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# TIGHTENING THE NET OF FLORIDA'S RICO ACT

JENNIFER DALEY\*

## I. INTRODUCTION

**T**OURISTS and other visitors to the Sunshine State can expect more than a warm climate and beautiful beaches these days. Because Florida has had the highest reported violent crime rate in the nation, it has been referred to as the "state of crime."<sup>1</sup> In the United States as a whole, while the overall level of crime has decreased since its peak in 1981, the victimization rate for violent crimes has risen since its decline in 1986 and 1989.<sup>2</sup> Concerns about crime permeate election campaigns, legislative debates, and public opinion polls.<sup>3</sup> These factors, combined with increased media coverage of violent crime over the past few years—including the coverage of the recent attacks on Florida tourists<sup>4</sup>—have fueled local, national, and interna-

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1. Vickie Chacere, *The State of Crime*, TAMPA TRIBUNE, Oct. 3, 1993, at 1A (reporting on crime statistics compiled by the Florida Department of Law Enforcement for the years 1982-1992); see *Violent Crime Up, According to FBI*, TAMPA TRIBUNE, Oct. 3, 1993, at 11A (reporting on a statement made by FBI Director Louis Freeh and noting that FBI statistics show that Florida has the highest crime rate of all 50 states and Dade County has the worst crime rate of all of the nation's metropolitan areas).

2. See BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: 1973-1990 TRENDS 1 (n.d.) (summarizing the Crime Victimization Survey Report, December 1992, NCJ-139564); BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: 1991, at 3 (n.d.) (summarizing the Crime Victimization Survey Report, December 1992, NCJ-139563, and finding an 11% increase, labeled as significant, in the number of violent crime attempts, primarily attributable to a rise in assaults). See also BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1991, at 257-70 (1992) (Tables 3.2-3.15).

3. JAMES GAROFALO, UNITED STATES DEP'T OF JUSTICE, PUBLIC OPINION ABOUT CRIME: THE ATTITUDES OF VICTIMS AND NONVICTIMS IN SELECTED CITIES 13 (1977).

4. Between December 1992 and September 16, 1993, nine tourists—four from Germany, two from England, two from Canada, and one from Venezuela—were killed and others wounded in South Florida and a rest stop in Monticello. The latest killing was of a British tourist. The eight earlier reported killings occurred in south Florida, including the savage beating and killing of a 39-year-old German woman, who while driving a rental car from Miami, got lost and strayed off Interstate 95 into Liberty City, and the killing of a German man who, on his honeymoon, was shot in his rental vehicle even after heeding tourist warnings not to stop their cars if hit from the rear by other vehicles. See Dana Peck & Tony Welch, *A Break in Tourist Slaying*, TALLAHASSEE DEMOCRAT, Sept. 16, 1993, at 1A (reporting on the arrest of teenage sus-

tional fears about rising crime rates in Florida and the nation far beyond the actual recorded increase in crime.<sup>5</sup> Consequently, more citizens are demanding new or improved legislation and greater enforcement of legislation aimed at addressing Florida's crime problem. These demands have been met with a number of federal and state measures, including legislation aimed at imposing harsher criminal sentences for certain offenses.

To address earlier outcries of Floridians for solutions to Florida's crime problem, the Florida Legislature enacted Florida's Racketeering Influenced and Corrupt Organizations Act (RICO).<sup>6</sup> Primarily because of the advantages over other criminal laws, federal and state governments have turned to RICO Acts as alternatives to other legislation, such as conspiracy laws which were previously used to prosecute large numbers of defendants in a single trial.<sup>7</sup> One advantage is that RICO Acts solve the deficiency in other criminal statutes that incarcerate the individual members of organizations engaged in criminal activity, but rarely eliminate the organizations.<sup>8</sup> Another advantage is that RICO Acts eliminate problems involving evidence gathering and constitutional protections, which prosecutors previously encountered in prosecuting organized crime.<sup>9</sup> Other advantages of RICO Acts include the availability of civil remedies to prosecutors and affected individuals, harsher penalties and new sanctions, injunctions to prevent defendants from using assets gained from racketeering to obtain legal

pects in Monticello for the killing and attempted robbery of a British tourist who, along with a companion, stopped at a highway rest stop to take a nap and was shot when he tried to escape from the teenagers); Manny Garcia & Gail Epstein, *A Brutal Welcome to Miami*, TALLAHASSEE DEMOCRAT, Sept. 9, 1993, at 1A; see also *Fight Fear in Florida*, TIME, Apr. 19, 1993, at 22 (reporting the attacks on tourists, including the German Consul statement that he is considering warning tourists to stay away from Miami, and the changes made to the city to avoid being listed with current travel-agency pariahs like Egypt and Northern Ireland); Christopher Sullivan, *News Offers a Glimpse of a Flawed Paradise*, TALLAHASSEE DEMOCRAT, Apr. 14, 1993, at 5B (reporting that the attacks on tourists and the recent highway sniping incidents in Jacksonville may affect tourism and Florida's image); Chuck Clark, *Chiles Reacts to Crime Spree Against Tourists*, TALLAHASSEE DEMOCRAT, Apr. 6, 1993, at 1A (reporting that the robberies of three Danish female tourists in Miami on April 5 took place while the Governor's Task Force on Safety was discussing the recent "plague" of crime on Miami tourists three blocks away).

5. See Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. REVIEW OF RES. 99, 117-18 (1992).

6. FLA. STAT. §§ 895.01-.06 (1991 & Supp. 1992); see *infra* notes 25-26 and accompanying text.

7. Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 167 (1980); The Office of the Att'y Gen. & the New Jersey County Prosecutor's Ass'n, *A Status Report on the War Against Organized Crime in New Jersey: Some Recommendations for the Future*, 6 CRIM. JUST. Q. 50 (1978) [hereinafter *Status Report*].

8. *Status Report*, *supra* note 7, at 57; see *infra* notes 96-110 and accompanying text.

9. *Id.*; see *infra* notes 33-39, 78-81 and accompanying text.

representation or to prepare a defense, and expanded doctrines regarding admissibility of evidence.<sup>10</sup>

In 1977, Florida legislators passed the original version of Florida's RICO Act intending to prevent racketeers involved in organized crime from infiltrating legitimate businesses.<sup>11</sup> Florida's current RICO Act now reaches a broader scope of criminal conduct not originally envisioned by the federal RICO Act,<sup>12</sup> upon which it was patterned, or the original Florida RICO Act.<sup>13</sup> Among other things, the current Act prohibits individuals from using or investing proceeds received from or derived through a "pattern of racketeering activity" to acquire title, right, interest, or equity in real property or to establish or maintain an enterprise; acquiring or maintaining control of an "enterprise" or real property through a pattern of racketeering activity; being employed by or associating with an enterprise through a pattern of racketeering activity; and conspiring or attempting to engage in such activities.<sup>14</sup> Furthermore, the Act prohibits individuals from acquiring or maintaining an interest in, or control of, an enterprise or real property through the collection of an unlawful debt, using or investing proceeds from the collection of an unlawful debt, or conducting or participating in an enterprise through the collection of an unlawful debt.<sup>15</sup>

This Article discusses the scope of Florida's current RICO Act and compares it to the federal RICO Act. The Article also discusses the elements necessary to successfully prosecute defendants under the Florida Act and the problems that Florida courts have encountered in attempting to apply the Act. Finally, the Article analyzes the critical elements of a successful RICO prosecution and proposes several changes to Florida's RICO Act.

## II. THE ORIGINAL NET

The Florida RICO Act was not the Legislature's first attempt at reaching organized crime in Florida. In 1969, Florida enacted legislation which allowed the Department of Legal Affairs to institute civil proceedings to forfeit the charter, revoke the permit, or enjoin the operation of a corporation when the corporate officers, managers, or

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10. Tarlow, *supra* note 7, at 170.

11. *See infra* note 25.

12. *See* 18 U.S.C. §§ 1961-68 (1988 & Supp. 1991). The original federal RICO Act became effective on October 15, 1970, and was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970); *see also infra* note 22.

13. *See* FLA. STAT. §§ 943.46-.464 (1977) [current version at FLA. STAT. §§ 895.01-.06 (1991 & Supp. 1992)].

14. FLA. STAT. § 895.03 (1991 & Supp. 1992).

15. *Id.*

persons controlling the management or operation of the corporation engaged in certain activities with the knowledge of the president and a majority of the board of directors, or under circumstances where those individuals should have known of the activities.<sup>16</sup> These activities included organized, violent, revolutionary, or unlawful activity aimed at overthrowing the state government or any of its political subdivisions, institutions, or agencies; organized homosexuality; organized crimes against nature; organized prostitution; organized gambling; organized narcotics; organized extortion; and direct or indirect connection with organizations, syndicates, or criminal societies engaged in such activities.<sup>17</sup> In 1971, however, the Florida Supreme Court held the legislation unconstitutional as it violated the Due Process Clauses of both the Florida and the United States Constitutions.<sup>18</sup> After repealing that legislation,<sup>19</sup> the Legislature enacted the original Florida RICO Act, which became effective on October 1, 1977<sup>20</sup> and was patterned after the federal RICO Act.<sup>21</sup> Congress enacted the federal RICO Act in 1970 to address what the federal government saw as a lack of state and federal legislation addressing the growing national problem of organized crime.<sup>22</sup> Congress had full knowledge that a number of state crimes were included within the scope of "racketeering activity."<sup>23</sup> Nonetheless, Congress passed the Act despite objections that it was acting beyond its enumerated powers.<sup>24</sup>

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16. FLA. STAT. §§ 932.58-.60 (1969), *repealed by* ch. 83-214, § 25, 1983 Fla. Laws 852.

17. *Id.*

18. *Aztec Motel, Inc. v. State ex rel. Faircloth*, 251 So. 2d 849, 854 (Fla. 1971).

19. Ch. 83-214, § 25, 1983 Fla. Laws 852.

20. *See supra* note 13; *see* ch. 77-334, §§ 1-8, 1977 Fla. Laws 1399, 1399-1406.

21. *See* 18 U.S.C. §§ 1961-68 (1988).

22. *See* Pub. L. No. 91-452, 84 Stat. 922 (1970). The Statement of Findings and Purpose of this Act states in pertinent part:

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking . . . ; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic process . . . ; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

*Id.* at 922-23; *see* *United States v. Turkette*, 452 U.S. 576, 586-93 (1981) (discussing and quoting findings from the Organized Crime Control Act of 1970, 84 Stat. 922, and hearings held on the matter).

23. *Turkette*, 452 U.S. at 586-87.

24. *Id.* *Turkette* provides an extensive discussion of the legislative history of the federal

Using legislation similar to the federal RICO Act, the Florida RICO Act was enacted to address the state's growing problem of organized crime. The original declared purpose of Florida's RICO Act was to target organized crime and to prevent organized criminal organizations from infiltrating and corrupting legitimate businesses.<sup>25</sup> The Legislature again referred to the 1977 Act's original purpose "to combat organized crime" when it amended the Act in 1981 to allow the state to successfully seize real and personal property gained through a pattern of racketeering activity and to prevent further investment in such property by persons charged under the RICO Act.<sup>26</sup> However, while the declared purpose of the original Florida and federal RICO Acts focused on targeting organized crime, neither Act expressly required the prosecutor or plaintiff to prove the connection between the targeted individuals and "organized crime."<sup>27</sup> The absence of such language produced conflicting opinions by the federal circuit courts on whether the federal RICO Act applies to illegitimate businesses as well as to legitimate businesses.<sup>28</sup> The United States Supreme Court resolved this conflict by holding that, on its face, the federal Act appears to include both legitimate and illegitimate enterprises within its

RICO Act. *Id.* See Jan Neuenschwander, *RICO Extended to Apply to Wholly Illegitimate Enterprises*, 72 J. CRIM. L. & CRIMINOLOGY 1426, 1435-40 (1981); Jacqueline Dowd, Comment, *Interpreting RICO: In Florida the Rules are Different*, 40 U. FLA. L. REV. 127, 130-34 (1988).

25. The preamble of chapter 77-334, 1977 Florida Laws, reads in relevant part:

WHEREAS, organized crime is infiltrating and corrupting legitimate businesses operating within this state and this infiltration and corruption uses vast amounts of money, power, and all the techniques of violence, intimidation, and other forms of unlawful conduct to accomplish its goals, and

WHEREAS, in furtherance of such infiltration and corruption, organized criminal operatives utilize and apply to their unlawful purposes laws of the State of Florida conferring and relating to the privilege of engaging in various types of business enterprises, and

WHEREAS, infiltration and corruption of legitimate business provide an outlet for illegally obtained capital, harm innocent investors, entrepreneurs, merchants, and consumers, interfere with free competition, and thereby constitute a substantial danger to the economic and general welfare of the State of Florida . . .

*Id.* For an extensive discussion of the legislative history of the Florida RICO Act, see Raymer F. Maguire, III, Note, *Racketeers and Non-Racketeers Alike Should Fear Florida's RICO Act*, 6 FLA. ST. U. L. REV. 483, 495-513 (1978).

26. Ch. 81-141, Preamble, 1981 Fla. Laws 290-91.

27. FLA. STAT. § 895.03 (1991); 18 U.S.C. §§ 1961-68 (1988); see *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *Boyd v. State*, 578 So. 2d 718 (Fla. 3d DCA), *rev. denied*, 581 So. 2d 1310 (Fla. 1991).

28. Prior to *United States v. Turkette*, 452 U.S. 576 (1981), all of the federal circuit courts, except the First Circuit, interpreted the federal RICO Act as encompassing illegitimate enterprises. See Neuenschwander, *supra* note 24, at 1430.

scope because "neither the language nor structure of RICO limits its application to legitimate 'enterprises.'"<sup>29</sup> The Florida Supreme Court, on the other hand, has acknowledged a conflict between the original Act's preamble, which focused on organized crime infiltrating legitimate businesses, and the actual language of the Florida Act, which states that it reaches licit as well as illicit enterprises.<sup>30</sup> The court, however, held that this conflict is not a constitutional defect and that the Florida Act applies to both types of enterprises.<sup>31</sup> Despite these holdings, federal and Florida courts have made it clear that the Act is intended to reach more than criminals who merely get together to commit sporadic acts of crime.<sup>32</sup>

Just as federal courts have upheld the federal RICO Act, Florida courts have upheld the amended Florida RICO Act against a number of constitutional challenges, including due process and equal protection. In the first RICO Act case it considered, the Florida Supreme Court rejected the argument that the Act's "pattern of racketeering activity" definition is unconstitutionally overbroad because the Legislature impermissibly included within its scope a host of misdemeanors that are unrelated to organized criminal activity.<sup>33</sup> The court has also rejected arguments that the Florida Act is facially unconstitutional because it imposes strict liability without requiring criminal intent or knowledge and that its sanctions are predicated on presumptively protected activities of free speech, press, and association.<sup>34</sup>

The Act has also been challenged unsuccessfully in the state district courts on a number of theories. These challenges include the following arguments: that the Legislature impermissibly delegated, without as-

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29. *Turkette*, 452 U.S. at 588; see Neuschwander, *supra* note 24 (discussing the history and impact of *Turkette*).

30. *Dorsey v. State*, 402 So. 2d 1178, 1180-81 (Fla. 1981).

31. *Id.*

32. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988); *Boyd v. State*, 578 So. 2d 718 (Fla. 3d DCA), *rev. denied*, 581 So. 2d 1310 (Fla. 1991); see also discussion *infra* parts III and IV.

33. *Moorehead v. State*, 383 So. 2d 629, 631 (Fla. 1980). The Florida Supreme Court held that even if there was merit to the argument, the argument did not apply because the defendant was charged with five auto thefts within a two-month period, which is not the type of minor criminal activity upon which the defendant's argument was based. *Id.* The federal courts also have upheld the federal Act against vagueness challenges. See *United States v. Tripp*, 782 F.2d 38, 42 (6th Cir.), *cert. denied*, 476 U.S. 1128 (1986); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States v. Campanale*, 518 F.2d 352, 364-65 (9th Cir.), *cert. denied*, 423 U.S. 1050 (1975); *United States v. Parness*, 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). *But see Firestone v. Galbreath*, 747 F. Supp. 1556 (S.D. Ohio 1990) (finding that the federal Act's pattern definition was unconstitutionally vague as applied to a case involving a dispute between family members concerning whether certain property should have remained in a relative's estate), *aff'd*, 976 F.2d 276 (6th Cir. 1992).

34. *Bowden v. State*, 402 So. 2d 1173 (Fla. 1981).

certainable standards, basic policy decisions to the prosecutor by allowing the prosecutor to either pursue misdemeanor convictions under predicate offenses for each separate gambling incident, or felony convictions under the Act for an entire gambling episode;<sup>35</sup> that the Act imposes cruel and unusual punishment because it raises the level of punishment for conduct involving the commission of two or more second degree misdemeanors to that imposed for the commission of a first degree felony;<sup>36</sup> and that the Act impairs the constitutional supremacy of federal law.<sup>37</sup> Finally, the Florida Supreme Court has rejected challenges to the Florida Act as an *ex post facto* law and has stated that the Act may be applied retroactively, as long as one of the predicate incidents occurred after the Act's effective date.<sup>38</sup>

### III. THE CURRENT ACT

#### A. Criminal Provisions

Section 895.03, *Florida Statutes*, is the heart of Florida's current RICO criminal provisions.<sup>39</sup> The section lists the conduct prohibited by the Act:

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35. *Vickery v. State*, 539 So. 2d 499 (Fla. 1st DCA), *rev. denied*, 549 So. 2d 1014 (Fla. 1989).

36. *Id.* at 501-02. The First District Court of Appeal rejected this argument in holding that the Act provides punishment for participating in an ongoing criminal enterprise, which is a distinct and separate crime, and does not merely provide an enhanced sentence for repeated misdemeanors. *Id.* Also, the court's examination of the punishment imposed under racketeering acts by other jurisdictions, including the federal government, indicated that the penalty imposed by Florida for RICO violations did not vary greatly from that imposed in other jurisdictions for RICO violations. *Id.*; see *Carlson v. State*, 405 So. 2d 173, 174 (Fla. 1981) (rejecting the argument that the Florida RICO Act imposes cruel and unusual punishment and noting that the determination of maximum penalties for violations of laws remains a matter for the Legislature).

37. *Rogers v. State*, 487 So. 2d 57, 58 (Fla. 3d DCA 1986). In *Rogers*, the Third District Court of Appeal rejected the argument made by a defendant whose RICO conviction was based on a predicate offense of federal mail fraud. The defendant argued that the Act impairs the constitutional supremacy of federal law because it is based upon an alleged violation of the federal mail fraud statute, the enforcement of which is already preempted by the federal government. *Id.* In rejecting this argument, the court noted that Florida's RICO Act forbids racketeering, not the federal crime of mail fraud per se, and merely uses the federal offense to make up the complete state charge. *Id.*; see *United States v. Turkette*, 452 U.S. 576 (1981). The federal courts also have upheld the federal RICO Act against arguments that it disturbs the state/federal relationship and lacks authority under the Commerce Clause. See, e.g., *United States v. Capetto*, 502 F.2d 1351, 1356 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

38. FLA. STAT. § 895.02(4) (1991); *Carlson*, 405 So. 2d at 174; *State v. Whiddon*, 384 So. 2d 1269, 1271 (Fla. 1980); see discussion *infra* part IV.C. The federal Act also has been upheld against similar challenges to it as an unconstitutional *ex post facto* law. See also *United States v. Campanale*, 518 F.2d 352, 364-65 (9th Cir.), *cert. denied*, 423 U.S. 1050 (1975); *United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978); *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md.), *supplemented by* 415 F. Supp. 1025 (D. Md. 1976).

39. The original version of the Act was part of chapter 943, *Florida Statutes*, which covered



(1) It is unlawful for any person who has with criminal intent<sup>40</sup> received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(2) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

(4) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsections (1), (2), or (3).<sup>41</sup>

The fundamental conduct prohibited by section 895.03, a "pattern of racketeering activity," involves the individual:

engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within 5 years after a prior incident of racketeering conduct.<sup>42</sup>

An information or indictment that fails to allege this essential element is subject to dismissal.<sup>43</sup>

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"criminal law enforcement," specifically sections 943.46-464, *Florida Statutes* (1977). See *supra* note 13.

40. This intent requirement is absent from the face of the federal RICO Act. See 18 U.S.C. § 1962 (1988). While commentators have criticized the federal Act for failing to include such an element in section 1963 and have suggested that an intent requirement be read into this section, they have disagreed as to the appropriate level of intent that should be applied. Cf. Tarlow, *supra* note 7, at 180-85; Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L. J. 1491, 1502-08 (1974).

41. FLA. STAT. § 895.03 (1991).

42. FLA. STAT. § 895.02(4) (1991).

43. See *State v. Lucas*, 600 So. 2d 1093 (Fla. 1992); *Bowden v. State*, 402 So. 2d 1173 (Fla. 1981); see also *infra* part IV (discussing the pattern of racketeering element and the other essential elements).

Like the federal RICO Act, the Florida Act defines the phrase "racketeering activity."<sup>44</sup> However, unlike the federal Act, the Florida RICO Act's definition reaches not only the commission of certain enumerated crimes which are chargeable by indictment or information, but also any attempt, conspiracy, solicitation, coercion, or intimidation of another person to do so.<sup>45</sup> The list of the enumerated crimes in the Florida RICO Act far outnumbers those in the federal Act and specifically includes all racketeering activity reached by the federal Act.<sup>46</sup> Florida's list of prohibited activity covers a wide range of crimes, felonies as well as misdemeanors,<sup>47</sup> including those statutes covering real estate time-share plans, environmental control, computer-related crimes, perjury, tampering with jurors and witnesses, dog racing, horse racing, jai alai frontons, and financial transactions.<sup>48</sup>

Neither the Florida RICO Act nor its federal counterpart requires individual convictions on the enumerated crimes as a predicate to obtaining a racketeering conviction. The Florida RICO Act requires only that the enumerated crime be "chargeable by indictment or information" under the enumerated provisions of the *Florida Statutes*.<sup>49</sup> Similarly, the federal Act requires enumerated crimes that are either "chargeable" or "indictable."<sup>50</sup> Thus, inconsistent verdicts between the predicates and the racketeering charge, alone, do not necessarily require dismissal or reversal of the racketeering charge or conviction.<sup>51</sup>

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44. FLA. STAT. § 895.02(1) (1991).

45. *Id.* Cf. 18 U.S.C. § 1961(1) (1988) (generally defining the phrase "racketeering activity" as involving the act or threat to commit the enumerated offenses).

46. FLA. STAT. § 895.02(1)(a), (b) (1991).

47. Cf. 18 U.S.C. § 1961(1) (1988).

48. See FLA. STAT. § 895.02(1)(a)1.-34. (1991). Cf. 18 U.S.C. § 1961(1) (1988). In *State v. Sun City Oil Co.*, 522 So. 2d 474 (Fla. 5th DCA 1988), the Fifth District noted one unexplained omission from the list of enumerated crimes in subsection 895.02(1)(a). The case involved a racketeering prosecution against a distributor of fuel which used as predicate crimes some counts of grand theft under section 812.13 and several counts of embezzlement under section 206.56, *Florida Statutes* (1983). *Id.* at 475. In dismissing several counts of the racketeering information based on embezzlement under section 206.56 as predicate crimes, the court noted that while section 895.02 lists grand theft as a permissible predicate crime under section 812.12, it excludes embezzlement under section 206.56, which addresses the failure of distributors to account for collected fuel taxes. *Id.* at 476. The court noted that the omission of section 206.56 did not appear to be a legislative oversight because if the legislature had intended to include that section in the list of enumerated crimes, it would have done so. *Id.* While section 206.56, *Florida Statutes* (1992), now classifies the offense as theft of state funds and targets any person who engages in such conduct, section 895.02 still omits that section from the list of enumerated crimes. See FLA. STAT. § 895.02 (1991 & Supp. 1992).

49. FLA. STAT. § 895.02(1)(a) (1991) (emphasis added).

50. 18 U.S.C. § 1961(1) (1988).

51. *Harvey v. State*, 617 So. 2d 1144 (Fla. 1st DCA 1993); see *United States v. Tinsley*, 800

For example, Florida's First District Court of Appeal affirmed a racketeering conviction where the information charged one count of racketeering and two separate counts of grand theft that served as the predicate incidents for the racketeering count, even though the jury was hung on one grand theft count and returned a not-guilty verdict on the other count.<sup>52</sup>

With respect to the possible criminal penalties and fines that may be imposed for racketeering, Florida's RICO Act penalties far exceed those of the federal Act. Violation of the federal Act may result in a fine of \$25,000 (or a fine of not more than twice the gross profits or proceeds received from the offense in lieu of the fine), imprisonment for not more than twenty years (or life if the violation is based on a racketeering activity for which the maximum penalty includes life), or both.<sup>53</sup> The federal government may also cause an individual or enterprise to forfeit any interest, security, property, contractual right, or proceeds gained in violation of the federal Act.<sup>54</sup>

Section 895.04 of the Florida RICO Act makes all violations of section 895.03 a first degree felony punishable by a term of imprisonment not exceeding thirty years<sup>55</sup> and a fine authorized by law.<sup>56</sup> Alternatively, if the offender obtains a thing of pecuniary value<sup>57</sup> or causes personal injury or property damage through racketeering conduct, the court may impose a fine not exceeding three times the gross value gained or three times the gross loss caused, whichever is greater,

F.2d 448 (4th Cir. 1986) (affirming racketeering and racketeering conspiracy convictions where the defendant was acquitted of one of the three predicate acts alleged in support of the racketeering offenses and of another predicate act charging that he used a communication facility to distribute methamphetamine, and holding that the other alleged predicate act could not be used as a predicate act for the RICO charge); *United States v. Elliott*, 571 F.2d 880 (5th Cir.) (acquittals on the substantive offenses do not preclude their consideration as part of the RICO conspiracy), *cert. denied*, 439 U.S. 953 (1978).

52. *Harvey*, 617 So. 2d at 1144; see *Tinsley*, 800 F.2d at 448. Cf. *Shaktman v. State*, 529 So. 2d 711, 722-24 (Fla. 3d DCA 1988) (regardless of any constitutional infirmity in the statute covering the predicate incidents, the validity of the defendants' plea to the RICO offense based on a pattern of bookmaking activity would not be affected; the section 849.25 violations merely serve to make up the complete RICO charge), *approved*, 553 So. 2d 148 (Fla. 1989).

53. 18 U.S.C. § 1963(a) (1988).

54. *Id.*

55. FLA. STAT. § 775.082(3)(b) (1991). A life sentence may be imposed for habitual felony offenders and habitual violent felony offenders. *Id.* § 775.084(4).

56. See *id.* § 775.083(b) (fine not exceeding \$10,000).

57. Section 895.04(4), *Florida Statutes*, defines "pecuniary value" as meaning: "(a) Anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else the primary significance of which is economic advantage; or (b) Any other property or service that has a value in excess of \$100."

plus court costs and the costs of investigation and prosecution reasonably incurred.<sup>58</sup>

### B. Civil Remedies

Like the federal RICO Act,<sup>59</sup> the pre-1986 Florida RICO Act provided civil remedies to the government and private individuals and was aimed primarily at reducing the economic power of individuals involved in organized criminal activity by divesting them of the fruits of their "ill gotten gains."<sup>60</sup> Civil remedies were available under chapter 895 of the Florida RICO Act without any proof that the defendant was convicted of organized criminal activity.<sup>61</sup> In 1986, however, the Legislature divided these remedies between two chapters of the *Florida Statutes*—chapter 895, which allows public civil RICO actions brought by the State and its subdivisions,<sup>62</sup> and the recently enacted chapter 772, which allows private civil RICO actions by anyone.<sup>63</sup> These remedies were separated primarily to avoid the abuses of civil RICO actions that the federal courts had been experiencing, such as cases in which only a single contractual relationship was involved but several acts of frauds were alleged to have arisen from the relationship.<sup>64</sup>

58. *Id.* § 895.04(2).

59. See 18 U.S.C. § 1964 (1988). This provision has been held constitutional against a challenge that it is an invalid exercise of Congress' authority to regulate commerce. See *United States v. Capetto*, 502 F.2d 1351, 1355-58 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

60. *United States v. Turkette*, 452 U.S. 576, 585 (1981); see Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity"*, 124 U. PA. L. REV. 192, 194 (1975).

61. *Banderas v. Banco Cent. del Ecuador*, 461 So. 2d 265, 269 (Fla. 3d DCA 1985); see *Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060 (4th Cir. 1984).

62. Nevertheless, injunctive relief is also available to "any aggrieved person," an undefined phrase. FLA. STAT. § 895.05(6) (1991).

63. See ch. 86-277, §§ 3, 6, 1986 Fla. Laws 2036, 2040 (amending section 895.05, *Florida Statutes*, and enacting chapter 772).

64. The majority decision documents the abuse in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985):

Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate enterprises." Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. . . .

We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original concept of its enactors. . . . The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept

The civil remedies of section 895.05 are available for violations of chapter 895, which primarily targets individuals engaged in a "pattern of racketeering activity."<sup>65</sup> The remedies include divesting the offender of any interest in the enterprise; imposing reasonable restrictions upon the offender's activities and investments; dissolving or reorganizing the organization; suspending or revoking a license or permit granted to the enterprise by a state agency; and forfeiting or revoking the charter of a Florida corporation or a foreign corporation organized to do business within the State.<sup>66</sup> Additionally, section 895.05 gives the State, including any of its agencies, instrumentalities, subdivisions, or municipalities, a cause of action for three times the actual damages sustained if it proves by clear and convincing evidence that it has been injured as a result of any violation of the RICO statute.<sup>67</sup> Nevertheless, if the court finds the claim to be without any substantial factual or legal support, the defendant may recover reasonable attorney's fees and costs.<sup>68</sup>

Except for three important differences, the civil remedies available under chapter 772 are similar to those available under section 895.05. First, in stating the prohibited conduct, section 772.103 uses the phrase "pattern of criminal activity" instead of "pattern of racketeering activity,"<sup>69</sup> apparently to avoid damaging the defendant's reputation by being labeled a "racketeer" as a result of the filing of the civil

of "pattern."

*Id.* at 499-500 (citations omitted); see Mary C. Green, *Recent Changes in Florida RICO*, FLA. B.J., Nov. 1988, at 75-77 (discussing the abuses that the federal courts experienced with federal civil RICO actions).

65. See discussion *infra* part IV.B.

66. FLA. STAT. § 895.05 (1991).

67. *Id.* The State may also recover trial and appellate attorneys' fees and reasonable costs of litigation and investigation. *Id.*

68. *Id.*

69. Section 772.103, *Florida Statutes*, provides that it is unlawful for any person:

(1) Who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of criminal activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(2) Through a pattern of criminal activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) Employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity or the collection of an unlawful debt.

(4) To conspire or endeavor to violate any of the provisions of subsection (1), subsection (2), or subsection (3).

*Cf.* FLA. STAT. § 895.03 (1991).

action.<sup>70</sup> Notwithstanding the distinction and probably because the terms are similarly defined, at least one Florida court required proof of a "pattern of racketeering activity" in an action for temporary injunctive relief pursuant to section 772.103.<sup>71</sup> Thus, in this respect, the separation of the civil remedies and the substitution of the phrases seems to have no real effect. This also seems to defeat one of the apparent reasons for dividing the remedies—to avoid injury to the defendant's reputation by the mere filing of the civil RICO action. Second, the definition of the phrase "pattern of criminal activity" in section 772.102 states that it "shall not include two or more incidents of fraudulent conduct arising out of a single contract or transaction against one or more related persons."<sup>72</sup> The Legislature apparently added this language to prevent litigants from bringing the types of suits used to abuse the federal civil RICO remedy. Third, section 772.104 allows a prevailing plaintiff to recover minimum damages in the amount of \$200, reasonable trial and appellate attorneys' fees, and costs without any consideration of the defendant's ability to pay such fees and costs.<sup>73</sup>

Like Florida, the federal RICO Act also affords plaintiffs civil remedies, including divesting the defendant of any interest in the enterprise and imposing reasonable restrictions on the defendant's future activities or investments, when the RICO violation affects interstate commerce.<sup>74</sup> However, at least one federal court has held that while Florida courts have concurrent jurisdiction over RICO claims, they do not have the power to require plaintiffs to exhaust state remedies prior to bringing federal civil RICO actions.<sup>75</sup>

In the early years of RICO prosecutions, these civil remedies were overlooked;<sup>76</sup> but, the advantages they offer over criminal RICO ac-

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70. See Green, *supra* note 64, at 76.

71. *Shouten v. Utah Int'l, Inc.*, 515 So. 2d 366 (Fla. 4th DCA 1987). It is unclear from this brief opinion whether the court was aware that the phrase "pattern of racketeering activity" does not appear in section 772.103, *Florida Statutes*, or whether the court instead believed that the substitution of the phrase in section 772.103 had no effect on the showing previously required by section 895.02. *Cf.* Green, *supra* note 63, at 76 (suggesting that cases interpreting section 895.03 should be used for guidance in section 772.103 civil actions).

72. FLA. STAT. § 772.102(4) (1991). "Related persons" are defined as natural "persons who are related by blood within the second degree or who are married and, as to other persons, persons which are substantially under the same direction, ownership, or control, either directly or indirectly." *Id.* § 777.102(6).

73. Section 772.19, however, does not allow damages to be recovered under chapter 772 against the state or its agencies, instrumentalities, subdivisions, or municipalities. *Id.* § 772.19.

74. 18 U.S.C. § 1964 (1988); see *Armbrister v. Roland Int'l. Corp.*, 667 F. Supp. 802 (M.D. Fla. 1987).

75. *Glickstein v. Sun Bank/Miami, N.A.*, 922 F.2d 666, 674 (11th Cir. 1991).

76. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 482 (1985).

tions may account for their increased use by litigants and consequent misuse.<sup>77</sup> Generally, the civil RICO plaintiff must prove a RICO violation, injury to business or property, and that the violation caused the injury.<sup>78</sup> However, the level of proof required in these civil actions is lower than the level required in criminal RICO actions.<sup>79</sup> Also, if a final judgment or decree is rendered in favor of the State in the criminal RICO action and the civil action is based on that same conduct, the judgment or decree estops the defendant as to all matters which it would have if the plaintiff had been a party in the criminal action.<sup>80</sup>

Additionally, in resolving a conflict within the federal courts,<sup>81</sup> the United States Supreme Court has held that a criminal conviction is a not a prerequisite for bringing a federal civil RICO action.<sup>82</sup> The Court based its holding upon the rationale that this requirement does not appear in the provisions governing either civil or criminal RICO actions, and that the requirement of a RICO "violation" does not imply a criminal conviction.<sup>83</sup> The Court also noted that such a requirement would be inconsistent with Congress' underlying policy concerns and would severely handicap potential plaintiffs.<sup>84</sup> The Florida Act offers another advantage in that the commencement of a civil RICO action does not preclude the plaintiff from pursuing any other civil or criminal remedy.<sup>85</sup> With one exception, however, Florida civil actions must be brought within five years after the prohibited conduct

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77. *Id.*

78. See *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992); *Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd.*, 792 F. Supp. 1566 (S.D. Fla. 1992). *But see Grogan v. Platt*, 835 F.2d 844, *cert. denied*, 488 U.S. 981 (1988).

79. See FLA. STAT. §§ 772.104, 895.05(7) (1991). *Cf. United States v. Cappelto*, 502 F.2d 1351, 1358 (7th Cir. 1974) (holding that a lower standard is applicable because it is the same kind of equitable relief that federal courts have been granting for generations under section 4 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7, and sections 4 and 25 of the Clayton Anti-Trust Act, 15 U.S.C. §§ 4, 12-27), *cert. denied*, 420 U.S. 925 (1975); *Banderas v. Banco Cent. del Ecuador*, 461 So. 2d 265, 271 (Fla. 3d DCA 1985) (substantial, competent evidence). In *Sedima*, the United States Supreme Court rejected the argument that the predicates must be established by proof beyond a reasonable doubt and suggested that a lower standard may apply, but did not address the nature of the standard. *Sedima*, 473 U.S. at 492.

80. FLA. STAT. §§ 772.14, 895.05(8) (1991).

81. *Cf. USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) (conviction under section 1982 is not a prerequisite for a civil RICO action). *Accord Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983). *Contra Viola v. Bensalem Township*, 601 F. Supp. 1086, 1091 (E.D. Pa. 1984) (convictions on predicate acts are prerequisites for standing in a federal civil RICO action), *vacated*, 774 F.2d 1153 (3d Cir. 1985).

82. *Sedima*, 473 U.S. at 488-90.

83. *Id. Cf. 18 U.S.C. §§ 1961, 1962, 1964* (1988).

84. *Sedima*, 473 U.S. at 488-90.

85. FLA. STAT. §§ 772.18, 895.05(11) (1991).

terminates or the cause of action accrues.<sup>86</sup> In contrast, federal civil actions are subject to a four-year statute of limitations.<sup>87</sup>

#### IV. THE NET TANGLES

The Florida courts have encountered numerous obstacles in attempting to construe the Florida RICO Act in accordance with its original legislative intent. The courts have looked to federal decisions interpreting the federal RICO Act for guidance in certain areas, but in other areas have chosen to reject the federal interpretation of the federal Act and to fashion the Florida RICO Act differently, but not without some criticism.<sup>88</sup>

The primary criticism of the Florida courts' decision to look to federal decisions in interpreting the Florida RICO Act stems from the presence of a "liberal construction clause" in Title IX of the Crime Control Act of 1970, from which the federal Act was derived. The clause states that "the provisions of this title shall be liberally construed to effectuate its remedial purposes."<sup>89</sup> Federal courts have construed this phrase as authority to broadly interpret the federal RICO Act. For example, when the United States Supreme Court ruled that the federal Act applied to both legitimate and illegitimate businesses, it noted that the presence of this clause and the absence of any ambiguity in the provision defining the term "enterprise" rendered the rule of lenity inapplicable.<sup>90</sup> Critics argue that the federal courts' decision to adhere to the liberal construction clause fails to follow the traditional principle of statutory construction that penal statutes shall be subject to strict interpretation, or at the very least, that their words be given no more than their normal meanings.<sup>91</sup> Others argue that in enacting the federal RICO Act, Congress overreacted to the problem of organized crime and made the Act too broad, and that this, coupled with judicial zeal in enforcing it, has resulted in the prosecution of individuals Congress did not intend to reach.<sup>92</sup>

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86. *Id.* §§ 772.17, 895.05(10).

87. *Bivens Gardens Office Bldg., Inc. v. Barnett Bank, Inc.*, 906 F.2d 1546, 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1695 (1991); *Wilder v. Meyer*, 779 F. Supp. 164, 168 (S.D. Fla. 1991).

88. See Tarlow, *supra* note 7, at 177-78; Dowd, *supra* note 24, at 24.

89. Pub. L. No. 91-452, § 904(a), 84 Stat. 947.

90. *United States v. Turkette*, 452 U.S. 576, 588 (1981).

91. See Jeff Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 *U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes*, 69 *J. OF CRIM. L. & CRIMINOLOGY* 1, 3 (1978).

92. See Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 *IOWA L. REV.* 837 (1980).



Nevertheless, even though Florida courts have looked to federal decisions for guidance in interpreting the Florida RICO Act, they have recognized that because the Act imposes enhanced sentences, they must adhere to the rule of construction that requires that provisions of the Florida Criminal Code and offenses defined by other statutes shall be strictly construed.<sup>93</sup> In determining whether the elements of a RICO violation have been established, the Florida courts' acknowledgment of this rule of strict construction appears to be inconsistent with their decision to follow federal decisions which broadly interpret the federal RICO Act.

Florida courts have recognized the following three elements as requisites to establishing a violation of the Florida RICO Act: (1) the defendant committed two or more incidents of the conduct enumerated in section 895.02(1) that have the same or similar intents, results, accomplices, victims, methods of commission, or that otherwise are interrelated by distinguishing characteristics, and in doing so, (2) the defendant associated with an enterprise and participated in the conduct of the enterprise's affairs through (3) a pattern of racketeering activity.<sup>94</sup> Each element will be discussed separately below, along with an analysis of the special issues that remain unresolved in RICO conspiracy prosecutions.

### A. *Enterprise Element*

The Florida RICO Act defines the term "enterprise" as meaning:

any 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.<sup>95</sup>

This definition is much broader than the definition provided in the federal RICO Act, and, on its face, reaches legitimate as well as illegitimate businesses. Alternatively, the federal Act defines "enterprise" as including any "individual, partnership, corporation,

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93. FLA. STAT. § 775.021(1) (1991). *See, e.g.*, *Flanagan v. State*, 566 So. 2d 868 (Fla. 2d DCA 1990). *See also* Dowd, *supra* note 24, at 159-63.

94. *See* *Boyd v. State*, 578 So. 2d 718, 721 (Fla. 3d DCA 1991); *Shimek v. State*, 610 So. 2d 632, 634-35 (Fla. 1st DCA 1992); *see also* *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). The federal RICO Act additionally requires that the prohibited activity affect interstate or foreign commerce. 18 U.S.C. § 1962 (1988).

95. FLA. STAT. § 895.02(3) (1991).

association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”<sup>96</sup> As the federal Act’s definition does not encompass sole proprietorships, the federal Act is narrower in scope than the Florida Act. Although both Acts cover any “person” engaging in the prohibited conduct, only the federal RICO Act defines that term. Under the federal Act, the term “person” includes “any individual or entity capable of holding a legal or beneficial interest in property.”<sup>97</sup> Even though the federal Act, unlike the Florida Act, does not expressly state that it reaches legitimate as well as illegitimate businesses, the United States Supreme Court has resolved the conflict between the circuits by clearly holding that it does.<sup>98</sup>

Under both Acts, an “enterprise” is an entity separate from the pattern of activity in which it engages.<sup>99</sup> This separation permits the State to prosecute an individual for more than one violation of the Act in connection with the same enterprise as long as each violation involves a different pattern of racketeering activity.<sup>100</sup> In such cases, there are multiple counts within the information or indictment to charge the enterprise with separate patterns of racketeering activities. In response to numerous double jeopardy challenges, the federal courts have developed five factors that must be considered in determining whether multiple indictments or informations charge the existence of one or several patterns of racketeering activity. Those factors are: (1) whether the activities that allegedly constitute two different RICO patterns occurred during the same time period; (2) whether the activities occurred in the same place; (3) whether the activities involved the same persons; (4) whether the multiple indictments alleged violations of the same criminal statutes; and (5) whether the overall nature and scope of the activities set forth in the indictments were the same.<sup>101</sup> However, no similar factors have been developed to determine whether separate enterprises are involved in such prosecutions.<sup>102</sup>

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96. 18 U.S.C. § 1961(4) (1988).

97. *Id.* § 1961(3).

98. *United States v. Turkette*, 452 U.S. 576, 584-88 (1981); see discussion *supra* part II.

99. *Turkette*, 452 U.S. at 584; *Boyd v. State*, 578 So. 2d 718, 721 (Fla. 3d DCA), *rev. denied*, 581 So. 2d 1310 (Fla. 1991).

100. *United States v. Ruggiero*, 754 F.2d 927, 931-32 (11th Cir.), *cert. denied*, 471 U.S. 1127 (1985); see *United States v. Russotti*, 717 F.2d 27, 33 (2d Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *United States v. Dean*, 647 F.2d 779, 787 (8th Cir. 1981), *modified on reh'g on other grounds*, 667 F.2d 729 (8th Cir.), *cert. denied*, 456 U.S. 1006 (1982).

101. *Ruggiero*, 754 F.2d at 932; see *Russotti*, 717 F.2d at 33; *Dean*, 647 F.2d at 787.

102. While the *Ruggiero* court noted the absence of such factors, the court declined to address this issue because it found that it was not relevant in resolving the issues actually raised on appeal. 754 F.2d at 934-35 n.15.

Although both Acts state that they apply to "individuals associated in fact although not a legal entity," the courts have generally required more than a showing of a mere association of criminals to establish the "enterprise" element.<sup>103</sup> A number of RICO cases have been dismissed or have had convictions reversed because the prosecutors failed to realize this limitation of the Acts.<sup>104</sup> The courts have held that there must be evidence of an ongoing organization, formal or informal, with various associates who function as a continuing unit.<sup>105</sup> The group or organization must have an identifiable decision-making structure and a mechanism for controlling and directing the group on a continuous basis.<sup>106</sup> Further, the prosecution must prove that the various associates function as a continuous unit.<sup>107</sup> The prosecution must also show that the organization has an existence separate and apart from the pattern of racketeering activity in which it engages.<sup>108</sup> Accordingly, this element is not satisfied if the prosecutor merely shows that the defendant acted alone in committing the underlying offenses.<sup>109</sup> For example, in one Florida RICO case, the court reversed a conviction where, at trial and in the amended information, the State charged that the defendant was the enterprise, that is, that he was employed by himself and associated with himself to conduct or participate in a pattern of racketeering activity.<sup>110</sup>

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103. See, e.g., *Turkette*, 452 U.S. at 576; *State v. Russell*, 611 So. 2d 1265 (Fla. 2d DCA 1992); *State v. Rutledge*, 611 So. 2d 1263 (Fla. 2d DCA 1992); *Boyd*, 578 So. 2d at 718.

104. See, e.g., *Flynn*, 852 F.2d at 1045; *Russell*, 611 So. 2d at 1263; *Boyd*, 578 So. 2d at 718.

105. *Turkette*, 452 U.S. at 584; *Boyd*, 578 So. 2d at 722.

106. See *Russell*, 611 So. 2d at 1267; *Rutledge*, 611 So. 2d at 1265; *Boyd*, 578 So. 2d at 718. To satisfy this requirement the state must show more than that there were conversations between the members of the group or organization indicating that the group was engaged in a certain activity or transaction. See, e.g., *Rutledge*, 611 So. 2d at 1265 (affirming dismissal of a RICO charge for lack of a prima facie showing of the existence of a criminal enterprise where the state's only evidence on the RICO charge was a recorded telephone conversation between the co-defendants which indicated buy/sell transactions between the two individuals); see also *Russell*, 611 So. 2d at 1265 (companion case to *Rutledge*).

107. *Boyd*, 578 So. 2d at 722. As will be discussed further below, "continuity" is also a requirement of the "pattern of racketeering activity" element. See discussion *infra* part IV.B.

108. *Boyd*, 578 So. 2d at 722. *Accord* *United States v. Flynn*, 852 F.2d 1045, 1051 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988).

109. See *Dorsey v. State*, 613 So. 2d 1368 (Fla. 2d DCA 1993); *Day v. State*, 541 So. 2d 1202 (Fla. 2d DCA 1988), *rev. denied*, 545 So. 2d 869 (Fla. 1989); *State v. Smith*, 532 So. 2d 1112 (Fla. 2d DCA), *rev. denied*, 542 So. 2d 990 (Fla. 1988).

110. *Wilson v. State*, 596 So. 2d 775 (Fla. 1st DCA 1992); see *Napoli v. State*, 596 So. 2d 782 (Fla. 1st DCA) (motions to dismiss amended information and for judgment of acquittal should have been granted where the information charged that the defendant conducted himself as an enterprise or associated with himself as an enterprise), *rev. denied*, 604 So. 2d 487 (Fla. 1992); *Craver v. State*, 561 So. 2d 1251 (Fla. 2d DCA 1990) (motion for judgment of acquittal improperly denied where the defendant was prosecuted as a "one man enterprise"); *State v. Nishi*, 521 So. 2d 252 (Fla. 3d DCA), *rev. denied*, 531 So. 2d 1355 (Fla. 1988) (the defendant could not be employed or associated with himself as an enterprise under the RICO Act).

Similarly, this element is not satisfied where nothing exists linking the members of the organization to each other except the commission of the predicate offenses. For example, in one Florida case, the State only proved that over a period of three weeks, four teenagers, who knew little about each other, drove through Dade County, looking for ways to obtain fast money by threat or force, and committed random acts of violence toward that end.<sup>111</sup> In reversing the defendants' RICO convictions, the court explained, "[i]t is clear . . . that in enacting the RICO statute, Congress did not intend to use RICO to prosecute criminals who merely get together to commit sporadic acts of crime."<sup>112</sup>

### B. Pattern Element

The Florida RICO Act defines "pattern of racketeering activity" as engaging in at least two incidents of "racketeering conduct" that have the same or similar intents, results, accomplices, victims, or methods of commission, or that are otherwise interrelated by distinguishing characteristics and are not isolated incidents.<sup>113</sup> This definition is more detailed than that provided in the federal RICO Act. The federal Act provides that a pattern "requires at least two acts of racketeering activity. . . ."<sup>114</sup> Many have criticized the federal "definition" of this phrase as not being an actual definition, but merely an explanation of the proof required to establish a pattern of racketeering activity.<sup>115</sup> It has also been criticized as being vague and simply a description of what the phrase does not mean.<sup>116</sup>

This criticism is warranted because the pattern of racketeering activity is the key conduct prohibited by the Act. Although the United States Supreme Court has expressed agreement with this criticism, it has not found the definition to be unconstitutionally vague. In *H.J., Inc. v. Northwestern Bell Telephone Co.*, the Court stated:

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111. *Boyd*, 578 So. 2d at 722.

112. *Id.* at 720.

113. FLA. STAT. § 895.02(4) (1991). As discussed *infra* in part IV.C., the definition also requires that at least one of the incidents occur after the effective date of the Act and that the last incident occur within five years after a prior incident of racketeering conduct. *Id.*

114. 18 U.S.C. § 1961(5) (1988). The remainder of the definition requires that at least one of the acts occur after the effective date of the chapter and the last occur within ten years (excluding any period of imprisonment) after the commission of the prior act of racketeering activity. See discussion *infra* part IV.C.

115. See *United States v. Ladmer*, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977); Tarlow, *supra* note 7, at 209-13; Dowd, *supra* note 24, at 140.

116. See *Ladmer*, 429 F. Supp. at 1244; see also Sandra B. Ross, Comment, *The Pattern Element of RICO Before and After Sedima: A Look at Both Federal and Florida RICO*, 15 FLA. ST. U. L. REV. 321, 321-22 (1987).

As we remarked in *Sedima, supra*, 473 U.S., at 496, n. 14, 105 S. Ct., at 3285, n. 14, the section of the statute headed "definitions," 18 U.S.C. § 1961, does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern. Unlike other provisions in § 1961 that tell us what various concepts used in the Act "mean," § 1961(5) says of the phrase "pattern of racketeering activity" only that it "requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." It thus places an outer limit on the concept of a pattern of racketeering activity that is broad indeed.<sup>117</sup>

In *H.J.*, the Court also addressed deficiencies in the federal definition and the showing necessary to establish this element of the racketeering offense. The Court stated that the legislative history of the federal RICO Act reveals that Congress intended for the plaintiff or prosecutor to prove a pattern of racketeering activity, and thus, a showing must be made that the racketeering predicates are related (relatedness requirement) and that they amount to or pose a threat of continued criminal activity (continuity requirement).<sup>118</sup>

With respect to the relatedness requirement, the Supreme Court held that the requisite showing could not be more constrained than that used in Title X of the Organized Crime Control Act (OCCA).<sup>119</sup> Under the OCCA, "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."<sup>120</sup> However, using this approach to read a relatedness requirement into the federal RICO Act has been criticized because of this requirement's absence from Title IX of the Crime Control Act, from which the federal RICO Act was derived.<sup>121</sup> Additionally, when Congress chooses to include language in one statute and not another, it does not intend that the language apply to the latter statute.<sup>122</sup> Nonetheless, despite

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117. 492 U.S. 229, 237 (1989); see Ross, *supra* note 116, at 323-43 (discussing the conflict in the federal courts prior to the *H.J.* decision concerning the proper interpretation of the phrase "pattern of racketeering activity").

118. *H.J.*, 492 U.S. at 239.

119. As stated in *supra* note 12, the federal RICO Act originated from Title IX of the Organized Crime Control Act.

120. *H.J.*, 492 U.S. at 239-40 (citing 18 U.S.C. § 3575(e)).

121. Tarlow, *supra* note 7, at 215.

122. *Id.*

this criticism, this requirement is useful because it narrows the scope of the federal Act by reducing the possibility that prosecutors will use the Act to prosecute in one action all the crimes committed by a person on the basis that an illegal enterprise was involved.<sup>123</sup>

As to the continuity requirement, *H.J.* describes "continuity" as both a "closed" and "open-ended" concept, "referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition."<sup>124</sup> Thus, a party alleging a violation of the RICO Act may demonstrate continuity using the close-ended method by proving a series of related predicates extending over a substantial period of time. One mistake made in a number of racketeering prosecutions brought by eager prosecutors is to bring the prosecution before continuity can be proved by this method.<sup>125</sup> In these situations, the open-ended concept may be applied provided there is either explicit or implicit proof of a threat of long-term racketeering activity. To do so, there must be proof that the predicates are part of the entity's regular way of doing business, that the predicates are part of a long-term association that exists for criminal purposes, or that the predicates are a regular way of conducting an ongoing legitimate business or RICO "enterprise."<sup>126</sup> One commentator has suggested that by imposing these requirements, *H.J.* may have sharply decreased the usefulness of the Act,<sup>127</sup> or at least has warned Congress that unless it modifies and clarifies the federal RICO Act, the judiciary is prepared to "throw up its hands in surrender to RICO's ambiguous language."<sup>128</sup> Critics also charge that nothing on the face of the federal Act suggests that "continuity" and "relatedness" are part of the pattern element.

The Florida Supreme Court has held that the "pattern" element of the Florida RICO Act is similar to that used in the federal Act.<sup>129</sup> This necessarily means that, consistent with *H.J.*'s construction of the pattern element of the federal RICO Act, the pattern element of the Florida Act also should require proof of relatedness and continuity.<sup>130</sup> Unlike the federal Act, the relatedness requirement is already part of

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123. *See id.*

124. *H.J.*, 492 U.S. at 241-42.

125. *Id.*

126. *Id.* at 242-43; see discussion *supra* part IV.A.

127. David W. Fassett, *Mother of Mercy, Is this the End of RICO?*, 6 CRM. JUST. 13 (Spring 1991).

128. *Id.*; see *Yellow Bus Lines v. Drivers, Chauffeurs, & Helpers Local Union 639*, 913 F.2d 948, 957-58 (D.C. Cir. 1990) (Mikva, C.J., concurring) (urging Congress to "apply logic and order to the statute called RICO"), *cert. denied*, 111 S. Ct. 2839 (1991).

129. *Bowden v. State*, 402 So. 2d 1173 (Fla. 1981).

130. *Id.*

the Florida RICO Act's definition of the phrase "pattern of racketeering activity."<sup>131</sup> Consequently, Florida courts have consistently imposed that requirement as part of the pattern element.<sup>132</sup> Like the federal Act, however, the Florida RICO Act's definition of the phrase does not indicate that a showing of "continuity" is required. Nonetheless, the Florida Supreme Court held in 1981 that the Florida Act, like the federal Act, requires a showing of continuity as part of the pattern element.<sup>133</sup> Despite this ruling, uncertainty remained in the district courts as to the proof required to establish continuity. The Florida Supreme Court recently re-addressed this issue in *State v. Lucas*,<sup>134</sup> in which it approved the concepts expressed by *H.J.* concerning the continuity requirement and the proof necessary to establish it.<sup>135</sup>

Even though the Florida Supreme Court has recognized that continuity is an essential requirement of the pattern element on which the jury must be instructed, this requirement is missing from the Standard Jury Instructions for RICO offenses.<sup>136</sup> Additionally, except for the instructions on conspiracy to engage in a pattern of racketeering activity,<sup>137</sup> the instructions for the offenses prohibited by section 895.03 do not clearly indicate that the state must prove a "pattern of racketeering activity" for offenses that clearly require such a showing. This includes offenses such as using or investing proceeds received from or derived through a pattern of racketeering activity, acquiring or maintaining control of an enterprise or real property through a pattern of racketeering activity, and being employed by or associating with an enterprise through a pattern of racketeering activity.<sup>138</sup> The First District Court of Appeal found this deficiency to be reversible error in *Shimek v. State*.<sup>139</sup>

In *Shimek*, the defendant appealed his convictions on three counts of grand theft and one count of conducting or participating in an enterprise through a pattern of racketeering activity in violation of the

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131. See FLA. STAT. § 895.03 (1991).

132. See, e.g., *Bowden*, 402 So. 2d at 1173; *State v. Lucas*, 600 So. 2d 1093 (Fla. 1992).

133. *Bowden*, 402 So. 2d at 1174-75.

134. 600 So. 2d 1093 (Fla. 1992).

135. See *Shimek v. State*, 610 So. 2d 632, 635 (Fla. 1st DCA 1992).

136. See FLA. STD. JURY INSTR. (CRIM.) 261-72 (1992).

137. *Id.* at 270-71.

138. *Id.* at 261-69. Such an instruction is properly omitted from the instructions for offenses relating to collection of an unlawful debt prohibited by section 895.03, *Florida Statutes*, because this section indicates that those offenses do not require a showing of a pattern of racketeering activity. Those offenses include acquiring or maintaining interest or control of an enterprise or real property through the collection of an unlawful debt, using or investing proceeds derived from the collection of an unlawful debt, or being employed by or associating with an enterprise through the collection of an unlawful debt. FLA. STAT. § 895.03 (1991).

139. 610 So. 2d 632 (Fla. 1st DCA 1992).

Florida RICO Act.<sup>140</sup> He contended that the trial court erroneously denied his request for the jury instruction on the racketeering charge and that the instruction actually read to the jury was not only incorrect, but directed the jury to find against him on the essential facts.<sup>141</sup> The instruction requested by the defendant read:

Before you can find the defendant guilty of conducting or participating in an enterprise, the State must prove the following two elements beyond a reasonable doubt:

1. The defendant was employed by or associated with an enterprise.

2. The defendant conducted or participated, directly or indirectly, in such enterprise *through a pattern of racketeering activity* by engaging in at least two of the following incidents of Grand theft as charged in Counts I, II, III, and IV of the Information.

3. Of those incidents in which the defendant was engaged, at least two of them had the same or similar intents, results, accomplices, victims, methods of commission, or were interrelated by distinguishing characteristics and were not isolated incidents.

*In order to constitute a pattern of racketeering activity, the incidents must amount to or otherwise constitute a threat of continuing racketeering activity.*<sup>142</sup>

Except for the emphasized language, the defendant's instruction is identical to the Standard Jury Instruction in Criminal Cases, intended to be given when the defendant is charged with racketeering based on "conduct or participation in an enterprise through a pattern of racketeering activity."<sup>143</sup> The trial court denied the defendant's jury instruction request and instead instructed the jury as follows:

Before you can find the defendant guilty of unlawful conduct or conducting or participating in an enterprise, the State must prove the following two elements beyond a reasonable doubt: The defendant was employed by or associated with an enterprise; two, the defendant conducted or participated directly or indirectly in such enterprise by engaging in at least two of the following *elements*, following incidents of grand theft that is charged in Counts I, II, III and IV. *As charged in the information, of course, three of those incidents in which the defendant was engaged, at least two of them had the same or similar, intent, results, accomplices, victims,*

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140. *Id.* at 633.

141. *Id.* at 637.

142. *Id.*

143. FLA. STD. JURY INSTR. (CRIM.) 269 (1992).



*methods of commission or were interrelated by distinguishing characteristics and were not isolated incidents . . .*<sup>144</sup>

While this instruction apparently was patterned after the Standard Jury Instruction, it clearly was not consistent with the standard instruction, especially the emphasized portions.<sup>145</sup> The court held that, with respect to the pattern element which, according to *Lucas*, included a continuity requirement,<sup>146</sup> the trial court committed reversible error in failing to instruct the jury according to the defendant's requested instruction.<sup>147</sup> The court then found that both the instruction given by the trial court and the Standard Jury Instruction fail to adequately instruct on the continuity requirement described in *Lucas* and *Bowden*.<sup>148</sup> The court held that the denial of the requested instruction was erroneous because the defendant was entitled to have the jury instructed by the trial court on each essential element of the case that is disputed and material to the defense.<sup>149</sup> Accordingly, the denial of the requested instruction deprived the defendant of a fair trial on the racketeering count, especially in light of the confusing instruction actually given by the trial court.<sup>150</sup> Thus, as to the pattern element of RICO offenses, the Standard Jury Instructions are deficient and must be amended to reflect the proper showing recognized by the Florida Supreme Court and section 895.03.

### C. Incidents/Acts

The Florida RICO Act requires at least two "incidents" of racketeering conduct,<sup>151</sup> in contrast with the two "acts" of racketeering required by the federal Act.<sup>152</sup> Florida courts have held that by using the

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144. *Shimek*, 610 So. 2d at 638.

145. *Id.*

146. See *supra* notes 131-32 and accompanying text.

147. *Shimek*, 610 So. 2d at 638.

148. *Id.*

149. *Id.* at 638-39. The court noted that the lack of proof of the requisite continuity to prove a pattern of racketeering activity was the defendant's principal defense to the RICO charge at trial, and the defense attorney argued this defense even though the trial court refused to instruct on it. *Id.*

150. *Id.* at 639. The court also agreed with the defendant's argument that the instruction read to the jury amounted to a peremptory or conclusive instruction on certain critical facts as well as a comment on the evidence by the trial court, even though not intended as such by the judge; however, this error was not a basis for reversal because the defendant did not make a contemporaneous objection to those deficiencies. *Id.*

151. FLA. STAT. § 895.02(4) (1991).

152. 18 U.S.C. § 1961(5) (1988). Yet, where the prosecution under both RICO Acts involves the collection of an unlawful debt, proof of only one collection is necessary. *Id.* § 1962(a); FLA. STAT. § 895.03(2) (1991); see *United States v. Pepe*, 747 F.2d 632, 661 (11th Cir. 1984).

term "incidents" rather than "acts," the Florida Legislature chose not to adopt the federal standard, but instead intended to narrow the scope of the Florida Act.<sup>153</sup> Some have criticized this interpretation as being both inconsistent with the Legislature's intent to make the Florida RICO Act broader than the federal Act and contrary to the suggestion that the Florida Act is the nation's toughest RICO Act.<sup>154</sup> Consequently, as applied, if in a single criminal episode or transaction a defendant commits two predicate offenses, this generally would satisfy the federal Act, but not the narrower Florida Act.<sup>155</sup> Some Florida courts and prosecutors have failed to recognize this important distinction between the use of these different terms and their effect on RICO prosecutions. Consequently, some actions have been dismissed and convictions have been reversed on these grounds.<sup>156</sup>

As previously noted, both Acts also require a showing of continuity, including similarity and relatedness, between or among the predicate incidents or acts as part of the pattern element.<sup>157</sup> Both Acts also impose time limits on when the predicate incidents or acts must occur.<sup>158</sup> Furthermore, both require that at least one of the incidents or acts occur after the effective date of the RICO Act.<sup>159</sup> However, while the federal Act requires that the last predicate act occur within ten years (excluding imprisonment) after the commission of a prior act,<sup>160</sup> the Florida Act requires only that the last incident occur within five years after a prior incident of racketeering conduct.<sup>161</sup> Both Acts are silent as to the time period over which the predicates must occur, but periods ranging from two to six months have been found to be sufficient for the Florida RICO Act,<sup>162</sup> and two-and-one-half months has

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153. *State v. Russo*, 493 So. 2d 504 (Fla. 4th DCA 1986), *rev. denied*, 504 So. 2d 768 (Fla. 1987); *see State v. Lucas*, 600 So. 2d 1093, 1095-96 (Fla. 1992); *Watts v. State*, 558 So. 2d 142 (Fla. 3d DCA 1990). The courts, however, have attached no significance to the Florida Act's use of the phrase "pattern of racketeering conduct" in its definition of the phrase "pattern of racketeering activity."

154. *See Dowd*, *supra* note 24, at 146.

155. *Compare In re Sahlen & Assocs., Inc. Securities Litigation*, 773 F. Supp. 342, 366 (S.D. Fla. 1991) (requirement satisfied) with *Watts*, 558 So. 2d at 144 (requirement not satisfied).

156. *See, e.g., Watts*, 558 So. 2d at 144.

157. *See discussion supra* part IV.B. and accompanying notes.

158. 18 U.S.C. § 1961(5) (1988); FLA. STAT. § 895.02(4) (1991).

159. 18 U.S.C. § 1961(5) (1988); FLA. STAT. § 895.02(4) (1991).

160. 18 U.S.C. § 1961(5) (1988).

161. FLA. STAT. § 895.02(4) (1991).

162. *See State v. Lucas*, 600 So. 2d 1093 (Fla. 1992) (six-month boiler room operation which defrauded investors); *Moorehead v. State*, 383 So. 2d 629 (Fla. 1980) (five auto thefts over a two-month period); *Harvey v. State*, 617 So. 2d 1144 (Fla. 1st DCA 1993) (four-month operation of a foundation in several Florida counties with the averred purpose of raising money to provide wheelchairs, therapy, and diapers for children with Spina Bifida through solicitors who represented that 70% of the money raised would be used for those purposes).

been found to be sufficient for the federal Act.<sup>163</sup>

Neither Act specifies where predicates must occur. One Florida court has held that, under the Florida RICO Act, the predicate incidents need not occur inside Florida.<sup>164</sup> The federal Act apparently does not require that the conduct occur inside the United States. In the federal racketeering prosecution brought against Manuel Noriega, the former head of the intelligence branch of the Panamanian National Guard and Commander-in-Chief of the Panamanian Defense Force, the federal district court held that the conduct may occur outside the United States as long as it produces effects or is intended to produce effects within the United States, a concept that has not yet been defined.<sup>165</sup> This action by the United States Government has been criticized as one taken without any concerted effort to examine the legal and prudential ramifications of the growing use of criminal justice mechanisms in foreign affairs, which may be more suitably governed by international law or foreign policy.<sup>166</sup> This criticism has some merit as the *Noriega* holding suggests that the boundaries of the federal RICO Act are virtually unlimited as long as there is proof that the racketeering activity produces effects in the United States or was intended to produce effects in the United States.

#### D. RICO Conspiracy

Both the federal and Florida Acts have similar conspiracy provisions that make it unlawful for any person to conspire to violate the provisions that set forth the prohibited criminal activity.<sup>167</sup> The Florida conspiracy provision additionally makes it unlawful for any person to endeavor to violate section 895.03.<sup>168</sup> However, neither Act adequately explains the showing required to prove conspiracy to violate either Act. Only the federal courts have squarely addressed this issue, but not without some dissension.

The first federal court to render an opinion on the issue, the former Fifth Circuit Court of Appeal, construed the conspiracy provision in

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163. See *United States v. Busacca*, 936 F.2d 232 (6th Cir.) (misappropriation of welfare and pension funds over a period of approximately two-and-one-half months), *cert. denied*, 112 S. Ct. 595 (1991).

164. *Domberg v. State*, 518 So. 2d 1360, 1361 (Fla. 1st DCA), *rev. denied*, 529 So. 2d 693 (Fla. 1988).

165. *United States v. Noriega*, 746 F. Supp. 1506, 1516-17 (S.D. Fla. 1990).

166. Jean E. Engelmayer, *Foreign Policy by Indictment: Using Legal Tools Against Foreign Officials Involved in Drug Trafficking*, 8 CRIM. J. ETHICS 3 (Summer/Fall 1989).

167. 18 U.S.C. § 1962(d) (1988); FLA. STAT. § 895.03(4) (1991).

168. FLA. STAT. § 895.03(4) (1991).

the federal Act to require a showing different from that required in traditional conspiracy cases.<sup>169</sup> *United States v. Elliott*<sup>170</sup> involved a federal racketeering prosecution of six co-defendants who had allegedly participated in over twenty different criminal acts. The acts included burning an unoccupied nursing home, stealing meat and dairy products, attempting to influence the outcome of the stolen meat trial, operating a car theft ring, stealing a dump truck, selling stolen property, selling illegal drugs, and murdering a police informant.<sup>171</sup> In affirming the defendants' RICO conspiracy convictions, the court refused to apply traditional conspiracy notions.<sup>172</sup> It found that Congress intended the federal RICO Act to authorize the single prosecution of a multifaceted, diverse conspiracy and to replace traditional conspiracy notions in those cases with the concept of "enterprise."<sup>173</sup> The court stated that the nature of a RICO conspiracy relates to an agreement to participate in the affairs of an enterprise, rather than an agreement to commit the predicate crimes constituting the enterprise.<sup>174</sup> As support for this holding, the court looked to the Statement of Findings and Purpose in the Organized Crime Control Act of 1970, which states that the Act was designed to "seek the eradication of organized crime . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."<sup>175</sup>

Since *Elliott*, the federal circuit courts have issued conflicting opinions on whether traditional conspiracy principles apply to RICO conspiracy cases and whether the agreement is one to participate in the affairs of the enterprise or to commit the predicate offenses. For example, while the Third and the Eleventh Circuits have followed *Elliott*,<sup>176</sup> the Eighth Circuit has criticized *Elliott's* holding as to the nature of RICO conspiracy, stating that nothing in the statutory scheme of the federal RICO Act suggests that Congress intended to discard traditional legal precepts applicable to criminal activity and to expand federal jurisdiction to the extent stated in *Elliott*.<sup>177</sup>

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169. *United States v. Elliott*, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

170. *Id.*

171. *Id.* at 884-96.

172. *Id.*

173. *Id.*

174. *Id.* at 902-03.

175. *Id.* at 902.

176. See, e.g., *United States v. Vastola*, 899 F.2d 211 (3d Cir.), vacated, 497 U.S. 1001 (1990); *United States v. Watchmaker*, 761 F.2d 1459 (11th Cir. 1985), cert. denied, 474 U.S. 1001 (1986); *United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984).

177. *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981); see *United States v. Zemek*, 634 F.2d 1159 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981); *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), decision vacated, 642 F.2d 1001 (6th Cir. 1980), cert. denied, 453 U.S. 912 (1981).

*Elliott* has also been criticized for reaching remote associates of the enterprise who may not know of the full scope of the conspiracy as the opinion requires only that they know of the essential nature of the enterprise.<sup>178</sup> The RICO Act may indeed reach individuals that Congress may not have intended it to reach when compared with Congress' statements of the types of activities about which it was concerned when it enacted the federal Act. Nevertheless, the criticism that these remote associates should not be reached because they may not know of the full scope of the conspiracy is questionable because, as noted previously, no provision in section 1962 of the federal RICO Act imposes any intent or knowledge requirement.

The federal courts have also split on the issue of whether a RICO conspiracy prosecution requires proof of an overt act—a requirement missing from the face of the federal Act. Some federal courts, including the former Fifth Circuit, have required proof of an overt act by at least one conspirator in furtherance of the conspiracy.<sup>179</sup> Other federal courts, like the Eleventh Circuit, however, have held that no such showing is required.<sup>180</sup> The United States Supreme Court has yet to resolve these conflicts.

Florida's position on these issues is unclear because no reported Florida case has squarely addressed the issues raised in the federal courts, notwithstanding the Florida courts' approval of *Elliott* in other contexts.<sup>181</sup> This absence may be due in part to Florida prosecutors using conspiracy as a predicate incident for a RICO violation rather than charging the defendant with conspiracy to violate the RICO Act; however, this strategy has not yielded much success.<sup>182</sup> For example, in reversing a RICO conviction on the ground that the infor-

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178. Tarlow, *supra* note 7, at 247.

179. See, e.g., *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146 (D.N.J. 1983), *aff'd in part and rev'd in part*, 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 469 U.S. 1121 (1985); *Medallion TV Enters., Inc. v. SelecTV, Inc.*, 627 F. Supp. 1290 (C.D. Cal. 1986), *aff'd*, 833 F.2d 1360 (9th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989).

180. See, e.g., *United States v. Tripp*, 782 F.2d 38 (6th Cir.), *cert. denied*, 476 U.S. 1128 (1986); *Pepe*, 747 F.2d at 632; *United States v. Coia*, 719 F.2d 1120 (11th Cir. 1983), *cert. denied*, 466 U.S. 973 (1984); *United States v. Barton*, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981).

181. See, e.g., *Dorsey v. State*, 402 So. 2d 1178 (Fla. 1971) (distinguishing *Elliott* on the issue of whether admission of testimony relating to a murder by members of an organization of which the defendant was a part is prejudicial error); *Beatty v. State*, 418 So. 2d 271 (Fla. 2d DCA 1982) (citing *Elliott* on an issue relating to the sufficiency of allegations of predicate incidents in an information).

182. See, e.g., *State v. Russo*, 493 So. 2d 504 (Fla. 4th DCA 1986) (dismissing RICO indictment); *Butler v. State*, 456 So. 2d 545 (Fla. 2d DCA 1984) (reversing RICO conviction and affirming conspiracy convictions); *Beatty*, 418 So. 2d at 271 (reversing RICO conviction but affirming the conspiracy conviction).

mation was legally insufficient by failing to apprise the defendant of the charge, one Florida court held that informations charging conspiracy must be subject to special scrutiny.<sup>183</sup>

The Standard Jury Instruction for conspiracy to engage in a pattern of criminal activity may provide some guidance as to how Florida courts may handle these issues. With respect to the nature of the agreement, the instructions require proof of three elements. First, the evidence must show that "two or more persons . . . came to a mutual understanding to try to accomplish a common and unlawful plan, namely to engage in a 'pattern of racketeering activity.'"<sup>184</sup> Second, the instruction requires a showing that the defendant knowingly and willfully became a member of the conspiracy.<sup>185</sup> Third, there must be a showing that the defendant joined the conspiracy with the specific intent to engage in at least two incidents of racketeering *or* with the specific intent to otherwise participate in the affairs of the enterprise.<sup>186</sup>

Thus, at first glance, these instructions appear to agree both with *Elliott* and the cases criticizing it. Nonetheless, this apparent internal inconsistency may be reconciled in the following manner. The first element of the offense appears to relate to the nature of the agreement. By rejecting *Elliott's* holding that the pertinent agreement is one to participate in the affairs of the enterprise, the first element approves of the cases that have held that the agreement is one to commit the predicate crimes.<sup>187</sup> The third element relates to the defendant's intent upon joining the conspiracy, which may be shown by either the method stated in *Elliott* (intent to participate in the affairs of the enterprise) *or* the method stated by the courts that have rejected *Elliott's* holding (intent to engage in at least two incidents of racketeering activity).<sup>188</sup>

In analyzing whether the Florida RICO Act requires a showing of an overt act, the Standard Jury Instruction for RICO conspiracy may provide some guidance. The instruction provides, in pertinent part:

A "conspiracy" is a combination or agreement of two or more persons to join together to attempt to accomplish an offense which would be in violation of the law. It is a kind of "partnership in

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

184. FLA. STD. JURY INSTR. (CRIM.) 270 (1992).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

criminal purposes" in which each member becomes the agent of every other member.

....

Neither must it be proved that all of the persons charged to have been members of the conspiracy were such nor that the alleged conspirators actually succeeded in accomplishing their unlawful objectives *nor that any alleged member of the conspiracy did any act in furtherance of the conspiracy*.<sup>189</sup>

These statements suggest that proof of an overt act is not required for a conviction under Florida's RICO Act.

### V. REPAIRING AND TIGHTENING THE NET

Some commentators have suggested that the federal RICO Act as applied has proven more successful than the Florida RICO Act in preventing organized criminal organizations from infiltrating and corrupting legitimate businesses. In cases involving a large number of defendants, however, RICO prosecutions generally have succeeded only against the principal participants.<sup>190</sup> This result is not surprising considering the significant number of holes present in the "nets" cast by RICO Acts. Based on the number of holes that have been discovered, the RICO nets appear fragile and may soon disintegrate unless Congress and the Florida Legislature address the problems revealed by the federal and Florida courts. To aid the Florida Legislature in that process, to prevent abuse of the Florida Act in the hands of "overzealous prosecutors,"<sup>191</sup> and to prevent the dismissal of RICO actions or reversals of RICO convictions clearly within the scope of the Act, a few suggestions are recommended not only for the Act itself, but also for parties involved in such actions.<sup>192</sup>

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189. *Id.* (emphasis added).

190. *United States v. Turkette*, 452 U.S. 576 (1981); *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

191. *United States v. Ruggiero*, 754 F.2d 927, 934 (11th Cir.), *cert. denied*, 471 U.S. 1127 (1985).

192. Some of these suggestions apply equally to the federal RICO Act. Judge Mikva adequately notes the need for such action in his concurring opinion in *Yellow Bus Lines v. Drivers, Chauffeurs, & Helpers Local Union 639*:

[I]t is long past time for Congress to address ambiguities in the [RICO] statute that courts have wrestled with over the past twenty years. We would be comforted to hear that Congress intended RICO neither to trump the federal courts' ordinary restraint in preempting state fraud law, nor to overwhelm the traditional federal labor law balance. It would be good for Congress, now that passions have cooled and courts have struggled, to apply logic and order to the statute called RICO.

913 F.2d 948, 957-58 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991).

### A. *Recommended Changes to the Act*

First, the definition of the term "pattern of racketeering activity" in section 895.02(4) should be amended to reflect that a showing of continuity is required. While the Florida Supreme Court has clearly stated that "continuity" is a part of the pattern element,<sup>193</sup> this requirement is not apparent from the face of the Act. This amendment should also reflect the two recognized methods of proving continuity.<sup>194</sup>

Second, the definition of the term "enterprise" in section 895.02(3) should be amended to reflect that a showing of continuity is required for this element as well, although this continuity appears to differ from that required for the pattern element. Again, while the courts have recognized that such a showing is required, this is not clear from the face of the Act. In amending this definition, the Legislature may also consider refining the definition to make clear that "enterprise" is not intended to reach a group of individuals who commit a few sporadic criminal acts. A number of RICO prosecutions have been unsuccessful due to the prosecutors' failure to realize this apparent legislative intent.

Third, the Florida RICO Act makes no distinction among the sentences imposed for a pattern of racketeering activity based on predicates consisting of felonies, those consisting of misdemeanors, or the number of predicate incidents involved—all are punishable as first degree felonies. It is unclear whether this was the intended result or merely an oversight. Regardless of the reason, the Act is arguably unfair in this respect because, unlike similar criminal statutes, the sentences proscribed do not account for differing levels of severity of conduct. One way to eliminate this apparent unfairness is to reduce the punishment when only a few predicate incidents are involved or when the violation is based on misdemeanor predicates only. Alternatively, the punishment may be increased when a great number of predicate incidents are involved or when the violation is based on serious felony predicates only. Another commentator has suggested that the Legislature make violations based on misdemeanors punishable as third degree felonies, while violations based on felonies continue to be punished as first degree felonies.<sup>195</sup>

Fourth, the Legislature needs to address the issue of where the predicate incidents must occur. The Legislature may choose to narrow the

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193. See *supra* notes 113-35 and accompanying text.

194. See *supra* notes 124-35 and accompanying text.

195. Maguire, *supra* note 25, at 503.



scope of the Florida RICO Act by indicating that the predicate incident must occur within the state, or broaden the scope by providing that they need not occur inside the state.

### B. *Suggestions for RICO Prosecutions*

First and foremost, the Standard Jury Instructions for Florida RICO offenses must be amended to include the pattern of racketeering activity element and the need to prove continuity under either of the two methods stated in *H.J.*<sup>196</sup> While *Shimek* squarely addressed this problem and noted the deficiency in the Standard Jury Instructions,<sup>197</sup> the Standard Jury Instructions have not yet been amended to reflect *Shimek's* holding. This must be done immediately to avoid reversals of convictions due to oversight of the instruction's deficiency after the considerable time and effort expended to obtain racketeering convictions, and to avoid subsequent duplication of such efforts.

Second, in future racketeering prosecutions, prosecutors and plaintiffs must consider which continuity method the action will use even before the targeted individuals are arrested or the prosecution initiated. This will prevent dismissals of actions or the return of not-guilty verdicts for failure to prove continuity under the close-ended concept outlined in *H.J.* Even though the open-ended concept offers an alternative method to prove continuity, this method requires proof of threatened future criminal activity or proof that the activity is a part of the enterprise's regular manner of doing business. Such proof may be difficult to obtain in situations where a business constituting the enterprise is a shell business with no properly kept records or is on the verge of bankruptcy or financial ruin. In such cases, the chance of threatened long-term activity is minimal.

Finally, private individuals affected by racketeering activity should not overlook the civil remedies available under chapter 772. This chapter allows a successful plaintiff to obtain treble damages, with a minimum recovery of \$200. However, plaintiffs who seek to abuse these remedies should note that, if the action is found to be without any substantial factual or legal support, the defendants may recover reasonable attorneys' fees and costs.<sup>198</sup>

While some commentators believe that, if properly modified or clarified, RICO Acts can be a great weapon in the war against organ-

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

197. *Shimek v. State*, 610 So. 2d 632 (Fla. 1st DCA 1992).

198. See *supra* notes 59-87 and accompanying text.

ized crime, others doubt that these Acts will have any appreciable effect on organized crime. Nevertheless, even if all of the perceived deficiencies in these Acts are addressed, it is unrealistic to believe that RICO Acts, or any other legislative act alone, can stem the tide of organized crime without efforts that separately address the root cause or causes of such behavior. There is probably no better statement of this reality than the following:

One factor in organized crime continues to be proven: Criminal activities continue despite arrests, despite convictions, despite incarcerations. All syndicate families in Pennsylvania are incapacitated in some way, yet the gambling, the loansharking, and the many other activities continue. Because profits are enormous, new leaders quickly replace the old to fill the public demand for illegal goods and services. The consumers of these illegal services have not been deterred from supporting organized crime. They ignore the violence which hurts innocent people as well as crime figures. They continue to ignore the fact that we all pay inflated prices because of criminal monopolies in certain industries. It is the public which supports organized crime. Only the public can withhold that support.<sup>199</sup>

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199. EUGENE DOLESCHAL ET AL., NATIONAL COUNCIL ON CRIME AND DELINQUENCY, A GUIDE TO THE LITERATURE ON ORGANIZED CRIME: AN ANNOTATED BIBLIOGRAPHY COVERING THE YEARS 1967-81, at 10 (1981).

