IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,363

THE STATE OF FLORIDA,

Petitioner,

vs.

ROBERT LOGAN PARKER,

Respondent,

ON APPLICATION FOR DISCRETIONARY JURISDICTION

BRIEF OF PETITIONER ON THE MERITS

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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 Respondent, Robert L. Parker, was the Appellee and will be referred to as "the Respondent." The symbol "R" will refer to the record on appeal and the symbol "T" will designate the transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

A. Statement of Proceedings

The instant matter commenced with the Petitioner seeking review of an order dismissing one count of an Information charging a violation of Sections 895.02 and 895.03, Fla. Stat. (1985) (RICO). In the trial court, the movants, the Respondents here, challenged the RICO count for failing to state a RICO enterprise and for failing to allege at least two incidents of racketeering conduct. (R. 40-43) 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. 40-43) In response, the Petitioner argued that in order to prove a "pattern of racketeering activity" all that is necessary is to show that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity. The Petitioner maintained that the scheme in the present case was directed at the general public and that since the investment offering did not target a specific finite group it was capable of continuing to accrue new victims.

By order date June 28, 1991, the trial court dismissed the count of the information charging a RICO violation. It specifically found that the allegations did not set forth a prima facie case of "pattern of racketeering activity" in that since the enterprise was comprised of a discrete and finite set of investors, there was no threat of continued criminal activity in the future. (R. 75-81) Appeal to the Third District Court of Appeal was taken from this adverse ruling by notice filed on July 2, 1991. (R. 82-83) The filing of briefs ensued in the fall of 1991 and oral argument before the Third District Court was held in the winter of 1991. Again, the only relevant issue discussed in all the briefs was the correctness of the trial court's holding that the information failed to allege sufficient continuity to show a "pattern of racketeering activity." On December 31, 1991, the Third District affirmed the trial court's ruling in a per curiam opinion which cited to State v. Lucas, 570 So.2d 952 (Fla. 3d DCA 1990) and H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S.Ct. 2893, 2902, 106 L.Ed.2d 195, 209-210 (1989), on the basis of lack of continuity. Petitioner timely sought rehearing which was denied on January 28, 1992. 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 defendant, Robert Logan Parker, was charged by information with committing a violation of the Florida Racketeer Influenced and Corrupt Organization Act (RICO) which resulted in at least two incidents of racketeering. (R. 11) The defendant engaged in this enterprise while acting as president for the corporation Lucayan Grove Limited Corporation. (R. 12) The defendant organized a limited partnership, Lucayan Tropical Groves Partners, Ltd., which he used for an investment offering involving the cultivation of unimproved land, and its transformation into lime groves. Id.

In this offering the defendant, through Lucayan Groves Limited was the "general partner" responsible for development of the land. Id. The nature of the scheme required the "general partner" to supply the escrow agent, Northern Trust Bank, with proof that the land was being fully developed and in return the escrow agent would disburse the money. Id. During the course of the enterprise the defendant submitted false proof to the escrow agent regarding the development of the land. Id. The defendant engaged in as many as six different incidents of racketeering through theft by presenting false proof to the escrow agent. (R. 13-14)

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 both the Third District and the trial court 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.

ARGUMENT

I.

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 943.45, 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 State v. Lucas, 570 So.2d 952 (Fla. 3d DCA 1990). More specifically, there was 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

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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.

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 in 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.

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. ____, 100 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 (3d 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 trial court and 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, the courts relied upon a number of conclusions, all of which could have been refuted by a more complete record. For example, the trial court's order cited to the fact that the acts span only a brief period of fourteen months. (R. 8) But the lower court may not have been aware that predicate acts could have continued indefinitely if law enforcement personnel had not taken the Defendant into custody and exposed their fraudulent scheme. The Petitioner certainly does not have to plead it but should be permitted to demonstrate that, but for the prompt law enforcement response, the Respondent would have gone about his criminal business for years. Further, the period in question extended for almost fourteen (14) months, twice as long as the six-month fraudulent scheme alleged in Geller/Lucas.

The trial court's order as well as the Third District's opinion which relies on Lucas also placed great emphasis upon the discrete set of victims, but again missed the mark. Perfectorily, 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: investors in a limited partnership known as Lucayan Tropical Groves Partners, Ltd. (R. 76) Presumably this fact was deduced from the sixty-seven (67) investors named as part of the general partnership. However, the full scope of the racketeering activity need not have been fully described in the charging document. In fact, Lucayan Grove Partners Limited, was a general offering to the public and "the defendant continued to solicit and take in funds from that solicitation, throughout the course of the RICO that we have charged here. (T. 31) Although the partnership offering was initially limited to forty (40) lots, these lots could be subdivided and additional land could be bought. In principle, since the offering was public, additional investor interest could fuel the growth of the scheme. Of course, no opportunity to develop this fact was made available and the trial court and Third District have seemingly overlooked it.

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 order of the trial court seized upon the definition of continuity provided in H.J. but then failed to reasonably and rationally apply it. Firstly, the trial court and the Third District in Lucas 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's order neglected to adduce this factor. The only business the Respondent was 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. Therefore, 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 an 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 an operation designed merely to fraud investors.

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 trial court's order opined that, in their view, "the period of 14 months ... was a relatively brief period of conduct

and specifically did not pose a threat of future long term racketeering conduct (R. 80), that court utterly failed to consider the nature of the enterprise.

What the trial court did do was to resolve the question of continuity on the basis of one clearly distinguishable civil case: Madden v. Glock, 815 F.2d 1163, 1164 (8th Cir. 1987). Not only is Madden 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 the criminal conduct of the Respondents here. Madden involved defendants whose actions were narrowly directed towards a single fraudulent goal: to control the activities of St. Louis Globe Democrat Inc. with the sole purpose of prolonging its life by creating an illusion that the company was solvent and able to pay its debts while all the while diverting the companies' assets to their own use and later selling their stock. The Court held in Madden that although the alleged acts were sufficiently related to form a pattern, the constituted mere subdivision of only one fraudulent scheme. However, the Court overlooked the fact that in the present case the very nature of the enterprise involves soliciting new debtors through a public offering and therefore constituted more than once scheme. Further, because of the nature of the enterprise in soliciting new debtors the schemes were capable of lasting well past the 14 months alleged in the information. 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.

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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).

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.

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; United States v. O'Connor, supra; United States v. Coiro, supra; United States v. Link, supra.

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.

The Respondent engaged in a scheme direct at the general public; although only sixty-seven (67) investors were identified as targets of the scheme more investors could have been solicited; while there were initially only forty (40) lots in the partnership, these lots could have been subdivided and additional land could have been bought. Such an open-ended racketeering scheme is completely distinguishable from the victims and time limited schemes in the aforementioned civil cases as well as Lucas.

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.

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 PETITIONER'S BRIEF ON THE MERITS was furnished by mail to MARC S. NURIK, ESQ., Suite 2612, C & S Bank Building, One Financial Plaza, Fort Lauderdale, Florida 33394 on this 16th day of March, 1992.

RICHARD S. FECHTER
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