IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,182

THE STATE OF FLORIDA

Petitioner,

vs.

DEAN KEVIN LUCAS, et al.,

Respondent.

* *

ON APPLICATION FOR DISCRETIONARY REVIEW

* *

PETITIONER'S BRIEF ON THE MERITS

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I.

INTRODUCTION

The Petitioner, the State of Florida, was the Appellant in the Third District Court of Appeal and will be referred to as "the Petitioner" in this brief. The Respondents, Dean Kevin Lucas, et al., were the Appellees and will be referred to as "the Respondents". The symbol "R" will refer to the record on appeal.

II.

STATEMENT OF THE CASE AND FACTS

A. Statement of Proceedings

The instant matter commenced with the Petitioner seeking review of an order dismissing two counts of an Information charging violations of Section 895.03, Fla. Stat. (1985) (RICO). In the trial court, the sole issue raised for dismissal by the movants, the Respondents here, was the failure to allege in the Information anything other than a single scheme. Respondents maintained there that no pattern of racketeering activity had been charged since at most, the predicate acts amounted to multiple offenses in a single scheme. (R. pp. 93-99.) In response, the Petitioner argued alternatively that the existence of a single scheme did not preclude prosecution under Florida's RICO Act and the single scheme contemplated in cases construing the Federal RICO legislation was far different from the pattern of racketeering activity alleged to have been present here. (R. pp. 104-118.)

By order dated June 24, 1988, the trial court dismissed the two counts of the Information charging RICO and RICO conspiracy. It specifically found that where the allegations constituted no more than a single scheme, a pattern of racketeering activity could not exist. (R. pp. 127-134.) Appeal to the Third District Court of Appeal was taken from this adverse ruling by notice filed July 8, 1988. (R. pp. 135-136.) The filing of briefs ensued early in 1989 and oral argument before the Third District Court was held on May 10, 1989. Again, the only issue discussed in all of the briefs was the correctness of the trial court's holding that the existence of a single scheme barred prosecution.

On June 26, 1990, the United States Supreme Court handed down its decision in H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. ___, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). In H.J., the Supreme Court established that a single scheme could constitute a pattern of racketeering activity as envisioned under Federal RICO. Id. 109 S.Ct. at 2901. Thus, the entire premise of the Respondents' motion in the trial court and the resultant decision there, was simply eviscerated. However, in the course of refining the definition of "pattern of racketeering activity", the Supreme Court, in H.J., went on to deal with the concept of continuity and the requirement of establishing the threat of continued criminal activity. It was that concept that the Third District Court of Appeal latched on to in affirming the trial

court in its initial opinion, adhered to on rehearing. For, on April 10, 1990, the Third District Court of Appeal issued an opinion affirming the trial court, State v. Lucas, 570 So.2d 952 (Fla. 3d DCA 1990), on the basis of lack of continuity as defined in H.J. Petitioner timely sought rehearing which was denied on December 4, 1990. State v. Lucas, supra. (R. pp. 151-152.) The Third District did, nevertheless, certify therein that the question of the applicability and the scope of the continuity requirement in a RICO prosecution was of great public importance.

B. Statement of Facts

The record of the trial court is devoid of facts: no stipulation, no testimony, now sworn motion is extant. That absence should have no effect though on the justiciability of the issue before this Court.

III.

SUMMARY OF ARGUMENT

The Third District Court of Appeal erred in affirming the dismissal of an Information charging RICO on the basis of failure to sufficiently allege continuity. There is no and should not be any such pleading requirement.

Additionally, the mechanistic approach utilized by the Third District in asserting the absence of continuity flies in the face of both precedent and logic. Application of the reasoning and rationale of numerous federal courts compels a result opposite to that reached below.

IV.

ARGUMENT

A.

THERE IS NO REQUIREMENT OF PLEADING CONTINUITY IN AN INFORMATION OR INDICTMENT CHARGING A VIOLATION OF RICO.

In Bowden v. State, 402 So.2d 1173 (Fla. 1981), this Court upheld the constitutionality of the Florida Racketeer Influenced and Corrupt Organization Act (RICO) [then section 943.46, Fla. Stat. (1977), now sections 895.02 et seq., Fla. Stat. (1989)]. That opinion, authored by Justice Adkins, refined the statutory definition of "pattern of racketeering activity", now contained in section 895.02(4), Fla. Stat. (1989), to include a requirement that there exist "a continuity of particular criminal activity." Id. at 1174.[1] Neither this Court, nor any District Court of Appeal, has had occasion to apply this refinement until the Third District, in the matter at hand. More specifically, there is no precedent for the holding of the court below that the charging document, the Information, is deficient in that it fails to establish continuity.

The error of the Third District in affirming the dismissal of the trial court on the basis of lack of continuity is most glaring because of the procedural history of this case. Manifestly, the record was insufficient to premise a decision on this ground. The only items which could have been of assistance to that court were the Information, and the inapposite unsworn motion to dismiss and response thereto. The Information was of little help, since under the Rules of Criminal Procedure, only that which is necessary to apprise the defendant with what he is charged is included. Rule 3.140 Fla.R.Crim.P. Liberal discovery supplants more detailed pleading. The Respondent's motion to dismiss was not filed pursuant to Rule 3.190(c)(4) and thus could not supply the material facts.

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[1] Ironically, in Bowden, this Court relied, in part upon United States v. Stofsky, 409 F.Supp. 609 (S.D.N.Y. 1973), aff'd on other grounds, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819, 97 S.Ct. 66, 50 L.Ed.2d 80 (1976), a decision concerned not with predicate acts that were too close together, but with predicate acts that were too far apart.

Thus, there is a fundamental flaw in the analysis and disposition of the issue of continuity by the lower court. Simply put, continuity cannot be decided on the basis of a criminal complaint and nothing else. It is conceivable that a motion to dismiss submitted under Rule 3.190(c)(4), properly traversed or demurred to, could resolve the issue of continuity, but that did not take place below. In fact, not one criminal case has been decided pretrial on the question of continuity other than the case at bar. United States v. Hobson, 893 F.2d 1267 (11th Cir. 1990), U.S. appeal pending; United States v. Kaplan, 886 F.2d 536 (2nd Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1127, 107 L.Ed.2d 1033 (1990); United States v. O'Connor, 910 F.2d 1466 (7th Cir. 1990); United States v. Coiro, 922 F.2d 1028 (2nd Cir. 1991); and United States v. Link, 921 F.2d 1523 (11th Cir. 1991), all involved appeals following convictions of RICO with obviously a complete record of the government's proof. United States v. Busacca, 739 F.Supp 370 (N.D. Ohio, E.D. 1990), is an order denying a motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. Again, the entire government's case was before the court for the determination of whether continuity was sufficiently established.

Most significantly, even the civil cases recognize the necessity of a sufficient record to enable consideration of the element of continuity. In Swistock v. Jones, 884 F.2d 755, 758 (3rd Cir. 1989), the court held:

> Although the Court in H.J., Inc. did not explicitly hold that the existence of a RICO pattern was a jury question, the Court held that the district court had improperly dismissed plaintiff's RICO claim because "a threat of continuity of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business."

Furthermore, it has been observed,

> The determination of the existence or non-existence of continuity requires the court to look beyond the bare enterprise and predicate acts. It is necessary for the court to examine the "overall context in which the acts took place" in order to ascertain whether sufficient continuity exists. Azurite Corp. Ltd. v. Amster & Co., 730 F.Supp. 571, 580 (S.D.N.Y. 1990).

And, of course, civil complaints are much more inclusive than criminal.

The error of the premature conclusion of the Third District Court of Appeal may not be obvious upon first glance, at least as far as it relates to the instant case. Nevertheless, in failing to find the existence of continuity in the predicate acts charged, that court relied upon a number of conclusions, all of which could have been refuted by a more complete record. For example, the opinion cited to the fact that the acts span only a brief period of six months. 570 So.2d at 955. But the lower court was unaware of the fact that the only reason the predicate acts terminated after six months was because the Respondents' criminal conduct was cut short by the execution of search warrants shutting down their place of business: their boiler room. The Petitioner certainly does not have to plead it but should be permitted to demonstrate that, but for the prompt law enforcement response, the Respondents would have gone about their criminal business for months, if not years.

The Third District's opinion also placed great emphasis upon the discrete set of victims but again missed the mark. Prefatorily, it should be noted that the United States Supreme Court in H.J. declined to explicitly identify the number of perpetrators or victims as relevant factors in the discussion of continuity. Swistock v. Jones, supra at 758. Nonetheless, the lower court asserted that the predicate acts were directed towards a limited set of victims: former clients of Wellington Precious Metals. 570 So.2d at 955. Presumably this fact was deduced from the seventeen victims named in the Information. However, the full scope of the racketeering activity need not have been fully described in the charging document. In fact, Wellington had approximately two thousand former clients who were potential victims. The inability of the Respondents to prey upon them due to aggressive law enforcement cannot preclude a determination that continued criminal activity was threatened. Moreover, the Petitioner specifically maintained before the Third District that there were those, other than Wellington clients, who were victimized by the Respondent's boiler room. (Brief of Appellant, p. 4.) Of course, no opportunity to develop this fact was made available and The Third District has seemingly overlooked it.

If this were not enough, the Court of Appeal extrapolated from the deficient record the proposition that the pattern of racketeering activity had but a limited fraudulent purpose. 570 So.2d at 955. Rather, the true

facts would suggest the contrary. This boiler room might not exist for eternity, but it would continue to defraud unsuspecting victims until shut down, for this was the only thing Respondents did.

It is therefore improvident if not impossible to decide the issue of continuity in a RICO prosecution absent sufficient evidence. The term "evidence" is important as ordinarily what is contemplated is disposition of the question upon a motion for judgment of acquittal at the close of the prosecution's case, or upon appeal after conviction. Although theoretically possible to resolve the issue pretrial pursuant to Rule 3.190(c)(4), the prosecution should have an opportunity to develop its theory of and evidence of continuity at trial.

B.

THE THIRD DISTRICT MISCONSTRUED AND MISAPPLIED THE REQUIREMENT OF CONTINUITY.

The opinion of the lower court seized upon the definition of continuity provided in H.J. but then failed to reasonably and rationally apply it. Firstly, the Third District ignored some of the express language utilized by the United States Supreme Court in expounding upon the concept of continuity. For example, the fact that the alleged predicate acts occurred over a short period of time is not, according to H.J., dispositive of the issue, because continuity might be "established by showing that the predicate acts were part of an ongoing entity's regular way of doing business." Id. 109 S.Ct. at 2902. Yet, the lower court decision neglected to adduce this factor. In trade parlance, Respondents operated a "boiler room". The only business they were in was to commit predicate acts of theft and fraud. It was their raison d'etre. It is precisely because of this fact that the Respondents posed a threat of continued criminal activity. Id., 109 S.Ct. at 2900. Therefor, continuity would be established.

This Court has required continuity and relatedness in the "pattern" element of RICO since 1981. Bowden v. State, supra. Therein it was recognized that by requiring a continuity of criminal activity as well as similarity and interrelatedness between those activities, the appropriate target of RICO prosecutions would be the professional or career criminal. The Florida RICO Act was enacted to prevent organized crime from infiltrating and corrupting legitimate businesses by providing and outlet for illegally

obtained capital, from harming innocent investors, entrepreneurs, merchants and consumers, and from interfering with free competition and thereby constituting a substantial danger to the economic and general welfare of the State. State v. Bowden, 413 So.2d 798 (Fla. 1st DCA 1982). One can hardly think of a more appropriate target for a RICO prosecution than a totally illicit boiler room operation made up of professional fraud merchants.

In United States v. Kaplan, supra, at 542, the Second Circuit, relying upon the en banc opinion in United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989), cert. denied, ___U.S.___, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989), and H.J., noted that a tension exists between continuity and relatedness. For, the shorter the elapsed time between acts, the less it can be said that the activity is continuing. Nonetheless, that tension could be resolved by "reference to the overall context in which the acts took place." Furthermore evidence of continuity could come from "facts external" to the predicate acts. A key external fact would be the nature of the RICO enterprise. Citing Indelicato, supra, the court iterated:

> [w]here the enterprise is an entity whose business is racketeering activity, an act performed in furtherance of that business automatically carries with it the threat of continued racketeering activity. Ibid.

While the Third District Court of Appeal opined that the, in their view, "short-run fraudulent scheme utterly fails to satisfy the continuity prong of the 'pattern of racketeering activity' element", 570 So.2d at 955, that court utterly failed to consider the nature of the enterprise.

What the Court of Appeal did do was to resolve the question of continuity on the basis of one clearly distinguishable civil case: Menasco, Inc. v. Wasserman, 886 F.2d 681 (4th Cir. 1989). Not only is Menasco inapposite, but so are the other civil RICO cases which have ended in summary judgment due to a lack of continuity. That is so because the plaintiffs therein did nothing which came close to the criminal conduct of the Respondents here.

Menasco involved defendants whose actions were narrowly directed towards a single fraudulent goal: to defraud two corporations with respect to their oil interests; one perpetrator, one goal, two victims. Id. at p. 684.

Notwithstanding the Third District's observation to the contrary, there is no similarity between the allegations in Menasco and what existed here.[2]

A cursory analysis of some of the analogous, recent cases reveals the same distinctions. Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 883 F.2d 48, 51 (7th Cir. 1989), presented, essentially, a contract dispute involving one victim, one transaction and at most two predicate acts; Service Engineering Co. v. Southwest Marine, Inc., 719 F.Supp. 1500, 1508 (N.D. Cal. 1989), involved fraudulent conduct relating to a singular SBA size determination; Orchard Hills Co-op. Apts. Inc. v. Germania Federal S&L Assoc., 720 F.Supp. 127 (C.D. Ill. 1989), involved one victim, one transaction, one injury; Airlines Reporting Corp. v. Aero Voyagers, Inc., 721 F.Supp. 579, 584 (S.D.N.Y. 1989), involved three perpetrators, one victim and an uncomplicated transaction amounting to a simple breach of contract; Disandro-Smith & Assoc. P.C., Inc. v. Edron Copier Service, 722 F.Supp. 912, 916 (D. R.I. 1989), involved the sale of three used copy machines as new; USA Network v. Jones Intercable, Inc., 729 F.Supp. 304, 318 (S.D. N.Y. 1990), involved few criminal acts, few participants, one victim and single fraudulent scheme which was accomplished in three and one-half months; Trundy v. Strumsky, 729 F.Supp. 178, 184 (D. Mass. 1990), involved one victim and one object - to obtain the plaintiff's interest in a corporation without paying fair compensation; Continental Realty Corp. v. J.C. Penney Co., Inc., 729 F.Supp. 1452, 1455 (S.D. N.Y. 1990), involved one victim and a limited goal - fraud and breach of contract in one real estate transaction. Passini v. Falke-Gruppe, 745 F.Supp. 991, (S.D.N.Y. 1990), involved a simple breach of contract resulting in the loss of expected business; National Credit Union Administration Board v. Regine, 749 F.Supp 401 (D. R.I. 1990), alleged no more than a breach of contract related to the purchase of one piece of property; Miranda-Rodriguez v. Ponce Federal Bank, F.S.B., 751 F.Supp. 18 (D. Puerto Rico 1990), involved one victim and one claim of injury.

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[2] Significantly, the Florida legislature has precluded the possibility of turning "garden variety" fraud cases into civil RICO cases and thus inundating the civil dockets. In providing private causes of action for civil plaintiffs injured by "a pattern of criminal activity" the legislature specifically excluded "two or more incidents of fraudulent conduct arising out of a single contract or transaction against one or more related persons." Fla. Stat. Ann., § 772.02(4) (1986).

Perhaps the best explication of the continuity requirement, at least in a civil case, can be found in Morrow v. Black, 742 F.Supp. 1199, 1206-1208 (E.D.N.Y. 1990). Therein, the court asserted that racketeering activity which extends over a short period of time "but at the time of the occurrence threatens any future criminal activity satisfies the continuity requirement." In a footnote, Chief Judge Platt, might have had the instant case in mind.

> It seems to this Court that the question is whether the activity threatened future activity at the time of its occurrence. That hindsight proves that the defendants are found out after a few weeks would not alter the conclusion that the activity threatened future activity at the time of its occurrence. Id. at 1207, fn. 20.

Contrary to the results reached in the aforementioned civil cases, the criminal cases ensuing after H.J. have uniformly found the threat of future harm and thus the existence of continuity. United States v. Hobson, supra; United States v. Kaplan, supra; Unites States v. O'Connor, supra; United States v. Coiro, supra; United States v. Link, supra. The decision in United States v. Busacca, supra, at 376, is especially commended to the Court. There, Judge Aldrich, agreeing with the approach of the Second Circuit in Kaplan, intimated that it would be incongruous, if not absurd, for law enforcement to delay the interruption of ongoing criminal activity for some arbitrary period of time to elapse. But that is precisely what the Third District Court of Appeal has wrought by the opinion below.

A clear picture emerges from the foregoing. Whatever value one can attach to the civil cases, those in which summary judgment was granted based on the lack of continuity bear no resemblance to what occurred here. A sophisticated boiler room operation was established; although only seventeen victims were identified in the information, they were not all similarly situated; the six month duration of the pattern was misleading because of its forced disruption. In contrast to the defendants in the aforementioned civil cases, the Respondents here engaged in no legitimate business. This was not an ongoing enterprise which incidentally committed criminal acts, but one created for the sole purpose of stealing. This is precisely what the United States Supreme Court envisioned as a sufficient pattern. If it is not apparent from the record, it is not Petitioner's fault.

V.

CONCLUSION

Based on the foregoing, it is respectfully suggested that this Court respond to the certified question in two forms. On the one hand, it should be established that, in a criminal RICO, continuity is an issue to be resolved only after a full presentation of the prosecution's case. And, on the other hand, a flexible approach must be utilized in determining the existence vel non of continuity. It is therefore respectfully requested that the decision of the courts below be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Paul Morris, Esquire, 2600 Douglas Road, Penthouse 2, Coral Gables, Florida 33134, on this the 8th day of March, 1991.

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RICHARD L. SHIFFRIN
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