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 RESPONDENT ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

Whether the decision below correctly affirmed the granting by the Trial Court of the Respondent's Motion to Dismiss Count I alleging a Rico violation for failure to allege the element of continuity.

TABLE OF CITATIONS AND OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

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

Respondent was charged by information, Count I, with committing a violation of the Florida Racketeer Influenced and Corrupt Organization Act (R.I.C.O.) (R. 1-20). The state alleges Respondent engaged in activity that violated the Florida R.I.C.O. Act while President of Lucayan Groves Limited Corporation. The State further alleges that Respondent organized and utilized a limited partnership, Lucayan Tropical Grove Partners, Limited, for an investment offering involving the cultivation of unimproved land on Grand Bahama Island.

The State charges that in this offering, Respondent, through Lucayan Groves, Limited, was the "general partner" and responsible for development of the land. As land was developed, Respondent, as a general partner of Lucayan Groves, Limited, would supply an escrow agent, Northern Trust Bank, with proof that a tract of land had been developed and planted with lime trees. Upon presentation of proof, the escrow agent would disperse funds to Respondent through Lucayan Groves, Limited.

The State charges that Respondent engaged in as many as six different incidents of racketeering by presenting false proof of development to the escrow agent. The State has also charged Respondent with six counts of grand theft relating to the alleged fraudulent acquisition of funds from the escrow agent, Northern Trust Bank.

Respondent moved to dismiss Count I charging the R.I.C.O. violation on the grounds that it failed to allege a pattern of racketeering activity (R. 50-58). The trial court granted Respondent's motion to dismiss (R. 75-81). Third District affirmed the ruling of the trial court upon the authority of: State v. Lucas, 570 So.2d 952 (Fla. 3d DCA 1990); and H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 2902, 106 L.Ed. 2d 195, 209-10 (1989); Menasco, Inc. v. Wasserman, 886 F.2d 681 (4th Cir. 1989); Tinwood N.V. v. Sun Banks, Inc., 570 So.2d 955 (Fla. 5th DCA 1990) (R. 84). On the State's motion for rehearing, the Third District certified to this court that the decision involves a question of great public importance as to the applicability and scope of the continuity requirement in a R.I.C.O. prosecution (R. 85).

SUMMARY OF ARGUMENT

The information fails to allege sufficient facts necessary to establish a pattern of racketeering activity as required by Section 895.03 (3), Florida Statutes (1981). State v. Lucas, 570 So.2d 952 (Fla. 3d DCA 1990). The racketeering activity which has been alleged constitutes but one scheme comprised of separate offenses by the manner in which it was effectuated and fails to allege the essential element of continuity. Accordingly, Count I charging Respondent with a R.I.C.O. violation was properly dismissed by the trial court and the dismissal was properly affirmed by the Third District.

ARGUMENT

THE THIRD DISTRICT CORRECTLY AFFIRMED THE GRANTING BY THE TRIAL COURT OF THE RESPONDENT'S MOTION TO DISMISS COUNT I ALLEGING A R.I.C.O. VIOLATION FOR FAILURE TO ALLEGE THE ELEMENT OF CONTINUITY.

The decision below held that Count I of the information which charged a violation of the Florida R.I.C.O. Act was properly dismissed upon the Respondent's motion because it failed to allege the essential element of continuity. State v. Lucas, 570 So.2d 952 (Fla. 3d DCA 1990); and see: H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2892, 2902, 106 L.Ed.2d 195, 209-10 (1989); Menasco, Inc. v. Wasserman, 886 F.2d 681 (4th Cir. 1989); Tinwood N.V. v. Sun Banks, Inc., 570 So.2d 955 (Fla. 5th DCA 1990).[1] The Third District's decision thus ensures that the Florida R.I.C.O. Act will not be construed in a manner which was not intended by the legislature.

The State's brief relies heavily on decisions from the Supreme Court of the United States, Circuit Courts of Appeal and Federal District Courts which interpret the Federal R.I.C.O. Statute. The State fails to recognize that the Federal and Florida R.I.C.O. statutes are materially different in both language and scope. This oversight is highly relevant to a determination of whether the legal requirements for charging a R.I.C.O. violation have been satisfied under Florida law.

In point "A" below, the Florida and Federal R.I.C.O. Acts are

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[1] Similarly, the decision in Lucas, supra, has been certified as involving a question of great public importance and is presently pending determination before this Court.

analyzed and distinguished. In point "B", the merits of the decision of the Third District are addressed.

A. FLORIDA R.I.C.O. AND FEDERAL R.I.C.O.

In Bowden v. State, 402 So.2d 1173 (Fla. 1981), this Court upheld the constitutionality of the Florida Racketeer Influenced and Corrupt Organization [R.I.C.O.] Act., Section 943.46 et seq., Florida Statutes, (1977), renumbered as Section 895.01 et seq., Florida Statutes, (1981). In rejecting Bowden's claim of unconstitutionality because Section 943.46 imposed strict liability without requiring criminal intent or knowledge, Justice Adkins noted that the Florida R.I.C.O. Statute, by its own limitations, applies only to those activities of an enterprise conducted through a "pattern of racketeering activity." Id. at 1174. The court also noted that the statute's definition of "pattern of racketeering activity"[2] suggests that "the similarity and interrelatedness of racketeering activities should be stressed in determining whether a 'pattern of racketeering' exists." Id, at 1174. The Court specifically noted that "the word 'pattern' clearly requires more than accidental or unrelated instances of proscribed behavior."

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[2] Section 895.02 (4), Florida Statutes defines "pattern of racketeering activity" as:

> Engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims or methods of commission or that 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 five years after a prior incident of racketeering conduct.

Id. In addition to these 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. The Court stated that by imposing such a construction, the target of R.I.C.O. Act prosecutions will be, appropriately, professional or career criminals. Id.

In State v. Russo, 493 So.2d 504 (Fla. 4th DCA 1986), review denied 504 So.2d 768 (1987), the Bowden interpretation of the Florida R.I.C.O. Act was followed by the Fourth District. In Russo, supra, the information charged a violation of Florida's R.I.C.O. Act based upon one count of trafficking in cannabis and one count of conspiracy to traffic the same cannabis. The State appealed dismissal of the R.I.C.O. charge. There, as here, the State argued for a reversal based upon the decisions of Federal Courts interpreting 18 U.S.C. §§ 1961-1968, the Federal R.I.C.O. Statute. The State argued that the Federal decisions held that if a defendant is charged with any substantive offenses within the definition of racketeering and conspiracy, then a R.I.C.O. violation can be alleged.

The Fourth District declined to interpret the broad Federal interpretation upon the Florida R.I.C.O. statute noting that the State legislature narrowed the definition of "pattern of racketeering activity" more so than Congress had in enacting the Federal Statute. The Florida R.I.C.O. Act provides as follows:

"Pattern of racketeering activity" requires engaging in

at least two incidents of racketeering conduct..."

Section 895.02 (4), Florida Statutes (1981) (emphasis supplied). In contrast, the Federal R.I.C.O. Statute states:

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

18 U.S.C. §1961 (5). The replacement of the word "acts" with the word "incidents" by the Florida legislature was clearly deliberate and the Fourth District recognized the distinction between these two words by stating:

> While the Florida Statute is similar to the Federal R.I.C.O. Statute, it contains one important difference. Florida R.I.C.O. refers to "two incidents" of racketeering conduct whereas the Federal R.I.C.O. requires "two predicate acts". We believe that the legislature intended to narrow the application of the Florida R.I.C.O. Statute by this language. This interpretation is in line with the Florida Supreme Court's determination that the proper target for R.I.C.O. 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.

State v. Russo, 493 So.2d at 505.

In the case at bar, the State urges the Court to rely upon Federal decisions interpreting the Federal R.I.C.O. Act in determining the legal sufficiency of allegations charging a violation of Florida's R.I.C.O. Act. The State, however, never addresses the substantive differences between the Federal and Florida R.I.C.O. Acts. Moreover, Florida courts have readily recognized that the Florida R.I.C.O. Act is to be construed more narrowly than the Federal counterpart. Consequently, the State's reliance on Federal decisions interpreting the Federal R.I.C.O. Act conflicts with the well reasoned opinions of Bowden and Russo,

supra.

Decisions interpreting the Federal R.I.C.O. Act have resulted in numerous splits amongst the circuits. When the United States Supreme Court attempted to clarify this issue in H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), matters grew worse.

In H.J. Inc., supra, a civil case, the United States Supreme Court sought to clarify the meaning of the pattern requirement of the Federal R.I.C.O. 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 that "a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. Id. at 492 U.S. 239.

The Court in H.J. Inc., supra, 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 R.I.C.O. 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 R.I.C.O. with long term criminal conduct."

H.J. Inc., 109 S.Ct. at 2902.

The concept of relationship was defined as follows, by the Supreme Court in H.J. Inc.:

> "(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)).

> [Following Sedima] the District and Circuit Courts set out "to develop a meaningful concept of "pattern,"...and promptly produced the wildest and most persistent circuit split on an issue of Federal law in recent memory...Today, four years and countless millions in damages and attorneys' fees (not to mention prison sentences under the criminal provisions of R.I.C.O.), the Court does little more than repromulgate those hints as to what R.I.C.O. 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., 492 U.S. at 251-52. (Scalia, J. concurring).

Justice Scalia concluded that the Court's opinion was so vague that he questioned whether the Federal R.I.C.O. Statute could withstand a 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 255-56.

Justice Scalia's concurring opinion in H.J., Inc. is the most compelling reason why this Court should not follow Federal interpretations of the Federal R.I.C.O. Act. Moreover, Federal decisions interpreting the Federal R.I.C.O. Act should be relied upon with caution and only when their effect will advance the intent of our narrower Florida Statute.

B. THE CONTINUITY REQUIREMENT

The information is devoid of 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 Respondent's alleged illegal conduct involved a discrete and finite set of victims. The legal insufficiency of the information is therefore clear. Affirmance of the ruling below is warranted on this ground alone.

Even if the State were to supplement its information in an attempt to meet the requisite element of continuity, that would not be enough. The continuity requirement means more than just satisfying the "temporal" aspect of continuity. 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 R.I.C.O. violation for failure to meet the continuity requirement. The Court stated:

> H.J. Inc. can be read to suggest that "continuity" is solely a "temporary concept" and that inquiry into the extent of 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 R.I.C.O. 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 R.I.C.O. 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 scheme to defraud aimed at a limited number of victims failed to meet the continuity element necessary for establishing a R.I.C.O. violation), quoted in Marshall-Silver, supra, and expressly relied upon by the Third District below (R. 84)

In addressing the continuity requirement of the Federal R.I.C.O. Act in United States Textiles, Inc. v. Anheuser-Busch Companies, Inc., 911 F.2d 1261 (7th Cir. 1990), the Seventh Circuit relied upon Menasco in reaching its decision. In U.S. Textiles, the Court, recognizing the Supreme Court's pronouncement in H.J. Inc., that a prosecutor need not show multiple schemes to meet the Federal R.I.C.O. "pattern" requirement, 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. Instead, the Court ruled that various factors must be reviewed to determine the sufficiency of a R.I.C.O. scheme. "Thus, while we realize that the fact of only a single scheme cannot preclude a finding of a R.I.C.O. pattern, we do believe it is significant when combined with the other relevant factors in showing a lack of the required 'continuity'". Id.

"Continuity" is "centrally a temporal concept." H.J. Inc., 109 S.Ct. at 2902. In a related case, Ochs v. Shearson Lehman

Hutton, Inc., 768 F.Supp. 418 (S.D.N.Y. 1991), the court, relying upon H.J. Inc. stated "[a] number of similar acts may establish relatedness for R.I.C.O. purposes, but relatedness and continuity are "distinct requirements", and related predicate acts do not satisfy the continuity requirement unless they extend "over a substantial period of time". In scrutinizing the R.I.C.O. charge for the requisite allegation of continuity, both the trial judge and the Third District went beyond a mere temporal concept and analyzed other relevant variables, including predicate acts, victims and the alleged scheme. From the information, both courts were unable to determine that the requisite degree of "continuity" existed sufficient to constitute a pattern of racketeering activity.

The State maintains that Respondent's conduct satisfies the continuity requirement for alleging a R.I.C.O. Act violation. An analysis of the R.I.C.O. charge reveals otherwise. First, Respondent's limited partnership, Lucayan Tropical Grove Partners, Limited, consisted of a discrete and finite set of sixty-seven (67) investors. Second, a finite amount of land was involved; to wit: Forty (40) lots. The amount of land along indicates the affairs of the partnership were limited and would be concluded at an ascertainable time. There was no threat of continued criminal activity beyond the readily defined affairs of the partnership. To suggest otherwise is purely conjectural and does not satisfy the requirements of pleading a R.I.C.O. violation. Id., Ochs at 426.

The facts alleged by the State in Count I constitute no more

than a subdivision of one fraudulent scheme. Even under H.J. Inc., the existence of such a single scheme remains relevant to resolution of the issues of pattern and continuity. However, it must be noted that the narrower Florida R.I.C.O. Act element of pattern of racketeering activity requires at least "two incidents of racketeering conduct," as opposed to the Federal Statute which only requires two "acts of racketeering activity." As such, the Florida Statute mandates a greater burden than its Federal counterpart. State v. Russo, supra. As in Russo, the information here alleges the perpetration of a single land sale scheme effectuated through the use of numerous predicate offenses. Although the predicate offenses "may" qualify as "racketeering activity", there is only one "incident" of racketeering "conduct". Thus, whether analyzed under the narrower Florida Statute or the broader Federal interpretations, Count I fails to satisfy the pattern requirement by not alleging the element of "continuity". Accordingly, the decision of the Third District should be affirmed.

CONCLUSION

Based upon the foregoing, the Respondent respectfully requests that the decision of the Third District Court of Appeal be approved.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. mail to: RICHARD S. FECHTER, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Ave., P.O. Box 013241, Miami, Florida, 33101 this 6th day of April, 1992.

By: _____
MARC S. NURIK
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