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RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO),¹ the culmination of its effort to develop new legal remedies to curtail the incidence of sophisticated crime in the United States.² A person may fall within the ambit of RICO’s prohibitions by engaging in one or more of four activities: (1) using income derived from a pattern of racketeering activity to acquire an interest in an enterprise;³ (2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity;⁴ (3) conducting the affairs of an enterprise through a pattern of racketeering activity;⁵ or (4) conspiring to commit any of these offenses.⁶ The “pattern of racketeering activity” must include at least two predicate


² The purpose of RICO is stated on the face of the statute:

It is the purpose of this Act to seek the eradication of crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.


The Supreme Court has considered RICO only once, in United States v. Turkette, 452 U.S. 576 (1981). The Court recognized that “the legislative history forcefully supports the view that the major purpose of Title IX is to address the infiltration of legitimate business by organized crime.” Id. at 584.

³ 18 U.S.C. § 1962(a) provides:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .

“Enterprise” includes “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4) (1976). In Turkette, the Supreme Court held that “enterprise” includes both legitimate and illegitimate associations. 452 U.S. at 584.

⁴ 18 U.S.C. § 1962(b) provides:

It shall be 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 control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

⁵ 18 U.S.C. § 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to con-
offenses committed within a period of ten years. The relationship between the RICO substantive offenses and the predicate offenses is critical for two issues that can arise in RICO prosecutions: the issues of double jeopardy and verdict consistency.

6 18 U.S.C. § 1962(d) provides: “It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.”

7 “Racketeering activity” includes murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotics or other dangerous drugs, chargeable under state law and punishable by imprisonment for more than one year, and any act indictable under statutes concerning bribery, sports bribery, counterfeiting, theft from interstate shipment, embezzlement from pension and welfare funds, extortionate credit transactions, transmission of gambling information, wire fraud, obstruction of justice, obstruction of criminal investigations, obstruction of state or local law enforcement, interference with commerce, robbery or extortion, racketeering, illegal gambling businesses, transportation of stolen property, white slave traffic, embezzlement of union funds, bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States. 18 U.S.C. § 1961(1).

8 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.” 18 U.S.C. § 1961(5).

9 See notes 21-115 infra and accompanying text.

10 See notes 116-57 infra and accompanying text. The relationship between the RICO substantive offenses and the predicate offenses is implicated on yet another level: the requisite state of mind to violate RICO. This issue is beyond the scope of this note, but for an excellent discussion, see Kolen, Rico and State of Mind, in 3 MATERIALS ON RICO 1286 (G.R. Blakey ed. 1980).

In brief, RICO focuses on relationship. If the RICO predicate offenses are conceptualized as lesser included in the RICO substantive charge, then the RICO offenses themselves would become merely aggravated forms of the predicate offenses, and no further inquiry into the state of mind issue would be necessary. The preferred interpretation of RICO, however, views the substantive and predicate offenses as separate and distinct, not greater and lesser included. See notes 13 and 55-59 infra and accompanying text.

Some courts have held that no additional state of mind, beyond that required to violate the predicate offenses, is required to violate RICO. See United States v. Boylan, 620 F.2d 359 (2d Cir.), cert. denied, 449 U.S. 833 (1980); United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976). Unfortunately, neither of these courts adequately analyzed the RICO statute in reaching its conclusion.

Section 1962(a) requires a defendant to knowingly use or invest capital. He must be at least reckless as to whether the capital was income or the proceeds of income. He must be at least reckless as to whether the income involved was from a pattern of racketeering activity. He must be at least reckless as to whether the use or investment of his money was related to an enterprise. No state of mind is required as to an effect on interstate commerce, since this requirement is jurisdictional only. Kolen, supra, at 1321.

Section 1962(b) requires a defendant to knowingly engage in activities. No state of mind is required as to whether the enterprise engages in interstate or foreign commerce, or whether the activities of enterprise affect interstate or foreign commerce, because these elements are
I. The Arguments Presented

Individuals convicted of a substantive RICO violation and one or more of its predicate offenses charged as separate substantive offenses consistently assert on appeal that their convictions and accompanying punishments violate the double jeopardy clause of the fifth amendment. They argue that RICO and its predicates are the "same offense" for double jeopardy purposes, because the predicate offenses are lesser included in the RICO substantive charge. Accordingly, they urge that the double jeopardy clause prohibits successive state-federal prosecutions, successive federal prosecutions, and separate punishments. Nevertheless, most courts have rejected these contentions on the ground that Congress intended that RICO and the predicate offenses be treated as separate and distinct. Because Congress expressed its intent that the two offenses be treated separately when it enacted RICO, the federal circuit courts of appeals have rejected double jeopardy attacks on RICO prosecutions.

jurisdictional. The defendant must be at least reckless as to whether a relationship exists between the distinct racketeering activities. He must be at least reckless as to his activity of collecting a debt, but no state of mind is required as to whether the debt was lawful or unlawful, because this is a legal question. The defendant must be at least reckless as to the result of acquiring or maintaining his interest. Kolen, supra, at 1325-26. Section 1962(c) requires the same state of mind as § 1962(b). Kolen, supra, at 1329-30. Section 1962(d) requires the defendant to knowingly conspire to violate either § 1962(a), § 1962(b), or § 1962(c).


12 See notes 21-59 infra and accompanying text.

13 See notes 55-59 infra and accompanying text.

14 See notes 60-115 infra and accompanying text. One commentator has recently proposed the need for greater double jeopardy controls in RICO prosecutions. His position appears to be that, because the RICO statute is broad and allows much prosecutorial discretion, prosecutors will violate the constitutional rights of criminal defendants by abusing their power to charge defendants under RICO and their power to recommend sentences for RICO violations. Comment, The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions, 70 CALIF. L. REV. 724 (1982) [hereinafter cited as Comment]. The author recommends strict compliance with the Petite policy, see note 70 infra and accompanying text, to eliminate successive state and federal trials. He also recommends strict application of the Blockburger test, see notes 44-54 infra and accompanying text, to obviate consecutive punishments for RICO substantive and predicate offenses, since he doubts that Congress intended RICO to warrant multiple punishments. Comment, supra, at 757.

RICO undoubtedly accords the government considerable discretion in charging, trying, and sentencing defendants. Such discretion is necessary to implement the statute. The potential for abuse of discretion is present in all facets of our criminal justice system, so citizens must trust prosecutors not to abuse their powers under RICO. In United States v. Dot-
When considering verdict consistency, however, the same courts have been slower to conceptualize the distinct legal relationship between the RICO substantive and predicate offenses. The courts disagree whether the RICO conviction must be reversed after an appellate court’s reversal of a predicate offense charged as a substantive crime. The better reasoned opinions hold the RICO conviction may stand.

_15_ See notes 116-21 infra and accompanying text.

_16_ See notes 140-51 infra and accompanying text.

_17_ See notes 146-51 infra and accompanying text.

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terweich, 320 U.S. 277 (1943), Justice Frankfurter remarked, “[T]he good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on ‘conscience and circumspection in prosecuting officers.’” _Id._ at 285 (citing Nash v. United States, 229 U.S. 378 (1912)). Any abuse that might occur would be the fault of the individual prosecutors, not the RICO statute.

One convicted under RICO may indeed face extensive punishment. However, equally extensive factors mitigate any abuses of discretion evident in a RICO prosecution. Even though the elements of a RICO violation are present, the prosecuting attorney is not required to charge the RICO violation. In fact, the Justice Department’s own RICO Guidelines stress that the statute ought not be used reflexively, but only after a carefully studied determination that RICO is the most appropriate vehicle for prosecution. “Utilization of the RICO statute, more than most other Federal criminal sanctions, requires particularly careful and reasoned application. . . . [I]t is the policy of the Criminal Division that RICO be selectively and uniformly used.” Preface, U.S. Dept. of Justice, _RICO GUIDELINES_ 1 (1981). See also _TASK FORCE ON THE PROSECUTION FUNCTION_, A.B.A., _The Prosecution Function_, 1 _AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE_ ch. 3 (1982) [hereinafter cited as _The Prosecution Function_], for further discussion of the prosecutorial role and responsibilities.

At least four factors ensure reasoned application of RICO. First, if the prosecutor chooses not to observe the RICO guidelines, a defendant may be able to prove the variance necessary to establish a discriminatory prosecution action against that prosecutor. Discriminatory enforcement is not a defense to the criminal charge, but can be used when applying to the court for a dismissal or a quashing of the prosecution on constitutional grounds. See United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), for an excellent discussion of discriminatory prosecution.

Second, the jury becomes a mitigating factor in that it may or may not convict a defendant for a RICO violation, and may legitimately base its verdict on leniency or compromise. _See_ notes 122-39 infra and accompanying text. The jury trial itself gives the defendant “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” _Duncan v. Louisiana_, 391 U.S. 145, 156 (1968).

Third, the judge has considerable discretion in sentencing the defendant. He may choose to impose concurrent sentences, or he may refuse to sentence for RICO violations. Only the criminal forfeiture provisions of RICO are mandatory. _See_ note 154 infra and accompanying text.

Finally, the parole board can ease disproportionate sentences imposed by judges through its control over parole dates. Those convicted under RICO can also seek extraordinary relief under the provisions of 28 U.S.C. §§ 1361 or § 2241, when they feel the parole board has acted arbitrarily or capriciously toward them and their terms of confinement. _See_, e.g., _Carter v. Carlson_, 545 F. Supp. 1120 (W.D. Va. 1982), where Carter’s sentence for violations of RICO §§ 1962(c) and § 1962(d) was reduced from 82 to 15 years through appellate proceedings, and where Carter petitioned for extraordinary relief, alleging the parole commission denied her equal protection and due process of the law.
This note examines the double jeopardy and verdict consistency arguments raised in RICO prosecutions. Part II reviews the general principles of greater and lesser included offenses. Part III discusses the lesser included offense issue as it relates to each of the three protections afforded by the double jeopardy clause. It argues that since the relationship between RICO and the predicate offenses is not greater and lesser included, double jeopardy attacks should be rejected in RICO prosecutions. Part IV analyzes the issue of verdict consistency. Since consistency of verdicts has never been required in general federal jurisprudence, it is asserted that no different rule ought to control jury verdicts in RICO prosecutions. To the degree that RICO prosecutions present unique consistency problems, special verdicts can be used to avoid them.

II. Lesser Included Offenses—General Principles

The common law developed the doctrine of lesser included offenses to aid the prosecution when it failed to prove some element of the crime charged. The courts soon recognized that the doctrine also benefited the defendant since, if the jury desired to convict him of something, it had the option of finding him guilty of the lesser offense. For example, in a prosecution for auto theft, the jury could decide that only a joyriding case was made. Because joyriding is lesser included in the automobile theft charge, the jury has the power to return a guilty verdict on joyriding alone. Similarly, the government, although desiring a conviction for auto theft, may still obtain a conviction against a defendant for the lesser included offense, even when it failed to present the requisite proof of each element of the crime charged in the indictment.

Today, rule 31(c) of the Federal Rules of Criminal Procedure...
governs lesser included offenses in federal courts. This rule provides: "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or of an offense necessarily included therein if the attempt is an offense."

The key phrase in rule 31(c) is "necessarily included." The Supreme Court of the United States has subtly encouraged a carefully reasoned analysis of whether one offense is necessarily included in another. In *Ianelli v. United States*, the appellant argued that 18 U.S.C. § 371, a general federal conspiracy statute, and 18 U.S.C. § 1955, a statute prohibiting illegal gambling businesses involving five or more persons, were greater and lesser included. Because section 1955 is silent regarding the necessity for concerted activity, the essence of a conspiracy charge, the Court construed section 1955 to permit the possibility that the five persons "involved" in the gambling operation might not be acting together. Thus, the federal statutes were not greater and lesser included.

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24 FED. R. CRIM. P. 31(c).
25 Id.
27 18 U.S.C. § 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both . . . .

28 18 U.S.C. § 1955 provides:

(a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
(b) As used in this section-
(i) "illegal gambling business" means a gambling business which-
(ii) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and
(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day . . . .

29 Section 1955 is part of Title VIII of the Organized Crime Control Act of 1970. The Court characterized the Act as a "carefully crafted piece of legislation," then stated:

Had Congress intended to foreclose the possibility of prosecuting conspiracy offenses under § 371 by merging them into prosecutions under § 1955, we think it would have so indicated explicitly. It chose instead to define the substantive offense punished by § 1955 in a manner that falls specifically to invoke the concerns which underlie the law of conspiracy.

420 U.S. at 789.

30 Id. at 791. The Court found that Congress had intended to retain § 371 and § 1955, each as an "independent curb" available for use in the strategy against organized crime. Id.
The Supreme Court upheld its *Ianelli* decision in *Jeffers v. United States*. In *Jeffers*, the appellants argued that 21 U.S.C. § 846, a statute governing conspiracy to distribute narcotics, and 21 U.S.C. § 848, a statute proscribing continuing criminal enterprises, were greater and lesser included. The Court held that the concerted activity requirement of section 848 "quite plausibly may be read to provide the necessary element of 'agreement' found wanting in [18 U.S.C.] § 1955 [in *Ianelli*]." The Court assumed for purposes of its decision that the two offenses were greater and lesser included, but found it unnecessary to definitively settle that issue. In addition, the Court further demonstrated its careful treatment of rule 31(c) in determining whether cumulative punishments were permissible for violations of sections 846 and 848. In deciding this issue, crucial in any determination of whether statutes are greater and lesser included, the Court yielded to congressional intent. The Supreme Court of the United States has thus left the analysis of greater and lesser included offenses quite flexible.

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31 432 U.S. 137 (1977). Jeffers was involved in a highly sophisticated narcotics distribution network.

32 21 U.S.C. § 846 provides: "Any person who attempts or conspires to commit any offense defined in this subchapter [Control and Enforcement] is punishable by imprisonment or fine which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

33 21 U.S.C. § 848 provides:

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2)...

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if:

(1) he violates any provision of this subchapter or subchapter II of this chapter [Import and Export] the punishment for which is a felony, and

(2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter-

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and,

(B) from which such person obtains substantial income or resources.

34 432 U.S. at 148.

35 Id. at 153 n.20. Before this case, it was not settled whether § 846 was a lesser included offense of § 848. The Court refused to decide the issue, because Jeffers himself was solely responsible for the successive prosecutions involved. Jeffers had objected to the Government's motion for joinder before the first trial, and his objection was sustained. The Supreme Court held that his action in expressly asking for separate trials deprived him of any double jeopardy rights he might have had against the consecutive trials. Id. at 154.

36 The Court concluded Congress did not intend to allow cumulative punishments for violations of §§ 846 and 848. Id. at 155.
III. Lesser Included Offenses and the Double Jeopardy Clause

The double jeopardy clause of the fifth amendment affords three protections: (1) protection after acquittal against a second prosecution for the same offense,\(^\text{37}\) (2) protection after conviction against a second prosecution for the same offense,\(^\text{38}\) and (3) protection against multiple punishments for the same offense.\(^\text{39}\) The clause is a rule of finality,\(^\text{40}\) expressing the policy that the government must not unduly harass the defendant or subject him to unnecessary expense.\(^\text{41}\) Courts have discovered that the concept of "same offense" does not lend itself to a simple or precise definition.\(^\text{42}\) Nevertheless, courts agree that greater and lesser included offenses are the "same offense" for constitutional purposes under the double jeopardy clause.\(^\text{43}\)


\(^\text{38}\) Id.

\(^\text{39}\) Id.

\(^\text{40}\) The fifth amendment provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The double jeopardy clause was held applicable to the states through the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969). Where a defendant may be subjected to successive prosecutions, the clause serves "a constitutional policy of finality for the defendant's benefit." United States v. Jorn, 400 U.S. 470, 471 (1979) (plurality opinion).

\(^\text{41}\) In United States v. Green, 355 U.S. 184 (1957), the Supreme Court stated the policy behind the double jeopardy clause as follows:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.


\(^\text{42}\) Justice Rehnquist characterized the concept of "same offense" as "a phrase deceptively simple in appearance but virtually kaleidoscopic in application." Whalen, 445 U.S. at 700 (Rehnquist, J., dissenting).

\(^\text{43}\) In Brown v. Ohio, 432 U.S. 161 (1977), the Supreme Court held, "The greater offense is therefore by definition the same for purposes of double jeopardy as any lesser offense included in it." Id. at 168.


The defendant who wishes to raise the double jeopardy defense must move before trial to dismiss the indictment. The district court may then hold a pretrial hearing solely on this issue. Abney v. United States, 431 U.S. 651, 662 (1977). If the district court finds the double jeopardy claim to be frivolous, the court must so state in writing. The defendant may appeal the district court's decision, but an appeal from a denial of a double jeopardy motion does not divest the district court of jurisdiction to proceed with trial. Rather, both the district court
A. The Blockburger Test

The leading Supreme Court case determining whether two offenses are the “same” for double jeopardy purposes is *Blockburger v. United States.* In *Blockburger,* the Supreme Court established the “same evidence” test, which provides that conduct may constitute an offense against two statutes only if each statute requires proof of an additional fact that the other does not.

The Supreme Court has recently refined and limited the scope of *Blockburger.* In *Whalen v. United States,* a divided Court held that the *Blockburger* test was a rule of statutory construction, to be used to determine whether Congress intended to create two offenses or one. The Court also stated that where two offenses are not the “same” under the *Blockburger* test, the sentences imposed will run consecutively. But where the offenses are the “same” under the test, cumulative sentences are prohibited unless specially authorized by Congress.

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. The test emphasizes the elements of the two crimes. Thus, if each offense requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. Id. at 693. In dissent, Justice Rehnquist criticized the *Blockburger* test’s application to statutes similar to RICO. “[T]he *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining ‘compound’ and ‘predicate’ offenses.” 445 U.S. at 708 (Rehnquist, J., dissenting). He believes that the legislature has the power to provide for separate punishments under separate statutory provisions, even if the provisions constitute the “same offense” under the *Blockburger* test. Id. "[W]hen applied to compound
The Whalen opinion was augmented by the Supreme Court's subsequent decision in Albernaz v. United States.\textsuperscript{51} There, the Supreme Court noted that the statutory language must be the starting point in "same-separate" offense analysis.\textsuperscript{52} The Court concluded that the Blockburger test was designed to construe congressional intent. When legislative intent is readily discernible, the Blockburger test does not control.\textsuperscript{53} The Court recognized that the definition of offenses and their corresponding punishments is a matter for the Congress. The judiciary's task in this regard is to follow congressional intent.\textsuperscript{54}

Thus, the Blockburger, Whalen, and Albernaz decisions establish that where offenses are separate, under the Blockburger test or because of express congressional intent, no constitutional limitation exists on the prosecution of a defendant in successive trials and on his resultant punishment.

B. \textit{RICO and the Predicates: Greater and Lesser Included?}

Many defendants have argued that the RICO substantive offenses and predicate offenses charged as substantive offenses are greater and lesser included. Most courts have rejected this contention. The opinion in United States v. Hartley\textsuperscript{55} illustrates the present

\textsuperscript{51} 450 U.S. 333 (1981). Opinion by Rehnquist, joined by Burger, Brennan, White, Blackmun, and Powell. Stewart filed an opinion concurring in the judgment, in which Marshall and Stevens joined. The dissenting justices of Whalen joined the majority opinion in Albernaz, thus strengthening the Albernaz holding as authority.


\textsuperscript{53} Id. at 340. One commentator insists that Blockburger, and not Whalen or Albernaz, should control in RICO cases. He argues that courts should determine whether multiple punishments were authorized by Congress, but that double jeopardy analysis should not end at this level. Rather, the court should further inquire, using Blockburger, whether multiple punishments have been authorized for two offenses that are in fact the "same offense." See Comment, supra note 14, at 741. However, this view ignores the status of Whalen and Albernaz as the law, although the author did recognize the Blockburger test as a rule of statutory construction, and that Whalen and Albernaz limited the test to that purpose. Id. at 740.


\textsuperscript{55} 678 F.2d 961 (11th Cir. 1982). Hartley was a vice president of Treasure Isle, Inc., a Florida corporation specializing in breaded seafood products. He was convicted of conspiring to defraud the government by supplying shrimp that did not conform to designated military specifications. The shrimp contained too much breading, were of inadequate size, and had
analytical trend. In *Hartley*, the United States Court of Appeals for the Eleventh Circuit admitted that the predicate offenses and the RICO offenses failed to qualify as separate under the *Blockburger* test.\(^5\) The court stated that the four substantive RICO offenses required proof of additional facts not required in proving the predicate offenses, in that evidence of an enterprise, a pattern of racketeering activity, and an effect on interstate commerce had to be demonstrated. Nevertheless, under the *Blockburger* test, the predicate offenses could not be considered separate offenses because they are incorporated in full into the RICO substantive offenses. Arguably, they had to be considered lesser included in the RICO offenses.\(^5\)

Because the *Blockburger* test is merely a rule of statutory construction, however, it does not control where legislative intent clearly indicates that the offenses are to be treated as separate and distinct.\(^5\) The *Hartley* court found such intent in RICO's statutory framework and language, and succinctly summarized, "[s]urely, Congress could not have meant to eliminate the penalties for [the specific racketeering crimes] by incorporating them as evidence of a more organized method of committing crime. In our opinion, Congressional intent is clear."\(^5\)

Against this background, this note will next examine the three
protections afforded by the double jeopardy clause, generally, and in relation to RICO prosecutions.

C. The Double Jeopardy Arguments

Defendants in RICO prosecutions have raised double jeopardy arguments in three contexts: successive state and federal trials, successive federal trials, and multiple charges in a single trial imposing multiple punishments. Challenges under these circumstances in RICO prosecutions have generally been rejected. State and federal governments may prosecute for the same or similar offenses, except

imposing criminal penalties or affording civil remedies in addition to those provided for in this title." Pub. L. No. 91-95, § 904(b).

The Hartley court also relied on the Fifth Circuit's opinion in United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981). In Hawkins, defendant Gerdes argued that substantive and predicate RICO offenses are the "same offense" under the Blockburger test. The court rejected this contention, stating that the Blockburger test is not a constitutional "litmus test" that determines when a sentence violates the double jeopardy clause. Rather, it is a rule of statutory construction, and the essential inquiry is that of congressional intent. Id. at 287. The Hawkins court discussed, but did not rule on, Blockburger's applicability. Id. at 288. Instead, the court distinguished predicate acts under RICO from the traditional greater and lesser included offenses. Id. The Fifth Circuit found clear intent that Congress wished to permit cumulative sentences for RICO offenses and the underlying predicate offenses, relying on United States v. Rone, 598 F.2d 564 (9th Cir. 1979), cert. denied, 449 U.S. 833 (1981), and United States v. Aleman, 609 F.2d 298 (7th Cir. 1980), cert. denied, 445 U.S. 946 (1980), and on the Statement of Findings and Purpose, the Supersedure Clause, and the Liberal Construction Clause, Pub. L. No. 91-452, § 904(a), which provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." 658 F.2d at 287.

Most courts considering the greater and lesser included offense issue have agreed with the Hartley conclusion. The United States Court of Appeals for the Ninth Circuit has aptly stated, "The government is not required to make an election between seeking a conviction under RICO or prosecuting the predicate offenses only," because this requirement would nullify the congressional intent behind RICO's enhanced penal sanctions. United States v. Rone, 598 F.2d 564, 572 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).


60 See notes 68-81 infra and accompanying text.
61 See notes 82-106 infra and accompanying text.
62 See notes 107-15 infra and accompanying text.
where prohibited by statute, under the doctrine of dual sovereignty. Moreover, since RICO substantive offenses are not the “same offense” as the predicate offenses, the federal government may prosecute them in separate trials without offending the fifth amendment’s ban against double jeopardy. Collateral estoppel issues do arise, however, when the defendant is acquitted in the first trial. Finally, because congressional intent indicates that the RICO substantive and predicate offenses are neither the same nor greater and lesser included, the government may seek punishment for both.

1. Successive Trials by State and Federal Governments

The double jeopardy implications of state and federal prosecutions of a defendant for the same conduct may arise whether the defendant is acquitted or convicted in the first trial.

a. The Dual Sovereignty Doctrine

Whether a defendant is acquitted or convicted in the first trial, generally no double jeopardy concern arises upon a second trial by a different sovereign. The double jeopardy clause does not bar two sovereigns from prosecuting the same or a similar offense, regardless of the sequence of the prosecutions, because the punished conduct violates the peace and dignity of both sovereigns. Under the “dual sovereignty” doctrine, state and federal governments have prose-

63 See note 70 infra and accompanying text.
64 See notes 68-70 infra and accompanying text.
65 See notes 85-93 infra and accompanying text.
66 See notes 73 and 84 infra and accompanying text.
67 See notes 110-15 infra and accompanying text.

The dual sovereignty doctrine does not apply to successive prosecutions by a state and a subdivision thereof. Waller v. Florida, 397 U.S. 387 (1970). Nor does it apply to prosecutions by a federal court and Indian tribal court, because these are considered to be the same sovereign. United States v. Wheeler, 545 F.2d 1255 (9th Cir. 1976).

69 In United States v. Lanza, 260 U.S. 377 (1922), the Supreme Court announced the policy behind the dual sovereignty doctrine as follows:

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory . . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

260 U.S. at 387. The dual sovereignty doctrine was affirmed by the Supreme Court in Abbate v. United States, 359 U.S. at 195.
cuted defendants in successive trials. Nevertheless, both the federal government and some state governments, by policy and by statute, have limited their ability to prosecute a defendant for the same conduct.\footnote{The following states have, by statute, limited the dual sovereignty doctrine: ALASKA STAT. § 12.20.010 (1962); ARIZ. REV. STAT. ANN. § 13-146 (1956); CAL. PENAL CODE § 656 (West 1955); IDAHO CODE § 19-315 (1947); ILL. ANN. STAT. ch. 38, § 3-4(c) (Smith-Hurd 1961); IND. CODE ANN. §§ 35-1-2-15 (Burns 1963); MINN. STAT. § 609.045 (1963); MISS. CODE ANN. §§ 99-11-27 (1972); MONT. CODE ANN. § 171.070 (1963); N.Y. CRIM. PROC. LAW § 139 (McKinney 1958); N.D. CENT. CODE § 29-03-13 (1960); OKLA. STAT. ANN. tit. 21, § 25 (West 1954); OR. REV. STAT. § 131.240(1) (1965); S.D. COMP. LAWS ANN. §§ 22-5-8 (1967); TEX. CRIM. PROC. CODE ANN. art. 1323 (Vernon 1966); UTAH CODE ANN. §§ 76-1-25 (1953); WASH. REV. CODE ANN. § 10.43.040 (1961); WIS. STAT. ANN. § 939.71 (West 1958). This list includes many of the most populous states of the union. Therefore, successive federal-state prosecutions will rarely result today.

In the federal courts, the Attorney General has attempted to limit successive state and federal trials through what is now known as the Petite policy. See Petite v. United States, 361 U.S. 529, 530-31 (1960), where the Supreme Court recognized this policy. See also Thompson v. United States, 444 U.S. 248 (1980). This policy provides that, after a state prosecution, no federal prosecution should ensue for substantially the same act. Any successive prosecution must have the prior approval of an Assistant Attorney General, who will determine whether the federal prosecution will serve "compelling interests of federal law enforcement." 444 U.S. at 248.

Moreover, when the Solicitor General concedes that the Petite policy has been violated by failure to obtain authorization for the federal prosecution, he will urge the court to vacate the judgment and remand the case to the district court with instructions to reverse the indictment. Id. at 249. The Supreme Court has consistently responded to such requests by granting certiorari and vacating the judgments. Id. (citing, e.g., Hammons v. United States, 439 U.S. 810 (1978); Frakes v. United States, 435 U.S. 911 (1978); Rinaldi v. United States, 434 U.S. 22 (1977), and other cases dating back to the Petite decision in 1960). The Supreme Court will also vacate judgments in other cases that the Solicitor General represents violate other Justice Department policies. 444 U.S. at 250. Thus, the Supreme Court would arguably reverse a conviction that violated the RICO guidelines.

In United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), the defendants argued that their indictment ought to have been dismissed as violative of the Petite policy against multiple prosecutions for the same transaction. The court rejected this argument because, although the Petite doctrine describes the Justice Department's internal position that successive indictments will not ordinarily be based on the same conduct, the policy is not reviewable by the courts except in extraordinary circumstances. Id. at 1215 (citing United States v. Snell, 592 F.2d 1083, 1087-88 (9th Cir.)), cert. denied, 442 U.S. 944 (1979), and United States v. Welch, 572 F.2d 1359, 1360 (9th Cir.), cert. denied, 439 U.S. 842 (1978).

The Attorney General's RICO guidelines similarly limit the federal government's ability to prosecute successively under RICO. The guidelines provide that no RICO count should be charged where the predicate acts consist solely of state offenses, except where (1) the federal government has a significant interest; (2) significant organized crime involvement exists; or (3) where the prosecution of significant political or governmental individuals may pose special problems for local prosecutors. RICO GUIDELINES, supra note 14, at 4. The Attorney General added that this policy underscores the principle that the prosecution of state crimes, except in the circumstances above, is primarily the responsibility of state authorities. Id. See also The Prosecution Function, supra note 14.

Although the policy of the RICO guidelines could not be used by the accused as a de-}
b. RICO and Successive State-Federal Trials

The dual sovereignty doctrine has generally been followed in successive RICO prosecutions on federal and state levels. The leading case is United States v. Frumento. In Frumento, a Philadelphia court tried and acquitted defendants for bribery, extortion, and conspiracy to accept bribes and avoid payment of the Pennsylvania cigarette tax. The subsequent federal indictment involved the same activity as the state prosecution, and charged the defendants with violating 18 U.S.C. § 1962(c), by conducting the affairs of the Pennsylvania Bureau of Cigarette and Beverage Taxes through a pattern of racketeering activity. The district court rejected the defendant’s double jeopardy and collateral estoppel claims.

The defendants argued on appeal that, even though bribing a state official is not a federal crime, the RICO statute makes committing a pattern of state offenses a federal crime. They claimed that such a construction gives the federal courts jurisdiction to try state offenses and, therefore, violates the double jeopardy clause. The United States Court of Appeals for the Third Circuit rejected this argument.

The court noted that RICO forbids racketeering, not the commission of state offenses per se. The court continued that the state offenses referred to in the federal act are definitional only, while racketeering, a showing by the defendant of the prosecutor’s utter disregard of the guidelines may be used as the basis of a discriminatory or vindictive prosecution charge. See note 14 supra. See also United States v. Brooklier, 685 F.2d at 1215-16. In addition, as noted above, a RICO prosecution in violation of the RICO Guidelines may be dismissed when the Solicitor General so requests.

71 See United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978), cert. denied, 440 U.S. 962 (1979). In Aleman, the Seventh Circuit noted that the dual sovereignty doctrine remains the law, but pointed out that the doctrine cannot be used merely as a “cover and a tool” of federal authorities. 609 F.2d at 309. The court added that state officials do not defer performing their own obligations because federal officials may possibly pursue the interstate aspects of the crime in the future. Id.

72 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978).

73 United States v. Frumento, 409 F. Supp. 136 (E.D. Pa. 1975). Frumento first argued that Abbate and the dual sovereignty doctrine were no longer valid. The district court flatly rejected this argument. Id. at 140.

Frumento then argued that the collateral estoppel doctrine of Ashe v. Swenson, 397 U.S. 436 (1970), barred his prosecution. In Ashe, the Supreme Court held that, if an essential element of the subsequent criminal charges was determined in the defendant’s favor in the previous proceeding, as with a verdict of acquittal, the government may not reprosecute. Id. at 443. The doctrine of collateral estoppel applies only when both proceedings involve the same parties. Since state and federal governments, as separate sovereigns, are not the same party, the district court rejected the collateral estoppel argument. 409 F. Supp. at 140.

74 563 F.2d at 1086-87.
eteering, the federal crime, is defined as a matter of legislative draftsmanship by reference to state law crimes. The Third Circuit followed the Supreme Court’s dual sovereignty decision in *Abbate v. United States*, where the Court discussed the strong policies behind the doctrine. Even though the conduct charged in the federal court involved the same operative facts considered at the state level, an additional element of unique significance to the federal courts was present—“the effect of the state operation on interstate commerce through a pattern of racketeering activity.” The *Frumento* decision remains viable precedent.

In *United States v. Aleman*, the Seventh Circuit faced the situation where one has been convicted at the state level and subsequently

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75 Id. at 1087. Section 1961(1) of RICO, see note 7 supra, incorporates offenses “chargeable under state law and punishable by imprisonment for more than one year.” The majority in *Frumento* interpreted this language to require only that the conduct on which the federal charge is based be typical of the type of serious crime dealt with by the state statute. The majority did not require the particular defendant be “chargeable under State law” at the time of the federal indictment. Id. at 1087 n.8A.

76 In a vigorous dissent, Judge Aldisert argued that, at the time of the federal indictment, the defendants’ activities were neither “chargeable” nor “punishable” under state law, because they had already been charged under state law and were acquitted. Because they had been acquitted, they could not be punished. “Therefore, since the federal definitional statute requires that the racketeering offense be both chargeable and punishable under state law, the government could not, and did not, prove all the elements necessary under the federal statute.” Id. at 1097 (emphasis in original). Thus, this was a case of legal impossibility of performance. Id. See also *Tarlow, RICO: The New Darling of the Prosecutor’s Nursery*, 69 FORDHAM L. REV. 265, 266 (1980).

The majority position in *Frumento* is better reasoned. Section 1961(1) is definitional only, and RICO does not punish the same conduct as do state laws. As the majority noted, “The gravamen of section 1962 is a violation of federal law, and ‘reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage.’” 563 F.2d at 1097 (citing United States v. Cerone, 452 F.2d 274 (7th Cir. 1971)) (emphasis in original). “Chargeable and punishable under state law” simply defines which state offenses are incorporated into RICO: not misdemeanor offenses, but only those offenses sufficiently serious to invoke federal concern when the other elements of a RICO violation are present.

77 359 U.S. 187 (1959). In *Abbate*, the Supreme Court held that a state conviction does not bar a subsequent federal prosecution for the same activity. The defendant again argued that the dual sovereignty doctrine was no longer accepted. The Third Circuit held otherwise, noting that *Abbate* has been routinely followed by the circuit courts since 1959, and that the Supreme Court has consistently denied certiorari. 563 F.2d at 1088.

78 Id.

79 The dual sovereignty doctrine disposed of defendants’ double jeopardy arguments in a few other RICO prosecutions. See United States v. Aleman, 609 F.2d 298 (7th Cir.), cert. denied, 445 U.S. 946 (1980) (federal prosecution following a state conviction); United States v. Solano, 605 F.2d 1141 (9th Cir.), cert. denied, 444 U.S. 1020 (1980) (both a federal and a state prosecution before the RICO prosecution); and United States v. Malatesta, 583 F.2d 748 (5th Cir.), cert. denied, 444 U.S. 846 (1978) (federal prosecution following a state acquittal).

80 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).
prosecuted for a RICO violation arising from the same activity. In *Aleman*, the appellant Fonesta was convicted under Indiana law for robbery. Fonesta alleged this conviction was a factor in a subsequent prosecution for RICO conspiracy, RICO § 1962(c), and transporting stolen goods. In upholding Fonesta's federal conviction, the court relied on the dual sovereignty doctrine, and noted that since a single act of the accused may impinge upon both state and federal interests, both sovereigns may prosecute.\(^8\)

2. **Successive Federal Trials**

As in successive state and federal trials, double jeopardy implications concerning successive federal trials may arise both when the first trial ends in acquittal and when it ends in conviction.

If the defendant was acquitted in the first trial, the government may not reprosecute for the "same offense" or a greater or lesser included offense.\(^8\) This principle also applies when a defendant is convicted in the first trial.\(^8\) But the government may prosecute in a successive trial where the offenses charged are not the same, subject to the collateral estoppel considerations previously mentioned.\(^8\)

a. **RICO and Successive Federal Trials**

Because RICO substantive and predicate offenses are not greater and lesser included, courts have generally upheld successive federal prosecutions where the first trial involved predicate offenses and the second trial involved a RICO substantive charge. In *United States v. Phillips*,\(^8\) the defendant argued that the government may not try multiple RICO predicate offenses, then later use those convictions to prove the RICO substantive charge.\(^8\) The Fifth Circuit responded that "[t]his contention misunderstands the nature of

\(^8\) 609 F.2d at 309. The court did note that a state prosecution may not be used "merely as a cover and tool of federal authorities," *id.*, but found no federal "orchestration" in the record. *Id. See note 71 supra.*

\(^8\) Two trials for the same offense are prohibited by the double jeopardy clause. *See note 40 supra.*

\(^8\) *Id.*

\(^8\) *See note 73 supra.* Because successive federal trials involve identical parties, the defendant may raise collateral estoppel after a verdict of acquittal at the first federal trial. In *United States v. Meinster*, 475 F. Supp. 1093 (S.D. Fla. 1979), the court recognized that acquittal on a federal aiding and abetting charge precluded the government from introducing as evidence any fact necessarily resolved against the government at the first trial. *Id.* at 1097.

\(^8\) 664 F.2d 971 (5th Cir. 1981).

\(^8\) *Id.* at 1009 n.55.
Congressional intent dictates that RICO and its predicates are separate and distinct. Thus, the court held that a defendant could properly be convicted for the predicate acts that form the pattern of racketeering activity basic to the RICO charge, and later be prosecuted under RICO. The Phillips decision is consistent with general double jeopardy principles, in that successive federal prosecutions do not offend the fifth amendment's ban on double jeopardy when the offenses tried are not the "same offense."

Similar double jeopardy arguments were rejected in United States v. Brooklier. In Brooklier, the appellants plead guilty to a RICO conspiracy charge, then were indicted a few years later for a RICO § 1962(c) violation. One activity instrumental in the prior conspiracy charge supplied a basis for the substantive RICO charge. The appellants moved to dismiss the alleged activity from the indictment on double jeopardy grounds. The Ninth Circuit denied the motion pursuant to the Blockburger test. The court stated that, if the appellants had not been indicted and convicted previously, the government could have charged them with both the RICO conspiracy and the substantive RICO offense, each based partly on the same extortion activity, in the same indictment. Thus, since the offenses were separate, the prior conviction did not bar a subsequent prosecution for a substantive RICO violation based in part on the same

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87 Id. The Court noted that RICO's legislative history demonstrates congressional intent to permit cumulative sentences for both the RICO offenses and the underlying predicate offenses. See also United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981); United States v. Boylan, 620 F.2d 359 (2d Cir.), cert. denied, 449 U.S. 833 (1981).


89 See note 82 supra.

90 685 F.2d 1208 (9th Cir. 1982). The court began its opinion with, "Appellants are members of La Cosa Nostra, a secret organization engaged in a wide range of racketeering activities, including murder, extortion, gambling, and loansharking." Id. at 1213. During this trial, the government presented evidence that since 1972, appellants extorted money from pornographers and bookmakers. Id.

91 Id. at 1215. The district court first denied the motion, and defendants filed an interlocutory appeal. The district court's decision was affirmed in United States v. Brooklier, 637 F.2d 620 (9th Cir. 1980). In the present case, the court declined to modify its interlocutory decision. 685 F.2d at 1214.

92 The Court found that the Blockburger test permitted the government to charge the defendants with two or more offenses arising from the same transaction when each offense has distinct elements. Id. at 1214.
b. **Non-RICO Conspiracies Charged as Predicate Offenses**

Where successive federal trials and the RICO statute are involved, the use of a non-RICO conspiracy conviction as a predicate offense is at issue in two situations: (1) use of the conspiracy in a later RICO substantive offense prosecution, and (2) the use of the conspiracy in a later RICO conspiracy prosecution.

The courts and commentator who have considered these questions agree that a non-RICO conspiracy conviction may be used as a predicate offense in a subsequent RICO substantive offense charge. The Fifth Circuit noted in *Phillips* that "conspiracy may properly be alleged as a predicate act of racketeering under RICO when it involves any of the substantive offenses listed in 18 U.S.C. § 1961(1)(D)."

The issue whether a non-RICO conspiracy can be used as a predicate offense in a subsequent RICO conspiracy prosecution is more complex. In *Braverman v. United States*, the Supreme Court stated that one agreement generally equals one conspiracy, regardless of the number or diversity of its objectives. But where the conduct in question violated two separate conspiracy statutes, the Supreme Court, in *American Tobacco Co. v. United States*, permitted conviction under both statutes, even though the defendants made only one agreement.

At the district court level, in *United States v. Phillips*, the govern-
ment conceded that double jeopardy considerations stemming from a previous section 846 conspiracy trial precluded a second prosecution for RICO conspiracy. The district court and at least one commentator have agreed with the government’s position.100

Both the Fifth and Ninth Circuits, however, have upheld RICO conspiracy convictions that followed convictions for conspiracy to distribute drugs in violation of 21 U.S.C. § 846. In United States v. Smith,101 the Fifth Circuit found differences in the elements of both conspiracy statutes and permitted the imposition of separate sentences.102 Similarly, in United States v. Solano,103 the Ninth Circuit rejected a double jeopardy argument because section 846 and section 1962(d) involve different elements.104

Since the RICO conspiracy offense is a separate offense from other conspiracies, and because at least two statutes are involved when a RICO conspiracy prosecution follows a non-RICO conspiracy conviction, successive prosecutions appear to raise no double jeopardy problems according to American Tobacco Co. v. United States.105 Both the Fifth and Ninth Circuits employed the Blockburger test when evaluating the conspiracy statutes. Congressional intention to separate a RICO conspiracy from all other conspiracies which may be predicate acts of racketeering might settle the question in the future, without the use of the Blockburger test.106

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100 Id. at 1095. See also Tarlow, supra note 75, at 261 n.251. For the text of 21 U.S.C. § 846, see note 32 supra.
101 574 F.2d 308 (5th Cir.), cert. denied, 439 U.S. 932 (1978).
102 The court noted that to convict for a RICO conspiracy, the Government must prove, in addition to the enterprise’s nexus with interstate or foreign commerce, the objective manifestation of an “agreement to participate, directly or indirectly, in the affairs of the enterprise through the commission of two or more predicate crimes.” 574 F.2d at 311 (citing United States v. Elliot, 571 F.2d 880 (5th Cir. 1978)). The RICO conspiracy and § 846 drug conspiracy share one common element, an agreement, but the resemblance ends there. 574 F.2d at 311. Because the two statutes satisfied the Blockburger test, the court held a defendant may properly be convicted under both. Id. Finally, the court noted that a single criminal conspiracy, like a single criminal act, can constitute two or more separate offenses, and Congress can mandate punishment for each offense without violating the double jeopardy clause. Id.
103 605 F.2d 1141 (9th Cir. 1979), cert. denied, 440 U.S. 1020 (1980).
104 Id. at 1145. The Ninth Circuit employed the Blockburger test to study the elements of the two conspiracies.
106 No case has yet to consider whether a § 371 conspiracy can be charged as a predicate act of racketeering in a RICO conspiracy prosecution. See note 27 supra. In United States v. Weisman, 624 F.2d 1118 (2d Cir. 1980), the court noted that violations of 18 U.S.C. § 371 were not listed as predicate acts of racketeering in § 1961. The court believed that only conspiracies to commit the offenses of § 1961(1)(D) could be predicate acts of racketeering, because the offenses of subsections (b) and (c) require the act be indictable under specifically enumerated sections of the criminal code. 624 F.2d at 1123.
3. Multiple Punishment for Multiple Charges in a Single Trial

The final protection afforded by the double jeopardy clause is that against multiple punishments for the "same offense." Imposing successive punishments for different and distinct offenses raises no double jeopardy implications. Since RICO and the predicate offenses are separate and not greater and lesser included, most courts have held that consecutive punishments may be imposed.

The Eleventh Circuit analyzed this issue in United States v. Hartley. There, the court began with the premise that the double jeopardy clause prohibits cumulative sentences for the "same offense" unless such sentences are specially authorized by Congress. The court found that Congress manifested its intent in RICO's Statement of Findings and Purpose and in its Supersedure Clause. Because Congress authorized cumulative punishments for substantive RICO offenses and the underlying predicate crimes, the court held the Blockburger test for statutory construction did not apply. Most other courts considering the double jeopardy argument in the context of consecutive punishments have reached the same conclusion.

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107 See note 37 supra.
109 See, e.g., United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981) (no violation of the double jeopardy clause to impose consecutive sentences for a RICO count and mail fraud counts which also serve as racketeering acts in the RICO count); United States v. Martino, 648 F.2d 367, 383 (5th Cir. 1981) (although RICO substantive and conspiracy charges involve considerable overlap in evidence, the double jeopardy clause is not automatically invoked); United States v. Morelli, 643 F.2d 402, 413 (6th Cir. 1981) (Congress may constitutionally make the commission of two crimes within a specified period of time and within the course of a particular type of enterprise an independant criminal offense punishable more severely than simply twice the penalty for each constituent offense); United States v. Rone, 598 F.2d 564 (9th Cir. 1979) (the court found consecutive sentences for § 1962(c) and § 1962(d) convictions permissible, relying on Ianelli v. United States, 420 U.S. at 770); United States v. Hawkins, 516 F. Supp. 1204, 1209 (M.D. Ga. 1981) (possession and concealment of property stolen from interstate shipment and disposal of counterfeit securities as RICO predicate offenses are not precluded from consecutive sentencing in addition to RICO, because the pattern of racketeering activity included proof of other offenses).
110 678 F.2d 961 (11th Cir. 1982).
111 Id. at 991. See Whalen v. United States, 445 U.S. 684, 693 (1980). See also notes 46-50 supra and accompanying text.
112 678 F.2d at 992. See note 2 supra.
113 678 F.2d at 992. See note 59 supra.
114 678 F.2d at 992.
115 See note 109 supra. One commentator believes that RICO's legislative intent as to multiple punishment is less clear than the courts have suggested. He finds neither the enhanced sanctions of the Statement of Findings and Purpose, the Supersedure Clause, nor the Liberal Construction Clause persuasive. Comment, supra note 14, at 737. Most circuit courts that have addressed this issue disagree. See note 109 supra. For a good discussion, see United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981). See also Title X of the Organized Crime
IV. Verdict Consistency

The relationship between RICO substantive and predicate offenses also arises in the context of verdict consistency. The value of consistency at trial and on appeal is significant in the consideration of RICO verdicts. Because the jury does not normally specify which two predicate offenses have satisfied the “pattern” requirement when more than two such offenses are charged, it may be unclear whether the jury in fact found the requisite pattern of racketeering activity to obtain the RICO conviction. General federal jurisprudence permits inconsistency in verdicts and discourages judicial speculation concerning the jury’s decision. Since the jury is presumed to have followed the court’s instructions, a guilty verdict on a RICO substantive charge suggests that the jury indeed found the required pattern of racketeering activity.

The consistency question must also be considered when an appellate court’s reversal of a predicate offense charged as a substantive crime raises the possibility that the court has thereby removed one of the two offenses relied upon by the jury to establish the pattern of racketeering. Although courts are divided as to whether the RICO conviction need be reversed, the better-reasoned opinions have decided the RICO conviction may stand.

A. General Rules of Verdict Consistency

At common law, jurors took an oath to well and truly try the case, and their verdict was considered sacrosanct. Since trial by jury developed as an alternative to the ancient methods of compurgation and ordeal, the jury was to be considered no more “rational” than the ordeals the jury had replaced. Just as one did not

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116 See notes 122-39 infra and accompanying text.

117 If the jury returned a verdict of acquittal on one predicate offense and a guilty verdict on the RICO offense, the offense of which the defendant was acquitted may have been one of the two offenses necessary to prove the pattern of racketeering. This situation has been troublesome for appellate courts. See notes 140-51 infra and accompanying text.

118 See notes 137-39 infra and accompanying text.

119 See note 132 infra and accompanying text.

120 See notes 140-43 infra and accompanying text.

121 See notes 144-51 infra and accompanying text.

122 See United States v. Maybury, 273 F.2d 899, 902-03 (2d Cir. 1960), for a discussion of the history of jury verdicts.

123 Id.

124 Id.
question the judgments of God in the ordeal, one did not challenge the jury’s verdict. Since consistency has never been a requisite attribute of a jury verdict, the jury could convict a defendant on one count of a multiple-count indictment and acquit him on another count, even when committing one crime without committing the other might have been impossible.

Today, rule 31 of the Federal Rules of Criminal Procedure governs verdicts in federal courts. The verdict must be unanimous, certain, and returned in open court; these requirements may not be waived. The jury is presumed to have performed its fact-finding function and is presumed to have followed the court’s instructions in the law.

Neither rationality nor consistency is required of the verdict or of the counts in an indictment. Each count in the indictment is to be treated as a separate indictment for jury deliberation purposes. Finally, sufficient evidence to support the verdict must be present.

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125 The Supreme Court has noted that ignoring inconsistencies in a jury’s disposition of the counts of a criminal indictment may be the price paid for securing the unanimous verdict that the sixth amendment requires. Andres v. United States, 333 U.S. 740, 748 (1948). The Maybury court added that “[t]he vogue for repetitious multiple count indictments may well produce an increase in seemingly inconsistent jury verdicts, where in fact the jury is using its power to prevent the punishment from getting too far out of line with the crime.” 274 F.2d at 902.


127 FED. R. CRIM. P. 31. Section (a) provides: “The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.”


129 Glenn v. United States, 420 F.2d 1323, 1324-25 (D.C. Cir. 1969)(verdict must be set aside if its meaning is unalterably ambiguous); United States v. DiMatteo, 169 F.2d 798, 801 (3d Cir. 1948)(jury is to return pertinent, adequate, and coherent verdict).

130 FED. R. CRIM. P. 31(a).

131 United States v. Lopez, 581 F.2d 1338, 1342 (9th Cir. 1978)(jury unanimity cannot be waived); United States v. Scalzi, 578 F.2d 307, 512 (9th Cir. 1978)(reversible error for district court to allow defendant to waive unanimous verdict requirement).


136 In United States v. Thevis, 665 F.2d 616 (5th Cir. 1982), the Fifth Circuit stated that an appellate court’s role in reviewing the sufficiency of the evidence is strictly limited. The
In *Dunn v. United States*, the Supreme Court held that jury verdicts need not be consistent. The Court noted, that while a verdict may have resulted from jury compromise or leniency, "verdicts cannot be upset by speculation or inquiry into such matters." Since consistency is not required of the jury verdict, and since the jury is presumed to have followed the court's instructions, it is reasonable in a RICO prosecution to assume that the jury found the requisite pattern of racketeering activity. Furthermore, reversal of a RICO conviction upon an acquittal, or the reversal of one of the predicate offenses charged as a substantive offense, would involve unwarranted and unwelcome intrusion into the jury's deliberations.

B. **RICO and Verdict Consistency**

The United States Court of Appeals for the Second Circuit, in *United States v. Parness*, agreed that the reversal of a predicate offense did not justify interfering with the jury's deliberations. Milton Parness was convicted of interstate transportation of stolen property (two counts), causing a person to travel in interstate commerce in furtherance of a scheme to defraud (one count), and a RICO § 1962(b) violation. The court decided that a conviction of any two of the three alleged acts of racketeering was sufficient to establish the necessary pattern of racketeering activity, and sustain a RICO conviction for acquiring an enterprise affecting interstate or foreign commerce.

In *United States v. Brown*, the Third Circuit was unpersuaded by the *Parness* logic. In *Brown*, the defendants were convicted of ex-

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**Notes**

137 284 U.S. 390 (1932). The three-count indictment charged the defendant with (1) a common nuisance by keeping liquor for sale at a specified place; (2) unlawful possession of intoxicating liquor; and (3) unlawful sale of liquor. The jury found the defendant guilty only on the first count, but the court held that consistency in the verdict was not necessary because each count in an indictment reads as if it were a separate indictment. *Id.* at 393.

138 *Id.* at 393. Inconsistent verdicts may result from jury leniency or compromise, or may be the price paid for unanimity. See notes 122-25 *supra*. Juries are supposed to reflect the people's opinion on a given issue, which opinion is rarely consistent or rational. *Id.* The logic of the jury verdict should not be analyzed.

139 284 U.S. at 394.

140 503 F.2d 430 (2d Cir. 1974).

141 *Id.* at 438.

tortion, three counts of mail fraud, a RICO § 1962(b) violation and a RICO § 1962(d) violation. The appellate court reversed two counts of mail fraud for insufficient evidence, then reversed the RICO convictions. Because the jury might have relied on either of the two later reversed mail fraud counts in finding the pattern of racketeering activity, the court determined the RICO convictions must fall.\(^{143}\)

As a general rule, consistency is not required of verdicts. Nothing in RICO's text or its legislative history suggests that a different rule should govern RICO verdicts.\(^{144}\) If the courts impose a consistency requirement upon RICO verdicts and the verdicts of the predicate offenses charged as substantive offenses, they would make the RICO statute unduly complex and perhaps unmanageable, would clearly violate the established rule that inconsistency is permissible, and would damage or risk damaging the congressional policy of enhanced penal sanctions in RICO prosecutions.\(^{145}\)

The \textit{Brown} decision suggests a procedure for courts to follow when convictions relating to one or more substantive offenses have been reversed. According to the \textit{Brown} court, courts must attempt to determine whether a reasonable certainty exists that the jury found a sufficient connection between the remaining predicate offenses and the RICO offense.\(^{146}\) Although this holding authorizes judicial in-

\(^{143}\) 583 F.2d at 669-70. The court could not determine upon which substantive counts the jury based its RICO convictions. In reversing the RICO convictions, the court relied on United States v. Dansker, 537 F.2d 40 (3d Cir. 1976). In \textit{Dansker}, the jury had returned a guilty verdict on a count of conspiracy with two objectives. The appellate court determined that insufficient evidence existed to sustain a conviction as to one objective, and reversed the guilty verdict on the conspiracy count. \textit{Id.} at 51-52.

\(^{144}\) The statute is silent on verdict consistency.

\(^{145}\) Had no RICO action been charged, each count would have been treated as a separate indictment. \textit{Dunn}, 284 U.S. at 393. United States v. Dunn mandates that no consistency between indictments or verdicts is required. \textit{Id.} The inclusion of a RICO count should not affect this conclusion. In \textit{Harris v. Rivera}, 102 S. Ct. 460 (1981), the Supreme Court reiterated, "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." \textit{Id.} at 464 (emphasis added). The court recognized that it had so held regarding inconsistency between verdicts on separate charges against a single defendant and regarding verdicts that treat codefendants in a joint trial inconsistently. \textit{Id.}

\(^{146}\) 583 F.2d at 669. In United States v. Huber, 603 F.2d 387 (2d Cir. 1979), the Second Circuit was faced with the \textit{Brown} argument, but declined to decide whether the RICO conviction should be reversed. The appellant challenged the sufficiency of the evidence on several counts and argued that, under \textit{Brown}, if any counts that might form the pattern of racketeering activity were reversed, the entire RICO conviction must be reversed. The \textit{Huber} court indicated there were two sides to the \textit{Brown} argument, one being the \textit{Parness} approach. \textit{Id.} at 339.

In United States v. Weisman, 624 F.2d 1118 (2d Cir.), \textit{cert. denied}, 449 U.S. 871 (1980),
quiry into jury deliberations and requires consistency in jury verdicts, the court offered no authority to support its significant departure from established jurisprudence. The Third Circuit recently faced a consistency problem similar to that it faced in Brown. In Bojfa v. United States, Eugene Boffa was convicted of a RICO § 1962(c) and a RICO § 1962(d) violation, based on ten mail fraud violations, five Taft-Hartley violations, and one obstruction of justice charge. The appellate court reversed all ten mail fraud violations, but upheld the RICO convictions because they were supported by the six remaining predicate acts. This Third Circuit panel neither followed nor cited the previous Third Circuit decision in Brown. Because substantial practical and historical reasons exist for not requiring consistent verdicts, Brown appears to have been incorrectly decided.

C. Elimination of the Problem: Special Verdicts

One solution to fuse the split in the circuits regarding the need for verdict consistency is to eliminate the consistency issue altogether by using special verdicts in RICO prosecutions. Special verdicts, though generally discouraged in criminal law as an intrusion upon the jury's functions, are sanctioned for use in criminal forfeiture.

the Second Circuit rejected the Brown argument. The court held that the jury could not have rationally concluded that the conspiracies to commit bankruptcy and securities fraud occurred in the conduct of the defendant's affairs, without also finding that the substantive offenses also took place in the conduct of the defendant's affairs. Thus, even without the conspiracy counts, the jury verdict conclusively established a RICO violation. Any error in the inclusion of the conspiracy counts in the RICO charge was harmless. The court discussed the Brown decision, but also referred the reader to Parness. Id at 1124-25.

In United States v. Smaldone, 583 F.2d 1129 (10th Cir. 1978), cert. denied, 439 U.S. 1073 (1979), the Tenth Circuit held that the defendant's acquittal for conducting an illegal gambling business was not inconsistent with a guilty verdict based on the defendant's use of the lounge to conduct a gambling business through a pattern of racketeering activity or, in the alternative, in the collection of gambling debts. 583 F.2d at 1134.

In United States v. Peacock, 675 F.2d 339 (5th Cir. 1981), several arsons, a murder, and 23 counts of mail fraud were predicate acts for a § 1962(c) conviction. One arson count and the murder count were reversed, but the court upheld the RICO conviction, assuming that at least two other acts were related to the affairs of the arson enterprise. Id at 248. The court stressed that only two acts of racketeering relating to the enterprise need be shown for a § 1962(c) conviction. Id at 352.

147 583 F.2d at 669-70.
148 688 F.2d 919 (3rd Cir. 1982).
149 Id. at 934.
150 The Third Circuit panel in Bojfa was not the same panel that decided Brown.
152 See, e.g., United States v. Huber, 603 F.2d 387 (2d Cir. 1979); United States v.
cases under rule 31(e) of the Federal Rules of Criminal Procedure.  

The RICO statute mandates criminal forfeiture, and rule 31(e) was devised to implement the RICO criminal forfeiture provision.  

The jury should be asked to return with its general verdict a special verdict indicating which counts comprised the pattern of racketeering activity. Several courts have successfully used this approach thus far.

Special verdicts would clarify the trial verdict, would aid the appellate courts in analyzing RICO cases, and would benefit potential litigants of RICO civil suits by clarifying parties and issues. Moreover, special verdicts would cure problems caused by general verdicts relating to issue preclusion.

V. Conclusion

The relationship between the RICO substantive and predicate offenses is crucial to the application of the statute. Congress manifested its intention that RICO and its predicates be separate offenses. The circuit courts of appeals have recognized and implemented this intent by holding that the predicate offenses are not lesser included in the RICO charge, and by recognizing that the traditional Blockburger test is inapplicable to RICO prosecutions.

Because RICO and the predicate offenses are not greater and

D'Looney, 544 F.2d 385 (9th Cir. 1976); United States v. McCracken, 488 F.2d 1337 (2d Cir.), cert. denied, 404 U.S. 939 (1971); United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

153 Fed. R. Crim. P. 31(e) states: "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."

154 18 U.S.C. § 1963. Forfeiture is mandatory, while fines and imprisonment are discretionary. One's interest in the enterprise is forfeited so as to be compatible with the rights of innocent parties.

155 Subdivision (e) was intended to provide procedural implementation of the criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963. "Although special verdict provisions are rare in criminal cases, they are not unknown." Fed. R. Crim. P. 31(e) (committee comments).

156 In United States v. Rone, 598 F.2d 564 (9th Cir. 1979), a special verdict indicated that the jury had found the appellants guilty on all of the racketeering acts alleged in the indictment (three murders and two acts of extortion). In United States v. Huber, 603 F.2d 387 (2d Cir. 1979), the court used a special verdict to determine which corporations were included in the enterprise, and the percentage of appellants' interest in each. The appellants challenged the first of these inquiries under rule 31(e), but the court stated that stipulating a percentage without designating the object of the percentage would be useless. See also United States v. Peacock, 654 F.2d 339 (5th Cir. 1981).

157 A directive by the jury indicating its exact findings would aid victims in their subsequent civil suits. "A prior criminal conviction may work an estoppel in favor of the victim in a subsequent civil proceeding." Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951).
lesser included, the courts have generally rejected double jeopardy claims in RICO prosecutions. Thus, successive state and federal trials, successive federal trials, and consecutive punishments are not constitutionally prohibited in RICO cases.

This conceptualization, on the part of the courts, of the legal relationship between RICO and its predicate offenses in the lesser included offense-double jeopardy context has not been recognized, however, when these same courts have examined the relationship in the verdict consistency context. The better reasoned opinions permit a RICO conviction to stand after an appellate court’s reversal of a predicate offense charged as a substantive offense. These courts acknowledge that general federal jurisprudence does not require consistent verdicts, and that this general rule ought to apply to RICO prosecutions. Many courts are using special jury verdicts to avoid the unique consistency problems created by RICO prosecutions. This trend in the use of special verdicts is a favorable one.

Karen J. Ciupak

Addendum

The United States Supreme Court recently held that the double jeopardy clause’s prohibition against multiple punishment for the same offense does not prohibit imposition, at a single trial, of cumulative convictions and punishments for two or more statutorily defined offenses that, while constituting the same crime under the Blockburger test, are specifically intended by the legislature to carry separate punishments. Missouri v. Hunter, 51 U.S.L.W. 4093, 4096 (U.S. Jan. 18, 1983). The Hunter opinion further strengthens the Whalen and Albernaz opinions, thus supporting the conclusion that consecutive punishments may constitutionally be imposed for convictions of RICO substantive and predicate offenses. See notes 44-54 supra.