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NOTE

"DON'T THROW ME INTO THE BRIAR PATCH": RICO AND RULES OF EVIDENCE

I. INTRODUCTION

Prosecutors have a difficult task before them. Many criminal prosecutions involve a series of long and difficult proofs, intended to demonstrate to a trier of fact that the accused committed the crime in question. The Federal Rules of Evidence and their state counterparts can make prosecution of a criminal more difficult than it should be in some circumstances. An example is a gang member involved in a drive-by shooting.¹ A simple murder charge can become a complicated mess. A prosecutor may want to prove that the accused is a member of a gang in order to show opportunity: for example, the gang provided him with the gun, and the gang's "turf" included a particular area of the city. A trial judge has discretion² to say that the great animosity toward gangs in a particular jurisdiction makes this

1 While the recent enhancements in gang-related criminal law are fascinating, these changes are outside the scope of this Note. Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, Missouri, Nevada, Oklahoma, and South Dakota have all passed anti-gang measures by creating gang-related crimes or providing for sentence enhancement for gang-related crimes. For a detailed treatment of this issue, see David R. Truman, Note, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683 (1995).

The gang references in connection with RICO are convenient examples. They may also be timely. See Robert A. Destro, *The Hostages in the Hood*, 36 ARIZ. L. REV. 785, 797-801 (1994); Lesley Suzanne Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579 (1993); Matthew Purdy, *Using the Racketeering Laws to Bring Down Street Gangs*, N.Y. TIMES, Oct. 19, 1994, at A1.

2 See FED. R. EVID. 403. While murder is, of course, a state crime, most states have passed rules of evidence that are nearly identical to their Federal counterparts. This Note's purpose is to examine the options of a state prosecutor in trying a murder: 1) As a simple murder; 2) With other offenses, under state RICO, see *infra* Parts III, IV, and V; and 3) With other offenses and a "handoff" to a federal prosecutor, under federal RICO, see *infra* Parts II, VI, and VII.

evidence unfairly prejudicial to the accused. A trial judge may feel that the general attitude toward gangs would make a jury more likely to convict simply because of membership, and not because of the facts of the case.³ If the prosecutor is unable to use gang membership to put the case together, there may be trouble convincing the jury in a circumstantial case. In addition, if a prosecutor has evidence that this particular defendant committed a series of "hits," the trial judge may also exclude this evidence. Unless those "hits" fit within an evidentiary exception, the trial judge may exclude the evidence, arguing that

3 The assertion that a trial judge might rule against the admission of gang membership testimony is a matter of some debate. Some courts are cautious about admitting membership evidence. *See, e.g.,* *People v. Maestas*, 20 Cal.App.4th 1482, 1494-99, 25 Cal. Rptr. 2d 644, 651-53 (1993) (ruling evidence inadmissible because cumulative and "inflammatory"); *People v. Jiminez*, 672 N.E.2d 914, 917 (Ill. App. Ct. 1996) (failing to ask potential jurors about bias against gang members reversible error); *State v. Aikins*, 932 P.2d 408, 425 (Kan. 1997) (affirming trial court's suppression of any mention of gang membership with a motion in limine); *State v. Barnes*, 685 So. 2d 1148, 1155 (La. Ct. App. 1996) (stating that gang membership creates "inherent connotation . . . [of] criminal activity"; may be harmless, but still error); *State v. Palmer*, No. C-960280, 1997 WL 78595, at *1 (Ohio Ct. App. Feb. 26, 1997) (affirming trial court's threatened mistrial if prosecutor referred to gang membership); *Pondexter v. State*, 942 S.W.2d 577, 584 (Tex. Crim. App. 1996) (determining that gang evidence is inadmissible if used solely to show bad character).

Other courts hold that gang membership is an important part of any case involving a gang-related incident. *See, e.g.,* *Scott v. State*, 924 S.W.2d 248, 250 (Ark. 1996) (ruling evidence admissible if relevant as to grounds for ill feeling in murder case); *People v. Olguin*, 31 Cal.App.4th 1355, 1370, 37 Cal. Rptr. 2d 596, 601 (1995) (holding gang evidence admissible when "highly relevant to the prosecution's theory"); *State v. Taylor*, 687 A.2d 489, 499-501 (Conn. 1996) (arguing gang evidence admissible if probative of motive, especially if defendant voluntarily admits to involvement); *State v. Green*, 920 P.2d 414, 418 (Kan. 1996) (holding gang evidence admissible if relevant to impeach defendant); *Hoops v. State*, 681 So. 2d 521, 530 (Miss. 1996) (allowing prosecutor to use evidence because court considers gang membership a "bad act," and therefore admissible as to motive).

For a general discussion of the debate, see John E. Thueman, Annotation, *Admissibility of Evidence of Accused's Membership in Gang*, 39 A.L.R.4th 775 (1985). Most importantly, the sentiment against admitting membership evidence exists and it may pose problems for a prosecutor. In the hypothetical discussed throughout this Note, proof that the murder is "gang-related" may be difficult to obtain, so courts may not decide whether the probative value of gang membership outweighs its possibility of unfair prejudice. While some courts have found gang membership probative if the crime is gang-related, *see, e.g., Olguin*, 31 Cal.App.4th at 1370, 37 Cal. Rptr. 2d at 601; *Hoops*, 681 So. 2d at 530, a prosecutor may want to use gang membership evidence to prove other facts such as an opportunity to possess a gun or to place defendant at the scene. If the evidence that the crime is "gang-related" is tenuous, the arguments in favor of admissibility may be more difficult to make.

its sole function is to demonstrate bad character and propensity to commit murder.⁴ This puts the prosecutor in a difficult position.

The picture changes dramatically when the authorities use other means to prosecute the defendant, such as the Racketeer Influenced and Corrupt Organizations Act (RICO).⁵ By using a state or federal RICO statute, there are a broader range of options concerning evidence in the case. RICO is a complex statute with more elements that must be proven than most crimes.⁶ What was a matter of discretion becomes a matter of necessary proof. Gang membership is a criminal "enterprise." Prior murders come in as a "pattern of racketeering activity." Additionally, there is the possibility of bringing down the entire criminal organization along with the accused. In a difficult evidentiary case, RICO can promote justice.

RICO is complicated legislation. It requires a sophisticated series of proofs in order to secure a conviction. Would the added burden of proof make RICO unappealing as a tool for prosecutors? As this Note suggests, the answer is no. Certainly, there are high evidentiary burdens involved with RICO. But, as illustrated above, because the RICO prosecutor *must* prove more, he *can* prove more. The evidence required to show a criminal "enterprise" and predicate acts for a "pattern of racketeering activity," might otherwise be excluded in a standard case. By making the case more complicated, RICO may facilitate conviction of the defendant, along with the added possibility of bringing down a criminal enterprise.⁷

Many children hear the story of Brer Rabbit and the briar patch. Brer Fox and Brer Bear didn't like Brer Rabbit and did everything they could to catch him. One day, they finally caught him. Brer Rabbit shouted, "Do whatever you want to me, but please don't throw me into the briar patch!" Bear and Fox naturally do exactly what he asked them not to do. After some loud yells of "anguish," Rabbit takes some time to laugh at his foolish adversaries. The briar patch is Brer

4 See FED. R. EVID. 404(b). Many states have similar provisions in their Rules of Evidence. Trial judges will inevitably have a great deal of discretion in such matters. Again, the prosecutor will have several options. See *supra* note 2.

5 18 U.S.C. §§ 1961-1968 (1994). Also discussed in this Note as a case study will be the Florida RICO statute, FLA. STAT. ch. 895.01-.09 (1996).

6 This is an oversimplification, but for present purposes it suffices. All crimes have sophisticated proofs as part of securing a conviction. It is the large amount of evidence that becomes relevant in a RICO case that makes it a useful tool here.

7 Although the point has been made that RICO can be a useful tool against gangs, see Destro, *supra* note 1, at 797-801 and Bonney, *supra* note 1, emphasizing the added bonus of a RICO conviction in an attempt to bring down the entire enterprise is important to ensuring that it is used as a tool to combat gangs.

Rabbit's home: he likes nowhere better and his protests were all for show.

Much like Brer Rabbit's briars, prosecutors can find a home in RICO. If they look to state or federal RICO in order to prove a difficult evidentiary case, they can go into an area that seems more dangerous than it is. One can almost hear prosecutors, much like Brer Rabbit, shouting, "Do whatever you want to me, but don't make me prove this complex RICO case!" As this Note will demonstrate, prosecutors should get to know their "briar patch" and use the resources of RICO to do their job more effectively.

Prosecutors have four options in this hypothetical. First, they can choose to "throw in the towel" and let a suspected murderer walk the streets because of difficulty with the case. Second, they can indict the defendant on the charge of murder and take their chances. Third, a prosecutor can indict the defendant and the gang under the state RICO statute. Finally, the prosecutor can choose to "hand off" the case to a federal prosecutor, and let him indict the defendant and the gang under federal RICO. As this Note will show, a comparison between RICO and non-RICO cases makes options Three and Four very attractive.⁸

Part II will examine the federal RICO statute and set the stage for arguments in favor of the use of both federal and state RICO. Parts III, IV, and V will analyze the basics of Florida's RICO statute, Florida's Evidence Code, and the case law in both RICO and non-RICO cases.⁹ Parts VI and VII will analyze Federal Rules of Evidence 403

8 There is a fifth option. Another possibility that has not been discussed here is the possibility of suing the federal RICO defendant in state court. This is permissible, as indicated in *Tafflin v. Levitt*, 493 U.S. 455, 465 (1990) ("We have full faith in the ability of state courts to handle the complexities of civil RICO actions, particularly since many RICO cases involve asserted violations of state law, such as state fraud claims, over which state courts presumably have greater expertise."). Since this Note is designed to focus on the criminal aspects of RICO, this option will not be addressed. It does show the flexibility and vast scope of RICO, however.

9 Florida is used for several reasons. First, it possesses a state RICO statute. Second, it has an evidence code which is nearly identical to the Federal Rules of Evidence, as will be shown in the following pages. Finally, Florida's RICO statute is currently the focus of a great deal of controversy. The State of Florida used that statute to prosecute tobacco companies that have "deliberately misled the public" concerning cigarette safety and design. *Documents Could Smoke Out Tobacco Industry Conspiracy*, TAMPA TRIB., March 22, 1997, at 8, available in 1997 WL 7041346. It drew a great deal of attention, particularly from the legal community: "[T]his Court has signed more orders in this one case admitting lawyers pro hoc vice than in all the Court's prior cases in all divisions put together over the past twenty years. The number of lawyers on this one case for the defense (and for the State) is mind-boggling." *State v. American Tobacco Co.*, No. CL 95-1466, 1996 WL 788371, at *5 (Fla.

and 404(b), as well as federal case law, both RICO and non-RICO. After laying down that foundation, Part VIII will draw some conclusions about the advantages of choosing state or federal RICO in a complex evidentiary case.

II. FEDERAL RICO AT A GLANCE

The Racketeer Influenced and Corrupt Organizations Act (RICO) was passed in 1970 as part of the Organized Crime Control Act.¹⁰ Congress set out the purposes it envisioned when it created RICO:

The Congress finds that (1) organized crime is a highly sophisticated, diversified, and widespread activity that annually draws billions of dollars from America's economy by unlawful conduct and the illegal use of force, fear, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate businesses and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized 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.¹¹

Cir. Ct. Dec. 13, 1996) (denying defendant's motion to dismiss). This suit was recently settled for over eleven billion dollars. See *Tobacco Settles Fla. Suit: Cigarette Makers To Pay \$11.3 Billion*, CHI. TRIB., Aug. 25, 1997, at A1, available in 1997 WL 3581897.

10 18 U.S.C. §§ 1961-1968 (1994).

11 RICO, Pub. L. No. 91-452, § 1, 84 Stat. 941 (1970).

RICO supplements the current justice system, and is a tool to eradicate organized crime. Considering these purposes, it seems logical that state and federal jurisdictions should use the broad capabilities of RICO as much as possible. While some criticize RICO as "The Monster That Swallowed Jurisprudence," in reality it is an innovation in individual and enterprise liability that still has a great deal of untapped potential.¹²

A few points concerning the statute and its elements need to be made. Section 1962 of RICO makes four activities unlawful:

- (a) using or investing income derived from a pattern of racketeering activity to acquire any interest in, or the establishment or operation of an enterprise which is engaged in, or the activities of which affect, interstate commerce;
- (b) acquiring or maintaining any interest or control, through a pattern of racketeering activity in an enterprise that is engaged in, or the activities of which affect, interstate commerce;
- (c) conducting the affairs of an enterprise through a pattern of racketeering activity that is engaged in, or the activities of which affect, interstate commerce; and
- (d) conspiracy to violate (a) through (c).¹³

The elements of RICO are the subjects of vast amounts of literature and many Supreme Court opinions. In order to be convicted under RICO, one must be a "person" (an entity capable of acquiring an interest in property). This person must commit at least two predicate offenses (which include state and federal offenses—from murder to mail fraud), making a "pattern of racketeering activity." Federal RICO also requires the presence of an "enterprise," as discussed in § 1962. This "enterprise" must be a formal or informal organization, affecting interstate commerce in some manner. If a prosecutor can prove the pattern of racketeering along with the "enterprise" and a violation of some subsection of § 1962, serious criminal penalties can result.¹⁴

Jurisdiction is a concern with federal RICO. In order to violate federal RICO, the criminal "enterprise" has to affect, or be engaged

12 The current criticisms seem to focus on civil RICO and the forfeiture provisions of criminal RICO. While these tools are controversial, the effectiveness of RICO as a whole is not controversial. Organized crime is a dangerous force in any society, and currently RICO is one of the best tools to combat it. What is offered in the following pages may arguably be an extension of that purpose, but it stills goes to the heart of Congressional intent: "to seek the eradication of organized crime in the United States." § 1, 84 Stat. at 941.

13 See 18 U.S.C. § 1962.

14 See generally 18 U.S.C. §§ 1961–1968.

in, interstate commerce. A gang may not always fit this description. For purpose of the argument, therefore, the hypothetical assumes that the gang engages in several commercial activities, including the sale of drugs and the purchase of weapons. These activities should place the gang within the realm of interstate commerce. Therefore, if the other requirements of federal RICO, such as the "pattern" and the "enterprise" elements, are met, the prosecutor will be able to "hand off" this case to a federal prosecutor. While this is only a basic overview of the requirements of federal RICO, it is enough of an introduction for the purposes of this discussion.

III. FLORIDA RICO AT A GLANCE

While there are many state RICO statutes, for the purposes of this Note it is appropriate to look at Florida's¹⁵ as a sample of the possibilities state RICO statutes offer. Florida passed its RICO statute in 1977,¹⁶ with several legislative findings:

WHEREAS, the Legislature finds that organized crime is a highly sophisticated, diversified, and widespread problem which annually drains billions of dollars from the nationwide economy by various patterns of unlawful conduct, including the illegal use of force, fraud, and corruption, and

WHEREAS, organized crime exists on a large scale within the state of Florida, and it engages in the same patterns of unlawful conduct which characterizes its activities in other states¹⁷

As these findings indicate, Florida's Legislature passed RICO in order to combat organized crime. While there might be some debate concerning exactly what the term "organized crime" means, a modern street gang should fit into the definition. This is particularly true in Florida, as the definition of "enterprise" within the Florida RICO statute includes a "group of individuals associated in fact although not a legal entity";¹⁸ and "illicit as well as licit enterprises and governmental, as well as other, entities."¹⁹ This definition is broader than the federal RICO definition of "enterprise," as discussed in Part II.²⁰

While Florida's RICO statute is, of course, governed by Florida law, it is important to note that federal case law on federal RICO will

15 See *supra* note 9 for an explanation of the choice of Florida's RICO statute.

16 FLA. STAT. ch. 895.01-.09 (1996).

17 1977 Fla. Laws ch. 77-334.

18 FLA. STAT. ch. 895.03 (1996).

19 *Id.*

20 See, e.g., Jennifer Daley, *Tightening the Net of Florida's RICO Act*, 21 FLA. ST. U. L. REV. 381, 396-99 (1993). The Federal RICO definition of "enterprise" does not include a reference to licit and illicit enterprises. See 18 U.S.C. § 1961(4) (1994).

also be an important consideration for a court. As stated in *O'Malley v. St. Thomas University, Inc.*, "[s]ince Florida RICO is patterned after federal RICO, Florida courts have looked to the federal courts for guidance in interpreting and applying the act Federal decisions should be accorded great weight."²¹ When considering the case study of Florida RICO, it is important to remember that the parallel discussions in Parts VI and VII concerning federal RICO are relevant.

IV. THE INTERACTION BETWEEN FLORIDA'S RICO STATUTE AND RULE 90.403

A. *Florida Rule 90.403*

Florida Evidence Code section 90.403 provides, in part, "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."²² This provision is substantially similar to Federal Rule of Evidence 403.²³ Florida trial courts will not admit evidence that is "so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence,"²⁴ if that prejudice substantially outweighs the evidence's probative value. This determination is within the discretion of the trial judge,²⁵ who should consider the following factors: "the need for the evidence, the tendency of the evidence to suggest an improper basis for the jury to resolve the matter, such as on an emotional basis, the chain of inference necessary to establish the material fact, and the effectiveness of a limiting instruction."²⁶

The importance of Evidence Code section 90.403 cannot be understated. It has implications with just about every item of evidence that will come up in a trial. Florida courts have affirmed the trial court's admission of evidence such as testimony tending to prove gun

21 *O'Malley v. St. Thomas Univ., Inc.*, 599 So. 2d 999, 1000 (Fla. Dist. Ct. App. 1992).

22 FLA. STAT. ch. 90.403 (1996).

23 See FED. R. EVID. 403. A 1978 revision to the Florida Evidence Code eliminated the phrase "undue waste of time," which appears in the Federal Rule.

24 *Young v. State*, 234 So. 2d 341, 348 (Fla. 1970) (quoting *Leach v. State*, 132 So. 2d 329, 331-32 (Fla. 1961)).

25 See, e.g., *Collier v. State*, 681 So. 2d 856, 858 (Fla. Dist. Ct. App. 1996) ("[A] trial court's decision to admit the evidence will not be disturbed absent a showing of an abuse of discretion.") (citations omitted).

26 *State v. Sawyer*, 561 So. 2d 278, 284 (Fla. Dist. Ct. App. 1990).

ownership,²⁷ threats toward a battery defendant,²⁸ testimony that a defendant is an escaped fugitive,²⁹ evidence suggesting premeditation in a murder case,³⁰ and diary excerpts implicating the defendant.³¹ While Florida appellate courts tend to defer to the discretion of the trial court,³² it is important to note that they will reverse if they determine that the trial court has abused its discretion by admitting or not admitting evidence.³³ In a great majority of cases, however, a Florida

27 See, e.g., *Smith v. State*, 683 So. 2d 577, 578 (Fla. Dist. Ct. App. 1996) (reviewing firearms possession conviction; defendant objected to use of his videotaped statements concerning a gun he owned; affirmed because evidence went to the essential element of possession and therefore was probative enough to outweigh any prejudice).

28 See, e.g., *Collier*, 681 So. 2d at 858 (reviewing battery and false imprisonment conviction; defendant objected to use of victim's statement detailing threat made by defendant; affirmed, even though prejudicial, because highly probative as to intent).

29 See, e.g., *Peterka v. State*, 640 So. 2d 59, 68 (Fla. Dist. Ct. App. 1994) (reviewing murder conviction; defendant objected to testimony that he was an escaped fugitive; affirmed because limiting instruction "eliminated any prejudice").

30 See, e.g., *Miller v. State*, 605 So. 2d 492, 494 (Fla. Dist. Ct. App. 1992) (reviewing murder conviction; defendant objected to evidence that he requested his gun prior to the murder; affirmed because highly probative as to premeditation).

31 See, e.g., *Obojes v. State*, 590 So. 2d 461, 462 (Fla. Dist. Ct. App. 1991), *rev'd on other grounds*, 604 So. 2d 474 (Fla. 1992) (reviewing burglary, robbery, kidnapping, and sexual battery conviction; defendant objected to use of diary excerpts implicating him; affirmed because necessary to prosecution's case, and no limiting instruction requested).

32 See, e.g., *Smith*, 683 So. 2d at 578; *Collier*, 681 So. 2d at 858; *Peterka*, 640 So. 2d at 68; *Miller*, 605 So. 2d at 494; *Obojes*, 590 So. 2d at 461.

33 See, e.g., *Jones v. State*, 678 So. 2d 890, 893 (Fla. Dist. Ct. App. 1996) (reviewing burglary conviction; defendant not permitted to testify about state witness' hostility toward him to show bias; reversed because prejudicial references to witnesses' homosexuality not enough to outweigh probative value of impeachment); *Keller v. State*, 586 So. 2d 1258, 1261 (Fla. Dist. Ct. App. 1991) (reviewing sexual battery conviction; defendant objected to use of witness testimony that defendant attempted to get witness to lie on his behalf; reversed because vague, speculative, irrelevant, and highly prejudicial); *Czubak v. State*, 570 So. 2d 925, 928-29 (Fla. Dist. Ct. App. 1990) (reviewing murder conviction; defendant objected to use of gruesome photographs of victim; reversed on other grounds, but court required remand to assess probative value and whether gruesome nature was due to causes above and beyond the killing); *Wilkins v. State*, 561 So. 2d 1339, 1340 (Fla. Dist. Ct. App. 1990) (reviewing drug conviction; defendant objected to characterization of location of arrest as "high crime area known for narcotics"; reversed because testimony created "an indelible impression that Wilkins was there for no other purpose than to deal in drugs"); *Palmer v. State*, 548 So. 2d 277, 277-78 (Fla. Dist. Ct. App. 1989) (reviewing burglary conviction; defendant objected to evidence that he signed out of a work release center on day of the crime; reversed because "prejudicial effect was too great" and presence at scene obtainable by other means).

trial court's determination on the admissibility of evidence will be affirmed.

B. *Florida's RICO Possibilities*

Florida RICO and Florida Evidence Code 90.403 are rarely mentioned together in Florida cases, so it is difficult to assess their interaction directly. Even without cases that directly draw the relationship, however, there are certain principles within the nature of RICO that suggest their relationship. As mentioned in Part I, a prosecutor can make the defendant's gang a RICO criminal "enterprise." In order to win a RICO prosecution, the prosecutor *must* bring in the gang. Florida's rules for an "enterprise" demand it, as indicated in Part III. A single defendant acting alone is not an "enterprise."³⁴ A RICO "enterprise" must have an existence separate and apart from the "pattern of racketeering activity."³⁵ In other words, the "enterprise" must be an ongoing organization, formal or informal, with various associates who function as a unit, and with an identifiable decision making structure.³⁶

These requirements make pleading the defendant's gang membership unavoidable; the charge will fail without it. Because of this, the gang becomes an essential part of the RICO charge, and therefore evidence of the gang is highly probative. In all likelihood, a trial judge will permit the inclusion of gang membership in this case de-

34 See, e.g., *State v. Jackson*, 677 So. 2d 938, 941 (Fla. Dist. Ct. App. 1996) (reviewing RICO charge dismissal; defendant involved in financial asset conversion scheme; reversed because state alleged proper "enterprise" by linking individual defendant to a law firm and financial activities and that action in concert was sufficient); *Flanagan v. State*, 566 So. 2d 868, 869-70 (Fla. Dist. Ct. App. 1990) (reviewing RICO conviction; defendant involved in stolen merchandise resale scam; reversed because "enterprise" requirement should be strictly construed and defendant that apparently acted alone did not satisfy a strict construction).

35 See, e.g., *Brown v. State*, 652 So. 2d 877, 879-80 (Fla. Dist. Ct. App. 1995) (reviewing RICO conviction; defendant directs others to cash stolen checks; reversed because no evidence of ongoing organization and no evidence that other members knew of each other led to conclusion that "enterprise" was not more than the "pattern"); *Clark v. State*, 645 So. 2d 575, 576 (Fla. Dist. Ct. App. 1994) (reviewing RICO conviction; defendant involved in purse-snatching and false identification scheme; affirmed because jury question of "enterprise" was presented when defendant coordinated activities of a group to steal wallets and then falsify identification to draw from the bank accounts of the victims).

36 See, e.g., *State v. Rutledge*, 611 So. 2d 1263, 1264-65 (Fla. Dist. Ct. App. 1992) (reviewing RICO conviction; possession and sale of cocaine; dismissal affirmed because telephone conversations concerning buy/sell transactions between two of the defendants were not enough to demonstrate that organization was ongoing, or had a decision making structure).

spite the possibility of prejudicial inferences. As will be demonstrated in Part VI, this is precisely what happens in many federal RICO cases. Because of the guidance Florida courts get from federal RICO decisions, Florida courts will probably take this federal attitude into account when ruling on the admissibility of gang membership evidence.

V. THE INTERACTION BETWEEN FLORIDA'S RICO STATUTE AND RULE 90.404(2)

A. *Florida Rule 90.404(2)*

Florida Evidence Code section 90.404(2) (a) provides:

Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.³⁷

The section is virtually identical to Federal Rule of Evidence 404(b).³⁸ Any evidence of this sort must have a proper purpose, as determined in the trial court's discretion. The trial court's determination will be reviewed for an abuse of that discretion.³⁹ Trial courts are guided by a four-step standard to determine whether the prior bad act evidence is admissible: (1) the evidence must be relevant and have probative value in proof of the instant case or some material fact or facts in issue, (2) the evidence's sole purpose is not to show bad character, (3) the evidence's sole purpose is not to show the propensity of the accused to commit the crime charged, and (4) the evidence's admission is not precluded elsewhere.⁴⁰ Evidence which is used solely to prove propensity or bad character is presumed to be harmful.⁴¹

If a proper purpose for admitting prior bad act evidence is found, the admission of the evidence will be affirmed. Proper purposes include opportunity,⁴² identity,⁴³ and absence of mistake.⁴⁴ Florida ap-

37 FLA. STAT. ch. 90.404(2) (a) (1997).

38 See FED. R. EVID. 404(b); see also *infra* Part VII(A).

39 See, e.g., *Saffor v. State*, 625 So. 2d 31, 33 (Fla. Dist. Ct. App. 1993), *rev'd on other grounds*, 660 So. 2d 474 (Fla. 1995).

40 See, e.g., *Green v. State*, 190 So. 2d 42, 46 (Fla. Dist. Ct. App. 1966).

41 See, e.g., *Abbott v. State*, 622 So. 2d 601, 602 (Fla. Dist. Ct. App. 1993).

42 See, e.g., *State v. Rawls*, 649 So. 2d 1350, 1353-54 (Fla. 1995) (reviewing sexual battery conviction; defendant objected to admission of past sex crimes; reversed on other grounds, but court held that past sex crimes admissible to prove opportunity, since defendant gained access to all of his victims in the same manner).

43 See, e.g., *Crump v. State*, 622 So. 2d 963, 967-68 (Fla. 1993) (reviewing murder conviction; defendant objected to admission of prior murders; affirmed because "cu-

pellate courts will reverse if no proper purpose is shown.⁴⁵ In addition, if the crimes are "inseparable," section 90.404(2) does not apply.⁴⁶ Florida appellate courts routinely defer to the trial court's discretion. Therefore, a trial court's decision not to let in the hypothetical gang member's "hits" will probably stand. The scenario changes if Florida's RICO statute is used.

B. Florida's RICO Possibilities

As with section 90.403 of the Florida Evidence Code, section 90.404(2) is rarely mentioned in RICO cases. However, there are certain details of the law surrounding the "pattern of racketeering activity" that are important. In order to prosecute under RICO, the state must demonstrate two or more "predicate acts" to constitute a "pattern of racketeering activity." These predicate acts cannot arise out of the same incident.⁴⁷ As with federal RICO, the "pattern" requirement is glossed to include a "continuity" requirement: basically, there must be a threat of continued criminal activity.⁴⁸ Failure to inform the jury

mulative effect of the numerous similarities between the two crimes establishes an unusual modus operandi which identifies Crump as Clark's murderer").

44 See, e.g., *Williams v. State*, 621 So. 2d 413, 417 (Fla. 1993) (reviewing sexual battery and kidnapping conviction; defendant objected to admission of prior sexual assaults; affirmed because prior knowledge of lack of consent with other victims probative to rebut defense of consent as absence of mistake).

45 See, e.g., *Saffor v. State*, 660 So. 2d 668, 671-72 (Fla. 1995) (reviewing sexual battery conviction; defendant objected to use of other sex crime; reversed because only similarity was familial context and additional showing of similarity necessary to make other crimes admissible to show identity); *Holland v. State*, 636 So. 2d 1289, 1293 (Fla. 1994) (reviewing murder conviction; defendant objected to admission of prior scuffle with police; reversed because record reflects no proper purpose and admission presumed to be harmful); *Henry v. State*, 574 So. 2d 73, 74-75 (Fla. 1991) (reviewing murder conviction; defendant objected to admission of murder of previous wife's son; reversed because no identifiable proper purpose and not part of "continuing criminal episode").

46 See, e.g., *Griffin v. State*, 639 So. 2d 966, 969 (Fla. 1994) (reviewing murder and grand theft conviction; defendant objected to admission of theft of car keys used to steal car; affirmed because theft of car keys necessary to steal car in first place, "inextricably intertwined" to the crime charged and therefore not "other crimes" evidence).

47 See, e.g., *Watts v. State*, 558 So. 2d 142, 144 (Fla. Dist. Ct. App. 1990) (reviewing RICO conviction; defendant involved in racketeering, kidnapping, and burglary scheme; reversed because all predicate acts arose out of same incident; "proper target of RICO prosecution will be the career criminal") (citations omitted).

48 See, e.g., *Brown v. State*, 652 So. 2d 877, 880-81 (Fla. Dist. Ct. App. 1995) (reviewing RICO conviction; defendant directed others to cash stolen checks; reversed because scheme was limited by number of checks cashed and posed no threat of long-term existence); *Shimek v. State*, 610 So. 2d 632, 635 (Fla. Dist. Ct. App. 1993) (re-

of this requirement is reversible error.⁴⁹ A series of acts, from several drug transactions⁵⁰ to a kidnapping and murder plot,⁵¹ should satisfy the requirement. These predicate acts can generally include charged or uncharged criminal acts.⁵²

The presence of a RICO charge makes inclusion of prior murders less problematic. As prior activities of the criminal "enterprise," whether charged or uncharged, these prior criminal acts can be included as predicate acts. Because of the requirement of at least two predicate acts not arising out of the same incident, they *must* be included in order to meet the "pattern" requirement. Part VII will show that the federal courts have consistently ruled that federal RICO allows the inclusion of prior criminal acts in this manner. As those federal decisions will serve as guidance for the Florida courts, trial judges will likely keep such a practice in mind when determining the admissibility of prior criminal acts evidence.

VI. INTERACTION BETWEEN FEDERAL RICO AND FEDERAL RULE OF EVIDENCE 403

A. Rule 403

If a state RICO prosecution is not the answer for a particular prosecutor, he may "hand off" the case and make it a federal RICO action.⁵³ Federal Rule of Evidence 402 provides: "All relevant evidence

viewing RICO conviction; grand thefts as predicate offenses; reversed on other grounds, but "grand scale" and links between incidents satisfied continuity); *State v. Lucas*, 600 So. 2d 1093, 1094-97 (Fla. Dist. Ct. App. 1992) (reviewing RICO conviction; defendant involved in investment scandal; dismissal of charges quashed because threat of continuing activity met since practice of defrauding customers was part of regular course of business).

49 See, e.g., *Shimek*, 610 So. 2d at 638-39.

50 See, e.g., *Schremmer v. State*, 578 So. 2d 392, 393 (Fla. Dist. Ct. App. 1991) (reviewing RICO conviction; drug defendant; affirmed because participation in four interrelated drug ventures over two-year period sufficient to allege "pattern").

51 See, e.g., *Domberg v. State*, 518 So. 2d 1360, 1361-62 (Fla. Dist. Ct. App. 1988) (reviewing RICO conviction; kidnapping and murder defendant; affirmed even though predicate acts were committed out of state).

52 See, e.g., *Domberg*, 518 So. 2d at 1361 (holding that uncharged criminal acts "established an ongoing pattern of criminality generally involving similar offenses and the same participants").

53 It is important to note once again that this may not be the ideal option for many state prosecutors. Local district attorneys may not want to give up a case, despite its difficulty, that can protect their community like a conviction of a murderer will. However, if a state RICO case is impossible or not prudent, this may be the best option as far as justice is concerned. This may also be the only other option to a murder charge in those states without their own RICO statute.

is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."⁵⁴ This Rule is the guide to trial judges in determining the admissibility of evidence. But, as provided for in Rule 402, Federal Rule of Evidence 403 serves as a limitation on the admissibility of evidence: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."⁵⁵ This limitation has been the subject of a great deal of debate. Despite the debate, it is true that "much leeway is given trial judges who must fairly weigh probative value against probable dangers."⁵⁶

Rule 403 is a common tool used by both prosecutors and defense attorneys to convince the judge that evidence is inadmissible. For example, in *United States v. Abel*, the defendant, accused of bank robbery, wished to use the testimonial evidence of one Mills to show that he did not participate in the robbery. Over defense objection, the prosecution showed that the defendant and Mills were both members of the Aryan Brotherhood, a prison organization that was willing to "lie, cheat, steal [and] kill"⁵⁷ to help one another. This evidence impeached the witness for bias toward the defendant, and the defendant was convicted.

The Supreme Court considered whether cross-examination for bias had survived promulgation of the Federal Rules of Evidence, as no Rule specifically mentions bias as grounds for impeachment. The Supreme Court ruled that it did survive, as "[a] successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony."⁵⁸ In addition, the defendant argued before the Court that a full description of the prison gang and its objectionable beliefs was unfairly prejudicial. The Court responded: "This argument ignores the fact that the *type* of organization in which

54 FED. R. EVID. 402.

55 FED. R. EVID. 403.

56 CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 185 (John William Strong ed., 4th ed. 1992); *see also* *United States v. Abel*, 469 U.S. 45, 54 (1984) ("A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules.").

57 *Abel*, 469 U.S. at 48.

58 *Id.* at 51.

a witness and party share membership may be relevant to show bias."⁵⁹ The Court also indicated that precautions such as not allowing use of the name Aryan Brotherhood and limiting instructions reduced the risk of unfair prejudice.⁶⁰

Numerous situations in which Rule 403 applies exist.⁶¹ The circuit courts review evidentiary issues such as a judge's opinion in a previous disposition,⁶² membership in a particular ethnic group,⁶³ the ability of government witnesses to coordinate their testimony as a credibility issue,⁶⁴ expert testimony concerning reliability of eyewitness

59 *Id.* at 54.

60 *Id.*

61 It is important to recognize that a great many cases in which the trial court excludes evidence in its discretion are not reviewed by the appellate courts. If a defendant is acquitted, the case is generally not reviewed. It is important, therefore, to look at the trial court's use of their discretion in the district courts as well. *See, e.g.*, *United States v. Pitner*, 969 F. Supp. 1246, 1252 (W.D. Wash. 1997) (excluding polygraph evidence in a firearms case because probative value slight and "[w]hen scientific evidence is presented to jurors with representations that the results are, for example, 98% accurate, there is a substantial risk that the jurors will substitute the examination results for their own judgment"); *United States v. Saya*, 961 F. Supp. 1395, 1397 (D. Haw. 1996) (excluding defendant's expert testimony concerning effect of drug use on government witness because expert's testimony was improper under standard for expert testimony, and even if proper, it was "speculative and hypothetical," and therefore prejudice outweighed probative value); *United States v. Stoecker*, 920 F. Supp. 867, 875-76 (N.D. Ill. 1996) (excluding evidence that banks suffered financially in bank fraud case because not an element of the offense and "at best marginally probative and highly prejudicial to the defendants"); *United States v. Erickson*, 794 F. Supp. 273, 275 (N.D. Ill. 1992) (excluding evidence of defendant's possession of 32 weapons not used in the charged bank robbery because while relevant as "tools of the trade," evidence was "highly inflammatory and may be misused by the jury").

62 *See, e.g.*, *United States v. Sokolow*, 91 F.3d 396, 405-06 (3d Cir. 1996) (reviewing mail fraud and money laundering conviction; "background information" from a Commonwealth Court opinion was read into evidence concerning the fraudulent employee benefit plan created by defendant; affirmed because jury instruction limited usage permitted to the jury as opinion evidence and was probative to the factual basis of the mail fraud scheme).

63 *See, e.g.*, *United States v. Eltayib*, 88 F.3d 157, 169 (2d Cir. 1996) (reviewing drug conviction; defendants objected to use of their Colombian passports because of the associations between Colombia and the drug cartels; passports also served the purpose of showing defendants presence at a particular location; court asserted that the drug inference will not necessarily be made, and that any argument of unfair prejudice was specious); *United States v. Phibbs*, 999 F.2d 1053, 1078-79 (6th Cir. 1993) (reviewing drug conviction; defendant argued that mentioning his connections with Colombia would be unfairly prejudicial; court ruled Colombian connections were relevant to identity in drug conspiracy and were not inflammatory).

64 *See, e.g.*, *United States v. Williams*, 81 F.3d 1434, 1443-44 (7th Cir. 1996) (reviewing drug conspiracy conviction; defendants tried to contradict proof of witnesses'

ness testimony,⁶⁵ statements made by a federal agent as a result of torture and interrogation,⁶⁶ statements made by a prosecutor in a previous hearing,⁶⁷ the opinion of a law enforcement officer concerning the guilt of a defendant before he is charged,⁶⁸ and the investigating officer's reasons for beginning his inquiry.⁶⁹ District courts will often use their discretion to admit evidence that they feel is not unfairly prejudicial.⁷⁰ If there is a possibility that the trial court's decision to admit (or not admit) evidence was unfairly prejudicial, circuit courts will remand for a determination of the matter.⁷¹ In any case, federal courts are very careful with evidence that could prejudice a defend-

limited motion while in jail to illustrate their credibility; trial court refused to admit evidence of witnesses' period of time in the "open" portion of the jail, holding that it was cumulative; reversed because prejudicial impact of refusing impeachment evidence, combined with other irregularities, required a determination of whether the irregularities affected the verdicts).

65 See, e.g., *United States v. Harris*, 995 F.2d 532, 534-36 (4th Cir. 1993) (reviewing bank robbery conviction; trial court excluded expert testimony offered by defendant regarding eyewitness unreliability; affirmed because probative value and accuracy of testimony questionable and therefore was within discretion of trial court to exclude).

66 See, e.g., *United States v. Matta-Ballesteros*, 71 F.3d 754, 768-69 (9th Cir. 1995) (reviewing kidnapping and racketeering convictions; defendant objected to use of recording of kidnapped federal agent's torture and interrogation because of prejudicial nature; affirmed because of several legitimate purposes including statements made, extent of agent's injuries, and intent and motive of kidnappers, combined with limiting instruction to limit prejudice).

67 See, e.g., *United States v. DeLoach*, 34 F.3d 1001, 1005-06 (11th Cir. 1994) (reviewing conviction for making false statements to obtain loans; trial court excluded alleged "inconsistent" statement made by prosecutor in previous trial because of jury confusion; affirmed because trial court, in determining that statements were not "evidence," did not abuse its discretion).

68 See, e.g., *United States v. Moore*, 936 F.2d 1508, 1520-22 (7th Cir. 1991) (reviewing robbery conviction; trial court excluded evidence of defendant's initial release without being charged because irrelevant and prejudicial, affirmed because law enforcement officer's opinion concerning guilt irrelevant and therefore within discretion to exclude).

69 See, e.g., *United States v. Freeman*, 816 F.2d 558, 563-64 (10th Cir. 1987) (reviewing counterfeiting conviction; defendant argued that explanation of why the investigation began prejudiced his case; affirmed because defendant was only referred to as a "white male from out-of-town," never directly, and explanation was not prejudicial in any other way).

70 See, e.g., *United States v. Sokolow*, 91 F.3d 396, 405-06 (3d Cir. 1996); *United States v. Eltayib*, 88 F.3d 157, 169 (2d Cir. 1996); *Matta-Ballesteros*, 71 F.3d at 768-69; *United States v. Phibbs*, 999 F.2d 1053, 1078-79 (6th Cir. 1993); *Freeman*, 816 F.2d at 563-64.

71 See, e.g., *United States v. Williams*, 81 F.3d 1434, 1442-44 (7th Cir. 1996) (holding that refusal to admit impeachment evidence could have been prejudicial).

ant.⁷² Circuit courts are reluctant, however, to overturn a district court's use of its discretion.⁷³ District courts are in a better position to determine evidentiary concerns, and the circuit courts will not reverse without a grave error on the part of the district court. There is no guarantee that a trial court will not exercise its discretion in a manner that will suppress important evidence.

B. *The RICO Difference*

The landscape changes somewhat when prosecutors use RICO. Because of the more sophisticated proofs involved, the probative value of some of the evidence will increase. Evidence that tends to show the existence and nature of an "enterprise" and evidence of acts that constitute part of a "pattern of racketeering activity" is highly probative. As long as there is a legitimate purpose served by the evidence, the chances of it being kept out of the trial are small. Generally, if the proffered evidence fits into the general RICO case, it will be admitted; examples include evidence tending to show the definition of an "enterprise,"⁷⁴ the "pattern of racketeering activity,"⁷⁵ making a connection to "predicate acts,"⁷⁶ or proving an essential element of a

72 See, e.g., *Sokolow*, 91 F.3d at 405-06 (holding that jury instruction limited usage permitted to the jury); *Matta-Ballesteros*, 71 F.3d at 768-69 (affirming admission because of several legitimate purposes, combined with limiting instruction to limit prejudice).

73 See, e.g., *Sokolow*, 91 F.3d at 405-06; *Eltayib*, 88 F.3d at 169; *Matta-Ballesteros*, 71 F.3d at 768-69; *Phibbs*, 999 F.2d at 1078-79; *Freeman*, 816 F.2d at 563-64.

74 See, e.g., *United States v. Brady*, 26 F.3d 282, 287-88 (2d Cir. 1994) (reviewing RICO conviction; defendants involved in conspiracy to commit murder to advance within New York Mafia family objected to admission of evidence of murders committed by others as part of the gang war; affirmed because evidence probative of existence of the war, the enterprise's existence and nature, and court's careful consideration of prejudice does not fail Rule 403 test); *United States v. Castellano*, 610 F. Supp. 1151, 1162-63 (S.D.N.Y. 1985) (reviewing RICO conviction; attorney's involvement with conspiracy made him a witness in the case to show existence of an "enterprise in fact"; defendant argued that allowing him to testify, thereby forcing defendant to find new counsel, was prejudicial; holding that "the status of the person through whom probative evidence is adduced is not one of Rule 403's concerns").

75 See, e.g., *United States v. Finestone*, 816 F.2d 583, 585-88 (11th Cir. 1987) (reviewing RICO conviction; affirmed because kidnapping and murder not committed by defendant admissible to show "pattern of racketeering activity," membership of those involved in the conspiracy, and to show duration of the conspiracy).

76 See, e.g., *United States v. Scarfo*, 711 F. Supp. 1315, 1321-22 (E.D. Pa. 1989) (reviewing RICO conviction; evidence of flight and guns seized from defendant's home; defendant argued that danger of jury concluding guilt without proper inferences connecting flight to RICO charge and involvement in theft of guns seized was unfair prejudice; court held that cooperation of co-conspirator could have led to the

"predicate act," as in any criminal case.⁷⁷ A prosecutor has a great deal to prove in a RICO case. As a result, circuit courts will uphold a district court's use of its discretion when a piece of evidence is logically connected to the case. Evidence that might not be admissible in an ordinary criminal case may be admissible in a RICO case.

C. Summary

As shown above, judges infrequently use Rule 403 to exclude evidence. However, when issues such as gang membership, as in *Abel*,⁷⁸ or other class membership, like the Colombians in *Eltayib*⁷⁹ and *Phibbs*,⁸⁰ are encountered, there is a definite danger of prejudice. Although not all courts are sympathetic to this, it is important to consider the wide latitude afforded to trial judges. In the hypothetical situation of the gang member involved in a drive-by shooting, it is possible that the judge will perceive his membership in the gang as unfairly prejudicial. Because a jury might convict on that evidence and gang stereotypes alone, the judge may exclude the evidence of gang membership. Another possibility is the one argued by the defendant in *Abel*: the court could severely limit the references to and descriptions of the gang. If the prosecutor's best chances of showing motive, opportunity, or intent come from the gang membership, but the trial court exercises its discretion to keep it out, acquittal becomes more likely. Using RICO to prosecute the same case may solve the problem. By using the gang as a criminal "enterprise," what was already probative information becomes more so. The danger of unfair prejudice becomes less of an issue as the probative value begins to tip the scales.

flight, and was sufficiently connected to predicate acts so as to be highly probative; court also held that any reference to the theft did not necessarily lead to a jury inference, and "pales" in comparison to other charged crimes, including murder).

⁷⁷ See, e.g., *United States v. Thevis*, 665 F.2d 616, 633-638 (5th Cir. 1982) (reviewing RICO conviction; adult film ring led to murder and arson; defendants objected to use of evidence, including statements of victim taken by FBI, recordings made by informant, and witness protection program references; affirmed because evidence was highly probative and limiting instructions minimized possibility of misuse; defendants sought to get evidence of a conspiracy by the FBI to frame them admitted; also holding that risk of prejudice and jury confusion from this theory was high).

⁷⁸ *United States v. Abel*, 469 U.S. 45 (1984).

⁷⁹ *United States v. Eltayib*, 88 F.3d 157, 169 (2d Cir. 1996).

⁸⁰ *United States v. Phibbs*, 999 F.2d 1053, 1078-79 (6th Cir. 1993).

VII. INTERACTION BETWEEN FEDERAL RICO AND FEDERAL RULE OF EVIDENCE 404(b)

A. Rule 404(b)

Federal Rule of Evidence 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.⁸¹

The rule "protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character."⁸² Even when offered for a proper purpose, admission of "prior bad acts" is not automatic. As the Advisory Committee states, "[t]he determination must be made whether the danger of unfair prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."⁸³ The prosecution cannot offer the evidence of "prior bad acts" solely to show a propensity to commit the instant crime. If propensity is a possible inference from the evidence that has a legitimate purpose, the defense may receive a limiting instruction under Federal Rule of Evidence 105.⁸⁴

The Supreme Court commented on Rule 404(b) in *Huddleston v. United States*.⁸⁵ In that case, the defendant was convicted of possession and sale of stolen videocassettes. The only material issue at trial was whether or not the defendant knew the tapes were stolen when he possessed and sold them. The government offered two pieces of similar act evidence in the case: (1) the defendant had participated in the sale of several televisions obtained from Leroy Wesby, and they were stolen, and (2) the defendant had participated in the sale of a large quantity of appliances from Wesby, which were also stolen. Because the defendant also got the tapes from Wesby, the prosecution argued that the prior acts showed that defendant had knowledge that the

81 FED. R. EVID. 404(b).

82 *Huddleston v. United States*, 485 U.S. 681, 687 (1988).

83 FED. R. EVID. 404(b) advisory committee note (citations omitted).

84 See *Huddleston*, 485 U.S. at 691-92.

85 485 U.S. 681 (1988).

tapes were also stolen. The district court instructed the jury that they should not consider the "prior bad acts" as evidence of character, but only as relating to defendant's knowledge.

The issue before the Supreme Court in this instance was whether or not a trial court must make a preliminary finding concerning the evidentiary basis for similar act evidence. Defendant's counsel argued that the trial court must make a preliminary finding that the similar event happened before allowing such evidence to go before the jury. The Supreme Court disagreed, stating that "[t]he text [of 404(b)] contains no intimation . . . that any preliminary showing is necessary before such evidence may be introduced for a proper purpose. If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403."⁸⁶ In holding that the admission of 404(b) evidence should be subject to the general rules, the Court specifically mentioned that Rule 104(b) would be important: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."⁸⁷ Using this analysis, the Court concluded that "[g]iven this evidence, the jury reasonably could have concluded that the televisions were stolen, and the trial court therefore properly allowed the evidence to go to the jury."⁸⁸

Huddleston does not adopt a particular test for admission of prior bad act evidence. The Supreme Court only gives the lower courts a set of guidelines: Rule 404(b) is subject to the general rules of relevance and admissibility, such as Rules 104(b), 402, and 403. The circuit courts of appeal have adopted their own tests. As with most evidentiary issues, all circuits review for abuse of discretion.⁸⁹

The First Circuit uses a two-prong test based on the text of Rule 404(b). The court will look for some "special" probative value of the evidence, such as intent, preparation, and so on, as enumerated in the Rule, and will then subject the evidence to Rule 403 analysis.⁹⁰ The

86 *Huddleston*, 485 U.S. at 687-88.

87 FED. R. EVID. 104(b).

88 *Huddleston*, 485 U.S. at 691.

89 See, e.g., *United States v. Hayden*, 85 F.3d 153, 159 (4th Cir. 1996); *United States v. Curry*, 79 F.3d 1489, 1494 (7th Cir. 1996); *United States v. Basinger*, 60 F.3d 1400, 1407 (9th Cir. 1995); *United States v. Scott*, 48 F.3d 1389, 1396 (5th Cir. 1995); *United States v. Green*, 40 F.3d 1167, 1174 (11th Cir. 1994); *United States v. Ballew*, 40 F.3d 936, 941 (8th Cir. 1994); *United States v. Birch*, 39 F.3d 1089, 1093 (10th Cir. 1994); *United States v. Cassiere*, 4 F.3d 1006, 1021 (1st Cir. 1993); *United States v. Hamilton*, 684 F.2d 380, 384 (6th Cir. 1982).

90 See, e.g., *Cassiere*, 4 F.3d at 1021.

Fourth Circuit looks to the relation of the evidence to the offense charged, its reliability, and also tests the evidence with Rule 403.⁹¹ The Fifth Circuit analyzes the evidence to determine whether it is relevant to an issue other than the character of the defendant, as well as subjecting it to Rule 403.⁹² The Sixth Circuit requires that the proffered evidence be material, substantially similar and near in time to the offense charged, and it must withstand Rule 403 scrutiny.⁹³ The Seventh Circuit articulates the following four factors:

(1) the evidence is directed towards establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury's finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice(Rule 403).⁹⁴

The Eighth Circuit requires that the evidence be for a purpose other than character, similar in kind to the crime charged, and close to the charged crime in time. In addition, there must be sufficient evidence for the jury to find that the defendant committed the prior act, and the evidence must also go through Rule 403 analysis.⁹⁵ The Ninth Circuit uses five factors: (1) the act must prove a material element of the offense for which the defendant is now charged, (2) in certain cases, the prior conduct must be similar to the charged conduct, (3) proof of the prior conduct must be based on sufficient evidence, (4) the prior conduct must not be too remote in time, and (5) the probative value of the evidence must outweigh its prejudicial effect under Rule 403.⁹⁶ Rather than articulate its own test, the Tenth Circuit points to the protections mentioned in *Huddleston* to analyze the issue: (1) 404(b)'s requirement of a proper purpose, (2) 402's requirement of relevance, (3) the prejudice test of 403, and (4) a Rule 105 limiting instruction is always available.⁹⁷ The Eleventh Circuit requires that the "prior bad act" contains the same intent as the charged offense,

91 See, e.g., *Hayden*, 85 F.3d at 159.

92 See, e.g., *Scott*, 48 F.3d at 1396; *United States v. Sanchez*, 988 F.2d 1384, 1393 (5th Cir. 1993).

93 See, e.g., *Hamilton*, 684 F.2d at 384.

94 See, e.g., *United States v. Bursey*, 85 F.3d 293, 296 (7th Cir. 1996); *Curry*, 79 F.3d at 1495.

95 See, e.g., *United States v. Ballew*, 40 F.3d 936, 941 (8th Cir. 1994).

96 See, e.g., *United States v. Basinger*, 60 F.3d 1400, 1408 (9th Cir. 1995); *United States v. Manning*, 56 F.3d 1188, 1197 (9th Cir. 1995).

97 See, e.g., *United States v. Birch*, 39 F.3d 1089, 1094 (10th Cir. 1994).

the jury could find that the defendant committed that prior offense, and looks to Rule 403.⁹⁸ The District of Columbia Circuit asks whether there was a purpose other than to show bad character of the defendant, and whether the prior offenses would be unfairly prejudicial under Rule 403.⁹⁹ All evidence is not subject to Rule 404(b), however. Some courts will determine that Rule 404(b) does not apply in a given case.¹⁰⁰

The circuit courts analyze evidence of prior bad acts according to these tests and will not admit any evidence relating solely to bad character or propensity.¹⁰¹ Circuit courts will affirm a trial court's decision

98 See, e.g., *United States v. Green*, 40 F.3d 1167, 1174 (11th Cir. 1994).

99 See, e.g., *United States v. Bruner*, 657 F.2d 1278, 1291 (D.C. Cir. 1981).

100 See, e.g., *United States v. Clements*, 73 F.3d 1330, 1337 (5th Cir. 1996) (reviewing tax evasion conviction; defendant argued that pre-indictment knowledge and disregard of payroll tax obligation should not have been admitted; affirmed because knowledge of obligations "inextricably intertwined" with crime charged); *Ballew*, 40 F.3d at 941 (reviewing wire and mail fraud conviction; defendant confronted with evidence of previous thefts in scheme; affirmed because those thefts were part of the same "scheme" to defraud); *United States v. Wells*, 995 F.2d 189, 192 (11th Cir. 1993) (reviewing drug conviction; defendant faced with prior arrest and seizure of drugs; failure to admit reversed because possession relates directly to charge of conspiracy to possess and distribute); *United States v. Portalla*, 985 F.2d 621, 625 (1st Cir. 1993) (reviewing use of prior conviction against parole revokee; affirmed because Federal Rules of Evidence do not apply to a revocation hearing); *Bruner*, 657 F.2d at 1291-94 (reviewing drug conviction; defendant argued that evidence of prior sexual behavior was used; "admission" affirmed because court found no evidence of this sort).

101 See *United States v. Frankhauser*, 80 F.3d 641, 648 (1st Cir. 1996) ("Although logically relevant, 'propensity' or 'bad character' evidence carries an unacceptable risk that a jury will convict for crimes other than those charged, or that it will convict, although uncertain of guilt, because a bad person deserves punishment.").

As with Rule 403, many cases in which the trial court excludes evidence in its discretion are not reviewed by the appellate courts. If a defendant is acquitted, the case is generally not reviewed. Therefore, the district court's opinion is another valuable source of information. See, e.g., *United States v. Gunn*, 968 F. Supp. 1089, 1095 (E.D. Va. 1997) (severing trial counts in a drug case because of 404(b) implications and stating that "[s]ince evidence that [defendant] is a felon for purposes of proving that specific element of Count II would not be admissible at a separate criminal trial on Count I, there is a manifest danger of prejudice to [defendant] stemming from the government's appropriate introduction of prior crimes evidence in a joint trial"); *United States v. Escobar*, 842 F. Supp. 1519, 1524-25 (E.D.N.Y. 1994) (excluding evidence of defendant's threats against United States officials and defendant's escape plot in a drug case because evidence of threats not similar to crime charged and therefore irrelevant, and escape plot occurred outside the scope of the conspiracy and therefore not probative as to membership in the conspiracy); *United States v. Vargas*, 702 F. Supp. 70, 73 (S.D.N.Y. 1988) (excluding evidence of previous homicide in drug case because limited probative value towards intent outweighed by inflammatory nature of the evidence and stating that "[e]vidence having a strong emotional or inflammatory impact may pose a risk of unfair prejudice to the defendant because

concerning admissibility of evidence in a 404(b) situation if that evidence had a legitimate purpose, such as knowledge,¹⁰² intent,¹⁰³ or state of mind.¹⁰⁴ Another proper purpose is to show identity, if the crimes show the same *modus operandi* or a "signature."¹⁰⁵ As with

it distracts the jury from the relevant issues of the case"); *United States v. Liuzzo*, 608 F. Supp. 1234, (S.D. Fla. 1985) (excluding evidence of bribes on previous occasions in obstruction of justice case because they were not sufficiently similar and "risks the severe prejudice against the Defendant in order to allow the Government to argue a tenuous theory of intent").

102 See, e.g., *United States v. Basinger*, 60 F.3d 1400, 1408 (9th Cir. 1995) (reviewing drug conviction; defendant confronted with evidence of prior arrest revealing methamphetamine manufacturing materials; affirmed because the evidence showed knowledge, was similar and not too remote, and express acknowledgment of Rule 403 was enough to demonstrate the balancing test was conducted); *United States v. Manning*, 56 F.3d 1188, 1197 (9th Cir. 1995) (reviewing mail bomb murder conviction; defendant confronted with prior bombing conviction; affirmed because prior conviction showed knowledge of explosives and a limiting instruction was given); *United States v. Cassiere*, 4 F.3d 1006, 1021-22 (1st Cir. 1993) (reviewing fraud conviction; previous fraudulent acts in a "land flip" case must not go to character or be unfairly prejudicial; affirmed, because evidence went to knowledge of how the scheme worked and there was no "extraordinary evidence" showing abuse of discretion).

103 See, e.g., *United States v. Hayden*, 85 F.3d 153, 159 (4th Cir. 1996) (reviewing drug conviction; admission of witness intimidation evidence to show consciousness of guilt and criminal intent; affirmed because intimidation evidence went directly to consciousness of guilt and criminal intent, was reliable, and was far more probative than prejudicial); *United States v. Curry*, 79 F.3d 1489, 1495 (7th Cir. 1996) (reviewing drug conviction; witnesses testified about previous crack sales by defendant; affirmed because evidence demonstrated intent to commit charged crime and limiting instructions limited unfair prejudice); *Manning*, 56 F.3d at 1197 (reviewing mail bomb murder conviction; defendant confronted with prior bombing conviction; affirmed because prior conviction showed intent and a limiting instruction was given); *United States v. Hamilton*, 684 F.2d 380, 384-85 (6th Cir. 1982) (reviewing alteration of money conviction; evidence that defendant had passed a \$2 bill altered to look like a \$20 bill admitted; affirmed because evidence could go to intent).

104 See, e.g., *United States v. Scott*, 48 F.3d 1389, 1396-97 (5th Cir. 1995) (reviewing drug conviction; evidence of past agreement to sell cocaine; affirmed because the evidence demonstrated state of mind, and prejudice minimized with a limiting instruction); *United States v. Green*, 40 F.3d 1167, 1174-75 (11th Cir. 1994) (reviewing drug conviction; prior arrest for distribution of cocaine required the same intent as charged offense and jury could find that defendant committed prior act; affirmed because acts required same mental state and 1987 offense not too remote in time).

105 See, e.g., *United States v. Bursey*, 85 F.3d 293, 296 (7th Cir. 1996) (reviewing drug conviction; defendant sought to block admission of prior dealings with police; affirmed because defendant "opened the door" and offered evidence for purpose of identity); *United States v. Sanchez*, 988 F.2d 1384, 1393-94 (5th Cir. 1993) (reviewing drug conviction; similarity of two heroin sales including charged offense showed a clear "modus operandi" and evidence's prejudicial effect was outweighed by need for evidence, closeness in time, and similarity); *Hamilton*, 684 F.2d at 384-85 (reviewing alteration of money conviction; evidence that defendant had passed a \$2 bill altered

Rule 403, in most cases the circuit courts will defer to the district court's discretion in a particular case, whether the court admitted the evidence¹⁰⁶ or excluded it.¹⁰⁷ Even if a trial court abuses its discretion, a circuit court can also affirm if it considers the admission harmless error.¹⁰⁸

B. *The RICO Difference*

While there is a long list of exceptions, and courts generally give a wide discretion to admitting such testimony, using "prior bad acts" can still be a difficult and arbitrary process. In some circumstances, it may be possible to use a RICO charge to get prior crimes admitted. If, for example, a prosecutor indicts the hypothetical gang member under RICO, previous behavior can be part of the "pattern of racketeering activity."

Many courts find Rule 404(b) inapplicable to the "other" acts that come up in RICO cases.¹⁰⁹ As with Rule 403, courts tend to treat

to look like a \$20 bill admitted; affirmed because evidence could go to identity, as a "signature" crime involving the same *modus operandi*).

106 See, e.g., *Bursey*, 85 F.3d at 296; *Hayden*, 85 F.3d at 159; *Curry*, 79 F.3d at 1494; *Basinger*, 60 F.3d at 1407; *Manning*, 56 F.3d at 1197; *Scott*, 48 F.3d at 1396; *Cassiere*, 4 F.3d at 1021-22; *Sanchez*, 988 F.2d at 1393-94; *Hamilton*, 684 F.2d at 384.

107 See, e.g., *United States v. Flaherty*, 76 F.3d 967, 973 (8th Cir. 1996) (reviewing aiding and abetting arson conviction; trial court excluded evidence of another suspect's prior arson; affirmed because probative value was slight, evidence did not fit within an exception to the rule, and court was not required to make an explicit Rule 403 balancing test); *United States v. Young*, 952 F.2d 1252, 1259 (10th Cir. 1991) (reviewing mail fraud conviction; trial court excluded evidence that witness had made false accusations in the past; affirmed because testimony was collateral and not impeaching).

108 See, e.g., *United States v. Birch*, 39 F.3d 1089, 1094 (10th Cir. 1994) (reviewing assault on federal officer conviction; previous convictions for battery of an officer used against defendant; affirmed because lack of proper purpose compared with large amount of other evidence pointing to defendant was harmless error).

109 In many RICO prosecutions, the concern over Federal Rule 404(b) disappears. Traditional crimes such as murder pose difficulties with "prior bad acts." But when the RICO charge involves a scheme to defraud, consisting of the predicate acts of wire and mail fraud, a different scenario exists. These predicate acts can be proven in several ways. Circumstantial evidence is sufficient in several circuits. See, e.g., *United States v. Behr*, 33 F.3d 1033, 1035 (8th Cir. 1994) (RICO; circumstantial evidence enough to show intent to defraud); *United States v. Copple*, 24 F.3d 535, 545 (3d Cir. 1994) (same); *United States v. Ham*, 998 F.2d 1247, 1254 (4th Cir. 1993) (same); *United States v. Stull*, 743 F.2d 439, 441 (6th Cir. 1984) (same). An elaborate effort to conceal by the defendant can also demonstrate the scheme. See, e.g., *United States v. Olson*, 925 F.2d 1170, 1176 (9th Cir. 1991) ("Elaborate efforts at concealment provide powerful evidence of their own consciousness of wrongdoing.") (quoting *United States v. Dial*, 757 F.2d 163, 170 (7th Cir. 1985)). The scheme can also be

"prior bad acts" evidence as an essential part of the RICO case, whether as a part of the conspiracy or as necessary to put the RICO evidentiary "puzzle" together.¹¹⁰ Because of the elements of the "en-

proven by a "willful blindness" by the defendant avoiding knowledge of the scheme. *See, e.g.,* United States v. Anderskow, 88 F.3d 245, 252-53 (3d Cir. 1996) (holding evidence that defendant deliberately closed his eyes sufficient proof); United States v. Camuti, 78 F.3d 738, 744 (1st Cir. 1996) (same); United States v. Mancuso, 42 F.3d 836, 846 (4th Cir. 1994) (same); United States v. Bussey, 942 F.2d 1241, 1250-51 (8th Cir. 1991) (same). If "willful blindness" cannot be proven, recklessness may be sufficient. *See, e.g.,* United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994) ("The specific intent element may be found from a material misstatement of fact made with reckless disregard for the truth."); United States v. Wingate, 997 F.2d 1429, 1433 (11th Cir. 1993) (same); United States v. Gay, 967 F.2d 322, 326 (9th Cir. 1992) (same); United States v. Schaflander, 719 F.2d 1024, 1027 (9th Cir. 1983) (same). While all of these methods of proving a scheme can involve "prior bad acts," it is also possible to prove a scheme to defraud by demonstrating a course of conduct which will necessarily include prior bad acts. *See, e.g.,* United States v. Allen, 76 F.3d 1348, 1364 (5th Cir. 1996) (holding that a course of conduct can be sufficient evidence of intent to defraud); United States v. Swinton, 75 F.3d 374, 378 (8th Cir. 1996) (holding that acts were "intrinsic" to scheme); United States v. Muscatell, 42 F.3d 627, 630 (11th Cir. 1995) (same). This is true, even if the uncharged offenses occur outside the statute of limitations. *See, e.g.,* Whitaker Corp. v. Execuair Corp., 736 F.2d 1341, 1347-48 (9th Cir. 1984) (holding that acts admissible to show course of conduct despite statute).

While proving the RICO case, a prosecutor may want to include "prior bad acts." If they are part of the general scheme involved in the RICO case, "prior bad acts" can be introduced to demonstrate a "pattern of racketeering activity." *See, e.g.,* United States v. Crockett, 979 F.2d 1204, 1211 (7th Cir. 1992). If uncharged offenses are necessary to prove an "enterprise," the offenses are admissible because Rule 404(b) no longer applies. *See, e.g.,* United States v. Salerno, 108 F.3d 730, 738-40 (7th Cir. 1997) (holding that because they are necessary to prove an enterprise, crimes demonstrating membership in the enterprise are not cognizable under 404(b)); United States v. Wong, 40 F.3d 1347, 1378 (2d Cir. 1994) (same); United States v. Ellison, 793 F.2d 942, 949 (8th Cir. 1986) (same); United States v. Murphy, 768 F.2d 1518, 1534-35 (7th Cir. 1985) (same). The Seventh Circuit requires that any acts to be proven must be in the indictment, however. *See* United States v. Neapolitan, 791 F.2d 489, 501 (7th Cir. 1986).

A RICO case involving a scheme to defraud can eliminate any Rule 404(b) problem. An "enterprise" must be more than a "pattern of racketeering activity." *See* United States v. Turkette, 452 U.S. 576, 583 (1981). At most, the two will be coterminous. A scheme to defraud, as indicated above, can be proven with uncharged acts within the scheme. Properly pled, it will also be coterminous with the "enterprise," as the "enterprise" is being run through the "scheme," as a "pattern of racketeering activity." Because all acts the prosecutor wants to prove are within the scheme and necessary to the RICO case the "bad acts" are not "prior." Rule 404(b) does not apply.

¹¹⁰ *See, e.g.,* United States v. Krout, 66 F.3d 1420, 1430-31 (5th Cir. 1995) (reviewing RICO conviction; defendants confronted with prior traffic stops that revealed drugs and intoxication; Rule 404(b) held to not apply because "[u]ncharged offenses

terprise" and "pattern" elements of RICO, prior acts, whether charged in the indictment or not, generally become central features of any case. They can show membership in a criminal "enterprise," participation in a conspiracy, or serve as predicate acts for a "pattern of racketeering activity." This does not mean that 404(b) is never used in a RICO context. Some "prior bad acts" evidence will not mesh well into the overall RICO case.¹¹¹ In that situation, courts will still attempt to place the other acts within the various proper purposes enunciated in 404(b), such as identity, intent, or to create the overall "setting" of the crime. However, circuit courts will reverse a trial court's incorrect as-

arising from the same transaction or series of transactions charged in the indictment . . . are not barred by the rule"; it was "part and parcel of the conspiracy itself"); *United States v. Thai*, 29 F.3d 785, 812-13 (2d Cir. 1994) (reviewing RICO conviction; street gang defendants confronted with beatings, extortion, and robbery; court held that despite no mention in the indictment, the uncharged acts were direct evidence of the conspiracy itself, and therefore Rule 404(b) was inapplicable); *United States v. Robertson*, 15 F.3d 862, 869-73 (9th Cir. 1994), *rev'd on other grounds*, 514 U.S. 669 (1995) (reviewing RICO conviction; while other "prior bad acts" were not properly admitted, evidence of forgery necessary to connect stolen property to the RICO "enterprise"); *United States v. Concepcion*, 983 F.2d 369, 392 (2d Cir. 1992) (reviewing RICO conviction; testimony that drug and weapons defendant ordered the murder of a rival; held admissible because it was "part of the very act charged," since it was done in furtherance of the alleged conspiracy); *United States v. Eufrazio*, 935 F.2d 553, 571-73 (3d Cir. 1991) (reviewing RICO conviction; murder conspiracy participants faced with uncharged "Mafia" offenses; affirmed because evidence tended to prove existence and nature of criminal "enterprise" and conspiracy, as well as acts taken in furtherance of the conspiracy); *United States v. Tripp*, 782 F.2d 38, 41 (6th Cir. 1986) (reviewing RICO conviction; prosecutors used evidence of poker games that took place during gambling enterprise's conspiracy; affirmed because "plainly relevant to the conspiracy").

111 See, e.g., *United States v. Devin*, 918 F.2d 280, 286-87 (1st Cir. 1990) (reviewing RICO conviction; former police officer's violations of Boston Police Department regulations ruled to fall under Rule 404(b), as they were "wrongs" or "acts"; admission affirmed because relevant to intent, knowledge, and "completed the story of [his] crime[s] by proving the immediate context of events near in time and place"); *United States v. Kopituk*, 690 F.2d 1289, 1333-36 (11th Cir. 1982) (reviewing RICO conviction; waterfront union officials and employers previously convicted of RICO charge; affirmed because extrinsic offenses similar and tended to prove intent and proper limiting instruction minimized prejudice); *United States v. Phillips*, 664 F.2d 971, 1028-29 (5th Cir. 1981) (reviewing RICO conviction; evidence of false driver's license relevant to prove identity); *United States v. Pantone*, 609 F.2d 675, 681-82 (3d Cir. 1979) (reviewing RICO conviction; use of bribery evidence reversed where no evidence of a proper purpose could be found; error not harmless because government's failure to articulate a proper purpose indicates that jury would not be able to articulate one); *United States v. Davis*, 576 F.2d 1065, 1067-68 (3d Cir. 1978) (reviewing RICO conviction; evidence of similar acts used against former prison warden who was accepting bribes; affirmed because evidence tended to show motive and intent in accepting the bribes).

assessment of "prior bad act" evidence if it demonstrates an abuse of discretion.¹¹²

C. Summary

Trial courts have a great deal of discretion to determine the admissibility of evidence. As a result, they are free to exercise their discretion with little fear of reversal. As long as the court applies the test articulated by its particular circuit in response to a well-taken objection, a reversal is unlikely. The exceptions to Rule 404(b) vary and this wide leeway brings a degree of uncertainty into the prosecution's attempt to get "prior bad act" evidence admitted. As shown above, using RICO does not shield evidence from the Federal Rules. What it does, however, is ensure that the evidence necessary to prove the RICO charge, such as prior murders, does not face as high a level of scrutiny as would be the case otherwise. The various circuits have complicated tests to analyze whether Rule 404(b) evidence is admissible. RICO predicate offenses, however, do not fall under Rule 404(b). Even if the court decides to analyze the proffered acts, it will do so under Rule 403 only. The fact that the acts are a vital part of the charge makes the evidence highly probative and more able to withstand Rule 403 scrutiny.

VIII. CONCLUSION: "PLEASE DON'T THROW ME INTO THE BRIAR PATCH"

RICO is often attacked for the manner in which it is being used in the American legal system. Opponents most often point to civil RICO, and complain that its current application is too broad. While the criticisms and defenses of civil RICO are best left to others, criminal RICO has been a powerful force for justice. Whether in federal or state courts, RICO makes it easier to bring down the criminal enterprises that simple individual criminal liability cannot. In addition, RICO's interaction with state and federal rules of evidence makes it a powerful tool to handle a difficult evidentiary case.

As discussed above, Florida Rules of Evidence 90.403 and 90.404(2), as well as Federal Rules of Evidence 403 and 404(b), give the trial judge a wide range of discretion in deciding the admissibility of evidence. This creates a level of uncertainty that replacing a simple criminal charge with a state or federal RICO charge avoids. A prosecutor will have to prove much more than in a traditional criminal

112 See *Pantone*, 609 F.2d at 681-82 (holding that no evidence of a proper purpose could be found).

case, owing to the complexity of the RICO case. But in the course of proving their case, prosecutors are able to sidestep many of the hurdles created by state and federal rules of evidence, as well as the state and federal common law.

A question that arises is whether or not this method of charging criminals is ethical. Some would argue that by using RICO in this manner, the prosecutor has evaded the rules of evidence in order to secure a conviction. Perhaps, some would argue, the integrity of the evidentiary system should have priority over conviction. It is important to consider, however, that the defendant might have gone free if not for this tactic. Rules of evidence should to protect the defendant from unfairness, not shield him from punishment for a crime. It may be time to avoid the formalisms inherent in the rules of evidence in order to put criminals behind bars. While prosecutors certainly like convictions on their record, only a cynic would argue that convictions (regardless of guilt) are their only goal.

Skepticism of the legal profession cannot be the only guide for structuring the way the criminal justice system works. To put it plainly: if using RICO furthers the ends of justice, then it should be used. RICO is not a corrupt means to an end; rather, it is a *different* means used to further the ends of justice. RICO should be a weapon in every prosecutor's arsenal. Considering the particulars of each case, a prosecutor has an additional choice on how best to serve the ends of justice and to get the criminal off the street. With this in mind, prosecutors should take the "briar patch" of RICO and make it their home.

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