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State Civil Penalties for Obscenity Violations: The Constitutionality of Pretrial Seizure of Obscene Publications

Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989).

I. INTRODUCTION

Virtually all states have enacted Racketeer Influenced and Corrupt Organizations (RICO) statutes.¹ Indiana's RICO statute includes obscenity offenses² as a predicate for racketeering violations which can be used to invoke Indiana's Civil Remedies for Racketeering Activity (CRRA)³ statute when the state seeks civil injunctive relief.⁴ The CRRA statute allows for, *inter alia*, the forfeiture of all the offender's property that "was used in the course of, intended for use in the course of, derived from, or realized through"⁵ the furtherance of racketeering activity. In addition, Indiana statutes prohibit the distribution of obscene material,⁶ violations of which can be used by the state as a basis for prosecution under the state's RICO statute.

Recently, the United States Supreme Court granted certiorari to review two Indiana cases which presented issues of the constitutionality of Indiana's RICO statute as applied to obscenity viola-

1. See Comment, *RICO's Forfeiture Provision: A First Amendment Restraint on Adult Bookstores*, 43 U. MIAMI L. REV. 418 (1988).

2. Section 35-45-6-1 of the Indiana Code states that "'Racketeering activity' means to commit, attempt to commit, or to conspire to commit a violation, or aiding and abetting a violation of . . . [the obscenity statute]" IND. CODE ANN. § 35-45-6-1 (Burns 1985). Indiana Code 35-49-3 is Indiana's obscenity statute. Section 35-45-6-2 of the Indiana Code specifies the penalties for violation of section 35-45-6-1. IND. CODE ANN. § 35-45-6-2 (Burns 1985). Specifically, a violation of this section is a class C felony. See *infra* note 29 for the text of the substantive section of the Indiana RICO statute.

3. The CRRA provides civil remedies for violations of the Indiana RICO statute. IND. CODE ANN. § 34-4-30.5-1 (Burns 1985).

4. IND. CODE ANN. § 34-4-30.5-2 (Burns 1985).

5. IND. CODE ANN. § 34-4-30.5-3 (Burns 1985). See *infra* note 66 for the text of the statute.

6. The Indiana statutes prohibit the importation or distribution of obscene matter. IND. CODE ANN. § 35-49-3-1 (Burns 1985). In addition, activities related to obscene performances are classified as class D felonies. IND. CODE ANN. § 35-49-3-2 (Burns 1985). Obscene materials are defined by applying, essentially, the same test as in *Miller v. California*, 413 U.S. 15 (1973). IND. CODE ANN. § 35-49-2-1 (Burns 1985). See also *infra* note 26 (providing the text of the *Miller* test).

tions. The first case, *4447 Corp. v. Goldsmith*,⁷ involved the selling of allegedly obscene publications from three stores operated by Fort Wayne Books, Inc.⁸ The state alleged that obscene material remaining in the stores was being used to further the store's racketeering activity. Thus, the state sought civil injunctive relief and invoked the CRRA statute and the state's pretrial seizure procedure to seize all of the store's property, real and personal.⁹ The trial court, in an *ex parte* hearing, considered testimony in support of the state's petition for pretrial seizure and issued an order authorizing the county sheriff to padlock the stores and haul away the stores' contents.¹⁰ Subsequently, Fort Wayne Books, Inc. petitioned the trial court to vacate the seizure order on federal constitutional grounds.¹¹ This attempt failed, but the trial court certified the constitutional question to the Indiana Court of Appeals which held that the RICO/CRRA provisions violate the United States Constitution.¹² The Indiana Supreme Court reversed the court of appeals and upheld "the constitutionality of the CRRA statute as a general proposition and the pretrial seizure of Fort Wayne Books' stores as a specific matter."¹³ The United States Supreme Court granted certiorari¹⁴ to consider the constitutional issues raised by the pretrial procedure and, in a plurality opinion, reversed the Indiana Supreme Court's ruling.

The second case, *State v. Sappenfield*,¹⁵ concerned a direct application of the state's RICO statute to the distribution of ob-

7. 504 N.E.2d 559 (Ind. 1987). The Indiana Court of Appeals consolidated *4447 Corp. v. Goldsmith* and *Fort Wayne Books, Inc. v. Indiana*. 479 N.E.2d 578 (Ind. App. 1985). Only Fort Wayne Books, Inc. petitioned for review. Thus, the discussion of *4447 Corp.* in this Note refers to the issues presented in *Fort Wayne Books*.

8. The state brought thirty-nine criminal charges against Fort Wayne Books, Inc. for selling allegedly obscene publications. *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 921 (1989).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* The Indiana Supreme Court answered in the negative both of the questions certified by the Indiana Court of Appeals. The questions were stated as follows:

(a) Does the application for seizure upon probable cause shown *ex parte* as provided for by I.C. 34-4-30.5-3(b) violate due process guarantees provided by the Indiana and United States Constitutions.

(b) Is the order of seizure issued March 19, 1984, which is based upon enumerated criminal convictions a violation of the First Amendment.

Id. at 928, n.9. However, the United States Supreme Court did not consider the due process issues because it disposed of the claim on first amendment grounds. *Id.*

13. *Id.* at 922.

14. 108 S. Ct. 1106 (1988).

15. 505 N.E.2d 504 (Ind. App. 1987).

scene material. The state filed six misdemeanor obscenity charges and two felony RICO charges against Sappenfield, the owner and operator of an adult bookstore.¹⁶ The trial court dismissed the RICO counts stating that "the RICO statute was unconstitutionally vague as applied to obscenity predicate offenses."¹⁷ However, the Indiana Court of Appeals, following the precedent set by the Indiana Supreme Court in *4447 Corp. v. Goldsmith*, reinstated the RICO charges.¹⁸ The Indiana Supreme Court refused to review the case. The United States Supreme Court granted certiorari¹⁹ to consider the constitutional issues raised by the application of the state's RICO statute to obscenity cases and affirmed the Indiana Court of Appeal's ruling.

Section II of this Note describes the United States Supreme Court's consideration of the constitutionality of the Indiana RICO statute as applied to obscenity predicate offenses. Central to the issues presented is the first amendment protection of materials bought and sold in adult bookstores. Specifically, the Court considered whether the Indiana RICO statute was so vague as to preclude first amendment protection of free speech and whether the felony penalties for violation of the Indiana RICO statute have a chilling effect on adult book store's exercising their first amendment rights. Section III of this Note analyzes the constitutionality of the seizure of adult book store property, including presumptively protected material. Indiana's RICO statute, read narrowly, allows such seizure without the heightened showing of probable cause required when first amendment protected material is involved.

II. THE CONSTITUTIONALITY OF INDIANA'S RICO STATUTE

The United States Supreme Court first considered the constitutionality of Indiana's RICO statute as presented in *Sappenfield*.²⁰ Sappenfield presented two main arguments in support

16. *Fort Wayne Books*, 109 S. Ct. at 922.

17. *Id.* Predicate offenses are listed in the Indiana RICO statute. See *infra* note 29 for text of the RICO statute.

18. *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989) (citing *State v. Sappenfield*, 505 N.E.2d 504, 506 (Ind. App. 1987)).

19. 108 S. Ct. 1106 (1988).

20. The Court based jurisdiction on an exemption to the finality rule. 109 S. Ct. at 923. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) describes four categories where a judgment is final even when further proceedings are pending in state court. The Court here found that the present case falls under the fourth category: refusal to review the claim "might seriously erode federal policy." 109 S. Ct. at 923 (quoting *Cox*, 420 U.S. at 482-483). Justices Blackmun and O'Connor filed separate concurring opinions but dissented from the

of its contention that the application of Indiana's RICO statute was unconstitutional when predicated on obscenity violations.²¹ First, Sappenfield claimed that the RICO statute is unconstitutionally vague as applied to enterprises for the distribution of obscene material.²² Second, Sappenfield argued that the penalties under the RICO statute are so "severe that the statute lacks a 'necessary sensitivity to first amendment rights.'" ²³ The Court rejected both of Sappenfield's arguments and found that Indiana's RICO statute is not unconstitutional as applied to obscenity predicate offenses.

A. Unconstitutional Vagueness

The Indiana obscenity statute is completely incorporated by reference into the state's RICO statute²⁴ which defines a pattern of multiple violations of substantive crimes, one of which is the distribution of obscene materials, as racketeering activity. The Court stated that the RICO statute cannot be unconstitutionally vague²⁵ as applied to obscenity predicate offenses if the underlying obscenity statute is not unconstitutionally vague. Because Indiana's obscenity statute conformed with the standards set forth in *Miller v. California*,²⁶ the Court found it not to be unconstitutionally vague.

majority's finding of jurisdiction. 109 S. Ct. at 930 (Blackmun, J., concurring in part, dissenting in part); 109 S. Ct. at 930 (O'Connor, J., concurring in part, dissenting in part). Justices Stevens, Brennan, and Marshall agreed with the jurisdictional grounds but dissented from the result. 109 S. Ct. at 930 (Stevens, J., dissenting in part, concurring in part).

21. *Fort Wayne Books*, 109 S. Ct. at 924.

22. *Id.*

23. *Id.*

24. See *supra* note 2 and accompanying text.

25. *Fort Wayne Books*, 109 S. Ct. at 925. The Court stated that Sappenfield cannot be convicted of the RICO charges without first being adjudicated guilty of violating the obscenity statute. *Id.*

26. 413 U.S. 15 (1973). The *Miller* Court set out the following three part standard for trial courts to use in determining whether material is obscene:

- (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (citations omitted). In addition, the Court in *Miller* held that obscene materials are not protected by the first amendment but added:

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commer-

The Court reasoned that the RICO statute is "less vague than any state obscenity law"²⁷ because the RICO statute requires a pattern of obscenity violations which makes the RICO statute "more limited than the scope of the state's obscenity statute."²⁸ Therefore, the Court concluded that the Indiana RICO statute is not unconstitutionally vague as applied to obscenity predicate offenses.

B. *The Necessary Sensitivity to first amendment Rights*

Indiana's RICO statute provides penalties under the state's felony statute²⁹ which imposes a possible five year prison sentence and a \$10,000 fine³⁰ for those offenders found guilty of racketeering. On the other hand, violations of the state's obscenity statute are punishable as misdemeanors with a maximum one year prison sentence and a \$5,000 fine.³¹ Sappenfield in this case would face a maximum of ten years in prison and a \$20,000 fine for conviction of the two felony RICO violations. However, Sappenfield would face six years in prison and a \$30,000 fine for conviction of the six misdemeanor obscenity violations.³² Therefore, Sappenfield argues,

cial activities may bring prosecution.

Id. at 15.

27. *Fort Wayne Books*, 109 S. Ct. at 925 n.7.

28. *Id.*

29. The Indiana RICO statute states:

(a) A Person:

(1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest or control of real property or an enterprise; or

(3) Who is employed or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony.

IND. CODE ANN. § 35-45-6-2 (Burns 1985). The felony section states:

A person who commits a class C felony shall be imprisoned for a fixed term of five [5] years, with not more than three [3] years added for aggravating circumstances or not more than three [3] years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars [\$10,000].

IND. CODE ANN. § 35-50-2-6.

30. *Id.*

31. The Indiana Obscenity Statute states that the importation or distribution of obscene matter is a class A misdemeanor. IND. CODE ANN. § 35-49-3-1 (Burns 1985).

32. *Fort Wayne Books*, 109 S. Ct. at 925. Although the aggregate punishment for this petitioner for committing a Class C felony does not appear to be much different than the punishment for committing a Class A misdemeanor, the *individual* penalties are quite different. See *supra* text accompanying notes 30 & 31.

the RICO penalties lack the necessary sensitivity to the values inherent in the first amendment and "have an improper chilling effect on first amendment freedoms."³³

The Court rejected Sappenfield's argument and recognized the disparity in the sanctions under the two statutes, but saw no constitutional significance in the differences.³⁴ The Court has upheld criminal sanctions for obscenity violations as constitutional in other cases³⁵ and, in this case, there was no difference between the sanctions under the Indiana RICO statute and the sanctions allowed by the Court in other state proceedings. The Court found that the "deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws"³⁶ and that this deterrence is exactly what the Indiana statute was designed to provide. The logical result of such a statute is a tendency toward self-censorship by adult book sellers and a reduction in the proliferation of obscene material. Consequently, the Court concluded that "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to render an obscenity law unconstitutional under [United States Supreme Court] precedents"³⁷ and the Constitution of the United States does not bar the inclusion of obscenity violations as predicate offenses under the Indiana RICO statute.³⁸

C. *The Court Rejects Sappenfield's Other Grounds*

Sappenfield set forth two additional grounds in support of its contention that the Indiana RICO statute is unconstitutional as applied to obscenity violations.³⁹ First, Sappenfield argued that the RICO statute was unconstitutional because it allowed convictions on non-successive dates in jurisdictions other than the jurisdiction where the charges were brought. The Court rejected this argument and found that the first amendment does not require affirmed, successive convictions in non-obscenity cases, and therefore, it reasoned, no such requirement can exist in obscenity cases.⁴⁰ The

33. *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 925 (1989).

34. *Id.*

35. *Id.* at 925 n.8 (1989) (citing *Smith v. United States*, 431 U.S. 291, 296, n.3 (1977) (5 year prison term and \$5,000 fine for first offense; 10 year prison term and \$10,000 fine for each subsequent violation); *Ginzburg v. United States*, 383 U.S. 463, 464-465, n.2 (1966) (5 year prison term and \$5,000 fine)).

36. *Fort Wayne Books*, 109 S. Ct. at 925.

37. *Id.* at 926

38. *Id.* The Court decided that Sappenfield's argument that the RICO statute was unconstitutional because of the severity of the penalties under the CRRRA was not ripe. *Id.*

39. *Id.*

40. *Id.* (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985)).

Court reasoned that the first amendment is satisfied by a proper standard of proof and, as such, the Court refused to require states to impose "warning shot" requirements before the state can bring felony obscenity charges.⁴¹ Further, the Court held that the jurisdictional requirement contention lacked merit because Sappenfield's offenses all took place in the same jurisdiction, and because requiring all RICO violations to occur in the same jurisdiction prior to subjecting the violator to RICO charges would "turn the RICO statute on its head."⁴²

Finally, the Court rejected Sappenfield's argument that the RICO statute was unconstitutional because it did not allow for an immediate adversarial hearing on the question of obscenity.⁴³ The Court found that Sappenfield did not request such a hearing. Moreover, the items in question were purchased rather than seized by undercover police officers.⁴⁴ Therefore, consistent with Supreme Court precedent,⁴⁵ the Court concluded that such purchases were not seizures of expressive materials and did not "trigger constitutional concerns."⁴⁶ However, the Court warned that the pretrial seizure of presumptively protected material is unconstitutional.⁴⁷

41. *Id.* (quoting the amicus curiae brief filed by the Solicitor General on behalf of the United States which argued that "this Court has never required a state to fire warning shots, in the form of misdemeanor prosecutions, before it may bring felony charges for distributing obscene materials.").

42. The Court was referring to the jurisdictional requirement as effectively "barring RICO prosecutions of large national enterprises that commit single predicate offenses in numerous jurisdictions." *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 926 (1989).

43. *Id.* at 927.

44. *Id.* The assumption is that the Court would consider the constitutionality of the taking of bookstore property if the property were in fact seized, not purchased. *See supra* notes 47-49 and accompanying text.

45. *Maryland v. Macon*, 472 U.S. 463 (1985). In *Maryland*, an undercover detective purchased allegedly obscene material from a sales clerk with marked currency. The Court held that such a purchase was not a seizure of property and stated:

The sale is not retroactively transformed into a warrantless search by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence. Assuming, *arguendo*, that the retrieval of the money incident to the arrest was wrongful, the proper remedy is restitution or suppression of the \$50 bill as evidence of the purchase, not the exclusion from the evidence of the previously purchased magazines.

Id. at 463.

46. *Fort Wayne Books*, 109 S. Ct. at 927.

47. *See infra* notes 48-69 and accompanying text.

III. THE UNCONSTITUTIONALITY OF INDIANA'S SEIZURE PROCEDURE: FIRST AMENDMENT AND FOURTH AMENDMENT TENSION

The first amendment⁴⁸ protects allegedly obscene materials from pretrial *ex parte* seizure while the fourth amendment⁴⁹ allows the use of such seizure procedures to preserve evidence. The Court in *Fort Wayne* was confronted with the tension between these two amendments: should a pretrial seizure procedure stand where the seizure effectively takes the materials out of circulation, but where the seizure also preserves the evidence necessary to prosecute under the RICO statute. These two interconnected constitutional provisions directly impact the constitutionality of the pretrial seizure of allegedly obscene materials.

The first amendment protects allegedly obscene material from being seized unless the seizure is for the express purpose of determining the question of obscenity.⁵⁰ This safeguard protects the obscene material from being taken out of circulation prior to a determination of its obscene nature.⁵¹ On the other hand, the general rule under the fourth amendment with respect to the seizure of material is that "all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances)"⁵² in order to preserve evidence. But, when the material subject to seizure is "presumptively pro-

48. The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

U.S. CONST. amend. I (emphasis added).

49. The fourth amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, *against unreasonable searches and seizures*, shall not be violated, and no Warrants shall issue, but upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV (emphasis added).

50. *Fort Wayne Books*, 109 S. Ct. at 927 (citing *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964); *Lees Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968)). In fact, Indiana law provides for a preliminary adversary hearing for determining whether seized material is obscene. IND. CODE ANN. § 35-49-2-4 (Burns 1985). However, this section is invoked only when materials are seized or purchased, or the defendant is arrested, under the obscenity statute, not the RICO statute. IND. CODE ANN. § 35-49-2-4(a) (Burns 1985). In addition, an Indiana law requires a warrant to issue prior to arrest of seizure and restricts seizure to "[t]he quantity of matter seized may encompass no more than is reasonably necessary for the purpose of obtaining evidence." IND. CODE ANN. § 35-49-2-3 (Burns 1985).

51. *Heller v. New York*, 413 U.S. 483 (1973).

52. *Fort Wayne Books*, 109 S. Ct. at 927.

ected by the first amendment,"⁵³ the general rule does not apply.⁵⁴ The United States Supreme Court considered the delicate interplay between the first and fourth amendments in its review of *4447 Corp. v. Goldsmith*.

A. Seizure of Bookstore Property under the Fourth Amendment

Pursuant to the Indiana trial court's order, the county sheriff padlocked the doors of the Fort Wayne bookstore and seized its contents.⁵⁵ Such seizures are proper under Indiana's RICO and CRRA statutes as a means of procuring and preserving evidence of alleged RICO violations.⁵⁶ The United States Supreme Court assumed without deciding that, in general, the property of bookstores may be seized without violating the United States Constitution;⁵⁷ but, it cautioned that the state must determine prior to seizure that the material actually was used in the furtherance of a pattern of racketeering activity.⁵⁸ In order to make this determination, the trial court must decide whether the seized material is obscene, violating the state's obscenity statute and, therefore, violating the RICO statute. In its consideration of *Sappenfield*, the Supreme Court decided that an implicit tenet of an individual's first amendment right to free speech is the corresponding restriction on the state prohibiting seizure of otherwise protected speech materials under the fourth amendment.⁵⁹

53. *Id.*

54. *Id.* *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). In *Lo-Ji Sales*, a group of law enforcement officers entered the premises of an adult book seller and seized articles pursuant to a search warrant prepared by the Town Justice, who assisted the officers during the search. The officers seized many articles not specified in the warrant. The Court stated:

We have repeatedly said that a warrant authorized by a neutral and detached judicial officer is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 326.

Further, the Court added that "[C]ourts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirement of *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) and *Marcus v. Search Warrant*, 367 U.S. 717 (1961) are fully met . . ." *Id.* at 328.

55. *Fort Wayne Books*, 109 S. Ct. at 921.

56. See *supra* notes 2-6 and accompanying text.

57. *Fort Wayne Books*, 109 S. Ct. at 928.

58. *Id.*

59. *Id.*

B. Circumvention of First Amendment Doctrines

The Indiana RICO and CRRA statutes were used by the state to seize allegedly obscene materials only when the use of the obscene materials was found to be in the furtherance of racketeering activity without a determination of the material's obscene nature.⁶⁰ The Indiana Supreme Court found that the seizure of Fort Wayne's property was not an attempt to "restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity."⁶¹ The court reasoned that it was not relevant that the seized material was or was not obscene.⁶²

In contrast, the United States Supreme Court did not find that the Indiana statutes actually were invoked by the state to sidestep the first amendment protections, but found that the seizures were violative of the constitution because "it is incontestable that these proceedings were begun to put an end to the sale of obscenity at the three bookstores."⁶³ In other words, the Court stated that probable cause, established *ex parte*, is not enough to seize first amendment materials even if the materials are allegedly obscene. Thus, the Court concluded that the special rules which apply to protected speech being removed from circulation must be invoked.⁶⁴

C. Pretrial Seizure is Unconstitutional

Prior to the seizure of Fort Wayne Books's property, the trial court adjudicated the predicate crimes under the RICO statute.⁶⁵ At the pretrial hearing conducted pursuant to the state's seizure petition, the prosecution was required to establish by a preponderance of the evidence that the materials should be seized.⁶⁶ How-

60. *Id.*

61. *Id.* (citing 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 565 (Ind. 1987)).

62. 4447 Corp., 504 N.E.2d at 564-565.

63. *Fort Wayne Books*, 109 S. Ct. at 929.

64. See *supra* note 49 and accompanying text.

65. See *supra* notes 2-7 and accompanying text.

66. Subsection (a) of the Indiana CRRA statute provides in pertinent part:

Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, or derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

IND. CODE ANN. § 34-4-30.5-3(a) (Burns 1985) (emphasis added). Subsection (b) provides:

ever, when materials are protected by the first amendment, mere probable cause is not enough.⁶⁷ If the state had predicated its seizure request on the Indiana obscenity statute, the state would have had to prove the obscenity violations prior to, or shortly after, the seizure.⁶⁸ On the other hand, under the RICO statute, the state simply had to show that there was probable cause to seize the materials due to their being used in the furtherance of possible RICO violations.⁶⁹ The United States Supreme Court found that "[t]he fact that the [state's] motion for seizure was couched as one under the Indiana RICO law—instead of being under the substantive obscenity statute—is unavailing."⁷⁰ The Court reasoned that the manner or means in which restraint on free speech is characterized is of little consequence.⁷¹

The United States Supreme Court held that the pretrial seizure procedure under the Indiana statutes is unconstitutional because it took protected materials out of circulation without the proper procedural safeguards.⁷² The Court stated that the state had "not proved whether the seizure was actually warranted under the Indiana CRRA and RICO statutes."⁷³

IV. CONCLUSION

Obscenity statutes which are incorporated into state RICO statutes must be specific and non-vague in order for the RICO statute to withstand constitutional scrutiny. If the underlying obscenity statute abides by the guidelines set forth in *Miller v. California*, then the RICO statute, which is inherently less vague than the underlying statute, will not be unconstitutionally vague.

In addition, when a state seizes property pursuant to its RICO statute, the Court will determine the constitutionality of the pre-

When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of Indiana Code 35-4-30.5-2 involving the property in question has occurred.

IND. CODE ANN. § 34-4-30.5-3(b) (Burns 1985) (emphasis added).

67. *Id.* See also *New York v. P.J. Video*, 475 U.S. 868 (1979) (stating that probable cause determined pursuant to affidavits expressing the "probability or substantial chance of criminal activity, not an actual showing of such activity" is the proper standard to be applied when warrants are issued to seize presumptively protected material).

68. *Fort Wayne Books*, 109 S. Ct. at 929. See also *supra* note 49.

69. See *supra* note 66.

70. *Fort Wayne Books*, 109 S. Ct. at 929.

71. *Id.*

72. *Id.*

73. *Id.* at 929-930.

trial procedure based on the characterization of the material seized. When the material is presumptively protected by the first amendment, the Court will require stricter safeguards notwithstanding the constitutionality of seizing property pursuant to the RICO statutes. The Court's decision in *Fort Wayne Books, Inc. v. Indiana*, although not groundbreaking nor unprecedented, sends a message to all states that incorporate substantive statutes into their RICO statutes: if a violation of the substantive statute leads to a pretrial seizure of property under the RICO statute, the constitutional protections of free speech cannot be sidestepped.

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