

067

SUPREME COURT OF FLORIDA

FILED

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CLERK, SUPREME COURT

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STEPHEN L. RUTH etc.,)
 et al.,)
)
 Petitioners,)
)
 v.)
)
 DEPARTMENT OF LEGAL AFFAIRS,)
)
 Respondent.)

CASE NO. 86,872

CORRECTED RESPONDENT'S REPLY BRIEF

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

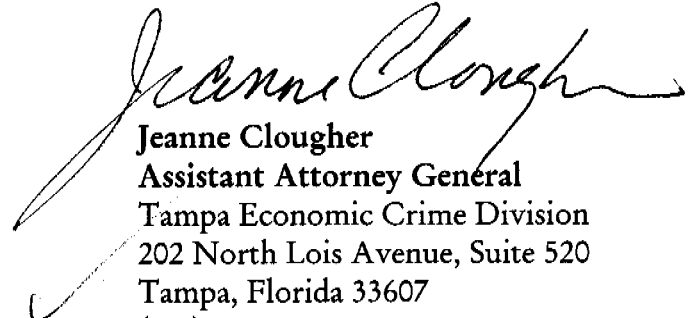

 Jeanne Clough
 Assistant Attorney General
 Tampa Economic Crime Division
 202 North Lois Avenue, Suite 520
 Tampa, Florida 33607
 (813) 871-7255
 Florida Bar No. 0629022

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ADDITIONAL STATEMENT OF THE CASE AND FACTS

Respondent adds the following facts to Petitioners' Statement of the Case and Facts:

On October 3, 1990, the State filed a Civil RICO action pursuant to Florida Statute 895.05 in the Tenth (10th) Judicial Circuit against Stephen L. Ruth (at that time incarcerated in Polk County Jail), Eileen Borg (the mother of Stephen Ruth who resides in Sarasota), and "The M. Eileen Borg Revocable Trust" (the trust ownership and interests were unknown to the State at this time except it was known to have real property located in Sarasota and Charlotte Counties). While incarcerated in Polk County, Ruth solicited an undercover Florida Department of Law Enforcement (FDLE) agent for the contract murder of another FDLE agent whom he deemed partially responsible for his incarceration on drug trafficking charges. Ruth also solicited the death of his former defense attorney, who had alerted authorities that Ruth threatened the lives of Judge Dale Durrence and his family if the maximum sentence was imposed upon him. As payment for the murders, Ruth pledged his interest in the trust property. (App. 1). Ruth also solicited from the agent an escape from incarceration, pledging an interest in the trust assets as payment. Ruth is currently serving time for these convictions as he awaits a federal drug trafficking trial. (R 832-836). The three Defendants were all served personally (service on the trust was obtained through personal service on trustee Eileen Borg). RICO lien notices were filed under all the Defendants' names in Polk, Sarasota and Charlotte Counties pursuant to Chapter 895.07, Florida Statutes. Lis pendens were filed with the known legal descriptions in Sarasota and Charlotte Counties pursuant to Chapter 47, Florida Statutes. The Civil RICO Complaint alleges that Ruth and others violated the RICO Act and that real and personal property had been used and acquired by the Defendants as a result of the violations

and in violation of said Act. The Civil RICO Complaint demands that the Defendants' interests in these monies, properties and interests in property are subject to forfeiture to the State. In addition, or in the alternative, the Civil RICO Complaint demands a money judgment equal to the amount of monies and properties that the Defendants acquired during the entire period of their illegal RICO activities. Significantly, the State was successful in stopping the flow of income from the properties to the Defendants after a full evidentiary hearing and a Second District Court of Appeal reversal. (R 483-487, 489-490).

Shortly after the filing of the State's RICO liens, attorneys for Ruth filed a note and mortgage on the property for payment towards representing the Defendants in this action and the state solicitation charges. Their payment is contingent upon their success in the instant matter. (R 988).

The Honorable Judge Joe Young of the Tenth Judicial Circuit ruled that he had subject matter jurisdiction over the State's action on October 4, 1991. No appeal was taken of that ruling by the Petitioners, nor did they raise it again until their Motion to Dismiss on April 11, 1994, after the State had placed the proceeding on the trial calendar. The State disagrees with Petitioner's Statement of Facts that both parties took the position that the court did not have jurisdiction. (R 402-411). Both parties initially agreed that the court had jurisdiction on July 16, 1991. (R 363). It was only after the court requested memoranda that Defendants changed their position to the surprise of the State. (R 364-367).

During the hearing on Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction held June 6, 1994, the court rejected the State's position that it had subject matter jurisdiction to directly order the forfeiture of property outside its boundaries pursuant to Florida Statute 895. (R 884). The State then argued in the alternative that the court had subject matter jurisdiction over the

Civil RICO proceeding and could order all remedies except the actual transfer of the titles to the land. It could always, however, determine the rights between the parties and order the Defendants to divest themselves of the property to the State. This hearing was continued without a ruling by the judge.

On July 6, 1994, the hearing on the Motion to Dismiss was reconvened along with the State's Renewed Motion to Sever and Transfer Action. The court took judicial notice of a Sarasota Circuit Court order which held that the majority of real property in the trust had been fraudulently conveyed to the trustee, Eileen Borg, by Stephen Ruth to avoid forfeiture and/or the Internal Revenue Service. (App. 2) . Since the Polk County court rejected the argument that it could directly forfeit the real property and because now the trust did not legally own the property that the State sought to forfeit, justice required a transfer to the county where the known property was located. The State requested that the action be split and transferred to the counties where the property was located so that it would not suffer possible statute of limitations or lien priority problems. The court entered an Order Granting State's Motion to Transfer reciting the State's "in the interest of justice" reasoning on August 29, 1994. (R 962-967). It is from this Order that Petitioners appeal.

SUMMARY OF ARGUMENT

Any circuit court may order forfeiture of real and personal property to the State pursuant to Chapter 895.05(2), Florida Statutes. This is because the RICO Action can be brought in personam. It is a personal action brought based on the acts of Defendants. Because it is personal, it is a transitory action and is not subject to the local action rule.

If the RICO Act is not a transitory action, then the legislation intended to expand the subject matter jurisdiction of circuit courts to reach beyond its boundaries to affect the property. Any other interpretation renders the RICO Act useless.

The local action rule does not apply to the RICO Act. It is clearly inconsistent with the intent of the legislature. This renders the common law rule outdated. The RICO Act should be viewed as a catalyst for the elimination of this outdated rule. Any circuit court may order the forfeiture; however, transfer of an action to the circuit court with territorial jurisdiction is certainly within the powers granted pursuant to RICO.

The transfer of the instant action was proper, and the State objects to any reconsideration of said transfer. This question is not before the court.

I. DOES A CIRCUIT COURT WHICH HAS IN PERSONAM JURISDICTION OVER THE DEFENDANT BUT DOES NOT HAVE IN REM JURISDICTION OVER THE PROPERTY HAVE JURISDICTION TO DETERMINE THE RIGHT TO THE PROPERTY AS BETWEEN THE STATE AND THE DEFENDANT IN A CIVIL FORFEITURE ACTION BROUGHT PURSUANT TO CHAPTER 895.05(2), FLORIDA STATUTES?

Yes. Any circuit court may order the forfeiture of real and personal property to the State pursuant to Chapter 895.05(2) Florida Statutes.

A Civil RICO action brought pursuant to Chapter 895.05, Florida Statutes, can be brought in personam as in the instant action. The Legislature modeled Chapter, 895 Florida Statutes, after its federal counterpart 18 U.S.C. 1961-1965 in which Congress intended broad sweeping remedies to combat the economic power of organized crime through the infiltration of illegally acquired proceeds. In doing so Congress directed that "The provisions of this title shall be liberally construed to effectuate its remedial purposes." **Russello v. United States**, 104 S. Ct 296, 302. (1983).

This same intent is enunciated by the State legislature in its Preamble to Chapter 895, Florida Statutes:

WHEREAS, it is consequently the intent of the legislature to enact legislation which will allow the State to successfully pursue the forfeiture of such real property and interests in real property and personal property under the Florida RICO Act and to further prevent the investment by persons charged or in violation of the Florida RICO Act of moneys in real property and interests in real property and personal property in the State . . . Preamble (Laws 1981, C. 81-141)

Every federal decision has held that the federal counterpart RICO is an in personam proceeding and not an in rem action. **United States v. McKinney**, 915 F. 2d 916 (4th Cir. 1990), cert. denied, 111 S. Ct. 680, 112 L.Ed 2d 672, cert. denied, 111 S. Ct. 2258, 114 L.Ed. 2d 711; **United States v. Conner**, 752 F. 2d 566 (11th Cir. 1985), cert. denied, 106 S. Ct. 72, 474 U.S. 821;

United States v. Cauble, 706 F. 2d 1322 (5th Cir. 1983), cert. denied, 104 S. Ct. 996, 465 U.S.1005, 79 L.Ed. 2d 229; **United States v. Huber**, 603 F. 2d 387 (2d Cir. 1979), cert. denied, 445 U. S. 927, 100 S. Ct. 1312. This determination is not dependent on whether or not the proceeding is brought criminally or civilly, but is dependent on whether or not the government brings the action in personam or in rem¹. **United States v. Rosenfield**, 651 F. Supp. 211 (E.D. Pa. 1986).

The government is entitled to a judgment against the Defendant for the amount of all proceeds and assets used and acquired in violation of RICO. Any assets may be forfeited to satisfy this judgment. RICO forfeitures, unlike other statutes, . . . are not a judgment against the property." **United States. v. Argie**, 907 F. 2d 627, 629 (6th Cir. 1990); **United States V. Ginsberg**, 773 F. 2d 798 (7th Cir. 1985), cert. denied, 106 S. Ct. 1186, 89 L.Ed. 2d 302. Divestiture and civil forfeiture are discretionary sanctions used by the court and government to fashion adequate remedies. **United States v. Barber**, 476 F. Supp. 182 (D.W.Va. 1979). Attempts by Defendants in federal cases to have the forfeiture provisions of 18 U.S.C. 1963 interpreted as in rem have been expressly rejected. **United States v. Anguilo**, 897 F. 2d 1169 (1st Cir. 1990), cert. denied, 111 S. Ct. 130, 490 U.S. 845, 112 L.Ed. F. 2d 98. In rejecting the argument that forfeiture pursuant to 18 U.S.C. 1963 was restricted to the traceable in rem interest in an enterprise, the United States Supreme Court stated:

Congress apparently selected the broad term, 'interest' because it did not wish the forfeiture provision to be limited by rigid and technical definitions drawn from other areas of law and because the term was fully consistent with the RICO statute's pattern in utilizing broad terms and concepts. **Russello v. United States**, 104 S. Ct. at 297. (emphasis added)

¹The State asserts that an action may be brought against the property in rem. If the court's jurisdiction is based on the property and not the person then the State's remedy is limited to the property and the State must file the action in the county where the property is located.

In then further rejecting Defendant's argument that the limiting construction was warranted because of language in the State RICO statutes, the Supreme Court said:

. . . Certain state racketeering statutes expressly provide for the forfeiture of "profits, money, interest or property," or "all property real or personal" acquired from racketeering, since those states presumably used such language so as to avoid narrow interpretations of their laws. . . Id.

Our legislature used this very language when it stated at Chapter 895.05(2)(a), Florida Statutes:

All property, real or personal, including money, used in the course of, intended for use in the course of, derived from or realized through conduct in violation of a provision of § 895.01-895.05 is subject to civil forfeiture to the State.

The reason for this is clear. As the Federal Act, this State's Civil RICO statute must be construed liberally to effectuate its purpose to successfully dispossess the Defendant of his illegal gains.

RICO actions contemplate that the specific profits of the illegal acts will not be easy to determine or locate due to sophisticated laundering. United States v. Navarro-Ordas, 770 F. 2d 959, cert. denied, 475 U.S. 1016, 106 S. Ct. 1200, 89 L.Ed. 2d 313, (11th Cir. 1985). That is why the action is brought personally and why the federal courts have refused to hold that the forfeiture must be of specific assets, in rem. United States v. Anguilo, supra. It is also why the federal courts do not look to other forfeiture statutes to interpret the federal RICO statutes. Russello v. United States, supra.

The Preamble clearly expresses on numerous occasions the difficulty the legislature contemplated of determining the ownership of property due to the use of various devices, including

trusts, to conceal it. In addition, the legislature recognizes that Defendants quickly dispose of their interests once they become aware of law enforcement's advances toward them. In the instant case, the State alleges that Ruth, et al. acquired and used properties in violation of the Act. In 1979 while a fugitive from justice in Mexico, he transferred said properties to Eileen Borg to avoid forfeiture. In 1989 Eileen Borg transferred said properties to an unrecorded revocable trust during the pendency of the Sarasota action. (App. 2).

In addition, the use of these ownership devices makes the real property as transient as the Defendant. Because the RICO lien notice created through Chapter 895.07(1), Florida Statutes, gives the investigative agency express authority to file RICO lien notices in the "official records of any one or more counties" after it files "any civil proceeding" (singular by intent). Because the RICO lien notices are filed under the "name" of the Defendant, it is clear that the legislature realized that the amount and place of ownership would be uncertain at this time, and therefore the action would be personal to the Defendant. In the instant case the State was unaware of what "interest" the Defendants owned, if any, in the trust assets at the time it filed its Civil RICO Complaint. It was in Polk County that Ruth pledged the property to the FDLE agent for contract murder. It was Polk County that the State wanted to alert that its action against Ruth intended to take this economic power.

The legislature further evidenced its intent that the proceeding be brought personally against the Defendant when it amended the definition of real property to include real property outside the State's territorial jurisdiction:

WHEREAS, the legislature desires to clarify the Florida RICO Act so as to allow enforcement of the civil remedies provisions in s. 895.05, Florida Statutes, against RICO Act violators with respect to

their real property located in other jurisdictions.

It then eliminated "situated in the state" from the definition of real property. Chapter 83-75 Laws of Florida.

Just as the federal venue provision of RICO makes no provision for venue based on the location of property, neither does the State. 18 U.S.C. 1965. The primary purpose of the instant Chapter 895 Civil RICO action is not founded on land and is not in rem. The term "forfeiture" does not mean an in rem remedy. "To forfeit means to lose, . . . some right, privilege or property to another or to the State. United States v. Chavez, et al., 87 F. 2d 16 (10th Cir. 1936). The definition itself focuses on the Defendants' loss. It is not the assets that are the focus of a RICO action, it is the acts of the Defendants. If the Defendants violate the RICO Act then the result is the forfeiture to the government of certain proceeds and assets. The action is a personal action that determines the rights to property between the Defendant and the State. Because it is a personal action, it is transitory and the local action rule does not apply. Goedmakers v. Goedmakers, 520 So. 2d 575 (Fla. 1988).

Jurisdiction of the subject matter is the court's power to adjudicate the class of cases. Merrill Lynch, Pierce, Fenner & Smith, Inc., 971 F. 2d 974 (3rd Cir. 1992), cert. denied; 113 S.Ct. 1580, 123 L.Ed 2d 148 (1993); Le Mire v. Galloway, 177 So. 183 (Fla. 1937); Willard v. Barry, 152 So 411 (Fla. 1934); Malone v. Meres, 109 So 677 (Fla. 1926). The legislature clearly gave "any circuit court" the power--jurisdiction in civil RICO cases. This clear intent must be followed by this Honorable Court. A statute should not be interpreted in a manner that would deem the action useless. Alexdex Corp. V. Nachon Enterprises, Inc., 641 So. 2d 858 (Fla. 1994).

If the legislature did not intend the action to be in personam and transitory, then it intended to expand the jurisdiction of the circuit court to effectuate the purpose of the RICO Act. The legislature has the power to define the circuit court's jurisdiction. It can do this so long as it does not create a conflict with the Florida Constitution. **Alexdex Corporation v. Nachon Enterprises, Inc., supra; State v. Sullivan**, 116 So. 255 (Fla. 1928). The legislature has clearly intended to grant the power to any circuit court of Florida original and concurrent jurisdiction of a proceeding filed pursuant to Chapter 895, Florida Statutes, regardless of where the property lies. This concurrent jurisdiction is not prohibited by the Florida Constitution. **State, ex rel., Jones v. C. Wiseheart**, 245 So. 2d 849 (Fla. 1971). The legislature has the clear right to create new causes of action and specify the trial court with jurisdiction over the action. **State ex rel., H. Price v. A. Duncan, Jr.**, 280 So. 2d 422 (Fla. 1973).

It was the intent of the legislature to create subject matter jurisdiction in any circuit court in order to assist the State in forfeiting the real property. This is the only alternative construction the court can reach to allow the legislation to be effective. **Spradley v. Doe**, 612 So. 2d 722 (Fla. 1st DCA 1993); **Stewart v. Carr**, 218 So. 2d 525 (Fla. 2d DCA 1969).

If in fact this were a local action, requiring it to be brought in the county where the property was located, then the State would assert that this result is inconsistent with the intent of the legislature. This inconsistency renders the common law rule outdated. Chapter 2.01, Florida Statutes.

When the rules of the common law are in doubt, or when a factual situation is presented which is not within the established precedents, we are sometimes called upon to determine what general principles are to be applied, and in doing this we, of necessity, exercise a broad judicial discretion. It is only proper that in such cases we take into

account the changes in our social and economic customs and present day conceptions of right and justice. When the common law is clear, we have no power to change it. **Duval v. Thomas, et al.**, 114 So. 2d 791, 794 (Fla. 1959).

The State would contend that, in light of an after enacted statute such as the RICO statute, there is no clear, unambiguous rule or reason for application of the common law local action rule in a RICO suit. **Meker Construction Corp. v. Village Mall of Port Orange**, 469 So. 2d 838 (Fla. 5th DCA 1985). RICO provides the court with the in rem jurisdiction to enforce its orders. When the reason for a common law rule ceases, it has no application. **Ripley, et. al v. Ewell**, 61 So. 2d 420 (Fla. 1952). The RICO statute should be viewed as a catalyst for the elimination of this rule in a RICO case since the legislature intended that cases brought under the Florida RICO statute could be brought in any county, not just the county where the property was located. Chapter 895.05(1), Florida Statutes.

II. DOES A CIRCUIT COURT WHICH HAS IN PERSONAM JURISDICTION OVER THE DEFENDANT BUT DOES NOT HAVE IN REM JURISDICTION OVER THE PROPERTY HAVE JURISDICTION TO ENTER A FINAL JUDGMENT OF FORFEITURE OR MUST THE COURT TRANSFER THE ACTION TO THE CIRCUIT COURT WHICH HAS TERRITORIAL JURISDICTION OVER THE LAND SOUGHT TO BE FORFEITED?

Yes, the State asserts that "any circuit court" can enter a final judgment of forfeiture.

It is not necessary to transfer the action to the circuit court with territorial jurisdiction.

However, in the interest of comity and judicial economy, transferring the action is certainly within the circuit court's discretion.

The trial court properly severed and transferred this action to the counties where the properties were located, "in the interests of justice," pursuant to Chapter 47.122, Florida Statutes. Defendants failed to appeal this decision in 1991 or reassert the issue of jurisdiction for almost three years. Defendants, furthermore, admitted venue was correct in Polk County in their argument opposing the transfer. (Petitioner's Brief, pg. 18).²

The State would be prejudiced if this action were dismissed by the loss of its RICO lien priorities and by potential statute of limitations problems. The State requested the transfer as a result of a Sarasota Circuit Court decision which held that the trust named in the Civil RICO proceeding was not the true owner of the property, and the ruling of the Polk County Judge that it could not transfer the title.

If in fact the Polk County Court ruled that it could not directly transfer the title, the only just remedy would be to transfer the actions to the counties that could. This decision of the trial court

²The State suggests that Ruth, et al. attempt to defeat the State's RICO liens and order escrowing rental proceeds in a disingenuous attempt to pay for legal services. (R988).

to transfer an action should not be disturbed absent a showing of abuse of discretion. **W. Tindall, II v. N. Smith**, 601 So. 2d 627 (Fla. 2d DCA 1992); **Hertz Corp v. Rentz**, 326 So. 2d 216 (Fla. 4th DCA 1976).

It is Florida's policy to transfer an action rather than dismiss it. **Southeast First National Bank of Miami v. Hain**, 357 So. 2d 716 (Fla. 1st DCA 1978). Even if the trial court did not have subject matter jurisdiction, transfer of an action is a more favored remedy to a harsh dismissal. **Tropicana Products, Inc., v. H. Shirley, Jr.**, 501 So. 2d 1373 (Fla. 2d DCA 1987). Transfer occurs in cases where the "local action rule" is used to find a court lacks subject matter jurisdiction. **Hendry Corp. V. State Board of Trustees of the Internal Improvement Trust Fund**, 313 So. 2d 453 (Fla. 2d DCA 1975). **State, DNR v. Antioch University**, 533 So. 2d 869 (Fla. 1st DCA 1988). Transferring cases is preferred to circumvent the operation of the statute of limitations and promote the ends of justice. **Board of County Commissioners Madison County v. G. Grice**, 438 So. 2d 392 (Fla. 1983). Transferring an action from a court with subject matter jurisdiction is common between county and circuit courts. **Spradley v. Doe**, 612 So. 2d 722 (Fla. 1st DCA 1993). Appellants use of out of state cases on subject matter jurisdiction creates no precedent to this court since this state clearly favors the policy of transfer.

When the legislature provided for the disposition of land forfeited to the State pursuant to Chapter 895.09.5 Florida Statutes, it assigned the responsibility for clearing title to The Board of Trustees of the Internal Improvement Fund. Chapter 253.03(13), Florida Statutes. Pursuant to this chapter, the "Board" must pay all valid claims and encumbrances against the property. After disposition of the property, the circuit court retains jurisdiction to direct payment of the proceeds including proceeds owned to judicially determined "innocent owners." Chapter 895.09(b), Florida

Statutes. It is clear that the legislature has provided a statutory scheme for the title of property to become marketable without the need to transfer the case.

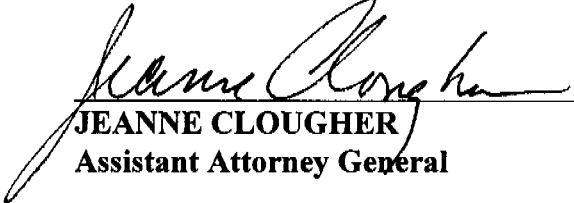
In addition, the Florida RICO Act specifically grants the circuit court the power to enter any orders it deems proper. Chapter 895.05(1) and (5), Florida Statutes; **State v. Ruth**, 595 So. 2d 1073 (Fla. 2d DCA 1992). The order transferring the instant action was appropriate and the circuit court had the specific power to enter it. To hold otherwise would defeat the purpose of the RICO act and six years of diligent effort on behalf of the State.

CONCLUSION

To hold that the court has no power but to dismiss the action in its entirety due to a narrow construction of an outdated common law rule clearly does not effectuate the remedial purposes of the RICO Act.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U. S. Mail this 25th day of March, 1996, to **WOFFORD H. STIDHAM, ESQUIRE**, Lane, Trohn, Clarke, et al., P. O. Box 1578, Bartow, Florida 33831.


JEANNE CLOUGHER
Assistant Attorney General