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Ohio's Pattern of Corrupt Activities Law: Ohio Revised Code Sections 2923.31-.36

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LEGISLATIVE NOTE

OHIO'S PATTERN OF CORRUPT ACTIVITIES LAW: OHIO REVISED CODE SECTIONS 2923.31-.36

I. INTRODUCTION

In 1970, Congress enacted the Racketeering Influenced Corrupt Organizations statute.[1] This statute, commonly referred to as "RICO," is one of the most complex and controversial criminal statutes ever written.[2] During the initial years of its existence, RICO was not extensively utilized.[3] By 1980, however, federal prosecutors began realizing the potential law-enforcement value afforded by RICO's broad scope, harsh penalties and innovative forfeiture provisions.[4] Consequently, RICO soon became a favorite tool for prosecuting a diverse group of defendants for a wide variety of criminal activities.[5] Once lawyers and legislators realized RICO's potential as a weapon for fighting organized crime, many states began to enact their own versions of the federal statute.[6] These state statutes are often referred to as "little RICOs."[7]

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1. 18 U.S.C. §§ 1961-68 (1988). RICO was enacted as part of the Organized Crime Control Act of 1970. Pub. L. No. 91-452, 84 Stat. 922 (1970).

2. *See* Gerald E. Lynch, *Rico: The Crime of Being A Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987) [hereinafter Lynch I & II].

3. Barry Tarlow, *Rico Revisited*, 17 GA. L. REV. 291, 293 (1983).

4. *See* Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L. Q. 1009, 1011-12 (1980).

5. *See* Tarlow, *supra* note 3, at 297-99.

6. To date, 28 states and Puerto Rico have enacted versions of RICO. *See* ARIZ. REV. STAT. ANN. §§ 13-2301 to -2316 (1989 & Supp. 1990); CAL. PENAL CODE §§ 186-186.8 (West 1988 & Supp. 1991); COLO. REV. STAT. ANN. §§ 18-17-101 to -109 (West 1990 & Supp. 1991); CONN. GEN. STAT. ANN. § 53-393 to -403 (West 1985); DEL. CODE ANN. tit. 11, §§ 1501-1511 (1987 & Supp. 1990); FLA. STAT. ANN. §§ 895.01-.05 (West Supp. 1991); GA. CODE ANN. §§ 16-14-1 to -15 (Michie 1988 & Supp. 1991); HAW. REV. STAT. §§ 842-1 to -12 (1985 & Supp. 1989); IDAHO CODE §§ 18-7801 to -7805 (1987 & Supp. 1991); ILL. REV. STAT. ch. 56 ½ §§ 1651-1661 (Smith-Hurd 1985 & Supp. 1991); IND. CODE ANN. §§ 35-45-6-1 to -22 (West 1983); LA. REV. STAT. ANN. §§ 15:1351-56 (West Supp. 1991); MISS. CODE ANN. §§ 97-43-1 to -11 (Supp. 1989); NEV. REV. STAT. ANN. §§ 207.350-.520 (Michie 1986 & Supp. 1989); N.J. STAT. ANN. §§ 2C:41-1 to -6.2 (West 1982 & Supp. 1991); N.M. STAT. ANN. §§ 30-42-1 to -6 (Michie 1989); N.Y. PENAL LAW §§ 460.00-.80 (McKinney 1989); N.C. GEN. STAT. §§ 75-D-1 to -14 (1990); N.D. CENT.

Ohio enacted its version of RICO on June 20, 1985, creating the criminal offense of "engaging in a pattern of corrupt activity."[8] These statutes took effect on January 1, 1986.[9] Throughout this note, these statutes, Ohio Revised Code sections 2923.31-36, will be referred to collectively as Ohio's Pattern of Corrupt Activities Law (PCA). PCA was passed unanimously by both the House[10] and Senate[11] of the Ohio General Assembly. The only reported comments regarding PCA were made by Eugene Watts, the statute's Senate sponsor. Senator Watts described PCA as "the toughest and most comprehensive . . . (RICO) Act in the nation" and "state of the art legislation."[12]

CODE §§ 12.1-06.1-01 to -08 (1985 & Supp. 1991); OHIO REV. CODE ANN. §§ 2923.31-.36 (Anderson 1987 & Supp. 1990); OKLA. STAT. ANN. tit. 22, §§ 1401-1419 (West Supp. 1991); OR. REV. STAT. §§ 166.715-.735 (1990); PA. CONS. STAT. ANN. tit. 18, § 911 (1983 & Supp. 1991); P.R. LAWS ANN. tit. 25, §§ 971-971(s) (1988); R.I. GEN. LAWS §§ 7-15-1 to -11 (1985); TENN. CODE ANN. §§ 39-12-201 to -210 (1990); UTAH CODE ANN. §§ 76-10-1601 to -1608 (1990 & Supp. 1991); WASH REV. CODE ANN. §§ 9A.82.010-.901 (West 1988 & Supp. 1991); WIS. STAT. ANN. §§ 946.80-.88 (West Supp. 1991).

7. Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV,* 87 COLUM. L. REV. 920, 982 (1987) [hereinafter Lynch III & IV]. The term "little RICO" may be a misnomer when used to refer to certain state statutes since many of these statutes are actually broader in scope and contain more severe penalties than the federal RICO statute. *See* [1985] RICO Bus. Disputes Guide (CCH) ¶ 2020.

8. 1985 Ohio Laws, Amended Substitute H.B. 5. House Bill 5 repealed Ohio's prior legislative attempt to formulate a statute targeted at organized crime. *Id.* The former section 2923.04 made it a criminal offense to establish, maintain or facilitate a criminal syndicate. Most of this statute was found unconstitutionally vague for a variety of reasons by the Ohio Supreme Court. State v. Young, 406 N.E.2d 499 (Ohio), *cert. denied,* 449 U.S. 905 (1980). The *Young* court held that the statute's prohibition against facilitating a criminal syndicate was vague because the scienter or intent requirement of the statute could be read to encompass facilitating a criminal syndicate in its legal activities. *Id.* at 504. Thus, the statute was unconstitutional because a person could not ascertain whether certain activity was prohibited by the statute. *Id.* at 507. For example, a person who unknowingly sold goods to a criminal syndicate could be found guilty of facilitating that syndicate. *Id.* The *Young* court also found that the prohibition against committing "*any offense of a type in which a criminal syndicate engages on a continuing basis*" was unconstitutionally vague because it failed to provide an ascertainable standard of guilt. *Id.* at 506 (quoting former Ohio Revised Code section 2923.04).

An Ohio appellate court has already upheld the constitutionality of PCA. *See* State v. Thrower, 575 N.E.2d 863 (Ohio Ct. App. 1989). In *Thrower,* the court upheld the defendant's convictions of engaging in a pattern of corrupt activity despite contentions that section 2923.32 violated the *ex post facto* clause and was unconstitutionally vague. *Id.* at 869-74. Because section 2923.32 requires that at least one act occur after the effective date of the statute, the court held that it was not an ex post facto law. *Id.* at 869. Moreover, section 2923.31's definition of corrupt activity was found sufficiently specific to avoid the vagueness problems encountered by the former section 2923.04 in *Young. Id.* at 873-74.

9. OHIO REV. CODE ANN. §§ 2923.31-.36 (Anderson 1987 & Supp. 1991).

10. 57 Ohio Report No. 119, Gongwer News Serv., at 4 (June 20, 1985).

11. 57 Ohio Report No. 117, Gongwer News Serv., at 3 (June 18, 1985).

12. *Id. See also* Summary of Enactments, January-July 1985, Ohio Legislative Service Commission, at 45. The Summary of Enactments is a brief description of enacted bills provided by the Ohio Legislative Service Commission, a group of Ohio legislators. The Ohio Legislative Service Commission states that "[the] bill repeals the crime of engaging in organized crime and supplants it with the crime of engaging in a pattern of corrupt activity." *Id.*

Like most states which have enacted versions of RICO, Ohio has not yet begun using PCA extensively.[13] In recent years, however, state prosecutors have increased RICO-type prosecutions under state versions of RICO.[14] The reason for this increase is probably that state law enforcement agencies and prosecutors are just beginning to understand the intricacies of a RICO case.[15]

This note is limited to the criminal aspects of Ohio's corrupt activity law[16] and has three purposes. First, it describes the substantive crimes and penalties created by PCA, briefly summarizing the important provisions of sections 2923.31-2923.36 of the Ohio Revised Code. Second, the analysis explains the important provisions of PCA by comparing these sections with the corresponding sections of the federal RICO statute. The comparison between RICO and PCA will point out the areas in which the Ohio legislature deviated from the federal prototype and explain the reasoning and possible effects of these variations. Finally, this article indicates several problems regarding PCA's interpretation and application suggesting modifications and guidelines to alleviate these difficulties.

II. SUMMARY

Section 2923.32 of the Ohio Revised Code creates three substantive criminal offenses.[17] First, section 2923.32(A)(1) makes it a criminal offense for a person to operate an enterprise through a pattern of corrupt activity.[18] Second, section 2923.32(A)(2) criminalizes the act

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13. *See* Fred Strasser, *RICO AND THE MAN; Racketeering Law in the States is Starting to Be Felt*, NAT'L L.J., March 20, 1989, at 1.

14. *Id.*

15. *Id.* Professor G. Robert Blakey, the principal drafter and foremost proponent of the federal RICO statute, analogizes RICO cases to brain surgery stating that "[t]he Legislature has authorized it, but until you get brain surgeons, there's no one around to do the operation." *Id.* Thus, the experience of Ohio prosecutors will probably parallel that of their federal counterparts and the use of PCA will gradually rise as prosecutors become more familiar with the statute. *See generally* Tarlow, *supra* note 3.

16. In addition to creating a novel set of crimes and penalties, PCA, like RICO, contains a provision creating a civil action. *See* OHIO REV. CODE ANN. § 2923.34 (Anderson 1987 & Supp. 1991). This section of PCA provides that any person, including the State of Ohio, "who is injured or threatened with injury by a violation of section 2923.32 [PCA's substantive criminal provision]" may file a civil suit against the person who allegedly violated PCA. *Id.* § 2923.34(B). Upon proving injury caused by a violation of PCA by a preponderance of the evidence, the injured party is entitled to treble damages. *Id.* § 2923.34(F).

For an overview and critique of the civil aspect of the federal RICO statute, see generally Michael Goldsmith, *Civil RICO Reform: The Basis For Compromise*, 71 MINN. L. REV. 827 (1987).

17. OHIO REV. CODE ANN. § 2923.32 (Anderson 1987 & Supp. 1990).

18. *Id.* § 2923.32(A)(1).

of taking control of an enterprise through a pattern of corrupt activity.[19] Third, section 2923.32(A)(3) prohibits a person from investing the proceeds of a pattern of corrupt activity in an enterprise.[20] In addition to the offenses created by Ohio Revised Code section 2923.32(A), section 2923.01 creates the offense of conspiring[21] to engage in a pattern of corrupt activity.[22] The terms used in section 2923.32 are defined in section 2923.31.[23] This section is crucial to understanding the offenses contained in section 2923.32.

Ohio Revised Code section 2923.31(C) defines "enterprise" as any legal entity, "organization, association, or group of persons associated in fact."[24] Under this section, the term enterprise includes both legal and illegal enterprises.[25] In order to constitute a "pattern," a person must engage in at least two "incidents of corrupt activity" (predicate acts)[26] related to the affairs of an enterprise.[27] One of these acts must occur after the effective date of the statute[28] and within six years of the other act forming the pattern.[29] "Corrupt activity" is defined as "engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another to engage in" any of a variety of other criminal offenses under the Ohio Revised Code, as well as anything defined as "racketeering activity" under RICO and any offense of any other state which is substantially similar to the listed Ohio offenses.[30]

A person who is convicted of violating Ohio Revised Code section 2923.32 is subject to extraordinary penalties.[31] The offense of engaging in a pattern of corrupt activity is a felony of the first degree.[32] In addition to being convicted of engaging in a pattern of corrupt activity, a

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19. *Id.* § 2923.32(A)(2).

20. *Id.* § 2923.32(A)(3).

21. *See infra* note 150 (defining Ohio conspiracy).

22. OHIO REV. CODE ANN. § 2923.01.

23. *Id.* § 2923.31.

24. *Id.* § 2923.31(C).

25. *Id.*

26. Predicate acts consist of the activities listed in section 2923.31(I) of the Ohio Revised Code. *See infra* note 49.

27. OHIO REV. CODE ANN. § 2923.31(E).

28. The effective date of sections 2923.31-.36 is January 1, 1986. *Id.*

29. *Id.* There need not be a prior conviction of either of the two predicate acts. *Id.* The two exceptions to the six year limitation period in Ohio Revised Code section 2923.31(E) are for offenses involving murder and for any period of imprisonment served by the person engaging in the activity. *Id.*

30. *Id.* § 2923.31(I); *see infra* note 49 (comprehensive list of predicate acts under both PCA and RICO).

31. OHIO REV. CODE ANN. § 2923.32.

32. *Id.* § 2923.32(B)(1). A person convicted of a felony of the first degree is subject to a minimum of four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, or twenty-five years and a maximum of 25 years of imprisonment. *Id.* § 2929.11. The maximum fine for a first degree felony is $10,000. *Id.*

person may be convicted of the predicate acts which constitute the pattern and conspiracy to engage in a pattern of corrupt activity.[33] Thus, anyone convicted of engaging in corrupt activity is chargeable with, and potentially guilty of, at least four separate offenses—each of the two illegal acts, violation of section 2923.32 and conspiracy to violate section 2923.32.

Furthermore, a court can order a person who "derives pecuniary value or causes property damage, personal injury other than pain and suffering or other loss through or by violation of this section [2923.32]" to pay a fine not exceeding three times the gross value gained or loss caused by such violation.[34] The court may also order a person convicted under PCA to pay the costs incurred by the court, the law enforcement agency handling the investigation and the prosecution.[35] All of these penalties are in addition to the penalties imposed for a first degree felony under Ohio Revised Code section 2929.11.[36] Finally, a person convicted of engaging in a pattern of corrupt activity will be ordered to criminally forfeit any property used or intended to be used in the course of, derived from, or realized through, engaging in a pattern of corrupt activity.[37]

PCA creates a variety of devices which allow for pre-trial seizure of a defendant's property.[38] In order to preserve the reachability of the property which may be subject to forfeiture under PCA, a court may enter a restraining order or injunction, require a performance bond, appoint a receiver, or take any other action necessary.[39]

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33. *See infra* notes 131-43 and accompanying text.

34. OHIO REV. CODE ANN. § 2923.32(B)(2)(a).

35. *Id.* § 2923.32(B)(2)(b)-(c).

36. *Id.* § 2923.32(B)(2).

37. *Id.* § 2923.32(B)(3). In order to secure criminal forfeiture under section 2923.32, the indictment must allege the extent of the property to be forfeited unless the forfeiture of that property was not reasonably foreseen at the time of the indictment. *Id.* § 2923.32(B)(4). The court must also enter a special verdict as to the extent of the forfeited property. *Id.* In addition to the criminal forfeiture under PCA, Ohio Revised Code section 2923.34 creates a civil action against a person who has engaged in a pattern of corrupt activity. *Id.* § 2923.34. Since a plaintiff in a civil suit need only prove the elements of PCA by a preponderance of the evidence, this aspect of PCA may prove to be an even more powerful weapon against organized crime. *See id.* § 2923.34(C). This article, however, is limited to the criminal aspects of PCA and the provisions pertaining to civil remedies will not be discussed.

38. *Id.* § 2923.33.

39. *Id.* The court may take these steps either before or after the prosecution brings an indictment. *Id.*

III. ANALYSIS

A. Comparison Between Ohio Revised Code Sections 2923.31-2923.36 (Ohio PCA) and RICO

In general, the Ohio statute creating the offense of engaging in a pattern of corrupt activity is modeled after the federal RICO statute.[40] In choosing to enact its own statute to deal with organized crime, however, Ohio has substantially deviated from the federal model. For example, Ohio's definition of corrupt activity is considerably broader than RICO's definition of racketeering activity, thus creating a broader range of indictable criminal activities than are included in the federal RICO statute.[41] In several instances, the Ohio legislature has codified some of the United States Supreme Court's more important interpretations of RICO.[42]

The legislative history of Ohio Revised Code sections 2923.31-2923.36 does not reveal the Ohio legislature's purpose in digressing from the federal model.[43] Taking into consideration that PCA was enacted fifteen years after RICO, one can assume that the Ohio legislators were influenced by the federal government's experience with RICO. Accordingly, the best way to ascertain the purpose of PCA is to analyze its digressions from RICO in light of the political and judicial criticisms of the federal statute.

It is likely that a fair amount of uncertainty will remain regarding PCA's interpretation despite the Ohio legislature's attempt to make PCA a more definitive and less confusing statute than RICO. Even after twenty years of RICO litigation, the federal circuit courts are hopelessly divided over several major elements of the RICO offenses.[44] Since Ohio courts have not yet dealt extensively with PCA, they will

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40. *See* State v. Thrower, 575 N.E.2d 863, 870 (Ohio Ct. App. 1989) ("The Ohio RICO statute was based on the [f]ederal RICO statute and statutes passed by other states."). Like PCA, most state RICO statutes are modeled on the federal RICO statute. *See* RICO Bus. Disputes Guide, *supra* note 7, at ¶ 2020.

41. *See infra* notes 47-51 and accompanying text (comparing definitions of "corrupt activity" and "racketeering activity").

42. *See infra* notes 82-101 and accompanying text.

43. Due to the lack of legislative history in Ohio, it is impossible to ascertain exactly what the Ohio legislators contemplated when they passed PCA. *See supra* note 12 and accompanying text. In order to surmise the legislative intent of PCA, it is, therefore, necessary to investigate PCA's deviations from RICO in light of the various criticisms of RICO and the federal cases construing RICO.

44. *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 251 (1989) (Scalia, J., concurring) (asserting that attempts to define RICO's pattern element have yielded "a kaleidoscope of circuit court positions"); *see also infra* notes 75-120 and accompanying text (discussing the pattern and enterprise elements of both PCA and RICO).

likely consult federal cases interpreting RICO to construe Ohio's version of that statute.[45] A comparison of Ohio's PCA to RICO along with an analysis of the few cases decided under PCA, may indicate the direction Ohio courts will take in developing their own body of case law.

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45. Several Ohio appellate courts have used federal RICO case law to construe PCA. *See, e.g.*, State v. Giffin, 575 N.E.2d 887 (Ohio Ct. App. 1991) (citing federal cases to support the proposition that, under PCA, venue can be fixed in any jurisdiction where the criminal enterprise conducted illegal activity regardless of whether the defendant was ever physically present in that jurisdiction); State v. Thrower, 575 N.E.2d 863 (Ohio Ct. App. 1989) (PCA not violative of constitutional proscriptions against laws which are *ex post facto*, retroactive or overly vague because federal cases have held that analogous provisions of RICO are constitutional); State v. Conley, No. CA90-11-023, 1991 Ohio App. LEXIS 3343 (12th App. Dist. July 15, 1991) (analogizing PCA to RICO and using federal cases to reach conclusion that Ohio legislature intended to impose separate punishment for both engaging in pattern of corrupt activity and conspiring to engage in pattern of corrupt activity); State v. Hill, No. CA-8094, 1990 Ohio App. LEXIS 5890 (5th App. Dist. Dec. 31, 1990) (federal cases used to support the conclusion that PCA enterprise can be inferred from the interdependence of activities of the defendants).

Other states that have enacted versions of the federal RICO also use federal RICO case law to define and interpret their state statutes. *See, e.g.*, Boyd v. Florida, 578 So. 2d 718 , *rehearing denied*, 581 So. 2d 1310 (Fla. Ct. App. 1991) (using federal case law to construe the enterprise element contained in Florida's RICO statute); Dover v. State, 385 S.E.2d 417, 420 (Ga. Ct. App. 1990) ("Although they do not control construction or application of the state RICO statute, federal circuit court opinions regarding the federal statute are instructive."); *In re* Liquidation of Integrity Ins. Co., 584 A.2d 286 (N.J. Super. 1990). "[I]n the absence of state law or decisions, federal case law may be used to interpret New Jersey's RICO statute. . . . The use of federal case law is especially appropriate in this matter because the New Jersey statute 'borrows' its structure . . . from federal RICO." *Integrity*, 584 A.2d at 286-87. *But see* Computer Concepts, Inc. v. Brandt, 801 P.2d 800, 809 (Or. 1990) (rejecting federal case law for purposes of interpreting Oregon's RICO statute in instances where Oregon statute deviated from federal model and federal case law post-dated enactment of Oregon statute).

Although this article is primarily concerned with PCA, the differences among PCA, federal RICO, and other state RICOs are pointed out throughout the analysis. Several Ohio courts have relied on federal case law, but the persuasiveness of federal case law in Ohio is still uncertain. From decisions in other states, one can glean that state courts have the option of using federal case law to interpret sections of their RICO statutes which parallel federal RICO. Thus, the weight of federal case law diminishes in proportion to the degree of PCA's deviation from the federal RICO statute.

One recent Ohio decision indicates that Ohio courts may not be persuaded by a federal case even where the PCA is substantially similar to RICO. *See* State v. McDade, No. 90 CA 46, 1991 Ohio App. LEXIS 5546 (2d App. Dist. Nov. 20, 1991); *see also infra* note 101.

The decisions of other states which have RICO statutes should also have some value because the federal RICO statute is the prototype for most of the state statutes. Nonetheless, these statutes differ in a variety of ways. *See generally* RICO Bus. Disputes Guide, *supra* note 7, at ¶ 2020. Ohio courts will, therefore, have a great deal of difficulty using the decisions of other state courts to construe the meaning of PCA. The case law of states which are similar to PCA, however, may have some persuasive value.

1. Ohio Revised Code Section 2923.31 Versus Title 18 United States Code Section 1961: Definitional Discrepancies

a. "Pattern of Corrupt Activity" versus "Pattern of Racketeering Activity"

PCA's first major departure from RICO is the use of the phrase "pattern of corrupt activity"[46] as opposed to RICO's "pattern of racketeering activity."[47] Ohio Revised Code section 2923.31(I)(1)'s definition of corrupt activities includes all activity defined as racketeering activity under 18 U.S.C. section 1961(1) of RICO.[48] Although both Ohio's PCA and RICO include a "laundry list" of criminal offenses which serve as predicate acts for engaging in a pattern of corrupt or racketeering activity, Ohio's list is considerably longer than its federal counterpart.[49] Furthermore, PCA includes as predicate offenses "[c]onduct constituting a violation of any law of any state . . . that is

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46. OHIO REV. CODE ANN. § 2923.32 (Anderson 1987 & Supp. 1990).

47. 18 U.S.C. § 1961(5) (1988).

48. OHIO REV. CODE ANN. § 2923.31(I)(2).

49. Section 2923.31 of the Ohio Revised Code defines "corrupt activity" as a violation of any of the following sections of the Revised Code:

> 2903.01 [aggravated murder], 2903.02 [murder], 2903.03 [voluntary manslaughter], 2903.04 [involuntary manslaughter], 2903.11 [felonious assault], 2903.12 [aggravated assault], 2905.01 [kidnapping], 2905.02 [abduction], 2905.11 [extortion], 2905.22 [extortionate extension of credit], 2907.321 [2907.32.1][pandering obscenity involving a minor], 2907.322 [2907.32.2][pandering sexually oriented matter involving a minor], 2907.323 [illegal use of minor in nudity-oriented material], 2909.02 [aggravated arson], 2909.03 [arson], 2911.01 [aggravated robbery], 2911.02 [robbery], 2911.11 [aggravated burglary], 2911.12 [burglary], 2911.13 [breaking and entering], 2911.31 [safecracking], 2921.02 [bribery], 2921.03 [intimidation], 2921.04 [intimidation of victims or witnesses], 2921.11 [perjury], 2921.12 [tampering with evidence], 2921.32 [obstructing justice], 2921.41 [theft in office], 2921.42 [unlawful interest in a public contract], 2921.43 [soliciting or receiving improper compensation], 2923.12 [carrying a concealed weapon], 2923.17 [unlawful possession of dangerous ordnance], 3769.11, 3769.15, 3769.16, 3769.19 [horseracing violations] or of division (A)(1) or (2) of section 1707.042 [1707.04.2][relating to control bids], or of division (B), (C)(4), (D), (E) or (F) of section 1707.44 [securities violations], or of division (A)(1) or (2) of section 2923.20 of the Revised Code [unlawful transactions in weapons] . . . .

Id. § 2923.31(I)(2)(a). Violation of the above sections constitutes corrupt activity regardless of value. *Id.* Violation of the following sections constitutes corrupt activity when the aggregate amount involved exceeds $500:

> (b) Any violation of section 2907.21 [compelling prostitution], 2907.22 [promoting prostitution], 2907.31 [disseminating matter harmful to juveniles], 2913.02 [theft], 2913.11 [passing bad checks], 2913.21 [misuse of credit cards], 2913.31 [forgery], 2913.32 [criminal simulation], 2913.42 [tampering with records], 2913.47 [insurance fraud], 2913.51 [receiving stolen property], 2915.02 [gambling], 2915.03 [operating a gambling house], 2915.06 [corrupting sports], 2925.03 [trafficking in drugs], 2925.37 [offenses involving counterfeit controlled substances] of the Revised Code . . .
>
> (c) Any violation of section 5743.112 . . . of the Revised Code [trafficking in cigarettes with the intent to avoid tax] when the amount of unpaid taxes exceeds one hundred dollars

substantially similar to the conduct described in (I)(2) of this section."[50] The expansive provisions of section 2923.31 indicate that Ohio probably chose to use the term "corrupt activity" to encompass a wider variety of activities than the federal definition of "racketeering activity."

Another reason for Ohio's use of the term "corrupt activity" may have been to demonstrate that the primary target of PCA is not simply "racketeers" or "organized criminals" in the traditional understanding of these terms.[51] Much of the controversy surrounding RICO centers on its application to a wide variety of defendants, many of whom were

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(d) Any violation or combination of violations of section 2907.32 of the Revised Code [involving various forms of obscenity] . . . .

(e) Any combination of violations of the sections listed in (I)(2)(b) of this section and any violation of 2907.32 [obscenity] . . . [in which the value] exceeds five hundred dollars.

Id. § 2923.31(I)(2)(b)-(e).

In addition to these offenses, PCA considers as corrupt activity "conduct constituting a violation of any law of any state other than this state that is substantially similar to the conduct described . . . [in this section], provided the defendant was convicted of such conduct in a criminal proceeding in the other state." *Id.* § 2923.31(I)(3)

Finally, PCA includes in its definition of corrupt activity all activity defined as racketeering activity in RICO. *Id.* § 2923.31(I)(2)(b). RICO defines as racketeering activity "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year. . . . 18 U.S.C. § 1961(1)(A).

Section 1961(1)(B) goes on to list as predicate acts, "any act which is indictable under any of the following provisions of title 18, United States Code:" 201 (bribery), 224 (sports bribery), 471, 472, and 473 (counterfeiting), 659 (theft from interstate shipment) if the act indictable under 659 is felonious, 664 (embezzlement from pension and welfare funds), 891-94 (extortionate credit transactions), 1029 (fraud and related activity in connection with access devices), 1084 (transmission of gambling information), 1341 (mail fraud), 1343 (wire fraud), 1344 (financial institution fraud), 1461-65 (obscene matter), 1503 (obstruction of justice), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1512 (tampering with a witness, victim, or an informant), 1513 (retaliating against a witness, victim, or an informant), 1951 (interference with commerce, robbery or extortion), 1952 (racketeering), 1953 (interstate transportation of wagering paraphernalia), 1954 (unlawful welfare fund payments), 1955 (illegal gambling businesses), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property from specified unlawful activity), 2251-52 (sexual exploitation of children), 2314-15 (interstate transportation of stolen property), 1958 (use of interstate commerce facilities for murder-for-hire), 2312-13 (interstate transportation of stolen motor vehicles), 2341-46 (trafficking in contraband cigarettes), 2421-24 (white slave traffic). *Id.* § 1961(1)(B).

Furthermore, section 1961(1)(B) lists as predicate acts violations of statutes dealing with: restrictions on loans to labor organizations, embezzlement of union funds, securities fraud, narcotics violations, and any act indictable under the Currency and Foreign Transactions Reporting Act. *Id.* § 1961(1)(C)-(E).

50. OHIO REV. CODE ANN. § 2923.32(I)(3). Section 2923.32(I)(3) requires that the defendant be convicted of this conduct in the other state. *Id.* Prior conviction is not required for any of the offenses listed in section 2923.31(I)(1) and 2923.31(I)(2). *Id.* § 2923.32(I)(1)-(2).

51. To most people, the term "organized crime" refers to a formally structured criminal syndicate. If the term is taken literally, however, it can mean any formally or informally structured group of individuals engaging in criminal activities. Lynch I & II, *supra* note 2, at 662 n.11.

never envisioned by the legislators who originally passed RICO.[52] An investigation of the legislative history of RICO indicates that it was originally intended to combat the infiltration of organized crime into legitimate businesses.[53] In recent years, however, prosecutors have used the broad language of the federal RICO statute to bring actions against a variety of defendants who are neither organized criminals in the traditional meaning of the term nor infiltrating legitimate businesses with the profits of illegal activity.[54] Federal RICO prosecutions involving the infiltration of organized crime into legitimate businesses are the exception rather than the norm.[55] The use of the term "corrupt activity" indicates that Ohio did not intend to limit PCA's application to those persons traditionally labelled "organized criminals" and "racketeers" or to the infiltration of organized crime into legitimate businesses. Rather, it is likely that Ohio intended the statute to apply to a wide variety of criminal activity.[56]

Racketeer is defined as "one who extorts money or advantages by threats of violence or by blackmail or by actual interference with a business or employment." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1891 (1971).

52. *See* Lynch I & II, *supra* note 2, at 662.

53. *Id.*; *see also* Craig M. Bradley, *Racketeers, Congress and the Courts: Analysis of RICO*, 65 IOWA L. REV. 837 (1980). Although most commentators conclude that RICO was primarily concerned with organized crime's infiltration of legitimate businesses, the issue is still open to considerable debate. The principal drafter of RICO, G. Robert Blakey, asserts that Congress always intended for RICO to encompass a wide variety of criminal activity. *See* Blakey & Gettings, *supra* note 4, at 1014-21. Each of the above sources support their conclusions with a comprehensive analysis of RICO's legislative history. Notwithstanding original intent, the reluctance of Congress to substantially modify RICO in the face of criticism indicates congressional approval of RICO's current applications.

54. *See* Lynch III & IV, *supra* note 7, at 977. Professor Lynch notes that "the vast disparity between what the legislative history shows that Congress was conscious of doing when it enacted RICO, and what, with the help of eager prosecutors and generally eager federal courts, it actually did." *Id.*

55. *Id.* at 726. A survey of 236 RICO indictments brought from 1974 through 1985 revealed that fewer than eight percent of these indictments used the sections of RICO proscribing the infiltration of legitimate businesses through a pattern of racketeering. *Id.* As a result of this survey, Professor Lynch concluded that RICO had failed as a means of preventing the infiltration of legitimate businesses by racketeers. *Id.*

56. Although the legislators who originally passed RICO may have been primarily concerned with fighting national criminal syndicates such as the La Cosa Nostra, by 1985, most courts construed RICO as applying to organized criminals in general, regardless of the size of their criminal operations. *See* Lynch I & II, *supra* note 2. Perhaps it is this construction of RICO which PCA intends to adopt in choosing the terms "corrupt activity" as opposed to RICO's "racketeering activity."

Some states have apparently taken the opposite approach. For example, New York's version of RICO states that it "is not intended to be employed to prosecute relatively minor or isolated acts of criminality which, while related to an enterprise and arguably part of a pattern as defined in this article, can be adequately and more fairly prosecuted as separate offenses." N.Y. PENAL LAW § 460.00 (McKinney 1989); *see also* People v. Moscatiello, 566 N.Y.S.2d 823, 823-24 (N.Y. App. Div. 1990). "OCCA [New York's RICO] was designed to target certain criminal activities more precisely defined and with less sweep than [federal] RICO." Moscatiello, 566 N.Y.S.2d at 823-24.

Under Ohio Revised Code section 2923.31, corrupt activity includes "attempting to engage in, conspiring to engage in or soliciting, coercing or intimidating another to engage in any" of the offenses listed in section 2923.31(I).[57] This provision has no counterpart in RICO and substantially increases the number of predicate offenses contained in section 2923.32. According to section 2923.31(I), a person can be convicted of engaging in a pattern of corrupt activity without ever having personally committed any of the listed offenses.[58] For example, a person might solicit or intimidate another into purchasing over five-hundred dollars worth of material containing a display of sexual conduct on two separate occasions. Each solicitation or intimidation constitutes a predicate act for the purposes of engaging in a pattern of corrupt activity.[59] Hence, under section 2923.31(I), both the purchaser of the obscene material and the person soliciting the purchase have committed the requisite predicate offenses. Even though the solicitor neither bought nor sold the obscene material, she could be convicted of engaging in a pattern of corrupt activity under section 2923.32 if the two solicitations constituted a pattern and occurred through the use of an enterprise.[60]

It does appear, however, that Ohio appellate courts will deny a conviction of engaging in a pattern of corrupt activities when a defendant merely discusses committing one of the predicate offenses. In *State v. Wolfe*,[61] an Ohio appellate court overruled the trial court's denial of the defendant's motion for acquittal of engaging in a pattern of corrupt activity.[62] The defendant had been indicted for an unlawful transaction in weapons, a violation of section 2923.20(A)(1) of the Ohio Revised Code and a predicate offense under section 2923.31(I)(a).[63] This activity happened in 1985, before the effective date of section 2923.32.[64] The only evidence the state offered to prove that the defendant had been engaged in a pattern of corrupt activity after the effective date of section 2923.32 was a discussion about the purchase of guns.[65] A witness at trial testified that the defendant approached him at a flea market and started talking to him about buying guns.[66] The court held that

57. OHIO REV. CODE ANN. § 2923.31(I).
58. *Id.*
59. *Id.*
60. *Id.*
61. 555 N.E.2d 689 (Ohio Ct. App. 1988).
62. *Id.*
63. *Id.* at 691.
64. *Id.*
65. *Id.* at 692.
66. *Id.*

this evidence was not sufficient to convict the defendant of engaging in a pattern of corrupt activity.[67]

The facts in *Wolfe* again raise the issue of what is meant by Ohio Revised Code section 2923.31(I)'s use of the term "soliciting."[68] Perhaps the state could have convicted the defendant in *Wolfe* if he had requested or encouraged the witness to sell him firearms. This could be considered "soliciting" another to engage in corrupt activity and the defendant would have thus committed the two requisite acts to constitute a "pattern" under section 2923.31(E).[69]

Ohio's use of the term "corrupt activity" makes sense for three reasons. First, in 1985, the American Bar Association proposed that Congress replace the term "racketeering activity" with the term "criminal activity."[70] The change was suggested to eliminate the prejudicial effects of the word "racketeer."[71] PCA's use of the term corrupt activity should eliminate any prejudicial effects created by labelling defendants as "racketeers." Second, it would be irrational for Ohio to use the

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67. *Id.*; *see also* Branson v. Sanford, No. 2-88-6, 1989 Ohio App. LEXIS 4261 (3d App. Dist. Nov. 7, 1989) (defendants entitled to summary judgement where plaintiff's response to defendants' motion for summary judgement failed to rebut defendants' contention that no incidents forming alleged pattern of corrupt activity had occurred after PCA's effective date).

68. OHIO REV. CODE ANN. § 2923.31(I). Generally, a person is guilty of solicitation "when he solicits, requests, commands, or importunes another person to commit a felony or a 'serious' misdemeanor. . . . " CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 713 (14th ed. 1981). *See also* MODEL PENAL CODE § 5.02 (1980):

> A person is guilty of solicitation to commit a crime if, with the purpose of promoting or facilitating its commission, he commands, encourages, or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime, or which would establish his complicity in its commission or attempted commission.

Id.

As is evidenced by these broad definitions, solicitation entails a wide variety of activity. Thus, the inclusion of this term significantly expands PCA's list of predicate acts.

69. The *Wolfe* court does not mention how the defendant's acts may have formed a pattern or what constituted the enterprise which was affected by the defendant's alleged pattern of corrupt activity.

70. *See* A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation, A.B.A. CRIM. JUST. ASS'N REP., at 3 (1985) [hereinafter A.B.A Report]. Moreover, several legislators and commentators have suggested replacing the term "racketeering activity" with the less prejudicial and more accurate term "illicit activity." *See* Goldsmith, *supra* note 16, at 859-60.

71. A.B.A. Report, *supra* note 70, at 3; *see also* Tarlow, *supra* note 3, at 416-17. The prejudicial effects of labelling a defendant as a racketeer are especially troubling in cases where the defendant is acquitted on the RICO count and convicted on one of the predicate offenses. Tarlow, *supra* note 3, at 416-17. One court has held that, under these circumstances, the prejudicial effects of labelling a defendant a racketeer require a reversal of a conviction of the predicate offense on appeal. *See* United States v. Guiliano, 644 F.2d 85 (2d Cir. 1981). In *Guiliano*, the court stated that:

> [o]ne of the hazards of a RICO count is that when the government is unable to sustain a conviction under this statute, it will have to face the claim that the prejudicial effect of tarring a defendant with the label of 'racketeer' tainted the conviction on an otherwise valid count.

term "racketeer" in a statute which will rarely be applied to individuals who fit the common meaning of the word "racketeer."[72] Finally, PCA's use of the broad term "corrupt activity"[73] is sensible because PCA includes a broader variety of activities which constitute predicate acts than the federal RICO statute.[74]

b. Definition of "Pattern"

One of the most perplexing issues in RICO prosecutions is determining whether the defendant has engaged in a "pattern of racketeering activity." Title 18 U.S.C. section 1961(5) gives a relatively brief description of the phrase[75] and as a result federal courts have struggled to define what constitutes a pattern for the purposes of RICO.[76] The definition of pattern of corrupt activity in Ohio Revised Code section 2923.31(E) is more elaborate than that of its federal counterpart. Both Ohio's PCA and RICO's definition of a pattern require that at least two predicate acts occur; one of these acts must occur after the effective date of the respective statute.[77] RICO requires that the acts have occurred within ten years of each other, whereas PCA requires that the acts have occurred within six years of each other.[78] Additionally, PCA requires that at least one of the predicate acts constitute a felony under the laws of Ohio.[79]

Id. at 89; *see also* United States v. Sam Goody Inc., 518 F. Supp. 1223, 1224-25 (E.D.N.Y. 1981), *mandamus denied*, 675 F.2d 17 (2d Cir. 1982) (defendants entitled to new trial because of prejudicial effects of RICO allegations).

72. *See supra* note 51 (definition of racketeer).

73. OHIO REV. CODE. ANN. § 2923.31.

74. *Id.* PCA's inclusion of a wider variety of predicate acts than RICO is evidenced by the fact that all of the acts listed in PCA are in addition to all that is defined as racketeering activity in RICO. *See supra* notes 49-50.

75. Section 1961(5) states that a " 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1988).

76. *See infra* notes 89-99 and accompanying text.

77. *See* 18 U.S.C. § 1961(5) (1988); OHIO REV. CODE ANN. § 2923.31(E). Although two acts of racketeering are necessary to constitute a pattern under RICO, they are not necessarily sufficient. JED S. RAKOFF & HOWARD W. GOLDSTEIN, RICO CIVIL AND CRIMINAL LAW AND STRATEGY § 104[2][a] (1991).

78. *See* 18 U.S.C. § 1961(5) (1988); OHIO REV. CODE ANN. § 2923.31(E). There are two exceptions to the six year limitation period in section 2923.31. The first is when one of the predicate acts is murder. OHIO REV. CODE ANN. § 2923.31(E). This exception has no counterpart in RICO. Second, like RICO, any term of imprisonment is excluded from the limitations period. *Id.*

79. *Id.* § 2923.31(E). This section implies that a prosecutor attempting to convict a person of engaging in a pattern of corrupt activity may charge the defendant with one predicate act which constitutes a misdemeanor as long as at least one of the predicate acts does, or would (if it is an offense created by the laws of either the federal government or another state) constitute a felony under the laws of Ohio.

PCA further provides that no prior conviction of the predicate acts is necessary.[80] However, PCA does require that these acts be "related to the affairs of the same enterprise, . . . not isolated, and . . . not so closely related to each other and connected in time and place that they constitute a single event."[81] These requirements are codifications of the United States Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*,[82] decided shortly before the passage of PCA. The *Sedima* Court interpreted RICO's use of the terms "indictable," "punishable" and "chargeable" in 18 U.S.C. section 1961 as meaning that a person can be convicted of a RICO violation without having been indicted, charged, or convicted of the predicate offenses.[83] Drawing from RICO's legislative history, the *Sedima* majority noted that two isolated acts do not constitute a pattern[84] and that a pattern required "continuity plus relationship."[85] It appears that the wording in Ohio Revised Code section 2923.31(E) of PCA is an attempt to clarify the meaning of the word "pattern" by incorporating the Supreme Court's interpretation of what constitutes a pattern under RICO.

Notwithstanding Ohio's attempt to clarify the pattern element of PCA through codification of the *Sedima* holding, a considerable

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PCA is also limited by the fact that many of the offenses listed in PCA — for example, the theft, fraud, prostitution, and obscenity offenses — may not serve as predicate offenses unless the amount of money involved exceeds five-hundred dollars. *Id.* § 2923.31(I)(2)(b). In Ohio, determining whether a crime is a felony or a misdemeanor often hinges on the amount of money involved in the particular offense. *Id.* Thus, the predicate offenses in PCA will often constitute felonies by virtue of the fact that the amount involved exceeds five-hundred dollars. *See, e.g., id.* § 2913.21 (misuse of credit cards is a misdemeanor when the amount involved is less than three-hundred dollars but a felony when the amount exceeds three-hundred dollars).

The area in which Ohio prosecutors are most likely to charge predicate offenses which constitute misdemeanors is where one of the predicate offenses involves attempt, conspiracy, or solicitation. For example, the state could allege a pattern of corrupt activity arising out of the predicate acts of misuse of credit cards in excess of three-hundred dollars and conspiracy to violate that section. The substantive offense in the above case constitutes a felony of the fourth degree. *Id.* The conspiracy charge would constitute a misdemeanor, however, since conspiracy is generally an offense of the next lesser degree. *See id.* § 2923.01(J)(6).

80. *Id.* § 2923.31(E).

81. *Id.*

82. 473 U.S. 479 (1985).

83. *Id.* at 488.

84. *Id.* at 496 n.14.

85. *Id. Sedima's* definition of a pattern was elevated from dicta to a holding in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Although PCA has apparently codified the holding of *Sedima*, it did codify the dictum requiring 'continuity plus relationship.' Consequently, Ohio courts have the discretion to read this element into PCA if they so choose. *See infra* note 101.

amount of confusion remains.[86] In *H.J. Inc. v. Northwestern Bell Telephone Co.*,[87] Justice Scalia went so far as to state that RICO's pattern element is so broad that it may be susceptible to a constitutional challenge under the vagueness doctrine.[88] *H.J.* represents the Supreme Court's latest attempt to define RICO's pattern element. After *Sedima*, the circuit courts struggled to define the continuity aspect of a RICO pattern.[89] These definitions ranged from a restrictive test requiring that the defendant engage in multiple criminal schemes,[90] to a broad test requiring only two bare acts of racketeering activity.[91] In *H.J.*, the Supreme Court rejected both of these bright line definitions as overly rigid and formalistic.[92] In their place, the Court adopted a flexible definition of the RICO pattern requirement, stating that the continuity aspect of a RICO pattern "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition."[93] In spite of, and perhaps even due to *H.J.'s* definition of the

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86. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989). In a concurring opinion in *H.J.*, Justice Scalia stated that since *Sedima*, the cases construing RICO's pattern element "produced the widest and most persistent [c]ircuit split on an issue of federal law in recent memory." *Id.* at 251 (Scalia, J., concurring).

87. 492 U.S. 229 (1989).

88. *Id.* at 255-56. For an in-depth look at both RICO's pattern element and the vagueness doctrine, see David W. Gartenstein and Joseph W. Warganz, Comment, *RICO'S "Pattern" Requirement: Void For Vagueness?*, 90 COLUM. L. REV. 489 (1990).

> There are two main structural aspects of the vagueness doctrine. To withstand a vagueness challenge, a statute must provide adequate notice to the individual of what activities are statutorily proscribed. Additionally, statutory language that is lacking in specificity is subject to vagueness challenge if it creates the potential for arbitrary and discriminatory law enforcement.

Id. at 512-13. Although RICO's pattern element is extraordinarily broad, judicial interpretation of the element is sufficiently predictable to overcome a vagueness challenge. *Id.* at 521. Furthermore, the requirement that a pattern have "continuity plus relationship" is a sufficient standard to avoid arbitrary enforcement. *Id.* at 524; *see also* Fort Wayne Books v. Indiana, 489 U.S. 46 (1989) (use of obscenity as predicate act in Indiana's RICO statute not unconstitutionally vague and not violative of the first amendment).

89. *H.J.*, 492 U.S. at 251.

90. *See, e.g.*, Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986). In *Superior Oil*, the defendants attempted to convert gasoline from the plaintiff oil company through several acts of mail and wire fraud. *Id.* The court held that these acts were insufficient to prove a pattern of racketeering activity because defendants had engaged in only one fraudulent scheme. *Id.* The rationale underlying the court's decision was that a single criminal episode was insufficient to show a threat of continuing criminal activity. *Id.*

91. *See, e.g.*, Beauford v. Helmsley, 865 F.2d 1386, 1390-91 (2d Cir. 1989). The court in *Beauford* rejected its prior view that two bare acts could constitute a RICO pattern. *Id.* Nonetheless, the court held that two related acts within the same criminal scheme could constitute a RICO pattern. *Id.*

92. *H.J.*, 492 U.S. at 240-41.

93. *Id.* at 241. Writing for a majority of the Court, Justice Brennan defined the requisite continuity of a RICO violation as an element distinct from the pattern requirement:

RICO pattern element, a precise definition of pattern continues to elude the circuit courts.[94]

Much of the confusion centers on whether two events or acts within one criminal scheme constitute a RICO pattern.[95] This situation is most likely to arise when the government uses the mail and wire fraud statutes as predicate acts.[96] For example, a person might use the postal service several times in one criminal scheme to defraud. Under 18 U.S.C. section 1341, each use of the postal service constitutes a separate and distinct violation of the mail fraud statute.[97] The federal government can use each violation of the mail fraud statute as a predicate offense and obtain a RICO conviction even though the defendant has only engaged in one criminal scheme. [98] Nonetheless, courts must still grapple with whether the criminal scheme is sufficiently continuous to constitute a RICO pattern. Consequently, the Supreme Court's elimination of the multiple scheme requirement in *H.J.* has done little to eliminate the confusion involved in defining a RICO Pattern.[99]

Although the Ohio Revised Code does not contain mail and wire fraud offenses, Ohio prosecutors can use these offenses as predicate acts under PCA by virtue of the fact that PCA incorporates acts defined as

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> [a] party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated.

Id. at 242.

94. *See infra* notes 95-98. For an in-depth analysis of the RICO pattern requirement, see Michael Goldsmith, *RICO and "Pattern:" The Search For "Continuity Plus Relationship,"* 73 CORNELL L. REV. 971 (1988); Ethan M. Posner, *Clarifying A "Pattern" of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement,* 86 MICH. L. REV. 1745 (1988); Stephan W. Milo, Comment, *The RICO Pattern After Sedima — A Case for Multifactored Analysis*, 19 SETON HALL L. REV. 73 (1989).

95. *See* RAKOFF & GOLDSTEIN, *supra* note 77, § 1.04[2].

96. *See* 18 U.S.C. §§ 1341, 1343 (1988).

97. *Id.* § 1341.

98. *See* H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 242 (1989).

99. *See* Beauford v. Helmsley, 865 F.2d 1386, 1391 (2d Cir. 1989).

> [A] RICO pattern may be established without proof of multiple schemes, multiple episodes or multiple transactions; and that acts . . . are not widely separated in time or space may nonetheless properly be viewed as separate acts of racketeering activity for purposes of establishing a RICO pattern. . . . We impose no multiple episode requirement, and we conclude that for determination of whether there is a RICO pattern, each individual racketeering act should be separately counted.

Id. But see United States Textile, Inc. v. Anheuser-Busch Companies, 911 F.2d 1261, 1268 (7th Cir. 1990). "Mail fraud and wire fraud are perhaps unique among the various sorts of 'racketeering activity' possible under RICO in that the existence of a multiplicity of predicate acts . . . may be no indication of the requisite continuity of the underlying fraudulent activity." *Id.* (quoting Lipin Enters. v. Lee, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring)).

racketeering activity in the federal RICO statute.[100] If Ohio prosecutors begin charging these offenses as PCA predicate acts, Ohio courts must determine whether a single criminal scheme may constitute a pattern of corrupt activity under PCA. Furthermore, in light of the confusion which followed the Supreme Court's decision in *Sedima,* Ohio's codifying *Sedima's* definition of pattern is unlikely to illuminate this element of PCA. Ohio courts have the option of choosing from at least three definitions of a what constitutes a "pattern" of corrupt activity. These definitions include the restrictive "multiple schemes" requirement, the expansive "two bare acts" approach, or the flexible "closed- and open-ended" definition. Thus, PCA's definition of pattern, although facially clearer than RICO's, is still open to a variety of interpretations.[101]

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100. OHIO REV. CODE ANN. § 2923.31.

101. Ohio's situation is further complicated by the fact that Ohio courts may not be strictly bound by federal case law. For example, it is unclear whether a pattern under PCA requires "continuity plus relationship." At least one state with a statute similar to PCA has rejected this definition of a pattern. *See* Computer Concepts, Inc. v. Brandt, 801 P.2d 800 (Or. 1990). In *Brandt*, the Oregon Supreme Court held that the statutory provision mandating that the predicate acts in Oregon's RICO (ORICO) statute may not be isolated does not require any showing of continuity. *Id.* The court held that the United States Supreme Court's decision in *H.J., Inc. v. Northwestern Bell Telephone Co.* was not persuasive because of the differences between ORICO and the federal RICO statute and because *H.J.* post-dated the enactment of ORICO. *Id. See generally supra* note 45.

At least one Ohio decision has indicated that the pattern requirement of PCA does not require an element of continuity. *See* State v. McDade, No. 90 CA 46, 1991 Ohio App. LEXIS 5546 (2nd App. Dist. Nov. 20, 1991). In *McDade,* the defendant, Michael McDade, was convicted of participating in the affairs of an enterprise through a pattern of corrupt activity under Ohio Revised Code section 2923.32(A)(1). *Id.* at *1. The enterprise consisted of two men, Steven Daniels and Michael Downing, associated for the purpose of bringing cocaine from Florida to Miami County, Ohio. *Id.* at *7. On two occasions, McDade travelled to Florida with Daniels and Downing to "facilitate" or make drug buys. *Id.* at *8.

McDade challenged his conviction on the ground that "the state failed to establish 'the essential element of continuity.' " *Id.* The court held that this argument was waived because of McDade's failure to raise the issue at the trial level. *Id.* Nonetheless, the court went on to state "that continuity has not been made an element of R.C. 2923.32(A)(1) by the legislature. Nor, to our knowledge, has the element of continuity been read into R.C. 2923.32(A)(1) by the Supreme Court of Ohio." *Id.* Moreover, the court indicated that even if PCA required an element of continuity, such element was met because the Downing-Daniels enterprise continued to operate after McDade's initial involvement. *Id.* at *9. This analysis is misguided, however, since it is the pattern rather than the enterprise element of RICO which requires continuity. *See supra* notes 85-89 and accompanying text. The *McDade* decision thus indicates the reluctance of at least one Ohio court to read the continuity element espoused by the Supreme Court's *H.J.* and *Sedima* decisions into Ohio's RICO statute.

Other states have dealt differently with RICO's controversial pattern requirement. For example, three states have eliminated the pattern requirement altogether. *See* ARIZ. REV. STAT. ANN. §§ 13-2301 to -2316 (1989); HAW. REV. STAT. §§ 842-1 to -12 (1986); R.I. GEN. LAWS §§ 7-15-1 to -11 (1985). Also, the Washington RICO statute requires that a private plaintiff prove at least three predicate offenses in order to constitute a pattern. *See* WASH REV. CODE ANN. §§

c. Definition of Enterprise

RICO defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[102] Ohio Revised Code section 2923.31(C)'s definition of enterprise parallels RICO except for its statement that an " '[e]nterprise' includes illicit as well as licit enterprises."[103] This statement is a codification of the Supreme Court's decision in *United States v. Turkette*.[104] There, the Court rejected the First Circuit's ruling that the term enterprise pertained only to legitimate enterprises.[105] The *Turkette* Court held that RICO's mandate required them to construe the provisions of the statute liberally, [106] and that the legislative history of the statute and the preventive aspect of RICO required that the term enterprise include organizations associated in fact for wholly criminal purposes as well as legal entities.[107]

Although *Turkette* makes it clear that RICO applies to both legal and illegal enterprises, the circuits remain split as to whether the "pattern of racketeering activity" can also constitute the affected "enterprise."[108] The Eighth, Fourth and Third Circuits all require that the enterprise be a distinct entity, separate from the pattern of racketeering activity.[109] Other circuits, notably the Sixth, have rejected this reasoning, holding that it is not necessary to prove an enterprise distinct

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9A.82010-901 (West 1988). In New York, a person can not be held guilty of "enterprise corruption" unless he/she has engaged in a pattern of at least three acts of criminal activity. *See* N.Y PENAL LAW § 460.20. (McKinney 1989).

102. 18 U.S.C. § 1961(4) (1988).

103. OHIO REV. CODE ANN. § 2923.31(C).

104. 452 U.S. 576 (1981).

105. *Id.* at 593.

106. Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

107. *Turkette*, 452 U.S. at 593. *Turkette* explicitly rejected the notion that "the pattern of racketeering activity" would serve to constitute the enterprise and thus eliminate an element of a RICO conviction. *Id.* at 583. Although the *Turkette* Court stated that the government must prove, as separate elements, both the existence of an "enterprise" and a "pattern of racketeering activity," it did admit that the proof of these elements might "coalesce" in particular cases. *Id.* Thus, the Court indicated that although proof of one element did not *necessarily* establish proof of the other, there could be cases in which both elements were essentially the same.

108. *See* David Vitter, Comment, *The RICO Enterprise as Distinct From The Pattern of Racketeering Activity: Clarifying the Minority View*, 62 TUL. L. REV. 1419, 1427 (1988).

109. *See* United States v. Tillet, 763 F.2d 628, 630 (4th Cir. 1985) (evidence that organization which existed for purpose of smuggling marijuana existed during intervals between actual importation of the drug sufficient to show enterprise distinct from pattern of racketeering activity); United States v. Riccobene, 709 F.2d 214, 222 (3d Cir. 1983) (evidence sufficient to show enterprise distinct from pattern of racketeering activity because criminal organization had hierarchy in which each of its members occupied specific roles); United States v. Bledsoe, 674 F.2d 647, 665, 666-67 (8th Cir. 1982) (mere fact that defendants were engaged in conspiracy not sufficient to find enterprise distinct from pattern of racketeering activity); United States v. Griffin, 660 F.2d

from the pattern of racketeering activity.[110] Circuits following this approach imply that an enterprise can be an organization formed for the common purpose of carrying out the predicate acts.[111] By merging the enterprise and pattern elements of RICO, courts following the test of the Sixth Circuit have essentially turned RICO into a broad criminal conspiracy statute.[112]

Ohio has not formulated its own test for what constitutes an enterprise. It does appear, however, that any such test will be broad. For example, in *State v. Hill*,[113] the defendant was convicted of engaging in a pattern of corrupt activity for selling "crack" cocaine from his bar on separate occasions.[114] In order to prove that the defendant had engaged in a pattern of corrupt activity, the state offered evidence that coca leaves are grown only in South America, where they are processed into a powdered form and that the powdered cocaine is then exported to the United States where it is made into crack.[115] The *Hill* court held that, from this evidence, the jury could reasonably infer that the defendant was part of a network or conspiracy to distribute cocaine in the United States.[116] The court went on to state that "[t]he network or enterprise need not be explicit as long as its existence can plausibly be inferred from the interdependence of activities and persons involved."[117]

996, 1000 (4th Cir. 1981) (association in fact enterprise formed with common objective of bribery sufficiently distinct from pattern of racketeering activity).

See also New York's version of RICO which defines a criminal enterprise as "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents." N.Y. PENAL LAW § 460.10 (McKinney 1989).

110. *See* United States v. Qaoud, 777 F.2d 1105, 1115 (6th Cir. 1985) (permissible to use same evidence to prove both pattern and enterprise elements of RICO); United States v. Errico, 635 F.2d 152, 156 (2d Cir. 1980) (group of jockeys and bettors joined for illegal purpose of fixing horse races constitutes RICO enterprise).

111. *See, e.g.*, United States v. Bagaric, 706 F.2d 42, 55 (2d Cir. 1982). RICO is applicable "to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering activities." *Id.*

112. *See* cases cited *supra* note 99. By allowing RICO convictions in cases in which a person merely engages in a pattern of racketeering activity, courts render RICO's creation of the offense of engaging in a pattern of racketeering activity *through an enterprise* little more than a redundancy. *See* 18 U.S.C. § 1962(c) (1988). Furthermore, such a construction creates an offense which renders recidivist criminals guilty by virtue of the fact that they are associated with other criminals. The merging of RICO's pattern and enterprise elements thus creates an offense which is closely analogous to a conspiracy. *See also* RAKOFF & GOLDSTEIN, *supra* note 77, § 1.04 [2]; Vitter, *supra* note 108, at 1444 (describing RICO illegitimate enterprise as type of "superconspiracy").

113. No. CA-8094, 1990 Ohio App. LEXIS 5890 (5th App. Dist. Dec. 31, 1990).

114. *Id.* at *4-5.

115. *Id.* at *9-10.

116. *Id.* at *10.

117. *Id.* at *11. The court cited two First Circuit decisions in support of this proposition, *United States v. Ruiz*, 905 F.2d 499 (1st Cir. 1990) and *United States v. Flaherty*, 668 F.2d 566 (1st Cir. 1981).

The Ohio legislature or the Ohio courts must ultimately clarify the definition of "association in fact" enterprises. In the absence of clarification, it is plausible that a person could be convicted of engaging in a pattern of corrupt activity for merely engaging in two or more of the predicate acts.[118] This is possible because an illegal enterprise could be inferred by the very existence of the pattern of corrupt activity, thus effectively eliminating the "enterprise" element of PCA.[119] The effective elimination of the enterprise element of PCA will therefore allow convictions under PCA where the defendant has committed any two predicate acts which constitute a pattern. Such an interpretation of PCA merely creates extremely harsh penalties for the underlying predicate offenses, without even requiring convictions of the predicate acts themselves.[120]

Ohio can rectify this situation by devising a three prong test for the definition of an enterprise similar to the test used by the Eighth[121] and Third Circuits.[122] Such a test might provide that an association in fact enterprise consists of: (1) an ongoing organization with a commonality of purpose or a guiding mechanism to direct the organization; (2) a continuing unit with an ascertainable structure; or (3) an organizational structure distinct from the pattern of predicate acts.[123]

Id. at *9. It is important to note that the jury had also found that the defendant used his bar as the location from which he conducted his criminal activities. *Id.* The decision and wording in *Hill* does, however, indicate that the mere activity of selling crack cocaine constitutes an enterprise for the purpose of Ohio Revised Code section 2923.32. *Id.* at *8. Thus, the decision in *Hill* indicates that a mere conspiracy may constitute an enterprise for the purposes of PCA.

118. Ohio case law indicates that one person may constitute an enterprise. *See* State v. Shumate, C.A. Nos. 91CA005067, 91CA005068, 1991 Ohio App. LEXIS 4711 (9th App. Dist. Oct. 2, 1991). If this is the case, it is difficult to conceptualize a one-man criminal enterprise which has an identifiable structure distinct from the pattern of criminal activity. Ohio courts are not strictly bound by federal case law. *See supra* note 101. It is therefore difficult to ascertain how Ohio courts will define PCA's enterprise element. However, PCA's overall tendency to define criminal offenses more broadly than RICO seems to indicate an expansive definition of RICO. *Id.*

119. Some courts assert that the pattern and enterprise elements of RICO are distinct even though it is possible to prove their existence through the same evidence. *See, e.g.*, United States v. Williams, 809 F.2d 1072, 1093-94 (5th Cir. 1987). In *Williams*, the court held that a court need not instruct the jury that a RICO enterprise must have an ascertainable structure distinct from the pattern of racketeering activity. *Id.* The *Williams* court also stated that the pattern element is separate from the enterprise element of RICO. *Id.* If proof of the pattern constitutes proof of the enterprise and the enterprise need not be distinct from the pattern, however, the same actions can constitute both the pattern and the enterprise. Thus, the *Williams* court's assertion that these elements are separate appears to be little more than double-talk.

120. OHIO REV. CODE ANN. § 2923.31(E) (prior conviction of predicate acts not a prerequisite for conviction under PCA).

121. *See* United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982).

122. *See* United States v. Riccobene, 709 F.2d 214, 221-22 (3d Cir. 1983).

123. This is essentially a synthesis of the tests devised by the Eighth and Third Circuits. *See Riccobene*, 709 F.2d at 221-22; *Bledsoe*, 674 F.2d at 665. In *Riccobene*, the court noted the

2. The Substantive Elements of RICO and PCA

a. Ohio Revised Code Section 2923.32(A) and 2923.32(B)(1) versus 18 United States Code Section 1962

Sections 2923.32(A)(1), 2923.32(A)(2), and 2923.32(A)(3) of the Ohio Revised Code roughly parallel their federal RICO counterparts.[124] Section 2923.32(A)(1) creates the offense of operating an enterprise through a pattern of corrupt activity.[125] This section is substantially the same as 18 U.S.C. section 1962(c), the most frequently used provision of RICO.[126] In order to violate section 2923.32(A)(1), a person must be "employed by, or associated with" the enterprise.[127] Under RICO, it is not necessary for the enterprise to benefit from the pattern of racketeering activity.[128]

The difficulty in interpreting Ohio Revised Code section 2923.32(A)(1) will most likely arise in determining the extent to which the predicate acts must be related to the affairs of the enterprise. In order to violate section 2923.32(A)(1), a person must "conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt."[129]

Supreme Court's wording in *Turkette*, which stated that the elements proving the pattern and the enterprise may tend to coalesce. *Riccobene*, 709 F.2d at 221; *see also supra* note 107. The court in *Riccobene* went on to state, however, that "it is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that [the enterprise] has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." *Riccobene*, 709 F.2d at 223-24.

The confusion surrounding RICO's pattern and enterprise elements is not confined to the federal RICO statute. State courts also differ as to whether the pattern of predicate acts can also constitute the enterprise under their respective versions of RICO. *See* Boyd v. Florida, 578 So. 2d 718, 721 (Fla. Dist. Ct. App. 1991) (Florida's RICO requires proof of enterprise with identifiable structure separate and distinct from pattern of criminal activity); People v. Moscatiello, 566 N.Y.S.2d 823, 825 (N.Y. Sup. Ct. 1990) (group of union officials associated for purpose of taking and receiving bribes does not constitute enterprise under New York's RICO statute where no evidence exists of an identifiable structure distinct from pattern of criminal activity); State v. Cheek, 786 P.2d 1305, 1307 (Or. Ct. App. 1990) (to prove enterprise state must produce sufficient evidence of ongoing organization distinct from commission of predicate criminal acts). *But see* Martin v. State, 376 S.E.2d 888, 893 (Ga. App. 1986) (under Georgia's RICO statute, enterprise may consist of group of criminals engaged in racketeering activity and state need not prove enterprise has ascertainable structure).

124. 18 U.S.C. § 1962(a)-(c) (1988). Ohio Revised Code section 2923.32 omits the requirement that the enterprise affect interstate commerce. OHIO REV. CODE ANN. § 2923.32.

125. OHIO REV. CODE ANN. § 2923.32(A)(1).

126. *See* RAKOFF & GOLDSTEIN, *supra* note 77, § 1.06[4].

127. OHIO REV. CODE ANN. § 2923.32(A)(1).

128. *See, e.g.*, United States v. Hartley, 678 F.2d 961, 991 (11th Cir. 1982) (proper question under RICO is whether affairs of enterprise were conducted through pattern of racketeering activity, not whether enterprise benefitted or profited from such activity).

129. OHIO REV. CODE ANN. § 2923.32(A)(1).

Although the circuit courts have not agreed on a precise test for defining what constitutes "through a pattern of racketeering," most require some sort of nexus between the pattern of racketeering activity and the enterprise.[130]

Ohio appears to have taken an expansive view of what constitutes "conducting or participating in . . . the affairs of an enterprise through a pattern of corrupt activity."[131] In *State v. Hill*,[132] the defendant was convicted under Ohio Revised Code section 2923.32(A)(1) for trafficking cocaine from his bar on two separate occasions.[133] The court in *Hill* held that the defendant's use of his business as the location from which he committed the corrupt activities was sufficient evidence to establish that he had participated in the affairs of an enterprise through a pattern of corrupt activity.[134] Thus, at least one Ohio court requires only a minimal relationship between the enterprise and the pattern of corrupt activity.[135]

Ohio Revised Code section 2923.32(A)(2) prohibits a person from acquiring or maintaining any interest in, or control of, an enterprise through a pattern of corrupt activity.[136] This section is the same as its federal counterpart.[137] Title 18 U.S.C. section 1962(b) requires that the purpose of the racketeering activity be to acquire control of an enterprise.[138] Thus, 18 U.S.C. section 1962(b) and Ohio Revised Code section 2923.31(A)(2) focus on those persons who utilize a pattern of racketeering or corrupt activity to acquire control of a particular enterprise. Examples of acquiring an interest in an enterprise through a pattern of racketeering activity include acquiring an interest in a hotel

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130. *See, e.g.*, United States v. Cauble, 706 F.2d 1322, 1341 n.62 (5th Cir. 1983) (defendant does not conduct affairs of enterprise through pattern of racketeering by mere fact that defendant works for legitimate enterprise and commits racketeering activity while on premises); United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980) (sufficient nexus between enterprise and pattern of corrupt activity exists when one is able to commit predicate offenses *solely because of* his involvement with enterprise or when predicate offenses are related to activities of enterprise).

131. OHIO REV. CODE ANN. § 2923.32(A)(1).

132. No. CA-8094, 1990 Ohio App. LEXIS 5890 (5th App. Dist. Dec. 31, 1990).

133. *Id.* at *7-8.

134. *Id. Contra* United States v. Nerone, 563 F.2d 836, 851 (7th Cir. 1977) (RICO conviction denied where government failed to show sufficient nexus between legitimate corporation and gambling activity occurring on corporation's premises); *see also supra* note 120.

135. Under Arizona's RICO statute it is not necessary to show any relationship between the racketeering activity and the enterprise. *See* O'Brien v. Dean Witter Reynolds, Inc., [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91, 509 (D.C. Ariz. 1984) (brokerage firm may be held liable under Arizona RICO statute for recklessly failing to supervise management of a portfolio). The *O'Brien* court disregarded federal case law requiring that brokers will not be held liable unless they knowingly or intentionally failed to supervise. *Id.*

136. OHIO REV. CODE ANN. § 2923.32(A)(2).

137. *See* 18 U.S.C. § 1962(b) (1988).

138. *See* RAKOFF & GOLDSTEIN, *supra* note 77, § 1.06[2].

through a scheme to defraud the majority stockholder[139] or taking an assignment of a bakery's lease as security for an unlawful loan.[140]

Relatively few cases are decided under 18 U.S.C. section 1962(b).[141] Perhaps this is because it is easier to convict a person of participating in the affairs of an enterprise through a pattern of racketeering activity.[142] To date, no Ohio appellate decisions mention Ohio Revised Code section 2923.32(A)(2); thus, it is difficult to ascertain the extent to which Ohio has used this section.

Like Ohio Revised Code sections 2923.31(A)(1) and (A)(2), section 2923.31(a)(3) of the PCA closely resembles its federal counterpart.[143] Title 18 U.S.C. section 1962(a) of RICO and Ohio Revised Code section 2923.32(A)(3) of PCA both prohibit the investment of the proceeds from engaging in racketeering or corrupt activity into an enterprise.[144] These sections are aimed at the infiltration of organized crime into legitimate businesses through the use of illegally obtained funds.[145] Congress was primarily concerned with this problem when it passed RICO in 1970.[146] Prosecutors rarely relied on 18 U.S.C. section 1962(a) before 1985.[147] Recent complications regarding the interpretation of 18 U.S.C. section 1962(c), however, have prompted an increase in the use of both 18 U.S.C. sections 1962(a) and (b).[148]

Ohio's decision to list the offense of participating in the affairs of an enterprise through a pattern of corrupt activity before the other substantive offenses in Ohio Revised Code section 2923.32 is yet another indication that the primary target of section 2923.32 is not the infiltration of organized crime into legitimate businesses. It is likely that Ohio's corrupt activities statute will be used primarily against ordinary criminals who happen to be connected with some sort of enterprise, regardless of whether that enterprise is legal or even distinct from the pattern of corrupt activity itself. Although these types of criminals are often targeted under RICO, many of these applications were probably never anticipated by the Congress which passed RICO.[149] In contrast

139. *See, e.g.*, United States v. Parness, 503 F.2d 430 (2d. Cir. 1974).
140. *See, e.g.*, United States v. Jacobsen, 691 F.2d 110 (2d Cir. 1982).
141. *See* RAKOFF & GOLDSTEIN, *supra* note 77, § 1.06[2].
142. *Id.*
143. *See* 18 U.S.C. § 1962(a) (1988).
144. 18 U.S.C. 1962(a) (1988); OHIO REV. CODE ANN. § 2923.32(A)(3).
145. *See* Lynch I & II, *supra* note 2, at 726-27.
146. *Id.* at 664-80.
147. *See* RAKOFF & GOLDSTEIN, *supra* note 77, § 1.06[1].
148. *Id.*
149. *See supra* notes 55-57 and accompanying text.

to the legislators who passed RICO, the Ohio General Assembly apparently recognized and welcomed the variety of applications made possible by 18 U.S.C. section 1962(c).

b. Conspiracy to Violate RICO Versus Conspiracy to Engage in a Pattern of Corrupt Activity

Ohio Revised Code section 2923.32(B)(1) provides that a "person may be convicted of violating the provision of this section as well as of conspiracy[150] to violate one or more of those provisions under section 2923.01 of the Revised Code."[151] Section 2923.01(A) creates the separate offense of conspiring to engage in a pattern of corrupt activities. Section 2923.31(L) states that a person who is found guilty of conspiring to engage in a pattern of corrupt activities is subject to the penalties under both section 2923.01 and section 2923.32.[152] The effect of these two sections is essentially to create two separate crimes and sets of penalties for one act.[153]

PCA conspiracies are further complicated by the fact that it is a predicate offense to conspire to commit any of the enumerated offenses defined as corrupt activity in Ohio Revised Code section 2923.31(I).[154]

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150. In Ohio, conspiracy is defined as planning or aiding another person(s) in planning to commit an offense as well as agreeing with another person(s) to engage "in conduct that facilitates the commission of any such offense." OHIO REV. CODE ANN. § 2923.01(A). In order to convict a person of conspiracy, it is also necessary to prove that one of the conspirators committed a substantial overt act in furtherance of the conspiracy. *Id.* § 2923.01(B).

151. *Id.* § 2923.32(B)(1).

152. *Id.* § 2923.01(A)

153. Similar results, reached under RICO, have been held not to violate double jeopardy. *See, e.g.*, United States v. Williams, 809 F.2d 1072, 1096 (5th Cir. 1987) (upholding convictions of conspiracy to distribute cocaine, engaging in a continuing criminal enterprise, and conspiracy to violate RICO against double jeopardy challenge); United States v. Ryland, 806 F.2d 943 (9th Cir. 1986) (consecutive sentences for conspiracy to import and distribute controlled substances, harbor a fugitive, engage in a continuing criminal enterprise and violate RICO not violative of double jeopardy); United States v. Smith, 574 F.2d 308, 311 (5th Cir. 1978) (conspiracy under 21 U.S.C. § 846 and RICO conspiracy are separate offenses).

The classic test for determining whether conviction of two or more similar offenses violates the double jeopardy clause is "whether each provision [of the offenses in question] requires proof of a fact which the other does not." *See* Blockburger v. United States, 284 U.S. 299, 304 (1932). Conviction of a RICO conspiracy, under title 18, section 1962(d) of the United States Code, requires proof of an *agreement* to violate the substantive elements of RICO. *See Smith*, 574 F.2d at 311. No agreement is required in order to convict on the substantive RICO counts by virtue of section 1962(a)-(c) of title 18 of the United States Code. *Id.* Therefore, it is permissible, under the *Blockburger* rule, to convict a defendant of both the substantive RICO violation and conspiracy to violate RICO. *Id.*; *see also* George C. Thomas III, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 NW. U. L. REV. 1359, 1371-74 (1984).

154. OHIO REV. CODE ANN. § 2923.32(I). RICO, unlike PCA, does not contain a provision which makes conspiring to commit a predicate offense a separate predicate offense. Nonetheless, courts have held that conspiring to commit certain offenses listed in section 1961 of title 18 of the United States Code may be used as a predicate act under RICO. *See* United States v. Licavoli, 725

When this section is read in conjunction with section 2923.32(B), it is possible to convict a person of: conspiring to violate one or more of the predicate offenses; actually committing one or more of the predicate offenses; conspiring to engage in a pattern of corrupt activities under both sections 2923.32 and 2923.01; and actually engaging in a pattern of corrupt activities.[155] Under PCA, a person can be convicted of both conspiring to engage in a pattern of corrupt activities and actually engaging in a pattern of corrupt activity. This is an exception to the general rule that a conspiracy offense terminates upon commision of the substantive offense.[156]

Furthermore, a person convicted of conspiring to engage in a pattern of corrupt activity can be penalized under both section 2923.01 (Ohio's conspiracy statute) and section 2923.32(B)(2), (3), (4) and (5) of PCA.[157] Ohio's conspiracy statute provides that "in addition to the penalties otherwise imposed for conspiracy, a person who is found guilty of conspiring to engage in a pattern of corrupt activity is subject to [the penalties contained in PCA]."[158] This is an exception to the rule that a conspiracy is generally penalized as a lesser offense than the actual commission of the act.[159] In contrast, the compound penalties previously described make the penalty for conspiring to violate PCA more severe than the penalty for actually violating PCA.[160] Thus, Ohio

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F.2d 1040, 1044-45 (6th Cir. 1984). In *Licavoli*, the court held that the jury could convict the defendants under RICO using the predicate acts of murder and conspiracy to commit murder to form the requisite pattern of racketeering activity. *Id.* at 1045. The court reasoned that RICO's statement that "any act or threat involving" certain predicate offenses, includes conspiracies or attempts to commit such offenses. *Id.* The court also stated that, in the absence of the "any act or threat involving" language, conspiracies, or attempts can only serve as predicate acts where the statutes listed in RICO as predicate acts contain conspiracy or attempt provisions. *Id.* Under RICO, therefore, conspiracy or attempt cannot serve as a predicate act when the listed offense is not preceded by the broad "any act or threat involving" language and the statute creating the listed offense does not contain a specific conspiracy or attempt provision. In contrast, PCA specifically states that attempting or conspiring to commit the listed offense and soliciting or intimidating another to commit such an offense serves as a predicate act. *See* OHIO REV. CODE ANN. § 2923.32(I).

155. *See* OHIO REV. CODE ANN. § 2923.32(B)(1).

156. *See id.* § 2923.01(G). "When a person is convicted of committing . . . a specific offense . . . he shall not be convicted of conspiracy involving the same offense." *Id.*; *see also* State v. Marian, 405 N.E.2d 267, 270 (Ohio 1980). The conspiracy offense, due to its inchoate nature, merges into the substantive offenses which are the object of the conspiracy. *Marian*, 405 N.E.2d at 270.

157. OHIO REV. CODE ANN. § 2923.01(L).

158. *Id.*

159. *See id.* § 2923.01.

160. A person convicted of engaging in a pattern of corrupt activity is subject to the penalties contained in Ohio Revised Code section 2923.32(B). *Id.* § 2923.32(B). These include imprisonment up to twenty years, a fine no greater than $10,000, a fine not exceeding three times the amount gained or loss caused by the defendant's corrupt activity, and payment of court and law enforcement costs and criminal forfeiture. *Id.* In addition to these penalties, a person convicted of

courts can impose multiple sentences upon conviction of conspiring to engage in a pattern of corrupt activity without even charging the substantive offense.[161]

The conspiracy provisions of PCA give Ohio prosecutors a vast amount of latitude because they can charge defendants with one or all of these violations.[162] They also provide for extremely harsh penalties. For example, a person who owns a business might sell cocaine from that establishment. A week later, that same person might meet with a friend and conspire to continue to sell cocaine from that establishment. First, this person can be charged separately with selling cocaine and conspiring to sell cocaine under Ohio's criminal conspiracy statute.[163] He can also be charged with conspiring to engage in a pattern of corrupt activity and actually engaging in a pattern of corrupt activity.

The two predicate offenses are selling cocaine and conspiring to sell cocaine.[164] These offenses are not so closely related as to constitute one act since they occurred on separate occasions and involved different action; nor are they isolated since they are both related to the same general scheme— selling cocaine through the person's enterprise. Since

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conspiracy to violate PCA may be subject to the penalties contained in Ohio Revised Code section 2923.01. *Id.* §§ 2923.01(L), 2923.32(B)(1). Under section 2923.01, a person convicted of conspiracy would be subject to the penalties imposed for a second degree felony. *Id.* § 2923.01. Although such a result seems both illogical and unduly harsh, this is apparently what the Ohio General Assembly intended when it passed PCA. In its description of PCA's conspiracy provision, the Ohio Legislative Service Commission states that:

> [t]he act [PCA] prohibits a person from conspiring to engage in a pattern of corrupt activities. Violators are guilty of a second degree felony. The act also states that, in addition to the penalties otherwise imposed for conspiracy, a person who is found guilty of conspiring to engage in a pattern of corrupt activity is subject to the extraordinary penalties imposed upon persons who engage in a pattern of corrupt activity.

See Summary of Enactments, *supra* note 12, at 46-47. The Legislative Service Commission does not assert any reasoning behind punishing a PCA conspiracy more severely than a substantive violation of PCA.

161. It is interesting to note that Ohio facilitates the prosecution of PCA conspiracies by granting immunity to any witness to a PCA offense who refuses to testify on the basis of self-incrimination. *See* OHIO REV. CODE ANN. § 2945.44. *But see id.* § 2923.01. "No person shall be convicted of conspiracy upon the testimony of a person with whom he conspired, unsupported by other evidence." *Id.* Moreover, Ohio allows for the conviction of unilateral conspirators. *See* State v. Marion, 405 N.E.2d 267 (Ohio 1980). This means that a person can be convicted of conspiracy even where the co-conspirator has only feigned agreement. *See id.*

162. *See supra* notes 154-56 and accompanying text.

163. OHIO REV. CODE ANN. § 2923.01. It is permissible to convict the defendant on both the conspiracy and the substantive offense because the conspiracy in this case is a conspiracy to commit a different substantive offense. *Id.*

164. *Id.* § 2923.31.

the person sold the cocaine from his business establishment, he has engaged in the pattern of corrupt activity through an enterprise and violated Ohio Revised Code section 2923.32(A)(1).[165] Moreover, the person might constitute an illicit enterprise even if he did not own the establishment.[166] Since the conspiracy is a conspiracy to sell cocaine through his business, or through his illicit enterprise, he has also violated Ohio Revised Code section 2923.32(B)(1). This person can be convicted of and punished severely for all four of these offenses.[167]

Ohio courts have upheld the imposition of consecutive sentences for conspiracy to violate PCA and a substantive violation of PCA over claims that this violates both the constitutional proscription of double jeopardy and Ohio's proscription of imposing multiple convictions for allied offenses of similar import.[168] In *State v. Conley*,[169] a defendant who pled guilty to both engaging in, and conspiring to engage in a pattern of corrupt activity appealed the imposition of consecutive sentences on the grounds that the trial court did not hold a hearing to determine whether the offenses were allied and of similar import.[170] In upholding the impostion of multiple sentences, the court held that it was unnecessary for the trial court to consider whether the offenses were allied because Ohio Revised Code section 2923.01(G) expressly manifested the legislature's intent to authorize cumulative punishments.[171]

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165. *See* State v. Hill, No. CA-8094, 1991 Ohio App. LEXIS 5890 (5th App. Dist. Dec. 31, 1990).

166. *See supra* notes 102-23 and accompanying text.

167. *See, e.g.*, State v. Grebenstein, C.A. No. 13608, 1989 Ohio App. LEXIS 416 (9th App. Dist. Feb. 1, 1989). In *Grebenstein*, a defendant was charged with aggravated trafficking in cocaine under Ohio Revised Code section 2925.03(A), conspiracy to commit aggravated trafficking in cocaine under section 2905.03(A)(7), engaging in a pattern of corrupt activity under section 2923.32 and conspiracy to engage in a pattern of corrupt activity under either section 2923.01 or section 2923.32. *Id.* at *1. The state's case was based on the uncorroborated testimony of a co-conspirator to the alleged crimes. *Id.* at *2. On appeal, the court upheld the jury's convictions on all of the charges except the conspiracy to engage in a pattern of corrupt activity, which was dismissed at the trial level. *Id.* at *7. The defendant was sentenced to three to fifteen years for the conspiracy to traffick and trafficking cocaine offenses and five to twenty-five years on the pattern of corrupt activity offense. *Id.* at *2. In addition to the consecutive sentences of imprisonment, the defendant was fined $140,000 and ordered to forfeit 245 shares of a corporation described as George Joseph Enterprises. *Id.*

168. Ohio Revised Code section 2941.25 provides: "[w]here the same conduct by the defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." OHIO REV. CODE ANN. § 2941.25.

169. No. CA90-11-023, 1991 Ohio App. LEXIS 3343 (12th App. Dist. July 15, 1991).

170. *Id.* at *5.

171. *Id.* at *7; *see also* State v. Brown, Nos. 90CA004836, 90CA004838, 1991 Ohio App. LEXIS 2010 (9th App. Dist. May 1, 1991) (offenses of engaging in pattern of corrupt activity and trafficking in narcotics not allied offenses of similar import).

The *Conley* court went on to state that the conviction did not violate the double jeopardy clause because the conspiracy charge required proof of the additional element of agreement in which "the defendant must have 'objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commision of two or more of the predicate crimes.' "[172] It is difficult to imagine situations in which a person has engaged in a pattern of corrupt activity without previously agreeing to do so since a substantive RICO violation closely resembles a conspiracy.[173] Nevertheless, federal courts have consistently upheld convictions of both RICO and conspiracy to violate RICO.[174]

Another substantial difference between RICO conspiracies and PCA conspiracies is the necessity of alleging and proving an overt act in furtherance of the conspiracy. In order to convict a person of conspiracy, it is generally necessary to prove that the alleged conspirator agreed to commit the crime which is the subject of the conspiracy and that one of the conspirators committed an overt act in furtherance of the conspiracy.[175] In a RICO conspiracy, it is not necessary for the prosecution to allege or prove an overt act in furtherance of the conspiracy.[176]

In contrast to RICO, PCA conspiracies require the prosecution to allege and prove an overt act. The conspiracy offense under PCA is defined by a reference to Ohio's general conspiracy statute, section 2923.01 of the Ohio Revised Code.[177] Section 2923.01 provides that: "[n]o person shall be convicted of conspiracy unless a substantial overt

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172. *Conley*, 1991 Ohio App. LEXIS 3343, at *10 (quoting United States v. Martino, 648 F.2d 367, 382-83 (5th Cir. 1981)).

173. *See* Lynch III & IV, *supra* note 7, at 921. While it is possible to commit a RICO violation without conspiring to do so in the context of a legitimate enterprise, the overlap between the completed offense and the conspiracy is total in the illicit enterprise cases. *Id.* at 953. Professor Lynch explains that:

> the criminal enterprise whose affairs are conducted through a pattern of racketeering can only exist to the extent to which its members have agreed to form it. Each individual member, moreover, can only be guilty of conducting his affairs through a pattern of racketeering to the extent that he knows that his particular crimes are part of a larger criminal enterprise with which he has voluntarily associated himself - precisely the mental state required to join the RICO conspiracy.

Id.

174. *See supra* note 153.

175. TORCIA, *supra* note 68, § 728.

176. *See* United States v. Tripp, 782 F.2d 38, 41 (6th Cir. 1986) (federal case law holds that mere agreement to violate substantive provisions of RICO statute sufficient to convict defendants of conspiracy to violate RICO even without proof of overt act in furtherance of conspiracy); United States v. Boldin, 779 F.2d 618, 619 (11th Cir. 1986) (proof of RICO conspiracy requires agreement, enterprise, defendant's association with enterprise, defendant's participation in conducting affairs of enterprise, and pattern of racketeering activity).

177. OHIO REV. CODE ANN. § 2923.01(A)(1).

act in furtherance of the conspiracy is alleged and proved to have been done by him or a person with whom he conspired."[178] PCA conspiracies are therefore slightly more difficult to prove than RICO conspiracies because PCA requires the prosecution to prove the additional element of an overt act in furtherance of the conspiracy.

In addition to the elimination of the overt act requirement, there are two problems associated with federal RICO conspiracies which PCA does not address. First, in some jurisdictions, it is permissible to convict a person of a RICO conspiracy without proving that the person specifically agreed to commit the predicate acts. In *United States v. Neapolitan*,[179] the Seventh Circuit held that a person may be convicted of conspiracy to violate RICO as long as the agreement contemplates any member of the conspiracy engaging in the pattern of predicate racketeering activity.[180] Two other circuits have held that the defendant must have personally agreed to commit at least two of the predicate acts.[181] Second, under traditional conspiracy doctrine, the government may not join a group of defendants involved in separate, multiple conspiracies under circumstances in which the joint trial would prejudice the rights of any of the defendants.[182] In *United States v. Elliot*, the Fifth Circuit disregarded traditional notions of conspiracy law and held that joint trials of multiple conspiracies were permissible because all of the alleged conspirators were connected by the RICO enterprise.[183]

The statutes creating PCA's conspiracy provision do not contain any guidance regarding the problems raised by *Neapolitan* or *Elliot*.

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178. *Id.* § 2923.01(B).

179. 791 F.2d 489 (7th Cir. 1986).

180. *Id.* at 497-98; *see also* United States v. Kragness, 830 F.2d 842, 860 (8th Cir. 1987).

181. *See* United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir. 1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981).

182. *See* Kotteakos v. United States, 328 U.S. 750, 775 (1946).

183. 571 F.2d 880, 902 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). Although *Elliot* is still considered good law in the Fifth Circuit, it was substantially modified by a subsequent decision. *See* United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981). Under *Elliot*, multiple conspiracies may not be joined in a single trial merely because the various conspiracies involve the same enterprise. However, multiple conspiracies which could not be joined in the absence of RICO may be joined if the defendants have agreed to violate a substantive provision of RICO. *Id.* at 1192-93.

For a discussion of the unique aspects of RICO conspiracies and the problems they create, see James Clann Minnis, Comment, *Clarifying RICO's Conspiracy Provision: Personal Commitment Not Required*, 62 TUL. L. REV. 1399 (1988). The principal danger posed by RICO's conspiracy provision is its propensity toward establishing a standard of guilt by association. *Id.* at 1412-16. This Comment posits that allowing conspiracy convictions of defendants who do not personally agree to commit the predicate acts poses no greater danger of guilt by association than traditional conspiracy law because the government must prove the elements of intent and agreement for each defendant. *Id.* at 1414. However, the author concludes that the elimination of the multiple conspiracy doctrine is problematic because it conveys to prosecutors a procedural advantage not found under traditional conspiracy law. *Id.* at 1416.

The problems inherent in RICO's conspiracy provision are likely to arise in Ohio, since PCA is modeled on the federal RICO statute. Ohio courts must eventually resolve these unique complications.[184]

The statutory language which creates Ohio's conspiracy to engage in a pattern of corrupt activity presents a variety of interpretive problems. PCA, like RICO, creates an offense which closely resembles a conspiracy to engage in a conspiracy.[185] Aside from this theoretical problem, the penalties for a conspiracy to violate PCA and the actual violation of PCA are mutually exclusive.[186] Since proof of engaging in a pattern of corrupt activity under Ohio Revised Code section 2923.32(A)(1) may also constitute proof of a conspiracy to violate that section, a person may in effect be penalized twice for the same act.[187]

Moreover, the fact that the predicate acts themselves may be conspiracies[188] creates the offense of a conspiracy to engage in a pattern of conspiracies through an enterprise. In this situation, the PCA enterprise could consist of the pattern of conspiracies.[189] The resulting offense would therefore resemble a conspiracy to conspire to engage in a pattern of conspiracies, a situation so bizarre that it defies any attempt at definition.[190]

The final problem with PCA's conspiracy provision is that it directly conflicts with Ohio's general conspiracy statute. Ohio Revised Code section 2923.01 (Ohio's conspiracy statute) states that "[w]hen a

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184. Although federal prosecutors can join multiple conspiracies in jurisdictions which follow *Elliot*, the Justice Department discourages this practice. *See* U.S. DEPT. OF JUST., RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS (1986).

185. A.B.A Report, *supra* note 70, at 10. A conspiracy under PCA is a conspiracy to engage in a pattern of corrupt activity. OHIO REV. CODE ANN. § 2923.31(E). A pattern of corrupt activity is essentially a group of related criminal acts, or in other words, a common scheme of criminal activity. *Id.* A PCA conspiracy is, therefore, a conspiracy to engage in a common scheme of criminal activity; this situation closely resembles a conspiracy to conspire.

186. OHIO REV. CODE § 2923.32(B). Criminal penalties under PCA "do not preclude the application of any other criminal or civil remedy." *Id.*

187. *See supra* notes 151-57 and accompanying text.

188. OHIO REV. CODE ANN. § 2923.32(I).

189. This situation will only occur if the Ohio courts subscribe to the view that the PCA enterprise need not be distinct from the pattern of corrupt activity. *See supra* notes 110-23 and accompanying text.

190. Likewise, PCA creates the offense of a conspiracy to engage in a pattern of solicitations, intimidations or coercions. *See* OHIO REV. CODE ANN. § 2923.31(E). For example, a person might agree with another to solicit a felony amount of obscene materials on several occasions. The two solicitations would constitute predicate acts and form the requisite pattern; the persons who are joined for the purpose of soliciting the obscene material might constitute the enterprise. The persons have never actually solicited the sale of obscene materials, however, they have conspired to do so through an enterprise, thus violating the material elements of PCA. Although it is unclear how such a situation might arise and doubtful as to whether these persons would actually be prosecuted for violating PCA, it appears to allow this situation.

person is convicted of committing or attempting to commit a specific offense . . . he shall not be convicted of conspiracy involving the same offense."[191] In contrast, section 2923.32 states that a person may be convicted of both violating PCA and conspiring to violate PCA.[192] Although section 2923.32(B)'s creation of the PCA conspiracy offense is prefaced by the statement "notwithstanding any other provisions of law," the PCA conspiracy is defined by a reference to section 2923.01.[193] Section 2923.01 states that "divisions (B) to (I) of this section are incorporated by reference in the conspiracy offense defined by other section of the Revised Code."[194] Thus, section 2923.01(G)'s mandate that a person may not be convicted of both conspiracy to commit an offense and actually committing the same offense should apply to PCA conspiracies. This result, however, appears to conflict with the language of section 2923.32.[195]

One Ohio court has apparently resolved this dispute in favor of allowing convictions for both violating PCA and conspiring to violate PCA.[196] This is the result suggested by the Ohio Legislative Service Commission.[197] Nonetheless, the Ohio General Assembly should clarify the meaning of PCA's conspiracy provision. This could be done by explicitly stating that section 2923.01(G) does not apply to PCA conspiracies.

4. Seizure of Property Under PCA and RICO

a. Forfeiture

Both RICO and PCA contain criminal forfeiture provisions.[198] Criminal forfeiture is a relatively new concept in federal criminal law and a unique and powerful aspect of RICO.[199] A person convicted under RICO must forfeit to the United States government:

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191. *Id.* § 2923.01(G).

192. *Id.* § 2923.32(B)(1).

193. *Id.*

194. *Id.* § 2923.01(K)(2).

195. *Id.* § 2923.32(B)(1).

196. State v. Conley, No. CA90-11-023, 1991 Ohio App. LEXIS 3343 (12th App. Dist. July 15, 1991).

197. *See* Summary of Enactments, *supra* note 12, at 46. "A person can be convicted of both engaging in a pattern of racketeering activity and conspiracy to do so." *Id.*

198. 18 U.S.C. § 1963(c) (1988); OHIO REV. CODE ANN. § 2923.32(B)(3).

199. *See* RAKOFF & GOLDSTEIN, *supra* note 77, § 6.03 [1]. Before RICO, no federal criminal statute provided for criminal forfeiture. *Id.* Congress included RICO's forfeiture provisions in response to the general deficiency of incarceration penalties as a deterrent against organized crime. *See* DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 101 (1985). In a report to the Senate Subcommittee considering RICO, the Attorney General stated that:

[w]hile the prosecution of ordinary crime leaders can seriously curtail the operations of Cosa Nostra, as long as the flow of money continues, such prosecutions will only result in a

(1) any interest the person has acquired or maintained in violation of 1962; (2) any— (A) interest in; (B) security of; (C) claim against; or (D) property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted or participated in the conduct of, in violation of section 1962; and (3) any property constituting, or derived from any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.[200]

In sum, these provisions of RICO mandate forfeiture of: property acquired through a pattern of racketeering; property which affords a source of influence over an enterprise involved in racketeering activity; and the proceeds derived from racketeering activity. Furthermore, in lieu of a fine otherwise imposed under 18 U.S.C. section 1962, a person may be fined up to twice the gross profits or proceeds derived from the RICO offense.[201]

In order to mandate forfeiture of property acquired through a pattern of racketeering activity, courts must find a nexus between the property and the racketeering activity.[202] One test for determining the extent of the property to be forfeited limits the property to that which

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compulsory retirement and promotion system as new people step forward to the place of those convicted.

S. REP. NO. 617, 91st Cong., 1st Sess. 78 (1969).

Although the forfeiture provisions in RICO were originally aimed at fighting the Cosa Nostra, the traditional notion of organized crime, forfeiture penalties are now a substantial part of most drug enforcement law. *See* DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 101 (1985); *see also* Michael Goldsmith & Mark Jay Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform,* 1989 DUKE L. J. 1254. "Forfeiture laws are one of the few effective ways to combat narcotics racketeers." Goldsmith & Linderman, *supra*, at 1255-56.

Before RICO and the advent of criminal forfeiture penalties, courts often engaged in "civil forfeiture," an *in rem* proceeding based on the legal fiction that the action was against the offending property. RAKOFF & GOLDSTEIN, *supra* note 77, § 6.03 [2]. In contrast, criminal forfeiture is a proceeding against the individual and imposes an additional criminal sanction. *Id.*

200. 18 U.S.C. § 1963(a)(1)-(3) (1988).

201. *Id.*

202. United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983). "A jury *may* find an interest or contractual right forfeitable if there is evidence linking the defendant's conduct to the property interest and the government has proved such a nexus beyond a reasonable doubt." *Id.* at 1348 (quoting Edward C. Weiner, *Crime Must Not Pay: RICO Forfeiture in Perspective*, 1 N. ILL. U. L. REV. 225, 229-30 (1981)).

the defendant would not have acquired "but for" the racketeering activities.[203] Additionally, property which is acquired, maintained or operated in violation of RICO may be subject to forfeiture in its entirety.[204] Generally, proceeds or profits derived from racketeering activity are forfeitable in their entirety.[205] Moreover, the double fine provision contained in 18 U.S.C. section 1963 tends to render forfeiture of profits and proceeds a redundancy.

As was the case with other sections of PCA, Ohio's forfeiture provision is both broader and harsher than its RICO counterpart. PCA compels a person convicted of engaging in a pattern of corrupt activity to criminally forfeit any property

> in which he has a interest and that was used in the course of, *intended for use in the course of,* derived from, or realized through conduct in violation of this section, including any property constituting an interest in, means of control over, or influence over the enterprise involved in the violation. . . .[206]

Especially troubling is the required forfeiture of property *intended* for use in violation of PCA. This provision is a deviation from RICO and, at present, no cases construe its meaning. It would appear that the court must order defendants to forfeit all of their property if the prosecution proves that they intended to use it in violation of PCA even if no nexus exists between the property and the offense. A person could also

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203. *See* United States v. Porcelli, 865 F.2d 1352, 1365 (2d. Cir. 1989) (in tax fraud scheme, property which is forfeitable is that which defendant would not have acquired but for fraudulent scheme); United States v. Horak, 833 F.2d 1235, 1242 (7th Cir. 1983) (permissible to order defendant convicted of conducting garbage disposal company through series of bribes, to forfeit his job in order to obtain forfeiture of defendant's salary, bonuses and stock; however, government must show property would not have been obtained but for racketeering activity).

204. *See, e.g.,* United States v. Anderson, 782 F.2d 908, 917-18 (11th Cir. 1986) (enterprise which contained night club through which defendants conducted pattern of racketeering is forfeitable in entirety regardless of fact that portions of enterprise were not "tainted" by racketeering activity); United States v. Cauble, 706 F.2d 1322, 1349 (5th Cir. 1983) (once jury finds that defendant has conducted enterprise through pattern of racketeering activity, defendant's interest in enterprise is forfeitable in entirety regardless of whether interests are "tainted" by use in racketeering activity); United States v. Hess, 691 F.2d 188, 191 (4th Cir. 1982) (defendant's interest in enterprise conducted through pattern of racketeering activity forfeitable in entirety notwithstanding fact that district court failed to return special verdict alleging extent of interest or property subject to forfeiture).

Moreover, it is unlikely that RICO forfeitures violate the Eighth Amendment's proscription of cruel and unusual punishment. *See* United States v. Kravitz, 738 F.2d 102, 106 (3d Cir. 1985) (ordering dentist who received police contracts through bribery to forfeit entire interest in dental corporation, including stocks and position, and holding that such forfeiture does not violate Eighth Amendment as disproportional punishment); *see also* Harmelin v. Michigan, 111 S.Ct. 2680, 2692 (interim ed. 1991) (Eighth Amendment does not contain guarentee that punishment be proportionate to crime).

205. RAKOFF & GOLDSTEIN, *supra* note 77, § 6.04[2][b].

206. OHIO REV. CODE ANN. § 2923.32(B)(3) (emphasis added).

be ordered to forfeit property which he possessed before the occurrence of the corrupt activity.[207] The limits to forfeiture under PCA are therefore largely undefined.[208]

Additionally, PCA increases the forfeiture of profits and proceeds by mandating a fine of up to *three* times the gross value gained or *loss caused* by the violation.[209] Under PCA, a person can be fined regardless of whether he has profited from the corrupt activity.[210] Instead of being in lieu of a criminal fine as in RICO, PCA's profit fine is in addition to any other fine imposed by the Ohio Revised Code.[211]

An interesting situation arises under both PCA and RICO when a person, as part of a plea bargain, agrees to forfeit property to the state. In *State v. Conley*,[212] the court overturned a forfeiture pursuant to a plea bargain because the trial court did not make a determination that "it could reasonably be foreseen that the property was subject to forfeiture."[213] Under Ohio Revised Code section 2923.32(B)(3), the property must be somehow related to or derived from the crime.[214] The *Conley* court held that the plea bargain had no factual basis since no such determination was made and remanded the case to the trial court.[215] Underlying the decision in *Conley* was the court's concern "that favorable plea bargains could be 'bought' through agreements to forfeit property even if that property is not related in any way to the corrupt activity."[216]

PCA's provision dealing with the forfeiture of third party interests is somewhat more restrictive than that of RICO. One of the most

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207. *See* State v. Shumate, Nos. 91CA005067, 91CA005068, 1991 Ohio App. LEXIS 4711 (9th App. Dist. Oct. 2, 1991). PCA allows for forfeiture of property owned by defendant before the date of criminal acts because such property may have been "intended for use in the violation." *Id.* at *3.

208. One Ohio case reversed a trial court's order of forfeiture. *See In re* $37,000, No. 87-CA-85, 1988 Ohio App. LEXIS 2044 (2d App. Dist. May 23, 1988). The defendant was caught with drugs and weapons in his father's home. *Id.* at *1. Upon convicting the defendant son of engaging in a pattern of corrupt activity, the lower court ordered the forfeiture of $37,000 found in the father's safe. *Id.* at *3. The court of appeals held that the forfeiture was improper because the money belonged to the father and the state had failed to connect the father to the corrupt activity in any way. *Id.* at *5.

209. OHIO REV. CODE ANN. § 2923.32(B)(2)(a).

210. *Id.* § 2923.32(B)(2).

211. *Id.*

212. No. CA90-11-023, 1991 Ohio App. LEXIS 3343 (12th App. Dist. July 15, 1991) (Ohio App. July 15, 1991).

213. *Id.* at *14.

214. *See* OHIO REV. CODE ANN. § 2923.32.

215. *Conley*, 1991 Ohio App. LEXIS 3343, at *17.

216. *Id.* at *15.

troublesome aspects of a federal RICO forfeiture is the so-called "relation back" provision.[217] This provision negates transfers of illegally obtained property after the illegal act.[218] Once a person is convicted of violating RICO, a court can order an innocent transferee of illegally obtained property to forfeit such property regardless of whether the transferee knew that the property was illegally obtained.[219] It is this provision of RICO which permits courts to order forfeiture of attorney's fees.[220]

In contrast to RICO, PCA provides that the state's interest in the property does not arise until the property is either seized by the state or the state files a "corrupt activities lien."[221] PCA does not contain "a relation back" provision; any property which was transferred before the actual seizure of the property or the filing of a corrupt activities lien is therefore beyond the scope of a PCA forfeiture.

This aspect of PCA protects the rights of tranferees of property obtained in violation of PCA. The requirements of Ohio Revised Code section 2923.36(G) grant enhanced protection to third parties who are bona fide transferees without knowledge that the property was illegally obtained.[222] For example, a court cannot order the forfeiture of attorneys' fees which are paid before the actual seizure of, or filing of a corrupt activities lien on a defendant's property. PCA's lack of a "relation back" provision allows a person to transfer property to a third party to avoid forfeiture of that property.[223] While PCA's protection of innocent transferees is an honorable deviation from RICO, it may have a negative effect on law enforcement because it allows a criminal anticipating a PCA indictment the opportunity to avoid forfeiture by transferring his assets to third parties.[224]

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217. 18 U.S.C. § 1963(c) (1988). "All right, title and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to the forfeiture. . . ." *Id.*

218. *Id.; see also* Goldsmith & Linderman, *supra* note 198, at 1264.

219. 18 U.S.C. § 1963(c) (1988). A subsequent transferee can retain his interest in the property in a post-forfeiture hearing by establishing, by a preponderance of the evidence, that "he is a bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture" by a preponderance of the evidence. *Id.* § 1963(l)(6)(B). The procedure for such a hearing is set forth in § 1963(l). *Id.* § 1963(l).

220. *See* Bruce J. Winnick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 770-71 (1989).

221. OHIO REV. CODE ANN. § 2923.36(G).

222. *Id.*

223. *Id.*

224. *See* Goldsmith & Linderman, *supra* note 198, at 1294 n.176.

b. Pre-trial Seizure of Property; Preliminary Restraining Orders and Preserving the Reachability of Property

Courts have the power to seize property before trial under both RICO and PCA through the use of temporary restraining orders.[225] The purpose of pre-trial seizure of property is to preserve the reachability of property which may be subject to forfeiture upon conviction by prohibiting suspected violators of PCA from transferring such property before trial.[226] RICO and PCA allow a court to enter restraining orders before or after indictment.[227] The ability of prosecutors to freeze assets before trial gives the prosecution vast powers to control a defendant's property before proof of guilt at trial and is thus vehemently opposed by members of the defense bar.[228]

The only significant difference between the pre-trial seizure provisions of RICO and PCA is that under RICO, no explicit provision requires the court to hold a hearing before the actual trial when entering

225. 18 U.S.C. § 1963 (1988); OHIO REV. CODE. ANN. § 2923.33. In addition to entering temporary restraining orders, courts may order an injunction, require a performance bond, or "take any other action to preserve the availability of the property." 18 U.S.C. § 1963(d)(1) (1988); OHIO REV. CODE ANN. § 2923.33(A).

226. H.R. REP. NO. 91-1549, 91st Cong., 2nd Sess. 57 (1981). In the absence of a pre-trial procedure for restraining property, defendants could defeat the purposes of RICO by transferring their assets prior to conviction. *Id.; see also* Paul McCaskill, Note, *CRIMINAL LAW—Plaintiffs Under Florida RICO Must Meet Traditional Equity Requirements When Seeking Temporary Injunctions to Safeguard Assets*, 14 FLA. ST. U. L. REV. 975, 983 (1987) (asserting that RICO restraining orders seek to prohibit defendants from transferring assets both to avoid forfeiture of the assets and to prohibit the use of the assets as evidence for a conviction).

227. 18 U.S.C. §§ 1963(d)(1)(A)-(B) (1988); OHIO REV. CODE ANN. § 2923.33 ("preserving the reachability of property").

228. *See* John C. Coffee, Jr., *Is Innocence Irrelevant? Under RICO, Trials Have Become Secondary*, LEGAL TIMES, Mar. 13, 1989 at 20. In this article, Professor Coffee points out that pre-trial seizure of assets and possible "enterprise forfeiture" grants prosecutors enormous leverage in plea bargaining because meritorious defenses become irrelevant if the defendant cannot risk a trial. *Id.* For an example of the harsh effects pre-trial restraints on assets can have on defendants, see *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988). In *Regan*, five partners of the "Princeton/Newport Group," a consortium of twenty investment companies, were indicted under RICO for conducting the affairs of an enterprise through a variety of securities and tax fraud offenses. *Id.* at 117. The district court issued a restraining order prohibiting the Princeton/Newport Group "from disposing of any of its assets '[e]xcept in the ordinary course of business' " without the permission of the court and appointed a monitor to oversee Princeton/Newport's affairs. *Id.* at 118. In 1988, the government sought to freeze $21.5 million of Princeton/Newport's assets; the actual forfeiture in the case was eventually reduced to $1.6 million. *See* Don J. DeBenedictis, *RICO Guidelines: Justice Department Plays Down Clarification of RICO Policy*, A.B.A. J., Feb. 1990, at 16. The Princeton/Newport Group eventually collapsed. *Id.* Many commentators blame the ultimate collapse of the Princeton/Newport Group on the government's restraining order and attempted forfeiture and, as a result, the Justice Department promulgated limits on the pre-trial seizure of assets.

a post-indictment restraining order.[229] The notion that the federal government can seize a person's property without notice or hearing raises a substantial due process issue. The federal government takes the position that since indictment is "constitutionally sufficient to warrant a restraint on personal liberty pending trial, in the form of detention or bond restrictions, . . . the indictment should likewise be sufficient to warrant a restraint on the transfer or disposition of property pending trial."[230] Three circuits have rejected this contention, requiring at least some form of hearing in order to comport with the requirements of due process.[231] In *United States v. Monsanto*,[232] the Supreme Court expressly declined to rule on whether due process requires a hearing before imposing a post-indictment restraining order.[233] Thus, the issue of whether a hearing is required for post-indictment seizure of assets under RICO is still open to debate.[234]

PCA eliminates some of this confusion by requiring that the court give notice to all affected parties and hold a hearing on the prosecution's post-indictment motion to preserve the reachability of property subject to forfeiture.[235] In this hearing, the prosecution must show by a preponderance of the evidence that the action is necessary to preserve the reachability of the property.[236] The prosecution is not required to show irreparable injury.[237] These requirements are more lenient than those imposed by some federal courts under RICO. In *United States v. Rogers*,[238] for example, a federal district court devised a three prong

229. 18 U.S.C. § 1963(d)(1)(A) (1988).

230. RAKOFF & GOLDSTEIN, *supra* note 77, § 6.06[4] (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).

231. *See* United States v. Monsanto, 836 F.2d 74, 82-84 (2d Cir. 1987), *rev'd on other grounds*, 491 U.S. 600 (1989) (requiring an adversarial hearing regarding forfeiture related restraining orders); United States v. Harvey, 814 F.2d 905, 929 (4th Cir. 1987) ("[T]o the extent that the Act authorizes the issuance of *ex parte* restraining orders after indictment without any post-deprivation hearing other than a criminal trial, it violates fifth amendment due process guarantees."); United States v. Theis, 801 F.2d 1463, 1468 (5th Cir. 1986) (Rule 65 of Federal Rules of Civil Procedure requires notice and hearing when preliminary injunctions are used to seize assets).

232. 491 U.S. 600 (1989).

233. *Id.*

234. Under RICO, restraining orders are considered as "strong medicine" and should only be used when other remedies (for example, performance bonds) are insufficient to preserve the reachability of the property. *See* United States v. Regan, 858 F.2d 115, 121-22 (2d Cir. 1988); *see also* UNITED STATES ATTORNEY'S MANUAL, TITLE 9—CRIMINAL DIVISION § 9-110.414 (1989) (requiring prosecution to show that less intrusive remedies likely to be ineffective as means of preserving reachability of property for forfeiture before seeking temporary restraining orders).

235. OHIO REV. CODE ANN. § 2923.33(A).

236. *Id.*

237. *Id.*

238. 603 F. Supp. 1492 (D. Colo. 1985).

test for determining whether or not to grant a pre-trial restraining order.[239] Under the *Rogers* test, the prosecution must show: a substantial likelihood that the defendant whose property is subject to forfeiture will be found guilty; that failure to obtain a restraining order is likely to result in the future unavailability of the property; and that the need to obtain the pre-trial order outweighs any hardship imposed on the party against who the order is issued.[240] While PCA makes it clear that a hearing is required for post-indictment restraining orders, it remains unclear as to what type of hearing is required.

Although Ohio's requirement that prosecutors show restraining orders are necessary by a preponderance of evidence is stricter than the "substantial likelihood test" used under RICO,[241] PCA does not require any showing that the defendant is likely to be found guilty or that the need for the order outweighs any hardship on the party against whom the order is issued.[242] Furthermore, the court may base its order on hearsay testimony.[243] Thus, it appears that PCA only requires a de minimis hearing regarding post-indictment restraining orders.[244]

In 1984, RICO was amended to provide a procedure for pre-indictment restraining orders.[245] Courts entering pre-indictment restraining orders pursuant to 18 U.S.C. section 1963(d)(1)(B) must determine that "there is a substantial likelihood that the United States will prevail on the issue of forfeiture," and that "the need to preserve the availability of the property . . . outweighs the hardship on the party against whom the order is entered."[246] Failure to enter the order

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239. *Id.* at 1334.

240. *Id.*

241. RAKOFF & GOLDSTEIN, *supra* note 77, § 6.06[3].

242. OHIO REV. CODE ANN. § 2923.33(A). "The prosecuting attorney is not required to show special or irreparable injury to obtain any court action pursuant to this division." *Id.*

243. *Id.* Ohio Revised Code section 2923.33(A)'s statement that the court's order may be based on hearsay "[n]otwithstanding the Rules of Evidence" seem to imply that the other Rules of Evidence are applicable. *Id.* This is in stark contrast to RICO, which explicitly states that the Rules of Evidence do not apply to hearings regarding pre-indictment restraining orders. 18 U.S.C. § 1963(d)(3) (1988). "The court may receive and consider, at a hearing held pursuant to this section, evidence and information that would be inadmissible under the Federal Rules of Evidence." *Id.*

244. Unlike federal courts under RICO, Ohio courts do not have to speculate as to what type of hearing is required for post-indictment restraining orders because PCA defines the procedure for such orders. Ohio courts may, therefore, require less exacting procedures for post-indictment restraining orders than federal courts. *See* OHIO REV. CODE ANN. § 2923.33(A).

245. Pub. L. No. 98-473. tit. II, ch. III, pt. A, § 302, ch. XXIII, § 2301 (a)-(c), 98 Stat. 2040, 2192 (1984).

246. 18 U.S.C. § 1963(d)(1)(B) (1988).

will result in the property being unavailable for forfeiture.[247] PCA requires a similar hearing before a court enters pre-indictment restraining orders.[248] In order to obtain a pretrial restraining order under PCA, the prosecuting attorney must show by a preponderance of the evidence: that "there is probable cause to believe that the property . . . is subject to criminal forfeiture;" that the need to preserve the reachability of the property outweighs irreparable hardship to the party against whom the order is entered; and that the order is necessary to preserve the reachability of the property.[249]

PCA's pre-indictment hearing procedure is apparently more exacting than that of its RICO counterpart for two reasons. First, PCA requires the prosecution to meet the statutory requirements by a preponderance of the evidence;[250] RICO does not establish an evidentiary standard for the court's determination. Second, in contrast to RICO, PCA does not explicitly state that the court can consider evidence which would be otherwise inadmissible.[251] Although PCA states that the court may base a post-indictment restraining order on hearsay evidence,[252] it implies that the other Rules of Evidence are applicable.[253]

PCA does not explicitly state that hearsay is admissible in hearings regarding pre-indictment restraining orders.[254] Moreover, Ohio Revised Code section 2923.33(B) sets forth a more exacting procedure for pre-indictment restraining orders than that of section 2923.33(A) regarding post-indictment restraining orders.[255] A person faced with a pre-indictment restraining order under PCA can therefore plausibly argue that a hearing under section 2923.33(B) must comport with the Ohio Rules of Evidence.[256]

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247. *Id.*

248. OHIO REV. CODE ANN. § 2923.33(B).

249. *Id.*

250. *Id.*

251. *Id.* RICO explicitly states that the court may consider evidence that would be inadmissible under the Federal Rules of Evidence. 18 U.S.C. § 1963(d)(3) (1988).

252. OHIO REV. CODE ANN. § 2923.33(A).

253. *Id.*

254. *Id.* § 2923.33(B).

255. *Id.* § 2923.33(A)-(B).

256. The prosecution might argue that since Ohio Revised Code section 2923.33(B) states that "the court can take any action specified in division (A)," all of section (A), including its allowance of hearsay evidence, is incorporated into section (B). *See id.* § 2923.33(B). This argument, however, conflicts with the language of the statute because the "actions" specified in section (A) refer to entering restraining orders and injunctions and requiring the execution of performance bonds. *Id.* § 2923.33(A).

5. RICO Guidelines

The final difference between RICO and PCA is that federal prosecutors must subscribe to specific guidelines when bringing RICO indictments.[257] In 1981, the United States Department of Justice issued a set of guidelines pertaining to RICO prosecutions.[258] The purpose of these guidelines is to ensure that RICO is "selectively and uniformly used."[259] The guidelines state that RICO prosecutions should not be brought in every case in which the technical elements of the violation exist.[260] In order to enforce these guidelines, the Department of Justice has set up a process to review RICO indictments to determine whether they fall within the guidelines.[261]

No guidelines currently govern the use of PCA in Ohio. Many of the RICO guidelines deal with exclusively federal problems and therefore have no relevance in this discussion.[262] Other guidelines serve to narrow the scope of RICO by allowing prosecutions only when offenses fit the narrow definitions of the pattern and enterprise elements of RICO.[263]

Ohio should consider adopting at least the RICO guideline that prohibits the use of RICO as a chip in the plea bargaining process.[264] In several instances, PCA provides for more severe penalties than RICO.[265] Equipped with PCA's broad applications and extremely harsh penalties, prosecutors could easily intimidate defendants into pleading to lesser charges. For example, persons faced with extreme jail sentences and the possible forfeiture of all of their assets could be convinced to plead guilty to some crime regardless of the weakness of the case against them. Additionally, favorable plea bargains might be

257. *See* RAKOFF & GOLDSTEIN, *supra* note 77, § 5.01. These guidelines are contained in THE UNITED STATES ATTORNEY'S MANUAL: TITLE 9—CRIMINAL DIVISION (reprinted in RAKOFF & GOLDSTEIN, *supra* note 77, at app. b, and hereinafter referred to as RICO GUIDELINES). It is important to note that while these guidelines represent the official policy of the Department of Justice they do not create enforceable substantive or procedural rights. *Id.* § 9-110.200. Thus, once a RICO indictment is brought, courts may not be bound by the RICO guidelines.

258. *See* UNITED STATES ATTORNEY'S MANUAL, *supra* note 233, § 9-110.

259. *Id.* § 9-110.200.

260. *Id.*

261. *Id.* § 9-110.210.

262. For example, several of the guidelines prohibit the use of RICO in cases which state and local law enforcement agencies can adequately investigate and prosecute the offenses. *See* RICO GUIDELINES, *supra* note 256, §§ 910.330-.331.

263. *See, e.g., id.* § 9-110.340 (indictments under 18 U.S.C. § 1962(c) shall not be brought when the pattern of racketeering activity arises out of a single criminal episode); *id.* § 9-110.350 (requiring a nexus between pattern of racketeering and enterprise); *id.* § 9-110.360 (RICO enterprise must have ascertainable structure, ongoing purpose, and be distinct from pattern of racketeering activity).

264. *Id.* § 9-110.321.

265. *See supra* notes 153-74.

"bought" if defendants are allowed to exchange the forfeiture of property for other criminal penalties.[266] The use of PCA as a chip in the plea bargaining process will thus create a high potential for abuse.

Another effect of the RICO Guidelines lacking in Ohio is that the RICO guidelines deter federal prosecutors from bringing a RICO indictment in cases in which the government's goals will be adequately served by charging the predicate offenses.[267] The rationale underlying the RICO guidelines is that RICO is a unique criminal statute which should not be used to prosecute garden variety criminals.[268] In the absence of these guidelines, Ohio prosecutors might use PCA against defendants in cases in which traditional criminal statutes and penalties are adequate to serve the state's goals. Such a use of state RICO statutes has been described as using a sledgehammer to kill flies.[269] It is unlikely, however, that Ohio will adopt guidelines restricting the use of PCA since the General Assembly apparently intended to use PCA to prosecute many crimes which could be adequately charged under previously existing criminal statutes.[270]

B. Criticism and Suggestions

PCA is an improvement of the federal RICO model in several respects. First, Ohio's use of the term "corrupt activity" is a preferable alternative to RICO's use of the term "racketeering activity." This substitution makes it clear that PCA applies to a wide variety of organized criminal activity rather than the traditional notion of a large criminal syndicate such as La Cosa Nostra. Furthermore, PCA eliminates categorizing defendants as racketeers, a potentially prejudicial term.[271] Second, through codification of the United States Supreme Court's decision in *United States v. Turkette*, PCA leaves no doubt that its enterprise element applies to illegitimate as well as legitimate enterprises.[272] Third, Ohio's process for pre-trial seizure of property is an improvement over that of its RICO counterpart because it expressly requires that a hearing is necessary before the court may take action to preserve

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266. *See supra* notes 211-15 and accompanying text.

267. *See* U.S. DEPT. OF JUST., RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 107 (1986 ed.).

268. *Id.*

269. *See* Strasser, *supra* note 13, at 34. In Florida, defense lawyers contend that prosecutions brought under Florida's RICO statute "include minimally involved people like salesmen in a boiler room. They are not appropriate RICO defendants, as reflected by the sentences they get . . . but it becomes complex litigation and the peripherals can't afford a defense." *Id.*

270. *See supra* text accompanying notes 46-60.

271. OHIO REV. CODE ANN. § 2923.31(C).

272. *Id.*

the reachability of the property.[273] Finally, PCA grants enhanced protection of third party interests by eliminating RICO's "relation back" provision.[274]

Notwithstanding these improvements, several problems remain regarding PCA's application and interpretation. First, PCA's definition of pattern is still open to a wide variety of interpretations.[275] Ohio's codification of the *Sedima, S.P.R.L. v. Imrex Co.* definition of pattern will not render this element any less confusing than it is under RICO. Two of the most significant questions remaining include whether a PCA pattern requires an element of continuity and whether a PCA pattern can arise out of two or more acts which are part of the same criminal scheme.[276]

Second, PCA does not demonstrate whether it is necessary to prove the existence of an enterprise which is separate and distinct from the pattern of corrupt activity.[277] If Ohio courts allow the pattern of corrupt activity to constitute the PCA enterprise, PCA can be used to administer extraordinary penalties against persons merely engaging in two or more criminal acts without even requiring a conviction on the predicate acts.[278] In order to avoid these types of prosecutions, Ohio should require that a PCA enterprise consist of a group of persons with an ongoing purpose and an ascertainable structure which is separate and distinct from the pattern of corrupt activities.

Third, Ohio should modify PCA's conspiracy provision. This section creates a more severe penalty for conspiring to engage in a pattern of corrupt activities than it does for actually engaging in a pattern of corrupt activities.[279] Such a result seems inordinately harsh considering that conspiracy is generally a lesser offense than actual commission of the offense;[280] furthermore, in a PCA conspiracy it is not even necessary to obtain a conviction for the predicate acts.[281] In addition to the

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273. *Id.* § 2923.33.

274. *Id.* § 2923.36(G).

275. *See supra* notes 76-101 and accompanying text.

276. *See supra* notes 100-01 and accompanying text. Apparently, Ohio seems to be leaning away from requiring that a pattern of corrupt activity contain an element of continuity in favor of the broad "two bare acts" approach. *Id.*

277. *See supra* notes 108-22 and accompanying text.

278. *See supra* notes 118-20 and accompanying text.

279. *See* OHIO REV. CODE ANN. § 2923.01(L); *see also supra* notes 155-65 and accompanying text.

280. OHIO REV. CODE ANN. § 2923.01(L).

281. *Id.* § 2923.31(E).

unique problems created by RICO conspiracies in general, PCA's definition of its conspiracy provision by reference to Ohio's general conspiracy statute renders interpretation of these provisions extremely difficult.[282] This is because PCA's mandate that a defendant can be convicted of both substantively violating PCA and conspiring to violate PCA conflicts with Ohio's general conspiracy statute.[283] The Ohio legislature can rectify this situation by eliminating the double penalty provision contained in Ohio Revised Code section 2923.01(L) and amending section 2923.32 to explicitly exclude section 2923.01's prohibition of convicting a person who violates a substantive offense of conspiracy to violate that offense.

Finally, Ohio should adopt some guidelines to avoid prosecutorial abuse under PCA. Specifically, Ohio should limit the use of PCA as a chip in the plea bargaining process. Defendants threatened with PCA's broad applications and harsh penalties might easily be convinced to plead guilty of lesser offenses regardless of the strength of the case against them. It is conceivable that an innocent person, faced with the risk of forfeiture of his entire business under PCA, would plead guilty rather than risk such a forfeiture. The use of PCA in the plea bargaining process creates a high potential for unfairness and abuse and should therefore be limited.

IV. CONCLUSION

Through PCA, Ohio has provided its prosecutors with a powerful new weapon against crime. For the most part, PCA is modeled on the federal RICO statute. Ohio did, however, choose to deviate from the federal model in several instances, presumably to draft a clearer and more effective statute. Some of these deviations will have the desired effect while others invariably will not. The ultimate responsibility for defining and clarifying PCA rests in the hands of the Ohio courts and General Assembly. Although this is a somewhat onerous task, Ohio has the benefit of drawing from twenty years of experience with the federal RICO statute. If the Ohio legal system corrects the mistakes of Congress and the federal courts and takes steps to avoid prosecutorial abuse, PCA will become one of the most effective RICO statutes in the nation.

Donald Cosmo Ligorio

282. *See supra* notes 165-187 and accompanying text.

283. OHIO REV. CODE ANN. § 2923.01.