IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,182

THE STATE OF FLORIDA,

Petitioner,

-v-

DEAN KEVIN LUCAS, et al.,

Respondents.

* *

ON APPLICATION FOR DISCRETIONARY REVIEW

* *

BRIEF ON THE MERITS OF RESPONDENTS MARTIN GELLER AND LESLEE GELLER

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TABLE OF CONTENTS

ISSUE PRESENTED FOR REVIEW

WHETHER THE DECISION BELOW CORRECTLY AFFIRMED THE GRANTING BY THE TRIAL COURT OF THE DEFENDANTS' MOTION TO DISMISS THE ALLEGED RICO ACT VIOLATIONS WHICH FAILED TO ALLEGE THE ELEMENT OF CONTINUITY.

TABLE OF CITATIONS

Cases

Florida Rules of Criminal Procedure

Florida Statutes

United States Code

STATEMENT OF THE CASE AND FACTS

The following facts are derived from the decision sought to be reviewed.

A fifty-four count information was filed against the defendants charging them in count one with violation of the Florida RICO (Racketeer Influenced and Corrupt Organization) Act and in count two with conspiracy to violate the Florida RICO Act. The other counts charged various criminal offenses distinct from the RICO charges, including unlawful operation of boiler rooms, organized fraud, grand theft, and fraudulent sale of security investments.

The information alleged that law enforcement authorities had closed a boiler room operation known as Wellington Precious Metals. The defendants obtained and used former Wellington client lists to solicit investments by telephone from former Wellington clients in nonexistent precious metals, misrepresenting themselves as agents of the Florida Attorney General's Office and leading the former Wellington clients to believe the defendants would assist in getting back defrauded investment funds. This scheme involved seventeen former Wellington clients and existed from October 1, 1985 to March 31, 1986.

The defendants moved to dismiss the two RICO counts for failure to sufficiently allege a pattern of racketeering activity. The trial court granted the motion and the Third District affirmed in State v. Lucas, 570 So.2d 952 (Fla.3d

DCA 1990). On the state's motion for rehearing, the Third District certified to this court that the decision involved a question of great public importance as to the applicability and scope of the continuity requirement in a RICO prosecution. Id.

SUMMARY OF THE ARGUMENT

The RICO charges were properly dismissed by the trial court and the dismissal was properly affirmed by the Third District because the charges failed to allege the essential element of continuity.

ARGUMENT

THE DECISION BELOW CORRECTLY AFFIRMED THE GRANTING BY THE TRIAL COURT OF THE DEFENDANTS' MOTION TO DISMISS THE ALLEGED RICO ACT VIOLATIONS WHICH FAILED TO ALLEGE THE ELEMENT OF CONTINUITY.

The decision below held that the counts of the information which charged violations of the Florida RICO Act were properly dismissed upon the defendants' motion because the essential element of continuity was lacking. State v. Lucas, 570 So.2d 952 (Fla.3d DCA 1990). Consistent with decisions of this court and various district courts of appeal, the ruling of the Third District ensures that the Florida RICO Act will not be expanded beyond its intended limits.

The state's brief relies almost exclusively upon decisions of the Supreme Court of the United States, federal circuit courts of appeal, and federal district courts that have interpreted the federal RICO statute. Although the Florida RICO Act was derived from the federal statute, Moorehead v. State, 383 So.2d 629 (Fla.1980), the federal and Florida RICO statutes are materially different in language and scope. These differences, along with the Florida appellate court decisions addressing those differences, are overlooked by the state. The differences between the state and federal RICO statutes are highly relevant to the determination of the legal requirements for charging a RICO violation under Florida law.

Although the state's brief rests upon federal decisions interpreting the federal RICO Act, not one of those decisions holds that under the federal RICO act, a criminal charge is legally sufficient in the absence of any allegation regarding continuity. Even if there were such a federal ruling, the decision below would nevertheless be correct because of the narrower scope of the Florida RICO Act and pursuant to pleading requirements of Florida criminal law. Additionally, in view of the conflicting and vague interpretations of the federal RICO statute which plague the federal courts, this court should decline the state's invitation to enter that morass.

In "A" below, the Florida and federal RICO Acts are discussed and contrasted. In "B", the state's procedural argument is answered. Finally, in "C", the merits of the decision of the Third District are addressed.

A. Florida RICO and Federal RICO

In Bowden v. State, 402 So.2d 1173 (Fla.1981), this court was faced with a claim that The Florida Racketeer Influenced and Corrupt Organization [RICO] Act, Section 943.46 et seq., Florida Statutes (1977), renumbered as Section 895.01 et seq., Florida Statutes (1981), was facially unconstitutional because it imposed strict liability without requiring criminal intent or knowledge and because it punished protected activities.[1] In rejecting the attack presented in Bowden, the court noted that the Florida

RICO statute, by its own limiting terms, applied only to those activities of an enterprise conducted through a "pattern of racketeering activity." Id., at 1174, quoting then Section 943.462(3), Fla.Stat. (1977). The court also noted that the statute's definition of "pattern of racketeering activity"[2] suggested "that the similarity and interrelatedness of racketeering should be stressed" so as to require "more than accidental or unrelated instances of proscribed behavior." Id.[3] In addition to the foregoing limitations, the court further narrowed the element of "pattern" as follows:

> We construe the "pattern" element to require, in addition to similarity and interrelatedness of racketeering activities, proof that a continuity of particular criminal activity exists.

Id. Such a construction, the court held, would properly restrict the target of RICO Act prosecutions to the professional or career criminals. Id.

The Bowden interpretation of the Florida RICO Act was followed by the Fourth District in State v. Russo, 493 So.2d 504 (Fla.4th DCA 1986), review denied 504 So.2d 768 (1987). In that case, the information charged a Florida RICO violation based upon one count of trafficking marijuana and one count of conspiracy to traffic the same marijuana. The trial judge dismissed the charge and the state appealed. As in the case at bar, the state argued for reversal based upon decisions of the federal courts interpreting the federal

RICO statute, 18 U.S.C. §§ 1961-1968. Those decisions, the state argued, held that if a defendant is charged with any substantive offenses within the definition of racketeering and also conspiracy, then a federal RICO violation can be alleged.

The Fourth District refused to engraft the broad federal interpretation upon the Florida statute, noting that in drafting the Florida RICO Act, the state legislature defined "pattern of racketeering activity" more narrowly than Congress had in the federal RICO statute. The Florida RICO Act provides as follows:

> "Pattern of racketeering activity" means engaging in at least two INCIDENTS of racketeering conduct....

Section 895.02(4), Fla.Stat. (1981) (emphasis supplied). By contrast, the federal RICO statute provides the following:

> "Pattern of racketeering activity" requires at least two ACTS of racketeering activity....

18 U.S.C. § 1961(5) (e.s.). The replacement by the Florida legislature of the word "acts" with the word "incidents" was clearly deliberate and the Fourth District implemented the intended distinction between the two words[4] as follows:

> While the Florida RICO statute is similar to the federal RICO statute it contains one important difference. Florida RICO refers to "two incidents" of racketeering conduct whereas federal RICO requires "two predicate acts." We believe that the legislature intended to narrow the application of the Florida RICO statute by this language. This interpretation is in line with the Florida Supreme Court's determination that the proper target of RICO prosecutions will be the career criminal. See Bowden v. State, 402 So.2d 1173

(Fla.1981). Thus, we affirm the dismissal of the defective indictment.

Russo, 493 So.2d at 505.

In the case at bar, the state argues that federal decisions interpreting the federal RICO statute should control the issue of legal sufficiency of a Florida RICO charge. In so arguing, the state has failed to take into account the differences in both scope and terminology between the Florida and federal RICO statutes. Consequently, the state's argument squarely conflicts with Bowden and Russo. In fact, one of the cases relied upon by the state (at pages 6 and 11 of its brief) is United States v. Hobson, 893 F.2d 1267 (11th Cir.1990), which interpreted the federal RICO statute to require the opposite result reached in Russo by the Fourth District in its interpretation of the Florida RICO Act. Under Hobson, a defendant can be charged with federal RICO for importation and possession of the same load of contraband. Because the Florida RICO Act was never intended to be applied as broadly as the federal statute, the state's reliance upon the federal decisions is misplaced and there is no reason to overrule Bowden or Russo.

Federal RICO decisions have never been known for their clarity or harmony. Over the years, perhaps no other area of federal decision-making has resulted in more splits among the circuits. When the United States Supreme Court attempted to "clear the air" in H.J. Inc. v. Northwestern

Bell Tel. Co., ___ U.S. ___, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), matters got worse. H.J. Inc. is the case most heavily relied upon by the state. It is also the most compelling evidence of why this court should not follow federal interpretations of the federal act.

In H.J. Inc., a civil case, the Supreme Court sought to clarify the meaning of the pattern requirement of the federal RICO statute. The Court rejected the idea "that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes." Id., 109 S.Ct. at 2899. Instead, the Court held, consistent with what had previously been stated by the Court in the famous footnote 14 of Sedima, S.P.R.L. v. Imrex Company, Inc, 473 U.S. 479, 496 n.14, 105 S.Ct. 3275, 3285 n.14, 87 L.Ed.2d 346 (1985), that there must be "continuity plus relationship" among the acts of racketeering to constitute a pattern. However, the Court's attempt to define continuity and relationship[5] was so confusing and vague that Justice Scalia filed a concurring opinion (joined by Justices Rehnquist, O'Connor and Kennedy) stating the following:

> [Following Sedima] the district and circuit courts set out "to develop a meaningful concept of "pattern," ... and promptly produced the widest and most persistent circuit split on an issue of federal law in recent memory.... Today, four years and countless millions in damages and attorney's fees later (not to mention prison sentences under the criminal provisions of RICO), the Court does little more than repromulgate those hints as to what RICO means, though with the caveat that Congress intended that they be applied using a "flexible approach." ...

> Elevating to the level of statutory text a phrase taken from the legislative history, the Court counsels the lower courts: "continuity plus relationship." ... This seems to me about as helpful to the conduct of their affairs as "life is a fountain."

H.J. Inc., 109 S.Ct., at 2906-07 (Scalia, J., concurring) (citations omitted). Justice Scalia went on to find the majority opinion so vague that he questioned whether the federal RICO statute could now withstand constitutional attack:

> No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

Id., at 2909.

The message is clear. Federal decisions interpreting the federal RICO statute should be relied upon with great caution and only when those rulings would advance rather than thwart the intent of (much less jeopardize the constitutionality of) our narrower statute.[6]

B. The Procedural Issue.

The state contends that the failure of the RICO counts to satisfy the element of continuity cannot be raised by a pretrial motion to dismiss without an evidentiary hearing. The state argues that had there been an evidentiary hearing it could have demonstrated that the alleged RICO conduct would have continued beyond the brief period alleged in the

information thereby satisfying the continuity requirement. This procedural argument is without merit.

To charge one with an offense defined by statute, the accused must be plainly and unmistakably placed within the criminal statute and all reasonable doubts must be resolved in his favor. Nell v. State, 277 So.2d 1, 4 (Fla.1973). An information must allege each of the essential elements of a crime to be valid. State v. Dye, 346 So.2d 538, 541 (Fla.1977). No essential element can be left to inference. Id.

For example, in Beatty v. State, 418 So.2d 271 (Fla.2d DCA 1982), the state charged the defendant with various offenses including violation of the RICO statute. In a pretrial motion, the defendant challenged the sufficiency of the RICO charge which alleged that the defendant and others

> "did engage in at least two incidents of racketeering conduct; to-wit: Conspiracies to Commit Violations of F.S. Ch. 893, relating to drug abuse prevention and control, the said conspiracies having the same or similar intents, results, accomplices, victims, or methods of commission or otherwise being interrelated by distinguishing characteristics and not being isolated incidents..."

Id., at 272. The Second District found the charge legally insufficient for failure to specify further the underlying conspiracies alleged, distinguishing State v. Whiddon, 384 So.2d 1269 (Fla.1980) (wherein this court held that the allegation of a RICO "enterprise" could properly be couched

in the language of the statutory definition) because Whiddon did not pass upon the sufficiency of the allegations of the predicate offenses. In Beatty, as in the case at bar, the legal insufficiency of the RICO charge was properly challenged in a pretrial motion to dismiss. Such is in keeping with Rule 3.190, Florida Rules of Criminal Procedure, which recognizes that a motion to dismiss can attack the form or substance of an information. See also State v. Covington, 392 So.2d 1321, 1324 (Fla.1981) ("The question of the sufficiency of the information was before the trial court, having been raised by the appellees in their motions to dismiss.").

The general rule is that where an essential element of a crime is imprecisely or incompletely alleged, a timely motion to dismiss is needed to preserve the error, but where an information is wholly lacking in an essential element of a crime, the total omission is deemed fatal. State v. Gray, 435 So.2d 816 (Fla.1983); State v. Dye, supra at 541; State v. Fields, 390 So.2d 128, 130 (Fla.4th DCA 1980) (cited by this court in Gray). Here, because a motion to dismiss was timely filed and granted, there is no valid claim of procedural default. There is no requirement that the prosecution must be afforded an evidentiary opportunity in order to cure a legally insufficient information. The remedy is dismissal and the state is free to refile a sufficient charge, if that is possible.

C. The Continuity Requirement

Turning to the merits, the controlling fact is the following: the information is completely lacking in any allegation directed toward the element of continuity. The state does not and cannot dispute this fact. The information does nothing more than allege that the conduct in question ended within six months of its commencement. The legal insufficiency of the information is therefore clear. Approval of the ruling below is warranted upon this ground alone.

Additionally, even if the state were to supplement the charges in an attempt to meet the temporal aspect of continuity, that would not be enough because the continuity requirement means more than that, even under post-H.J. Inc. federal analyses. For example, in Marshall-Silver Construction Inc. v. Mendel, 894 F.2d 593 (3d Cir.1990), the court affirmed the trial court's dismissal of a civil complaint alleging a federal RICO Act claim for failure to satisfy the continuity requirement. The court held as follows with regard to the concept of RICO continuity:

> H.J. Inc. can be read to suggest that "continuity" is solely a "temporal concept" and that inquiry into the extent of the criminal activity (e.g., the number of victims, the number of schemes, etc.) is relevant only as it bears on the duration or threatened duration of the repeated criminal conduct. Under this reading, whether the objective of the conduct was to inflict a single injury or a series of injuries would be without consequence so long as the actual or threatened conduct is of substantial duration.

> Without more explicit guidance from the Supreme Court we are reluctant to embrace this reading of H.J. Inc. The concept of "continuity" plays an important constraining role in the operation of the RICO statute. If the extent of the threatened societal injury is deemed irrelevant and we are to focus solely on the period of time over which the predicate acts occurred or the period during which any threatened criminal activity would be likely to last, "continuity" will be present in criminal conduct that clearly does not pose a societal threat worthy of the draconian penalties and remedies available under RICO. Virtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are "related" by purpose and are spread over a period of at least several months.

Marshall-Silver, 894 F.2d at 596-97. See also Menasco, Inc. v. Wasserman, 886 F.2d 681, 683 (4th Cir.1989) (one-year fraud scheme aimed at a single set of victims held insufficient to allege a RICO violation due to lack of continuity), quoted in Marshall-Silver, supra, and expressly relied upon by the Third District below. State v. Lucas, 570 So.2d at 955.

Menasco was relied upon by the Seventh Circuit in United States Textiles, Inc v. Anheuser-Busch Companies, Inc., 911 F.2d 1261 (7th Cir.1990). In that case, while recognizing that the Supreme Court had held in H.J. Inc. that a prosecutor need not show multiple schemes to meet the federal RICO "pattern" requirement, the court held that "[t]his, however, does not mean that the fact that there is only one scheme involved is of no consequence to the 'pattern' determination." Id., at 1269. Rather, the court ruled, various factors must be examined to determine the

sufficiency of a RICO allegation. "Thus, while we realize that the fact of only a single scheme cannot preclude a finding of a RICO pattern, we do believe it is significant when combined with the other relevant factors in showing a lack of the required 'continuity.'" Id. Reiterating what had previously been held in Sutherland v. O'Malley, 882 F.2d 1196 (7th Cir.1989), the court noted:

> 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. Thus, a multiplicity of mailings does not necessarily translate into a 'pattern' of racketeering activity.

911 F.2d at 1268, quoting 882 F.2d at 1205 n.8.

If a federal RICO violation requires allegations of continuity not satisfied merely by a temporal allegation, a fortiori, continuity under the narrower Florida RICO statute also requires more. In scrutinizing the RICO charges for any allegation of continuity, both the trial judge and the Third District went beyond a mere temporal concept and carefully analyzed the other relevant variables, including predicate acts, victims, and the alleged scheme. From these allegations, both courts were unable to glean continuity sufficient to constitute a pattern of racketeering activity. The state contends (without citation to any authority) that it did not have to plead continuity or the reason why continuity was apparently negated on the face of the

information. Petitioner's Brief on the Merits at 7. If this were true, a RICO Act charge would be legally sufficient even if it alleged ordinary fraudulent acts which took place over a period of one hour. Such an absurd result would fly in the face of Bowden which, as even the state recognizes (Petitioner's Brief on the Merits at 8-9), requires continuity in order to limit the application of the statute to the professional or career criminal. Here, the Third District held that even under the post-H.J. Inc. federal decision in Menasco, dismissal was warranted.

An analysis of the RICO charges in the case at bar confirms the reasoning of the Third District, revealing nothing more than a typical boiler room operation broken down into various acts of fraud. Count 1 charges racketeering and Count 2 charges conspiracy to engage in racketeering. The boiler room scheme is divided into numerous acts of racketeering activity appearing in subsections A through SSS of Count 1. Subsection A alleges organized fraud in violation of § 817.036, Fla.Stat., and is further alleged as separate Count 3. Subsections B through R allege the federal offense of wire fraud, 18 U.S.C. § 1343. Subsections T through MM allege the offenses of grand theft, § 812.124, Fla.Stat. T through MM are alleged separately as Counts 4 through 23. Subsections NN through RRR allege the offenses of fraudulent transactions, § 517.301, Fla.Stat. NN through RRR are alleged separately as

Counts 24 through 54. Subsection SSS alleges unlawful operation of a boiler room, § 571.312, Fla.Stat., and is alleged separately as Count 55.

The Florida boiler room statute suggests that the Florida legislature, having prohibited ordinary boiler room operations, never intended that every boiler room could be charged as a RICO violation. To warrant a RICO charge, a boiler room operation would have to include additional acts (e.g., extortion), or involve another group of perpetrators involved in other crimes. Through this case, however, the state seeks authority to charge every boiler room as a RICO. In fact, under the state's argument, every scheme to defraud could be charged as a RICO. The Florida RICO statute cannot be so broadened unless it is rewritten.

Unless every boiler room operation is necessarily a RICO violation, Counts 1 and 2 fail to allege a pattern of racketeering conduct. These counts charge but a single scheme boiler room operation involving a discrete set of victims during a short period of time. Even under H.J. Inc., the existence of such a single scheme, while not controlling, remains relevant to resolution of the issues of pattern and continuity. Accord, U.S. Textiles, Inc., supra; Menasco, Inc., supra. However, it must be recalled that the narrower Florida RICO Act element of pattern of racketeering activity requires at least "two incidents of racketeering

conduct", unlike the federal statute which merely requires two "acts of racketeering activity." Thus, the Florida statute by its own terms requires more. State v. Russo, supra. As in Russo, the information here alleges the perpetration of a single boiler room scheme effected through the commission of numerous predicate offenses as is the case with every boiler room. Although the predicate offenses qualify as "racketeering activity", there is but one "incident" of racketeering "conduct." Thus, whether viewed under state or federal interpretations, the RICO counts do not meet the pattern requirement.

The decision below did not pass upon whether the state could prove continuity at a trial should a legally sufficient information be filed. Because that issue is not before this court, the state's lengthy discussion (Petitioner's Brief on the Merits at 8-12) regarding how continuity and relationship as defined in H.J. Inc., supra, and its federal progeny can be established at trial is not relevant. To what degree Florida courts adopt the definitions from H.J. Inc. to test sufficiency of proof at trial remains to be seen. In Tinwood N.V. v. Sun Banks, Inc., 570 So.2d 955 (Fla.5th DCA 1990), the court measured the trial evidence of continuity against H.J. Inc. as well as the decision by the Third District in the case at bar and affirmed a directed verdict on the basis that the defendant's conduct had a limited purpose directed to a

limited group and "covered only a short-term operation with no reasonable possibility of continuous existence." Id., at 961. Whether such a "reasonable possibility" can be proven in this case remains to be seen. The controlling factor is not what the state might prove at trial, but that the charging document fails to allege the element of continuity. Accordingly, the decision of the Third District should be approved.

FOOTNOTES

[1] This court had previously upheld the Act against an overbreadth and vagueness attack in Moorehead v. State, supra.

[2] "Pattern of racketeering activity" under the Florida RICO Act is defined as follows:

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

§ 895.02(4).

[3] As noted in Moorehead, supra at 630, unlike the federal RICO statute, the Florida RICO Act expressly limits "pattern of racketeering activity" to incidents that are related and not isolated.

[4] An "act" is "the doing of a thing", a "deed"; an "incident" is "something dependent on or subordinate to something else of greater or principal importance." Webster's Ninth New Collegiate Dictionary (1988).

[5] The Court in H.J. Inc. defined continuity as follows:

> "Continuity" 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.... 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.

H.J. Inc., 109 S.Ct. at 2902. The concept of relationship was defined as follows:

> "'[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of

commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'"

Id., at 2901 (quoting 18 U.S.C. § 3575(e)).

[6] "If a Florida statute is patterned after a federal law, on the same subject, it will take the same construction in the Florida courts as its prototype has been given in the federal courts insofar as such construction is harmonious with the spirit and policy of Florida legislation on the subject. Kidd v. Jacksonville, 97 Fla. 297, 120 So. 556 (1929); State ex rel. Packard v. Cook, 108 Fla. 157, 146 So. 223 (1933)." Pasco County School Board v. Florida Public Employees Relations Commission, 353 So.2d 108, 116 (Fla.1st DCA 1977).

CONCLUSION

Based upon the foregoing, the respondents respectfully request that the decision below be approved.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of this brief was mailed to Richard L. Shiffrin, Counsel for Petitioner, Office of the State Attorney, 1351 N.W. 12th Street, Miami, FL 33125, and Gary Weiner, 901 S.W. 17th Street, Suite 208, Ft. Lauderdale, FL 33316, Valerie Jonas, Assistant Public Defender, 1351 N.W. 12th Street, 8th Floor, Miami, FL 33125, this 30th day of May, 1991.

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