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Is RICO A Different Offense or Just Additional Punishment for the Same Criminal Conduct?

December, 2008

CRIMINAL JUSTICE

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INTRODUCTION

The federal RICO (Racketeering Influenced and Corrupt Organizations) Act[1] was originally passed in1970 to deal with organized crime. Relying heavily on work by Professor Donald Cressey, the Kazenbach Commission studied the problem of

organized crime in the United States in the1960's and determined that there were people committing crimes and investing the proceeds into otherwise legitimate businesses.[2] The Mafia was the chief focus of the study.

These days, RICO is not used against the Mafia and few cases in which RICO counts are alleged actually go to trial. The ones that do often garner headlines but in routine cases the prosecutor often uses a RICO count as a bargaining chip. RICO is no longer a unique offense but is pigy-backed onto traditional state or federal criminal statutes.

This experience with RICO is replicated in other cases, such as money laundering in federal court and gang enhancements in California state courts. In this month's *Criminal Justice* column, we will look at RICO with an eye toward whether it and other statutes like RICO, money laundering and gang enhancements might run afoul of constitutional principles by becoming so overbroad that they simply swallow the predicate offenses.

WHAT HAS RICO BEEN USED FOR?

As a result of the Katzenbach Commmission Report, members of Congress introduced legislation which eventually became the RICO statute we have today. The RICO statute has been expanded in practice to prosecute cases which do not involve the Mafia itself. Since the passage of the statute, prosecutors have used RICO to prosecute many crimes that do not involve the Mafia or organized crime as we think of it in the Mafia context. As a result, RICO is used as a bargaining chip for the ordinary criminal defendant who is offered a plea agreement in which the RICO count is dismissed in exchange for a plea to the substantive count or counts. An agreement to plead, say, to mail fraud with a sentence under the United States Sentencing Guidelines of, perhaps, 27 to 30 months may be attractive when a loss at trial might result in RICO sentence of 10 years or more.

In fact, RICO prosecutions of actual Mafia organizations have been few and far between. The statute has been used to prosecute people so disparate as the former West Coast President of the Hell's Angels[3] and a businessman making a fraudulent job application.[4] RICO has also been used to prosecute bankers and other business people alleging mail fraud as the most common predicate act. But, traditionally, the predicate acts are perpetrated for the benefit of an enterprise that has an ascertainable structure beyond the association of the perpetrators. If that were not the case, RICO would just be an alternative way of charging the same predicate acts which are crimes under their own state of federal statutes..

IS RICO EXPANDING TO THE POINT THAT IT IS INDISTINGUISHABLE FROM THE UNDERLYING CRIMINAL OFFENSES?

As originally written, the characteristic of RICO that distinguished it from a conspiracy or a group of people on a crime spree was that there was an independent entity, known as the enterprise, to which proceeds of the illegal activities were being directed. After all, that was the Mafia business model that the Katzenbach Commission studied. People commit a series of crimes, e.g. frauds or extortions, but then put the money into a "legitimate" business, such a legitimate trash collection business. RICO, therefore, was created to establish much harsher punishments than were provided for under the statutes pertaining to the underlying offenses in order to combat this aspect of funneling money into a legitimate enterprise.

Recently, however, prosecutors have been expanding the use of RICO to cover situations where the participants are not involved in a separate enterprise but are simply a loose association of people committing crimes. In other words, the individuals could be prosecuted for the crimes that can be proven and other "associates" could be prosecuted as aiders and abettors or co-conspirators if they have the requisite evidence to prove liability under those theories. But, now, there is an effort to avoid the strict requirements of proof of aiding and abetting or conspiracy and to use RICO by claiming that the association to commit crimes itself is the enterprise which is the focus of the RICO statute.

The United States Supreme Court has granted *certiorari* in a case where this approach was tried by the prosecutor and where the district court instructed the jury that the loose association of individuals who came together to commit the crimes could be

considered the enterprise for RICO purposes. In *United States v. Edmund Boyle*,[5] the Second Circuit held that the fact that the defendant committed bank robberies "together with others" was sufficient to satisfy the enterprise requirement. Mr. Boyle then found himself sentenced under the RICO statute and Sentencing Guidelines pertaining to RICO rather than bank robbery. The United States Supreme Court granted *certiorari* and the case is pending there.[6]

THE USE OF RICO AND OTHER "META-CRIMES" AND THE DOCTRINE OF MERGER

One significant flaw in the expansion of RICO to include cases where there is not an independent enterprise is that it merges with the underlying crimes. In other words, if the draconian punishments under RICO can be imposed for nothing more than proof that the crimes occurred (and, perhaps, not as much proof as would be required for some the conviction of some individuals under aiding and abetting or conspiracy theories), then RICO has become merged with the underlying offenses.

In this sense, RICO becomes a "meta-crime" that is simply superimposed on the same conduct covered by substantive criminal statutes. We are seeing this occur in other areas, such as money laundering where there is really no further culpable conduct in addition to the underlying offenses. In California state courts we see the efforts of prosecutors to impose substantial penalties for gang enhancements where they seek to be excused from really proving that the crimes were committed by actual gang members or for the benefit of, under the direction of or in association with a gang.[7] Gang enhancements can make misdemeanors felonies and add 10 years or more to a prison sentence.[8] Like RICO, money laundering and gang enhancements can simply become meta-crimes that merge with the underlying offenses.

The United States Supreme Court began to deal with this issue in the October 2007 Term in a money laundering prosecution in *United States v. Santos* case.[9] There the court considered the concept of "proceeds" in the plurality opinion and was joined by Justice Stevens in the analysis of merger. Basically, the Court held that the money laundering statute dealt with net proceeds not gross receipts, otherwise there would

be no difference between the underlying crime (there running an illegal lottery) and the money laundering offense.

If the rationale in *Santos* is followed, it would seem that attempts to do away with the requirement of proving an independent enterprise for RICO, or some act of laundering for money laundering, or some actual furtherance of gang activities for gang enhancements would be unconstitutional. Right now, the one issue before the United States Supreme Court is the RICO "enterprise" issue but we can anticipate others.

CONCLUSION

There is a rule of lenity in criminal law. The United State Supreme Court has recognized this rule historically and again in Justice Scalia's opinion in *Santos*. Where there are conflicting or overlapping code sections imposing criminal sanctions, the lesser should be chosen over the greater. In *Santos*, the prosecutor could not make an illegal lottery into money laundering unless there was the actual laundering of profits. It will be interesting to see if the Court continues on this path in the *Boyle* case.

Prosecutors want to construe elements of RICO, money laundering or, in our state courts, gang enhancements so broadly that they need not prove anything in addition to the underling offense. However, if they do so and the nature of the prosecution becomes essentially indistinguishable from the underlying offenses, the rule of lenity should compel the court to strike the meta crime and proceed on the underlying statute only. But, time will tell.

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[1] 18 U.S.C. Sections 1961-1968.

[2] The Katzenbach Commission Report was formally titled, *The President's Commission on Law Enforcement and the Administration of Justice: Organized Crime*,

U.S. Government Printing Office, 1967. As a matter of local interest, Dr. Cressey was a professor of Sociology at UCSB.

[3]See, for instance, the conviction of the West Coast President of the Hell's Angels last year in Seattle based on predicate acts of mail fraud, extortion and trafficking in stolen motorcycles. Jennifer Sullivan, *Hell's Angel Figure gets 7 ½ Years*, Seattle Times, September 18, 2007.

[4]Martha Graybow, *U.S. Businessman Accused of Fraud in Job Search*, Reuters News Service, May 30, 2008.

[5]Not certified for publication, 2007 WL 4102738 (Cir.2, N.Y.).

[6]The issue in Boyle v. United States for which *certiorari* was granted is: "does proof of an association-in-fact enterprise under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1962 (c) - (d), require at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages?"

[7]A Los Angeles Deputy District Attorney, in an official Department of Justice publication, boasts how easy it is to introduce gang evidence and how prejudicial it is to the defense. Alan Jackson, *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, U.S. Department of Justice, Bureau of Justice Assistance, April 2004. He goes so far as to say that defense lawyers "cower" in the face of gang evidence. He says the 186.22(b) "enhancement applies to any felony and any misdemeanor, it wields extraordinary power. The prosecutor need only prove that the crime—whatever it was—was committed for the benefit of, in association with, or at the direction of a criminal street gang. Indeed, the prosecutor does not even have to prove that the defendant is a member of the gang, as long as his conduct promotes or benefits the gang."

[8]California Penal Code Section 186.22(b).

[9]128 S.Ct. 2020 (2008).