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Could You Use That in a Sentence, Please?: The Intersection of Prosecutorial Ethics, Relevant Conduct Sentencing, and Criminal RICO Indictments

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COULD YOU USE THAT IN A SENTENCE, PLEASE?: THE INTERSECTION OF PROSECUTORIAL ETHICS, RELEVANT CONDUCT SENTENCING, AND CRIMINAL RICO INDICTMENTS

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Introduction

In the last fifty years, two developments transformed federal criminal law. First, Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO)[1] in 1970, allowing federal prosecutors to convict those who use enterprises to conduct patterns of racketeering activity.[2] Second, the United States Sentencing Commission promulgated the federal Sentencing Guidelines in 1987,[3] providing a complex sentencing framework intended to create uniformity while still

* J.D. Candidate, University of Notre Dame Law School. I would like to thank Professor G. Robert Blakey for his advice and guidance with this Note. Professor Blakey first noted that the conceptual overlap between RICO's "pattern of racketeering activity" and the Guidelines' "common scheme or plan" concept could lead to sentencing confusion, and he graciously granted me permission to develop the idea into a separate paper. *See* G. Robert Blakey & John Robert Blakey, RICO and Reves: *Quo Vadis* Professionals? (and a Variety of Other Key Issues), 14 n.8 (unpublished manuscript) (on file with author) ("While it is counter-intuitive, courts sentence on conduct for which a jury returns a not-guilty verdict under a preponderance of the evidence standard for 'relevant conduct.' That conduct is in the surrounding circumstances of the offense for which the jury returns a guilty verdict. RICO, however, is different; the predicate offenses do not have necessarily to relate to each other, but only to the enterprise. Thus, when a RICO charge fails before a jury, which is a relatively rare event, it raises the legitimate concern that the prosecution brought an extraordinarily weak RICO charge to gain sentencing advantage by using the un-convicted RICO conduct to aggravate, above the normal range, the sentence for the predicate offense." (citations omitted)).

1 Racketeer Influenced and Corrupt Organizations Act, Pub. L. 91-452, tit. IX, § 901(a), 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2006)).

2 For a complete discussion of the RICO Act, see discussion *infra* Part II.

3 *See infra* notes 6–7 and accompanying text.

preserving judges' power to consider the unique characteristics of each crime and defendant.

Both developments have enhanced the power of federal prosecutors. RICO allows prosecutors to achieve elevated sentences for convicted racketeers and to seize the proceeds of racketeering activity.[4] Because the Sentencing Guidelines reduce the sentencing discretion of the judge and place increased weight on the charges that the prosecutor brings, they give the prosecutor greater influence over a defendant's final sentence.[5] Although scholars have studied both RICO and the Sentencing Guidelines in depth, very little has been written about the ways in which the two frameworks interact.

This Note highlights a potential prosecutorial abuse at the intersection of RICO and the Sentencing Guidelines; specifically, how a weak RICO charge can create an unfair sentencing advantage over a defendant who is acquitted of that charge but is still convicted of at least one other count. Because this sentencing strategy involves two complex statutory frameworks, this Note requires a detailed overview of both the RICO Act and the current sentencing regime; this is necessary to clearly demonstrate how a faulty RICO indictment can be used to conceptually tie together otherwise unrelated acts and achieve an increased sentence under "relevant conduct" sentencing.

Part I will describe the United States Sentencing Guidelines, focusing on the concept of "relevant conduct" sentencing. Part II will discuss the key concepts of RICO, looking closely at the "relatedness" requirement for a RICO "pattern of racketeering activity." Part III will demonstrate how a prosecutor could use a weak RICO charge and allege a "pattern of racketeering activity" to connect two unrelated acts to one another, in order to argue later that these unrelated acts were part of the "same course of conduct or common scheme" for the purposes of relevant conduct sentencing. This Part will examine the corruption trial of former Alabama Governor Don Siegelman to illustrate how RICO's "pattern" concept can lead to post-trial confusion when evaluating a defendant's "common scheme of conduct" at sentencing. Part IV will argue that a prosecutor who *intentionally* confuses these concepts to gain sentencing leverage behaves both unethically and in a manner contrary to the purposes of the United States Sentencing Guidelines. As a result, this Note will recommend that judges be informed of this problem and that the Department of Justice prohibit this use of RICO indictments as part of its already-established RICO oversight process.

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4 *See infra* notes 93–94 and accompanying text.

5 *See* discussion *infra* Section I.E.

I. The Federal Sentencing Guidelines and "Relevant Conduct"

A. Historical Overview

In 1984, Congress passed the Sentencing Reform Act of 1984.[6] The Sentencing Reform Act established a seven-member Sentencing Commission to draft Sentencing Guidelines that would take effect in late 1987.[7] The Sentencing Reform Act had as its twin goals achieving "honesty in sentencing" and eliminating unjustifiably "wide sentencing disparity."[8] Tasked with these goals, the Commission set out to transform a byzantine and chaotic array of federal criminal statutes into a transparent, consistent, and equitable sentencing system.

At their core, the Sentencing Guidelines are a struggle between a "real-offense" sentencing regime and a "charge-offense" system.[9] In a real-offense system, the prosecutor brings charges under a particular federal criminal statute. Once a defendant is convicted, however, that statute serves no other purpose than to provide the mandatory, but often wide range within which a judge must sentence the defendant.[10] When sentencing, the judge is able to consider factors that were not proven beyond a reasonable doubt at trial.[11] The goal is to sentence a person for the "real" crime that he or she committed, with all of the unique circumstances that aggravate or mitigate the seriousness of the offense. The consequence, however, is that two defendants who are convicted of the exact same code violation can receive widely disparate sentences merely because they appear before different judges who happen to prioritize their sentencing factors differently. At its worst, a real-offense system can lead to a situation where a defendant's sentence is determined more by the courtroom he is assigned to than the crime he commits. The federal sentencing regime prior to the

6 Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987.

7 *Id.*; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and The Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 5 (1988). Now-Justice Breyer's article is a thoughtful and comprehensive look at the drafting of the Sentencing Guidelines and the underlying values that governed the process.

8 U.S. Sentencing Guidelines Manual ch. 1, pt. A, original intro. (2012) ("Congress . . . sought honesty in sentencing[,] . . . reasonable uniformity in sentencing by narrowing the wide disparity in sentenc[ing] . . . [, and] proportionality in sentencing . . . that imposes appropriately different sentences for criminal conduct of differing severity.").

9 For a thoughtful comparison of real-offense and charge-offense regimes, see Julie R. O'Sullivan, Federal White Collar Crime 125–31 (5th ed. 2012). *See also* Breyer, *supra* note 7, at 8–13.

10 O'Sullivan, *supra* note 9, at 126–27.

11 *Id.* at 126.

promulgation of the Guidelines was a real-offense system,[12] and these are some of the very concerns that helped spur the passage of the Sentencing Reform Act.

A charge-offense system, in contrast, restrains the judge's discretion and affords more weight to the prosecutor's formal charges. If a defendant is convicted in a pure charge-offense system, he receives the exact sentence prescribed for that code violation. Sentence disparities are nonexistent, and defendants' punishments are not determined by a particular judge's individual priorities. Unfortunately, a charge-offense system provides uniformity at the expense of carefully tailored sentences.[13]

B. Applying the Guidelines

The finalized Sentencing Guidelines are a blend of real-offense and charge-offense considerations, and they are often referred to as a "modified real-offense" system.[14] Charge-offense rules set a common foundation for all sentences, but real-offense considerations trigger structured changes to the baseline sentence. In this way, violations of the same code provision begin at the same starting point but are altered to result in an individually tailored sentence.

At the most general level, a defendant's sentence is determined by the interaction between his "offense level" and his "criminal history." Under the Guidelines Manual, the sentencing judge[15] calculates a numerical "score" for both the crime's offense level and the defendant's criminal history. The judge then applies these "scores" to the Sentencing Table in Chapter Five of the Sentencing Guidelines. The offense level forms the vertical axis of the sentencing grid, and the criminal history level is the horizontal axis.[16] The defendant's sentence, stated in months, is provided at the intersection of the two axes.

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12 *Id.* at 126.

13 *Id.* at 128 ("[I]mposing a uniform tariff on all persons who violate an undifferentiated criminal code section . . . will only in the most happenstantial [sic] way further the purposes of criminal sentencing. Seeking to effectuate no particular goal other than the procedurally efficient warehousing of defendants, such a sentencing system has no more principled basis than sentencing by roulette.").

14 Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMP. POL. & CIV. RTS. L. REV. 377, 381 (2010).

15 Although the sentencing judge determines a defendant's final sentence and theoretically makes all the sentencing calculations, the court's probation officer is actually responsible for the presentence report and is the person who will make most of the actual sentencing calculations. U.S. SENTENCING GUIDELINES MANUAL § 6A1.1(a) (2012) (Presentence Report) ("The probation officer must conduct a presentence investigation and submit a report to the court before it imposes.").

16 *See infra* Figure 1.

The Sentencing Table reduces the complex considerations that govern criminal sentencing into a calculation of stark simplicity.

A defendant's overall offense level, which forms the Sentencing Table's vertical axis, consists of three distinct components added together: the "base offense level," the "specific offense characteristics," and any "applicable general adjustments."[17] The base offense level, which forms the foundation for the overall offense level,[18] is determined solely by looking at the "offense of conviction."[19]

After determining the base offense level, the court determines whether any "specific offense characteristics" apply to elevate or reduce the offense level.[20] Specific offense characteristics take into consideration factors that aggravate or mitigate the seriousness of the crime.[21] Each offense of conviction has special offense characteristics that are unique to that particular type of offense, and they often deal with the quantifiable aspects of a crime. For example, the specific offense characteristics for larceny and theft offenses include the amount of money lost in the offense; the greater the loss, the greater the increase in the offense level.[22]

Once the specific offense characteristics are added to the offense level, the sentencing judge then determines whether any "applicable general adjustments" apply.[23] These *general* adjustments, which are located in Chapter Three of the Guidelines, are, somewhat obviously, less specific than Chapter Two's *specific* offense characteristics. Rather than accounting for the crime's quantitative variables, they account for the qualitative and contextual aspects of the crime. For example, general adjustments include factors like whether the defendant has shown remorse,[24] whether he acted from a position of power,[25] or whether he obstructed justice.[26] General adjustments are real-offense

17 O'SULLIVAN, *supra* note 9, at 132.

18 *See id.*

19 William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 498 (1990).

20 O'SULLIVAN, *supra* note 9, at 132–33 (quoting Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 11 (1999)).

21 *Id.*

22 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2012) (providing the specific offense characteristics for larceny, embezzlement, and other theft-related offenses).

23 O'SULLIVAN, *supra* note 9, at 133.

24 U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2012) (Acceptance of Responsibility).

25 *Id.* § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

26 *Id.* § 3C1.1 (Obstructing or Impeding the Administration of Justice).

considerations,[27] and they are truly "general"; they apply to all offenses and are not different for different crimes.[28]

After applying any general adjustments, the sentencing judge has the defendant's overall offense level and has therefore located the vertical coordinate on the Sentencing Table. The court must then use the Guidelines Manual to ascertain the defendant's "criminal history," which provides the Table's horizontal coordinate. Chapter Four of the Guidelines Manual explains how to calculate criminal history, which is determined by the number and nature of a defendant's prior criminal offenses.[29] Once the criminal history category is compiled, the sentencing judge has both of the Sentencing Table coordinates and can determine the sentence range.

FIGURE 1[30]

SENTENCING TABLE
(in months of imprisonment)

		Criminal History Category (Criminal History Points)					
	Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

27 O'SULLIVAN, *supra* note 9, at 133.

28 U.S. SENTENCING GUIDELINES MANUAL ch. 3, pt. A, introductory cmt. (2012) ("*The following adjustments are included in this Part because they may apply to a wide variety of offenses.*")

29 *Id.* ch. 4.

30 U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A. (2012).

The Sentencing Guidelines are a complicated system with a number of "moving parts"; perhaps a simple example will provide clarity.[31] Imagine that John Doe is a defendant who was convicted under the federal kidnapping statute.[32] Mr. Doe, who previously served a full eighteen-month sentence for an unrelated offense, led a gang of seven people who assisted in the kidnapping. During the kidnapping, both of the victim's legs were broken.

When preparing a presentencing report, the court must first determine John Doe's overall offense level. The judge (or probation officer) looks to Chapter Two of the sentencing manual and finds the section entitled "Kidnapping, Abduction, Unlawful Restraint."[33] This section states that the base offense level for a federal kidnapping conviction is thirty-two.[34]

The base offense level is then modified by any specific offense characteristics. For kidnapping, the Guidelines state that "if the victim sustained serious bodily injury, [the judge should] increase [the offense level] by [two] levels."[35] Because the victim's legs were broken, Mr. Doe's offense level increases from thirty-two to thirty-four.

Assuming for simplicity's sake that no other specific offense characteristics apply, the court looks to Chapter Three for any general adjustments. Section 3B1.1, entitled "Aggravating Role," provides that there should be a general adjustment of four more levels "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants."[36] Because Mr. Doe led a group of seven kidnappers, his offense level increases to thirty-eight.

After fixing Mr. Doe's vertical coordinate offense level at thirty-eight, the court must still determine his horizontal "criminal history" coordinate. Section 4A1.1, entitled "Criminal History Category," requires the court to "[a]dd [three] points for each prior sentence exceeding one year and one month."[37] Because John Doe was sentenced to eighteen months for a previous offense, his criminal history level is three points. It is important to remember that a defendant's criminal history level stands alone and is not added to his offense

31 For another concrete example that explains the application of the Sentencing Guidelines, see Simons, *supra* note 14, at 377–78 (explaining sentencing through a hypothetical example of three young men convicted of a string of store robberies).

32 18 U.S.C. § 115(b)(2) (2006).

33 U.S. SENTENCING GUIDELINES MANUAL § 2A4.1. (2012) (Kidnapping, Abduction, Unlawful Restraint).

34 *Id.* § 2A4.1(a).

35 *Id.* § 2A4.1(b)(2)(B).

36 *Id.* § 3B.1.1(a).

37 *Id.* § 4A1.1(a).

level. With both coordinates, the court refers to the Sentencing Table to determine Mr. Doe's sentencing range. With an offense level of thirty-eight and a criminal history level of three, the Guidelines instruct the sentencing judge to give Mr. Doe a sentence between 292 and 365 months in prison.

C. "Relevant Conduct" Sentencing

Unfortunately, the Sentencing Guidelines are further complicated by the concept of "relevant conduct" sentencing. Rather than considering the simple unadorned facts of a crime, the Sentencing Guidelines require the court to consider all "relevant conduct" surrounding the crime when determining a sentence. "Relevant conduct" is used here as a term of art and refers to more specific conduct than the plain language of the term might suggest.

Section 1B1.3 of the Guidelines Manual, entitled "Relevant Conduct (Factors that Determine the Guideline Range)," widens the sentencing judge's lens at the beginning of his inquiry, adding factors that must be considered for all three components of the offense level/vertical coordinate (i.e., base offense level, specific offense characteristics, and general adjustments).[38] Because "relevant conduct" is a difficult concept to grasp, and because the Sentencing Guidelines are written in a very technical manner, direct and unaided reference to the manual's text might be more confusing than enlightening in this instance. Fortunately, William Wilkins, former chairman of the United States Sentencing Commission and former Chief Judge of the Fourth Circuit Court of Appeals, has clarified the relevant conduct provisions by conceptually dividing the manual's relevant conduct factors into three components. The first component is what Wilkins calls the "temporal dimension";[39] it mandates that all of the offense level decisions (those that make up the vertical axis of the Sentencing Table) should reflect "all reasonably foreseeable acts and omissions . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."[40] The second relevant conduct factor is what Wilkins calls the "accomplice attribution" dimension,[41] and it states that the judge should consider all acts and omissions "aided, abetted, counseled, commanded, induced, [or]

38 *Id.* § 1B1.3.

39 Wilkins & Steer, *supra* note 19, at 504–06.

40 U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1) (2012).

41 Wilkins & Steer, *supra* note 19, at 506–13.

procured . . . by the defendant."[42] The third component is what Wilkins simply refers to as the "third dimension."[43] This component provides that for offenses that require "grouping,"[44] courts should include all acts or omissions that "were part of the same course of conduct or common scheme or plan."[45] This third component widens the range of real-offense information that can be considered by the judge.

Furthermore, relevant conduct decisions are made on the "preponderance of the evidence" standard, rather than the "beyond a reasonable doubt" standard.[46] Even though they are not decided by a jury and require a lower burden of proof, relevant conduct decisions can have an enormous impact on the defendant's actual sentence.

D. Judicial Developments

The United States Supreme Court has wrestled with the Sentencing Guidelines since their inception. In *Mistretta v. United States*,[47] the Court affirmed the constitutionality of the Guidelines, holding that Congress did not unconstitutionally delegate too much power to the

42 U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A) (2012).

43 Wilkins & Steer, *supra* note 19, at 513–17.

44 *See* U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 (2012) (Groups of Closely Related Counts). The Guidelines require grouping where the offenses involve "substantially the same harm" to the victim or the public. Examples include counts that involve the same victim and act, crimes that involve the same victims and a "common scheme or plan," and crimes where one count is effectively a specific offense characteristic for another count. *Id.*

45 *Id.* § 1B1.3(a)(2).

46 *Id.* § 6A1.3 ("In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility . . . provided that the information has sufficient indicia of reliability to support its probable accuracy."); *see id.* cmt. (" *The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.*"); Wilkins & Steer, *supra* note 19, at 518–19 ("Pre-guidelines pronouncements by the United States Supreme Court and other courts indicate that a preponderance of the evidence standard comports with [F]ifth [A]mendment due process requirements when sentencing factors . . . are contested." (footnotes omitted)); Laura Greenwald, Note, *Relevant Conduct and the Impact of the Preponderance Standard of Proof Under the Federal Sentencing Guidelines: A Denial of Due Process*, 18 VT. L. REV. 529, 531 n.16 (1994) (collecting cases which have upheld the preponderance standard at sentencing).

47 488 U.S. 361 (1989); *see* Breyer, *supra* note 7, at 1 n.3 (elaborating on the *Mistretta* holding).

Sentencing Commission under separation of powers principles.[48] Slightly more than ten years later, however, the Supreme Court's assessment of state sentencing regimes began to portend trouble for the federal Sentencing Guidelines.

Two cases in the early 2000s foreshadowed serious difficulties for the Guidelines. In *Apprendi v. New Jersey*,[49] the petitioner fired shots into the home of an African-American family. The state district court convicted Apprendi under a generic firearms possession statute, which required a sentence between five and ten years. However, the prosecutor argued for an enhancement under the New Jersey hate crime statute, which permitted the judge to decide by a preponderance of the evidence that the underlying crime was motivated by an intent to intimidate a specific group (e.g., racial minorities).[50] The judge indeed found that Apprendi's crime was motivated by racial bias and gave him a twelve-year sentence for that count. Apprendi appealed on the grounds that the hate crime enhancement required a finding beyond a reasonable doubt by a jury.[51] The Court, relying on the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment as applied to the states through the Fourteenth Amendment,[52] vacated the sentence and held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the *prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt."[53]

48 *Mistretta*, 488 U.S. at 374 ("[W]e harbor no doubt that Congress' [sic] delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.").

49 530 U.S. 466 (2000).

50 *Id.* at 470–71.

51 *Id.* at 471.

52 *Id.* at 476, 483–84 ("We do not suggest that trial practices cannot change . . . . But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt. . . . We thus require this . . . procedural protection[ ] to 'provid[e] concrete substance for the presumption of innocence,' and to reduce the risk of imposing such deprivations erroneously." (quoting *In re* Winship, 397 U.S. 358, 363 (1970))).

53 *Id.* at 490 (emphasis added). The holding in *Apprendi* relied in part on *Jones v. United States*, 526 U.S. 227 (1999). In *Jones*, the defendant was sentenced under 18 U.S.C. § 2119, the federal carjacking statute. The statute provided for a fifteen year maximum sentence, but it also contained a subsection that elevated the maximum sentence to twenty-five years "if serious bodily injury . . . results." 18 U.S.C. § 2119(2) (1994) (amended 1996). The jury convicted without reference to the subsections. At sentencing, the judge treated the subsection as a mere sentencing factor reserved to his discretion. Accordingly, he found by a preponderance of the evidence that the carjacking involved bodily injury and therefore imposed a twenty-five year sentence.

This immediately raised the question of how to define the statutory maximum for a crime.

In 2004, the Supreme Court decided *Blakely v. Washington*,[54] which grappled with how the *Apprendi* holding applied to the Washington state sentencing regime. In *Blakely*, the defendant was convicted under the state's kidnapping statute. However, following the state sentencing procedures, the judge departed from the default sentencing range and imposed a higher sentence because he found that the defendant had acted with "deliberate cruelty," a sentencing factor that was grounds for an upward departure in Washington.[55] The issue on appeal was whether the elevated sentence exceeded the statutory maximum and therefore had to be proven beyond a reasonable doubt under *Apprendi*.

For the second-degree kidnapping count, the state's sentencing statute called for a sentence between forty-nine and fifty-three months, but permitted judges to make a different sentence under compelling circumstances.[56] Additionally, the state had a catchall maximum of ten years (120 months) for all Class B felonies, including kidnapping. The judge imposed a ninety-month sentence because he found that the defendant acted with "deliberate cruelty," which permitted a departure under the sentencing statute. Because the ninety-month sentence was higher than the range for the kidnapping count but lower than the catchall maximum, the Court had to decide which provision provided the statutory maximum for *Apprendi* purposes.[57] The government argued that the statutory maximum for the kidnapping was the catchall maximum for Class B felonies, which was ten years (120 months) and would avoid an *Apprendi* problem,[58] but the Supreme Court chose to define statutory maximum differently. The Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[59]

Jones, 526 U.S. at 231. The Supreme Court, applying the doctrine of constitutional avoidance, decided to construe the subsection as an element of the crime that needed to be proven to the jury. *Id.* at 251–52. An interpretation treating them as sentencing factors, the Court indicated, would be "open to constitutional doubt [due to questions of] . . . due process and the guarantee of trial by jury." *Id.* at 240. The Court addressed those very questions in *Apprendi*.

54 542 U.S. 296 (2004).

55 *Id.* at 300.

56 *Id.* at 299.

57 *Id.* at 303–04.

58 *Id.* at 303.

59 *Id.* at 303. The Court went on to say, "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional

These two cases, although they dealt with state sentencing regimes, presented a challenge to the federal Guidelines that came to a head in *United States v. Booker*.[60] In *Booker*, the jury convicted the defendant of drug possession, based on "evidence that he had 92.5 grams [of crack] in his duffel bag," subjecting him under these facts alone to a base sentence of 210 to 262 months.[61] However, at a sentencing hearing, where evidentiary rules do not apply[62] and the judge can therefore consider a wider range of evidence, the judge decided by a preponderance of the evidence that Booker possessed an additional 566 grams of crack and "had obstructed justice," which required a sentence of 360 months to life.[63] Justice Stevens, writing for a majority of the Court, recognized the irreconcilable problem created by *Apprendi* and *Booker*. *Apprendi* held that a judge could not sentence above the statutory maximum without a jury finding, and *Blakely* had established that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[64] Because the Federal Guidelines were mandatory, they required judges to consider factors and make factual decisions outside the jury findings that then commanded sentences beyond the *Blakely* statutory maximum. As a result, the Court extended the *Apprendi* and *Blakely* holdings to the federal Guidelines.[65]

Having established that *Apprendi* applied to the Guidelines, Justice Stevens concluded his partial majority opinion. Picking up where he left off, Justice Breyer, with his unique expertise on the Sentencing Guidelines,[66] authored a second partial majority opinion addressing the consequences of Stevens's holding. Because the Guidelines were mandatory and thus required a judge to increase a sentence where his own findings of fact so required, even if they exceeded the statutory maximum, the Court held that they were unconstitutional.[67] To remedy this, the Court simply decided to sever the provisions making

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facts, but the maximum he may impose *without* any additional findings." *Id.* at 303–04.

60 543 U.S. 220 (2005).

61 *Id.* at 227.

62 *See supra* note 46.

63 543 U.S. at 272 (Stevens, J., dissenting in part).

64 *Id.* at 227–28 (majority opinion) (quoting *Blakely*, 542 U.S. at 303).

65 *Id.* at 243–44.

66 *See generally* Breyer, *supra* note 7 (discussing the compromises embodied in the Federal Sentencing Guidelines).

67 543 U.S. at 245 (Breyer, J.).

them mandatory.[68] This effectively made the Guidelines advisory without abolishing them. Although the Guidelines were no longer mandatory, judges were still required to consider them in sentencing.[69]

Even though the Guidelines were now only advisory, the Court imposed new appellate standards of review that preserved much of the Guidelines' practical power. After completing the severability analysis, Justice Breyer imposed a "reasonableness" standard of review.[70] Under this standard, a judge must determine the reasonableness of a sentence in light of the statutory factors that govern sentencing.[71] This reasonableness standard was further fleshed out in *Rita v. United States*.[72] In *Rita*, the Court decided that any sentencing decision made within the Sentencing Guidelines' range for a particular offense is afforded a "presumption of reasonableness" by appellate courts.[73] Because the Guidelines are the product of a deliberate, studied, and empirically based effort to construct a regime that reflects the underlying goals of criminal punishment, which a sentencing judge is already required to consider, a sentence recommended by the Guidelines is presumed to be reasonable at the appellate stage.[74]

E. The Role of the Prosecutor Under the Sentencing Guidelines

The currently advisory Sentencing Guidelines still afford a federal prosecutor significant power over a defendant's final sentence. The current sentencing regime provides the Assistant United States Attorney overseeing a prosecution with a wide range of procedural, structural, and substantive advantages.

Procedurally, the prosecutor has a number of tools to control sentencing. First, the sentencing hearing's preponderance burden[75] allows the prosecutor to make arguments at sentencing that might not be provable beyond a reasonable doubt but are still capable of per-

68 *Id.* at 245, 259–60 (invalidating 18 U.S.C. § 3553(b)(1) (requiring mandatory sentencing) and 18 U.S.C. § 3742(e) (imposing de novo review for sentencing outside of the guidelines)).

69 *Id.* at 259 (noting that 18 U.S.C. § 3553(a), which requires judges to consider, *inter alia*, the sentence recommended by the Sentencing Guidelines, remained in effect after *Booker*).

70 *Id.* at 260–62.

71 18 U.S.C. § 3553(a) (2006) (requiring judges to consider, *inter alia*, the goals of just punishment, deterrence, incapacitation, and rehabilitation when sentencing).

72 551 U.S. 338 (2007).

73 *Id.* at 347.

74 *Id.* at 350–51.

75 *See supra* note 46.

suading a judge.[76] Furthermore, evidentiary restrictions do not apply at a sentencing hearing, so a prosecutor can introduce evidence that he could not present at trial (e.g., inadmissible hearsay), so long as it possesses "sufficient indicia of reliability."[77] Lastly, the prosecutor has the sole power to request a downward departure because the defendant has provided substantial assistance.[78]

Structurally, the administrative demands on the court give the prosecutor enormous influence over the sentencing process. Although the probation office bears the responsibility for creating a presentence report,[79] the administrative burdens placed on probation office staff and the prosecutor's superior knowledge of the case means that courts inevitably rely on prosecutors' recommendations.[80] This

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76 Although *Booker* made the Sentencing Guidelines advisory, it did not remove the judge's ability to make sentencing decisions based on a preponderance of the facts. In *United States v. Watts*, 519 U.S. 148, 157 (1997), the Supreme Court held that a sentencing court can consider acquitted conduct so long as it is proven by a preponderance of the evidence. The majority in *Booker* itself affirmed that *Watts* remained good law. United States v. Booker, 543 U.S. 220, 240 (2005). The Sixth Circuit, in *United States v. White*, clarified this tension, holding that

> the Sixth Amendment [does not] prevent[ ] a district court from relying on acquitted conduct in applying an *advisory* [G]uidelines system. In the post-*Booker* world, the relevant statutory ceiling is no longer the Guidelines range but the maximum penalty authorized by the United States Code. . . . So long as the defendant receives a sentence at or below the statutory ceiling set by the jury's verdict, the district court does not abridge the defendant's right to a jury trial by looking to other facts, including acquitted conduct, when selecting a sentence within that statutory range.

United States v. White, 551 F.3d 381, 384–85 (6th Cir. 2008) (citations omitted).

77 U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 (2012) (Resolution of Disputed Factors) ("In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility . . . provided that the information has sufficient indicia of reliability to support its probable accuracy.").

78 *See* William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 W. VA. L. REV. 373, 389 n.74, 390 (1995) (citing U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1993) (allowing prosecutors to make a motion seeking downward departures when the defendant provides substantial assistance)). Like most prosecutorial decisions, the decision to seek or refrain from seeking a substantial assistance departure is not subject to review by appellate courts. *Id.* at 390–91. However, the now-advisory Guidelines place some check on the prosecutor and restore some discretion to the judge. *See* O'SULLIVAN, *supra* note 9, at 134.

79 U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 (2012) (Presentence Report) ("The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence . . . .").

80 *See* Powell & Cimino, *supra* note 78, at 383 n.55 ("It should be clear that while the probation office is intended to act independently on behalf of the court, the real-

unstated prosecutorial advantage derives neither from the text of the Guidelines nor the law, but merely from pragmatic concerns generated by the sentencing structure.

Lastly, and most importantly, the prosecutor has increased substantive power as a result of the judge's diminished discretion. Prior to the Guidelines, the only limitation on a judge was the wide statutory range provided in the United States Code. The Guidelines imposed a structured framework of offenses, characteristics, and relevant conduct factors. Although they restricted the judge's discretion, they did not remove all discretion from sentencing; rather, they simply frontloaded the decisions to the prosecutor because they gave more weight to the prosecutor's charges and the facts he chose to present in court. This "discretion tradeoff" led to criticism during the mandatory Guidelines era, leading one district judge to lament that "Congress has thus shifted discretion from persons who have demonstrated essential qualifications to the satisfaction of their peers, various investigatory agencies, and the United States Senate to persons who may be barely out of law school with scant life experience and whose common sense may be an unproven asset."[81] The now-advisory Guidelines might have restored some discretion to judges, but the *Rita* presumption of reasonableness provides a strong incentive for sentencing judges to remain within the Guidelines range and continues to leave most of the sentencing discretion with the prosecutor.

The point of this Section is neither to call into question the validity of the Sentencing Guidelines nor to lament the prosecutor's role in sentencing. Rather, it is merely to show that the prosecutor has a surprisingly large amount of power over a defendant's final sentence. The Guidelines reduce judicial discretion, but they do so by transferring most of that discretion to federal prosecutors.

II. Racketeering Influenced and Corrupt Organizations Act

A. RICO: Key Concepts

Congress passed the Racketeer Influenced and Corrupt Organizations Act,[82] known popularly as RICO, as Title IX of the larger

ity is that probation offices have neither the resources nor the training to conduct independent investigations prior to sentencing, and rely on Assistant United States Attorneys to provide sentencing information.").

81 Powell & Cimino, *supra* note 78, at 384 (quoting United States v. Boshell, 728 F. Supp. 632, 637 (E.D. Wash. 1990)).

82 Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2006)).

Organized Crime Control Act of 1970.[83] As part of the government's efforts against organized crime, RICO was passed to provide prosecutors with more effective tools to fight enterprise criminality,[84] which tends to be more dangerous and long-lasting than single crimes and can persist in the face of multiple prosecutions for discrete crimes. In effect, the RICO statute intended to render criminal organizations themselves illegal, rather than merely the criminal acts they commit.[85] As a result, RICO necessarily employs broad and flexible concepts that are capable of capturing the various manifestations of racketeering activity.

RICO's statutory framework is located from 18 U.S.C. §§ 1961 to 1968. Section 1961 provides all of the overarching statutory definitions, while § 1962 contains all of the act's substantive legal prohibitions. Sections 1963 and 1964 provide for criminal prosecutions and civil enforcement proceedings, respectively. Sections 1965 to 1968 provide a number of investigative and procedural provisions that are not central to the present discussion.[86]

Section 1962 imposes liability on four different racketeering behaviors. Section 1962(a) states that it is "unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . to use or invest, directly, or indirectly, any part of such income . . . in acquisition of . . . or the establishment or operation of, any enterprise which is engaged in . . . interstate or foreign commerce."[87] Section 1962(b) makes it "unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or

83 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.).

84 *See* G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013–14 (1980).

85 Although RICO was written largely with the threat of organized crime in mind, there is no organized crime element that must be proven in a RICO case. *See, e.g.*, H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 244 (1989). The RICO statute applies to any defendant who meets the stated elements of RICO, whether or not he or she is involved in a traditional organized crime family. *Id.* at 248.

86 *See* 18 U.S.C. § 1965 (2006) (establishing venue and process requirements); *id.* § 1966 (permitting the "[e]xpedition of actions" in civil cases if the Attorney General files a certificate designating the case to be "of general public importance"); *id.* § 1967 (granting the judge the discretion to close proceedings to the public during civil RICO actions after considering "the rights of affected persons"); *id.* § 1968 (establishing a process for a "civil investigative demand" that the Attorney General can utilize to compel documents related to a RICO investigation).

87 *Id.* § 1962(a).

control of any enterprise" engaged in commerce.[88] Section 1962(c), the most utilized and discussed of the RICO provisions, makes it "unlawful for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce[ ] to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."[89] The final provision, § 1962(d), prohibits anyone from conspiring to violate any of the other provisions in section 1962.[90]

Sections 1963 and 1964 provide RICO's enforcement mechanisms. Section 1964 allows for civil suits to be brought by the federal government or by private individuals who are "injured in [their] business or property by reason of a violation of § 1962."[91] For civil suits, successful private plaintiffs can receive treble damages and attorney's fees.[92] Civil RICO litigation is an active and complex area of law and has been the subject of numerous articles, cases, and books. This Note, however, addresses criminal sentencing, and for the sake of brevity, will avoid any detailed discussion of civil RICO actions.

Section 1963 imposes criminal liability for all violations of § 1962. According to the § 1963, violators "shall be fined . . . or imprisoned not more than 20 years" or for life if the violation includes a predicate act with a life imprisonment maximum.[93] Criminal RICO convictions also allow the government to utilize a criminal forfeiture provision that requires a convicted RICO defendant to forfeit "any interest the person has acquired or maintained in violation of section 1962," any interest in an "enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation

88 *Id.* § 1962(b).

89 *Id.* § 1962(c). The Supreme Court has held that to "conduct or participate. . . in the conduct of [an] enterprise's affairs" requires that the defendant has "participate[d] in the operation or management of the enterprise itself." Reves v. Ernst & Young, 507 U.S. 170, 185 (1993) (internal quotation marks omitted). For a detailed analysis of the *Reves* "operation and management" test, see Blakey & Blakey, *supra* note *, at 94–105.

90 18 U.S.C. § 1962(d).

91 *Id.* § 1964(c).

92 *Id.*

93 *Id.* § 1963(a). This provides merely the basic statutory maximum for RICO violations. As discussed earlier, the Sentencing Guidelines provide a more structured sentencing regime. For the RICO base offense level, see U.S. SENTENCING GUIDELINES MANUAL § 2E1.1 (2012) (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations), which calls for a base offense level of nineteen for RICO violations, or thirty to thirty-seven months if there are no general adjustments or criminal history.

of section 1962," and any "proceeds" from racketeering activity.[94] This forfeiture provision helps to strike a lethal blow against any criminal enterprise by removing its resources and assets.

Section 1961 provides a long list of statutory definitions, but the three that are most important are "racketeering activity," "enterprise," and "pattern of racketeering activity." Due to the broad language and framework of RICO, courts have grappled mightily with the scope and specific definitions of these terms. This Section will provide a helpful, although not exhaustive, discussion of the major cases.

The definition of "enterprise" has a complicated judicial history. The unadorned statutory text defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[95] In *United States v. Turkette*,[96] the Court confronted the enterprise concept and held that an enterprise included both legitimate, legally constituted entities, as well as criminal groups that are not legally structured, but are nevertheless associations-in-fact.[97] In *Turkette*, the defense made an *ejusdem generis* argument that the phrase "group of individuals associated in fact" should be read to include only legitimate enterprises because the more specific preceding terms referred only to legitimate, legal entities.[98] The Court dismissed this argument, holding that the *ejusdem generis* canon did not apply because it was clear that the statute intended to include criminal enterprises, and there was no ambiguity in the statute that would mandate the canon's application.[99]

Furthermore, the Court rejected the argument that counting a criminal organization as an enterprise would collapse "pattern of racketeering activity" with "enterprise" because the same facts, in the context of a criminal organization or gang, would prove the existence of both elements.[100] To rebut this argument, the Court noted the following:

> [T]he Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand,

94 18 U.S.C. § 1963(a).
95 *Id.* § 1961(4).
96 452 U.S. 576 (1981).
97 *Id.* at 580.
98 *Id.* at 581 (quoting § 1961(4)).
99 *Id.*
100 *Id.* at 583.

> a series of criminal acts as defined by the statute. . . . While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element [that] must be proved by the Government.[101]

Although the Court had included criminal organizations within the enterprise concept, the Court's attempt to maintain the distinction between the "pattern of racketeering activity" and "enterprise" concepts was not entirely clear.

The Court attempted to resolve some of this analytical confusion in *Boyle v. United States*.[102] The case involved a § 1962(c) prosecution of a defendant who had engaged in a number of bank robberies with a group of others. The petitioner challenged his conviction, arguing that an enterprise had to have "an ascertainable structural hierarchy distinct from the charged predicate acts,"[103] which the bank robbers did not have. Writing for the majority, Justice Alito rejected this argument, holding that an enterprise, although a separate element from a pattern of racketeering activity, does not need any structure other than the structure inherently generated by the commission of the predicate acts; the majority noted that "the existence of an enterprise may . . . be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity."[104] The Court further elaborated by holding that

> an association-in-fact enterprise . . . need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis . . . . Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. . . . [A] group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.[105]

This served to maintain that criminal groups could still be prosecuted as RICO enterprises even if they did not have a clear, cognizable, and formal structure.

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101 *Id.* (citation omitted).

102 556 U.S. 938 (2009).

103 *Id.* at 943.

104 *Id.* at 947.

105 *Id.* at 948.

In contrast to the enterprise element, the definition of "racketeering activity" is the most straightforward of the statutory definitions. Section 1961(1) defines "racketeering activity" by providing a long list of other federal and state crimes.[106] Several illustrative examples include bribery, wire fraud, trafficking stolen vehicles, and witness intimidation. These crimes are violations of the United States Code or state law, but § 1961 appropriates them and makes them "predicate acts" for RICO, which helps to define a pattern of racketeering activity.

Although "racketeering activity" is an easily defined concept, a "pattern of racketeering activity" has proven more complicated. The statutory text states that a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[107] The Supreme Court's biggest contribution to the "pattern" element came in *H.J. Inc. v. Northwestern Bell Telephone Co.*,[108] which involved a RICO class action by telephone customers alleging that their telephone company rigged rates by bribing utilities commissioners.[109] In its holding, the Court determined that § 1961(5)'s "pattern of racketeering activity" required more than simply the commission of two predicate acts; a pattern is not merely a checklist of racketeering acts that must be proved by the government.[110] At the outset, the Court adopted an idea from past precedent that although "two acts are necessary [for a pattern], they may not be sufficient."[111] The Court also noted that although something more than two predicate acts was required, the pattern requirement was a "flexible" concept that could be proven in multiple ways.[112] Looking at the legislative history, the Court held that "to prove a pattern of racketeering activity 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."[113] This introduced two new requirements for a pattern of racketeering activity: a relationship component and a continuity component.

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106 18 U.S.C. § 1961(1) (2006).

107 *Id.* § 1961(5).

108 492 U.S. 229 (1989).

109 *Id.* at 233.

110 *Id.* at 237.

111 *Id.* (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 470, 496 n.14 (1985) (internal quotation marks omitted)).

112 *Id.* at 238.

113 *Id.* at 239.

To define the relationship requirement ("that the racketeering predicates are related"), the Court merely adopted a definition from Title X of the Organized Crime Control Act that "criminal 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."[114] The Court further elaborated that the relationship between the predicate acts can be demonstrated not only by "the relationship that they bear to each other" but also the relationship that they have to "some external organizing principle that renders them 'ordered' or 'arranged.'"[115] This possible alternative method of proving relationship has caused serious disagreement between the circuit courts of appeal, and will be discussed in more detail later.[116]

According to the Court, the continuity requirement ("that [the activities] amount to or pose a threat of continued criminal activity")[117] was even broader and more flexible than the already broad relationship requirement. The Court simply noted that continuity could be proven in multiple ways, but that it was largely a temporal concept that could be demonstrated by a showing that predicate acts continued over a closed period or threatened, by their nature, to continue over time. Although the Court remained deliberately open-ended in its holding, the majority did state that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement [because] Congress was concerned in RICO with long-term criminal conduct."[118]

B. "Pattern of Racketeering Acts": The "Relatedness" Requirement

The circuit courts of appeal differ widely in their interpretation of *H.J. Inc.*'s relationship requirement. Most circuits, relying directly on the *H.J. Inc.* holding and its adoption of the Title X definition for relationship, hold that predicate acts must be substantively related to one another in order to be related; this has been termed "horizontal relatedness."[119] Two circuits, the Third and the Sixth, hold that the

114 *Id.* at 239–40.

115 *Id.* at 238.

116 *See infra* Section II.B.

117 *H.J. Inc.*, 492 U.S. at 239.

118 *Id.* at 242.

119 *See, e.g.*, United States v. Browne, 505 F.3d 1229, 1258 (11th Cir. 2007) ("[T]he predicate acts must relate to *each other* . . . ."); United States v. Cianci, 378 F.3d 71, 88 (1st Cir. 2004) ("Predicate acts are 'related' for RICO purposes if they 'have the same or similar purposes, results, participants, victims, or methods of commission, or other-

predicate acts only need to be related to a common enterprise; they do not need to demonstrate any substantive relationship to one another.[120] This type of relationship is referred to as "vertical relatedness." The Second Circuit appears to hold that both vertical and horizontal relatedness must be proven to show a RICO pattern.[121] The

wise are interrelated by distinguishing characteristics and are not isolated events.'" (quoting *H.J. Inc.*, 492 U.S. at 240 (internal quotation marks omitted)); Corley v. Rosewood Care Ctr., Inc., 142 F.3d 1041, 1048 (7th Cir. 1998) (holding that predicate acts have to share the same purposes, results, etc.); United States v. Keltner, 147 F.3d 662, 669 (8th Cir. 1998) (finding relatedness because property stolen during one predicate act was used in later predicate acts and because the same person supervised and directed different predicates); Anderson v. Found. for Advancement, Educ., & Emp't of Am. Indians, 155 F.3d 500, 505–06 (4th Cir. 1998) (holding that the relationship element was not met where the same enterprise committed two factually distinct mail and wire fraud schemes against different victims); Heller Fin., Inc. v. Grammco Computer Sales, Inc., 71 F.3d 518, 523–25 (5th Cir. 1996) (holding that wire fraud scheme and commercial bribery scheme committed by same defendant were "not sufficiently interrelated to constitute a pattern of racketeering activity" because they had dissimilar results, participants, victims, and methods of commission); United States v. Starrett, 55 F.3d 1525, 1543 (11th Cir. 1995) ("[T]he government must prove that the predicate acts are related to each other . . . ."); United States v. Grubb, 11 F.3d 426, 440 (4th Cir. 1993) (holding that multiple campaign fraud schemes were related because they had similar purposes and results). For further discussion of the relatedness requirements, see Colman McCarthy, Note, *Criminal Relationships: Vertical and Horizontal Relatedness in Criminal RICO*, 86 WASH. U. L. REV. 1493, 1507–08 & nn.103–04 (2009). McCarthy provides a similar analysis and list of cases as those provided here and in the following footnotes.

120 *See, e.g.*, United States v. Irizarry, 341 F.3d 273, 296 (3d Cir. 2003) ("[T]he government can prosecute a series of different predicate conspiracies in a single RICO count. This can include persons who are not members of the enterprise, but who conspire with the enterprise to commit predicate offenses as long as the predicate conspiracies relate to the affairs of a single RICO enterprise."); United States v. Corrado, 227 F.3d 543, 554 (6th Cir. 2000) ("The predicate acts do not necessarily need to be directly interrelated; they must, however, be connected to the affairs and operations of the criminal enterprise."); United States v. Eufrasio, 935 F.2d 553, 566 (3d Cir. 1991) ("Our interpretation of RICO's pattern requirement ensures that separately performed, functionally diverse[,] and directly unrelated predicate acts and offenses will form a pattern under RICO, as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise."); United States v. Sinito, 723 F.2d 1250, 1261 (6th Cir. 1983) ("It is unnecessary that the underlying predicate acts be interrelated as long as the acts are connected to the affairs of the enterprise.").

121 United States v. Daidone, 471 F.3d 371, 375 (2d Cir. 2006) ("This Court has further developed this requirement of 'relatedness,' holding that predicate acts 'must be related to each other ("horizontal" relatedness), and they must be related to the enterprise ("vertical" relatedness).'" (quoting United States v. Minicone, 960 F.2d 1099, 1106 (2d Cir. 1992))). *Daidone* appears to be a change from an earlier test that appeared to permit some form of vertical relatedness. *See* United States v. Locascio, 6

Tenth Circuit, although it has traditionally favored "horizontal relatedness," has demonstrated an implicit willingness to accept "vertical relatedness."[122]

The relatedness requirement has enormous impact on a federal prosecutor's charging decisions. In a circuit that requires horizontal relatedness, or requires both horizontal and vertical relatedness like the Second Circuit, the prosecutor must prove that there is an enterprise, that there are the requisite predicate acts, and that those acts have both the threat of continuity and are related *substantively* to one another. A circuit like the Third or the Sixth provides a little more "play in the joints" for a federal prosecutor. In those circuits, the prosecutor has to prove the existence of an enterprise and the requisite predicate acts (plus continuity), but proving the relationship between the predicate acts is much easier. He or she merely needs to connect the predicate acts to the same enterprise to prove relatedness. The two predicate acts can be wildly different in scope, aims, and methods, but they are deemed related if they are performed by the same enterprise.

III. The Problem: Using Faulty RICO Indictments to Gain a Sentencing Advantage

A. The Advantages of a RICO Indictment

Now that the Sentencing Guidelines and RICO have been explained, the discussion can turn to the central issue of this Note: the potential abuse of RICO indictments for sentencing advantage. This Section will describe a prosecutorial strategy that can be referred to in the shorthand as the "relatedness-relevant conduct" strategy. According to this strategy, the prosecutor uses a RICO claim and its relatedness requirement to mask differences between substantively unrelated counts so that a judge will consider them "relevant conduct" during sentencing.

F.3d 924, 943 (2d Cir. 1993) ("We have held that the relatedness requirement is satisfied even if the predicate acts are not *directly* related to each other so long as both are related to the RICO enterprise in such a way that they become *indirectly* connected to each other.").

122 *See* United States v. Smith, 413 F.3d 1253, 1269 (10th Cir. 2005) (holding that predicate gang attacks were related because they had the similar purpose of maintaining the enterprise's reputation), *overruled on other grounds by* United States v. Hutchinson, 573 F.3d 1011, 1021 (10th Cir. 2009). *But see* United States v. Knight, 659 F.3d 1285, 1291–94 (10th Cir. 2011) (recognizing the flexibility of the relatedness test and demonstrating an openness towards the Third Circuit's vertical relatedness approach without totally embracing it).

Suppose that the government has a defendant with one count that it can confidently prove (the "primary count"). Imagine further that the government has less persuasive evidence that the defendant committed other crimes (the "secondary counts") that are not closely related to the stronger count. The prosecutor can bring individual counts for all of the crimes, but he or she risks a high chance of acquittal on all counts but the primary one. On the other hand, he or she can add a RICO count and allege that all of the unrelated counts are part of a common RICO enterprise. Because of the wide flexibility in defining a RICO enterprise,[123] a creative prosecutor can make a plausible argument that an enterprise exists in order to survive a motion to dismiss. Therefore, these separate events serve both as individual counts and as predicate acts for the RICO charge. Because of the underlying lack of evidence, the risk of acquittal is still high, but the prosecutor has a newfound advantage.

Even if the prosecutor fails to prove the RICO count or the secondary counts beyond a reasonable doubt, he or she is still in a stronger position for sentencing. By alleging that disparate and only loosely related acts were related to a common RICO enterprise, the prosecutor can use the trial to advance a theory of a closely connected scheme of criminal activity. A prosecutor who asserts throughout a trial that a defendant's actions constitute a pattern of racketeering activity effectively spends the whole trial arguing that all of the facts are relevant conduct, which gives him or her a "head start" on sentencing arguments. This is clever enough in a circuit that requires horizontal relatedness for a RICO pattern; the prosecutor merely has to make a sufficiently plausible argument that the acts are substantively related to one another to survive a motion to dismiss the RICO count. He or she can then spend the trial arguing that all of the facts are part of the same pattern, perhaps as a "Hail Mary" attempt to prove a RICO count, but also with an eye to gain sentencing leverage.

The "relatedness-relevant conduct" strategy, however, is even shrewder in a circuit that only requires vertical relatedness. In these circuits, the prosecutor only needs to plead that factually unrelated acts are related to a common enterprise. Even though the acts are unrelated to one another factually and substantively, the RICO count effectively becomes the narrative glue relating all the acts together. The prosecutor spends the whole trial arguing that the alleged predicates are part of the same pattern and related to the same enterprise; even when the jury acquits on the RICO count, the impression that the facts are part of the "same course of conduct or common scheme"

123 *See supra* notes 96–100 and accompanying text.

remains, and it is not a far cry to assume that a judge might decide by a preponderance of the evidence that they are relevant conduct to be considered at sentencing.

B. The Similarity Between the "Third" Dimension of Relevant Conduct and a RICO Pattern

The conceptual overlap between a RICO pattern of racketeering activity and "relevant conduct" sentencing considerations reveals why a prosecutor would be clever to utilize the "relatedness-relevant conduct" strategy. As noted earlier, the factors that are included in relevant conduct consideration are divided into three different sections in the Sentencing Guidelines:

(1) Section 1B1.3(a)(1)(A)'s "accomplice attribution" provision, which includes all acts and omissions attributable to the defendant;[124]

(2) Section 1B1.3(a)(1)(B)'s "temporal" dimension, which encompasses "all reasonably foreseeable acts and omissions . . . in furtherance" of "the jointly undertaken criminal activity ([defined as] a criminal plan, scheme, endeavor, or *enterprise* undertaken . . . in concert with others);"[125] and

(3) the final relevant conduct provision, which includes everything "that [was] part of the same course of conduct or common scheme or plan."[126]

These concepts, particularly the temporal dimension and the final "same course of conduct or common scheme" dimension are very similar to a RICO pattern of racketeering activity. The temporal dimension includes all acts that occurred during a jointly undertaken activity and even goes so far as to utilize the term "enterprise." To commit a RICO violation, an enterprise must carry out a pattern of activity that has temporal continuity, which would mean that all of the acts in the pattern are automatically included in the "temporal dimension." The "same course of conduct or common scheme" dimension also conforms with a RICO pattern; whether "vertical" or "horizontal" relatedness is required, a RICO pattern must show in some way that the predicate acts are related (either directly or indirectly), and are thus part of the same conduct or scheme.

124 U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A) (2012).

125 *Id.* § 1B1.3(a)(1)(B) (emphasis added).

126 *Id.* § 1B1.3(a)(2). For further elaboration on the relevant conduct considerations and Judge Wilkins's taxonomy, see *supra* notes 38–44 and accompanying text.

Furthermore, the final "same course of conduct" dimension applies to all counts that require "grouping."[127] As noted earlier, "grouping" applies to those crimes that involve "substantially the same harm."[128] Section 3D1.2 of the Guidelines Manual lists multiple ways that counts can qualify for grouping. One example points to counts that "involve the same victim and two or more acts or transactions connected by a common criminal objective."[129] This definition is remarkably similar to the definition of a RICO pattern of racketeering activity, which requires two related predicate acts. In fact, the "same victim" language is the only difference that distinguishes the two definitions. It is a prime example of how RICO's statutory language tracks very closely with the language of the "relevant conduct" provisions.

C. Case Study: The Don Siegelman Case

Because of the complexity of the "relatedness-relevant conduct" strategy, there are no cases where it is clear that a prosecutor has intentionally used this strategy. Nevertheless, there are cases where the conceptual overlap between RICO and the Sentencing Guidelines led to confusion at sentencing.

The 2006 corruption trial of former Alabama Governor Don Siegelman is an example of a situation where the "relatedness-relevant conduct" prosecutorial strategy would be likely to arise. Donald "Don" Siegelman was the Governor of Alabama from 1999 to 2003. In 2005, a federal grand jury indicted Siegelman and several others on thirty-four counts.[130] The primary issue at the trial, although multiple charges were brought, was HealthSouth CEO Richard Scrushy's alleged payment of $500,000 in exchange for a seat on the state's Certificate of Need (CON) Board, which regulates health care facilities like those operated by HealthSouth.[131]

To be perfectly clear, this Note does not and cannot allege that the Assistant United States Attorneys in the Siegelman case purposely employed the "relatedness-relevant conduct" strategy. The weakness and ultimate failure of the RICO counts could have been the result of an overzealous desire to bring a RICO claim, an inability to successfully explain RICO's complexities to the jury, a simple decision by the

127 U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2) (2012).

128 *Id.* § 3D1.2.

129 *Id.* § 3D1.2(b).

130 Second Superseding Indictment, United States v. Siegelman, 467 F. Supp. 2d 1253 (M.D. Ala. 2006) (No. 2:05-CR-119-F) [hereinafter *Siegelman Indictment*].

131 *See Statements Give Glimpse Behind Scrushy-Siegelman Case*, THE ASSOCIATED PRESS, Mar. 10, 2006, *available on Westlaw at* 3/10/06 AP Alert–Alabama 21:50:24.

jury to split the counts, or any number of other considerations. Given the evidence available, it would be unfair and unjust to attribute bad faith to Siegelman's prosecutors. Nevertheless, the Siegelman case presents a fact pattern where facially weak RICO claims that were rejected by the jury led to confusion about "relevant conduct" at the sentencing phase. As a result, they present a valuable example of where the "relatedness-relevant conduct" problem could arise.

All thirty-four of the Siegelman indictment counts do not need to be examined here, but a review of the RICO claims is necessary. Counts One and Two of the indictment alleged a RICO § 1962(d) conspiracy and a substantive RICO § 1962(c) violation, respectively.[132] The substantive RICO count alleged that Governor Siegelman and his chief of staff, Paul Hamrick, operated the "Executive Department of the State of Alabama"[133] as an enterprise engaged in a pattern of racketeering activity. The indictment alleged five separate predicate acts. The first predicate act alleged that the defendants committed bribery, wire fraud, and money laundering all in connection to the payments from Scrushy to Siegelman's lottery campaign.[134] The second predicate act alleged conspiracy to commit extortion, bribery, and mail fraud related to alleged payments from lobbyist Lanny Young in return for official acts and favors in relation to a number of business interests unrelated to the Scrushy affair.[135] The third and fourth predicate acts alleged obstruction of justice in the form of checks paid by Siegelman aide Nicholas Bailey to Lanny Young in order to hinder an FBI investigation into Siegelman's activities.[136] In the indictment's alleged Racketeering Act 4(b), the grand jury alleged that "defendant [Siegelman] did cause Nicholas D. Bailey to [write him] a check in the amount of $2,973.35 with the notation 'balance due on [motorcycle]' with intent to hinder . . . the Federal Bureau of Investigation."[137] The fifth and final predicate act alleged that the defendant engaged in extortion, bribery, money laundering, and mail fraud involving Alabama Department of Transportation head Gary Mack Roberts and alleged extortion of transportation contractors Jimmy

132 *Siegelman Indictment*, *supra* note 130, at 2, 5.

133 *Id.* at 13.

134 *Id.* at 4–7.

135 *Id.* at 7–11.

136 *Id.* at 12–13.

137 *Id.* at 12–19. The prosecutors alleged that Lanny Young gave Siegelman money to purchase the motorcycle, and that the check from Bailey was intended to obscure the transaction. Kim Chandler, *On 27th Day, Prosecution Rests*, BIRMINGHAM NEWS, June 9, 2006, *available at* 2006 WLNR 9953202.

Lynn Allen and Max Marcato.[138] The § 1962(d) conspiracy claim charged that Siegelman, Hamrick, Siegelman's aide Nicholas Bailey, and lobbyist Lanny Young conspired to "participate . . . in the conduct of the affairs" of the Governor's Office through a pattern involving honest services fraud, extortion, money laundering, and obstruction of justice.[139]

The RICO claims were facially very weak. The different predicate acts alleged various acts of political corruption, but they were all factually distinct and unrelated to one another; they alleged different victims and different methods of commission. Their only relationship was that they were run out of the enterprise of the "Executive Department of the State of Alabama."[140] The Eleventh Circuit, however, requires horizontal relatedness between the predicate acts.[141] Because the indictment did not allege horizontal relations, the RICO claims should have been dismissed prior to trial. The § 1962(d) conspiracy claim, because it charged unrelated acts as one large conspiracy, also had its weaknesses.[142]

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138 *Siegelman Indictment*, *supra* note 130, at 2–3, 22–28.

139 *Id.* at 3.

140 *Id.* at 2–3. By defining the RICO enterprise as the state's executive department, the indictment conveniently transformed the Governor, who would otherwise be an individual defendant, into a RICO enterprise.

141 *See supra* note 119 (including the Eleventh Circuit amongst those that require horizontal relatedness).

142 In *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981), the Fifth Circuit encountered the case of a municipal judge who received separate bribes from separate defendants. *Id.* at 1186. There was no agreement alleged at trial between the two bribing defendants. All three were convicted of a § 1962(d) conspiracy. *Id.* at 1185. Because there was no agreement between the two bribe-paying defendants to form a single coherent traditional conspiracy, the government attempted to argue on appeal that multiple conspiracies can be tried together as a RICO "enterprise conspiracy." *Id.* at 1191. They pointed to Sutherland's judicial office as the enterprise and glue holding the entire RICO conspiracy claim together. To make this argument, they relied on language from *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978) (en banc), that "[RICO's] effect . . . is to free the government from the strictures of the multiple conspiracy doctrine and to allow the joint trial of many persons accused of diversified crimes." *Id.* at 900. The *Sutherland* court backed away from this language and held that a RICO conspiracy did not abandon traditional conspiracy elements, but simply provided a new substantive crime that conspirators can be shown to have agreed to violate; namely, a RICO conspiracy can arise out of the agreement to form an enterprise that conducts a pattern of racketeering activity. *Sutherland*, 656 F.2d at 1192. Applying the facts to the case at hand, the court held that the prosecutors had not attempted to prove a RICO conspiracy using two separate conspiracies. However, the court held that in Sutherland's case, the error in defining the RICO conspiracy was harmless. *Id.* at 1197–98.

Nevertheless, all counts proceeded to a jury trial. The jury acquitted on twenty-five of the thirty-five counts, most importantly on the two RICO counts. The jury convicted on Count Three (federal funds bribery in relation to Scrushy's payment to get on the CON Board), Count Five (conspiracy to commit fraud related to the Scrushy-Siegelman transaction), Counts Six and Seven (mail fraud in the form of appointment letters naming HealthSouth employees to the CON Board), Counts Eight and Nine (mail fraud in the form of letters providing certificates of need to HealthSouth facilities), and Count Seventeen.[143] Count Seventeen was an obstruction of justice violation related to Nicholas Bailey's check for the "balance due on [a motorcycle]"; it was the only successful count that was not related to Scrushy and the CON Board payments.[144]

At sentencing, the government sought to have all counts considered together because they were corruption offenses and their offense levels were "largely based on the amount of harm."[145] The government also requested that the court consider the acquitted counts related to Lanny Young when calculating the harm for sentencing;[146] without the RICO count, it would have been very difficult to argue that the payments from Lanny Young and the Scrushy donation

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Siegelman's case presents some factual similarities, and because *Sutherland* was decided prior to the split of the Fifth Circuit, it is binding on Eleventh Circuit judges. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (holding that the decisions of the old Fifth Circuit handed down prior to September 30, 1981 are binding in the Eleventh Circuit). The RICO conspiracy count in Siegelman's indictment flimsily alleged that a number of discrete and factually unrelated transactions constituted a conspiracy because they were run out of an enterprise defined merely as the "Executive Department of the State of Alabama," much like the discrete crimes in *Sutherland* were purportedly connected through the judge's office. *Siegelman Indictment*, *supra* note 130, at 2–3. As such, the RICO conspiracy claim might have been reversed on appeal as a result of *Sutherland*. The Siegelman indictment might have avoided the *Sutherland* pitfall in one way, however. In *Sutherland*, the prosecutor named two defendants who had not agreed with each other to do anything, creating a wheel and spoke conspiracy with no rim. *Sutherland*, 656 F.2d at 1189–90 (citing Kotteakos v. United States, 328 U.S. 750, 755 (1946)). Siegelman's prosecutors might have avoided this problem by alleging that the co-conspirators were Hamrick and Siegelman, who both worked in the Governor's Office and clearly knew each other. In any event, the point is moot because the jury was not convinced by the RICO conspiracy claim in the first place.

143 United States v. Siegelman, 467 F. Supp. 2d 1253, 1261 (M.D. Ala. 2006); *see Siegelman Indictment*, *supra* note 130, at 18–22, 24–25.

144 *Siegelman Indictment*, *supra* note 130, at 12, 24–25.

145 United States' Sentencing Memorandum as to Defendant Siegelman at 6, United States v. Siegelman, 467 F. Supp. 2d 1253 (M.D. Ala. 2006) (No. 2:05-CR-119-MEF).

146 *Id.* at 3–4.

should be grouped as part of the "same course of conduct." Furthermore, the government also sought an upward departure based on pervasive corruption under Section 5K2.0,[147] which governs upward departures above the recommended Guidelines sentence. The guidelines for bribery convictions permit an upward departure if the "defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government."[148] In its sentencing motion, the government sought such an upward departure because Siegelman "injected corruption throughout the government of the State of Alabama."[149]

Upward departures are not directly influenced by relevant conduct considerations, but are governed by the "information specified in the respective guidelines."[150] Nevertheless, since relevant conduct factors apply to those same "respective guidelines" that determine offense level (like specific offense characteristics and general adjustments), relevant conduct considerations still indirectly impact upward departures. The Eleventh Circuit later affirmed the trial court's upward departure for Siegelman.[151]

This use of relevant conduct sentencing presents serious problems. The jury rejected the RICO charges against Siegelman but convicted him on several of the individual predicate acts that doubled

147 United States' Motion for Upward Departure for Systematic and Pervasive Government Corruption at 1, United States v. Siegelman, 467 F. Supp. 2d 1253 (M.D. Ala. 2006) (No. 2:05-CR-119-MEF) [hereinafter *Upward Departure Motion*].

148 U.S. SENTENCING GUIDELINES MANUAL § 2C1.1 cmt. 7 (2012).

149 *Upward Departure Motion*, *supra* note 147, at 1. The government, in its motion for an upward departure, relied solely on the convicted counts in seeking an upward departure for conviction. *Id.* at 1–2. As a result, some might argue that the acquitted RICO counts played no role in the court's departure determination and that the "relatedness-relevant conduct" problem did not apply. However, it remains difficult to see how Count 17 (the motorcycle check) and the other counts, which all relate to the Scrushy transaction, create "pervasive" corruption without reference to the acquitted RICO indictments. Furthermore, the government had already asked the court to consider the acquitted conduct in calculating the harm and setting the offense level. If the judge decided by a preponderance that those facts had occurred, it seems certain that he would consider them when determining whether a corruption departure was necessary.

150 *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(b) (2012) ("Factors in Chapter . . . Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.").

151 United States v. Siegelman, 640 F.3d 1159, 1189–90 (11th Cir. 2011). Unfortunately, both Siegelman's appellate lawyers and the circuit panel did not address issues related to the "relatedness-relevant conduct" problem but instead focused on whether Siegelman's public criticisms of the prosecutor influenced the departure.

as substantive counts (e.g., mail fraud). This supports the inference that the jury acquitted not because of any deficiency in the underlying predicate acts, but because it was unconvinced that there was an enterprise or pattern connecting them together. To turn around and argue that all the counts should be grouped together at sentencing flies directly in the face of the jury verdict.

The intentional manipulation of relevant conduct sentencing violates the spirit of the Sentencing Guidelines. The relevant conduct paradigm was not conceived of with large enterprise crimes like RICO in mind. Relevant conduct sentencing is an attempt to permit judges to consider real-offense considerations that go beyond the unadorned code violation and that were not included in the indictment or charged at trial. It is one thing to make a judicial determination about circumstances the jury did not consider at all; for example, the fact that the defendant lacked remorse or that he abused a position of power. It is another thing entirely for a judge to find that a series of facts are all part of the same course of conduct after a jury has rejected a RICO charge that for all intents and purposes alleged the exact same thing. Although it might be facially legal, it is a manipulation of the sentencing system rather than a faithful application of its principles.

Some might argue that the differing burdens of proof mitigate this problem. A jury could decide that there was reasonable doubt that the acts were sufficiently related and thus that they did not form RICO pattern, and a judge could still decide by a preponderance of the evidence that the acts were sufficiently related for relevant conduct in the Sentencing Guidelines context. This is true, but the problem is the prosecutorial methods that are used to encourage this finding by the judge. When a prosecutor brings a charge, he is stating that he intends to prove that count beyond a reasonable doubt; if he does not think that he can prove a RICO count or that the count is particularly weak, but will serve the advantageous effect of making conduct seem more closely related than it actually is, he is manipulating his indictment power for ends it was not designed to serve.

IV. Remedies and Recommendations

A. Constitutional Analysis

This Part will examine the implications of the "relatedness-relevant conduct" strategy. Given the current case law, the strategy is not facially unconstitutional. In *United States v. Watts*,[152] the Court

152 519 U.S. 148 (1997) (per curiam).

decided a case where the police had discovered cocaine base and two guns hidden in a defendant's home. The jury convicted the petitioner of a cocaine possession offense, but acquitted him of a firearms offense. The sentencing judge then decided by a preponderance of the evidence that the defendant indeed used the guns in the commission of the crime and elevated his sentence accordingly.[153] The Ninth Circuit reversed and held that the acquitted facts could not be considered at sentencing. However, the Supreme Court reversed the Ninth Circuit, holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[154] Relying on the difference between the reasonable doubt and preponderance standards, the Court determined that a jury could logically decide that there was reasonable doubt and acquit, while a judge could subsequently decide that the conduct was more likely committed than not, permitting him to sentence on that conduct. Under this analysis, it is not unconstitutional for a judge to consider an acquitted RICO charge when determining a defendant's sentence.

B. Ethical Analysis

Just because the "relatedness-relevant conduct" problem is not unconstitutional does not mean that its intentional use is ethical. ABA Model Rule of Professional Conduct 3.8 states explicitly that "[t]he prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[155] If a federal prosecutor brings a RICO claim that he knows is unlikely to succeed, but does so merely to connect substantively unrelated acts, then he or she does not have probable cause to bring the charge. In this instance, he would be abusing his discretion and subverting the spirit of the sentencing regime, which was constructed in order to achieve "honesty in sentencing."[156]

C. Education of Defense Attorneys and Sentencing Judges

This discussion of the "relatedness-relevant conduct" strategy cannot end with a perfunctory conclusion that its use is unethical; some solution or remedy must be proposed. Although it is difficult to explain the "relatedness-relevant conduct" strategy, it is not difficult to

153 *Id.* at 149–50. For more on *Watts*, see *supra* note 76.

154 *Watts*, 519 U.S. at 157.

155 MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2013).

156 *See supra* note 8 and accompanying text.

identify its solution. One of the easiest ways to prevent prosecutors from abusing RICO indictments is to educate judges and defense attorneys about its potential. If defense attorneys are aware of possible abuse, they can inform the sentencing judge. If a judge knows of this problem, he or she can factor it into his or her sentencing considerations. Now that the Sentencing Guidelines are advisory,[157] the judge is not tightly bound to the prosecutor's charging decisions and can depart from the Guidelines if justice requires it. If a district judge suspects that RICO counts were brought in order to make unrelated conduct appear related during the sentencing phase, then he can resist the government's attempts to increase a defendant's sentence. These educational efforts can be carried out through legal scholarship, continuing legal education forums, or any other number of avenues.

D. The Department of Justice's Regulation of RICO Proceedings

Although legal education is important, the most effective way to prevent federal prosecutors from bringing frivolous RICO claims for sentencing gain is for the Department of Justice to step in and solve the problem. Because the Department of Justice already supervises federal RICO prosecutions, it can easily remedy the situation. The DOJ already publishes a manual that governs criminal RICO indictments by United States Attorneys' Offices. The manual provides an overview of the statute and the DOJ's RICO policies. The current manual has a section entitled "Application of Sentencing Guidelines to RICO," which describes sentencing issues.[158] A simple amendment could introduce a new section explaining the "relatedness-relevant conduct" problem and prohibiting Assistant United States' Attorneys from charging weak RICO claims for sentencing purposes.

Once in place, this prohibition could then be enforced through the DOJ's RICO approval process. The RICO statute is unique because the federal government exercises more oversight over RICO indictments than it does over other federal criminal statutes. Currently, "[n]o [RICO] indictment, information, or complaint [can] be filed without the prior approval of the [Organized Crime and Gang Section]."[159] According to the United States Attorneys' Manual, "[n]o criminal or civil prosecution or civil investigative demand [can] be

157 *See supra* Section I.D (discussing judicial sentencing developments).

158 U.S. DEP'T OF JUSTICE, ORGANIZED CRIME AND RACKETEERING SECTION, CRIMINAL RICO: 18 U.S.C. §§ 1961–1968: A MANUAL FOR FEDERAL PROSECUTORS 163–78 (5th rev. ed. Oct. 2009).

159 *Id.* at 17.

commenced or issued under the RICO statute without the prior approval of the . . . Criminal Division."[160]

Because the Department of Justice exercises oversight over RICO, the "relatedness-relevant conduct" problem can be solved without amending the Sentencing Guidelines or the RICO statute. By simply adding the "relatedness-relevant conduct" problem to the DOJ's list of pre-approval considerations, this unethical prosecutorial strategy can be eliminated. If DOJ attorneys who review proposed RICO indictments explicitly include this factor in their formal considerations, then its abuse can be severely curtailed.

CONCLUSION

In 1935, Justice Benjamin Sutherland of the United States Supreme Court wrote:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.[161]

This Note has demonstrated how a defendant could be acquitted of a RICO charge and yet receive a higher sentence than a similarly situated defendant who was not charged under RICO. The intent of this Note is not to criticize the RICO statute, the current sentencing regime, or the powers granted to federal prosecutors; all three contribute greatly to the functioning of the federal criminal legal system. Rather, its purpose is to counsel federal prosecutors to exercise vigilance and extreme care when prosecuting defendants under complex criminal statutes like RICO. When dealing with complex frameworks like the Sentencing Guidelines or RICO, attorneys have a responsibility to be intellectually disciplined, precise, and honest in their arguments. By illustrating an interesting conceptual overlap between parts of the RICO statute and the Sentencing Guidelines, this Note attempted to show one example in which two conceptually dense stat-

160 U.S. DEP'T. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-110.320 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/110mcrm.htm.

161 Berger v. United States, 295 U.S. 78, 88 (1935).

utory systems can lead to confusion and potential prosecutorial abuse in criminal sentencing. By noting this overlap and cautioning against its abuse, the RICO statute and the United States Sentencing Guidelines can continue to function both honestly and efficiently.