy requires proof that the defendant agreed personally to commit two or more acts of racketeering activity. *Id.* at 1136. But in *Adams*, the government argued that the defendant need only be a party to an agreement that another person commit two acts of racketeering activity. *Adams*, 106 S. Ct. at 337.

216. *See* Trombley & Alcott, *supra* note 49, at § 7.1; *see also* cases cited *supra* note 11.

217. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947. No other statute in the United States Code that imposes criminal penalties has a liberal construction directive. Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 168 n.6 (1980); *see also* Atkinson, *supra* note 5, at 3 ("The statute is exceptional . . . because it attempts to alter a traditional principle of statutory construction.").

218. Organized Crime Control Act of 1970, Pub. L. No. 91 452, § 904(a), 84 Stat. 947.

219. *See, e.g.*, United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976), *aff'd on this point and vacated in part on other grounds*, 591 F.2d 1347 (4th Cir.), *aff'd en banc*, 602 F.2d 653 (1979), *cert. denied*, 445 U.S. 961 (1980). The Maryland District Court said

> While Congress may instruct courts to give broad interpretations to civil provisions, it cannot require courts to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency. To do so would . . . violate the principles of due process on which the canon of interpretation rests.

Id. at 1022 (citations omitted). The Fourth Circuit Court of Appeals later asserted that the district court was correct in its construction of § 1962(c). *Mandel*, 591 F.2d at 1376. *See* United States v. Davis, 576 F.2d 1065 (3d Cir.) (majority construed § 1961(1)(a) liberally, but concurring opinion emphasized the criminal nature of the action and stated the language must be strictly construed), *cert. denied*, 439 U.S. 836 (1978); United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979) (liberal construction would invite "serious due process problems"), *cert. denied*, 459 U.S. 825 (1982).

220. *See, e.g.*, United States v. Grzywacz, 603 F.2d 682, 686 n.6 (7th Cir. 1979) ("enterprise"), *cert. denied*, 446 U.S. 935 (1980); United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979) ("enterprise"), *cert. denied*, 445 U.S. 927 (1980); United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978) ("enterprise"), *cert. denied*, 441 U.S. 933 (1979); United States v.

Congress' liberal construction directive has been challenged on both statutory and constitutional grounds. The language of the clause permits liberal construction only to effectuate RICO's "remedial purposes"[222] but does not require that RICO be liberally construed to determine what conduct constitutes a violation of the statute. Congress likely intended the liberal construction clause to apply only to the remedies, considered to be the major innovation of RICO at the time it was enacted.[223] If the liberal construction clause is used to determine

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Elliott, 571 F.2d 880, 899 (5th Cir.) ("enterprise"), *cert. denied*, 434 U.S. 1021 (1978); United States v. Salinas, 564 F.2d 688, 691 (5th Cir. 1977) ("racketeering activity"), *cert. denied*, 435 U.S. 951 (1978); United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977) (statute as a whole); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976) ("enterprise" and statute as a whole), *cert. denied*, 429 U.S. 1039 (1977); United States v. Parness, 503 F.2d 430, 439 n.12 (2d Cir. 1974) ("enterprise" and statute as a whole), *cert. denied*, 419 U.S. 1105 (1975); United States v. Chovanec, 467 F. Supp. 41, 45 (S.D.N.Y. 1979); United States v. Pray, 452 F. Supp. 788, 800-01 (M.D. Pa. 1978); United States v. Frumento, 426 F. Supp. 797, 802 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

221. *See, e.g.*, Atkinson, *supra* note 5, at 3 ("an ominous and imprecise way in which to draft a criminal statute"); Tarlow, *supra* note 48, at 178 (use of the clause is questionable on both statutory and constitutional grounds); Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491 (1974) (examining the ambiguities, omissions, and proof problems in § 1962(a)); Comment, *Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in Its Interpretation*, 27 DE PAUL L. REV. 89 (1977) ("enterprise" should not apply to associations the sole purpose of which is to commit illegal acts); Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192 (1975) (constitutional problems interpreting the clause); Comment, *Racketeer Influenced and Corrupt Organizations Act: Application of RICO in the Third Circuit*, 24 VILL. L. REV. 263, 276 (1979) (broad interpretation may prompt argument that that statute is unconstitutionally vague). *But see* Blakey & Goldstock, *"On the Waterfront": RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 349-50 (1980) (asserting the strict construction rule does not apply to RICO); Note, *supra* note 158 (restrictive reading threatens RICO's continued usefulness in controlling organized crime). For specific criticism of Professor Blakey's view, see Tarlow, *supra* note 48, at 178 n.60.

222. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947.

223. *See* S. REP. NO. 617, 91st Cong., 1st Sess. 81 (1969); H. REP. NO. 1549, 91st Cong., 2d Sess. 7, 58-59 (1970), *reprinted in*, 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4034-35. *See also* United States v. Grzywacz, 603 F.2d 682, 691 (7th Cir. 1979) (primary motivation for the enactment of Title IX was the provision of new remedies), *cert. denied*, 446 U.S. 935 (1980). However, in a recent civil RICO case, Justice Powell asserted in dissent that although RICO's criminal provisions must be read broadly and construed liberally, "[i]t does not necessarily follow that the same principles apply to RICO's private civil provisions." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 523 (1985) (Powell, J., dissenting). The introduction of antitrust civil remedies was considered an essential feature of RICO. *See* Tarlow, *supra* note 48, at 173-74. In asking Congress to back up his promise to attack organized crime, President Nixon said the remedies of the Sherman Antitrust Act, including forfeiture and treble damages, "suggest a new panoply of weapons to attack organized crime." Presidential Message on Organized Crime, Apr. 23, 1969, *reprinted in*, CONGRESSIONAL QUARTERLY, INC., 1969 CQ ALMANAC 45-A. Earlier

the scope of criminal liability under RICO, it should be declared unconstitutional.[224]

The unconstitutionality of the clause was addressed in *United States v. Anderson*.[225] In *Anderson*, the Eighth Circuit indicated that using the liberal construction clause to determine the scope of criminal liability violates due process.[226] The court noted that the extent of judicial deference to be accorded the clause was unclear in light of the traditional rule of statutory construction which requires criminal statutes to be construed in favor of lenity[227] and to provide a fair warning of the prohibited activities.[228] In *Dunn v. United States*,[229] the Supreme Court observed that the rule was "rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."[230] *Dunn* cautioned against statutory constructions that impose punishment for actions not "plainly and unmistakeably" prohibited.[231]

Regardless of whether the federal RICO statute's liberal construction directive is constitutional, in Florida the rules are different.

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versions of RICO were intended as amendments to the Sherman Act rather than as independent criminal statutes. Antitrust Section of the ABA, Report on S.S. 2048 & 2049 (Aug. 26, 1969), *reprinted in, Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on the Judiciary*, 91st Cong., 1st Sess. 556, 557-58 (1969). The Antitrust Section of the ABA objected to the proposals as an undesirable commingling of goals of criminal enforcement with goals of regulating competition. *Id.*

224. *See* United States v. Grzywacz, 603 F.2d 682, 692 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 446 U.S. 935 (1980); United States v. Davis, 576 F.2d 1065, 1069-71 (3d Cir.) (Aldisert, J., concurring), *cert. denied*, 439 U.S. 836 (1978); United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976), *aff'd in part and vacated in part*, 591 F.2d 1347 (4th Cir.), *aff'd en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). *See also* Atkinson, *supra* note 5, at 14; Tarlow, *supra* note 48, at 178; Comment, supra note 221, at 276.

225. 626 F.2d 1358 (8th Cir. 1980).

226. *Id.* at 1369-70.

227. United States v. Bramblett, 348 U.S. 503 (1954).

228. *Anderson*, 626 F.2d at 1369-70. A statute is void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

229. 442 U.S. 100 (1979).

230. *Id.* at 112. *Dunn* may be of particular significance in the RICO context because the Court was construing 18 U.S.C. § 1623, another section of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, of which RICO is a part.

231. *Dunn*, 442 U.S. at 113.

Florida requires that criminal statutes be strictly construed.[232] This statutory provision, shared by only one other state,[233] has not been addressed by any of the courts deciding cases under the Florida RICO statutes. Nearly all the reported Florida RICO decisions cite federal cases to support their holdings.[234] Consequently, Florida courts have cited federal case law, which uses the liberal construction provision of the federal RICO statute, as authority in interpreting the language of the Florida RICO Act, which is subject to the strict construction rule.

Florida has applied the strict construction rule for nearly a century.[235] Courts have used the rule in a variety of contexts, with its application limited only by the principle that criminal statutes should not be so strictly construed as to defeat the intention of the legislature.[236]

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232. FLA. STAT. § 775.021(1) (1987).

233. Pennsylvania is the only other state that specifically requires strict construction of penal statutes. 1 PA. CONS. STAT. ANN. § 1928 (Purdon Supp. 1974-78). Many states have abrogated the strict construction rule or specifically provided for liberal construction. *See* ARIZ. REV. STAT. ANN. § 1-211 (1956); ARK. STAT. ANN. §§ 1-203, 1-204 (repealed vol. 1976); CAL. PENAL CODE § 4 (West 1970); DEL. CODE ANN. tit. 11, § 203 (rev. 1974); IDAHO CODE § 73-102 (1973); ILL. REV. STAT. ch. 131, para. 1.01 (1975); IOWA CODE § 4.2 (1977); KY. REV. STAT. § 446.080 (1962); MICH. STAT. ANN. § 28.192 (Callaghan rev. vol. 1962); MO. REV. STAT. § 1.010 (1978); MONT. REV. CODES ANN. § 45-1-102(2) (1979); NEV. REV. STAT. § 29-106 (1975); N.H. REV. STAT. ANN. § 625.3 (repealed 1974); N.Y. PENAL LAW § 5 (McKinney 1975); N.D. CENT. CODE § 29-01-29 (repealed 1974); OR. REV. STAT. § 161.025(2) (1977); S.D. CODIFIED LAWS ANN. § 22-1-1 (rev. 1979); TENN. CRIM. CODE & CODE CRIM. P., § 39-105 (Proposed Final Draft, Nov. 1973); TEX. PENAL CODE ANN. § 105(a) (Vernon 1974); UTAH CODE ANN. § 76-1-106 (1978). Other states, while not expressly abrogating strict construction nor mandating liberal construction, have provided that courts construe the laws "according to the fair import of their terms" with a view toward effecting their purposes and promoting justice. *See* ALA. CODE § 13A-1-6 (1977); COLO. REV. STAT. § 18-1-102(1) (repealed 1978); HAW. REV. STAT. § 701-104 (repealed 1976); LA. REV. STAT. ANN. § 14:3 (West 1974); MINN. STAT. ANN. § 609.01 (West 1964); NEB. REV. STAT. § 29-106 (1975); NEV. REV. STAT. § 193.030 (1973); N.J. STAT. ANN. § 2C:1-2 (West 1979); WASH. REV. CODE ANN. § 9A.04.02(2) (1977).

234. *See* cases cited *supra* note 11. A computer search found only twelve Florida RICO cases that did not cite federal authority, and eight of those were *per curiam* decisions of a page or less. Gordon v. Etue, Wardlow, & Co., 511 So. 2d 384 (Fla. 1st D.C.A. 1987) and American Credit Card Tel. Co. v. National Pan Tel. Corp., 504 So. 2d 486 (Fla. 1st D.C.A. 1987) both dismiss plaintiffs' allegation of RICO violations in one paragraph.

235. *Ex parte* Bailey, 39 Fla. 734, 23 So. 552 (1897). The rule dates back to 17th century England. *See* 1 W. BLACKSTONE, COMMENTARIES *88 ("Penal statutes must be construed strictly.").

236. Atlantic C.L.R. Co. v. State, 73 Fla. 609, 74 So. 595 (1917).

By enacting its own RICO statute, the Florida Legislature intended to produce a tougher statute than the federal law.[237] However, since the language of the Florida RICO statute is broader in several respects than the federal statute, courts should not apply the liberally construed federal decisions to broaden it further.[238] Florida law firmly establishes that courts may not use statutory interpretation to alter or amend a statute to achieve a result thought desirable.[239] Although the Florida Legislature patterned its RICO statute after the federal law, some changes were made.[240] If the legislature intended that the strict construction rule not apply to RICO, it could have included a liberal construction provision.[241] Florida followed the federal model in so many respects that the few instances where the Florida statute varies have been read by the courts as clear and deliberate departures.[242] Accordingly, courts should view the absence of a liberal construction clause in Florida's RICO statute as a deliberate legislative choice. In reaching beyond the legislature's already widened horizons of RICO, Florida courts are overstepping their authority.

X. CONCLUSION

The plain language of Florida's RICO statute is far broader than its federal counterpart, incorporating more crimes and applying to more types of organizations. The breadth of the statute presents tremendous potential for prosecutorial abuse and creates the possibility of infringement on fundamental individual constitutional rights. Because of these dangers, courts must carefully apply the Florida RICO statute. Because of the basic similarity between the two statutes,

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237. *See supra* notes 44 & 136 and accompanying text.

238. In determining the intent of the legislature with regard to a criminal statutory provision, each pertinent section of the criminal code should be considered. Hutchinson v. State, 315 So. 2d 546, 547 (Fla. 2d D.C.A. 1975).

239. *See, e.g.*, Fine v. Moran, 74 Fla. 417, 77 So. 533 (1917); Dade County v. Baker, 362 So. 2d 151 (Fla. 3d D.C.A. 1978); State *ex rel.* Washington v. Rivkind, 350 So. 2d 575 (Fla. 3d D.C.A. 1977); American Bankers Life Assurance Co. of Fla. v. Williams, 212 So. 2d 777 (Fla. 1st D.C.A. 1968); United States Casualty Co. v. Town of Palm Beach, 119 So. 2d 800 (Fla. 2d D.C.A. 1960); Dillman v. Dillman, 105 So. 2d 33 (Fla. 2d D.C.A. 1958).

240. *See supra* notes 61-67, 175, 185-86 and accompanying text.

241. Florida's statutory strict construction rule includes language which indicates the legislature had considered the possibility that some criminal offenses would be excluded. FLA. STAT. § 775.021(2) (1987) provides: "The provisions of this chapter are applicable to offenses defined by other statutes, *unless the code otherwise provides . . . .*" *Id.* (emphasis added). The RICO statute itself also refers to other sections of Chapter 775 in establishing criminal penalties. *Id.* § 895.04(1).

242. *See, e.g.*, Dorsey v. State, 402 So. 2d 1178 (Fla. 1981).

however, Florida courts have turned to federal court decisions for guidance in interpreting the Florida RICO statute.

Florida courts have incorrectly used the decisions of federal courts as authority in interpreting the language of the Florida RICO Act. Courts have overlooked Florida's statutory strict construction rule, which is an essential difference between federal and Florida criminal law. The Florida Legislature deliberately created a broader RICO law, but chose not to exclude it from the strict construction rule. Florida courts, therefore, should not apply the liberally construed federal decisions to further broaden the Florida RICO statute.