Blame the Lawyers: A Look at the Advice of Counsel Defense

New York American Inn of Court White Collar Crime Program

November 6, 2023

6:30 – 8 pm

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Blame the Lawyers: A Look at the Advice of Counsel Defense

Timed Agenda

-Introduction: (2 minutes)

-Scene 1**: Golden Boy and Wingman Make a Plan** (3 minutes)

-Scene 2: **Wingman Calls Outside Counsel** (6 minutes)

-Scene 3(a): **Instructing the Sales Reps** (3 minutes)

-Scene 3(b): **Recruiting a Doctor** (3 minutes)

-Scene 4: **Doctor's Office** (3 minutes)

-Scene 5: **USAO Meeting** (20 minutes)

-Scene 6: **Courtroom Finale** (20 minutes)

-Panel Presentation: (20 minutes)

-Audience Questions: (10 minutes)

Team Members

1. Laurie Brecher
2. Brian Choi
3. Glenn Colton
4. Jonathan Coppola
5. Mary Diaz
6. Richard Diorio
7. Harry Dixon
8. Jeff Gross
9. Milosz Gudzowski
10. Diana Haladey
11. Meredith Jones
12. John Moscow
13. Deanna Paul
14. Amanda Raines
15. Walter G. Ricciardi
16. Jared Rosen
17. Solomon B. Shinerock
18. Steven Tugander

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds People v. Chaussee, Colo., September 12, 1994

109 S.Ct. 2893
Supreme Court of the United States

H.J. INC., et al., etc., Petitioners
v.
NORTHWESTERN BELL
TELEPHONE COMPANY et al.

No. 87–1252.
|
Argued Nov. 8, 1988.
|
Decided June 26, 1989.

Synopsis
Customers of telephone company brought class action, alleging that company gave members of the Minnesota Public Utilities Commission numerous bribes with the objective of causing the commissioners to approve unfair and unreasonable rates. Plaintiffs sought an injunction and triple damages under the civil liability provisions of the Racketeer Influenced and Corrupt Organizations Act. The United States District Court for the District of Minnesota, 648 F.Supp. 419, granted motion to dismiss. After motion to reconsider was denied, 653 F.Supp. 908, plaintiffs appealed. The Court of Appeals for the Eighth Circuit, 829 F.2d 648, affirmed. Plaintiffs petitioned for certiorari which was granted. The Supreme Court, Justice Brennan, held that: (1) in order to prove a pattern of racketeering activity under RICO, plaintiff or prosecutor must show at least two racketeering predicates that are related and that amount to, or threaten the likelihood of, continued criminal activity; (2) although proof of multiple criminal schemes may be relevant to inquiry into continuity, it is not the only way to show continuity; (3) allegation and proof of an organized crime nexus is not required to establish a RICO pattern; and (4) plaintiff sufficiently pled a pattern of racketeering activity.

Reversed and remanded.

Justice Scalia filed an opinion concurring in the judgment which was joined by Chief Justice Rehnquist, and Justices O'Connor and Kennedy.

Opinion on remand, 734 F.Supp. 879.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

West Headnotes (12)

[1] Racketeer Influenced and Corrupt Organizations Number of schemes, goals, episodes, or transactions

Predicate acts of racketeering may form a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act, even though they are not part of separate illegal schemes. 18 U.S.C.A. §§ 1961(5), 1962.

981 Cases that cite this headnote

[2] Racketeer Influenced and Corrupt Organizations Pattern of Activity

A pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act is not established merely by proving two predicate acts. 18 U.S.C.A. §§ 1961(5), 1962.

508 Cases that cite this headnote

[3] Racketeer Influenced and Corrupt Organizations Number of predicate acts

Racketeer Influenced and Corrupt Organizations Number of schemes, goals, episodes, or transactions

Racketeer Influenced and Corrupt Organizations Continuity or relatedness; ongoing activity

In order to prove a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act a plaintiff or prosecutor must show at least two racketeering predicates that are related, and that they amount to or pose a threat of continued criminal activity. 18 U.S.C.A. §§ 1961(5), 1962.

2775 Cases that cite this headnote

[4] **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

With respect to "relationship" element of a RICO pattern, the term is no more constrained than that used in Title X of the Organized Crime Control Act, under which "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C.A. §§ 1961(5), 1962; 18 U.S.C. (1982 Ed.) § 3575(e).

898 Cases that cite this headnote

[5] **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

Although proof that a RICO defendant has been involved in multiple criminal schemes would be highly relevant to inquiry into continuity of racketeering activity, proof of multiple schemes is not the only way to show continuity. 18 U.S.C.A. §§ 1961(5), 1962.

60 Cases that cite this headnote

[6] **Racketeer Influenced and Corrupt Organizations** Time and duration

Party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time; predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy continuity requirement. 18 U.S.C.A. §§ 1961(5), 1962.

3042 Cases that cite this headnote

[7] **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

A RICO pattern may be established if related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. 18 U.S.C.A. §§ 1961(5), 1962.

588 Cases that cite this headnote

[8] **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

Continuity element of a RICO pattern may be established by showing that predicate acts or offenses are part of an ongoing entity's regular way of doing business. 18 U.S.C.A. §§ 1961(5), 1962.

931 Cases that cite this headnote

[9] **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

"Continuity" is sufficiently established for purposes of a RICO pattern, where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes; such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." 18 U.S.C.A. §§ 1961(5), 1962.

182 Cases that cite this headnote

[10] **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

Continuity requirement of a RICO pattern is satisfied where it is shown that predicates are regular way of conducting defendant's ongoing legitimate business, or of conducting or participating in an ongoing and legitimate

RICO "enterprise." 18 U.S.C.A. §§ 1961(5), 1962.

420 Cases that cite this headnote

[11] Racketeer Influenced and Corrupt Organizations Legitimacy; connection with organized crime

RICO's pattern of racketeering concept does not require allegation and proof of an organized crime nexus. 18 U.S.C.A. §§ 1961(5), 1962.

66 Cases that cite this headnote

[12] Racketeer Influenced and Corrupt Organizations Continuity or relatedness; ongoing activity

Allegations that telephone company and some of its employees gave members of the Minnesota Public Utilities Commission numerous bribes at different times over the course of at least a six-year period, with the objective of causing the commissioners to approve unfair and unreasonable rates for the company were sufficient to plead a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C.A. §§ 1961(5), 1962.

121 Cases that cite this headnote

****2895 *229** *Syllabus* *

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968, which is Title IX of the Organized Crime Control Act of 1970 (OCCA), imposes criminal and civil liability upon persons who engage in certain "prohibited activities," each of which is defined to include, as a necessary element, proof of a "pattern of racketeering activity," § 1962. "Racketeering activity" means "any act or threat involving" specified state-law crimes, any "act" indictable under specified federal statutes, and certain federal "offenses." § 1961(1). A "pattern" requires "at least two acts of racketeering activity" within a 10–year period. § 1961(5). Petitioners, customers of respondent Northwestern Bell, filed a civil action in the District Court against Northwestern Bell and other respondents, including members of the Minnesota Public Utilities Commission (MPUC)—which is responsible for determining Northwestern Bell's rates—seeking an injunction and treble damages. They raised four separate claims under §§ 1962(a), (b), (c), and (d), based on factual allegations that between 1980 and 1986, Northwestern Bell made various cash and in-kind payments to MPUC members, and thereby influenced them to approve rates for the company in excess of a fair and reasonable amount. The District Court dismissed the complaint, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted, on the ground that each of the fraudulent acts alleged was "committed in furtherance of a single scheme to influence MPUC commissioners" rather than multiple illegal schemes. The Court of Appeals affirmed, confirming that under its precedent, a single scheme is insufficient to establish a pattern of racketeering activity.

Held:

1. In order to prove a pattern of racketeering activity, a plaintiff or prosecutor must show at least two racketeering predicates ****2896** that are related *and* that amount to, or threaten the likelihood of, continued criminal activity. Proof of neither relationship nor continuity requires a showing that the racketeering predicates were committed in furtherance of multiple criminal schemes. Pp. 2899–2905.

(a) Section 1961(5) states that at least two racketeering predicates committed within a 10-year period are necessary to establish a RICO ***230** pattern, but implies that two acts may not be sufficient. Section 1961(5) thus assumes that there is something to a pattern beyond merely the number of predicates involved. In normal usage, the word "pattern" would also be taken to require not simply a multiplicity of predicates, but rather predicates arranged or ordered by reason of the relationship they bear to each other or to some external organizing principle. The text of RICO fails to identify the forms of relationship or external principles to be used to determine whether predicates fall into a pattern. RICO's legislative history, however, establishes that Congress

intended that to prove a "pattern of racketeering activity" a plaintiff or prosecutor must show both "relationship" and "continuity"—that the racketeering predicates are related, and that they either constitute or threaten long-term criminal activity. Pp. 2899–2900.

(b) Relationship and continuity are two distinct requirements, though their proof will often overlap. RICO's notion of relationship is no more constrained than that used in Title X of OCCA, under which "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). Continuity of racketeering activity likewise may be demonstrated in a variety of ways. Continuity is centrally a temporal concept, and may be either closed- or open-ended. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Otherwise, it must be shown that the predicates establish a *threat* of long-term racketeering activity—for example, because the predicates themselves involve a distinct threat of such activity; because they are part of the regular way of doing business for an ongoing entity such as a criminal association or legitimate business; or because they are a regular means of conducting or participating in an ongoing RICO enterprise. Although proof of multiple criminal schemes may be relevant to this inquiry into continuity, it is not the only way to show continuity. Adopting the Court of Appeals' multiple scheme test would bring a rigidity to the methods of proving a pattern not present in the idea of "continuity" itself, and it would introduce a concept—the "scheme"—that does not appear in RICO's language or legislative history. Pp. 2901–2903.

(c) Neither RICO's language nor its legislative history supports a rule that a defendant's racketeering activities form a pattern only if they are characteristic of organized crime. No such restriction appears in RICO's text. Nor is there any language suggesting that RICO's scope should be limited to acts of an association rather than an individual acting alone. Moreover, Congress' approach in RICO can be contrasted with ***231** its decision to enact explicit limitations to organized crime in other statutes. *E.g.,* Omnibus Crime Control and Safe Streets Act of 1968, § 601(b). The argument that RICO's broad language should be read restrictively to be congruous with RICO's purpose to eradicate organized crime is rejected: the legislative history shows Congress had no such restriction in mind. Pp. 2903–2906.

2. The Court of Appeals erred in affirming the District Court's dismissal of petitioners' complaint for failure to allege facts sufficient to demonstrate a "pattern of racketeering activity." Consistent with the allegations in their complaint, petitioners may be able to prove that the multiple predicates alleged satisfy the requirements of continuity and relationship and hence ****2897** satisfy RICO's pattern of racketeering element. P. 2906.

829 F.2d 648, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which REHNQUIST, C.J., and O'CONNOR and KENNEDY, JJ., joined, *post,* p. 2906.

Attorneys and Law Firms

Mark Reinhardt argued the cause for petitioners. With him on the briefs were *Susan Bedor* and *John Cochrane.*

John D. French argued the cause for respondents. With him on the brief were *John F. Beukema, James L. Volling,* and *Stephen T. Refsell.**

* Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Acting Assistant Attorney General Richard, Deputy Solicitor General Bryson, Richard G. Taranto, Joel M. Gershowitz,* and *Frank J. Marine;* and for the States of Arizona et al. by *Robert K. Corbin,* Attorney General of Arizona, *John K. Van de Kamp,* Attorney General of California, *John J. Kelly,* Chief State's Attorney of Connecticut, *Jim Jones,* Attorney General of Idaho, *Frank J. Kelley,* Attorney General of Michigan, *W. Cary Edwards,* Attorney General of New Jersey, *Hal Stratton,* Attorney General of New Mexico, *Lacy H. Thornburg,* Attorney General of North Carolina, and *Jean A. Benoy,* Senior Deputy Attorney General, *Dave Frohnmayer,* Attorney General of Oregon, *Jim Mattox,* Attorney General of Texas, *Kenneth O. Eikenberry,* Attorney General of Washington, *Charlie Brown,* Attorney General of West Virginia, *Donald J. Hanaway,* Attorney General of Wisconsin, and *Joseph B. Meyer,* Attorney General of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg* and *Laurence Gold;*

for the American Institute of Certified Public Accountants by *Philip A. Lacovara, Geoffrey F. Aronow,* and *Louis A. Craco;* for the National Association of Manufacturers by *Stephen M. Shapiro, Andrew L. Frey, Kenneth S. Geller, Mark I. Levy, Jan S. Amundson,* and *Quentin Riegel;* and for the Washington Legal Foundation by Daniel J. Popeo, Paul D. Kamenar, *and Vicki S. Marani.*

Briefs of *amici curiae* were filed for the Chamber of Commerce of the United States by *Stephen A. Bokat, Robin S. Conrad,* and *Lynn M. Smelkinson;* and for Trial Lawyers for Public Justice by *Robert M. Hausman.*

Opinion

***232** Justice BRENNAN delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO or Act), Pub.L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961–1968 (1982 ed. and Supp. V), imposes criminal and civil liability upon those who engage in certain "prohibited activities." Each prohibited activity is defined in 18 U.S.C. § 1962 to include, as one necessary element, proof either of "a pattern of racketeering activity" or of "collection of an unlawful debt." "Racketeering activity" is defined in RICO to mean "any act or threat involving" specified state-law crimes, any "act" indictable under various specified federal statutes, and certain federal "offenses," 18 U.S.C. § 1961(1) (1982 ed., Supp. V); but of the term "pattern" the statute says only that it "requires at least two acts of racketeering activity" within a 10–year period, 18 U.S.C. § 1961(5). We are called upon in this civil case to consider what conduct meets RICO's pattern requirement.

I

RICO renders criminally and civilly liable "any person" who uses or invests income derived "from a pattern of racketeering activity" to acquire an interest in or to operate an enterprise engaged in interstate commerce, § 1962(a); who acquires or maintains an interest in or control of such an enterprise "through a pattern of racketeering activity," § 1962(b); who, being employed by or associated with such an enterprise, conducts or participates in the conduct of its affairs ***233** "through a pattern of racketeering activity," § 1962(c); or, finally, who conspires to violate the first three subsections of § 1962, § 1962(d). RICO provides for drastic remedies: conviction for a violation of RICO carries severe criminal penalties and forfeiture of illegal proceeds, 18 U.S.C. § 1963 (1982 ed., Supp. V); and a person found in a private civil action to have violated RICO is liable for treble damages, costs, and attorney's fees, 18 U.S.C. § 1964(c).

Petitioners, customers of respondent Northwestern Bell Telephone Co., filed this putative class action in 1986 in the District Court for the District of Minnesota. Petitioners alleged violations of §§ 1962(a), (b), (c), and (d) by Northwestern Bell and the other respondents—some of the telephone company's officers and employees, various members of the Minnesota Public Utilities Commission (MPUC), and other unnamed individuals and corporations—and sought an injunction and treble damages under RICO's civil liability provisions, §§ 1964(a) and (c).

The MPUC is the state body responsible for determining the rates that Northwestern Bell may charge. Petitioners' five–count complaint alleged that between 1980 and 1986 Northwestern Bell sought to influence members of the MPUC in the performance of their duties—and in fact caused them to approve rates for the company in excess of a fair and reasonable amount—by making cash payments to commissioners, negotiating with them regarding future employment, and paying for parties and meals, for tickets to sporting events and the like, and for airline tickets. Based upon these factual allegations, petitioners alleged in their first count a pendent state-law claim, asserting that Northwestern Bell violated the Minnesota bribery statute, Minn.Stat. § 609.42 (1988), as well as state common law prohibiting bribery. They also raised four separate claims ****2898** under § 1962 of RICO. Count II alleged that, in violation of § 1962(a), Northwestern Bell derived income from a pattern of racketeering activity involving predicate acts of bribery and used ***234** this income to engage in its business as an interstate "enterprise." Count III claimed a violation of § 1962(b), in that, through this same pattern of racketeering activity, respondents acquired an interest in or control of the MPUC, which was also an interstate "enterprise." In Count IV, petitioners asserted that respondents participated in the conduct and affairs of the MPUC through this pattern of racketeering activity, contrary to § 1962(c). Finally, Count V alleged that respondents conspired together to violate

§§ 1962(a), (b), and (c), thereby contravening § 1962(d).

The District Court granted respondents' Federal Rule of Civil Procedure 12(b)(6) motion, dismissing the complaint for failure to state a claim upon which relief could be granted. 648 F.Supp. 419 (Minn.1986). The court found that "[e]ach of the fraudulent acts alleged by [petitioners] was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers." *Id.,* at 425. It held that dismissal was therefore mandated by the Court of Appeals for the Eighth Circuit's decision in *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (1986), which the District Court interpreted as adopting an "extremely restrictive" test for a pattern of racketeering activity that required proof of "multiple illegal schemes." 648 F.Supp., at 425. [1] The Court of Appeals for the Eighth Circuit affirmed the dismissal of petitioners' complaint, confirming that under Eighth Circuit precedent "[a] single fraudulent effort or scheme is insufficient" to establish a pattern of racketeering ***235** activity, 829 F.2d 648, 650 (1987), and agreeing with the District Court that petitioners' complaint alleged only a single scheme, *ibid.* Two members of the panel suggested in separate concurrences, however, that the Court of Appeals should reconsider its test for a RICO pattern. *Id.,* at 650 (McMillian, J.); *id.,* at 651 (J. Gibson, J.). Most Courts of Appeals have rejected the Eighth Circuit's interpretation of RICO's pattern concept to require an allegation and proof of multiple schemes, [2] and we granted certiorari to resolve ****2899** this conflict. 485 U.S. 958, 108 S.Ct. 1219, 99 L.Ed.2d 420 (1988). We now reverse.

***236** II

In *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), this Court rejected a restrictive interpretation of § 1964(c) that would have made it a condition for maintaining a civil RICO action both that the defendant had already been convicted of a predicate racketeering act or of a RICO violation, and that plaintiff show a special racketeering injury. In doing so, we acknowledged concern in some quarters over civil RICO's use against "legitimate" businesses, as well as "mobsters and organized criminals"—a concern that had frankly led to the Court of Appeals' interpretation of § 1964(c) in *Sedima,* see *id.,* at 499–500, 105 S.Ct., at 3286–3287. But we suggested that RICO's expansive uses "appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern' "—both factors that apply to criminal as well as civil applications of the Act. *Id.,* at 500, 105 S.Ct., at 3287; see also *id.,* at 501–502, 105 S.Ct., at 3292–3293 (MARSHALL, J., dissenting). Congress has done nothing in the interim further to illuminate RICO's key requirement of a pattern of racketeering; and as the plethora of different views expressed by the Courts of Appeals since *Sedima* demonstrates, see n. 2, *supra,* developing a meaningful concept of "pattern" within the existing statutory framework has proved to be no easy task.

[1] **[2]** It is, nevertheless, a task we must undertake in order to decide this case. Our guides in the endeavor must be the text of the statute and its legislative history. We find no support in those sources for the proposition, espoused by the Court of Appeals for the Eighth Circuit in this case, that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes. Nor can we agree with those courts that have suggested that a pattern is established merely by proving two predicate acts, see, *e.g.,* *United States v. Jennings,* 842 F.2d 159, 163 (CA6 1988), or with *amici* in this case who argue that the word "pattern" refers ***237** only to predicates that are indicative of a perpetrator involved in organized crime or its functional equivalent. In our view, Congress had a more natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.

A

[3] We begin, of course, with RICO's text, in which Congress followed a "pattern [of] utilizing terms and concepts of breadth." *Russello v. United States,* 464 U.S. 16, 21, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983). As we remarked in *Sedima, supra,* 473 U.S., at 496, n. 14, 105 S.Ct., at

3285, n. 14, the section of the statute headed "definitions," 18 U.S.C. § 1961 (1982 ed. and Supp. V), does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern. Unlike other provisions in § 1961 that tell us what various concepts used in the Act "mean," 18 U.S.C. § 1961(5) says of the phrase "pattern of racketeering activity" only that it "requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970,] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." It thus places an outer limit on the concept of a pattern of racketeering activity that is broad indeed.

Section 1961(5) does indicate that Congress envisioned circumstances in which no more than two predicates would be necessary to establish a pattern of racketeering ****2900** — otherwise it would have drawn a narrower boundary to RICO liability, requiring proof of a greater number of predicates. But, at the same time, the statement that a pattern "requires at least" two predicates implies "that while two acts are necessary, they may not be sufficient." ***238** *Sedima,* 473 U.S., at 496, n. 14, 105 S.Ct., at 3285, n. 14; *id.,* at 527, 105 S.Ct., 3289 (Powell, J., dissenting). Section 1961(5) concerns only the minimum *number* of predicates necessary to establish a pattern; and it assumes that there is something to a RICO pattern *beyond* simply the number of predicate acts involved. The legislative history bears out this interpretation, for the principal sponsor of the Senate bill expressly indicated that "proof of two acts of racketeering activity, without more, does not establish a pattern." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). Section § 1961(5) does not identify, though, these additional prerequisites for establishing the existence of a RICO pattern.

In addition to § 1961(5), there is the key phrase "pattern of racketeering activity" itself, from § 1962, and we must "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States,* 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962). In normal usage, the word "pattern" here would be taken to require more than just a multiplicity of racketeering predicates. A "pattern" is an "arrangement or order of things or activity," 11 Oxford English Dictionary 357 (2d ed. 1989), and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged." The text of RICO conspicuously fails anywhere to identify, however, forms of relationship or external principles to be used in determining whether racketeering activity falls into a pattern for purposes of the Act.

It is reasonable to infer, from this absence of any textual identification of sorts of pattern that would satisfy § 1962's requirement, in combination with the very relaxed limits to the pattern concept fixed in § 1961(5), that Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set. For any more specific guidance as ***239** to the meaning of "pattern," we must look past the text to RICO's legislative history, as we have done in prior cases construing the Act. See *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S., at 486–490, 105 S.Ct., at 3279–3282 (majority opinion); *id.,* at 510–519, 105 S.Ct., at 3297–3302 (MARSHALL, J., dissenting); *id.,* at 524–527, 105 S.Ct., at 3287–3289 (Powell, J., dissenting); *Russello v. United States, supra,* at 26–29, 104 S.Ct., at 302–304; *United States v. Turkette,* 452 U.S. 576, 586–587, 589–593, 101 S.Ct. 2524, 2530–2531, 2531–2534, 69 L.Ed.2d 246 (1981).

The legislative history, which we discussed in *Sedima, supra,* 473 U.S., at 496, n. 14, 105 S.Ct., at 3285, n. 14, shows that Congress indeed had a fairly flexible concept of a pattern in mind. A pattern is not formed by "sporadic activity," S.Rep. No. 91–617, *supra,* p. 158 (1969), and a person cannot "be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses," 116 Cong. Rec., at 18940 (1970) (Sen. McClellan). Instead, "[t]he term 'pattern' itself requires the showing of a relationship" between the predicates, *ibid.,* and of " 'the threat of continuing activity,' " *ibid.,* quoting S.Rep. No. 91–617, at 158. "It is this factor of *continuity plus relationship* which combines to produce a pattern." *Ibid.* (emphasis added). RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that

the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.

****2901** B

[4] For analytic purposes these two constituents of RICO's pattern requirement must be stated separately, though in practice their proof will often overlap. The element of relatedness is the easier to define, for we may take guidance from a provision elsewhere in the Organized Crime Control Act of 1970 (OCCA), Pub.L. 91–452, 84 Stat. 922, of which RICO formed Title IX. OCCA included as Title X the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575 *et seq.* (now partially repealed). Title X provided for enhanced sentences ***240** where, among other things, the defendant had committed a prior felony as part of a pattern of criminal conduct or in furtherance of a conspiracy to engage in a pattern of criminal conduct. As we noted in *Sedima, supra,* at 496, n. 14, 105 S.Ct., at 3285, n. 14, Congress defined Title X's pattern requirement solely in terms of the *relationship* of the defendant's criminal acts one to another: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." § 3575(e)§ 3575(e). We have no reason to suppose that Congress had in mind for RICO's pattern of racketeering component any more constrained a notion of the relationships between predicates that would suffice.

[5] RICO's legislative history tells us, however, that the relatedness of racketeering activities is not alone enough to satisfy § 1962's pattern element. To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity. As to this continuity requirement, § 3575(e)§ 3575(e) is of no assistance. It is this aspect of RICO's pattern element that has spawned the "multiple scheme" test adopted by some lower courts, including the Court of Appeals in this case. See 829 F.2d, at 650 ("In order to demonstrate the necessary continuity appellants must allege that Northwestern Bell 'had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities.' ... A single fraudulent effort or scheme is insufficient"). But although proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity, it is implausible to suppose that Congress thought continuity might be shown *only* by proof of multiple schemes. The Eighth Circuit's test brings a rigidity to the available methods of proving a pattern ***241** that simply is not present in the idea of "continuity" itself; and it does so, moreover, by introducing a concept —the "scheme"—that appears nowhere in the language or legislative history of the Act.[3] We adopt a less ****2902** inflexible approach that seems to us to derive from a commonsense, everyday understanding of RICO's language and Congress' gloss on it. What a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, *simpliciter.* This may be done in a variety of ways, thus making it difficult to formulate in the abstract any general test for continuity. We can, however, begin to delineate the requirement.

[6] "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. See *Barticheck v. Fidelity Union Bank/First National State,* 832 F.2d 36, 39 (CA3 1987). It ***242** is, in either case, centrally a temporal concept—and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated. See S.Rep. No. 91–617, at 158.

[7] **[8]** **[9]** **[10]** Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the field of possibilities—preferring to deal with this issue in the context of concrete factual situations presented for decision—we offer some examples of how this element might be satisfied. A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to

collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently establishedwhere ***243** the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."[4]

The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular ****2903** case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.

III

[11] Various *amici* urge that RICO's pattern element should be interpreted more narrowly than as requiring relationship and continuity in the senses outlined above, so that a defendant's racketeering activities form a pattern only if they are characteristic either of organized crime in the traditional sense, or of an organized-crime-type perpetrator, that is, of an association dedicated to the repeated commission of criminal offenses. ***244** [5] Like the Court of Appeals' multiple scheme rule, however, the argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text, and is at odds with the tenor of its legislative history.

One evident textual problem with the suggestion that predicates form a RICO pattern only if they are indicative of an organized crime perpetrator—in either a traditional or functional sense—is that it would seem to require proof that the racketeering acts were the work of an association or group, rather than of an individual acting alone. RICO's language supplies no grounds to believe that Congress meant to impose such a limit on the Act's scope. A second indication from the text that Congress intended no organized crime limitation is that no such restriction is explicitly stated. In those titles of OCCA where Congress did intend to limit the new law's application to the context of organized crime, it said so. Thus Title V, authorizing the witness protection program, stated that the Attorney General may provide for the security of witnesses "in legal proceedings against any person alleged to have participated in an organized criminal activity." 84 Stat. 933, note preceding 18 U.S.C. § 3481 ***245** since repealed). And Title VI permitted the deposition of a witness to preserve testimony for a legal proceeding, upon motion by the Attorney General certifying that "the legal proceeding is against a person who is believed to have participated in an organized criminal activity." 18 U.S.C. § 3503(a). Moreover, Congress' approach in RICO can be contrasted with its decision to enact explicit limitations to organized crime in other statutes. *E.g.,* Omnibus Crime Control and Safe Streets Act of 1968, § 601(b), Pub.L. 90–351, 82 Stat. 209 (defining "organized crime" as "the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations"). Congress' decision not explicitly to limit RICO's broad terms strongly implies that Congress had in mind no such narrow and fixed idea of what constitutes a pattern as that suggested by *amici* here.

It is argued, nonetheless, that Congress' purpose in enacting RICO, as revealed in the Act's title, in OCCA's preamble, 84 Stat. 923 (Congress seeking "the eradication of organized crime in the United States"), and in the legislative history, was ****2904** to combat organized crime; and that RICO's broad language should be read narrowly so that the Act's scope is coextensive with this purpose. We cannot accept this argument for a narrowing construction of the Act's expansive terms.

To be sure, Congress focused on, and the examples used in the debates and reports to illustrate the Act's operation concern, the predations of mobsters. Organized crime was

without a doubt Congress' major target, as we have recognized elsewhere. See *Russello,* 464 U.S., at 26, 104 S.Ct., at 302; *Turkette,* 452 U.S., at 591, 101 S.Ct., at 2532. But the definition of a "pattern of criminal conduct" in Title X of OCCA in terms only of the relationship between criminal acts, see *supra,* at 2901, shows that Congress ***246** was quite capable of conceiving of "pattern" as a flexible concept not dependent on tying predicates to the major objective of the law, which for Title X as for Title IX was the eradication of organized crime. See 84 Stat. 923. Title X's definition of "pattern" should thus create a good deal of skepticism about any claim that, despite the capacious language it used, Congress must have intended the RICO pattern element to pick out only racketeering activities with an organized crime nexus. And, indeed, the legislative history shows that Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime.

Opponents criticized OCCA precisely because it failed to limit the statute's reach to organized crime. See, *e.g.,* S.Rep. No. 91–617, at 215 (Sens. Hart and Kennedy complaining that the OCCA bill "goes beyond organized criminal activity"). In response, the statute's sponsors made evident that the omission of this limit was no accident, but a reflection of OCCA's intended breadth. Senator McClellan was most plain in this respect:

> "The danger posed by organized crime-type offenses to our society has, of course, provided the occasion for our examination of the working of our system of criminal justice. But should it follow ... that any proposals for action stemming from that examination be limited to organized crime?
>
> "[T]his line of analysis ... is seriously defective in several regards. Initially, it confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that reexamination.
>
> "In addition, the objection confuses the role of the Congress with the role of a court. Out of a proper sense of their limited lawmaking function, courts ought to confine their judgments to the facts of the cases before ***247** them. But the Congress in fulfilling its proper legislative role must examine not only individual instances, but whole problems. In that connection, it has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem. Comprehensive solutions to identified problems must be translated into well integrated legislative programs.
>
> "The objection, moreover, has practical as well as theoretical defects. Even as to the titles of [the OCCA bill] needed primarily in organized crime cases, there are very real limits on the degree to which such provisions can be strictly confined to organized crime cases.... On the other hand, each title ... which is justified primarily in organized crime prosecutions has been confined to such cases to the maximum degree possible, while preserving the ability to administer the act and its effectiveness as a law enforcement tool." 116 Cong. Rec. 18913–18914 (1970).

Representative Poff, another sponsor of the legislation, also answered critics who complained that a definition of "organized crime" was needed:

> "It is true that there is no organized crime definition in many parts of the bill. ****2905** This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant?" *Id.,* at 35204.

See also *id.,* at 35344 (Rep. Poff) ("organized crime" simply "a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances," not a precise concept).

***248** The thrust of these explanations seems to us reasonably clear. The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime. In Title IX, Congress picked out as key to RICO's application broad concepts that might fairly indicate an organized crime connection, but that it fully realized do not either individually or together provide anything approaching a perfect fit with "organized crime." See, *e.g., id.,* at 18940 (Sen. McClellan) ("It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well").

It seems, moreover, highly unlikely that Congress would have intended the pattern requirement to be interpreted by reference to a concept that it had itself rejected for inclusion in the text of RICO at least in part because "it is probably impossible precisely and definitively to define." *Id.,* at 35204 (Rep. Poff). Congress realized that the stereotypical view of organized crime as consisting in a circumscribed set of illegal activities, such as gambling and prostitution—a view expressed in the definition included in the Omnibus Crime Control and Safe Streets Act, and repeated in the OCCA preamble—was no longer satisfactory because criminal activity had expanded into legitimate enterprises. See *United States v. Turkette,* 452 U.S., at 590–591, 101 S.Ct., at 2532–2533. Title 18 U.S.C. § 1961(1) (1982 ed., Supp. V), with its very generous definition of "racketeering activity," acknowledges the breakdown of the traditional conception of organized crime, and responds to a new situation in which persons engaged in long-term criminal activity often operate *wholly* within legitimate enterprises. Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators ***249** operating in many different ways. It would be counterproductive and a mismeasure of congressional intent now to adopt a narrow construction of the statute's pattern element that would require proof of an organized crime nexus.

As this Court stressed in *Sedima,* in rejecting a pinched construction of RICO's provision for a private civil action, adopted by a lower court because it perceived that RICO's use against non-organized-crime defendants was an "abuse" of the Act, "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises." 473 U.S., at 499, 105 S.Ct., at 3286. Legitimate businesses "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences"; and, as a result, § 1964(c)'s use "against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued." *Ibid.* If plaintiffs' ability to use RICO against businesses engaged in a pattern of criminal acts is a defect, we said, it is one "inherent in the statute as written," and hence beyond our power to correct. *Ibid.* RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court. There is no more room in RICO's "self-consciously expansive language and overall approach" for the imposition of an organized crime limitation than for the "amorphous 'racketeering injury' requirement" we rejected in *Sedima,* see ****2906** *id.,* at 495, 498, 105 S.Ct., at 3284, 3286. We thus decline the invitation to invent a rule that RICO's pattern of racketeering concept requires an allegation and proof of an organized crime nexus.

IV

[12] We turn now to the application of our analysis of RICO's pattern requirement. Because respondents prevailed on a motion under Federal Rule of Civil Procedure 12(b)(6), we read the facts alleged in the complaint in the light most favorable to petitioners. And we may only affirm the dismissal of the complaint if "it is clear that no relief could be granted ***250** under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984).

Petitioners' complaint alleges that at different times over the course of at least a 6–year period the noncommissioner respondents gave five members of the MPUC numerous bribes, in several different forms, with the objective—in which they were allegedly successful—of causing these commissioners to approve unfair and unreasonable rates for Northwestern Bell. RICO defines bribery as a "racketeering activity," 18 U.S.C. § 1961(1), so petitioners have alleged multiple predicate acts.

Under the analysis we have set forth above, and consistent with the allegations in their complaint, petitioners may be able to prove that the multiple predicates alleged constitute "a pattern of racketeering activity," in that they satisfy the requirements of relationship and continuity. The acts of bribery alleged are said to be related by a common purpose, to influence commissioners in carrying out their duties in order to win approval of unfairly and unreasonably high rates for Northwestern Bell. Furthermore, petitioners claim that the racketeering predicates occurred with some frequency over at least a 6–year period, which may be sufficient to satisfy the continuity requirement. Alternatively, a threat of continuity of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise, the MPUC.

The Court of Appeals thus erred in affirming the District Court's dismissal of petitioners' complaint for failure to plead "a pattern of racketeering activity." The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

***251** Justice SCALIA, with whom THE CHIEF JUSTICE, Justice O'CONNOR, and Justice KENNEDY join, concurring in the judgment.

Four Terms ago, in *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), we gave lower courts the following four clues concerning the meaning of the enigmatic term "pattern of racketeering activity" in the Racketeer Influenced and Corrupt Organizations Act (RICO or Act), Pub.L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961–1968 (1982 ed. and Supp. V). First, we stated that the statutory definition of the term in 18 U.S.C. § 1961(5) implies "that while two acts are necessary, they may not be sufficient." *Sedima,* 473 U.S., at 496, n. 14, 105 S.Ct., at 3285, n. 14. Second, we pointed out that "two isolated acts of racketeering activity," "sporadic activity," and "proof of two acts of racketeering activity, without more" would not be enough to constitute a pattern. *Ibid.* Third, we quoted a snippet from the legislative history stating "[i]t is this factor of *continuity plus relationship* which combines to produce a pattern." *Ibid.* Finally, we directed lower courts' attention to 18 U.S.C. § 3575(e), which defined the term "pattern of conduct which was criminal" used in a different title of the same Act, and instructed them that "[t]his language may be useful in interpreting other sections of the Act," 473 U.S., at 496, n. 14, 105 S.Ct., at 3285. Thus enlightened, the District Courts and Courts of Appeals set out "to develop a meaningful concept of 'pattern,' ****2907** " *id.,* at 500, 105 S.Ct., at 3287, and promptly produced the widest and most persistent Circuit split on an issue of federal law in recent memory, see, *e.g., ante,* at 2898, n. 2. Today, four years and countless millions in damages and attorney's fees later (not to mention prison sentences under the criminal provisions of RICO), the Court does little more than repromulgate those hints as to what RICO means, though with the caveat that Congress intended that they be applied using a "flexible approach." *Ante,* at 2900.

***252** Elevating to the level of statutory text a phrase taken from the legislative history, the Court counsels the lower courts: " 'continuity plus relationship.' " *Ante,* at 2900 (emphasis deleted). This seems to me about as helpful to the conduct of their affairs as "life is a fountain." Of the two parts of this talismanic phrase, the relatedness requirement is said to be the "easier to define," *ibid.,* yet here is the Court's definition, *in toto:* " '[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events,' " *ante,* at 2901. This definition has the feel of being solidly rooted in law, since it is a direct quotation of 18 U.S.C. § 3575(e). Unfortunately, if normal (and sensible) rules of statutory construction were followed, the existence of § 3575(e)§ 3575(e)—which is the definition contained in another title of the Act that was explicitly *not* rendered applicable to RICO—suggests that *whatever* "pattern" might mean in RICO, it assuredly *does not* mean that. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983). But that does not really matter, since § 3575(e)§ 3575(e) is utterly uninformative anyway. It hardly closes in on the target to know that "relatedness" refers to acts that are related by "purposes, results, participants, victims, ... methods of commission, *or* [just in case that is not vague enough] *otherwise.*" Is the fact that the victims of both predicate acts were women enough? Or that both acts had the purpose of enriching the defendant? Or that the different coparticipants of the defendant in both acts were his coemployees? I doubt that the lower courts will find the Court's instructions much more helpful than telling them to look for a "pattern"—which is what the statute already says.

***253** The Court finds "continuity" more difficult to define precisely. "Continuity," it says, "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Ante,* at 2902. I have no idea what this concept of a "closed period of repeated conduct" means. Virtually all allegations of racketeering activity, in both civil and criminal suits, will relate to past periods that are "closed" (unless one expects plaintiff or the prosecutor to establish that the defendant not only committed the crimes he did, but is still committing them), and all of

them *must* relate to conduct that is "repeated," because of RICO's multiple-act requirement. I had thought, initially, that the Court was seeking to draw a distinction between, on the one hand, past repeated conduct (multiple racketeering acts) that is "closed-ended" in the sense that, in its totality, it constitutes only one criminal "scheme" or "episode"—which would not fall within RICO unless in its nature (for one or more of the reasons later described by the Court, see *ante,* at 2902) it threatened future criminal endeavors as well—and, on the other hand, past repeated conduct (multiple racketeering acts) that constitutes several separate schemes—which is alone enough to invoke RICO. But of course that cannot be what it means, since the Court rejects the "multiple scheme" concept, not merely as the *exclusive* touchstone of RICO liability, see *ante,* at 2901, but in all its applications, ****2908** since it "introduc[es] a concept ... that appears nowhere in the language or legislative history of the Act," *ante,* at 2901, and is so vague and "amorphous" as to exist only "in the eye of the beholder," *ante,* at 2901, n. 3. Moreover, the Court tells us that predicate acts extending, not over a "substantial period of time," but only over a "few weeks or months and threatening no future criminal conduct" do not satisfy the continuity requirement. *Ante,* at 2902. Since the Court has rejected the concept of separate criminal "schemes" or "episodes" as a criterion of "threatening future criminal conduct," ***254** I think it must be saying that at least a few months of racketeering activity (and who knows how much more?) is generally for free, as far as RICO is concerned. The "closed period" concept is a sort of safe harbor for racketeering activity that does not last *too* long, no matter how many different crimes and different schemes are involved, so long as it does not otherwise "establish a threat of continued racketeering activity," *ibid.* A gang of hoodlums that commits one act of extortion on Monday in New York, a second in Chicago on Tuesday, a third in San Francisco on Wednesday, and so on through an entire week, and then finally and completely disbands, cannot be reached under RICO. I am sure that is not what the statute intends, but I cannot imagine what else the Court's murky discussion can possibly mean.

Of course it cannot be said that the Court's opinion operates only in the direction of letting some obvious racketeers get out of RICO. It also makes it clear that a hitherto dubious category is included, by establishing the rule that the "multiple scheme" test applied by the Court of Appeals here is not only nonexclusive but indeed nonexistent. This is, as far as I can discern, the Court's only substantive contribution to our prior guidance—and it is a contribution that makes it *more* rather than *less* difficult for a potential defendant to know whether his conduct is covered by RICO. Even if he is only involved in a single scheme, he may still be covered if there is present whatever is needed to establish a "threat of continuity." The Court gives us a nonexclusive list of three things that do so. Two of those presumably polar examples seem to me extremely difficult to apply—whether "the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes," *ante,* at 2902, and whether "the predicates are a regular way of conducting defendant's ongoing legitimate business," *ibid.* What is included beyond these examples is vaguer still.

It is, however, unfair to be so critical of the Court's effort, because I would be unable to provide an interpretation of ***255** RICO that gives significantly more guidance concerning its application. It is clear to me from the prologue of the statute, which describes a relatively narrow focus upon "organized crime," see Statement of Findings and Purpose, The Organized Crime Control Act of 1970, Pub.L. 91–452, 84 Stat. 922–923, that the word "pattern" in the phrase "pattern of racketeering activity" was meant to import some requirement beyond the mere existence of multiple predicate acts. Thus, when § 1961(5) says that a pattern "requires at least two acts of racketeering activity" it is describing what is needful but not sufficient. (If that were not the case, the concept of "pattern" would have been unnecessary, and the statute could simply have attached liability to "multiple acts of racketeering activity"). But what that something more is, is beyond me. As I have suggested, it is also beyond the Court. Today's opinion has added nothing to improve our prior guidance, which has created a kaleidoscope of Circuit positions, except to clarify that RICO may in addition be violated when there is a "threat of continuity." It seems to me this increases rather than removes the vagueness. There is no reason to believe that the Courts of Appeals will be any more unified in the future, than they have in the past, regarding the content of this law.

That situation is bad enough with respect to any statute, but it is intolerable with respect to RICO. For it is not only true, as ****2909** Justice MARSHALL commented in *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), that our interpretation of RICO has "quite simply revolutionize[d] private litigation" and "validate[d] the federalization of broad areas of state common law of frauds," *id.,* at 501, 105 S.Ct., at 3292 (dissenting

opinion), so that clarity and predictability in RICO's civil applications are particularly important; but it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws, *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296, 74 S.Ct. 593, 600–601, 98 L.Ed. 699 (1954). No constitutional challenge ***256** to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

However unhelpful its guidance may be, however, I think the Court is correct in saying that nothing in the statute supports the proposition that predicate acts constituting part of a single scheme (or single episode) can never support a cause of action under RICO. Since the Court of Appeals here rested its decision on the contrary proposition, I concur in the judgment of the Court reversing the decision below.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The District Court also held that, because the MPUC had conclusively determined that Northwestern Bell's allegedly excessive rates were reasonable, the "filed rate" doctrine provided an independent ground for dismissal of the complaint. 648 F.Supp., at 428–429. The Court of Appeals did not consider this issue, and we have no occasion to address it here. Nor do we express any opinion as to the District Court's view that Count II was defective because it failed to "allege the existence of an 'enterprise' separate and distinct from the 'person' identified," as the court held was required by § 1962(a). *Id.*, at 428.

2 See *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 30–31 (CA1 1987) (rejecting multiple scheme requirement; sufficient that predicates relate to one another and threaten to be more than an isolated occurrence); *United States v. Indelicato*, 865 F.2d 1370, 1381–1384 (CA2 1989) (en banc) (rejecting multiple scheme requirement; two or more interrelated acts with showing of continuity or threat of continuity sufficient); *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39–40 (CA3 1987) (rejecting multiple scheme requirement; adopting case-by-case multifactor test); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154–155 (CA4 1987) (rejecting any mechanical test; single *limited* scheme insufficient, but a large continuous scheme should not escape RICO's enhanced penalties); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (CA5 1985) (two related predicate acts may be sufficient); *United States v. Jennings*, 842 F.2d 159, 163 (CA6 1988) (two predicate acts potentially enough); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975–976 (CA7 1986) (refusing to accept multiple scheme requirement as the general rule; adopting multifactor test, but requiring that predicates constitute "separate transactions"); *Sun Savings and Loan Assn. v. Dierdorff*, 825 F.2d 187, 193 (CA9 1987) (rejecting multiple scheme test; requiring two predicates, separated in time, which are not isolated events); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928–929 (CA10 1987) (holding single scheme from which no threat of continuing criminal activity may be

inferred insufficient); *Bank of America National Trust & Savings Assn. v. Touche Ross & Co.,* 782 F.2d 966, 971 (CA11 1986) (rejecting multiple scheme test; requiring that predicates be interrelated and not isolated events); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639,* 268 U.S.App.D.C. 103, 110, 839 F.2d 782, 789 (1988) (requiring related acts that are not isolated events).

3 Nor does the multiple scheme approach to identifying continuing criminal conduct have the advantage of lessening the uncertainty inherent in RICO's pattern component, for " 'scheme' is hardly a self-defining term." *Barticheck v. Fidelity Union Bank/First National State,* 832 F.2d, at 39. A "scheme" is in the eye of the beholder, since whether a scheme exists depends on the level of generality at which criminal activity is viewed. For example, petitioners' allegation that Northwestern Bell attempted to subvert public utility commissioners who would be voting on the company's rates might be described as a single scheme to obtain a favorable rate, or as multiple schemes to obtain favorable votes from individual commissioners on the ratemaking decision. Similarly, though interference with ratemaking spanning several ratemaking decisions might be thought of as a single scheme with advantageous rates as its objective, each ratemaking decision might equally plausibly be regarded as distinct and the object of its own "scheme." There is no obviously "correct" level of generality for courts to use in describing the criminal activity alleged in RICO litigation. Because of this problem of generalizability, the Eighth Circuit's "scheme" concept is highly elastic. Though the definitional problems that arise in interpreting RICO's pattern requirement inevitably lead to uncertainty regarding the statute's scope —whatever approach is adopted—we prefer to confront these problems directly, not "by introducing a new and perhaps more amorphous concept into the analysis" that has no basis in text or legislative history. *Ibid.*

4 Insofar as the concurrence seems to suggest, *post,* at 2907–2908, that very short periods of criminal activity that do *not* in any way carry a threat of continued criminal activity constitute "obvious racketeer[ing]" to which Congress intended RICO, with its enhanced penalties, to apply, we have concluded that it is mistaken, and that when Congress said predicates must demonstrate "continuity" before they may form a RICO pattern, it expressed an intent that RICO reach activities that amount to or threaten long-term criminal activity.

5 See Brief for Washington Legal Foundation as *Amicus Curiae* 11, 15–16; Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 17. See also Briefs for National Association of Manufacturers, and for American Institute of Certified Public Accountants, as *Amici Curiae.*

Lower courts have rejected various forms of the argument that RICO should be limited in scope, through one or another of its terms or concepts, to organized crime. See, *e.g., Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482, 492, n. 32 (CA2 1984) (citing cases), rev'd, 473 U.S. 479, 105 S.Ct. 3292, 87 L.Ed.2d 346 (1985); *Moss v. Morgan Stanley Inc.,* 719 F.2d 5, 21 (CA2 1983) ("The language of the statute ... does not premise a RICO violation on proof or allegations of any connection with organized crime"), cert. denied *sub nom. Moss v. Newman,* 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984); *Schacht v. Brown,* 711 F.2d 1343, 1353–1356 (CA7 1983).

Kapoor v. United States

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Petition for certiorari denied on June 13, 2022

Docket No.	Op. Below	Argument	Opinion	Vote	Author	Term
21-994	**1st Cir.**	N/A	N/A	N/A	N/A	**OT 21**

Issues: (1) Whether a non-physician may be convicted of conspiring with a physician to prescribe controlled substances outside the course of professional practice under **21 U.S.C. § 841(a)** without regard to the non-physician's understanding that the physician believed their prescribing to be within the usual course of professional practice; and (2) whether a federal court must grant a motion for judgment of acquittal when, after construing the evidence in the light most favorable to the government and considering both exculpatory and inculpatory inferences, the evidence of guilt and innocence is in equipoise.

SCOTUSblog Coverage

- **Dismissing False Claims Act cases, promoting prescription fentanyl, and a capital case** (John Elwood, June 7, 2022)

Date	Proceedings and Orders (**key to color coding**)
Nov 10 2021	**Application (21A151) to extend the time to file a petition for a writ of certiorari from November 23, 2021 to January 10, 2022, submitted to Justice Breyer.**

Nov 15 2021	Application (21A151) granted by Justice Breyer extending the time to file until January 10, 2022.
Jan 10 2022	**Petition for a writ of certiorari filed. (Response due February 14, 2022)**
Feb 01 2022	Motion of United States for an extension of time not accepted for filing. (February 02, 2022 - Corrected motion to be filed)
Feb 03 2022	**Motion to extend the time to file a response from February 14, 2022 to March 16, 2022, submitted to The Clerk.**
Feb 04 2022	Motion to extend the time to file a response is granted and the time is extended to and including March 16, 2022.
Mar 10 2022	**Motion to extend the time to file a response from March 16, 2022 to April 15, 2022, submitted to The Clerk.**
Mar 11 2022	Motion to extend the time to file a response is granted and the time is further extended to and including April 15, 2022.
Apr 04 2022	**Motion to extend the time to file a response from April 15, 2022 to April 29, 2022, submitted to The Clerk.**
Apr 05 2022	Motion to extend the time to file a response is granted and the time is further extended to and including April 29, 2022.
Apr 29 2022	**Brief of respondents United States in opposition filed. VIDED.**
May 13 2022	**Reply of petitioner John Kapoor filed. (Distributed)**
May 17 2022	DISTRIBUTED for Conference of 6/2/2022.

Jun 06 2022	DISTRIBUTED for Conference of 6/9/2022.
Jun 13 2022	Petition DENIED.

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in United States v. Walker, D.Guam, May 13, 2022

105 S.Ct. 3275
Supreme Court of the United States

SEDIMA, S.P.R.L., Petitioner,
v.
IMREX COMPANY, INC., et al.

No. 84–648.
|
Argued April 17, 1985.
|
Decided July 1, 1985.

Synopsis

Belgian corporation, which had entered into a joint business venture with New York exporter of aviation parts, sued the exporter and two of its officers under private treble damages provision of Racketeer Influenced and Corrupt Organizations Act for alleged violations of the Act, based on predicate acts of mail and wire fraud. The United States District Court for the Eastern District of New York, Israel Leo Glasser, J., 574 F.Supp. 963, dismissed. The Court of Appeals for the Second Circuit, 741 F.2d 482, affirmed. Certiorari was granted. The Supreme Court, Justice White, held that: (1) there is no requirement that a private action can proceed only against a defendant who has already been convicted of a predicate act or of a RICO violation, and (2) there is also no requirement that a plaintiff in a private action establish a "racketeering injury" as opposed to an injury resulting from the predicate acts themselves.

Judgment of Court of Appeals reversed and remanded.

Justice Powell filed dissenting opinion.

Justice Marshall filed dissenting opinion, reported at 105 S.Ct. 3292, in which Justice Brennan, Justice Blackmun and Justice Powell joined.

West Headnotes (8)

[1] **Racketeer Influenced and Corrupt Organizations** Weight and sufficiency

Predicate acts perhaps need not be established beyond a reasonable doubt in a private treble damages action under Racketeer Influenced and Corrupt Organizations Act; fact that the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction. 18 U.S.C.A. §§ 1962, 1964(c).

261 Cases that cite this headnote

[2] **Criminal Law** Liberal or strict construction; rule of lenity

The principle of strict construction of criminal enactments is merely a guide to statutory interpretation, and like its identical twin, the "rule of lenity," it only serves as an aid for resolving ambiguity and is not to be used to beget one.

17 Cases that cite this headnote

[3] **Racketeer Influenced and Corrupt Organizations** Necessity of conviction

There is no requirement that a private treble damages action under Racketeer Influenced and Corrupt Organizations Act can proceed only against a defendant who has already been convicted of a predicate act or of a RICO violation; hence, fact that defendant corporation, which had entered into joint venture with plaintiff and which allegedly was cheating plaintiff by overbilling, and two of its officers had not been convicted under RICO or for the charged federal mail and wire fraud statutes did not bar private RICO action; disavowing *Bankers Trust Co. v. Rhoades*, 741 F.2d 511

and result reached in *Furman v. Cirrito*, 741 F.2d 524. 18 U.S.C.A. §§ 1962, 1964(c).

1758 Cases that cite this headnote

[4] Racketeer Influenced and Corrupt Organizations Separate or distinct racketeering or criminal enterprise injury

No distinct "racketeering injury" requirement is necessary to maintain a private treble damages action under Racketeer Influenced and Corrupt Organizations Act; if defendant engages in a pattern of racketeering activity in a manner forbidden by section 1962 and the racketeering activities injured the plaintiff in his business or property, the plaintiff has a private claim for treble damages; disavowing *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408; *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 and result reached in *Furman v. Cirrito*, 741 F.2d 524. 18 U.S.C.A. §§ 1962, 1964(c).

3434 Cases that cite this headnote

[5] Statutes Legislative silence, inaction, or acquiescence

Congressional silence, no matter how "clanging," cannot override the words of the statute.

18 Cases that cite this headnote

[6] Racketeer Influenced and Corrupt Organizations Constitutional and statutory provisions

Racketeer Influenced and Corrupt Organizations Act is to be read broadly. 18 U.S.C.A. §§ 1961–1968.

209 Cases that cite this headnote

[7] Racketeer Influenced and Corrupt Organizations Civil Remedies and Proceedings

While few of the legislative statements about novel remedies and attacking crime on all fronts were made with direct reference to private damages provision of Racketeer Influenced and Corrupt Organizations Act, it is in such spirit that all of the Act's provisions should be read. 18 U.S.C.A. §§ 1961–1968, 1964(c).

78 Cases that cite this headnote

[8] Racketeer Influenced and Corrupt Organizations Legitimacy; connection with organized crime

In enacting Racketeer Influenced and Corrupt Organizations Act, Congress wanted to reach both "legitimate" and "illegitimate" enterprises, and the former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences; fact that private damages provision is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. 18 U.S.C.A. §§ 1962, 1964(c).

1975 Cases that cite this headnote

****3276 *479** *Syllabus* *

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968, which is directed at "racketeering activity"—defined in § 1961(1) to encompass, *inter alia,* acts "indictable" under specific federal criminal provisions, including mail and wire fraud—provides in § 1964(c) for a private civil action to recover treble damages by any person injured in his business or property "by reason of a violation of section 1962." Section 1962(c) prohibits conducting or participating in the conduct

of an enterprise "through a pattern of racketeering activity." Petitioner corporation, which had entered into a joint business venture with respondent company and which believed that it was being cheated by alleged overbilling, filed suit in Federal District Court, asserting, *inter alia,* RICO claims against respondent company and two of its officers (also respondents) under § 1964(c) for alleged violations of § 1962(c), based on predicate acts of mail and wire fraud. The court dismissed the RICO counts for failure to state a claim. The Court of Appeals affirmed, holding that under § 1964(c) a RICO plaintiff must allege a "racketeering injury"—an injury "caused by an activity which RICO was designed to deter," not just an injury occurring as a result of the predicate acts themselves—and that the complaint was also defective for not alleging that respondents had been convicted of the predicate acts of mail and wire fraud, or of a RICO violation.

Held:

1. There is no requirement that a private action under § 1964(c) can proceed only against a defendant who has already been convicted of a predicate act or of a RICO violation. A prior-conviction requirement is not supported by RICO's history, its language, or considerations of policy. To the contrary, every indication is that no such requirement exists. Accordingly, the fact that respondents have not been convicted under RICO or the federal mail and wire fraud statutes does not bar petitioner's action. Pp. 3280-3283.

****3277** 2. Nor is there any requirement that in order to maintain a private action under § 1964(c) the plaintiff must establish a "racketeering injury," not merely an injury resulting from the predicate acts themselves. A reading of the statute belies any "racketeering injury" requirement. If the defendant engages in a pattern of racketeering activity in a manner ***480** forbidden by § 1962, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement. Where the plaintiff alleges each element of a violation of § 1962, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Pp. 3284–3287.

741 F.2d 482 (CA2 1984), reversed and remanded.

Attorneys and Law Firms

Franklyn H. Snitow argued the cause for petitioner. With him on the brief was *William H. Pauley III.*

Richard Eisenberg argued the cause for respondents. With him on the brief were *Alfred Weintraub* and *Joel I. Klein.**

* Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *Norman C. Gorsuch* of Alaska, *John Van de Kamp* of California, *Duane Woodard* of Colorado, *Joseph Lieberman* of Connecticut, *Jim Smith* of Florida, *Michael Lilly* of Hawaii, *Jim Jones* of Idaho, *Neil Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *David L. Armstrong* of Kentucky, *William J. Guste, Jr.,* of Louisiana, *Frank J. Kelley* of Michigan, *Edward L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Mike Greely* of Montana, *Brian McKay* of Nevada, *Irwin L. Kimmelman* of New Jersey, *Paul Bardacke* of New Mexico, *Lacy H. Thornburg* of North Carolina, *Nicholas J. Spaeth* of North Dakota, *Anthony Celebrezze* of Ohio, *Michael Turpen* of Oklahoma, *David Fronmayer* of Oregon, *Dennis J. Roberts II* of Rhode Island, *T. Travis Medlock* of South Carolina, *Mark V. Meierhenry* of South Dakota, *W.J. Michael Cody* of Tennessee, *David L. Wilkinson* of Utah, *John J. Easton* of Vermont, *Kenneth O. Eikenberry* of Washington, *Charlie Brown* of West Virginia, *Bronson C. La Follette* of Wisconsin, *Archie G. McClintock* of Wyoming; for the State of New York by *Robert Abrams,* Attorney General, and *Robert Hermann,* Solicitor General; for the City of New York et al. by *Frederick A.O. Schwarz, Jr., James D. Montgomery,* and *Barbara W. Mather;* and for the County of Suffolk, New York, by *Mark D. Cohen.*

Briefs of *amici curiae* urging affirmance were filed for the Alliance of American Insurers et al. by *James F. Fitzpatrick* and *John M. Quinn;* for the American Institute of Certified Public Accountants by *Philip A. Lacovara, Jay Kelly Wright, Kenneth J. Bialkin,* and *Louis A. Craco;* and for the Securities Industry Association by *Joel W. Sternman, Eugene A. Gaer,* and *William J. Fitzpatrick.*

Opinion

***481** Justice WHITE delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO), Pub.L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961–1968, provides a private civil action to recover treble damages for injury "by reason of a violation of" its substantive provisions. 18 U.S.C. § 1964(c). The initial dormancy of this provision and its recent greatly increased utilization [1] are now familiar history. [2] In response to what it perceived to be misuse of civil RICO by private plaintiffs, the court below construed § 1964(c) to permit private actions only against defendants who had been convicted on criminal charges, and only where there had occurred a "racketeering injury." While we understand the court's concern over the consequences of an unbridled reading of the statute, we reject both of its holdings.

I

RICO takes aim at "racketeering activity," which it defines as any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, and any "offense" involving bankruptcy or securities ***482** fraud or drug-related activities that is "punishable" under federal law. § 1961(1). [3] Section 1962, entitled "Prohibited ****3278** Activities," outlaws the use of income derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; the acquisition or maintenance of any interest in an enterprise "through" a pattern of racketeering activity; ***483** conducting or participating in the conduct of an enterprise through a pattern of racketeering activity; and conspiring to violate any of these provisions. [4]

Congress provided criminal penalties of imprisonment, fines, and forfeiture for violation of these provisions. § 1963. In addition, it set out a far-reaching civil enforcement scheme, § 1964, including the following provision for private suits:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." § 1964(c).

In 1979, petitioner Sedima, a Belgian corporation, entered into a joint venture with respondent Imrex Co. to provide electronic components to a Belgian firm. The buyer was to order parts through Sedima; Imrex was to obtain the parts ***484** in this country and ship them to Europe. The agreement called for Sedima and Imrex to split the net proceeds. Imrex filled roughly $8 million in orders placed with it through Sedima. Sedima became convinced, however, that Imrex was presenting inflated bills, cheating Sedima out of a portion of its proceeds by collecting for nonexistent expenses.

In 1982, Sedima filed this action in the Federal District Court for the Eastern District of New York. The complaint set out common-law claims of unjust enrichment, conversion, and breach of contract, fiduciary duty, and a constructive trust. In addition, it asserted RICO claims under § 1964(c) against Imrex and two of its officers. Two counts alleged violations of § 1962(c), based on predicate acts of mail and wire fraud. See 18 U.S.C. §§ 1341, 1343, 1961(1)(B). A third count alleged a conspiracy to violate § 1962(c). Claiming injury of at least $175,000, the amount of the alleged overbilling, Sedima sought treble damages and attorney's fees.

The District Court held that for an injury to be "by reason of a violation of section 1962," as required by § 1964(c), it must be somehow different in kind from the direct injury resulting from the predicate acts of ****3279** racketeering activity. 574 F.Supp. 963 (1983). While not choosing a precise formulation, the District Court held that a complaint must allege a "RICO-type injury," which was either some sort of distinct "racketeering injury," or a "competitive injury." It found "no allegation here of any injury apart from that which would result directly from the alleged predicate acts of mail fraud and wire fraud," *id.*, at 965, and accordingly dismissed the RICO counts for failure to state a claim.

A divided panel of the Court of Appeals for the Second Circuit affirmed. 741 F.2d 482 (1984). After a lengthy review of the legislative history, it held that Sedima's complaint was defective in two ways. First, it failed to allege an injury "by reason of a violation of section 1962." In the court's view, ***485** this language was a limitation on standing, reflecting Congress' intent to compensate victims of "certain specific kinds of organized criminality," not to provide additional

remedies for already compensable injuries. *Id.,* at 494. Analogizing to the Clayton Act, which had been the model for § 1964(c), the court concluded that just as an antitrust plaintiff must allege an "antitrust injury," so a RICO plaintiff must allege a "racketeering injury"—an injury "different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." *Id.,* at 496. Sedima had failed to allege such an injury.

The Court of Appeals also found the complaint defective for not alleging that the defendants had already been criminally convicted of the predicate acts of mail and wire fraud, or of a RICO violation. This element of the civil cause of action was inferred from § 1964(c)'s reference to a "violation" of § 1962, the court also observing that its prior-conviction requirement would avoid serious constitutional difficulties, the danger of unfair stigmatization, and problems regarding the standard by which the predicate acts were to be proved.

The decision below was one episode in a recent proliferation of civil RICO litigation within the Second Circuit[5] and ***486** in other Courts of Appeals.[6] In light of the variety ****3280** of approaches taken by the lower courts and the importance of the issues, we grant certiorari. 469 U.S. 1157, 105 S.Ct. 901, 83 L.Ed.2d 917 (1984). We now reverse.

II

As a preliminary matter, it is worth briefly reviewing the legislative history of the private treble damages action. RICO formed Title IX of the Organized Crime Control Act of 1970, Pub.L. 91–452, 84 Stat. 922. The civil remedies in the bill passed by the Senate, S. 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and ***487** d). Previous versions of the legislation, however, had provided for a private treble-damages action in exactly the terms ultimately adopted in § 1964(c). See S. 1623, 91st Cong., 1st Sess., § 4(a) (1969); S. 2048 and S. 2049, 90th Cong., 1st Sess. (1967).

During hearings on S. 30 before the House Judiciary Committee, Representative Steiger proposed the addition of a private treble-damages action "similar to the private damage remedy found in the anti-trust laws.... [T]hose who have been wronged by organized crime should at least be given access to a legal remedy. In addition, the availability of such a remedy would enhance the effectiveness of title IX's prohibitions." Hearings on S. 30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970) (hereinafter House Hearings). The American Bar Association also proposed an amendment "based upon the concept of Section 4 of the Clayton Act." *Id.,* at 543–544, 548, 559; see 116 Cong.Rec. 25190–25191 (1970). See also H.R. 9327, 91st Cong., 1st Sess. (1969) (House counterpart to S. 1623).

Over the dissent of three members, who feared the treble-damages provision would be used for malicious harassment of business competitors, the Committee approved the amendment. H.R.Rep. No. 91–1549, pp. 58, 187 (1970), U.S.Code Cong. & Admin.News 4007. In summarizing the bill on the House floor, its sponsor described the treble-damages provision as "another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong.Rec. 35295 (1970). The full House then rejected a proposal to create a complementary treble-damages remedy for those injured by being named as defendants in malicious private suits. *Id.,* at 35342. Representative Steiger also offered an amendment that would have allowed private injunctive actions, fixed a statute of limitations, and clarified venue and process requirements. *Id.,* at 35346; see *id.,* at 35226–35227. The proposal was greeted with some hostility because it had not been reviewed in Committee, ***488** and Steiger withdrew it without a vote being taken. *Id.,* at 35346–35347. The House then passed the bill, with the treble-damages provision in the form recommended by the Committee. *Id.,* at 35363–35364.

The Senate did not seek a conference and adopted the bill as amended in the House. *Id.,* at 36296. The treble-damages provision had been drawn to its attention while the legislation was still in the House, and had received the endorsement of Senator McClellan, the sponsor of S. 30, who was of the view that the provision would be "a major new tool in extirpating the baneful influence of organized crime in our economic life." *Id.,* at 25190.

III

The language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction. The word "conviction" does not appear in any relevant portion of the statute. See §§ 1961, 1962, 1964(c). To the contrary,

the predicate acts involve conduct that is "chargeable" or "indictable," and "offense[s]" that **3281 are "punishable," under various criminal statutes. § 1961(1). As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be. See also S.Rep. No. 91–617, p. 158 (1969): "a racketeering activity ... must be an act in itself *subject to* criminal sanction" (emphasis added). Thus, a prior conviction-requirement cannot be found in the definition of "racketeering activity." Nor can it be found in § 1962, which sets out the statute's substantive provisions. Indeed, if either § 1961 or § 1962 did contain such a requirement, a prior conviction would also be a prerequisite, nonsensically, for a criminal prosecution, or for a civil action by the Government to enjoin violations that had not yet occurred.

The Court of Appeals purported to discover its prior-conviction requirement in the term "violation" in § 1964(c). 741 F.2d, at 498–499. However, even if that term were *489 read to refer to a criminal conviction, it would require a conviction under RICO, not of the predicate offenses. That aside, the term "violation" does not imply a criminal conviction. See *United States v. Ward,* 448 U.S. 242, 249–250, 100 S.Ct. 2636, 2641–2642, 65 L.Ed.2d 742 (1980). It refers only to a failure to adhere to legal requirements. This is its indisputable meaning elsewhere in the statute. Section 1962 renders certain conduct "unlawful"; § 1963 and § 1964 impose consequences, criminal and civil, for "violations" of § 1962. We should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections. [7]

The legislative history also undercuts the reading of the court below. The clearest current in that history is the reliance on the Clayton Act model, under which private and governmental actions are entirely distinct. *E.g., United States v. Borden Co.,* 347 U.S. 514, 518–519, 74 S.Ct. 703, 706–707, 98 L.Ed. 903 (1954). [8] The only *490 specific reference in the legislative history to prior convictions of which we are aware is an objection that the treble-damages provision is too broad precisely because "there need *not* be a conviction under any of these laws for it to be racketeering." 116 Cong.Rec. 35342 (1970) (emphasis added). The history is otherwise silent on this point and contains nothing to contradict the import of the language appearing in the statute. Had Congress intended to impose this novel requirement, there would have been at least some mention of it in the legislative history, even if not in the statute.

The Court of Appeals was of the view that its narrow construction of the statute was essential to avoid intolerable practical **3282 consequences. [9] First, without a prior conviction to rely on, the plaintiff would have to prove commission of the predicate acts beyond a reasonable doubt. This would require instructing the jury as to different standards of proof for different aspects of the case. To avoid this awkwardness, *491 the court inferred that the criminality must already be established, so that the civil action could proceed smoothly under the usual preponderance standard.

[1] [2] We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. See, *e.g., United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984); *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 235, 93 S.Ct. 489, 492, 34 L.Ed.2d 438 (1972); *Helvering v. Mitchell,* 303 U.S. 391, 397, 58 S.Ct. 630, 632, 82 L.Ed. 917 (1938); *United States v. Regan,* 232 U.S. 37, 47–49, 34 S.Ct. 213, 216–217, 58 L.Ed. 494 (1914). There is no indication that Congress sought to depart from this general principle here. See Measures Relating to Organized Crime, Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 388 (1969) (statement of Assistant Attorney General Wilson); House Hearings, at 520 (statement of Rep. Steiger); *id.,* at 664 (statement of Rep. Poff); 116 Cong.Rec. 35313 (1970) (statement of Rep. Minish). That the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction. Cf. *United States v. Ward, supra,* 448 U.S., at 248–251, 100 S.Ct., at 2641–2642. But we need not decide the standard of proof issue today. For even if the stricter standard is applicable to a portion of the plaintiff's proof, the resulting logistical difficulties, which are accepted in other contexts, would not be so great as to require invention of a requirement that cannot be found in the

statute and that Congress, as even the Court of Appeals had to concede, 741 F.2d, at 501, did not envision. [10]

***492** ****3283** The court below also feared that any other construction would raise severe constitutional questions, as it "would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation 'racketeer,' authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law." *Id.,* at 500, n. 49. We do not view the statute as being so close to the constitutional edge. As noted above, the fact that conduct can result in both criminal liability and treble damages does not mean that there is not a bona fide civil action. The familiar provisions for both criminal liability and treble damages under the antitrust laws indicate as much. Nor are attorney's fees "clearly punitive." Cf. 42 U.S.C. § 1988. As for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings. Furthermore, requiring conviction of the predicate acts would not protect against an unfair imposition of the "racketeer" label. If there is a problem with thus stigmatizing a garden variety defrauder by means of a civil action, it is not reduced by making certain that the defendant is guilty of *fraud* beyond a reasonable doubt. Finally, to the extent an ***493** action under § 1964(c) might be considered quasi-criminal, requiring protections normally applicable only to criminal proceedings, cf. *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965), the solution is to provide those protections, not to ensure that they were previously afforded by requiring prior convictions. [11]

Finally, we note that a prior-conviction requirement would be inconsistent with Congress' underlying policy concerns. Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for any number of reasons—not least among them the possibility that the Government itself may choose to pursue only civil remedies. Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps. Cf. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 344, 99 S.Ct. 2326, 2333, 60 L.Ed.2d 931 (1979). This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice. See also n. 9, *supra.*

[3] In sum, we can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble-damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists. Accordingly, the fact that Imrex and the individual defendants have not been convicted under RICO or the federal mail and wire fraud statutes does not bar Sedima's action.

IV

In considering the Court of Appeals' second prerequisite for a private civil RICO action—"injury ... caused by an ***494** activity which RICO was designed to deter"—we are somewhat hampered by the vagueness of that concept. Apart from reliance on the general purposes of RICO and a reference to "mobsters," the court provided scant indication of what the requirement of ****3284** racketeering injury means. It emphasized Congress' undeniable desire to strike at organized crime, but acknowledged and did not purport to overrule Second Circuit precedent rejecting a requirement of an organized crime nexus. 741 F.2d, at 492; see *Moss v. Morgan Stanley, Inc.,* 719 F.2d 5, 21 (CA2 1983), cert. denied *sub nom. Moss v. Newman,* 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984). The court also stopped short of adopting a "competitive injury" requirement; while insisting that the plaintiff show "the kind of economic injury which has an effect on competition," it did not require "actual anticompetitive effect." 741 F.2d, at 496; see also *id.,* at 495, n. 40.

The court's statement that the plaintiff must seek redress for an injury caused by conduct that RICO was designed to deter is unhelpfully tautological. Nor is clarity furnished by a negative statement of its rule: standing is not provided by the injury resulting from the predicate acts themselves. That statement is itself apparently inaccurate when applied to those predicate acts that unmistakably constitute the kind of conduct Congress sought to deter. See *id.,* at 496, n. 41. The opinion does not explain how to distinguish such crimes from the other predicate acts Congress has lumped together in § 1961(1). The court below is not alone in struggling to define "racketeering injury," and the difficulty of that task itself cautions against imposing such a requirement. [12]

***495** **[4]** **[5]** We need not pinpoint the Second Circuit's precise holding, for we perceive no distinct "racketeering injury" requirement. Given that "racketeering activity" consists of no more and no less than commission of a predicate act, § 1961(1), we are initially doubtful about a requirement of a "racketeering injury" separate from the harm from the predicate acts. A reading of the statute belies any such requirement. Section 1964(c) authorizes a private suit by "[a]ny person injured in his business or property by reason of a violation of § 1962." Section 1962 in turn makes it unlawful for "any person"—not just mobsters—to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. §§ 1962(a)–(c). If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement. [13]

***496** ****3285** A violation of § 1962(c), the section on which Sedima relies, requires (1) conduct (2) of an enterprise (3) through a pattern [14] (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim. Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of § 1962, nor is mere commission of the predicate offenses. In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. As the Seventh Circuit has stated, "[a] defendant who violates section 1962 is not liable ***497** for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago,* 747 F.2d 384, 398 (1984), aff'd, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437.

But the statute requires no more than this. Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts. [15]

[6] This less restrictive reading is amply supported by our prior cases and the general principles surrounding this statute. RICO is to be read broadly. This is the lesson not only ***498** of Congress' self-consciously ****3286** expansive language and overall approach, see *United States v. Turkette,* 452 U.S. 576, 586–587, 101 S.Ct. 2524, 2530–2531, 69 L.Ed.2d 246 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub.L. 91–452, § 904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity. See also n. 10, *supra.* Far from effectuating these purposes, the narrow readings offered by the dissenters and the court below would in effect eliminate § 1964(c) from the statute.

[7] RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime. See generally *Russello v. United States,* 464 U.S. 16, 26–29, 104 S.Ct. 296, 302–303, 78 L.Ed.2d 17 (1983). While few of the legislative statements about novel remedies and attacking crime on all fronts, see *ibid.,* were made with direct reference to § 1964(c), it is in this spirit that all of the Act's provisions should be read. The specific references to § 1964(c) are consistent with this overall approach. Those supporting § 1964(c) hoped it would "enhance the effectiveness of title IX's prohibitions," House Hearings, at 520, and provide "a major new tool," 116 Cong.Rec. 35227 (1970). See also *id.,* at 25190; 115 Cong.Rec. 6993–6994 (1969). Its opponents, also recognizing the provision's scope, complained that it provided too easy a weapon against "innocent businessmen," H.R.Rep. No. 91–1549, p. 187 (1970), and would be prone to abuse, 116 Cong.Rec. 35342 (1970). It is also significant that a previous proposal to add RICO-like provisions to the Sherman Act had come to grief in part precisely because it "could create inappropriate and unnecessary obstacles in the way of ... a private litigant [who] would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.' " 115 Cong.Rec. 6995 (1969) (ABA comments on S. 2048); see also *id.,* at 6993 (S. 1623 proposed

as an amendment to title 18 to avoid these problems). In borrowing its "racketeering ***499** injury" requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid.

[8] Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. 741 F.2d, at 487. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.' " *Ibid.* Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. *United States v. Turkette, supra.* The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago, supra,* at 398.

It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster. [16] Yet this defect—if defect it is—is ****3287** inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations ***500** where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.

We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. See generally ABA Report, at 55–69. Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its diagnosis or its remedy. The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern." We do not believe that the amorphous standing requirement imposed by the Second Circuit effectively responds to these problems, or that it is a form of statutory amendment appropriately undertaken by the courts.

V

Sedima may maintain this action if the defendants conducted the enterprise through a pattern of racketeering activity. The questions whether the defendants committed the requisite predicate acts, and whether the commission of those acts fell into a pattern, are not before us. The complaint is not deficient for failure to allege either an injury separate from the financial loss stemming from the alleged acts of mail and wire fraud, or prior convictions of the defendants. The judgment below is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

***523** Justice POWELL, dissenting.

I agree with Justice MARSHALL that the Court today reads the civil RICO statute in a way that validates uses of the statute that were never intended by Congress, and I join his dissent. I write separately to emphasize my disagreement ***524** with the Court's conclusion that the statute must be applied to authorize the types of private civil actions now being brought frequently against respected businesses to redress ordinary fraud and breach-of-contract cases. [1]

I

In *United States v. Turkette,* 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), the Court noted that in construing the scope of a statute, its language, if unambiguous, must be regarded as conclusive "*in the absence* of 'a clearly expressed legislative intent to the contrary.' " *Id.,* at 580, 101 S.Ct., at 2527 (emphasis added) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)). Accord, *Russello v. United States,* 464 U.S. 16, 20, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983). In both *Turkette* and *Russello,* we found that the "declared purpose" of Congress in enacting the RICO statute was "to seek the eradication of organized crime in

the United States.' " *United States v. Turkette, supra,* 452 U.S., at 589, 101 S.Ct., at 2532 (quoting the statement of findings prefacing the Organized Crime Control Act of 1970, Pub.L. 91–452, 84 Stat. 923); accord, *Russello v. United States, supra,* 464 U.S., at 26–27, 104 S.Ct., at 302–303. That organized crime was Congress' target is apparent from the Act's title, is made plain throughout the legislative history of the statute, see, *e.g.,* S.Rep. No. 91–617 p. 76 (1969) (S.Rep.), and is acknowledged by all parties to these two ****3288** cases. Accord, Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 70–92 (1985) (ABA Report). The legislative history cited by the Court today amply supports this conclusion, see *ante,* at 3280–3281, and the Court concedes that "in its private civil version, RICO is evolving into something quite ***525** different from the original conception of its enactors. See generally ABA Report 55–69." *Ante,* at 3287. Yet, the Court concludes that it is compelled by the statutory language to construe § 1964(c) to reach garden-variety fraud and breach of contract cases such as those before us today. *Ibid.*

As the Court of Appeals observed in this case, "[i]f Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it."[2] 741 F.2d 482, 492 (1984). The Court today concludes that Congress *was* aware of the broad scope of the statute, relying on the fact that some Congressmen objected to the possibility of abuse of the RICO statute by arguing that it could be used "to harass innocent businessmen." H.R.Rep. No. 91–1549, p. 187 (1970) (dissenting views of Reps. Conyers, Mikva, and Ryan); 116 Cong.Rec. 35342 (1970) (remarks of Rep. Mikva).

In the legislative history of every statute, one may find critics of the bill who predict dire consequences in the event of its enactment. A court need not infer from such statements by opponents that Congress *intended* those consequences to occur, particularly where, as here, there is compelling evidence to the contrary. The legislative history reveals that Congress did not state explicitly that the statute would reach only members of the Mafia because it believed there were constitutional problems with establishing such a specific status offense. *E.g., id.,* at 35343–35344 (remarks of Rep. Celler); *id.,* at 35344 (remarks of Rep. Poff). Nonetheless, the legislative history makes clear that the statute was intended to be *applied* to organized crime, and an influential sponsor of the bill emphasized that any effect it had beyond such crime was meant to be only incidental. *Id.,* at 18914 (remarks of Sen. McClellan).

***526** The ABA study concurs in this view. The ABA Report states:

> "[I]n an attempt to ensure the constitutionality of the statute, Congress made the central proscription of the statute the use of a 'pattern of racketeering activities' in connection with an 'enterprise,' rather than merely outlawing membership in the Mafia, La Cosa Nostra, or other organized criminal syndicates. 'Racketeering' was defined to embrace a potpourri of federal and state criminal offenses deemed to be the type of criminal activities frequently engaged in by mobsters, racketeers and other traditional members of 'organized crime.' The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes. The 'enterprise' element, when coupled with the 'pattern' requirement, was intended by the Congress to keep the reach of RICO focused directly on traditional organized crime and comparable ongoing criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental, and only to the extent necessary to maintain the constitutionality of a statute aimed primarily at organized crime." *Id.,* at 71–72 (footnote omitted).

It has turned out in this case that the naysayers' dire predictions have come true. As the Court notes, *ante,* at 3287 and n. 16, RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the ****3289** statute. While I acknowledge that the language of the statute *may* be read as broadly as the Court interprets it today, I do not believe that it *must* ***527** be so read. Nor do I believe that interpreting the statutory language more narrowly than the Court does will "eliminate the [civil RICO] private action," *ante,* at ——, in cases of the kind clearly identified by the legislative history. The statute may and should be read narrowly to confine its reach to the type of conduct Congress had in mind. It is the duty of this Court to implement the unequivocal intention of Congress.

II

The language of this complex statute is susceptible of being read consistently with this intent. For example, the requirement in the statute of proof of a "pattern" of racketeering activity may be interpreted narrowly. Section 1961(5), defining "pattern of racketeering activity," states that such a pattern "requires at least two acts of racketeering activity." This contrasts with the definition of "racketeering activity" in § 1961(1), stating that such activity "means" any of a number of acts. The definition of "pattern" may thus logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a "pattern" to be proved. The ABA Report concurs in this view. It argues persuasively that "[t]he 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes," ABA Report 72, such as the criminal acts alleged in the cases before us today.

The legislative history bears out this interpretation of "pattern." Senator McClellan, a leading sponsor of the bill, stated that "proof of two acts of racketeering activity, without more, does not establish a pattern." 116 Cong.Rec. 18940 (1970). Likewise, the Senate Report considered the "concept of 'pattern' [to be] essential to the operation of the statute." S.Rep., at 158. It stated that the bill was not aimed at sporadic activity, but that the "infiltration of legitimate business normally requires more than one 'racketeering ***528** activity' *and* the threat of continuing activity to be effective. It is this factor of continuity *plus* relationship which combines to produce a pattern." *Ibid.* (emphasis added). The ABA Report suggests that to effectuate this legislative intent, "pattern" should be interpreted as requiring that (i) the racketeering acts be related to each other, (ii) they be part of some common scheme, and (iii) some sort of continuity between the acts or a threat of continuing criminal activity must be shown. ABA Report, at 193–208. By construing "pattern" to focus on the manner in which the crime was perpetrated, courts could go a long way toward limiting the reach of the statute to its intended target—organized crime.

The Court concedes that "pattern" could be narrowly construed, *ante,* at 3285, n. 14, and notes that part of the reason civil RICO has been put to such extraordinary uses is because of the "failure of Congress and the courts to develop a meaningful concept of 'pattern,' " *ante,* at 3287. The Court declines to decide whether the defendants' acts constitute such a pattern in this case, however, because it concludes that that question is not before the Court. *Ante,* at 3287. I agree that the scope of the "pattern" requirement is not included in the questions on which we granted certiorari. I am concerned, however, that in the course of rejecting the Court of Appeals' ruling that the statute requires proof of a "racketeering injury" the Court has read the entire statute so broadly that it will be difficult, if not impossible, for courts to adopt a reading of "pattern" that will conform to the intention of Congress.

The Court bases its rejection of the "racketeering injury" requirement on the general principles that the RICO statute is to be read "broadly," that it is to be " 'liberally construed to effectuate its remedial purposes,' " *ante,* at 3286 (quoting Pub.L. 91–452, § 904(a), 84 Stat. 947), and that the statute was part of "an aggressive initiative ****3290** to supplement old remedies and develop new methods for fighting crime." *Ante,* at 3286. Although the Court acknowledges that few of the legislative statements supporting these principles were made ***529** with reference to RICO's private civil action, it concludes nevertheless that all of the Act's provisions should be read in the "spirit" of these principles. *Ibid.* By constructing such a broad premise for its rejection of the "racketeering injury" requirement, the Court seems to mandate that all future courts read the entire statute broadly.

It is neither necessary to the Court's decision, nor in my view correct, to read the civil RICO provisions so expansively. We ruled in *Turkette* and *Russello* that the statute must be read broadly and construed liberally to effectuate its remedial purposes, but like the legislative history to which the Court alludes, it is clear we were referring there to RICO's *criminal* provisions. It does not necessarily follow that the same principles apply to RICO's private civil provisions. The Senate Report recognized a difference between criminal and civil enforcement in describing proposed civil remedies that would have been available to the Government. It emphasized that although those proposed remedies were intended to place additional pressure on organized crime, they were intended to reach "essentially an economic, *not* a punitive goal." S.Rep., at 81 (emphasis added). The Report elaborated as follows:

> "However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, *but* there is no intent to visit punishment on any individual; the purpose is civil. Punishment as such is limited to the criminal remedies...." *Ibid.* (emphasis added; footnote omitted).

The reference in the Report to "predatory activities" was to organized crime. Only a small fraction of the scores of civil RICO cases now being brought implicate organized crime in any way.[3] Typically, these suits are being brought —in the ***530** unfettered discretion of private litigants —in federal court against legitimate businesses seeking treble damages in ordinary fraud and contract cases. There is nothing comparable in those cases to the restraint on the institution of criminal suits exercised by Government prosecutorial discretion. Today's opinion inevitably will encourage continued expansion of resort to RICO in cases of alleged fraud or contract violation rather than to the traditional remedies available in state court. As the Court of Appeals emphasized, it defies rational belief, particularly in light of the legislative history, that Congress intended this far-reaching result. Accordingly, I dissent.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Of 270 District Court RICO decisions prior to this year, only 3% (nine cases) were decided throughout the 1970's, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984. Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 55 (1985) (hereinafter ABA Report); see also *id.,* at 53a (table).

2 For a thorough bibliography of civil RICO decisions and commentary, see Milner, A Civil RICO Bibliography, 21 C.W.L.R. 409 (1985).

3 RICO defines "racketeering activity" to mean

> "(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–2424 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section

501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act." 18 U.S.C. § 1961(1) (1982 ed., Supp. III).

4 In relevant part, 18 U.S.C. § 1962 provides:

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt ... 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....

"(b) 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.

"(c) 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 conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

5 The day after the decision in this case, another divided panel of the Second Circuit reached a similar conclusion. *Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (1984), cert. pending, No. 84–657. It held that § 1964(c) allowed recovery only for injuries resulting not from the predicate acts, but from the fact that they were part of a *pattern.* "If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern," and cannot recover. *Id.,* at 517 (emphasis in original).

The following day, a third panel of the same Circuit, this time unanimous, decided *Furman v. Cirrito,* 741 F.2d 524 (1984), cert. pending, No. 84–604. In that case, the District Court had dismissed the complaint for failure to allege a distinct racketeering injury. The Court of Appeals affirmed, relying on the opinions in *Sedima* and *Bankers Trust,* but wrote at some length to record its disagreement with those decisions. The panel would have required no injury beyond that resulting from the predicate acts.

6 A month after the trio of Second Circuit opinions was released, the Eighth Circuit decided *Alexander Grant & Co. v. Tiffany Industries, Inc.,* 742 F.2d 408 (1984), cert. pending, Nos. 84–1084, 84–1222. Viewing its decision as contrary to *Sedima* but consistent with, though broader than, *Bankers Trust,* the court held that a RICO claim does require some unspecified element beyond the injury flowing directly from the predicate acts. At the same time, it stood by a prior decision that had rejected any requirement that the injury be solely commercial or competitive, or that the defendants be involved in organized crime. 742 F.2d, at 413; see *Bennett v. Berg,* 685 F.2d 1053, 1058–1059, 1063–1064 (CA8 1982), aff'd in part and rev'd in part, 710 F.2d 1361 (en banc), cert. denied, 464 U.S. 1008, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983).

Two months later, the Seventh Circuit decided *Haroco, Inc. v. American National Bank & Trust Co. of Chicago,* 747 F.2d 384 (1984), aff'd, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437. Dismissing *Sedima* as the resurrection of the discredited requirement of an organized crime nexus, and *Bankers Trust* as an emasculation of the treble-damages remedy, the Seventh Circuit rejected "the elusive racketeering injury requirement." 747 F.2d, at 394, 398–399. The Fifth Circuit had taken a similar position. *Alcorn County v. U.S. Interstate Supplies, Inc.,* 731 F.2d 1160, 1169 (1984).

The requirement of a prior RICO conviction was rejected in *Bunker Ramo Corp. v. United Business Forms, Inc.,* 713 F.2d 1272, 1286–1287 (CA7 1983), and *USACO Coal Co. v. Carbomin Energy, Inc.,* 689 F.2d 94 (CA6 1982). See also *United States v. Cappetto,* 502 F.2d 1351 (CA7 1974), cert. denied, 420 U.S. 925, 95 S.Ct. 1121, 43 L.Ed.2d 395 (1975) (civil action by Government).

7 When Congress intended that the defendant have been previously convicted, it said so. Title 18 U.S.C. § 1963(f) (1982 ed., Supp. III) states that "[u]pon conviction of a person under this section," his forfeited property shall be seized. Likewise, in Title X of the same legislation Congress explicitly required prior convictions, rather than prior criminal activity, to support enhanced sentences for special offenders. See 18 U.S.C. § 3575(e).

8 The court below considered it significant that § 1964(c) requires a "violation of section 1962," whereas the Clayton Act speaks of "anything forbidden in the antitrust laws." 741 F.2d, at 488; see 15 U.S.C. § 15(a). The court viewed this as a deliberate change indicating Congress' desire that the underlying conduct not only be forbidden, but also have led to a criminal conviction. There is nothing in the legislative history to support this interpretation, and we cannot view this minor departure in wording, without more, to indicate a fundamental departure in meaning. Representative Steiger, who proposed this wording in the House, nowhere indicated a desire to depart from the antitrust model in this regard. See 116 Cong.Rec. 35227, 35246 (1970). To the contrary, he viewed the treble-damages provision as a "parallel private remedy." *Id.,* at 27739 (letter to House Judiciary Committee). Likewise, Senator Hruska's discussion of his identically worded proposal gives no hint of any such intent. See 115 Cong.Rec. 6993 (1969). In any event, the change in language does not support the court's drastic inference. It seems more likely that the language was chosen because it is more succinct than that in the Clayton Act, and is consistent with the neighboring provisions. See §§ 1963(a), 1964(a).

9 It is worth bearing in mind that the holding of the court below is not without problematic consequences of its own. It arbitrarily restricts the availability of private actions, for lawbreakers are often not apprehended and convicted. Even if a conviction has been obtained, it is unlikely that a private plaintiff will be able to recover for all of the acts constituting an extensive "pattern," or that multiple victims will all be able to obtain redress. This is because criminal convictions are often limited to a small portion of the actual or possible charges. The decision below would also create peculiar incentives for plea bargaining to non-predicate-act offenses so as to ensure immunity from a later civil suit. If nothing else, a criminal defendant might plead to a tiny fraction of counts, so as to limit future civil liability. In addition, the dependence of potential civil litigants on the initiation and success of a criminal prosecution could lead to unhealthy private pressures on prosecutors and to self-serving trial testimony, or at least accusations thereof. Problems would also arise if some or all of the convictions were reversed on appeal. Finally, the compelled wait for the completion of criminal proceedings would result in pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications.

10 The Court of Appeals also observed that allowing civil suits without prior convictions "would make a hash" of the statute's liberal-construction requirement. 741 F.2d, at 502; see RICO § 904(a). Since criminal statutes must be strictly construed, the court reasoned, allowing liberal construction of RICO—an approach often justified on the ground that the conduct for which liability is imposed is "already criminal"—would only be permissible if there already existed criminal convictions. Again, we have doubts about the premise of this rather convoluted argument. The strict-construction principle is merely a guide to statutory interpretation. Like its identical twin, the "rule of lenity," it "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan v. United States,* 364 U.S. 587, 596, 81 S.Ct. 321, 326, 5 L.Ed.2d 312 (1961); see also *United States v. Turkette,* 452 U.S. 576, 587–588, 101 S.Ct. 2524, 2530–2531, 69 L.Ed.2d 246 (1981). But even if that principle has some application, it does not support the court's holding. The strict-and liberal-construction principles are not mutually exclusive; § 1961 and § 1962 can be strictly construed without adopting that approach to § 1964(c). Cf. *United States v. United States Gypsum Co.,* 438 U.S. 422, 443, n. 19, 98 S.Ct. 2864, 2876, n. 19, 57 L.Ed.2d 854 (1978). Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident.

11 Even were the constitutional questions more significant, any doubts would be insufficient to overcome the mandate of the statute's language and history. "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *United States v. Albertini,* 472 U.S. 675, 680, 105 S.Ct. 2897, ——, 86 L.Ed.2d 536 (1985).

12 The decision below does not appear identical to *Bankers Trust.* It established a standing requirement, whereas *Bankers Trust* adopted a limitation on damages. The one focused on the mobster element, the other took a more conceptual approach, distinguishing injury caused by the individual acts from injury caused by their cumulative effect. Thus, the Eighth Circuit has indicated its agreement with *Bankers Trust* but not *Sedima. Alexander Grant & Co. v. Tiffany Industries, Inc.,* 742 F.2d, at 413. See also *Haroco, Inc. v. American National Bank & Trust Co. of Chicago,* 747 F.2d, at 396. The two tests were described as "very different" by the ABA Task Force. See ABA Report, at 310.

Yet the *Bankers Trust* court itself did not seem to think it was departing from *Sedima,* see 741 F.2d, at 516–517, and other Second Circuit panels have treated the two decisions as consistent, see *Furman v. Cirrito,* 741 F.2d 524 (1984), cert. pending, No. 84–604; *Durante Brothers & Sons, Inc. v. Flushing National Bank,* 755 F.2d 239, 246 (1985). The evident difficulty in discerning just what the racketeering injury requirement consists of would make it rather hard to apply in practice or explain to a jury.

13 Given the plain words of the statute, we cannot agree with the court below that Congress could have had no "inkling of [§ 1964(c)'s] implications." 741 F.2d, at 492. Congress' "inklings" are best determined by the statutory language that it chooses, and the language it chose here extends far beyond the limits drawn by the Court of Appeals. Nor does the "clanging silence" of the legislative history, *ibid.,* justify those limits. For one thing, § 1964(c) did not pass through Congress unnoticed. See Part II, *supra.* In addition, congressional silence, no matter how "clanging," cannot override the words of the statute.

14 As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally

form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91–617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship.... So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern...." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.,* at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States,* 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).

15 Such damages include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery. See *post,* at 3303. Under the dissent's reading of the statute, the harm proximately caused by the forbidden conduct is not compensable, but that ultimately and indirectly flowing therefrom is. We reject this topsy-turvy approach, finding no warrant in the language or the history of the statute for denying recovery thereunder to "the direct victims of the [racketeering] activity," *post,* at 3303, while preserving it for the indirect. Even the court below was not that grudging. It would apparently have allowed recovery for both the direct and the ultimate harm flowing from the defendant's conduct, requiring injury "not *simply* caused by the predicate acts, but *also* caused by an activity which RICO was designed to deter." 741 F.2d, at 496 (emphasis added).

The dissent would also go further than did the Second Circuit in its requirement that the plaintiff have suffered a competitive injury. Again, as the court below stated, Congress "nowhere suggested that actual anti-competitive effect is required for suits under the statute." *Ibid.* The language it chose, allowing recovery to "[a]ny person injured in his business *or property,*" § 1964(c) (emphasis added), applied to this situation, suggests that the statute is not so limited.

16 The ABA Task Force found that of the 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% "allegations of criminal activity of a type generally associated with professional criminals." ABA Report, at 55–56. Another survey of 132 published decisions found that 57 involved securities transactions and 38 commercial and contract disputes, while no other category made it into double figures. American Institute of Certified Public Accountants, The Authority to Bring Private Treble-Damage Suits Under "RICO" Should be Removed 13 (Oct. 10, 1984).

1 The Court says these suits are not being brought against the "archetypal, intimidating mobster" because of a "defect" that is "inherent in the statute." *Ante,* at 3287. If RICO must be construed as the Court holds, this is indeed a defect that Congress never intended. I do not believe that the statute *must* be construed in what in effect is an irrational manner.

2 The force of this observation is accented by RICO's provision for treble damages—an enticing invitation to litigate these claims in federal courts.

3 As noted in the ABA Report, of the 270 District Court RICO decisions prior to this year, only 3% (9 cases) were decided throughout the entire decade of the 1970's, whereas 43% (116 cases) were decided in 1984. ABA Report, at 53a (Table). See *ante,* at 3277, n. 1.

877 F.3d 464
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
William SCULLY, aka Liam Scully Defendant–Appellant,
Shahrad Rodi Lameh, Defendant.

Docket No. 16-3073-cr
|
August Term, 2017
|
Argued: August 24, 2017
|
Decided: December 13, 2017

Synopsis

Background: The United States District Court for the Eastern District of New York, Arthur D. Spatt, J., 170 F.Supp.3d 439, granted in part and denied in part defendant's motion for judgment of acquittal and denied defendant's motion for new trial, relating to his convictions for mail fraud, wire fraud, conspiracy to commit mail fraud and wire fraud, conspiracy to defraud the United States through introduction of misbranded drugs into interstate commerce, introduction of misbranded drugs into interstate commerce, receipt of misbranded drugs into interstate commerce and delivery thereof for pay, introduction of unapproved drugs into interstate commerce, and unlicensed wholesale distribution of prescription drugs. Defendant appealed.

Holdings: The Court of Appeals, Gerard E. Lynch, Circuit Judge, held that:

[1] exclusion, as unfairly prejudicial, of defendant's proffered testimony regarding legal advice he had received from second attorney concerning legality of importing and reselling foreign versions of pharmaceutical drugs and medical devices approved by Food and Drug Administration (FDA) was erroneous;

[2] the error was not harmless; and

[3] defendant's assertion of advice-of-counsel defense did not diminish government's burden of proving intent to defraud.

Vacated and remanded.

West Headnotes (22)

[1] **Criminal Law** Evidence

A district court's evidentiary determinations generally will not be disturbed unless they are manifestly erroneous.

1 Case that cites this headnote

[2] **Criminal Law** Relevance

So long as the District Court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion regarding whether admission of the proffered evidence would be unfairly prejudicial will be disturbed only if it is arbitrary or irrational. Fed. R. Evid. 403.

4 Cases that cite this headnote

[3] **Criminal Law** Discretion of Lower Court

In general, a district court is said to abuse its discretion when its decision cannot be located within the range of permissible decisions or is based on a clearly erroneous factual finding or an error of law.

5 Cases that cite this headnote

[4] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

District Court erred in its balancing determination, when ruling that probative value of defendant's proffered testimony, regarding legal advice he had received from second attorney concerning legality of importing and reselling foreign versions of pharmaceutical drugs and medical devices approved by Food

and Drug Administration (FDA), outweighed prejudicial effect on government; while District Court correctly noted that defendant's only defense at trial was an advice-of-counsel defense and that it was extremely important for defendant to bolster that defense with relevant evidence of advice from second attorney, it was difficult to identify what unfair prejudice that testimony would have imposed on government. Federal Food, Drug, and Cosmetic Act §§ 301(a, c, d, t), 303(a)(2), (b)(1)(D), 505, 21 U.S.C.A. §§ 331(a, c, d, t), 333(a)(2), (b)(1)(D), 355; 18 U.S.C.A. § 371; Fed. R. Evid. 403.

1 Case that cites this headnote

[5] **Criminal Law** Evidence as to information acted on

Defendant's proffered testimony in support of his advice-of-counsel defense, regarding legal advice he had received from second attorney concerning legality of importing and reselling foreign versions of pharmaceutical drugs and medical devices approved by Food and Drug Administration (FDA), was admissible as nonhearsay circumstantial evidence of defendant's state of mind, which was not offered to prove the truth of second attorney's advice that defendant's activities were legal. Federal Food, Drug, and Cosmetic Act §§ 301(a, c, d, t), 303(a)(2), (b)(1)(D), 505, 21 U.S.C.A. §§ 331(a, c, d, t), 333(a)(2), (b)(1)(D), 355; 18 U.S.C.A. § 371; Fed. R. Evid. 801(c)(2).

5 Cases that cite this headnote

[6] **Criminal Law** Evidence as to information acted on

Admission of defendant's proffered nonhearsay testimony in support of his advice-of-counsel defense, regarding legal advice he had received from second attorney concerning legality of importing and reselling foreign versions of pharmaceutical drugs and medical devices approved by Food and Drug Administration (FDA), was not conditioned on defendant calling the second attorney as a witness in order to ensure the reliability of defendant's testimony; defendant was competent to testify to advice he received from counsel even if his testimony was one-sided and self-serving, and it was the province of the jury, alone, to determine whether defendant's testimony was not credible and reliable. Federal Food, Drug, and Cosmetic Act §§ 301(a, c, d, t), 303(a)(2), (b)(1)(D), 505, 21 U.S.C.A. §§ 331(a, c, d, t), 333(a)(2), (b)(1)(D), 355; 18 U.S.C.A. § 371; Fed. R. Evid. 801(c)(2).

3 Cases that cite this headnote

[7] **Witnesses** Parties and Interested Persons as Witnesses

The common law rule that excluded as witnesses persons interested in the result of the trial is no longer applied.

[8] **Criminal Law** Credibility of Witnesses

A party's belief that testimony offered by the opposing party is false or misleading is not a factor to be weighed against the receipt of otherwise admissible testimony, because ample means are available to challenge the credibility of the testimony, and credibility is to be decided by the jury.

2 Cases that cite this headnote

[9] **Criminal Law** Exclusion of Evidence

Error was not harmless as to exclusion, as unfairly prejudicial, of defendant's proffered nonhearsay testimony in support of his advice-of-counsel defense, regarding legal advice he had received from second attorney concerning legality of importing and reselling foreign versions of pharmaceutical drugs and medical devices approved by Food and Drug Administration (FDA); defendant's defense was that he relied on advice of counsel in operating his business and therefore lacked the requisite fraudulent intent that the government had to prove at trial, and evidence of second attorney's

advice was necessary to rebut government's claim. Federal Food, Drug, and Cosmetic Act §§ 301(a, c, d, t), 303(a)(2), (b)(1)(D), 505, 21 U.S.C.A. §§ 331(a, c, d, t), 333(a)(2), (b)(1)(D), 355; 18 U.S.C.A. § 371; Fed. R. Evid. 403, 801(c)(2).

2 Cases that cite this headnote

[10] **Criminal Law** Exclusion of Evidence

In assessing whether the improper exclusion of defense evidence was harmless, the appellate court considers: (1) the importance of the unrebutted assertions to the government's case; (2) whether the excluded material was cumulative; (3) the presence or absence of evidence corroborating or contradicting the government's case on the factual questions at issue; (4) the extent to which the defendant was otherwise permitted to advance the defense; and (5) the overall strength of the prosecution's case.

1 Case that cites this headnote

[11] **Criminal Law** Instructions

Defendant waived appellate review of claim that District Court's jury charge on advice-of-counsel defense improperly placed burden on defendant to establish the defense rather than on government to demonstrate that defendant had the requisite intent, in a prosecution relating to defendant's business of importing and reselling foreign versions of pharmaceutical drugs and medical devices approved by Food and Drug Administration (FDA), where defense counsel, in response to government's letter motion objecting to advice-of-counsel jury charge and verdict sheet, urged that there was no reason or basis for District Court to rewrite the advice-of-counsel instruction it had drafted and had discussed to the satisfaction of both parties, and urged that jury charge should be read to jury as agreed during District Court's charging conference. Federal Food, Drug, and Cosmetic Act §§ 301(a, c, d, t), 303(a)(2), (b)(1)(D), 505, 21 U.S.C.A. §§ 331(a, c, d, t), 333(a)(2), (b)(1)(D), 355; 18 U.S.C.A. § 371.

[12] **Criminal Law** Matters of defense and rebuttal in general

Criminal Law Reasonable Doubt

While the prosecution must prove guilt beyond a reasonable doubt, it is constitutionally permissible to provide that various affirmative defenses are to be proved by the defendant.

[13] **Criminal Law** Defenses in general

An "affirmative defense" is a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true.

5 Cases that cite this headnote

[14] **Criminal Law** Good faith; advice of counsel

In a criminal fraud case, the advice-of-counsel defense is not an affirmative defense that defeats liability even if the jury accepts the government's allegations as true; rather, the claimed advice of counsel is evidence that, if believed, can raise a reasonable doubt in the minds of the jurors about whether the government has proved the required element of the offense that the defendant had an unlawful intent.

11 Cases that cite this headnote

[15] **Criminal Law** Matters of defense and rebuttal in general

Criminal Law Necessity of instructions in general

Government's burden to prove defendant's intent to defraud, in a prosecution for fraudulently importing and reselling foreign versions of pharmaceutical drugs and medical devices approved by Food and Drug Administration (FDA), was not diminished because defendant raised an advice-of-counsel defense, and

accordingly, the District Court was required to advise the jury in unambiguous terms that the government at all times bore the burden of proving beyond a reasonable doubt that the defendant had the state of mind required for conviction on a given charge. Federal Food, Drug, and Cosmetic Act §§ 301(a, c, d, t), 303(a)(2), (b)(1)(D), 505, 21 U.S.C.A. §§ 331(a, c, d, t), 333(a)(2), (b)(1)(D), 355; 18 U.S.C.A. § 371.

1 Case that cites this headnote

[16] **Criminal Law** Defenses in general

Defendants are entitled to an advice-of-counsel instruction only if there are sufficient facts in the record to support the defense, i.e., there must be evidence such that a reasonable juror could find that the defendant honestly and in good faith sought the advice of counsel, fully and honestly laid all the facts before his counsel, and in good faith and honestly followed counsel's advice.

8 Cases that cite this headnote

[17] **Criminal Law** Matters of defense and rebuttal in general

Criminal Law Defenses in General

Criminal Law Defenses in general

Once the evidence meets the threshold for an advice-of-counsel defense, it is for the government to carry its burden of proving fraudulent intent beyond a reasonable doubt and for the jury to decide whether that burden was met, and it is therefore potentially confusing to instruct the jury that the defendant has the burden of producing evidence to support the defense or must satisfy the elements of the defense, or that it is the jury's job to determine whether the defense was established.

5 Cases that cite this headnote

[18] **Criminal Law** Burden of Proof

The burden of producing evidence simply means that the issue is not for the jury's consideration at all absent some evidence of the required facts, and whether that burden is met is thus, in the first instance, for the court to decide.

[19] **Criminal Law** Presumptions and Burden of Proof

It is generally preferable not to use the language of "burden of production" in jury instructions, for fear that it will confuse the jury about the all-important burden of proof that remains on the prosecution.

1 Case that cites this headnote

[20] **Criminal Law** Good faith; advice of counsel

Criminal Law Defenses in general

Where the government must establish a defendant's fraudulent intent, the jury should not be instructed to first decide whether the defendant is guilty and then determine separately if the defense of advice of counsel has been established; reliance on the advice of counsel, in cases where fraudulent intent is a required element for guilt, is a defense that tends to refute the government's proof of such intent, and if the defendant lacks such intent, he is not guilty of the offense.

12 Cases that cite this headnote

[21] **Health** Requisites and adequacy of labeling

Prescription drugs affixed with foreign-language labels do not provide adequate directions for use, as required by the statute prohibiting misbranding of drugs. Federal Food, Drug, and Cosmetic Act § 502(f), 21 U.S.C.A. § 352(f).

[22] **Health** Pharmaceuticals, drugs, and medical devices

Reliance by a victim, on fraudulent or misleading misrepresentations, is not an element of felony introduction of misbranded drugs into interstate commerce nor of felony receipt of misbranded drugs in interstate commerce and delivery

thereof for pay, which are completed offenses when the defendant formulates a fraudulent scheme and introduces or receives and sells misbranded drugs through interstate commerce. Federal Food, Drug, and Cosmetic Act §§ 301(a, c), 303(a)(2), 21 U.S.C.A. §§ 331(a, c), 333(a)(2).

Attorneys and Law Firms

***468** Kenneth M. Abell, Assistant United States Attorney (Amy Busa and Charles P. Kelly, Assistant United States Attorneys, on the brief), for Bridget M. Rohde, Acting United States Attorney for the Eastern District of New York, for Appellee.

Scott A. Resnik (Michael M. Rosensaft, on the brief), Katten Muchin Rosenman LLP, New York, NY, for Defendant-Appellant.

Before: Pooler and Lynch, Circuit Judges, and Cogan, District Judge. *

Opinion

Gerard E. Lynch, Circuit Judge:

William Scully appeals from a judgment of conviction entered following a five-week jury trial in the United States District Court for the Eastern District of New York (Arthur D. Spatt, *Judge*).

The jury found Scully guilty of mail and wire fraud and conspiracy to commit the same in violation of 18 U.S.C. §§ 1341, 1343, and 1349; conspiracy to defraud the United States through the introduction of misbranded drugs into interstate commerce in violation of 18 U.S.C. § 371; introduction of misbranded drugs into interstate commerce in violation of 21 U.S.C. §§ 331(a) and 333(a)(2); receipt of misbranded drugs into interstate commerce and delivery thereof for pay in violation of 21 U.S.C. §§ 331(c) and 333(a)(2); introduction of unapproved drugs into interstate commerce in violation of 21 U.S.C. §§ 331(d) and 333(a)(2); and unlicensed wholesale distribution of prescription drugs in violation of 21 U.S.C. §§ 331(t), 333(b)(1)(D), and 355. He was sentenced principally to 60 months in prison.

The main issue on appeal is whether the district court properly excluded evidence relating to Scully's advice-of-counsel defense. Because we find that the evidence was admissible and its exclusion was not harmless error, we VACATE the district court's judgment and REMAND for further proceedings consistent with this decision. [1]

BACKGROUND

The jury found Scully guilty of all charges relevant to this appeal, so we consider the evidence in the light most favorable ***469** to the government. *See* *United States v. Bouchard*, 828 F.3d 116, 120 (2d Cir. 2016).

I. The Rise and Fall of Pharmalogical

Scully and Shahrad Rodi Lameh founded Pharmalogical, Inc., in 2002 or 2003 as equal owners, Scully running the company's day-to-day operations and Lameh managing payments and providing most of the capital. They initially planned to acquire pharmaceutical products from manufacturers and sell those products to retail customers (such as doctors, hospitals, and clinics) as a wholesale distributor. To that end, Pharmalogical received a license from New York State authorizing it to act as a wholesale distributor of pharmaceutical products. Pharmalogical struggled to turn a profit for several years, and eventually Scully decided to set the company on a new course: parallel importing. That is, rather than buying prescription drugs and medical devices approved by the U.S. Food and Drug Administration from the drug manufacturers, the company would import foreign versions of FDA-approved products into the United States from European distributors. Pharmalogical could purchase these drugs at reduced prices and then sell them to customers in the United States for far less than the going rate on the domestic market. Around the same time, the company also began doing business under the name Medical Device King or MDK.

Pharmalogical launched its parallel importing business around 2009 with purchases of Botox from a Canadian distributor. One of the company's first potential customers, Dr. James Avellini, expressed concern that the product

labels did not include a National Drug Code ("NDC")[2] and requested assurances of the product's legitimacy before he placed an order. Dr. Avellini's inquiry prompted Scully and Lameh to approach an attorney, Richard Gertler, then of Thaler & Gertler, LLP, to research whether it was legal to resell the imported products in the United States. Gertler produced an opinion letter dated May 27, 2009, indicating that "Pharmalogical has not received any correspondence or notification from the FDA advising that Pharmalogical is operating in violation of any of the provisions of the Federal Food, Drug and Cosmetic Act," and that "Pharmalogical has no reason to believe that it is not in full compliance with the FFDCA or any other statute or regulation." App'x 400. The letter satisfied Dr. Avellini and others that Pharmalogical was authorized to sell Botox.

Scully and Lameh soon learned that the Canadian distributor with which they had been placing Botox orders simply forwarded those orders to a European distributor, which then shipped the product to Pharmalogical in the United States. Pharmalogical decided to cut out the Canadian middleman and began to place orders for Botox and a second product, Mirena intrauterine devices, directly with the European company. They also began buying Mirena IUDs at an even lower price from a Turkish company that sold the devices with Finnish- and Turkish-language labels and packaging. Around that time, the FDA responded to an inquiry from Scully regarding the sale of the Mirena IUDs, notifying him that foreign-made versions of FDA-approved drugs were considered unapproved new drugs. Scully and Lameh asked Gertler to look into the matter and Gertler once again produced an opinion ***470** letter, finding that "the importation of Mirena ... from Finland to the United States by Pharmalogical, Inc., for resale to the end user, would not violate the criminal laws of the United States." App'x 417.

As had occurred with Botox, when a potential customer for the Mirena IUDs, Planned Parenthood, requested assurances that the product was lawful to purchase, Scully and Lameh provided Gertler's Mirena letter. Planned Parenthood then placed a small order for Mirena IUDs, but then rejected and returned the order because the product labels were missing NDCs. Scully and Lameh nevertheless resolved to continue selling the Mirena IUDs to doctors. As the company's sales of Botox and Mirena IUDs increased, Scully and Lameh further expanded their business into oncology products. Gertler did not issue a separate legal opinion regarding Pharmalogical's importation and sale of oncology drugs.

The first signs of trouble for Pharmalogical came in May 2012, when FDA agents executed warrants to search Pharmalogical's offices. In response, Gertler and other lawyers, including Peter Tomao for Scully and Geoffrey Kaiser for Lameh, arranged meetings with prosecutors, and Pharmalogical ceased selling oncology products. But Scully made at least one shipment of oncology products after the search through Taranis Medical Corp., a company that he had incorporated in December 2011 and for which he executed written agreements authorizing it to use Pharmalogical's wholesale license to distribute prescription drugs, all without Lameh's knowledge. Scully did not consult Gertler or Lameh before making the Taranis shipment.

II. Indictment and Pre-Trial Motions

Scully and Lameh were indicted and arrested in April 2014. The indictment alleged that the two men used Pharmalogical (doing business as Medical Device King and MDK) and Taranis, to knowingly and willfully import foreign versions of prescription drugs and medical devices not approved by the FDA for use in the United States, and that they sold those products to customers under materially false and fraudulent pretenses. After initially pleading not guilty, Lameh entered into a cooperation agreement with the government and pled guilty to conspiracy to commit wire fraud and conspiracy to distribute misbranded drugs.

Prior to trial, Scully moved to strike all counts based on violations of FDA regulations, as well as Count 72, charging fraudulent importation and transportation of goods, and Count 73, charging trafficking in counterfeit drugs. The district court denied the motions, but ordered the government to provide a bill of particulars identifying the specific fraud alleged in each count and the misbranding alleged in each count. The government provided such a bill, and obtained a superseding 75-count indictment that added two new counts charging Scully with the introduction of unapproved new drugs into interstate commerce and the unlicensed wholesale distribution of prescription drugs.

III. The Trial

At trial, the government called dozens of witnesses to prove that Scully purchased prescription drugs and medical devices with labels bearing instructions in foreign languages and lacking NDCs from foreign distributors, misrepresented those products to medical professionals as FDA-approved products with English-language labeling, and continued selling such pharmaceuticals through Taranis after government officials

raided Pharmalogical. The witnesses included Lameh, who detailed Pharmalogical's activities and Scully's knowledge regarding the legality of the ***471** company's business model throughout the company's history; some of the medical professionals who purchased products from Scully and testified to representations that Scully made about the products; and pharmaceutical company representatives and government officials who testified to the importance of FDA approval and NDCs.

At the close of the government's case, Scully moved to dismiss all counts of the superseding indictment for insufficient evidence. The district court denied that motion except as to Counts 72 and 73, which charged fraudulent importation and transportation of goods and trafficking in counterfeit drugs, on which the court reserved decision.

Scully then advanced an advice-of-counsel defense, contending that he lacked the requisite intent for all counts alleging fraud due to his good faith reliance on advice from Gertler and Tomao regarding the legality of his conduct. The defense called Gertler as its first witness, and both parties questioned him extensively on the nature of his relationship with Scully. In particular, Gertler testified to his legal experience with health care matters, the information that Scully shared with him about Pharmalogical's business and products, the advice he provided to Scully and Pharmalogical, and Tomao's role on Scully's legal team.

The government's direct examination of Lameh and cross-examination of Gertler and Scully effectively undermined Scully's advice-of-counsel defense as to Gertler. In particular, the government presented evidence that Scully and Lameh only approached Gertler for opinion letters after they had purchased products and potential customers raised concerns about the legitimacy of the products sold by Pharmalogical; that Scully provided Gertler with false information, including that the products sold by Pharmalogical were FDA-approved and that Pharmalogical followed all laws and regulations for importing their products into the United States; that Scully did not inform Gertler that Pharmalogical would advertise FDA-approved products on its website, but sometimes provide to customers foreign equivalents of those products that were not FDA-approved; and that Scully did not inform Gertler that U.S. customs officials seized, sometimes permanently, some of the prescription drugs Pharmalogical purchased from abroad because they were misbranded.

The defense did not call Tomao to testify. Instead, they sought to introduce evidence of Tomao's legal advice to Scully through Scully's own testimony. The government objected to that course of action after the following exchange during defense counsel's direct examination of Scully:

> Q. Did Mr. Tomao also give you an oral legal opinion as to his conclusions about your business model?
>
> A. Yes. We sat down and met at Mr. Gertler's office. We had a meeting. It was Rodi, myself, Mr. Gertler and Peter Tomao, and Peter had given his approval and said the business was completely legal.

App'x 279. The government moved to strike, which the district court sustained as to "[t]he statement that Peter gave us his approval." *Id.* As the court explained:

> When we have the alternative of his state of mind and the jury hearing hearsay, very important testimony, the answer is no. I will not permit that. ...
>
> Bring in Mr. Tomao. ...
>
> It is extremely prejudicial to the Government for you to allow [Scully] to give that testimony. That overtakes the state of mind in my opinion. ...
>
> ***472** It is not an exception to this hearsay rule which is that where you have a major figure, a very important figure which you do not bring in, I'm not going to let the hearsay come in, state of mind or otherwise.

Id. at 280–81.

The following day, Scully asked the district court to reconsider that ruling, noting that the defense offered evidence of Tomao's advice to Scully not for the truth of the matters asserted, but to establish Scully's state of mind as part of the advice-of-counsel defense. Accordingly, the defense argued, that evidence fell outside of the hearsay rule. *See* Fed. R. Evid. 801(c)(2). On further reflection, the district court agreed that the testimony was not technically hearsay, but ruled that evidence of Tomao's advice was nevertheless inadmissible under the balancing inquiry of Federal Rule of Evidence 403, noting:

> This testimony is extremely important to the defense, and as the prosecutor said, totally prejudicial to the

> government. Where is Mr. Peter Tomao? We all know he is a trial lawyer readily available. Why should I permit this totally prejudicial evidence for a state of mind where it is outweighed by the danger of unfair prejudice? ... So I rule that the evidence's probative value is substantially outweighed by the danger of unfair prejudice.

App'x 302. The court then again pointed out that Tomao was "readily available" and "in court every day." *Id.*

After both sides rested their cases, the district court dismissed Counts 72 and 73 for lack of sufficient evidence, as well as Counts 6 and 22, charging mail and wire fraud relating to a Dr. R. Daniel Jacob, on the government's motion because Dr. Jacob was unable to testify at trial. Although the court did not provide printed copies of its proposed charge to the parties, it read to them its proposed jury charge, including its instructions on the advice-of-counsel defense. The defense's only requested changes to the court's instructions on the advice-of-counsel defense were to remove the term "affirmative" from descriptions of the defense and to change references to Scully's "crimes" to his "acts." App'x 333–34. The government raised no objections to those proposed changes, and the court accepted them both.

Later that day, however, the government filed a letter motion objecting on various grounds to the court's proposed charge and verdict sheet on the advice-of-counsel defense. Scully's counsel responded by letter arguing that "[t]here is no reason or basis for the Court to now rewrite the advice-of-counsel instruction it drafted and discussed to the satisfaction o[f] both parties" and urging the court to use the charge "as agreed during the Court's charging conference." G. App'x 56. The court denied the government's motion as to the jury charge, and proceeded to instruct the jury on the 71 remaining counts in the superseding indictment. Of relevance to this appeal, the court instructed the jury on Scully's advice-of-counsel defense as follows:

> Now I am going to instruct you on the defense of reliance on the advice of an attorney. ...
>
> In this regard, I instruct you that the defendant has the burden of producing evidence to support the defense, but the burden of proof in this case remains on the government.
>
> I further instruct you that the defendant has to satisfy the following three elements to sustain the defense of advice of counsel:
>
> First, that the defendant sought the advice of counsel honestly and in good faith prior to committing any of these crimes;
>
> ***473** Second, that the defendant fully and honestly placed all of the facts before his counsel, and;
>
> Third, that the defendant followed his counsel's advice in good faith and honestly believing it to be correct and intending that his actions are lawful.
>
> Each of these three requirements must be satisfied.

App'x 368–69.

The court also described to the jury how it was to consider the advice-of-counsel defense on the verdict form:

> As to each count you will be asked to render your verdict and mark the verdict sheet. The verdict sheet will list every count. And next to it ... the words "not guilty or guilty." ...
>
> [I]f you find the defendant guilty of that count, then you will be asked to determine if the defense of "advice of counsel" has been established.
>
> Next to the question on advice of counsel there will be two markings, "established," if the defense has been established and "not established" if the defense has not been established. If you find the defendant guilty of the crime at issue, but also find that the defense of advice of counsel has been established, I advise you that the defendant will be acquitted of that count.

App'x 369–70.

The jury deliberated for two days and returned a guilty verdict on all counts except five counts of wire fraud.

IV. Post-Trial Developments

After the jury's verdict, Scully moved for a judgment of acquittal on all counts and, in the alternative, a new trial. The district court granted the motion only as to Counts 45 and 62, which concerned the purchase and sale of Altuzan to the Hematology and Oncology Center of Iowa. The court

then entered judgment and sentenced Scully to 60 months in prison. [3] This appeal followed.

DISCUSSION

On appeal, Scully does not renew his post-trial challenge to all counts for lack of sufficient evidence to prove criminal intent. [4] Instead, Scully's main challenge on appeal focuses on two alleged impediments to the fair presentation and consideration of his advice-of-counsel defense, his only defense at trial: the district court's exclusion of evidence of Tomao's legal advice and the jury instructions on the advice-of-counsel defense. We now turn to those issues.

I. Evidence of Tomao's Legal Advice

[1] **[2]** **[3]** Scully argues that the district court abused its discretion when it excluded testimony and evidence relating to the legal advice that Scully received from Tomao. The abuse of discretion standard is "famously slippery" and "there has been little consensus over the years as to precisely what the phrase means." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168 n.4 (2d Cir. 2001) (Cabranes, *J.*). A district court's evidentiary determinations generally "will not be disturbed unless they are manifestly erroneous." ***474** *Davis v. Velez*, 797 F.3d 192, 201 (2d Cir. 2015) (internal quotation marks omitted). "Under Rule 403, so long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational." *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006). In general, a district court is said to abuse its discretion "when its decision cannot be located within the range of permissible decisions or is based on a clearly erroneous factual finding or an error of law." *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007) (internal quotation marks omitted).

During Scully's trial, the district court ruled that Scully could not introduce evidence of Tomao's legal advice through Scully's direct examination. The court initially excluded that evidence on hearsay grounds, basing that decision on its sense that the importance of Tomao's advice and the "extremely prejudicial" nature of that testimony to the government's case "overt[ook] the state of mind" exception to the hearsay rule. App'x 281.

Even after defense counsel demonstrated that the testimony was not hearsay because it went to Scully's state of mind and was not offered for the truth of the matter asserted, the court continued to maintain that the evidence was unfairly prejudicial to the government and therefore inadmissible under Federal Rule of Civil Procedure 403. Though the district court changed the legal basis for its ruling, hearsay concerns permeated the court's reasoning. For example, the court noted that Tomao was "readily available" and "in court every day," and that "allow[ing] this defendant to testify as to what Peter Tomao told him" is "extremely important and prejudicial probably to the government." App'x 302. The court further explained in its post-trial ruling on Scully's motion to vacate the judgment that the proposed evidence did "not shed its fundamental character as hearsay," "bore the trappings of unreliable hearsay," and was "largely cumulative of his testimony regarding Gertler." *United States v. Scully*, 170 F.Supp.3d 439, 475–76 (E.D.N.Y. 2016).

[4] **[5]** We find that the district court erred in its balancing of the probative value and prejudicial effect of the proposed evidence under Rule 403. As the district court noted, Scully's efforts to bolster his only defense at trial with relevant evidence of the advice of a second attorney was "extremely important to the defense." App'x 302. But it is difficult to identify what unfair prejudice that testimony would have imposed on the government. The district court's continued concern with the hearsay character of Scully's secondhand relaying of Tomao's words was misplaced. A statement is only hearsay if it is offered "to prove the truth of the matter asserted." Fed. R. Evid. 801(c)(2). "Where, as here, the statement is offered as circumstantial evidence of [the defendant's] state of mind, it does not fall within the definition given by Rule 801(c)[,] because it was not offered to prove the truth of the matter asserted." *United States v. Detrich*, 865 F.2d 17, 21 (2d Cir. 1988). Though "the fact that a statement falls within an exception to the hearsay rule does not mean that the statement is not to be classified as hearsay," *United States v. Gupta*, 747 F.3d 111, 131 (2d Cir. 2014), Scully's proposed testimony does not fall within a hearsay *exception*; it is, by definition, not hearsay at all.

[6] **[7]** Nor was it appropriate to require that Scully call Tomao as a witness in order to ensure the reliability of Scully's testimony. There may be reasons to doubt the credibility and reliability of Scully's testimony in that regard, and the government may well be correct that the documents ***475** proffered by Scully were unlikely to sway a jury. But

such determinations are the province of the jury alone. *See* *United States v. Khan*, 53 F.3d 507, 514 (2d Cir. 1995). Scully is competent to testify to the advice he received from counsel, even if his testimony is one-sided and self-serving; we are now a long way from the common law rule that "excluded as witnesses ... persons interested in the result of the trial," *Wolfson v. United States*, 101 F. 430, 435 (5th Cir. 1900).

[8] It was thus error for the district court, in effect, to consider as an element of prejudice to the government the increased possibility that Scully's testimony about Tomao's oral advice would be false if uncorroborated by testimony from Tomao himself. One party to a trial will frequently believe that testimony offered by the other side is false or misleading. That, however, is not a factor to be weighed against the receipt of otherwise admissible testimony. The opposing party has ample means to challenge the credibility of a party's testimony, which is to be decided by the jury. Here, for example, if Scully had been permitted to testify to what he claims Tomao told him, the government could have cross-examined him about that testimony, noted in summation the self-serving nature of the testimony due to Scully's interest in the outcome and the conspicuous lack of corroboration from Tomao himself, challenged the likelihood that a reputable attorney would have given such a significant opinion orally, or called Tomao as a rebuttal witness, as it did Lameh's attorney Geoffrey Kaiser. The government's strategic preference not to take those steps does not affect the admissibility of Scully's evidence.

The government's argument that evidence of Tomao's advice to Scully would have been cumulative is also unavailing. Scully's entire defense rested on the advice he allegedly received from two lawyers, Gertler and Tomao. The government effectively cross-examined Gertler, raising questions as to Scully's version of the relevant events and Gertler's level of experience with FDA matters. Evidence of the legal advice of another attorney, and in particular a former federal prosecutor with acknowledged experience working on FDA compliance matters, might well have bolstered Scully's case in the eyes of the jury. Though the record includes references to Tomao and his role on Scully's legal team, such stray bits of testimony do not substitute for Scully's direct account of the advice that he claims to have received from Tomao, particularly where the case revolved around what Scully told his attorneys and what they told him.

[9] **[10]** Finally, we conclude that that error was not harmless. In assessing whether the improper exclusion of defense evidence was harmless, we consider

> (1) the importance of the unrebutted assertions to the government's case; (2) whether the excluded material was cumulative; (3) the presence or absence of evidence corroborating or contradicting the government's case on the factual questions at issue; (4) the extent to which the defendant was otherwise permitted to advance the defense; and (5) the overall strength of the prosecution's case.

United States v. Oluwanisola, 605 F.3d 124, 134 (2d Cir. 2010). Scully's defense was that he relied on the advice of counsel in operating his business and therefore lacked the requisite fraudulent intent that the government had to prove at trial. Evidence of Tomao's advice was necessary to rebut the government's claim. Of course, the most persuasive evidence of that advice would have been testimony from Tomao himself. But Scully was not legally required to call Tomao. He was fully competent to testify about his own state of ***476** mind, and about how Tomao's advice affected his state of mind. It was for the jury to determine whether that testimony was credible and raised a reasonable doubt about Scully's guilt.

On that basis, Scully is entitled to a new trial.

II. Advice-of-Counsel Jury Instructions

[11] Scully also argues that the district court's jury charge on the advice-of-counsel defense improperly placed the burden on Scully to establish the defense, rather than on the government to demonstrate that Scully had the requisite intent. Scully waived that argument, however, when defense counsel, in response to the government's letter motion objecting to the advice-of-counsel jury charge and verdict sheet, urged that "[t]here is no reason or basis for the Court to now rewrite the advice-of-counsel instruction it drafted and discussed to the satisfaction o[f] both parties" and that the charge "should be read to the jury as agreed during the Court's charging conference." G. App'x 56. Such affirmative endorsement of the district court's jury instructions waives the

right to appellate review. *See* *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009); *cf.* *United States v. Crowley*, 318 F.3d 401, 414 (2d Cir. 2003). Accordingly, were we not remanding for a new trial in any event, Scully's belated appellate objection to the district court's jury instructions would not warrant vacating his conviction. But because a new trial is required on other grounds, we take the opportunity to provide some guidance to the district court on the issue.

[12] **[13]** **[14]** **[15]** While "the prosecution must prove guilt beyond a reasonable doubt," "the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant." *Patterson v. New York*, 432 U.S. 197, 211, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). An affirmative defense is "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." Black's Law Dictionary 451 (8th ed. 2004); *see also* *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003). In a fraud case, however, the advice-of-counsel defense is not an affirmative defense that defeats liability even if the jury accepts the government's allegations as true. Rather, the claimed advice of counsel is evidence that, if believed, can raise a reasonable doubt in the minds of the jurors about whether the government has proved the required element of the offense that the defendant had an "unlawful intent." *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1194 (2d Cir. 1989). The government must carry its burden to prove Scully's intent to defraud, and that burden does not diminish because Scully raised an advice-of-counsel defense. Accordingly, the district court must advise the jury in unambiguous terms that the government at all times bears the burden of proving beyond a reasonable doubt that the defendant had the state of mind required for conviction on a given charge.

[16] **[17]** **[18]** **[19]** That said, defendants are entitled to an advice-of-counsel instruction only if there are sufficient facts in the record to support the defense. *United States v. Evangelista*, 122 F.3d 112, 117 (2d Cir. 1997). There must be evidence such that a reasonable juror could find that the defendant "honestly and in good faith sought the advice of counsel," "fully and honestly laid all the facts before his counsel," and "in good faith and honestly followed counsel's advice." *United States v. Colasuonno*, 697 F.3d 164, 181 (2d Cir. 2012) (brackets and internal quotation marks omitted). Once the evidence meets ***477** that threshold, it is for the government to carry its burden of proving fraudulent intent beyond a reasonable doubt and for the jury to decide whether that burden was met. It is therefore potentially confusing to instruct the jury that the defendant "has the burden of producing evidence to support the defense"[5] or must "satisfy" the elements of the defense, or that it is the jury's job to determine whether the defense was "established." App'x 368–70.

In drafting a more appropriate instruction on the advice-of-counsel defense, it may be tempting to turn to the Supreme Court's century-old formulation, adopted by this Court in *Beech-Nut*:

> [I]f a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do ..., and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of [a] crime which involves willful and unlawful intent[,] even if such advice were an inaccurate construction of the law. But, on the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.

871 F.2d at 1194–95 (alterations in original), quoting *Williamson v. United States*, 207 U.S. 425, 453, 28 S.Ct. 163, 52 L.Ed. 278 (1908). But that language, like many excerpts from appellate opinions articulating legal principles for an audience of judges and lawyers, is unwieldy for a jury instruction.

More manageable contemporary formulations are available. The treatise on jury instructions authored by the late Leonard B. Sand, a wise and experienced trial judge, and his colleagues, offers the following template that translates the *Williamson*/*Beech-Nut* formulation into clearer language:

> You have heard evidence that the defendant received advice from a lawyer and you may consider that evidence in deciding whether the defendant acted willfully and with knowledge.
>
> The mere fact that the defendant may have received legal advice does not, in itself, necessarily constitute a complete defense. Instead, you must ask yourselves whether the defendant honestly and in good faith sought the advice of a competent lawyer as to what he may lawfully do; whether he fully and honestly laid all the facts before his lawyer; and whether in good faith he honestly followed such advice, relying on it and believing it to be correct. In short you should consider whether, in seeking and obtaining advice from a lawyer, the defendant intended that his acts shall be lawful. If he did so, it is the law that a defendant cannot be convicted of a crime that involves willful and unlawful intent, even if such advice were an inaccurate construction of the law.
>
> On the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences of his conduct by pleading that he followed the advice of his lawyer.
>
> Whether the defendant acted in good faith for the purpose of seeking guidance ***478** as to the specific acts in this case, and whether he made a full and complete report to his lawyer, and whether he acted substantially in accordance with the advice received, are questions for you to determine.

1 Leonard B. Sand, et al., Modern Federal Jury Instructions: Criminal, Instruction 8-4, at 8-19 (2017).

We also refer district courts to the model instructions drafted by our sister circuits, particularly the Seventh Circuit's model, which reads as follows:

> If the defendant relied in good faith on the advice of an attorney that his conduct was lawful, then he lacked the [intent to defraud; willfulness; etc.] required to prove the offense[s] of [identify the offense] charged in Count[s] __.
>
> The defendant relied in good faith on the advice of counsel if:
>
> 1. Before taking action, he in good faith sought the advice of an attorney whom he considered competent to advise him on the matter; and
>
> 2. He consulted this attorney for the purpose of securing advice on the lawfulness of his possible future conduct; and
>
> 3. He made a full and accurate report to his attorney of all material facts that he knew; and
>
> 4. He then acted strictly in accordance with the advice of this attorney.
>
> [You may consider the reasonableness of the advice provided by the attorney when determining whether the defendant acted in good faith.]
>
> The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted [with intent to defraud; willfully; etc.] as charged in Count[s] __.

Seventh Circuit Pattern Criminal Jury Instructions, § 6.12 (2012 ed.).

[20] Neither of these instructions muddles the question of burden of proof by injecting the concept of a "burden of production" or asserting that a defendant must "show" or "establish" or "satisfy" the jury about particular facts. The last paragraph of the Seventh Circuit instruction, which explicitly informs the jury that a defendant need not establish her good faith, seems to us a valuable final reminder of the burden of proof that the prosecution must carry and should be included in any instruction to the jury on the advice-of-counsel defense. [6]

III. Scully's Challenges to Additional Counts

In addition to the claims of trial error discussed above, Scully also contests his guilt on several specific counts of which he was convicted. First, Scully argues that the district court should have dismissed all counts premised on his distribution of prescription drugs not bearing English-language labeling because those requirements are imposed by FDA regulation and therefore cannot serve as the basis of a criminal charge. Second, Scully claims that there was insufficient evidence to convict him of the two remaining counts relating to Dr. Jacob because Dr. Jacob did not testify at trial. We find no merit to these arguments.

***479** **[21]** Scully claims that he was erroneously convicted of counts based on the sale of prescription drugs with labels in languages other than English. His argument misunderstands both the bases for his conviction and the law. A drug is

misbranded if its labeling lacks "adequate directions for use," 21 U.S.C. § 352(f), or "if at any time prior to dispensing the label of the drug fails to bear, at a minimum, the symbol 'Rx only,' " 21 U.S.C. § 353(b)(4)(A). In the bill of particulars filed by the government at court order, the government alleged that each of the drugs that Scully sold "failed to bear the phrase 'Rx only.' " G. App'x 13–18. Scully did not claim otherwise at trial or on appeal. Accordingly, the evidence of guilt was sufficient without regard to the foreign-language label. But in any event, we find no legal flaw in the government's alternative theory based on the absence of English-language labels. Prescription drugs affixed with foreign-language labels do not provide adequate directions for use as required by the statute, and not merely by FDA regulations. It requires no administrative regulation to reach the common-sense conclusion that medical products bearing labels in languages other than the prevailing language in the relevant marketplace—here, English—are, in effect, not labeled at all.

[22] Scully also argues that the record lacked sufficient evidence to support his conviction on Counts 40 and 57, charging introduction of Botox into interstate commerce and receipt of Botox in interstate commerce and delivery thereof to Dr. R. Daniel Jacob for pay with the intent to defraud or mislead. Because Dr. Jacob was unable to testify at trial due to illness, Scully argues that the government failed to prove that Dr. Jacob relied on Scully's representations when purchasing the misbranded Botox, thereby defeating any finding of fraudulent intent. But reliance by a victim is not an element of felony introduction of misbranded drugs into interstate commerce nor of felony receipt of misbranded drugs in interstate commerce and delivery thereof for pay, which are complete when the defendant formulates a fraudulent scheme and introduces or receives and sells misbranded drugs through interstate commerce. Moreover, "direct proof of defendant's fraudulent intent is not necessary." *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999). "[A] jury may bring to its analysis of intent on individual counts all the circumstantial evidence it has received on the scheme and the purpose of the scheme in which the defendant allegedly participated." *Id.* at 130. There is substantial evidence in the record from which a jury could find that Scully was engaged in a scheme to defraud doctors, clinics, and hospitals; the whole corporate enterprise was built on Scully's assurances that the drugs sold in the name of Pharmalogical, Medical Device King, and Taranis were appropriate for sale in the United States. The government need not present testimony from each victim of Scully's fraudulent scheme to prove intent as to that victim.

CONCLUSION

For the reasons stated above, the judgment of the district court is VACATED and REMANDED for further proceedings in accordance with this opinion.

All Citations

877 F.3d 464, 105 Fed. R. Evid. Serv. 166

Footnotes

* Judge Brian M. Cogan, of the United States District Court for the Eastern District of New York, sitting by designation.

1 We need not address Scully's claim that the government's presentation of two later-dismissed counts unfairly prejudiced the jury against Scully because a new trial on remand will not include these counts.

2 The NDC is a unique number assigned to each drug that allows for easy identification of the labeler of the product (*i.e.*, manufacturer, repackager, or distributor); the product's active ingredients, strength, and dosage form; and the package size and type. *See* 21 C.F.R. § 207.33 (2016).

3 In sentencing Scully, the district court applied two sentencing enhancements: abuse of a position of trust under U.S.S.G. § 3B1.3 and a leadership role in a criminal activity under U.S.S.G. § 3B1.1(c). Because

we vacate Scully's conviction and remand for a new trial, we need not address the propriety of these enhancements.

4 Scully does raise legal challenges to his convictions on certain specific counts. Those arguments are discussed in Part III below.

5 The "burden of producing evidence," App'x 368, simply means that the issue is not for the jury's consideration *at all* absent some evidence of the required facts. Whether that burden is met is thus, in the first instance, for the court to decide. *See, e.g.*, *United States v. Bok*, 156 F.3d 157, 164 (2d Cir. 1998). It is generally preferable, in our view, not to use the language of "burden of production" in jury instructions for fear that it would confuse the jury about the all-important burden of proof that remains on the prosecution.

6 For similar reasons, we disapprove of the format of the verdict sheet adopted by the district court in this case. Where the government must establish a defendant's fraudulent intent, the jury should not be instructed to first decide whether a defendant is "guilty" and then determine separately "if the defense of 'advice of counsel' has been established." App'x 370. Reliance on the advice of counsel, in cases where fraudulent intent is a required element for guilt, is a defense that tends to refute the government's proof of such intent. If the defendant lacks such intent, he is not guilty of the offense.

12 F.4th 1
United States Court of Appeals, First Circuit.

UNITED STATES of America,
Appellee/Cross-Appellant,
v.
Richard M. SIMON, Defendant,
Appellant/Cross-Appellee.
United States of America, Appellee/Cross-Appellant,
v.
Sunrise Lee, Defendant, Appellant/Cross-Appellee.
United States of America, Appellee/Cross-Appellant,
v.
Joseph A. Rowan, Defendant, Appellant/Cross-Appellee.
United States of America, Appellee/Cross-Appellant,
v.
John Kapoor, Defendant, Appellant/Cross-Appellee.
United States of America, Appellee/Cross-Appellant,
v.
Michael J. Gurry, Defendant, Appellant/Cross-Appellee.

Nos. 20-1368, 20-1412, Nos. 20-1369, 20-1411, Nos. 20-1370, 20-1413, Nos. 20-1382, 20-1409, Nos. 20-1410, 20-1457
|
August 25, 2021

Synopsis

Background: Defendants, who were former executives and managers of pharmaceutical company, were convicted of conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) through acts of mail fraud, honest-services mail fraud, wire fraud, honest-services wire fraud, and Controlled Substances Act (CSA) violations. The United States District Court for the District of Massachusetts, Allison D. Burroughs, J., 427 F.Supp.3d 166, granted in part and denied in part motions for judgment of acquittal and for a new trial. Defendants and government appealed.

Holdings: The Court of Appeals, Selya, Circuit Judge, held that:

[1] evidence was sufficient to support conviction for conspiring to violate RICO statute based on predicate act of illegal distribution of controlled substance in violation of CSA;

[2] evidence was sufficient to support conviction for conspiring to violate RICO statute based on predicate act of honest services fraud;

[3] evidence was sufficient to establish predicate offense of mail fraud;

[4] evidence was sufficient to support conviction of mail and wire fraud predicates to conspiracy to violate RICO statute;

[5] testimony from nine patients about their altered behavior, addiction, and withdrawal symptoms after receiving cancer drug prescriptions was relevant;

[6] new trial due to alleged prejudicial spillover from CSA predicate offense and honest-services predicate offense was not warranted; and

[7] government's use of "loaded gun" metaphor in rebuttal argument did not warrant a new trial.

Affirmed in part, reversed in part, vacated in part, and remanded.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion.

West Headnotes (106)

[1] Criminal Law Form

A defendant's adoption by reference of another defendant's argument cannot occur in vacuum; to be meaningful, arguments adopted in brief must be readily transferable from proponent's case to adopter's case.

[2] Conspiracy Racketeering conspiracies in general

Defendant need not have agreed to commit or facilitate each and every part of substantive offense in order to be found guilty under Racketeer Influenced and Corrupt Organizations Act (RICO), nor need such defendant be capable

of committing substantive offense; instead, all government need show is that defendant agreed to facilitate scheme in which conspirator would commit at least two predicate acts, if substantive crime had occurred. 18 U.S.C.A. §§ 1962(c), 1962(d).

[3] **Criminal Law** Review De Novo

Court of Appeals affords de novo review to district court's rulings on defendants' joint motion for judgment of acquittal. Fed. R. Crim. P. 29(a).

[4] **Criminal Law** Construction in favor of government, state, or prosecution

Where defendants challenge sufficiency of evidence, all proof must be perused from government's perspective. Fed. R. Crim. P. 29(a).

[5] **Criminal Law** Construction of Evidence

Criminal Law Reasonable doubt

In reviewing sufficiency of evidence, Court of Appeals scrutinizes evidence in light most compatible with verdict, resolves all credibility disputes in verdict's favor, and then reaches judgment about whether rational jury could find guilt beyond reasonable doubt. Fed. R. Crim. P. 29(a).

2 Cases that cite this headnote

[6] **Criminal Law** Inferences or hypotheses from evidence

In reviewing sufficiency of the evidence, Court of Appeals must honor jury's evaluative choice among plausible, albeit competing, inferences. Fed. R. Crim. P. 29(a).

[7] **Criminal Law** Verdict supported by evidence

In reviewing sufficiency of the evidence, when all is said and done, Court of Appeals need not be convinced that verdict is correct; it need only be satisfied that verdict is supported by record. Fed. R. Crim. P. 29(a).

[8] **Criminal Law** Reasonable doubt

Verdict must stand unless evidence is so scant that rational factfinder could not conclude that government proved all essential elements of charged crime beyond reasonable doubt. Fed. R. Crim. P. 29(a), 33(a).

[9] **Controlled Substances** Manufacture

Controlled Substances Sale, Distribution, Delivery, Transfer or Trafficking

Licensed health-care practitioners registered under Controlled Substances Act (CSA) face criminal liability, for knowingly or intentionally manufacturing, distributing, or dispensing a controlled substance, when their activities fall outside the usual course of professional practice. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1).

[10] **Conspiracy** Racketeering conspiracies in general

A Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy conviction requires proof that defendants specifically intended that some conspirator commit each element of the predicate racketeering acts. 18 U.S.C.A. §§ 1962(c), 1962(d).

2 Cases that cite this headnote

[11] **Conspiracy** Controlled Substances

Evidence was sufficient to support finding that pharmaceutical company founder intended healthcare practitioners to prescribe cancer drug as much as possible, even when there was no medical necessity for drug or dosage prescribed, supporting conviction for conspiring to violate Racketeer Influenced and Corrupt Organizations

(RICO) statute based on predicate act of illegal distribution of controlled substance in violation of controlled substances act (CSA); founder's "effective dose" campaign was designed to dissuade doctors from prescribing medically appropriate lower dosages and to accelerate dose titration, founder pursued pill mill doctors, and founder implemented direct-ship option to avoid Drug Enforcement Administration (DEA) scrutiny and drug shipment freezes. 18 U.S.C.A. § 1962(d); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Crim. P. 29(a).

[12] **Criminal Law** Intent

Under certain circumstances, a party's retention of counsel may ground an inference of benevolent motive.

[13] **Conspiracy** Health care and medical benefits fraud

Evidence was sufficient to support finding that pharmaceutical company founder agreed and intended that healthcare practitioners would breach their fiduciary duty to cancer patients by prescribing cancer drug outside usual course of medical practice and without any legitimate medical purpose, as required to support conviction for conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute based on predicate act of honest services fraud; evidence indicated that founder agreed and intended that health-care practitioners would breach their fiduciary duty to patients by prescribing drug or a particular dose of drug outside usual course of professional practice and not for a legitimate purpose. 18 U.S.C.A. §§ 1346, 1962(d); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Crim. P. 29(c).

[14] **Fraud** Honest Services Fraud

A person contravenes the honest service statute if, in violation of a fiduciary duty, he participates in bribery or kickback schemes. 18 U.S.C.A. § 1346.

[15] **Conspiracy** Controlled Substances

Conspiracy Health care and medical benefits fraud

Evidence was sufficient to support finding that pharmaceutical company regional manager encouraged and intended healthcare practitioners to prescribe cancer drug as much as possible, even when there was no medical necessity for drug or dosage prescribed, supporting conviction for conspiring to violate Racketeer Influenced and Corrupt Organizations (RICO) statute based on predicate act of illegal distribution of controlled substance in violation of controlled substances act (CSA) and honest services fraud predicate; manager encouraged sales representatives to negotiate prescription quotas with doctors that had no apparent relationship to medical necessity or patient need, and encouraged pressure on doctors to write prescriptions regardless of medical need. 18 U.S.C.A. §§ 1346, 1962(d); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Crim. P. 29(c).

[16] **Conspiracy** Controlled Substances

Conspiracy Health care and medical benefits fraud

Evidence was sufficient to support finding that pharmaceutical company regional manager encouraged and intended healthcare practitioners to prescribe cancer drug outside usual course of professional practice, even when there was no medical necessity for drug or dosage prescribed, supporting conviction for conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute based on predicate

act of illegal distribution of controlled substance in violation of controlled substances act (CSA) and honest services fraud predicate; manager encouraged sales representatives to agree with each practitioner on a specific number of prescriptions per week and to "push the dose" regardless of medical need. 18 U.S.C.A. §§ 1346, 1962(d); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Crim. P. 29(c).

[17] **Conspiracy** Controlled Substances

Conspiracy Health care and medical benefits fraud

Evidence was sufficient to support finding that pharmaceutical company regional manager encouraged and intended healthcare practitioners to prescribe cancer drug outside usual course of professional practice, even when there was no medical necessity for drug or dosage prescribed, supporting conviction for conspiring to violate Racketeer Influenced and Corrupt Organizations (RICO) statute based on predicate act of illegal distribution of controlled substance in violation of controlled substances act (CSA) and honest services fraud predicate; manager developed quota agreements with practitioners regardless of medical need, and manager believed that successful performance of his job depended on promoting illicit prescription-writing. 18 U.S.C.A. §§ 1341, 1343, 1962(d); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Crim. P. 29(c).

[18] **Criminal Law** Construction of Evidence

Criminal Law Inferences or deductions from evidence

Criminal Law Circumstantial evidence

When the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, the Court of Appeals must reverse the conviction, but this equal-evidence rule takes hold only after the inquiring court has drawn all reasonable inferences in favor of the verdict.

1 Case that cites this headnote

[19] **Criminal Law** Inferences or deductions from evidence

Criminal Law Inferences or hypotheses from evidence

When pieces of evidence are layered, with inferences taken in the government's favor, it is not a case in equipoise that would support reversal of conviction. Fed. R. Crim. P. 29(c).

1 Case that cites this headnote

[20] **Fraud** Nature and Elements of Offense

To establish commission of mail fraud, government must show a scheme to defraud using false pretenses, a defendant's knowing and willing participation in the scheme with the intent to defraud, and the use of the mails in furtherance of that scheme. 18 U.S.C.A. § 1341.

1 Case that cites this headnote

[21] **Fraud** Nature and Elements of Offense

Mail- and wire-fraud offenses share common elements; they differ only in that to prove a violation of the wire-fraud statute, government must establish the use of wires, rather than the use of the mails, in furtherance of the alleged scheme. 18 U.S.C.A. §§ 1341, 1343.

2 Cases that cite this headnote

[22] **Conspiracy** Mail and wire fraud

Fraud False pretenses or representations

Fraud Use of mails or telecommunications

Evidence was sufficient to establish that pharmaceutical company founder committed predicate offense of mail fraud in conspiring to violate Racketeer Influenced and Corrupt

Organizations (RICO) statute, by mailing bribes to prescribers of cancer drug, and then fraudulently obtaining insurance payments for prescriptions through company's reimbursement center; company mailed bribes to healthcare practitioners to increase volume of prescriptions, and bribes for increased volume of prescriptions facilitated pre-authorization requests for prescriptions that were fraudulently processed through center. 18 U.S.C.A. §§ 1341, 1962(d); Fed. R. Crim. P. 29(c).

[23] **Fraud** Relation of communications to scheme; furtherance of scheme

The "in furtherance" requirement of mail fraud statute is to be read broadly; the use of the mails need not be an essential element of the scheme. 18 U.S.C.A. § 1341.

[24] **Fraud** Relation of communications to scheme; furtherance of scheme

To prove the "in furtherance" element of mail fraud statute, government need only show that the mailing was incident to an essential part of the scheme, or a step in the plot. 18 U.S.C.A. § 1341.

1 Case that cites this headnote

[25] **Fraud** Relation of communications to scheme; furtherance of scheme

For the "in furtherance" requirement for mail fraud, the relevant question at all times is whether the mailing is part of the execution of the scheme. 18 U.S.C.A. § 1341.

[26] **Fraud** Relation of communications to scheme; furtherance of scheme

Mail-fraud statute does not require a "but-for" link between a mailing and the fraudulent scheme. 18 U.S.C.A. § 1341.

[27] **Indictments and Charging Instruments** Conspiracy, racketeering, and money laundering

Mail fraud scheme described by district court in denying defendant's joint motion for judgment of acquittal did not constructively amend indictment, which stated that "[h]ad the insurers known that the defendants gave bribes and kickbacks to the targeted practitioners, the insurers would not have authorized payment for [cancer drug]," in prosecution for conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) statute based on mail fraud predicate; crime charged was not altered, predicate offenses were not elements required to be proved, and founder was not convicted of a crime other than that charged in indictment. 18 U.S.C.A. §§ 1341, 1962(d); Fed. R. Crim. P. 29(c).

[28] **Indictments and Charging Instruments** Constructive Amendment

Constructive amendment of indictment occurs when charging terms of indictment are altered, either literally or in effect, by prosecution or court after grand jury has last passed upon them.

[29] **Indictments and Charging Instruments** Variance Between Allegations and Proof

So long as statutory violation remains the same, jury can convict even if facts found are somewhat different than those charged in indictment.

[30] **Conspiracy** Racketeering conspiracies in general

To prove a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, it is enough to prove that a defendant agreed with one or more others that two predicate offenses be committed; the predicate offenses themselves, however, are not elements required to be proved. 18 U.S.C.A. § 1962(d).

[31] **Indictments and Charging Instruments** Constructive Amendment

Rule against constructive amendments is focused not on particular theories of liability but on the offenses charged in an indictment.

[32] **Conspiracy** Mail and wire fraud

Fraud Scheme to defraud

Fraud False pretenses or representations

Fraud Knowledge and intent; foreseeability

Evidence was sufficient to establish that pharmaceutical company's regional sales manager knowingly and willingly participated in scheme to deceive insurers into paying for prescriptions for which they otherwise would not have paid, supporting conviction of mail and wire fraud predicates to conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) statute; manager received list of over 100 prescriptions that company's reimbursement center was attempting to process on doctor's behalf, manager pushed for prior authorizations with knowledge that information reimbursement center relayed to insurers was inaccurate, and manager was copied on emails regarding coaching of sales representatives on misleading diagnosis codes to be provided to insurers. 18 U.S.C.A. §§ 1341, 1343, 1962(d); Fed. R. Crim. P. 29(c).

[33] **Conspiracy** Mail and wire fraud

Fraud Scheme to defraud

Fraud Knowledge and intent; foreseeability

Evidence was sufficient to establish that pharmaceutical company's regional sales manager knew about misleading statements about cancer drug made by company's reimbursement center to insurers, such that insurers would pay for drug prescriptions, supporting conviction on mail and wire fraud predicates to conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) statute; manager was informed whenever a doctor granted reimbursement center permission to contact an insurer for authorization, manager was copied on emails reporting denials by insurers, manager created reports documenting center's efforts to obtain authorizations, and manager listened to calls in which employees requested drug authorizations using misleading words and diagnosis codes. 18 U.S.C.A. §§ 1341, 1343, 1962(d); Fed. R. Crim. P. 29(c).

[34] **Conspiracy** Mail and wire fraud

Fraud Scheme to defraud

Fraud False pretenses or representations

Fraud Knowledge and intent; foreseeability

Evidence was sufficient to establish that pharmaceutical company's regional sales manager, knew about false or misleading statements about cancer drug made by company's reimbursement center to insurers, such that insurers would pay for drug prescriptions, supporting conviction on mail and wire fraud predicates to conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) statute; manager instructed subordinates to do whatever he could to help and assist with insurance claims, various subordinates reported when doctors had completed pharmaceutical company's reimbursement center opt-in forms and alerted him when doctors encountered difficulty obtaining insurance approvals, and manager knew many prescriptions were illegitimate. 18 U.S.C.A. §§ 1341, 1343, 1962(d); Fed. R. Crim. P. 29(c).

[35] **Criminal Law** Necessity and scope of proof

Trial court enjoys considerable discretion with respect to its evidentiary rulings.

[36] **Conspiracy** Controlled substances and intoxicating liquors

Conspiracy Fraud and false pretenses

Testimony from nine patients about their altered behavior, addiction, and withdrawal symptoms after receiving cancer drug prescriptions from doctors who participated in pharmaceutical company's kickback scheme, at which defendants were former executives and managers, was relevant, and thus admissible in prosecution for conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute; patient testimony was relevant to show that doctors prescribed drug in absence of medical necessity, to show that they failed to minimize risk of adverse effects when setting dosages, to show that defendants had entered into an agreement to bring about that result, and to help establish scope of conspiracy. 18 U.S.C.A. § 1962(d); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Crim. P. 33(a); Fed. R. Evid. 401.

[37] **Criminal Law** Relevancy in General

Standard for relevancy of evidence is not exacting. Fed. R. Evid. 401.

[38] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

Probative value of testimony of nine patients about their altered behavior, addiction, and withdrawal symptoms after receiving cancer drug prescriptions from doctors who participated in pharmaceutical company's kickback scheme, at which defendants were former executives and managers, was not substantially outweighed by danger of unfair prejudice, in prosecution for conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) statute; testimony was relatively brief, testimony established that patients became addicted to drug and suffered withdrawal symptoms, testimony explained how the charged conspiracy was able to function and how it generated product demand, and testimony was concise. 18 U.S.C.A. § 1962(d); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Crim. P. 33(a); Fed. R. Evid. 403.

[39] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

Court of Appeals affords district court considerable latitude in steadying the balance demanded by rule regarding exclusion of relevant evidence as unduly probative. Fed. R. Evid. 403.

[40] **Criminal Law** Necessity of Objections in General

Plain error hurdle is high, and purported error must, among other things, be clear or obvious in order to be plain.

[41] **Criminal Law** Grounds in general

In reviewing claims under cumulative error doctrine, cumulativeness is almost always matter of degree, and defendants' claim of cumulativeness, if it suggests error at all, at most suggests error that is neither clear nor obvious.

[42] **Criminal Law** Rulings on evidence

New trial due to alleged prejudicial spillover from Controlled Substances Act (CSA) predicate offense and honest-services predicate offense was not warranted for pharmaceutical company vice president convicted of conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute based on illegal distribution of a controlled substance, and mail and wire fraud; evidence admitted against coconspirators was relevant to and independently admissible against vice president, jury instructions had been custom-tailored to

guard against prejudicial spillover, and vice president was acquitted of CSA and honest-service predicates. 18 U.S.C.A. § 1962(d); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Crim. P. 33(a).

[43] **Criminal Law** Grounds

"Prejudicial spillover," as would warrant severance of offenses, occurs when the evidence admitted to prove a charge as to which the defendant was acquitted was so extensive, inflammatory, and prejudicial that it necessarily spilled over into the jury's consideration of his guilt on other charges.

1 Case that cites this headnote

[44] **Criminal Law** Grounds

To determine whether an unacceptable threat of prejudicial spillover materialized, as would warrant severance of offenses, the Court of Appeals must evaluate whether the record evinces a serious risk that the joinder of offenses compromised a specific trial right or prevented the jury from making a reliable judgment about guilt or innocence.

1 Case that cites this headnote

[45] **Criminal Law** Proceedings; waiver

The devoir of persuasion on a claim of prejudicial spillover rests with the defendant seeking severance of offenses to show prejudice so pervasive that a miscarriage of justice looms.

1 Case that cites this headnote

[46] **Criminal Law** Preliminary proceedings

Court of Appeals reviews district court's denial of new trial based on allegations of prejudicial spillover from denial of joinder of offenses for abuse of discretion. Fed. R. Crim. P. 33(a).

[47] **Criminal Law** Limiting effect of evidence of other offenses

As a general rule, instructing the jury to consider each charged offense, and any evidence relating to it, separately as to each defendant constitutes an adequate measure to guard against spillover prejudice.

1 Case that cites this headnote

[48] **Criminal Law** Conspiracy cases

Criminal Law Evidence admissible only against codefendant; spillover or compartmentalization

Severance of pharmaceutical company's regional manager from trial of other defendants, who were company's former executives and managers, which manufactured and distributed cancer drug, was not warranted, in prosecution for conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute, based on mail and wire fraud predicates; record contained substantial evidence showing manager's involvement with company's reimbursement center, which processed insurance claims, and because government charged and proved a single conspiracy and because manager was charged and convicted as a coconspirator, virtually all of the evidence properly admitted against the other defendants was also admissible against manager. 18 U.S.C.A. §§ 1341, 1343, 1962(d); Fed. R. Crim. P. 14(a).

[49] **Criminal Law** Preliminary proceedings

Court of Appeals reviews district court's denial of motion to sever defendant's trial from codefendant's for abuse of discretion. Fed. R. Crim. P. 14(a).

[50] **Criminal Law** Conspiracy

When indictment charges criminal conspiracy among multiple defendants, government enjoys

benefit of rebuttable presumption that joint trial is appropriate. Fed. R. Crim. P. 14(a).

[51] **Criminal Law** Joinder and severance

In cases where joinder of defendants is proper, Court of Appeals must affirm district court's denial of motion to sever unless defendant makes strong and convincing showing of prejudice. Fed. R. Crim. P. 14(a).

[52] **Criminal Law** Conspiracy cases

Joinder of pharmaceutical company's regional manager with trial of other defendants, who were company's former executives and managers, which manufactured and distributed cancer drug, was appropriate, in prosecution for conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute, based on mail and wire fraud predicates; manager's only argument rested on self-serving conclusion that government mislead court into believing manager dealt exclusively with pharmaceutical company's reimbursement center, which processed insurance claims, and manager's argument was at odds with record that showed manager's involvement with reimbursement center. 18 U.S.C.A. §§ 1341, 1343, 1962(d); Fed. R. Crim. P. 8(b).

[53] **Criminal Law** Joinder or severance of counts or codefendants

Claim of misjoinder requires reversal only if misjoinder results in actual prejudice. Fed. R. Crim. P. 8(b).

[54] **Criminal Law** Prejudice; fair trial

Movant for severance must show that her joinder had substantial and injurious effect or influence in determining jury's verdict. Fed. R. Crim. P. 8(b).

[55] **Criminal Law** Joinder and severance

In certain cases, evidence at trial may serve as an ex post assurance on appeal that joinder was a step founded on a reasonable, good faith basis in fact. Fed. R. Crim. P. 8(b).

[56] **Criminal Law** Conspiracy, racketeering, and money laundering

Evidence of employment history of regional manager of pharmaceutical company as an exotic dancer and her unorthodox professional behavior with doctor who prescribed company's cancer drug was intrinsic to charged crimes of conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) statute, based on mail and wire fraud predicates, and thus propensity bar in federal rule of evidence governing "other act" evidence did not apply; evidence about manager's qualifications, or lack thereof, suggested that scheme to bribe doctors to prescribe drug offered doctors both money and sexual favors, and evidence was illustrative of manager's relationship with doctor and how she interacted with him to motivate more drug prescriptions. 18 U.S.C.A. §§ 1341, 1343, 1962(d); Fed. R. Evid. 404(b).

[57] **Criminal Law** Reception and Admissibility of Evidence

Court of Appeals reviews district court's admission of challenged evidence for abuse of discretion.

1 Case that cites this headnote

[58] **Criminal Law** Other Misconduct Inseparable from Crime Charged

Evidence intrinsic to crime charged is not precluded under rule governing admission of other crimes evidence. Fed. R. Evid. 404(b).

[59] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

Probative value of evidence of employment history of regional manager of pharmaceutical company as an exotic dancer and her unorthodox professional behavior with doctor who prescribed company's cancer drug was not substantially outweighed by its unfairly prejudicial effects, in prosecution for conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) statute, based on mail and wire fraud predicates; evidence was probative of one way in which manager and her superiors attempted to influence prescribers, was probative of defendants' intent to downplay traditional sales strategies that focus on patients' needs, government was instructed to avoid specific details of encounter with doctor, and jury was instructed not to take evidence for truth of the matter. 18 U.S.C.A. §§ 1341, 1343, 1962(d); Fed. R. Evid. 403.

[60] **Criminal Law** Otherwise irreparable error or prejudice in general

Criminal Law Evidentiary Matters

Declaring mistrial is last resort, only to be implemented if taint is ineradicable, that is, only if trial judge believes that jury's exposure to evidence is likely to prove beyond realistic hope of repair.

[61] **Criminal Law** Issues related to jury trial

Court of Appeals reviews district court's denial of mistrial for abuse of discretion.

[62] **Criminal Law** Evidentiary Matters

Pharmaceutical company's regional manager was not entitled to mistrial due to admission of testimony regarding her prior work experience and unorthodox professional behavior with doctor who prescribed company's cancer drug in prosecution for conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute, based on mail and wire fraud predicates; court gave clear limiting jury instructions and promptly stuck extraneous matters. 18 U.S.C.A. §§ 1341, 1343, 1962(d).

[63] **Criminal Law** Matters of defense

District court's refusal to use pharmaceutical company's regional sales manager's proposed language for jury instruction on supervisory condonation was within its discretion, in prosecution for conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute, based on mail and wire fraud predicates; district court's charge, as rendered, contained a good-faith instruction, and instruction fully permitted manager to present her supervisory condonation defense. 18 U.S.C.A. §§ 1341, 1343, 1962(d).

[64] **Criminal Law** Failure to instruct

Court of Appeals reviews district court's eschewal of proposed instruction is for abuse of discretion.

1 Case that cites this headnote

[65] **Criminal Law** Necessity of giving in language of requests

A district court is under no obligation to honor a party's word choices or to parrot proposed language when delivering jury instructions.

[66] **Criminal Law** Diligence on part of accused; availability of information

Government's failure to disclose all communications between manager of company's reimbursement center and government concerning alleged recording used as training tool for center did not constitute *Brady* violation in prosecution of company's vice president of sales for conspiracy to violate the

Racketeer Influenced and Corrupt Organizations (RICO) statute, based on mail and wire fraud predicates; vice president failed to establish that such recording actually existed. 18 U.S.C.A. §§ 1341, 1343, 1962(d).

[67] **Criminal Law** Preliminary proceedings

Court of Appeals reviews district court's denial of motion to compel discovery for abuse of discretion.

[68] **Criminal Law** Preliminary proceedings

Criminal Law Discovery and disclosure

Abuse of discretion standard of review for denial of motion to compel discovery is not one-dimensional; within it, Court of Appeals reviews for clear error district court's factual finding that no further document subject to production existed.

[69] **Criminal Law** Constitutional obligations regarding disclosure

Under *Brady*, the government is obligated to disclose evidence in its possession that is favorable to the accused and material to guilt or punishment.

2 Cases that cite this headnote

[70] **Criminal Law** Request for disclosure; procedure

Where a claim of *Brady* error is advanced, defendant bears the burden of showing a likelihood of prejudice stemming from the government's nondisclosure; to make such a showing, he must articulate with some specificity what evidence he hopes to find in the requested materials, why he thinks the materials contain this evidence, and, finally, why this evidence would be both favorable to him and material.

1 Case that cites this headnote

[71] **Criminal Law** Materiality and probable effect of information in general

In determining whether the evidence sought is material, for purposes of determining *Brady* violation, question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

[72] **Criminal Law** Request for disclosure; procedure

Naked assertion by defendant asserting *Brady* claim that a particular communication must have occurred, no matter how vociferously expressed, is insufficient to undermine a reasoned judicial determination that no such communication actually exists.

[73] **Criminal Law** Request for disclosure; procedure

Mere conjecture that certain communications might contain exculpatory evidence without any supporting evidence or arguments to indicate this was, in fact, the case, is inadequate to ground a claimed *Brady* violation.

2 Cases that cite this headnote

[74] **Criminal Law** Previous or concurrent representation of witness or other party

Representation by counsel's law firm of both pharmaceutical company's regional manager, in prosecution for conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute, based on mail and wire fraud predicates, and company, in bankruptcy restructuring, did not result in conflict of interest, and thus did not warrant a new trial for manager; there was no actual conflict of interest that adversely affected counsel's performance at manager's trial, and alternative strategy proposed by manager was not a plausible defense strategy.

U.S. Const. Amend. 6; 18 U.S.C.A. §§ 1341, 1343, 1962(d); Fed. R. Crim. P. 33.

2 Cases that cite this headnote

[75] **Criminal Law** Review De Novo
Criminal Law Counsel

Court of Appeals reviews the district court's factual findings in connection with a conflict-of-interest claim for clear error but affords de novo review to the court's ultimate conclusion.

[76] **Criminal Law** Conflict of Interest

Under the Sixth Amendment, a defendant has a right to conflict-free counsel; that right, though, does not protect a defendant from an attorney's mere theoretical division of loyalties. U.S. Const. Amend. 6.

1 Case that cites this headnote

[77] **Criminal Law** Prejudice and harm in general

To prevail on a conflict-of-interest claim, a defendant must show that a conflict of interest actually affected the lawyer's performance; such a showing requires a demonstration that (1) the lawyer could have pursued a plausible alternative defense strategy or tactic and (2) the alternative strategy or tactic was inherently undertaken in loyalties. U.S. Const. Amend. 6.

2 Cases that cite this headnote

[78] **Criminal Law** Conflict of Interest

To prevail on Sixth Amendment conflict-of-interest claim, conflict must be real. U.S. Const. Amend. 6.

1 Case that cites this headnote

[79] **Criminal Law** Weight and sufficiency of evidence in general

Where a new trial motion is based upon the weight of the evidence, a district court should not grant a new trial unless it is quite clear that the jury has reached a seriously erroneous result. Fed. R. Crim. P. 33(a).

1 Case that cites this headnote

[80] **Criminal Law** Weight and sufficiency of evidence in general

New trial should be granted sparingly based on weight of evidence, and only when the evidence preponderates heavily against the jury's verdict or a miscarriage of justice otherwise looms. Fed. R. Crim. P. 33(a).

1 Case that cites this headnote

[81] **Criminal Law** New Trial

Court of Appeals reviews a district court's denial of a motion for new trial solely for abuse of discretion. Fed. R. Crim. P. 33(a).

[82] **Criminal Law** Instructions

Defendants waived for appellate review, any challenge to court's curative jury instructions addressing specific components of governments rebuttal arguments regarding pharmaceutical company's vice president's corporate-officer status and alleged touching on defendants' failure to testify in prosecution for conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute; court circulated proposed instructions, invited edits, and accepted all proposed edits, and, after reading edited instructions to the jury, court invited counsel to approach sidebar, but counsel declined. 18 U.S.C.A. §§ 1341, 1343, 1962(d).

1 Case that cites this headnote

[83] **Criminal Law** Review De Novo

Court of Appeals evaluates de novo claims of error involving the propriety of government's closing argument.

[84] **Criminal Law** Estoppel or Waiver

Criminal Law Instructions

When a subject matter is unmistakably on the table in prosecution, and defense's silence is reasonably understood only as signifying agreement that there was nothing objectionable, the issue is waived on appeal; one application of this rule occurs when a district court informs the parties exactly how it is planning to instruct the jury and seeks their feedback, with the result that a party's counsel affirmatively states there is no objection or remains silent, in that circumstance, an appellate court is free to consider the instructions approved by that party and any claim that the instructions are inadequate is deemed waived.

2 Cases that cite this headnote

[85] **Criminal Law** Responsive statements and remarks

Government's use of "loaded gun" metaphor in rebuttal argument was harmless, in prosecution of vice-president of pharmaceutical company on conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) statute; government used metaphor only once during rebuttal argument that lasted 30 minutes and in a trial that lasted for over seven weeks, government made no attempt to weave metaphor into other portions of closing argument or trial as a whole, court gave curative instruction that proposition had nothing to do with case at hand, and metaphor related primarily to intent element of Controlled Substances Act (CSA) and honest-services predicates of which vice-president was acquitted. 18 U.S.C.A. §§ 1341, 1343, 1962(d); Fed. R. Crim. P. 33.

[86] **Criminal Law** Statements as to Facts, Comments, and Arguments

In determining whether a prosecutor's allegedly improper remarks were harmless, bottom-line question is whether the impropriety so poisoned the well that the trial's outcome was likely affected.

[87] **Criminal Law** Conduct of counsel in general

Criminal Law Action of Court in Response to Comments or Conduct

In the context of a prosecutorial misconduct claim, harmless error review takes into account a multiplicity of factors, including the severity of the impropriety, the nature of the impropriety, that is, whether or not it was deliberate, whether or not it was isolated, and the like, the strength of the government's case against the defendant, and how the district court responded to the impropriety, especially the timing, nature, and force of any curative instructions.

[88] **Criminal Law** Action of Court in Response to Comments or Conduct

A trial court is not required to use magic words in framing curative instructions in response to alleged prosecutorial misconduct; it is only required to convey, in clear language, a message adequate to redress the perceived harm.

[89] **Criminal Law** Review De Novo

Criminal Law Restitution

Criminal Law Sentencing

Court of Appeals reviews restitution orders for abuse of discretion, examining the court's subsidiary factual findings for clear error and its answers to abstract legal questions de novo.

1 Case that cites this headnote

[90] **Sentencing and Punishment** Compensable Losses

Sentencing and Punishment Actual loss

Defendant convicted of certain federal crimes, including crimes committed by fraud or deceit, must make restitution to victims commensurate

with victims' actual losses. 18 U.S.C.A. § 3663A(c)(1)(A)(ii).

2 Cases that cite this headnote

[91] **Sentencing and Punishment** Nature and purpose

Restitution is designed to compensate victim, not to punish offender.

[92] **Sentencing and Punishment** Nature and purpose

In awarding restitution, court's goal is to make victim whole again.

[93] **Sentencing and Punishment** Nature and purpose

Restitution order should not confer windfall upon victim.

[94] **Sentencing and Punishment** Nexus to offense of conviction

Sentencing and Punishment Actual loss

For the purpose of calculating restitution, actual loss is the beacon by which federal courts must steer, in this context, actual loss is limited to the pecuniary harm that would not have occurred but for the defendant's criminal activity; this standard obligates the government to show both that the particular loss would not have occurred but for the conduct undergirding the offense of conviction and that a causal nexus exists between the loss and the conduct — a nexus that is neither too remote factually nor too remote temporally.

4 Cases that cite this headnote

[95] **Criminal Law** Sentencing

Court of Appeals will uphold sentencing court's restitution award as long as court's order reasonably responds to some reliable evidence.

3 Cases that cite this headnote

[96] **Sentencing and Punishment** Amount, value

Sentencing court's mere guesswork will not suffice to warrant restitution; similarly, rough approximation that do not sufficiently reflect losses of victims are not appropriate grist for restitution mill.

[97] **Sentencing and Punishment** Degree of proof

In ordering restitution, court must resolve any genuine and material disputes about fact, cause, or amount of loss by preponderance of evidence. 18 U.S.C.A. § 3664(d).

1 Case that cites this headnote

[98] **Sentencing and Punishment** Amount, value

Evidence failed to support district court's restitution award of 100 percent of insurers' paid claims for cancer drug prescriptions traceable to 13 bribed doctors in prosecution of pharmaceutical company's executives and managers for conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) statute, based on mail and wire fraud predicates; no party offered evidence that supported determination that all insurance claims passed through company's reimbursement center, and government expert opined, without contradiction, that approximately 80.9 percent of all prescriptions passed through company's reimbursement center. 18 U.S.C.A. §§ 3663A(c)(1)(A)(ii), 3664(d).

1 Case that cites this headnote

[99] **Sentencing and Punishment** Nexus to offense of conviction

Every loss that factors into restitutionary amount must have adequate causal link to defendant's criminal conduct.

[100] **Sentencing and Punishment** Degree of proof

Although court's reasoning and calculations leading to restitution amounts ordered must be clear, its bottom-line determination need only amount to reasonable response to reliable evidence in record.

2 Cases that cite this headnote

[101] **Forfeitures** Plenary or de novo review

Forfeitures Questions of fact and evidence

In evaluating forfeiture orders, Court of Appeals assays district court's legal conclusions de novo and examines its factual findings for clear error.

[102] **Forfeitures** Tainted or untainted determinations; commingled funds

Defendant's proceeds from racketeering activity are subject to a rule of proportionality; this guardrail ensures that proceeds are subject to forfeiture only to the extent they are tainted by the racketeering activity. 18 U.S.C.A. § 1963(a)(3).

[103] **Forfeitures** Findings and conclusions

District court's forfeiture order must determine portion of defendant's earnings over relevant time period that were tainted by racketeering activity and therefore subject to forfeiture. 18 U.S.C.A. § 1963(a)(3).

[104] **Forfeitures** Tainted or untainted determinations; commingled funds

In determining amount of forfeiture order in prosecution of pharmaceutical company's executives and managers for conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) statute, based on mail and wire fraud predicates, district court was required to determine specific amount of defendants' earnings that were tainted by racketeering activity; any cancer drug prescription processed independently of company's reimbursement center fell outside the scope of fraudulent scheme. 18 U.S.C.A. §§ 1341, 1343, 1962(d), 1963(a)(3).

[105] **Conspiracy** Withdrawal, Abandonment, or Renunciation

Mere cessation of activity in furtherance of the conspiracy does not constitute withdrawal from the conspiracy.

1 Case that cites this headnote

[106] **Forfeitures** Amount, particular cases

Forfeiture amount that defendants, who were convicted of conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) statute, based on mail and wire fraud predicates, were required to pay was not to be offset by income taxes paid on earnings in connection with their employment at pharmaceutical company; proceeds in forfeiture statute referred to gross proceeds, not net profits, and defendants clearly obtained amount of funds subject to forfeiture before they were subject to taxation. 18 U.S.C.A. §§ 1341, 1343, 1962(d), 1963(a)(3).

***14** APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, [Hon. Allison D. Burroughs, U.S. District Judge]

Attorneys and Law Firms

William W. Fick, with whom Daniel N. Marx and Fick & Marx LLP were on brief, for defendant Simon.

Peter Charles Horstmann for defendant Lee.

Michael Kendall, with whom Karen Eisenstadt, Alexandra I. Gliga, and White & Case LLP were on brief, for defendant Rowan.

Martin G. Weinberg and Kosta S. Stojilkovic, with whom Martin G. Weinberg Law, P.C., Beth A. Wilkinson, Chanakya A. Sethi, and Wilkinson Walsh LLP were on brief, for defendant Kapoor.

Megan A. Siddall, with whom Tracy A. Miner and Miner Orkand Siddall LLP were on brief, for defendant Gurry.

David M. Lieberman, Attorney, Appellate Section, United States Department of Justice, with whom Nicholas L. McQuaid, Acting Assistant Attorneys General, Criminal Division, Robert A. Zink, Acting Deputy Assistant Attorney General, Nathaniel R. Mendell, Acting United States Attorney, Donald C. Lockhart, Appellate Chief, and Mark T. Quinlivan, Fred Wyshak, K. Nathaniel Yeager, and David G. Lazarus, Assistant United States Attorneys, were on brief, for the United States.

Before Howard, Chief Judge, Selya, Circuit Judge, and Gelpí, * District Judge.

Opinion

SELYA, Circuit Judge.

A noted British ethologist once observed that "[t]he total amount of suffering per year in the natural world is beyond all decent contemplation." Richard Dawkins, River Out of Eden 131-32 (Basic Books 1995). Some of this suffering is unavoidable, but some is caused by those who callously place profits over principle. The facts of this mammoth case, as supportably ***15** found by the jury, tell a chilling tale of suffering that did not need to happen. It involves a group of pharmaceutical executives who chose to shunt medical necessity to one side and shamelessly proceeded to exploit the sickest and most vulnerable among us — all in an effort to fatten the bottom line and pad their own pockets.

The tale told by this case chronicles the pernicious practices employed by a publicly held pharmaceutical firm, Insys Therapeutics, Inc. (Insys), with respect to the marketing and sale of Subsys, a fentanyl-laced medication approved by the United States Food and Drug Administration (FDA) for use in the treatment of breakthrough cancer pain. When the government got wind of these practices, it launched an investigation. That investigation produced evidence that led a federal grand jury to indict seven of the company's top executives on charges brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d). Two of the executives eventually entered into plea agreements, but the rest stood their ground. Following a fifty-one-day trial, the jury convicted the five remaining defendants as charged (with an exception described below), and the district court (again with an exception described below) declined to set aside the jury verdicts. The court then sentenced the defendants to prison terms of varying lengths, ordered defendant-specific restitution, and directed the forfeiture of certain assets.

On appeal, the defendants — ably represented — raise a gallimaufry of claims. The government cross-appeals, assigning error to the district court's refusal to embrace the whole of the jury verdicts and to its computation of the forfeiture amounts. After careful consideration of an amplitudinous record, we uphold the jury verdicts in full, affirm the defendants' sentences (which are unchallenged), vacate the restitution and forfeiture orders, and remand for further proceedings consistent with this opinion.

I

We begin with a snapshot of the relevant facts drawn from the evidence adduced at trial. We then briefly rehearse the travel of the case.

A

Insys is a pharmaceutical firm founded by one of the defendants, Dr. John Kapoor. Under the Insys umbrella, Kapoor sought to develop sublingual spray drug-delivery formulations. The firm explored various options, but soon concentrated on developing a sublingual fentanyl spray. This product came to be called "Subsys."

In early 2012, the FDA approved Subsys for the treatment of patients suffering from "breakthrough cancer pain." The term "breakthrough cancer pain" is a term of art: it refers to brief spikes in pain (typically lasting less than one hour) in patients with cancer who are already dealing with constant and relatively steady pain. All other uses of Subsys were deemed "off-label."

When Subsys went on the market, its FDA-approved label declared that "[t]he initial dose of Subsys to treat episodes of breakthrough cancer pain is always 100 micrograms." Moreover, the label warned that "Subsys contains fentanyl,"

which is a "Schedule II controlled substance with an abuse liability similar to other opioid analgesics." Relatedly, the label carried a limitation on who could prescribe the drug: due to "the risk for misuse, abuse, addiction and overdose," Subsys could be prescribed "only through a restricted program ... called 'Risk Evaluation and Mitigation Strategy' " (REMS). This program ***16** formed part of the FDA's Transmucosal Immediate Release Fentanyl REMS Access Program, which required patients, prescribers, and pharmacists to sign a form stating that they understood the risks presented by the prescribed drug.

Subsys made its debut in the marketplace in March of 2012 (shortly after FDA approval was secured). At that point in time, Kapoor was serving as Insys's executive chairman, Michael Babich was serving as its chief executive officer, Shawn Simon was serving as its vice president of sales, and Matthew Napoletano was serving as its vice president of marketing.

Around the time of the Subsys launch, Insys assembled a marketing team. It proceeded to provide its sales force with access to data that ranked physicians "based on their history of prescribing within the opiate market, in particular, the fentanyl market." The ranking system assigned a number between 1 and 10 to each doctor — the higher the number the greater the volume of prescriptions written. Salespeople were instructed to target doctors ranked 5 or above and to give their "highest attention" to those assigned a 10. They were also told to employ a "switch strategy" aimed at persuading prescribers whose patients already had been determined to need a similar fentanyl product to jettison the similar product in favor of Subsys. Although the only approved use for Subsys was for treatment of breakthrough cancer pain, most of the prescribers listed in the database were pain-management specialists, not oncologists.

Notwithstanding Insys's strategic plan, Kapoor was disappointed with initial sales and revenue figures. He told colleagues that it was "the worst f*****g launch in pharmaceutical history he's ever seen." In Kapoor's view, the "main issue" was that the majority of patients who started on Subsys would stay on the drug only for the first month and would not refill their prescriptions. Napoletano hypothesized that patients were electing not to stick with Subsys because insurance companies were choosing not to cover it. Patients, he suggested, did not want to pay out of pocket to refill Subsys prescriptions.

Kapoor, though, had a different take: he attributed the widespread failure to refill Subsys prescriptions to patients "starting on too low of a dose." Because the Subsys label specified the initial dose as 100 micrograms, Kapoor expressed concern that patients who were used to a higher dose of a competing product would not be satisfied with the pain management offered by Subsys at that initial dosage. Consistent with Kapoor's concerns, sales data (which Insys executives analyzed daily) showed that the lower a patient's starting dose, the higher the "falloff rate."

By the fall of 2012, Insys had begun to overhaul its marketing team. Shawn Simon was cashiered, and Alec Burlakoff (previously a regional manager) replaced him as vice president of sales. Defendant Joseph A. Rowan was promoted into Burlakoff's former role. Defendants Sunrise Lee and Richard M. Simon were installed as regional managers, and defendant Michael J. Gurry became vice president for managed markets. [1]

In addition to these executive-suite changes, Insys revamped its sales and marketing strategy. That fall, it hosted both a national sales meeting and a national sales call to train its sales force on a "new plan of attack." This plan had several components:

***17** • A new "switch program" allowed patients who were transitioning to Subsys from a competing drug to receive vouchers to defray the cost of Subsys for as long as they needed it or until it was covered by their insurance.

• A new "super voucher" program offered a means of providing free product to patients.

• A specially crafted "effective dose" message informed prescribers that, despite the statements on the FDA-approved labelling, 100- or 200-microgram doses were not effective. To complement this "effective dose" messaging, sales representatives were notified "each and every time" a prescriber wrote a Subsys prescription for 100-or 200-micrograms; and they were instructed to report back within 24 hours both as to the reason why the doctor had prescribed the low dose and as to how the doctor planned to titrate the patient to the "effective dose."

• A revised compensation structure was put in place. This structure rewarded sales representatives for pushing doctors to prescribe higher doses of Subsys. Under it, larger prescribed doses yielded salespeople larger

> bonuses both because bonus percentages were higher for higher doses and because higher doses were more costly.

The icing on the cake was Insys's inauguration of a speaker program in August of 2012. The ostensible "objective of the program" was to provide "peer-to-peer education." To that end, Insys would invite physicians whom it envisioned as potential Subsys prescribers and the speaker (a fellow health-care provider) would "present the information [about the drug] to them." These presentations would take place through "online web hosting[s]" or at "dinner meetings." Each sales region was to host a roughly equal number of programs.

In its original incarnation, the speaker program never got off the ground. Instead, Kapoor transmogrified it. About a month after Napoletano announced the inauguration of the program, Kapoor "put on hold all speaker programs effective immediately." This directive emanated from Kapoor's disagreement with Napoletano about what the objective of the program ought to be: as Kapoor saw it, the speaker program "was designed for the speakers," not for the physicians who comprised the audience. Kapoor "wanted every speaker to write" Subsys prescriptions.

To accomplish this objective, Kapoor asked Napoletano for a list of the doctors who served as speakers, along with data as to "how many of them were writing [Subsys]" and data as to "what percentage of the prescriptions came from them." Napoletano balked, responding that "it's the attendees that you measure" — not the speakers. Kapoor "was not in agreement with that" and continued to insist upon a restructuring of the program.

In September, Kapoor, Burlakoff, Babich, and Napoletano met to discuss the direction of the speaker program. Consistent with Kapoor's vision, Burlakoff argued against the original peer-to-peer education model. When Napoletano pointed out that "in accordance with pharma code" each event had to have "a minimum of two to four people" attend, Burlakoff replied that he "d[idn't] care if there are any attendees" and that "he expect[ed] every speaker to write" prescriptions. He said that the speaker program should be "about the speaker and getting return from the speaker." Although the meeting "was very contentious," Kapoor was satisfied that his message had been received and proceeded to lift his "hold" on the speaker program.

***18** Burlakoff then emailed the sales force stating that speaker programs are "the number one opportunity to grow [their] business." He predicted that "[t]he hungry, motivated sales representatives will be facilitating as many speaker programs as humanly possible." He also suggested that a successful speaker program would require salespersons to seek out speakers who are "expert[s] with the utilization of Subsys in [their] clinical practice" and who "have at least 20 patients on Subsys."

Even with this sharp change in direction, Insys's top brass disagreed as to how to measure the program's success. In October, Kapoor, Napoletano, Babich, and Burlakoff met regarding that issue. Napoletano wanted to "track [the attendees] moving forward to see if the presentation had any impact and if they adopted the product in their practice." Burlakoff disagreed and reiterated that "the metric to track is the speaker." The meeting concluded with the issue still up in the air.

At a subsequent meeting, Kapoor resolved the issue. He stated that he "wanted to make sure every speaker wrote" Subsys prescriptions and "wanted a positive ROI" — a shorthand reference to return on investment. The ROI, as Kapoor measured it, would be the ratio between net revenue and the amount paid for speaker services. After a heated exchange, Napoletano capitulated and agreed to begin preparing reports tracking speakers and their corresponding ROIs. These reports allowed Kapoor to "see how successful [the] speakers were and how much product they were writing, based on how much money [Insys] had given them so far." Once this data became available, any speaker who "did not generate at least two times in revenue what was being paid to them" was "flagged" for a "temporary hold on programming." Refined to bare essence, the flagged speakers "wouldn't get programs" and, thus, would not receive honorariums.

This new protocol transformed the speaker programs from pedagogical exercises into funding mechanisms for a pay-for-play fandango. It is, therefore, unsurprising that with the new protocol in place, Burlakoff sought to identify "whales." He coined the term "whales" to refer to physicians who "ha[d] agreed in a very clear and concise manner that they [were] up for the deal, which [meant that] they [would] be compensated based on the number of prescriptions of Subsys they wr[ote]." A corollary to that deal was that "the more they wr[ote] and the more they increase[d] the dose, the more they'[d] get paid to speak." At Burlakoff's urging, regional sales managers were to have a "candid conversation" with each potential whale and make clear that if the physician was going to receive payments from Insys, he was "going to write

a significant amount of Subsys prescriptions to new patients as well as increase the doses of current patients." Burlakoff told sales managers to view speakers as their "business partner[s]."

Burlakoff's whale hunt was fruitful: he identified many whales, including Drs. Mahmood Ahmad, Gavin Awerbuch, Steven Chun, Patrick Couch, Paul Madison, Judson Somerville, and Xiulu Ruan. These prescribers were frequently mentioned on the daily 8:30 a.m. management calls, in which Kapoor, Babich, Napoletano, Burlakoff, and Gurry regularly participated. All of the whales committed to prescribing large quantities of Subsys. And if a whale failed to meet prescription expectations, an Insys representative would put pressure on him to get him back on track.

Without exception, the prescription numbers of these physicians increased when they joined the speaker program. In an email, Burlakoff described the doctors ***19** as "clueless" because they "prescribe strictly based on their relationship with the sales manager." As a result of that relationship and the pressure that sales representatives exerted, practitioners designated as "[s]peakers" generated approximately $4,200,000 in net revenue (60 percent of Insys's total net revenue) after receiving more than $550,000 in speakers' fees. Pleased with the success of the reconstituted speaker program, Kapoor raised the speaker budget in subsequent years.

Insys allocated speaker programs primarily to whales and other prolific Subsys prescribers. These practitioners were paid between $1,000 and $3,000 per event, depending on the particular practitioner's "résumé or ... influence." Speakers' payments were routinely sent by mail. Multiple speaker events featured the same practitioner. Insys initially capped annual speaking fees at $100,000 per practitioner but later raised the ceiling to $125,000. At a meeting in January of 2014, Babich, Burlakoff, and Richard Simon compiled a list of "doctors that had the highest potential to write." Burlakoff then "mobilized the sales force to go out and make sure that these 19 or 20 doctors reached their [fees] cap."

Despite the largess shown to speakers, the speaking events themselves had little to no attendance. Often, only the speaker, a friend or family member, and the sales representative were on hand. Even when more people were in attendance, the speaker programs were mostly "social outings" or "just a reason to gather people and have dinner and pay [the doctor]." Although sales representatives were required to submit sign-in forms and attendee evaluation forms to a third-party compliance firm (Sci Medica), they frequently submitted inaccurate documentation, including sign-in sheets with names and signatures of people who were not present, to give the speaking programs an aura of legitimacy. And when Kapoor replaced Sci Medica with an in-house compliance officer, the apocryphal documentation continued to flow.

While the revamped speakers' program drove up the volume of Subsys prescriptions, insurance coverage remained a problem. Medicare, Medicaid, and private insurance companies covered the cost of Subsys prescriptions only if a practitioner obtained prior authorization to prescribe the drug. And because of the FDA label, coverage was limited to patients with a current cancer diagnosis who both suffered from breakthrough cancer pain and already had tried other opioid medication.

Nor did the coverage limitations stop there. As a condition precedent to coverage, insurers required that a patient had tried a generic fentanyl product that had either failed to ameliorate the breakthrough cancer pain or proved difficult to ingest. To seek prior authorization, a practitioner typically submitted patient and diagnosis information to the insurer, and the insurer relied upon the accuracy of the submitted information in its decisionmaking. When Insys launched Subsys, it processed prior authorization requests through a third party and achieved only a 30-35 percent success rate for prior authorization approvals.

To enhance the approval rate, Gurry suggested bringing the approval process in-house. With Kapoor's blessing, Gurry hired Elizabeth Gurrieri in October of 2012 to found the Insys Reimbursement Center (IRC), which operated out of Insys headquarters. Insys created an opt-in form through which Subsys prescribers could authorize the IRC to contact insurers and request prior authorizations. The form listed patient information that insurers typically would request during the prior authorization ***20** process, such as whether the patient had tried certain medications. Particular items from the list could be checked off as applying to a specific case. This streamlined the process: a prescriber would sign and fax an opt-in form to the IRC; the IRC would call the insurer; and if the insurer needed additional information, the IRC would reach out to the sales representative who would then follow up with the prescriber. Insys encouraged physicians to use the IRC, knowing that if the prior authorization was approved, "[t]he sales rep would get paid, Insys would get paid, and the script would get paid." A pilot program achieved an approval

rate of 65-70 percent. As a result, Insys quickly transitioned the IRC out of its pilot phase and expanded it. Gurrieri was promoted to manager of reimbursement services in March of 2013.

The IRC proved to be a rousing success. It owed much of its success to the sales representatives. They interacted with the physicians and collected documentation requested by insurers during the prior-authorization process. A sales representative would often spend at least one day per week in a physician's office, reviewing patient files, assisting with authorizations, and completing the opt-in forms.

Another factor in the IRC's success was the hiring of "area business liaison[s]." These individuals were assigned to the physicians who prescribed Subsys in substantial volume. Each area business liaison worked in a physician's office processing authorizations, but was paid by Insys, thereby reducing the physician's overhead.

The third, and perhaps most impactful, factor in the IRC's success was Insys's decision to begin collecting data on each coverage decision. The IRC identified diagnoses and conditions that historically had prompted particular insurers to approve Subsys prescriptions. It proceeded to list these diagnoses and conditions on the opt-in form, and sales representatives encouraged physicians to employ them when seeking Subsys authorizations. For example, Gurrieri noted success using "the terminology 'history of cancer,' which means that they didn't have cancer at the time but they had a history of cancer." Once salespeople heard that use of that phrase could help obtain insurance approval, the IRC, "all of a sudden, saw more opt-ins having 'history of cancer' on them, which [led] to better approval ratings."

Management regularly discussed the IRC on the daily 8:30 a.m. calls. All updates about the IRC were communicated by Gurry during those calls. Although Insys had made great strides in upping its approval rate, Kapoor put constant pressure on the IRC to achieve a rate of 90 percent or higher. Striving to attain this benchmark, the IRC started to offer training sessions to sales representatives on "how to get the drug approved." Similarly, Gurry started to advise sales representatives about what diagnoses and conditions should be checked on the opt-in forms. He famously directed IRC employees "to ride the gray line," that is, to "work around the insurance companies" and "find ways around their questions." Following that direction, the IRC developed strategies to mislead insurers into granting prior authorizations for the use of Subsys. Some of these strategies included misleading the insurer into believing that the caller was calling from the physician's office rather than from the IRC; representing that a patient had cancer even if the available information reflected only a history of cancer; giving the ICD-9 diagnosis code as "338" to obscure the fact that the diagnosis was chronic pain (which uses code 338.29 or 338.4) and not cancer pain or neoplasm-related pain (which uses code 338.3); listing tried-and-failed medications that the ***21** patient had never used; and falsely stating that patients had dysphagia (difficulty swallowing).

Insys expected insurance companies to ask whether a physician had prescribed Subsys to treat "breakthrough cancer pain." Gurrieri instructed IRC staff to respond with "the spiel," which was pat phrasing designed to obfuscate the purpose of the prescription. The essence of the spiel was that "[t]he physician is aware that the medication is intended for the management of breakthrough pain in cancer patients, and the physician is treating the breakthrough pain." Phrased in this way, the expectation was that "the person on the other end of the phone would be misled to think the patient had cancer and approve the prior authorization."

The record makes manifest that the IRC, in practice, was more interested in transmitting information that would prompt favorable coverage determinations than it was in transmitting accurate information. Through the IRC, the insurers were fed a steady diet of deceptions, evasions, and half-truths.

Just as sales representatives were incentivized to push physicians to prescribe higher doses of Subsys, IRC staffers were incentivized to obtain insurance approvals. Goals known as "gates" were set weekly. If the gate was opened, the staff member (usually paid a low hourly wage) would receive a bonus.

The cocktail that Insys had mixed — including its revised marketing and sales strategies, its use of speaker programs as vehicles for bribes to physicians, its use of business liaisons, and its no-holds-barred tactics within the IRC — proved to be lucrative. Insys was able to go public only a year after introducing Subsys to the market. Within two years after the initial public offering, the company reached a market cap of over $3,000,000,000. And by the end of 2015, Insys's stock price had nearly quadrupled. Throughout, the defendants received substantial salaries, bonuses, and stock options.

But Insys's meteoric rise appeared too good to be true, and the company attracted unwanted attention. When federal authorities began probing the details of how Insys was marketing Subsys, the defendants' scheme began to unravel.

B

In the wake of the federal investigation, a federal grand jury sitting in the District of Massachusetts charged Kapoor, Lee, Simon, Gurry, and Rowan with conspiracy to distribute Subsys through a pattern of racketeering activity.[2] See id. The conspiracy was effected, the indictment said, through acts of mail fraud, see id. § 1341; honest-services mail fraud, see id. §§ 1341, 1346; wire fraud, see id. § 1343; honest-services wire fraud, see id. §§ 1343, 1346; and Controlled Substances Act (CSA) violations, see 21 U.S.C. § 841(a)(1). Following lengthy pretrial maneuvering, not relevant here, a fifty-one-day trial ensued.

The jury returned guilty verdicts against all of the defendants. In connection with those verdicts, the jury made a series of special findings that all the defendants were guilty of committing predicate acts of mail-fraud and wire-fraud, and that all the defendants (except Gurry) were guilty of agreeing to distribute a controlled substance and to commit honest-services mail fraud and honest-services wire fraud.

***22** The defendants moved for judgments of acquittal and/or new trials. See Fed. R. Crim. P. 29(a), 33(a). The district court granted in part the joint motion for judgments of acquittal filed by Kapoor, Lee, Simon, and Rowan, vacating as to them the adverse findings with respect to the CSA and honest-services predicates. See United States v. Gurry, 427 F. Supp. 3d 166, 222 (D. Mass. 2019). But with respect to all five defendants, the court rejected their challenges to the mail- and wire-fraud predicates, rejected their efforts to secure judgments of acquittal, and declined to order a new trial. See id. The court sentenced the defendants to terms of immurement of varying lengths and entered a series of restitution and forfeiture orders.[3] See United States v. Babich, No. 16-CR-10343, 2020 WL 1235536, at *10 (D. Mass. Mar. 13, 2020). All of the defendants appealed, and the government cross-appealed.

II

In this venue, we are faced with a kaleidoscopic array of claims. Kapoor, Lee, Simon, and Rowan contend that the evidence was insufficient to convict on the various mail- and wire-fraud predicates, assigning error to the district court's denial of their joint motion for judgment of acquittal. Relatedly, all defendants claim error in the admission of patient-harm testimony and prejudicial spillover arising out of the government's efforts to prove the CSA and honest-services predicates through that testimony.

[1] Some defendants raise individual claims as well. Lee challenges the district court's order denying her pretrial motion for severance, certain of the district court's evidentiary rulings, and one of the district court's jury instructions. Rowan claims that the government unlawfully withheld exculpatory material, and that the district court erred in denying his mid-trial motion to compel production of that material. The defendants, jointly and severally, offer a plethora of reasons as to why they — or some of them — ought to be granted new trials, including claims relating to allegedly conflicted counsel, weight of the evidence, and prosecutorial misconduct during closing arguments.[4] And although the defendants ***23** do not challenge their prison sentences, they do contest the district court's ancillary orders awarding restitution and forfeiture. The government cross-appeals, assigning error to the district court's order vacating the jury's findings adverse to Kapoor, Lee, Simon, and Rowan on the CSA and honest-services predicates. It also appeals the district court's calculation of forfeiture amounts with respect to Lee, Simon, Gurry, and Rowan.

We start our journey with the parties' competing claims concerning the sufficiency of the evidence with respect to the CSA and honest-services predicates. From there, we wend our way through the remaining sufficiency-of-the-evidence claims, the admissibility of the patient-harm testimony, questions pertaining to evidentiary spillover, and a myriad of other claims of trial error. Our journey ends with an appraisal of the parties' opposing views regarding issues related to restitution and forfeiture.

III

[2] Under RICO, it is a crime "for any person employed by or associated with any enterprise engaged in, or the

activities of which affect, interstate or foreign commerce," to conspire "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." See 18 U.S.C. § 1962(c), (d). A pattern of racketeering activity requires at least two predicate racketeering acts within ten years of each other. See id. § 1961(5). A defendant need not have "agree[d] to commit or facilitate each and every part of the substantive offense" in order to be found guilty. Salinas v. United States, 522 U.S. 52, 63, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). Nor need such a defendant be capable of committing the substantive offense. See id. Instead, "[a]ll the government need show is that the defendant agreed to facilitate a scheme in which a conspirator would commit at least two predicate acts, if the substantive crime [had] occurred." United States v. Rodríguez-Torres, 939 F.3d 16, 29 (1st Cir. 2019); see Salinas, 522 U.S. at 65, 118 S.Ct. 469 ("A [RICO] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor.").

In this case, the critical questions involve whether — as to each defendant — the record sufficiently supports the jury's verdict that he or she, directly or through another conspirator, committed the charged offenses. While the jury answered these questions in the affirmative (except as to Gurry, who was found guilty only with respect to the mail- and wire-fraud predicates), the district court found the government's proof of the CSA and honest-services predicates wanting. The court ruled that, although "it would not have been unreasonable for the jury to infer that the nefarious tacit understanding the Government describes existed," it "would have been equally reasonable for the jury to infer from the same evidence that no such tacit understanding existed." Gurry, 427 F. Supp. 3d at 186. Because the proof "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," the court vacated the jury findings regarding the CSA and honest-services predicates vis-à-vis Kapoor, Lee, Simon, and Rowan. Id. (quoting United States v. Burgos, 703 F.3d 1, 10 (1st Cir. 2012)).

[3] **[4]** **[5]** The government appeals from this ruling. Our task is familiar. We afford de novo review to the district court's rulings on the defendants' joint motion for judgment of acquittal. See ***24** United States v. Kilmartin, 944 F.3d 315, 325 (1st Cir. 2019); United States v. Olbres, 61 F.3d 967, 970 (1st Cir. 1995). "Where, as here, the defendant[s] challenge[ ] the sufficiency of the evidence, all of the proof 'must be perused from the government's perspective.' " Kilmartin, 944 F.3d at 325 (quoting United States v. Gomez, 255 F.3d 31, 35 (1st Cir. 2001)). This lens demands that "we scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt." Olbres, 61 F.3d at 970 (quoting United States v. Taylor, 54 F.3d 967, 974 (1st Cir. 1995)).

[6] **[7]** **[8]** In conducting this tamisage, "we must honor the jury's evaluative choice among plausible, albeit competing, inferences." United States v. Rodríguez-Vélez, 597 F.3d 32, 40 (1st Cir. 2010). When all is said and done, "[t]he court need not be convinced that the verdict is correct; it need only be satisfied that the verdict is supported by the record." Kilmartin, 944 F.3d at 325. Consequently, a "verdict must stand unless the evidence is so scant that a rational factfinder could not conclude that the government proved all the essential elements of the charged crime beyond a reasonable doubt." Rodríguez-Vélez, 597 F.3d at 39 (emphasis in original).

[9] **[10]** Our next chore is to elaborate the elements of the CSA predicates. The CSA makes it a crime "for any person knowingly or intentionally ... to manufacture, distribute, or dispense ... a controlled substance." 21 U.S.C. § 841(a)(1). Even so, licensed health-care practitioners (typically, physicians) registered under the CSA are authorized to dispense controlled substances. See id. § 822(b). This authorization, though, is not absolute. Such practitioners face criminal liability "when their activities fall outside the usual course of professional practice." United States v. Moore, 423 U.S. 122, 124, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975); see United States v. Limberopoulos, 26 F.3d 245, 249 (1st Cir. 1994) ("[T]he statute applies to a pharmacist's (or physician's) drug-dispensing activities so long as they fall outside the usual course of professional practice."). Because a RICO conspiracy conviction requires proof that defendants "specifically intended that some conspirator commit each element of" the predicate racketeering acts, Ocasio v. United States, 578 U.S. 282, 136 S. Ct. 1423, 1432, 194 L.Ed.2d 520 (2016) (emphasis in original), the government

had to prove that the defendants specifically intended that a licensed practitioner would prescribe Subsys "with no legitimate medical purpose," United States v. Volkman, 797 F.3d 377, 391 (6th Cir. 2015); see United States v. Feingold, 454 F.3d 1001, 1008 (9th Cir. 2006).

Against this backdrop, we canvass the proof as to Kapoor, Lee, Simon, and Rowan.

A

[11] Through his motion for judgment of acquittal, Kapoor challenged, inter alia, the jury's finding that he was guilty of conspiracy to commit racketeering activities through a pattern of racketeering acts that included the CSA and honest-services predicates. As we have said, the district court set aside the jury's findings with respect to those predicates. The question is one of evidentiary sufficiency.

The record is replete with support for the proposition that Kapoor intended physicians to write medically illegitimate prescriptions. Kapoor sought out pill mill doctors (that is, doctors who were notorious for their readiness to prescribe drugs regardless of medical necessity). See, e.g., ***25** United States v. Iriele, 977 F.3d 1155, 1161 (11th Cir. 2020) (describing as "pill mill" a clinic where people "could get prescriptions for their controlled substances of choice with few, if any, questions asked"). For instance, Burlakoff testified that, to increase sales, Kapoor wanted him to do "[w]hatever it took with whomever [they] called on, including pill mill doctors."

Perhaps the best illustration of Kapoor's intent is found in the evidence concerning his attitude toward Dr. Madison. Kapoor encouraged dealings with Dr. Madison despite having reviewed an email in which a sales representative wrote that "Dr. Madison runs a very shady pill mill and only accepts cash. ... He basically just shows up to sign his name on the prescription pad, if he shows up at all." Kapoor also knew that another sales representative had observed a "shady setup" in Dr. Madison's office with "many patients ... going in and out of there ... just seeking medication." As one expert witness put it, this prescribing behavior was inconsistent with a doctor's duty to carry out "those things that are necessary to reasonably diagnose the problem," such as "history taking, physical examination, and the obtaining and evaluation of diagnostic studies."

Although on unmistakable notice of the kind of operation that Dr. Madison appeared to be running, Kapoor pursued him. Babich testified that Kapoor "wanted [Dr. Madison] to write the drug" and awarded him speaker programs (and, thus, kickbacks) "as much as once a week." This was consistent both with Babich's description of Kapoor's avowed "philosophy" and with other evidence reflecting Kapoor's appetite for whales. The jury reasonably could have found that Kapoor's decision to continue courting and compensating Dr. Madison, notwithstanding his knowledge that the doctor was running a notorious pill mill, was proof of at least a tacit understanding of Kapoor's culpable role in the distribution scheme. See United States v. King, 898 F.3d 797, 809 (8th Cir. 2018).

Kapoor complains that this is a bridge too far. He laments that he received hundreds of emails a day, that he was busy with other business pursuits and charitable endeavors, and that Dr. Madison is only one of 13 doctors discussed in the four-page email. It follows, Kapoor suggests, that a reasonable jury could not infer that he read the sales representative's description of Dr. Madison.

This suggestion is little more than whistling past the graveyard. It conveniently overlooks that the jury heard evidence that Kapoor demanded information on "every [Subsys] script that was written" and "every doctor that wrote it." He demanded spreadsheets to parse doctor-level data and sought to identify "whales" — doctors who understood that, in exchange for speaker-program payments, they would prescribe "a significant amount of Subsys prescriptions."

What is more, Babich testified that Kapoor expressed great interest in these kinds of sales reports. Kapoor "want[ed] every single rep every Friday to e-mail [Babich] a list of all their top physicians and what happened with those top physicians that week." An assistant "print[ed] these out" and put "them on [Kapoor's] desk for Monday morning, so he c[ould] review" them. Given that level of attention to detail vis-à-vis prescribers, the inference that Kapoor read the email about Dr. Madison seems compelling.

Last — but surely not least — Babich confirmed that he gave the four-page email directly to Kapoor. He also testified that — several months after he had forwarded that email about Dr. Madison to Kapoor — the same sales representative again reiterated that Dr. Madison operated a pill mill and added that Dr. Madison faced possible legal action. Babich described

***26** this matter as "a serious issue" and testified that he personally reviewed this information with Kapoor. Kapoor responded that Dr. Madison "still has a medical license. I don't want him taken off the call list" for speaker programs.

We need not tarry. The evidence, taken in the light most hospitable to the verdict, plainly supports the inference that Kapoor knew of Dr. Madison's illegitimate prescribing habits yet took steps to ensure that he would continue prescribing Subsys. Indeed, the evidence warrants an inference that Kapoor sought to recruit Dr. Madison as a speaker (that is, as a kickback recipient) precisely because of these habits. Such an inference is consistent with other evidence that pill mill doctors were prized by Kapoor: he tracked physicians' prescription patterns, gave favorable treatment to the doctors who prescribed Subsys most profligately, and — according to Burlakoff — did "whatever it took" to increase Subsys sales. As Burlakoff put it, Kapoor's message to the sales force was that "pill mills for [Insys] meant dollar signs."

The evidence also showed that Kapoor led Insys's effort to influence physicians' prescription decisions through "effective dose" messaging. The FDA-approved label stated that "[t]he initial dose of Subsys to treat episodes of breakthrough cancer pain is always 100 micrograms." Doctors were supposed to "look at one patient at a time" and "titrate one patient at a time" to the dose of the drug that achieves "the desired effect." Noting that patients on higher doses were more likely to refill their Subsys prescriptions, Kapoor sought to ride roughshod over this regime and "move patients to higher doses." His mantra was to "push the dose." To that end, he incorporated into the speaker program kickbacks for dosage increases — the greater the increase, the greater the payout. Predictably, Kapoor's campaign to increase dosages resulted in the sales force negotiating dosage agreements with doctors. And Insys closely monitored these agreements: for example, when Dr. Somerville's dosage numbers appeared to be low, a sales representative was instructed to "[d]rill into [the medical assistant's] head that every refill has to be 180 to 240 [micrograms]" because "Dr. Somerville agreed to do this."

To sum up, the evidence plainly supports a finding that Kapoor intended practitioners to prescribe Subsys as much as possible, even when there was no medical necessity for the drug or the dosage prescribed. His "effective dose" campaign was designed to dissuade doctors from prescribing medically appropriate lower dosages and to accelerate dose titration. A reasonable jury could infer that, by taking these actions, Kapoor pushed physicians — in Burlakoff's words — to "initiate a new habit" that would transform patients into repeat customers, quite apart from medical necessity. See United States v. Clough, 978 F.3d 810, 820-21 (1st Cir. 2020) (concluding that giving "opioid-dependent patients high dosages of this highly-addictive fentanyl drug, even when patients had no problems with their existing regimen" supported reasonable inference that defendant's "behavior was not reminiscent of a physician assistant prescribing based on need, but rather [that] of a drug pusher"). And having thrown medical necessity to the wind, Kapoor's "push the dose" message effectively directed Insys salespersons, who were not health-care professionals, to enforce mandatory ranges of dosages. Following Kapoor's lead, they shaped doctors' prescription decisions without regard to any individual patient information by getting the doctors to commit to meeting prescription-quantity numbers on a weekly basis. Jurors are allowed to use common sense and — surveying this unattractive tableau — a reasonable ***27** jury could have inferred that Kapoor, in "push[ing] the dose," intended doctors to increase doses of Subsys regardless of who the patient was or what the patient's medical needs might be. See United States v. Guzman, 571 F. App'x 356, 363 (6th Cir. 2014) ("[T]he jury could reasonably infer the requisite agreement to distribute controlled substances, as well as knowledge and participation" from "evidence showing that [defendants] tried to modify the prescribing practices of another nurse practitioner," including by directing a "nurse to prescribe short-acting rather than long-acting medications and to prescribe prednisone for all customers.").

So, too, a reasonable jury could conclude that when drug wholesalers reported suspicious Subsys ordering patterns to the federal Drug Enforcement Administration (DEA), Kapoor sought to tamp down any suspicions so that Insys could continue its modus operandi while concealing it from outside scrutiny. Wholesalers serve as middlemen between pharmaceutical manufacturers and pharmacies and they impose quantity limits on the amount of controlled substances that a pharmacy can receive each month. When wholesalers notice suspicious ordering patterns, they are obligated to notify the DEA. During the relevant time frame, several pharmacies that served Insys speakers overshot their monthly quantity limits. As a result, drug wholesalers froze Subsys shipments to those pharmacies.

Insys executives knew that the reason for the freeze was that wholesalers' software algorithms to monitor order patterns had flagged Subsys orders as "potentially suspicious." In an

email to Kapoor, Christopher Homrich, an Insys executive, told him that it was "very likely" that the DEA software would flag future orders from those pharmacies as "suspicious" due to the "material" increase in projected Subsys sales. Such freezes would be inimical to Insys's strategic aim of getting doctors to prescribe Subsys in heavy doses and without regard to medical necessity. Because "Kapoor wanted to keep doing business" with the physicians (particularly the whales) associated with the targeted pharmacies, he demanded that Insys executives "find an alternative to make sure one of our top customers has the product."

To accomplish this end run around the DEA and to avoid the imminent freezes, Kapoor decided to explore a direct-ship option. Such an option would have Insys ship Subsys straight to the pharmacy associated with the prescribing doctor. Insys's distribution manager (Dion Reimer) advised against this setup "at least a dozen times." Given that Subsys was a controlled substance, "[t]rying to circumvent any of the systems that are out there could raise red flags." Kapoor disregarded Reimer's protests and authorized sales representatives to negotiate supply commitments and direct-ship agreements with individual doctors. At his direction, Insys proceeded down this crooked path. [5]

Kapoor insists that the direct-ship agreements were made only to "maximize sales of Subsys" and that he was "not trying to evade DEA rules." But something that prowls like a tiger and growls like a tiger usually is a tiger — and Reimer's assessment of the direct-ship option as a means of circumventing DEA guidelines seems spot-on.

***28** **[12]** In arguing to the contrary, Kapoor points to Babich's testimony recounting how Insys retained "outside attorneys who have expertise with the DEA rules" to ensure the direct-ship arrangements were done "the right way." Babich also testified, though, that Insys "did not tell the lawyers who drafted the agreement[s] that [Insys was] providing kickbacks to the physicians" associated with these pharmacies. According to Babich, that omission was deliberate: the company feared that the bribes contravened federal anti-kickback law. Under certain circumstances, a party's retention of counsel may (as Kapoor suggests) ground an inference of benevolent motive. See United States v. Powers, 702 F.3d 1, 9 (1st Cir. 2012). But viewing what happened here in context, a jury instead could reasonably infer that direct-ship agreements were evidence of Kapoor's efforts to have doctors continue to prescribe Subsys illegitimately. See id. (explaining that advice-of-counsel defense "is not available to one who omits to disclose material information to advisors" (quoting Janeiro v. Urological Surgery Prof. Ass'n, 457 F.3d 130, 140 (1st Cir. 2006))).

Taking the evidence in the light most favorable to the verdict, a jury reasonably could conclude — as this jury did — that Kapoor relentlessly pursued pill mill doctors, pressured health-care practitioners to increase dosages regardless of medical need (through financial incentives and upfront prescription commitments), knew of and encouraged certain physicians' illegitimate prescribing habits, and — facing regulatory scrutiny for the burgeoning sales generated through these tactics — tried to hide the true state of affairs by cutting out the middleman. Cf. Volkman, 797 F.3d at 391 (holding that evidence that defendants "were aware of the reality that the prescriptions from their clinic had no legitimate medical purpose" and that "[i]nstead of rectifying the ... issues with [the] prescriptions, [defendants] exacerbated the problem by ... cutting out the middleman" sufficed "for a jury to find that [defendants] executed a plan to unlawfully distribute controlled substances with no legitimate medical purpose"). Consequently, we are satisfied that the adverse finding against Kapoor as to the CSA predicates was supported by the record and, therefore, should have been allowed to stand.

[13] **[14]** This holding also dictates that we reinstate the jury's verdict against Kapoor as to the honest-services predicates. Federal law prohibits a "scheme or artifice to defraud," 18 U.S.C. §§ 1341, 1343, including "a scheme or artifice to deprive another of the intangible right of honest services," id. § 1346. A person contravenes this provision if, "in violation of a fiduciary duty, [he] participate[s] in bribery or kickback schemes." Skilling v. United States, 561 U.S. 358, 407, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). Kapoor disputes the "fiduciary duty" element and contends that the government failed to prove that he specifically intended health-care professionals to write medically illegitimate Subsys prescriptions.

As the district court noted, the "overlap" between the CSA and honest-services predicates is striking. Gurry, 427 F. Supp. 3d at 187-88. Just as the jury instructions for the CSA predicates required proof beyond a reasonable doubt that a particular defendant agreed that a health-care practitioner would prescribe Subsys outside the usual course of medical

practice, the honest-services predicates required evidence that "the Defendant agreed and specifically intended that health-care practitioners would breach their fiduciary duty to their patients by prescribing Subsys or a particular dose of Subsys outside the usual course of professional practice and not for ***29** a legitimate purpose." Accordingly, the evidence supporting the intent element of the CSA predicates was "coextensive" with the evidence supporting the fiduciary duty element of the honest-services predicates. Id. at 188.

That is game, set, and match. Because we already have concluded that the evidence supports the jury's finding with respect to Kapoor's guilt regarding the CSA predicates, we must perforce conclude that the evidence supports the findings with respect to Kapoor's guilt regarding the honest-services predicates. It follows that we must reverse the district court's partial grant of the Rule 29(c) motion in favor of Kapoor and reinstate the jury's findings as to him insofar as they pertain to both the CSA and honest-services predicates.

B

[15] The district court set aside the jury's finding that Lee was guilty of conspiracy to commit racketeering activities through a pattern of racketeering acts that included the CSA and honest-services predicates. The jury heard evidence, though, that Lee supervised the sales representative who reported that Dr. Madison had a "shady setup" and that patients at Dr. Madison's office "were just seeking medication." When the sales representative spoke to Lee about her concerns with Dr. Madison's potential law-enforcement issues, Lee replied that "[i]t was okay." Like Kapoor, she appeared unfazed by Dr. Madison's potential criminal liability and "ensured that Dr. Madison understood that he would speak ... as much as [Insys] can utilize him" — which meant, of course, that Dr. Madison would continue to receive kickbacks. The only condition was that "he would prescribe a significant amount of Subsys, more and more as time went on, and increas[e] the dose." This condition had nothing to do with medical necessity.

Lee's hot pursuit of Dr. Madison supports the conclusion that getting doctors to write illegitimate prescriptions was not merely an unforeseeable risk of her work for Insys but, rather, an integral part of the business model that she assiduously followed while doing that work. As Babich explained, Dr. Madison was made a speaker notwithstanding that his clinic was a pill mill "[b]ecause he was the biggest writer of the type of product in the Chicago land area, and getting that revenue was very important to [Insys] as a company." A jury could reasonably infer that Insys knowingly counted on revenue from illegitimate prescriptions and that Lee (as a regional sales manager who benefitted handsomely from greater sales) intended to keep that revenue stream flowing even if it meant prescribing Subsys to patients who did not legitimately need it.

Other evidence corroborated the conclusion that Lee intended prescribing doctors to expand the company's customer base to people who did not qualify medically to use Subsys. The regional managers were instructed by Simon "to get a specific number of scripts per week that is mutually agreed to and an outline of how [the representatives who reported to them] will hold [them]selves and [their] customers to this plan." In other words, salespeople were to negotiate prescription quotas with the doctors in their territories. These quotas had no apparent relationship to either medical necessity or patient needs, and the jury had an ample basis for inferring that Lee followed Simon's instructions.

Here, too, Lee's experience with Dr. Madison exemplifies the point. As a speaker, Dr. Madison was expected to maintain or exceed previous prescription-writing numbers. When Dr. Madison fell short, Lee would order a sales representative "to ***30** continue to put pressure on [Dr. Madison]" and tell the doctor "that if he's going to keep doing these programs, he needs to keep his writing up." There was no medically informed rationale for Dr. Madison's quota, and his agreement to abide by such a quota is a surefire sign that Lee knew that, under that agreement, Dr. Madison would be prescribing Subsys illegitimately. Cf. United States v. Hughes, 895 F.2d 1135, 1142 (6th Cir. 1990) (reaching similar conclusion regarding quota for blood tests). Her incessant enforcement of the quota therefore is evidence that she intended for Dr. Madison to write those illegitimate prescriptions. The way that Lee did business with Dr. Madison is emblematic of her intent to have health-care practitioners forsake medical necessity for financial gain.

We conclude that the adverse finding against Lee as to the CSA predicates was supported by the record and, therefore, should have been allowed to stand. And as with Kapoor, see supra Part III(A), this holding dictates that we reinstate the jury's findings as to the honest-services predicates. It follows that we must reverse the district court's partial grant of the Rule 29(c) motion in favor of Lee as it pertains to both the CSA and honest-services predicates.

C

[16] The district court set aside the jury's finding that Simon was guilty of conspiracy to commit racketeering activities through a pattern of racketeering acts that included the CSA and honest-services predicates. Once again, we disagree. On this record, a reasonable jury could conclude that Simon (also a regional manager) intended health-care providers to prescribe Subsys outside the usual course of professional practice.

Simon encouraged the sales force to agree with each practitioner on a "specific number of scripts per week" — a quota — and to "push the dose." Relatedly, sales representatives under his supervision pressured health-care practitioners to write medically illegitimate prescriptions. For example, nurse Heather Alfonso agreed with her sales representative "to do one to two scripts per week." She later admitted that she "had come to rely on th[e] extra money" and had "broke[n her] duty to patients." So, too, Dr. Awerbuch was informed, at Simon's behest, that "the average of his prescriptions was very low, within the one to 200 microgram range." As he recalled it, he then "started prescribing [Subsys] to patients who didn't really even need to be on it just to increase [his] numbers."

A reasonable jury could infer from the evidence that illegitimate prescriptions were not an unintended consequence of Simon's sales techniques but, rather, were a goal. With an eye on revenue, Simon specifically sought to have practitioners prescribe Subsys to patients who did not need it. It was Simon, for instance, who endeavored to enforce a minimum-dosage agreement with Dr. Somerville. As a result, Dr. Somerville entered into a Faustian bargain with Insys that required, in Simon's own words, "every refill" to be for at least 180 micrograms. In facilitating this arrangement, Simon not only knew that prescriptions would thereafter be untethered from patients' medical histories but also solicited precisely that outcome. As one defense expert explained, a doctor "decide[s]" whether the medication is warranted "at the moment while [she's] seeing the patient," not "a week in advance." Accordingly, a reasonable jury could find that Simon intended doctors to prescribe Subsys outside the course of professional practice because his quota arrangements required them to commit both to specific ***31** numbers of Subsys prescriptions and to specific dosages before they had a chance either to examine their patients or to assess patients' medical needs. See Hughes, 895 F.2d at 1142; United States v. Mahar, 801 F.2d 1477, 1487 (6th Cir. 1986) ("[T]hat patients were regularly sold controlled substances ... selected by non-physician[s] ... would further support a finding that controlled substances were issued outside the usual course of medical practice and for no legitimate medical purpose.").

We conclude that the adverse finding against Simon as to the CSA predicates was supported by the record and, therefore, should have been allowed to stand. And as with Kapoor, see supra Part III(A), this holding dictates that we reinstate the jury's findings as to the honest-services predicates. It follows that we must reverse the district court's partial grant of the Rule 29(c) motion in favor of Simon as it pertains to both the CSA and honest-services predicates.

D

[17] As with Kapoor, Lee, and Simon, the district court set aside the jury's finding that Rowan was guilty of conspiracy to commit racketeering activities through a pattern of racketeering acts that included the CSA and honest-services predicates. Here, too, the evidence supports a finding that Rowan intended doctors to write medically illegitimate prescriptions. Rowan worked hard to develop quota agreements. For example, he was not shy about communicating his prescription expectations to Dr. Couch. According to one witness, Rowan gave Dr. Couch "a hard time about the fact he hadn't been prescribing enough" and threatened to "take[ ] away" the speaking programs (and, thus, the kickback payments) if Dr. Couch "wasn't prescribing enough." Rowan's aggressive enforcement of prescription quotas is evidence that he knew that he was soliciting prescriptions that were not medically necessary. See Hughes, 895 F.2d at 1135. Given that knowledge, the kickbacks that Rowan was arranging constituted incentives for prescribers to prescribe Subsys illicitly. See id.

The jury also heard evidence that Rowan had reason to believe that successful performance of his job depended on promoting illicit prescription-writing. His dealings with Dr. Ruan illustrate this point. Rowan spoke directly with Dr. Ruan to make clear that Insys would "pay [Dr. Ruan] as much as we possibly and humanly can in exchange to write as much Subsys as [Dr. Ruan] humanly can." In the same vein, the

government introduced evidence that Rowan understood that Dr. Ruan would find a way to prescribe more as long as the dollars kept flowing. The facts on the ground confirmed Rowan's understanding: Dr. Ruan ultimately wrote enough Subsys prescriptions to boost Rowan into a position as Insys's top sales representative anywhere in the country. Moreover, Rowan's soaring sales figures exemplified the success of the kickback scheme, and he was repeatedly mentioned in the 8:30 a.m. management calls as a poster child for the proposition that "if you give these [doctors] programs, they're going to write the drug for you."

There was more. After the DEA froze opioid shipments to the pharmacy that principally filled Dr. Ruan's prescriptions, Rowan learned that the pharmacy had access to an "unlimited supply" of a competing opioid. He learned as well that the pharmacy wanted not only a similar arrangement for Subsys in order to circumvent "limits on [Schedule II drugs] in place by [the] current wholesaler" but also "to ensure uninterrupted delivery to patients of Dr. [Ruan]." Although by then Rowan either knew or was willfully ignorant of ***32** Dr. Ruan's pill mill tendencies, he nonetheless became involved in negotiating a direct-ship agreement for Dr. Ruan. He (along with Kapoor and Babich) attended the dinner meeting with Dr. Ruan at which the direct-ship agreement was finalized.

Taking this proof in the light most favorable to the verdict, a reasonable jury could conclude that Rowan intended Drs. Couch and Ruan to prescribe Subsys outside the accepted course of medical practice. See Volkman, 797 F.3d at 391. Because the record supports a determination that Rowan agreed to commit CSA violations, the jury's finding to that effect should not have been vacated. See Kilmartin, 944 F.3d at 325. And as with Kapoor, see supra Part III(A), this holding dictates that we reinstate the jury's findings as to the honest-services predicates. It follows that we must reverse the district court's partial grant of the Rule 29(c) motion in favor of Rowan as it pertains to both the CSA and honest-services predicates.

E

We add a coda. As said, the district court rested its vacation of certain predicates on the so-called equipoise principle, holding that because the proof "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," Gurry, 427 F. Supp. 3d at 186 (quoting Burgos, 703 F.3d at 10), those predicate-act findings should be set aside. We conclude that the equipoise principle was inapposite: the evidence, viewed in the requisite light, was not so evenly balanced. We summarize our reasoning.

[18] **[19]** We start with common ground: we agree with the district court that the equipoise principle is entrenched in this circuit's jurisprudence. When "the 'evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged,' this court must reverse the conviction." United States v. Flores-Rivera, 56 F.3d 319, 323 (1st Cir. 1995) (quoting United States v. Sanchez, 961 F.2d 1169, 1173 (5th Cir. 1992)). But "this equal-evidence rule takes hold only after [the inquiring court] ha[s] drawn all reasonable inferences in favor of the verdict." Magraw v. Roden, 743 F.3d 1, 5 (1st Cir. 2014) (emphasis in original). Here — as we already have explained — the evidence, viewed in the light most favorable to the jury verdicts, clearly favors a finding that the defendants conspired to distribute Subsys even when the drug served no legitimate medical purpose. See supra Parts III(A)-(D). "When the[se] pieces of evidence are layered, with inferences taken in the government's favor, this is not a case in equipoise." United States v. Ortiz, 447 F.3d 28, 34 (1st Cir. 2006). Rather, it is a case in which a jury could find, beyond a reasonable doubt, that the four affected defendants (Kapoor, Lee, Simon, and Rowan) conspired with health-care practitioners to write Subsys prescriptions outside the course of accepted medical practice and without any medical justification. We conclude, therefore, that the equipoise principle simply did not apply. To the contrary, this is a case in which the jury supportably found that the government had proved the CSA and honest-services predicates beyond a reasonable doubt. It follows, then, that the district court erred in vacating those findings.

IV

The jury found all five defendants guilty with respect to the mail- and wire-fraud predicates. In their joint Rule 29(c) motion, four of the defendants (Kapoor, Lee, Simon, and Rowan) challenge the sufficiency of the evidence underlying these findings. ***33** [6] As the district court saw it, however, the evidence supported those portions of the jury's findings and, thus, left them intact. The four named defendants appeal that ruling.

[20] The mail-fraud statute prohibits use of the mails in connection with a "scheme or artifice to defraud." 18 U.S.C. § 1341. To establish the commission of this offense, the government must show a scheme to defraud using false pretenses, the defendant's knowing and willing participation in the scheme with the intent to defraud, and the use of the mails in furtherance of that scheme. See United States v. Soto, 799 F.3d 68, 92 (1st Cir. 2015).

[21] The mail- and wire-fraud offenses share common elements. They differ only in that, to prove a violation of the wire-fraud statute, the government must establish the use of wires (rather than the use of the mails) in furtherance of the alleged scheme. See United States v. Arif, 897 F.3d 1, 9 (1st Cir. 2018).

A

We start with Kapoor's claims of evidentiary insufficiency with respect to the mail-fraud predicate. We can make short shrift of them.

1

[22] Kapoor disputes the sufficiency of the evidence in connection with the mail-fraud predicate only with respect to the third element: whether the use of the mails furthered the alleged scheme. To this end, he argues that the mailed bribes to practitioners did not further the misrepresentations to insurers regarding patients' conditions. We do not agree.

[23] **[24]** The "in furtherance" requirement is to be read broadly. United States v. Hebshie, 549 F.3d 30, 36 (1st Cir. 2008). "[T]he use of the mails need not be an essential element of the scheme." Schmuck v. United States, 489 U.S. 705, 710, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989). To prove this element, the government need only show that the mailing was "incident to an essential part of the scheme," id. at 711, 109 S.Ct. 1443 (quoting Pereira v. United States, 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435 (1954)), or "a step in [the] plot," id. (quoting Badders v. United States, 240 U.S. 391, 394, 36 S.Ct. 367, 60 L.Ed. 706 (1916)). We therefore parse the record to determine whether the evidence shows some "connection or relationship" between the mailing and the fraudulent scheme. Hebshie, 549 F.3d at 36 (quoting United States v. Pimental, 380 F.3d 575, 587 n.5 (1st Cir. 2004)).

We find that the record shows a sufficient connection. The mailed bribes generated prescriptions, which were fraudulently processed through the IRC's authorization scheme. And in order to facilitate the fraudulent processing of prior-authorization requests, Insys offered business liaisons to whales (prolific prescribers) who received bribes through the mail. Such bribe recipients included Drs. Awerbuch, Chun, and Ahmad.

[25] "The relevant question at all times is whether the mailing is part of the execution of the scheme." Schmuck, 489 U.S. at 715, 109 S.Ct. 1443. Because the scheme alleged here involved mailing bribes for writing medically illegitimate Subsys prescriptions ***34** and then obtaining insurance payments for those prescriptions, we conclude that a jury reasonably could answer this question in the affirmative.

Kapoor resists this conclusion. He argues that because the IRC processed all the prescriptions that it received (regardless of whether the prescribing doctor was bribed), the scheme to defraud insurers did not "depend" on the bribes mailed to doctors. In support, Kapoor notes that the bribed doctors were only a "small fraction" of the doctors whose prescriptions were fraudulently processed through the IRC.

[26] This argument misses the mark: the government need not show that the fraudulent scheme would have petered out without the bribes. The mail-fraud statute does "not require[ ] a 'but-for' link between a mailing and the fraudulent scheme." Hebshie, 549 F.3d at 36 (quoting Pimental, 380 F.3d at 587). It requires only a connection between the two, and the record, read in the light most favorable to the government, supports an inference that the bribes, in increasing the volume of prescriptions, facilitated the scheme. No more is exigible to uphold the jury's mail-fraud finding.

2

[27] As a fallback, Kapoor essays a constructive amendment claim. In mounting this claim, he says that the mail-fraud scheme described by the district court differed from that charged in the indictment. The government, he adds, failed to adduce sufficient proof of the latter scheme.

Specifically, he calls our attention to paragraph 31 of the indictment, in which the grand jury alleged that "[h]ad the insurers known that the defendants gave bribes and kickbacks to the targeted practitioners, the insurers would not have authorized payment for Subsys." Because the government did not show that Kapoor "intended for the IRC to affirmatively misrepresent" Insys's bribes to practitioners, his thesis runs, it failed to substantiate the scheme it alleged. Although Kapoor gets high marks for ingenuity, his claim fails the constructive-amendment test.

[28] **[29]** "A constructive amendment 'occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon them.' " United States v. Dunn, 758 F.2d 30, 35 (1st Cir. 1985) (quoting Gaither v. United States, 413 F.2d 1061, 1071-72 (D.C. Cir. 1969)). "[O]ur practice has been to look to statutory elements in response to claims by defendants that 'the crime charged' has been changed." United States v. Mubayyid, 658 F.3d 35, 51 (1st Cir. 2011). Therefore, "[s]o long as the statutory violation remains the same, the jury can convict even if the facts found are somewhat different than those charged." Id. (quoting United States v. Twitty, 72 F.3d 228, 231 (1st Cir. 1995)); see United States v. Dowdell, 595 F.3d 50, 68 (1st Cir. 2010).

In this case, the putative amendment occurred after trial (when the court denied the defendants' joint Rule 29(c) motion). Thus, Kapoor had no realistic opportunity to assert his constructive amendment claim below. Consequently, this claim of error engenders de novo review. See United States v. Rodriguez, 919 F.3d 629, 635 (1st Cir. 2019); United States v. Hernández, 490 F.3d 81, 83 (1st Cir. 2007).

[30] We discern nothing resembling a constructive amendment here. The crime charged was not altered because the language in paragraph 31 did not implicate the statutory elements of the RICO conspiracy. To prove a RICO conspiracy, "it is enough to prove that a defendant agreed with one or more others that two predicate ***35** offenses be committed." Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1562 (1st Cir. 1994) (emphasis in original). The predicate offenses themselves, however, are not elements required to be proved. See id. Since Kapoor was not "convicted of a crime other than that charged in the indictment," no constructive amendment occurred.[7] United States v. Day, 700 F.3d 713, 720 (4th Cir. 2012) (quoting United States v. Randall, 171 F.3d 195, 203 (4th Cir. 1999)).

[31] "[T]he rule against constructive amendments ... is focused not on particular theories of liability but on the offenses charged in an indictment." Id. at 720 (emphasis in original). Although the district court's order "eliminated a theory of liability" alleged in paragraph 31, United States v. Celestin, 612 F.3d 14, 25 (1st Cir. 2010), "the statutory violation remain[ed] the same," Mubayyid, 658 F.3d at 51 (quoting Twitty, 72 F.3d at 231). For that reason, the district court's order did not constructively amend the indictment in any forbidden way. See Celestin, 612 F.3d at 25; United States v. Miller, 471 U.S. 130, 145, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985); cf. United States v. Mueffelman, 470 F.3d 33, 38 (1st Cir. 2006) (distinguishing forbidden constructive amendment from one alleging "a scheme similar to but somewhat narrower in breadth and malignity than that charged in the indictment").

B

[32] Lee's challenge to the sufficiency of the evidence underlying the mail- and wire-fraud predicates need not detain us. We previously have limned the elements of those offenses. Lee disputes only the second element of each offense — her knowing and willing participation in the scheme with the intent to defraud — and claims that the government failed to show that she had the requisite knowledge of, or involvement in, the scheme. The record belies her protestations.

Wire transmission of authorization requests and approvals was essential to the operation of the IRC, and the government's proof showed that Lee had both extensive interactions with the IRC and a working knowledge of the approval process. A few examples will suffice to hammer home the point:

- During the IRC's pilot phase, Gurrieri communicated directly with Lee about Dr. Awerbuch's prescriptions.

Lee received a list of over one hundred prescriptions that the IRC was attempting to process on Dr. Awerbuch's behalf.

- Lee supervised the representative assigned to Dr. Awerbuch, who helped process the authorization requests; she also arranged the hiring of Dr. Awerbuch's niece as a business liaison to "fill out the forms," "get the prescriptions pushed through," and "work[ ] with th[e] IRC."

- Lee was "very close" to an IRC authorization specialist and lobbied for her promotion.

- Lee tried very hard to maximize the authorization rate because she understood that Insys got paid (and her ***36** own compensation increased) only if insurers approved the drug.

We add, moreover, that the record supports an inference that Lee pushed for prior authorizations with knowledge that the information that the IRC relayed to insurers was inaccurate. She worked closely with Drs. Madison and Awerbuch, who were two of the most prolific prescribers of Subsys in the country. The record likewise supports an inference that Lee knew that these prescribers were writing medically illegitimate prescriptions. Because these prescriptions would not get insurance approval organically, sales representatives had to be "coach[ed]" on the misleading diagnosis codes to be provided to insurers, and Lee was aware of this coaching because she was copied in emails that discussed it.

On this record, a jury unquestionably could conclude that Lee knew that the IRC was processing medically illegitimate prescriptions by deliberately providing insurers misleading information. The jury also could conclude that Lee agreed to facilitate the fraudulent scheme by generating more prescriptions for the IRC to process through mailed bribes and by streamlining Dr. Madison's and Dr. Awerbuch's insurance-authorization processes. The district court, therefore, did not err in denying Lee's motion for judgment of acquittal on the mail- and wire-fraud predicates.

C

[33] Simon's evidentiary insufficiency claim with respect to the mail- and wire-fraud predicates is easily dispatched. Like Lee, Simon disclaims knowledge of or involvement in the insurance-fraud scheme. See Soto, 799 F.3d at 92; Arif, 897 F.3d at 9. The record, however, tells a different tale: it supports the jury's findings as to both predicates.

The evidence shows that Simon understood, assisted, and furthered the IRC's fraudulent activities. The sales representatives who reported to him informed him whenever a doctor granted the IRC permission to contact an insurer for an authorization, and he was copied on emails reporting denials by insurers. To convey this information to senior management, Simon created "charts in progress" reports which documented the IRC's efforts to obtain authorization for each Subsys prescription. In addition, it was Simon who created the business liaison program. A jury reasonably could envision these efforts as knowing facilitation of the IRC's corrupt authorization processes.

The record also supports an inference that Simon sought to maximize the IRC's success despite knowing that the information the authorization specialists supplied to insurers was misleading and/or false. He was an occasional participant in the 8:30 a.m. daily management calls, during which Kapoor and other senior executives regularly discussed the IRC and strategies for obtaining insurer authorizations. Such strategies included the use of misleading words, phrases, and diagnosis codes, as well as the "spiel." What is more, the government introduced evidence that Simon saw these strategies in action when he visited the IRC and listened to calls during which employees contacted insurers and requested Subsys authorizations. From this evidence, a jury reasonably could find that Simon had knowledge of the IRC's fraudulent activities, yet chose to feed the IRC more prescriptions by bribing doctors through the mail. It follows that the district court did not err in denying Simon's motion for judgment of acquittal on the mail- and wire-fraud predicates.

D

[34] Rowan's claim of error with respect to the sufficiency of the evidence ***37** underlying the mail- and wire-fraud predicates is bootless. He, too, challenges only the intent element of the jury's adverse findings on the mail- and wire-fraud predicates. [8] See Soto, 799 F.3d at 92; Arif, 897 F.3d at 9. Our review discloses, however, that the record is shot full of evidence that Rowan monitored, facilitated, and participated in the IRC authorization process. For instance, he personally arranged a liaison for Dr. Chun and he

instructed his subordinate (a sales representative) to have the "[prior authorization] form filled out every day with update to [Gurry]" and "to do whatever we could to help and assist in getting that insurance pull-through." Various of his subordinates reported to Rowan to confirm that doctors had completed IRC opt-in forms and to alert him when doctors encountered difficulty obtaining insurance approvals. A jury reasonably could conclude that these were deliberate efforts to support the corrupt IRC authorization procedure.

To cinch the matter, a jury reasonably could conclude that Rowan undertook these efforts notwithstanding his knowledge that the IRC was deliberately misleading insurers. Rowan had every reason to believe that Dr. Ruan was prescribing Subsys illegitimately, and a reasonable jury could infer that Rowan knew that the IRC's efforts to get prior authorization for many of Dr. Ruan's prescriptions were likewise illegitimate. His attendance at an IRC training session corroborates such an inference. At that session, Rowan heard about the IRC's "history of cancer" practice, including an explicit instruction to the authorization specialists to include a reference to cancer even if "that's not what we're seeing them for" because such a reference meant a "sure approval" from insurers. So, too, Rowan learned that the IRC maintained a list of drugs for authorization specialists to include as tried-and-failed medications — a list that was to be used liberally even if particular patients had not furnished any information about prior medications. It thus seems nose-on-the-face plain that, after this session, Rowan knew that the IRC was defrauding insurers both because it cited bogus medical rationales in support of prescriptions and because it provided apocryphal lists of tried-and-failed medications. Yet, he continued to work hand-in-glove with the IRC.

We do not gainsay that the jury was free to conclude, as Rowan argues, that the IRC training session was innocuous. But there were two sides to this particular story, and "it [was] within the jury's purview to evaluate [these] competing factual inferences." United States v. Ridolfi, 768 F.3d 57, 61 (1st Cir. 2014). Rowan's efforts to bribe doctors through the mail and to push through Dr. Ruan's prescriptions despite Rowan's knowledge of what was going on supports the conclusion that he knowingly and willingly participated in the scheme with the intent to defraud insurers. It follows that the district court did not err in denying Rowan's motion for judgment of acquittal on the mail- and wire-fraud predicates.

V

The district court admitted at trial testimony of nine patients who had received Subsys prescriptions from doctors who participated in the kickback scheme. All of the defendants challenge the admission of their testimony as irrelevant and unduly prejudicial. Some stage-setting is needed.

***38** The defendants had anticipated the government's presentation of evidence that patients had suffered harm from taking Subsys. Prior to the trial, they moved to exclude such evidence in its totality. The district court granted their motion in part, leaving the government free to present testimony about "the medical care that patients received from co-conspirator physicians" and their "medical status." This evidence was allowed for the purpose of showing "that prescribing was not medically necessary or was in excess of what was medically necessary, or that a patient's medical status was different from what was represented to insurers in furtherance of claims for reimbursement." The court also allowed the introduction of evidence showing "that a patient became addicted to Subsys, the medical consequences of that addiction, and whether and how prescribing practices changed thereafter." Striving to strike a balance, though, the court prohibited "evidence concerning the social consequences to the patient of wrongful prescribing or addiction, such as loss of employment, erosion of familial relationships, and the like."

At the final pretrial conference, the defendants renewed their objections to patient-harm evidence. The government argued that it should be allowed to elicit testimony as to patients' medical histories (e.g., whether a patient had cancer) "because the IRC, which is run by Insys, is telling the pharmacy benefit managers and other insurers that patients have cancer when the patient doesn't have cancer." This testimony, the government said, was intended "primarily to prove the fraud." So, too, the government wanted to adduce testimony about the effects that Subsys had on patients — that they "couldn't function[,] [t]hey slept all day[,] [t]hey became addicted."

The district court essentially reaffirmed its earlier ruling. The court noted that the charged conspiracy involved "not just defrauding the insurance company," but also "overprescri[ption] and increase [in] prescriptions." It therefore concluded that the government should be "allowed to put that evidence on to show that [the defendants]

succeeded in their objective, which is evidence of the fact that it was their objective."

During trial, the defendants objected for a third time to evidence of patient harm. In response, the district court reiterated that it would not broadly preclude such testimony. When the defendants renewed their objections yet again, the court reiterated that testimony regarding addiction was "fair game."

All in all, nine patients testified about the debilitating effects of addiction that they experienced while ingesting Subsys. We offer a representative sampling of this testimony:

- Cathy Avers testified that, as a result of taking Subsys, she "bec[a]me an addict" such that "[n]o matter how much [she] took, eventually it just wasn't enough." She testified to side effects such as "having a hard time functioning, standing up, going to sleep. It was such an impact on [her] being able to get up, out of bed, get dressed, and do anything." She confirmed that the information Insys had provided to her insurer — that she had a current cancer diagnosis, was taking morphine and hydromorphone, and was using a fentanyl patch — was apocryphal.

- Paul Lara testified that, while taking Subsys, he wound up "not finding [his] way home in a town [he'd] lived in all [his] life" and having "to call [his] wife to get directions home." He repeatedly hallucinated and "thought [he] was ***39** going crazy." He could not follow what customers were saying to him at work and once "literally three or four" of his teeth "[fell] out right there [while] talking to a customer." He also confirmed that Insys's representations to his insurer that he had a current diagnosis of cancer were spurious.

- Sara Dawes testified that, while taking Subsys, she was "unable to function" and spent "most of [her] time in bed." When she stopped taking Subsys, she "was very, very, very sick and mentally couldn't hold it together" to the point that she had "a breakdown" and "drove off and left [her] kids on Christmas." She also testified that, contrary to what Insys had told her insurer, she never had cancer, never had taken methadone, and did not have difficulty ingesting generic fentanyl products.

- Betty Carrera testified that, while taking Subsys, she began having such phantasmagoric hallucinations that the police had to be called several times. She could not function and spent her days sleeping. She said that, when withdrawing from Subsys, she had nightmares and hallucinations, and she would "[wake] up at night screaming." She also contradicted Insys's representations to her insurer and testified that she never had issues swallowing.

- Woodrow Chestang described "slobber ... just run[ning] down [his] mouth," watching the clock, and craving more Subsys between doses. When he was unable to get Subsys, he experienced delirium tremens, nausea, and inability to eat or drink. He sometimes curled "into a fetal position" and realized that he was "burn[ing] up with fever." He added that, contrary to the information that Insys had given to his insurer, he neither had a history of cancer nor had previously been prescribed generic opioid containing fentanyl.

- Scott Byrd testified that Subsys was "life-changing" because "[i]t put [him] into an addiction state that [he] almost couldn't come out of." Because he used more than the quantity that his doctor had prescribed, he ran out early and experienced major withdrawal. He also swore that the signature on the opt-in form purportedly authorizing Insys to contact his insurer on his behalf was not his and, in fact, misspelled his name.

- Kendra Skalnican testified that she developed an addiction after starting on Subsys, and, as a result, began to take more of the medication than had been prescribed. When she ran out, she experienced severe withdrawal, sweating, vomiting, diarrhea, and pain all over her body. She told the jury that Subsys "made [her] addicted" and "[she] slept a lot of [her] life away." She also testified — contrary to information provided by Insys to her insurer — that she never had issue swallowing pills and never had tried other fentanyl products.

- Michelle DiLisio (previously Kamzyuk) testified that, while taking Subsys, she was lethargic, fatigued, dizzy, and felt "out of it." She reported that she suffered from severe withdrawal symptoms after she stopped taking the medication. And she made clear that the information that Insys had furnished to her insurer was false: she never had "any cancer ever" and, specifically, she never had ovarian cancer (indeed, she had undergone ovary-removal surgery years before Subsys had been prescribed for her).

- Alicia Hinesley testified that Subsys made her "extremely sleepy" and led to difficulty in thinking. Sometimes

***40** she would sit or sleep all day. Belying Insys's statements that she was experiencing breakthrough cancer pain, she flatly denied that she ever had cancer.

After the jury verdicts had been returned, the defendants moved for a new trial. They argued that the admission of the patient-harm testimony constituted reversible error. The district court thought not: it concluded that "[t]he patient testimony at trial conformed to the Court's motion in limine ruling in which it allowed only limited use of patient testimony and carved out most inflammatory aspects, such as the social consequences of addiction." Gurry, 427 F. Supp. 3d at 203. The testimony, the court said, "was relevant to show the medical care that patients received from co-conspirator prescribers, to demonstrate that certain prescriptions were not medically necessary or were excessive, and to support claims that a patient's medical status was different from what was represented to insurers." Id.

[35] It hardly bears repeating that a trial court enjoys considerable discretion with respect to its evidentiary rulings. See United States v. Zaccaria, 240 F.3d 75, 78 (1st Cir. 2001). We review the rulings that the defendants challenge here only for abuse of that discretion. See Iacobucci v. Boulter, 193 F.3d 14, 20 (1st Cir. 1999).

A

[36] **[37]** We start with the defendants' claim that the challenged testimony was irrelevant. The standard for relevancy is not exacting. See United States v. Rivera Calderón, 578 F.3d 78, 97 (1st Cir. 2009). The patient-harm testimony is relevant if it has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Id. (quoting Fed. R. Evid. 401).

The district court appropriately found that the patient-harm testimony was relevant. To prove the CSA predicates, the government had to show that the defendants agreed that a healthcare practitioner would prescribe Subsys outside the usual course of medical practice and without any legitimate medical purpose. See Volkman, 797 F.3d at 391. The evidence of the patients' altered behavior, addiction, and withdrawal symptoms was plainly relevant to show that the doctors' treatment was outside the course of professional practice. This is particularly true where, as here, each doctor continued to prescribe Subsys to his or her patient despite knowing of the patient's addiction. Taking a practical view of what had transpired, the jury reasonably could have regarded the patient-harm testimony as powerful proof both that the coconspirator doctors prescribed Subsys in the absence of any medical necessity and that they failed to minimize the risk of adverse effects when setting dosages. In fine, the patient-harm testimony was relevant to show that the doctors contravened their professional obligations. See United States v. Singh, 54 F.3d 1182, 1187 (4th Cir. 1995). And we think it obvious that evidence that the doctors prescribed Subsys outside the usual course of professional practice while receiving kickbacks constitutes evidence relevant to show that the defendants had entered into an agreement to bring about exactly that result. See United States v. Rivera-Santiago, 872 F.2d 1073, 1079 (1st Cir. 1989) (explaining that "[t]he actions, as well as the words of the [coconspirators], are evidence of the existence and scope of a conspiracy"). On this record, evidence about the exploitation of addiction was relevant to show that all of the coconspirators, including the defendants, viewed addiction less as a societal ***41** problem and more as a pathway to predatory profits.

On the same basis, we dismiss Gurry's contention that he "had no connection to prescribers' medical decision-making." The patient-harm testimony is relevant as to Gurry because it helped establish the scope of the conspiracy. See id. "The fact that [Gurry] participated in one retail link of the distribution chain, knowing that it extended beyond his individual role, was sufficient" to establish relevancy as to him. Id.

The defendants erect a straw man. They submit that the patient-harm testimony "said nothing about what [they], who had no contact with any of these patients and no knowledge of [what] they were affected by Subsys, specifically intended." But as we already have discussed, a core component of the conspiracy to distribute Subsys was influencing doctors to "push the dose." The most logical reason for the defendants' unremitting efforts to increase dosages was their knowledge that patients on higher doses would refill their Subsys prescriptions while patients on lower doses would not. The patient-harm testimony showed vividly just how the "effective dose" messaging furthered the scheme.

At the risk of carting coal to Newcastle, we add that the patient-harm testimony also helped to explain how the defendants could expect doctors to fulfill their commitments to Insys representatives, that is, to meet quotas obligating them to prescribe inordinately high amounts of Subsys. The patients trusted the doctors; the doctors provided a limited explanation of the drug to the patients; and by the time the patients realized they were addicted, they were powerless to refrain from seeking more and more Subsys.

To say more about relevancy would be to paint the lily. Because the patient-harm testimony tended to show the ins and outs of the defendants' scheme, it was within the district court's discretion to deem this evidence relevant. See United States v. Hale, 857 F.3d 158, 171 (4th Cir. 2017).

B

[38] **[39]** The defendants next argue that the patient-harm testimony, even if relevant, was unfairly prejudicial. In examining this claim, we begin with evidentiary bedrock. A district court may exclude relevant evidence if an objecting party can show that "its probative value is substantially outweighed by a danger of ... unfair prejudice." Fed. R. Evid. 403. But under Rule 403, one size does not fit all. Thus, we afford the district court "considerable latitude in steadying the balance which Rule 403 demands." United States v. Cadden, 965 F.3d 1, 22 (1st Cir. 2020) (quoting United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989)).

Through serial rulings, the court below exercised care in weighing the considerations affecting the Rule 403 balance. From the beginning, the court precluded evidence concerning the social consequences of addiction and — in its own words — took pains to "carve[ ] out most inflammatory aspects" of the testimony. Gurry, 427 F. Supp. 3d at 203. Even so, the defendants complain that the court did not carve out a sufficiently wide exclusionary swath.

The defendants' argument relies primarily on our decision in Kilmartin, 944 F.3d at 315. Kilmartin, though, is a horse of a different hue. There, the government prosecuted — for fraud-related crimes — a defendant who advertised cyanide to suicidal individuals, collected their money, and sent them Epsom salts instead. See id. at 323-24. At trial, the government offered as "anecdotal background evidence" testimony from victims (other than those ***42** named in the charged counts) who had tried to purchase cyanide from the defendant. Id. at 333. This testimony "went into excruciating detail about the ... victims' personal lives, medical issues, histories of depression, earlier suicide attempts, suicidal motivations, and the like." Id. at 335. We later described the testimony as "copious," "emotionally charged," and as having "virtually no probative value." Id. at 337. Because the inordinate potential for prejudice "substantially outweighed" the dubious probative value of the anecdotal evidence, we held that the district court abused its discretion in admitting that evidence. Id. at 338.

This case is a world apart from Kilmartin. The patient-harm testimony here was relatively brief and squarely probative, established that the patients became addicted to Subsys and suffered withdrawal symptoms, shed a bright light on the prescribing habits of the coconspirator physicians, tied the "effective dose" messaging into the scheme, and catalogued (in checklist fashion) many of the ways in which the IRC misrepresented patient information. Perhaps most importantly, the patient-harm testimony explained how the charged conspiracy was able to function and how it generated product demand. And, finally, the testimony was concise: no testifying patient was permitted to dwell unduly on the harm that he or she suffered. Viewed in this perspective, the patient-harm testimony was less like the challenged testimony in Kilmartin and more like the victim testimony in Cadden, 965 F.3d at 22 — the admission of which we approved because it was relatively brief and the trial court precluded more graphic details.

To be sure, the patient-harm testimony packed a punch. Nevertheless, the issue is not prejudice simpliciter but, rather, whether particular evidence crosses the line into the forbidden realm of unfair prejudice. [9] See United States v. Pitrone, 115 F.3d 1, 8 (1st Cir. 1997) ("[I]t is only unfair prejudice against which the law protects." (emphasis in original)). The fact that addiction is ugly does not bar the government from offering evidence about it when — as in this case — the defendants' scheme has made addiction relevant and probative. See, e.g., United States v. Morales-Aldahondo, 524 F.3d 115, 120 (1st Cir. 2008) (holding that, although admitted images of child pornography "undoubtedly had an emotional impact on jurors," district court "properly balanced the competing concerns of Rule 403" when evidence was probative and

court "limit[ed] the number of images presented"). In the last analysis, a "court is not required to scrub the trial clean of all evidence that may have an emotional impact, where the evidence is part of the Government's narrative." Id. at 120 (internal quotation omitted).

We are aware that the defendants offered to stipulate that none of the testifying patients had cancer. But such a stipulation was not an acceptable proxy for the patients' testimony. The scope of the proffered stipulation was much narrower than the scope of the testimony, and the government was entitled to show (for example) other misrepresentations made by the IRC. We consistently have rejected parties' attempts to insist that district courts accept stipulations that are not commensurate substitutes for live proof, see, e.g., Cadden, 965 F.3d at 22, and we do so here.

To sum up, we discern no abuse of discretion in the court's construction of the Rule 403 balance. The patient-harm testimony ***43** bore on the government's theory of the case in salient ways, and the court took prudent steps to soften the emotional impact of the testimony. We have stated before that "[o]nly rarely — and in extraordinarily compelling circumstances — will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." United States v. Mehanna, 735 F.3d 32, 59 (1st Cir. 2013) (quoting Freeman v. Package Mach. Co., 865 F.2d 1331, 1340 (1st Cir. 1988)). This is not so rare an instance, and the district court acted within the encincture of its discretion under Rule 403 in allowing the challenged testimony.

C

The defendants' challenge to the admissibility of the patient-harm testimony incorporates one last point. They contend that the patient-harm testimony was cumulative of other proof. They note, for example, that Dr. Awerbuch and Nurse Alfonso testified that their Subsys prescriptions were not medically necessary and that Gurrieri and other IRC staffers testified that they lied to insurers about patients' conditions. Since the defendants did not raise this objection below, plain error review obtains. See Taylor, 54 F.3d at 972-73; United States v. Nivica, 887 F.2d 1110, 1116 (1st Cir. 1989).

[40] **[41]** "The plain error hurdle is high," United States v. Hunnewell, 891 F.2d 955, 956 (1st Cir. 1989), and a purported error must (among other things) be "clear or obvious" in order to be "plain." United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001). Cumulativeness is almost always a matter of degree, and the defendants' claim of cumulativeness — if it suggests an error at all — at most suggests an error that is neither clear nor obvious. See United States v. Sepulveda, 15 F.3d 1161, 1185 (1st Cir. 1993) ("We have routinely found cumulative evidence impotent when accidentally uncorked."). Plain error is, therefore, plainly absent.

VI

[42] Gurry — whom the jury acquitted with respect to the CSA and honest-services predicates — contends that the evidence admitted with respect to those predicates unfairly influenced the jury's findings against him on the mail- and wire-fraud predicates. [10]

[43] This is, for all intents and purposes, a claim of prejudicial spillover. As relevant here, prejudicial spillover occurs when the evidence admitted to prove a charge as to which the defendant was acquitted "was so extensive, inflammatory, and prejudicial that it necessarily spilled over into the jury's consideration of [his] guilt on other charges." Mubayyid, 658 F.3d at 72.

[44] **[45]** To determine whether an unacceptable threat of prejudicial spillover materialized, we must evaluate whether the record evinces "a 'serious risk' that the joinder of offenses compromised a specific trial right or 'prevent[ed] the jury from making a reliable judgment about guilt or innocence.' " Id. (quoting United States v. Houle, 237 F.3d 71, 75-76 (1st Cir. 2001)). The devoir of persuasion rests with the defendant to show "prejudice so pervasive ***44** that a miscarriage of justice looms." United States v. Trainor, 477 F.3d 24, 36 (1st Cir. 2007) (quoting United States v. Levy-Cordero, 67 F.3d 1002, 1008 (1st Cir. 1995)).

In the court below, Gurry argued that the government's "accusation" that he and the other defendants intended to coax doctors to prescribe Subsys illegitimately, coupled with the patient-harm testimony, tainted the jury's findings against him

on other matters. The district court rejected this argument and refused to order a new trial on this ground. See Gurry, 427 F. Supp. 3d at 196-97. It found that the patient-harm testimony was properly admitted as to all the defendants and all the charged predicates and observed that its jury instructions had been custom tailored to guard against prejudicial spillover. See id.

[46] We review the district court's denial of a new trial based on allegations of prejudicial spillover for abuse of discretion. See United States v. Neal, 36 F.3d 1190, 1205 (1st Cir. 1994). We discern none.

At the outset, it bears mentioning that Gurry's argument repastinates much of the same ground covered in our discussion of the admissibility of the patient-harm testimony. See supra Part V. He was charged as a coconspirator and, thus, almost all of the evidence properly admitted against other coconspirators was relevant to and independently admissible against him. See United States v. O'Bryant, 998 F.2d 21, 26 (1st Cir. 1993). And because the patient-harm testimony was independently admissible against Gurry, he hardly can be heard to complain about an untoward spillover effect. See id. Simply put, the government's case against Gurry would have comprised essentially the same evidence even if the government had not seen fit to charge him with the acquitted predicates.

We add that Gurry's argument that patient-harm testimony likely "incited [the jury's] ire" is severely wounded by his acquittal with respect to the CSA and honest-services predicates. That the jury's findings distinguished among defendants and differentiated among proposed predicates is strong evidence that no spillover prejudice occurred. See United States v. Williams, 809 F.2d 75, 88 (1st Cir. 1986); cf. United States v. Natanel, 938 F.2d 302, 308 (1st Cir. 1991) ("The introduction of evidence against other defendants cannot realistically be viewed as having jeopardized [the defendant's] chances on [one count] when the jury proved willing to treat the case against [him] on its own merits by acquitting him on the other counts."). Here, moreover, the jury differentiated not only between counts but among defendants — and that selectivity is "strong evidence" that the jury was not blinded by raw emotion but, rather, properly compartmentalized and applied the law to the facts. United States v. Bailey, 405 F.3d 102, 112 (1st Cir. 2005); see United States v. Dworken, 855 F.2d 12, 29 (1st Cir. 1988) (giving credence to "jury's ability to segregate the evidence and carefully weigh against which defendant it was applicable" (quoting United States v. Richman, 600 F.2d 286, 299-300 (1st Cir. 1979)).

[47] Much of the credit for the jury's discernment must go to the district court. The court excluded the most inflammatory evidence about the effects of Subsys and prudently instructed the jury both to treat each defendant individually and to weigh separately the evidence as to each defendant. As a general rule, "instructing the jury to consider each charged offense, and any evidence relating to it, separately as to each defendant" constitutes an "adequate measure[ ] to guard against spillover prejudice." United States v. Casas, 425 F.3d 23, 50 (1st Cir. 2005); see, e.g., ***45** United States v. Figueroa, 976 F.2d 1446, 1454 (1st Cir. 1992) (holding that "district court minimized any danger from prejudicial spillover through its repeated instructions that the jury was to give separate consideration to each charge against each defendant"). Gurry has not pointed to anything that would take this case out of the general rule.

Little more need be said. The jury acquitted Gurry with respect to the CSA and honest-services predicates while at the same time finding the four other defendants guilty of those charges. This result constituted "an uncommonly convincing 'ex post validation' of the jury instructions." Figueroa, 976 F.2d at 1454. In the circumstances of this case, Gurry's claim of prejudicial spillover lacks force, and the district court acted well within the ambit of its discretion in refusing to grant him a new trial on that ground.

VII

During pretrial proceedings, Lee moved for a severance of the charges against her. See Fed. R. Crim. P. 14(a). The district court denied her motion. Lee assigns error.

A

[48] In support of severance, Lee argued below that the government charged two distinct conspiracies: one to bribe doctors who would prescribe Subsys indiscriminately and another to defraud insurers to pay for those prescriptions. From this starting point, she asserted that a joint trial would

prejudice her because she was not personally involved in the second of these conspiracies. The district court denied her motion, concluding that Lee had failed to make a sufficient showing of potential prejudice. Specifically, the court found that Lee had "fail[ed] to identify any evidence or argument that would not be admissible against her in a separate trial" and that her allegations of prejudice were wholly conclusory.

[49] On appeal, Lee traverses the same terrain. Her case should have been severed, she submits, because she was a stranger to the IRC portion of the wrongdoing. We review the district court's denial of her motion for abuse of discretion. See United States v. Azor, 881 F.3d 1, 12 (1st Cir. 2017).

[50] **[51]** When — as in this case — an indictment charges a criminal conspiracy among multiple defendants, the government enjoys the benefit of a rebuttable presumption that a joint trial is appropriate. See United States v. Soto-Beníquez, 356 F.3d 1, 29 (1st Cir. 2003) (explaining that "the general rule is that those indicted together are tried together"); see also Zafiro v. United States, 506 U.S. 534, 537, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) (noting Supreme Court's "repeated[ ] ... approv[al] of joint trials" for coconspirators). And in cases where joinder is proper, "[w]e must affirm the district court's denial of a motion to sever unless the defendant makes a strong and convincing showing of prejudice." United States v. Richardson, 515 F.3d 74, 81 (1st Cir. 2008) (internal citations omitted); see Azor, 881 F.3d at 12.

Here, we uphold the district court's refusal to sever for two reasons. First, the record contains substantial evidence showing Lee's involvement with the IRC (for instance, evidence showing that Lee sought to maximize the number of opt-in forms to be transmitted to the IRC and evidence showing that she supervised some of Insys's IRC authorization specialists). Second, because the government charged and proved a single conspiracy and because Lee was charged and convicted as a coconspirator, virtually all of the evidence ***46** properly admitted against the other defendants (including evidence showing that the IRC was an integral part of the single conspiracy) was also admissible against Lee. See O'Bryant, 998 F.2d at 26; see also Richardson, 515 F.3d at 82 ("[T]his Court has repeatedly refused to overrule a denial of severance if substantially the same evidence would have been admitted in separate trials.").

Straining to show that she did not belong in the case, Lee identifies 34 witnesses who — she speculates — would not have been called to testify had she been tried alone. But the unadorned fact that additional witnesses will be called in a joint trial is not a cognizable basis for severance. The right to a severance necessarily entails a showing of prejudice, and Lee offers no explanation as to why the testimony of these witnesses (who, in her brief's words, "had nothing relevant or incriminating to say about Lee") prejudiced her in any way.

B

[52] Lee plucks out of thin air a new assault on the denial of her motion for a severance. She contends, for the first time on appeal, that joinder was improper under Federal Rule of Criminal Procedure 8(b). This misjoinder, she says, independently demanded severance. Although we normally review the propriety of joinder de novo, see Azor, 881 F.3d at 12, Lee's unpreserved contention engenders — at most — plain error review, [11] see United States v. Greenleaf, 692 F.2d 182, 187 n.4 (1st Cir. 1982); see also United States v. Ackerly, 981 F.3d 70, 74 (1st Cir. 2020).

[53] **[54]** Whatever the standard of review, a claim of misjoinder "requires reversal only if the misjoinder results in actual prejudice." United States v. Lane, 474 U.S. 438, 449, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986); see United States v. Bruck, 152 F.3d 40, 44 (1st Cir. 1998). The movant must show that her joinder had a "substantial and injurious effect or influence in determining the jury's verdict." Bruck, 152 F.3d at 44 (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). Lee's feeble effort to show that her joinder was prejudicial falls far short.

Lee starts with the uncontroversial proposition that prejudicial joinder may entitle a defendant to a severance. See Natanel, 938 F.2d at 306. Lee has very little to say, though, about why her joinder was prejudicial. Her only argument seems to rest on her self-serving conclusion that "the Government misled the Court into believing that Lee 'dealt extensively' with the IRC." This conclusion, in turn, circles back to her protest that she had "no criminal association" with the IRC side of the venture.

[55] As we already have explained, this protest is at odds with the record. In certain cases, evidence at trial may "serv[e] as an ex post assurance that joinder was a step founded on a reasonable, good faith basis in fact." Id. at 307. So it is here, and we hold unhesitatingly that Lee's joinder was appropriate.

VIII

[56] Lee's employment history was unusual for a pharmaceutical executive: her most relevant prior work experience seems ***47** to have been as an exotic dancer at a Chicago-area strip club. Before trial, the government sought leave to introduce evidence about Lee's past work and her unorthodox professional behavior with Dr. Madison (the notorious pill mill operator). The district court ruled, over Lee's objection, that the proffered evidence was "not admissible to prove the Defendants' character, but such evidence may be admissible for other purposes, including to establish the nature of the relationships between the co-conspirators, duress, or relevant corporate culture." Along the same lines, the court ruled that Lee's employment history "[was] not admissible to prove [her] character," but "may be intrinsic to aspects of the charged offense" and, to that extent, might be admissible. In the end, the court temporized, stating that the proffered evidence "will be admitted if it is otherwise admissible" under the federal rules of evidence.

At trial, the government offered evidence of Lee's employment history. Burlakoff testified that he first met Lee while she was working at a strip club, that he invited her to apply for a sales manager position at Insys, and that he sent her résumé to Babich. In order to bolster its theory that Kapoor knew of Lee's lack of credentials in either management or pharmaceutical sales, the government discussed at sidebar its intention to introduce an email that suggested that Lee had run an escort service. The court refused to admit the email but allowed testimony about whether portions of Lee's résumé were incomplete.

In front of the jury, the prosecutor asked Burlakoff whether someone had provided Insys with information that Lee was "running an escort service." The court sustained an objection and struck the question. But that was not the end of the matter. When the parties returned to sidebar, the district court ruled that the email contained "relevant information," but directed the prosecutor "to keep the salacious aspect to an absolute minimum." Acceding to a defense request for an instruction that the contents of the email were not being admitted for the truth of the matter asserted, the court told the jurors that they would "hear testimony ... that the company got some information about Ms. Lee that suggested that she might not be qualified for the job." Because "the letter that [Insys] received is anonymized," the court cautioned:

> The letter does not — and I cannot emphasize this strongly enough — does not come in for the truth of the matter asserted. ... [T]he person that wrote ... the letter ... is certainly not here. They're not testifying. There may be issues of bias. We don't have any way to know if what they're saying is true or not. You're to consider this information only to the effect that [it] had on the company and what they did in response to receiving this information.

Burlakoff then testified that Babich had received an email about Lee from an "ex-fiancé ... who had a bone to pick with her." According to Burlakoff, the email questioned why Insys would hire someone with Lee's background and listed several websites. He checked the websites and found topless photos of Lee. After he informed Babich, Babich consulted with Kapoor, who "s[aw] no issue with it" but asked that "those pictures come down immediately." Burlakoff relayed Kapoor's wishes to Lee, who took the topless photos down.

Separately, two sales representatives testified that they went to a Chicago nightclub with Lee and Dr. Madison after a speaker event. One testified that Lee "was sitting on [Dr. Madison's] lap, kind of bouncing around, and he had his hand sort ***48** of inappropriately all over her on her chest." The other sales representative testified that he observed "[v]ery inappropriate contact" between Lee and Dr. Madison, such as Dr. Madison placing "[h]is hands ... all over her, her front and her pants, in her shirt" and "heavily kissing" Lee.

Lee objected to all of this testimony and moved for a mistrial, which the district court denied. She argues that the court erred in admitting this evidence because it constituted "salacious propensity evidence" that should have been excluded under Federal Rule of Evidence 404(b). She suggests that because "the jury heard questions that gave an inference that if Lee

worked as an escort or operated an escort service for financial gain in the past and had topless photos on the internet, it is more likely that she committed the charged offense for financial gain." In the alternative, she suggests that the evidence should have been excluded under Rule 403.

[57] **[58]** We review the district court's admission of the challenged evidence for abuse of discretion. See Iacobucci, 193 F.3d at 20. We start with Lee's Rule 404(b) challenge. Rule 404(b)'s propensity bar "excludes only extrinsic evidence — 'evidence of other crimes, wrongs, or acts' — whose probative value exclusively depends upon a forbidden inference of criminal propensity." United States v. Manning, 79 F.3d 212, 218 (1st Cir. 1996) (quoting United States v. Hadfield, 918 F.2d 987, 994 n.5 (1st Cir. 1990)). Evidence intrinsic to the crime charged is not precluded under Rule 404(b). See id.

Following these guideposts, we conclude that Rule 404(b)'s proscription of propensity evidence is inapposite here. The probative value of the challenged evidence does not depend exclusively on a forbidden inference of propensity but, rather, is intrinsic to the crime charged. Burlakoff's testimony about Lee's qualifications (or lack of them) tends to show that neither Kapoor nor Lee could reasonably think that Lee was hired as a sales manager due to either her executive excellence or her marketing skill set. Instead, the evidence suggests that the defendants' scheme to bribe doctors into prescribing Subsys indiscriminately offered doctors both money (through the speaker programs) and sexual favors.

So, too, the sales representatives' testimony about Lee's physical interactions with Dr. Madison has independent probative value: that testimony confirms Lee's willingness to influence doctors' prescription habits through sexual interactions. As Burlakoff made clear, the doctors "prescribe[d] strictly based on their relationship with the sales manager." Here, the challenged evidence was relevant because it explained the background and development of the relationship between two of the coconspirators (Lee and Dr. Madison) inasmuch as it showed Lee's tactics for getting Dr. Madison "to keep his writing up" and because it revealed some of the unprofessional motivations underlying Dr. Madison's prescription habits. See United States v. Escobar-de Jesus, 187 F.3d 148, 169 (1st Cir. 1999). As the district court noted, the evidence is "illustrative of [Lee's] relationship with [Dr. Madison] and how she's interacting with him" to motivate the doctor to prescribe more and more Subsys.

We also reject Lee's contention that the jury necessarily inferred that she was likely to have committed a crime from evidence that she ran an escort service and that topless photos of her floated on the internet. The record contains no indication of the evidence being offered or used for that purpose. Perhaps more importantly, the district court carefully limited the ways in which the jury could put that ***49** information to use. The email came in only to show "the effect that [it] had on the company and what [the company] did in response to receiving this information." We long have held that courts may presume that jurors will follow the judge's instructions, United States v. Spencer, 873 F.3d 1, 16 (1st Cir. 2017), and Lee has provided no reason for us to deviate from that norm.

[59] Nor did the district court abuse its discretion in concluding that the probative value of the challenged evidence was not substantially outweighed by its unfairly prejudicial effects. We afford district courts appreciable discretion in striking the balance that Rule 403 demands. See Mehanna, 735 F.3d at 59; Freeman, 865 F.2d at 1340. The evidence challenged here was probative of one of the ways in which Lee and her superiors attempted to influence prescribers, and it was also probative of the defendants' intent to downplay traditional sales strategies that focus on patients' needs. Here, moreover, the district court was sensitive to the potential for prejudice, cautioning the government to "tone it down" and to avoid the specific details of Lee's encounter with Dr. Madison. In the same spirit, the court made certain that the information derived from the email was presented to the jury as suspect: it told the jurors that there was no way to find out if the information in the email was true and instructed them not to take it for the truth of the matter. [12] We conclude, therefore, that the district court held the Rule 403 balance steady and true, and that Lee's claim of error is impuissant.

[60] **[61]** **[62]** Lee's appeal from the denial of her motion for a mistrial is equally unavailing. "Declaring a mistrial is a last resort, only to be implemented if the taint is ineradicable, that is, only if the trial judge believes that the jury's exposure to the evidence is likely to prove beyond realistic hope of repair." Sepulveda, 15 F.3d at 1184. We review the district court's denial of a mistrial for abuse of discretion. See United States v. Chisholm, 940 F.3d 119, 126 (1st Cir. 2019).

In the case at hand, the district court supportably found that a mistrial was not required. Its clear limiting instructions and prompt striking of extraneous matter, combined with the presumption that juries follow the trial court's instructions, leads inexorably to a conclusion that the district court did not abuse its discretion.

IX

[63] Lee requested a jury instruction on supervisory condonation. She asked that the jury be instructed that while "Burlikoff [sic] and Babich's knowledge or condoning of activities does not by itself constitute a defense or an excuse," evidence of their "actions or omissions, or evidence of deficiencies in the manner in which they implemented or enforced [Insys's] policies and procedures, may be considered ... to the extent that such evidence bears on the issue of whether or not defendant Lee formed the required intent to commit the crimes with which [s]he is charged." The district court did not give the requested instruction. Lee preserved her objection and now assigns error.

***50** **[64]** **[65]** Our review of the district court's eschewal of this proposed instruction is for abuse of discretion. See United States v. De La Cruz, 514 F.3d 121, 139 (1st Cir. 2008). A district court is, of course, under no obligation to honor a party's word choices or to parrot proposed language when delivering jury instructions. See United States v. DeStefano, 59 F.3d 1, 2-3 (1st Cir. 1995). As a result, we will not second-guess the trial court's rejection of a proposed instruction unless the proposed instruction is itself substantively correct, was not covered (at least in substance) in the charge as given, and touched upon a salient point (such that the refusal so to instruct seriously undercut the proponent's ability to mount a particular claim or defense and caused substantial prejudice). See id.

Lee's proposed instruction fails under the second and third prongs of this formulation. The district court's charge, as rendered, contained a good-faith instruction, which informed the jury that "[t]he 'good faith' of a Defendant is a complete defense to the charge in the indictment because good faith on the part of the Defendant is, simply, inconsistent with both knowingly and willfully agreeing to become a member of the alleged conspiracy and specifically intending that a member of the alleged conspiracy would commit criminal conduct." The court added that "[a]n honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct." So, the court said, "[i]f the evidence in the case leaves ... a reasonable doubt as to whether a Defendant acted with criminal intent or in good faith," the jury should "find the Defendant not guilty."

This instruction fully permitted Lee to present her supervisory condonation defense and, thus, forestalled any cognizable claim of prejudice. Lee demurs, maintaining that the court's good-faith instruction did not accommodate her two-pronged argument that she "was lawfully following the instructions of her employer" and that "Insys condoned her conduct."

Lee's claim of error depends on an unrealistically cramped reading of the court's good-faith instruction. Under this instruction, Lee was free to argue that she acted in good faith because she subjectively believed that her conduct was lawful and that she based that belief on her employer's orders, its condonation of her conduct, or both. Because of her employer's guidance and approval, she might say, her mistake was an honest one. The court's good-faith instruction focused the jury on Lee's "actual, subjective beliefs," so the "charge basically did what [Lee] wanted it to do." United States v. Denson, 689 F.3d 21, 26 (1st Cir. 2012). Because the instruction actually given accommodated both prongs of Lee's argument, the district court's refusal to use Lee's proposed language was well within its discretion.

X

[66] Rowan assigns error to the district court's denial of his mid-trial motion to compel the disclosure of allegedly exculpatory information. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This claim of error harks back to a prosecutor's comment to Rowan's counsel, allegedly made during a break in Gurrieri's testimony, supposedly mentioning that the government had discussed a recording used as an IRC training tool with Gurrieri. Asserting that this recording was a critical piece of evidence in the government's case against him, Rowan moved to compel the government to produce all communications between Gurrieri and the government concerning the recording.

***51** In response, the government vouchsafed that it "has consistently met and exceeded its ethical and legal discovery obligations in this case." There were no further communications that were subject to production, the government said, because it had "fully complied with all of

its obligations," including disclosure of all of its interview reports and rough notes. The government added that "[i]f [it] was aware of any exculpatory or Brady information in any form, it would have disclosed that information in a report, in agent notes, verbally, via email, or in some other form."

The district court denied Rowan's motion "[b]ased on the government[']s representations" and its own "understanding of the issues in the case as a result of a lengthy trial." The court took the opportunity, though, to remind the government "that its [Brady] obligations continue through sentencing." Rowan moved for reconsideration, but to no avail.

[67] **[68]** We review the district court's denial of a motion to compel discovery for abuse of discretion. See United States v. Flete-Garcia, 925 F.3d 17, 33 (1st Cir.), cert. denied, —— U.S. ——, 140 S. Ct. 388, 205 L.Ed.2d 232 (2019). This standard of review is not one-dimensional. See Akebia Therapeutics, Inc. v. Azar, 976 F.3d 86, 92 (1st Cir. 2020); United States v. Lewis, 517 F.3d 20, 24 (1st Cir. 2008). Within it, we review for clear error the district court's factual finding that no further document subject to production existed. See United States v. Padilla-Galarza, 990 F.3d 60, 79-80 (1st Cir. 2021).

[69] **[70]** **[71]** Under Brady, the government is obligated "to disclose evidence in its possession that is favorable to the accused and material to guilt or punishment." United States v. Prochilo, 629 F.3d 264, 268 (1st Cir. 2011) (citing, inter alia, Brady, 373 U.S. at 87, 83 S.Ct. 1194). Where, as here, a claim of Brady error is advanced, the defendant bears the burden of showing "a likelihood of prejudice stemming from the government's nondisclosure." Flete-Garcia, 925 F.3d at 33. To make such a showing, he must "articulate with some specificity what evidence he hopes to find in the requested materials, why he thinks the materials contain this evidence, and, finally, why this evidence would be both favorable to him and material." Id. (quoting Prochilo, 629 F.3d at 269). And in determining whether the evidence sought is material, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." United States v. Josleyn, 206 F.3d 144, 152 (1st Cir. 2000) (quoting Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)).

[72] **[73]** Rowan has utterly failed to make the requisite showing. The most prominent fly in the ointment is that he has failed to establish that the evidence he seeks actually exists. Although Rowan conclusorily asserts that "such communications must have occurred," all three prosecutors (including the prosecutor whom the defense identified as having mentioned the government's purported discussion with Gurrieri) signed the pleading in which the government insisted that it had "withheld nothing." Given the unequivocal nature of the government's representations and the experience gleaned by the court in presiding over this case (including protracted pretrial proceedings, discovery disputes, and a lengthy trial), we descry no clear error in the court's determination that the claimed evidence did not exist. A defendant's naked assertion that a particular communication "must have occurred," no matter how vociferously expressed, is insufficient to undermine a reasoned judicial ***52** determination that no such communication actually exists. See United States v. Duval, 496 F.3d 64, 75 (1st Cir. 2007); cf. Padilla-Galarza, 990 F.3d at 80 (holding, in Jencks Act context, that "the government cannot be expected to produce that which has never existed"). We therefore reject Rowan's claim of Brady error. [13]

XI

[74] Following the adverse jury verdicts, Simon — represented by successor counsel — moved for a new trial. See Fed. R. Crim. P. 33. Among the grounds asserted in support of this motion, he averred that his trial counsel had been handicapped by a conflict of interest. Specifically, he averred that his trial counsel, Steven Tyrrell, was conflicted because the law firm in which Tyrrell was a principal — Weil Gotshal & Manges LLP (Weil) — was representing Insys in a bankruptcy restructuring at the same time that Tyrrell was representing Simon in this case. The district court disagreed and refused to order a new trial. Simon appeals that ruling.

Simon's conflict-of-interest claim has its roots in an internal investigation that Insys conducted some three years prior to the start of Tyrrell's representation of Simon. In December of 2013, Insys received a subpoena from the Department of Justice. Insys immediately retained Skadden, Arps, Slate, Meagher & Flom LLP (Skadden) to serve as its outside investigations and compliance counsel. Skadden conducted a thorough investigation, interviewed numerous

Insys employees, reviewed a wide range of company practices, and offered advice to Insys's board of directors.

Years passed and — in 2017 — Simon retained Tyrrell to represent him in the case at hand. The following year, Insys turned to Weil in connection with anticipated chapter 11 proceedings. When Tyrrell became aware of his firm's potential representation of Insys, he discussed the matter with Simon. Tyrrell informed Simon that — should his representation of Simon continue — he would be "walled off" from the Weil team handling Insys's bankruptcy reorganization. Simon assented to this arrangement.

In due course, Weil signed an engagement letter with Insys, which explicitly permitted Tyrrell to act adversely to Insys in connection with his representation of Simon. Weil quickly instituted screens to prohibit the two teams from reviewing, discussing, or sharing information.

We fast-forward to June of 2019. After the jury returned its verdicts, Simon queried Tyrrell about Weil "representing Insys in its bankruptcy case." Tyrrell reminded Simon of their earlier conversation, described the "wall" that was in place, and assured Simon that "there is no sharing of information or interaction." Simon renewed his queries the following month, calling Tyrrell's attention specifically to the internal investigation that Skadden had overseen. Tyrrell responded that the internal investigation had ended before the criminal case began and reiterated that ***53** Weil's representation of Insys in the bankruptcy proceedings was unrelated to the criminal case.

Unassuaged, Simon retained fresh counsel and moved for a new trial on the ground that Tyrrell had been laboring under a conflict of interest. He alleged that Weil's representation of Insys had inhibited Tyrrell and prevented him from seeking to obtain the findings of Insys's internal investigation into the marketing and sale of Subsys. Although Insys had consistently asserted that those materials were shielded by the attorney-client privilege, Simon argued that a different (conflict-free) attorney could have pierced the privilege. The government opposed the motion. The district court denied relief, concluding that Simon's proffered alternative strategy was not plausible. See Gurry, 427 F. Supp. 3d at 217.

[75] **[76]** **[77]** We review the district court's factual findings in connection with the conflict-of-interest claim for clear error but afford de novo review to the court's ultimate conclusion. See Reyes-Vejerano v. United States, 276 F.3d 94, 97 (1st Cir. 2002). Under the Sixth Amendment, a defendant has a right to conflict-free counsel. See United States v. Ponzo, 853 F.3d 558, 574 (1st Cir. 2017); U.S. Const. amend. VI. That right, though, does not protect a defendant from an attorney's "mere theoretical division of loyalties." Id. at 575 (quoting Mickens v. Taylor, 535 U.S. 162, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)). To prevail on a conflict-of-interest claim, a defendant must show that " 'a conflict of interest actually affected' the lawyer's 'performance.' " Id. (quoting Mickens, 535 U.S. at 171, 122 S.Ct. 1237). Such a showing requires a demonstration "that (1) the lawyer could have pursued a plausible alternative defense strategy or tactic and (2) the alternative strategy or tactic was inherently in conflict with or not undertaken due to the attorney's other interests or loyalties." Id. (quoting United States v. Colón-Torres, 382 F.3d 76, 88 (1st Cir. 2004)).

We conclude — as did the court below, see Gurry, 427 F. Supp. 3d at 217-19 — that no actual conflict of interest existed because piercing attorney-client privilege to lay bare the findings of Skadden's internal investigation was not a plausible defense strategy. According to Simon, this proposed strategy would have offered "material from Skadden's internal investigation to substantiate a good-faith defense." This must be so, he muses, because Skadden "apparently ... did not advise Insys to shut down the ISP, to close the IRC, or to fire or discipline Mr. Simon." Building on this rickety foundation, Simon argues that the seeming absence of such advice must mean that Skadden concluded that Insys's operations were beyond reproach. So, Simon's thesis runs, Skadden's internal investigatory materials "would have revealed the evidentiary basis — facts, documents, witness testimony — underlying Skadden's findings and advice, which [his] defense counsel could have marshaled to use at trial."

This proposed strategy is both substantively and strategically bankrupt. First and foremost, Simon's allegation that the findings reached during the investigation must be favorable to him is anchored on abject speculation. Simon consistently has acknowledged that he has never been "privy to the details of [outside counsel's] findings and advice." Skadden's findings are, he confesses, "unknown to [him]." Knowledge is essential to the making of value judgments, and saying that something is "unknown" is tantamount to an admission that its favorability cannot be ascertained.

Despite this void, Simon self-servingly surmises that the materials generated during ***54** the investigation must bolster his defense because Skadden interviewed him and — subsequent to that interview and the completion of Skadden's investigation — "nobody ever counseled [him] to modify his own practices or imposed any discipline or punishment on him for wrongdoing." Simon also suggests that since the IRC did not shut down, an inference is warranted that Skadden did not advise Insys to cease operations. Piling inference upon inference, he then suggests that Skadden must have refrained from giving such advice because it found Insys's business practices aboveboard. In other words, Simon asks us to assume that the materials would be exculpatory simply because the internal investigation neither "resulted in [any] adverse employment action against [him]" nor brought about any changes in day-to-day IRC operations. Arriving at that assumption, though, elevates hope over reason. Given the complicity of so many company hierarchs in the scheme, the unknown time span covered by the internal investigation, and the lack of congruity between that time span and the life of the conspiracy, Insys's failure to either take adverse action against Simon or to modify the IRC's modus operandi may well have other more compelling explanations.

In all events, the district court had ample reason to infer that the findings of the internal investigation were likely detrimental to Simon's defense. The government and the defendants engaged in considerable pretrial skirmishing as to whether the government could elicit testimony from an Insys compliance officer who coordinated the investigation. See id. at 218. Her testimony would have focused on her conclusion that the IRC was engaging in insurance fraud, id. — a conclusion that Simon would just as soon have the jury not hear. So, too, other evidence in the record makes it likely that the evidence Simon seeks would not have been exculpatory. As we already have pointed out, see supra Part III(C), the record includes substantial evidence of Simon's knowledge of illegitimate Subsys prescriptions and his attempts to increase their volume, his knowledge of the IRC's fraudulent representations to insurers, and the like. Viewing the record in its entirety, Simon's notion that Insys permitted him to continue working because his work was legitimate seems far less plausible than the notion that he was kept in place because his work furthered the ongoing criminal scheme. Cf. Gurry, 427 F. Supp. 3d at 220 ("The evidence at trial indicated that although Insys hired compliance personnel and a general counsel after receiving the subpoena in December 2013, these individuals were largely viewed as obstacles to the success of the sales force and the company."). Considering the improbability of Simon's assumption, his afterthought defense strategy cannot be said to possess even a patina of plausibility and, thus, cannot be considered a viable strategy. See United States v. Cardona-Vicenty, 842 F.3d 766, 773 (1st Cir. 2016); see also Ponzo, 853 F.3d at 577 ("[M]ere speculation does not suffice to show a Sixth Amendment infraction.")

To complete the picture, we note that the proffered strategy was not only implausible but also entailed significant strategic risks. It is hornbook law that forgoing "a strategy that could inculpate the defendant does not constitute an actual conflict." Ponzo, 853 F.3d at 576. That is precisely the sort of strategy that Simon now embraces. We explain briefly.

It is luminously clear that piercing the attorney-client privilege would have been fraught with peril. Success in that endeavor would have opened the floodgates for damaging testimony from Insys's compliance officer, in-house counsel, and others involved in the internal investigation. The ***55** potentially dire consequences of such a strategy explain why the other defendants — even though most of them would have had at least as good a chance as Simon to benefit from the allegedly exculpatory evidence — chose, through independent and highly skilled counsel, not to buck Insys's attorney-client privilege. Instead, they banded together and asked the district court, in their own words, to "preclude the government from eliciting at trial any testimony regarding privileged communications between Insys or its Board of Directors ... and the company's in-house or outside counsel." To put it bluntly, they all went to the mat to block the government from introducing the findings of the internal investigation. The fact that no other defendant sought to pierce Insys's attorney-client privilege is a telling indication that this strategy was neither likely to be helpful to the defendants nor free from significant risks of further inculpating them. Cf. Brien v. United States, 695 F.2d 10, 16 (1st Cir. 1982) (giving weight to "the fact that none of [defendant's] other co-defendants, even though they had independent counsel," sought the particular evidence). This is far removed from the kind of alternative defense strategy that can undergird a Sixth Amendment claim. See Ponzo, 853 F.3d at 576.

If more were needed — and we do not think that it is — Simon also has failed to establish a meaningful relationship

between the findings of the internal investigation and his proffered good-faith defense. Such a defense asks the jury to determine what the defendant's "actual, subjective beliefs" may have been. Denson, 689 F.3d at 26. Because Simon has never been privy to the findings of the investigation, those findings could not have informed his subjective beliefs. [14] See United States v. Zayyad, 741 F.3d 452, 461 (4th Cir. 2014); United States v. Dynalectric Co., 859 F.2d 1559, 1574 n.19 (11th Cir. 1988).

[78] That ends this aspect of the matter. To prevail on a Sixth Amendment conflict-of-interest claim, "the conflict must be real." Brien, 695 F.2d at 15. The conflict of interest that Simon ascribes to his trial counsel is purely theoretical and, thus, does not come close to supporting a claim of constitutional dimension. See id. We are not in the business of granting "undeserved windfall[s]" to defendants who merely point to any course of action not taken by their attorney and cry foul. Cardona-Vicenty, 842 F.3d at 774 (internal quotation omitted). It is exactly that kind of windfall that Simon is seeking. His quest goes begging because the district court was on solid ground in denying his conflict-of-interest claim.

XII

Gurry contends that the district court blundered in denying his motion for a new ***56** trial. He argues that the evidence against him was "remarkably thin" and that the government's case turned on the "uncorroborated" word of one cooperating witness — Gurrieri.

[79] **[80]** **[81]** Where, as here, a new trial motion is based upon the weight of the evidence, a district court should not grant a new trial "unless it is quite clear that the jury has reached a seriously erroneous result." United States v. Rothrock, 806 F.2d 318, 322 (1st Cir. 1986) (quoting Borras v. Sea-Land Serv., Inc., 586 F.2d 881, 887 (1st Cir. 1978)). In a nutshell, such a remedy should be granted sparingly and only when the evidence preponderates heavily against the jury's verdict or a miscarriage of justice otherwise looms. See United States v. Merlino, 592 F.3d 22, 32 (1st Cir. 2010). We review a district court's denial of such a motion solely for abuse of discretion. See United States v. Ruiz, 105 F.3d 1492, 1501 (1st Cir. 1997).

The record comfortably supports Gurry's convictions on the mail- and wire-fraud predicates. He advised employees to "ride the gray line" with insurers and use the "spiel" to obscure the patients' lack of a cancer diagnosis. In addition, he led strategic planning for the IRC, attended the daily 8:30 a.m. management calls as the IRC's "mouthpiece," listened to accounts of the IRC's deceptive practices during those daily calls, directly supervised Gurrieri (who instructed employees to report false medical rationales for prescriptions and bogus lists of tried-and-failed medications), approved spurious patient-specific reports of difficulty swallowing, and enforced IRC authorization quotas. This evidence supports the jury's conclusion that Gurry deliberately participated in Insys's defrauding of insurers — a scheme that involved bribing doctors (through the mails) to generate prescriptions and misrepresenting (through the wires) patients' medical histories and needs.

In resisting this conclusion, Gurry focuses single-mindedly on Gurrieri's credibility. Without that testimony, he suggests, the evidence against him would be weakened to a point where the adverse jury verdict would topple.

Gurry's single-minded focus means that he has left himself with a steep uphill climb: "the district court must generally defer to a jury's credibility assessments" when evaluating a motion for a new trial. Merlino, 592 F.3d at 32. On appeal, we may not "second guess the [district] judge's refusal of a new trial and the jury's willingness to accept the essentials of [a government witness's] account of the events." United States v. Pitocchelli, 830 F.2d 401, 403 (1st Cir. 1987) (affirming denial of new trial when trial court elected to leave "to the jury the ultimate decision as to whether it believed" disputed testimony).

Even if we set to one side the steepness of this slope, Gurry has not shown that the jury's verdict was seriously flawed. He offers nothing that is sufficient to discredit the inference that he purposefully bought into the IRC's tactics. We briefly inspect his main contention — that Gurrieri was not to be believed — and explain why we find that contention wanting.

First, Gurry emphasizes Gurrieri's decision to testify as a cooperating witness. He rates this as a reason to disbelieve her testimony. But Gurry's rating system is out of kilter: he fails to take into account the jury's prerogatives. The district court appropriately instructed the jury that Gurrieri was cooperating with the government and that her testimony therefore ought

to be considered "with particular care and caution." Given this cautionary instruction, it was within the jury's province to choose whether to believe or disbelieve Gurrieri's ***57** testimony. See United States v. Appolon, 695 F.3d 44, 55 (1st Cir. 2012).

Next, Gurry declares that Gurrieri's testimony was "uncorroborated." This declaration is specious.[15] Other witnesses and documents substantiated the inference that Gurry both knew of and supported the IRC's corrupt tactics. For instance, a sales manager testified that she toured the IRC with Gurry, and that they listened as an employee used deceptive tactics to obtain Subsys authorization from an insurer over the telephone. Then, too, Babich testified that Gurry was part of the "primary group" of senior executives who participated in the daily 8:30 a.m. management calls, that Gurry was in charge of communicating to that group "any highlights both positive and negative that they're seeing in the IRC," that those highlights were informed by Gurry's communications with Gurrieri, and that those daily calls discussed the IRC's deceptive tactics (including the promiscuous use of "dysphagia" references and the "spiel"). Babich also testified that the dysphagia gambit was discussed by Gurrieri in front of a group that included Gurry.

There was also documentary corroboration. More than one piece of this corroboration originated with Gurry, who (for example) sent himself an email reminder about employee training on the difference between breakthrough cancer pain and breakthrough pain. Similarly, he sent a detailed email to sales managers enumerating strategies that were crafted to prompt unwarranted insurer approvals. Additionally, he was copied on several inculpatory emails, including emails about "the issue that arose with Dr. Chun's pharmacy" and the direct shipments of Subsys to Dr. Ruan's pharmacy for the purpose of ensuring "uninterrupted delivery to patients." Corroboration may come in various forms and shapes, and we find significant corroboration for Gurrieri's testimony in this record.

Gurry presses his attack on Gurrieri's credibility in other ways as well. For instance, he makes a frontal assault on Gurrieri's testimony that he maintained an office near hers at the IRC. In this regard, he notes that two witnesses testified otherwise. That may be so, but it is up to the jury to decide who to believe — and that is especially true when witnesses offer inconsistent versions of the facts. See United States v. Patel, 370 F.3d 108, 112 (1st Cir. 2004). And to tie a bow on it, even if we assume, for argument's sake, that Gurrieri's recollection was inaccurate on this one point, the jury was still entitled to credit other aspects of her testimony that were unfavorable to Gurry. Because a witness's testimony is not a monolith, it was within the jury's purview to "credit some parts of [Gurrieri's] testimony and disregard other potentially contradictory portions." United States v. Sabean, 885 F.3d 27, 37 (1st Cir. 2018) (quoting United States v. Alicea, 205 F.3d 480, 483 (1st Cir. 2000)).

Gurry also posits that Gurrieri's testimony that she was following Gurry's directions is contradicted by her "eagerness to take credit for the IRC's success" in the moment. Gurry's argument rests on a kernel of truth: Gurrieri did claim credit for the "creat[ion] [of] the IRC." But nothing about that claim undercuts her testimony ***58** that she consulted with Gurry on key decisions, that he sanctioned the IRC's deceptive tactics, and that he directed her to undertake specific acts of fraud (including the submission of authorization requests containing fictitious medication lists).

Gurry has one last shot in his sling. He complains that only Gurrieri characterized him as dishonest. Other witnesses, he says, described him as disciplined, quiet, polite, respectful, supportive, and stiff. These traits, he tells us, are inconsistent with the government's attempted depiction of him as a racketeer.

We are not so sanguine. A quiet, polite, and respectful demeanor is simply not a warranty of good behavior.[16] Choir boys and curmudgeons alike can commit conspicuously corrupt crimes. It was the jury's task to weigh the salience, if any, of Gurry's positive traits against the specific evidence of his less-than-savory actions. Given the deference that we afford juries in regard to credibility calls, we cannot say that the jury in this case either misweighed the evidence or reached a seriously erroneous result.

This door is shut. The jury was entitled to credit Gurrieri's testimony, and the district court did not err in denying Gurry's motion for a new trial.

XIII

The defendants sought a new trial on the ground that prosecutorial misconduct infected the government's closing argument. The district court denied their motion, and all of

them — Gurry directly, and the rest by adoption — now appeal.

We set the stage. During the rebuttal portion of his closing argument, the prosecutor sought to establish that the defendants specifically intended physicians to prescribe Subsys outside the usual course of professional practice. He told the jury:

> People intend [the] reasonably foreseeable consequences of their actions. It is as though, if I took a gun and fired it into the audience, which I'm not going to do, I don't intend to shoot any particular individual, but I know somebody's going to get hit. And when the defendants arm these doctors with all these bribes and all these incentives, they were creating a loaded gun.

None of the defendants interposed a contemporaneous objection.

In the same phase of his closing argument, the prosecutor referred to evidence that defendants had hired a compliance officer. He noted that the defendants "had no interest in compliance prior to that" and that the compliance officer "told you, when she was hired in April of 2014, that she was being frustrated in her efforts." The prosecutor then stated, "regarding Mr. Gurry, who was running the IRC, who is responsible for the IRC, that's his job. As a corporate officer, he bears the responsibility." This time, the defendants objected.

The prosecutor also stated:

> After nine weeks of trial, there should be no doubt, in anybody's mind here, that there was a massive insurance fraud here, happened every day, day in and day out. And there was a massive bribery scheme involved. I think the defendants concede as much, but what they want to sit here and say to you is ***59** that these men and women who ran this company, who were the managers, had no idea what was going on. Sort of like that scene from Casablanca, I'm shocked to find out there's illegal gambling in this place.

Along this same line, the prosecutor argued that the defendants "incentivized these doctors" to prescribe Subsys frequently and at high doses, "and they can't sit here and tell you, now, that they didn't intend for that to happen." The defendants did not contemporaneously object to either of these comments.

At the conclusion of the government's rebuttal, the district court gave a curative instruction in response to the objection relating to Gurry's corporate-officer status. It told the jury that "the corporation, Insys, is not on trial here. The individuals are on trial and your verdict must turn on your assessment of the culpability of them as individuals and not as corporate officers." Neither side objected to this instruction.

Several days later — but before jury deliberations began — the defendants sought additional curative instructions or in the alternative, a mistrial. In support, they identified several instances of alleged prosecutorial misconduct:

- They alluded to the comment about Gurry's corporate-officer status and argued that they could not be held criminally liable merely for the wrongdoing of subordinates.
- They calumnized the prosecutor's "loaded gun" analogy and asserted that the statement that "[p]eople intend [the] reasonably foreseeable consequences of their actions" deviated materially from the specific-intent element of a RICO conspiracy charge.
- Observing that none of them had elected to testify, the defendants raised the specter that the prosecutor's rebuttal argument had "made veiled reference to the fact that Defendants had pressed various factual arguments at trial without taking the witness stand."

The district court responded with an offer to give additional curative instructions. The court then circulated draft instructions; defense counsel proposed revisions; and the court accepted all but one of the proposed revisions. [17] The court read its prepared charge to the jury and followed

up by reading the supplemental instructions. In pertinent part, the supplemental instructions admonished:

> At least some of the defendants were at relevant times corporate officers or managers with responsibility for their departments and/or subordinates. The fact that a defendant had an executive or managerial position at Insys is not alone enough to convict the defendant of the RICO conspiracy charge in the indictment.
>
> A healthcare company executive's or manager's failure to correct or prevent misconduct at the company does not alone constitute a violation of the RICO statute. In other words, even if you think that a defendant should have known about certain conduct, should have done more to correct or prevent such conduct or should be responsible for the conduct of company employees, you cannot convict the defendant on this basis.
>
> As I already told you bribes and kickbacks alone are insufficient to convict in this case. For you to find an agreement ***60** regarding the racketeering act of illegal distribution of a controlled substance, honest services mail fraud or honest services wire fraud, you must find that defendants agreed to and specifically intended for healthcare practitioners to write Subsys prescriptions outside of the usual course of professional practice and without legitimate medical purpose. Under the law, knowledge of foreseeable consequences without more is not enough to establish that someone specifically intended certain conduct. Rather, the government must prove that the defendant acted with a bad purpose or with the object of committing a prohibited act, here, for the controlled substance and honest services predicates, having healthcare practitioners prescribe Subsys outside of the usual course of professional practice and without legitimate medical purpose.
>
> ...
>
> Finally, you should not interpret anything that was said in this case as a comment on the fact that defendants chose not to testify. As I've already instructed you, defendants have an absolute constitutional right not to testify. And you cannot draw any inference from the fact that they exercised their rights. You cannot consider or discuss defendants' choices not to testify during your deliberations.

After giving these supplemental instructions, the district court asked if any party wanted to be heard at sidebar. Receiving no affirmative response, the court instructed the jury to start its deliberations.

Following the adverse jury verdicts, the defendants renewed their prosecutorial misconduct claims in their new-trial motions. Those motions were uniformly denied. See Gurry, 427 F. Supp. 3d at 201.

[82] **[83]** Although we review the district court's order denying a new trial for abuse of discretion, see Merlino, 592 F.3d at 32 n.5, we evaluate de novo their claims of error involving the propriety of the government's closing argument, see United States v. Kuljko, 1 F.4th 87, 94 (1st Cir. 2021); United States v. Carpenter, 736 F.3d 619, 626 (1st Cir. 2013). We start with the claims of error arising out of the government's comments about Gurry's corporate-officer status and the alleged allusions to the defendants' failure to testify. Those claims of error share a common characteristic: the defendants do not assert that the challenged comments were so toxic that no cautionary instructions could have saved the day but, rather, assert only that the cautionary instructions given by the district court were insufficient.

[84] The architecture of the defendants' assertions shapes the contours of our inquiry. This architecture places waiver principles front and center. We have explained that "when the 'subject matter [is] unmistakably on the table, and the defense's silence is reasonably understood only as signifying agreement that there was nothing objectionable,' the issue is waived on appeal." Soto, 799 F.3d at 96 (quoting United States v. Christi, 682 F.3d 138, 142 (1st Cir. 2012)). One application of this rule occurs when "the district court informed the [parties] exactly how it was planning to instruct the jury" and "sought their feedback," with the result that a party's counsel "affirmatively stated there was no objection" or "remained silent." Soto, 799 F.3d at 96. In that circumstance, an appellate court is free to consider the instructions approved by that party. See id. Any claim that the instructions are inadequate is deemed waived. See id.

With respect to the corporate-officer comment and the alleged references to the defendants' failure to testify, this is such a case. The defendants sought curative instructions ***61** addressing specific components of the government's rebuttal argument and the district court obliged by circulating proposed instructions. The court invited edits and — in so

far as the proposed instructions pertained to the corporate-officer comment and the comments allegedly touching upon the defendants' failure to testify — accepted all the proposed edits. The court then read the edited instructions to the jury. After doing so, the court invited counsel to approach sidebar, yet counsel declined the invitation. That declination unambiguously signified approval of the supplemental instructions as given and constituted a waiver of the defendants' arguments on those points. See id.

To be sure, the defendants now argue that waiver principles apply only to "the court's instruction-in-chief, [but] not to curative instructions." This is so, they say, because only the former "result[s] from an iterative process of give and take between the parties and the court." Here, however, the transcript shows beyond hope of contradiction that such an iterative process took place with respect to the curative instructions. In addition, we previously have found that waiver principles apply with undiminished force to claims of error targeting curative instructions. See, e.g., United States v. Charriez-Rolón, 923 F.3d 45, 53 (1st Cir. 2019). We hold, therefore, that the defendants' claims of error regarding the corporate-officer comment and the alleged comments on the defendants' failure to testify are unavailing.

[85] **[86]** This leaves the claim of error relating to the prosecutor's use of the "loaded gun" metaphor. The government concedes that this metaphor was inconsistent with the specific-intent element of a RICO conspiracy offense and, thus, improper. Given this concession, we are left to determine whether the impropriety was harmless. For that purpose, "[t]he bottom-line question is whether the impropriety 'so poisoned the well that the trial's outcome was likely affected.' " Kuljko, 1 F.4th at 94 (quoting United States v. Mejia-Lozano, 829 F.2d 268, 274 (1st Cir. 1987)).

[87] "In this context, harmless error review takes into account a multiplicity of factors." Id. Those factors include "the severity of the impropriety, the nature of the impropriety (that is, whether or not it was deliberate, whether or not it was isolated, and the like), the strength of the government's case against the defendant, and how the district court responded to the impropriety (especially the timing, nature, and force of any curative instructions)." Id. The district court, looking at the "loaded gun" metaphor through this prism, concluded that each of the pertinent factors "counsel[ed] against a finding that the Government's misstatement 'so poisoned the well' as to warrant a new trial." Gurry, 427 F. Supp. 3d at 201. We agree.

This inquiry is, of course, case-specific. As we already have explained, see supra Parts III(A)-(D), the evidence of the defendants' guilt was copious. The unseemly metaphor itself played only a bit part in the case: the prosecutor used it only once in a rebuttal that lasted around thirty minutes and in a trial that lasted for over seven weeks. Importantly, the prosecutor made no attempt to weave the metaphor into other portions of either his closing argument or the trial as a whole. Considering that the "loaded gun" imagery occupies only a few lines in a compendious transcript, the infelicitous comment can fairly be described as "isolated." United States v. Alcantara, 837 F.3d 102, 110 (1st Cir. 2016).

The defendants disagree. They argue that the prosecutor's improper metaphor was a deliberate effort to portray them "as indiscriminate drug dealers." In support, they rely on ***62** United States v. Carpenter, 494 F.3d 13 (1st Cir. 2007) — a case in which the defendant was convicted of defrauding investors by misrepresenting his investment strategy, id. at 16. The prosecutor used "some permutation of the word 'gamble' " in "eighteen instances" during closing argument, as well as "numerous references to other gambling terms" like "cashing in chips," "doubling down," and "river boat gambler." Id. at 23. The district court granted the defendant a new trial, concluding that these persistent references reflected a deliberate (and ultimately successful) attempt to inflame the jury, and we affirmed. See id. at 22.

Except, perhaps, to the extent that it illustrates the wide margins of the district court's discretion with respect to the granting of a new trial based on an out-of-bounds closing argument, Carpenter is not a fair congener. That case involved a series of improper references and a pattern of abuse. In contrast, the prosecutor in this case used the "loaded gun" metaphor once, and the district court supportably found that it was an isolated instance and not a continuing theme. Moreover, the district court in Carpenter found that the prosecutor's misconduct was prejudicial, whereas in this case the district court found that the misconduct, in light of the curative instructions, was harmless. Given these significant discrepancies, comparing this case to Carpenter is like comparing cabbages to cantaloupes.

Here, moreover, the district court's curative instructions were carefully crafted and went to the heart of the matter. The content and timing of those instructions argue persuasively against a finding that the government's misstatement irretrievably poisoned the well. Importantly, the instructions unambiguously debunked the prosecutor's mistaken view of the specific-intent element of the charged offense. The prosecutor had told the jury that people intend the reasonably foreseeable consequences of their actions. To ensure that the jurors did not get the wrong impression, the court told them that this proposition had nothing to do with the case at hand. Furthermore, the court told them in no uncertain terms that "knowledge of foreseeable consequences without more is not enough to establish that someone specifically intended certain conduct." These pointed instructions cleared the air and kept the jurors focused on the real issues in the case.

[88] Grasping at straws, the defendants say that the curative instructions were insufficient because they failed to tell the jury that the prosecutor's argument was improper. But a trial court is not required to use magic words in framing curative instructions: it is only required to convey, in clear language, a message adequate to redress the perceived harm. See United States v. Riccio, 529 F.3d 40, 45 (1st Cir. 2008) ("This court has repeatedly held that a strong, explicit and thorough curative instruction to disregard improper comments by the prosecutor is sufficient to cure any prejudice from prosecutorial misconduct."). The curative instructions given by the court below satisfied this standard, and the court — exercising its discretion — determined that adding a specific indictment of the prosecutor's misstatement was unnecessary. The substantial deference that we afford trial courts in matters of this sort reflects an awareness that the "trial judge ... listened to the tone of the argument as it was delivered," had an opportunity to "observe[ ] the apparent reaction of the jurors," and was "more conversant with the factors relevant to the determination." Carpenter, 494 F.3d at 24. We think that the district court's determination that its curative instructions would set the jury straight, without any need to place a scarlet letter on the prosecutor, ***63** was within the broad compass of its discretion.

One further observation should be made. Although the district court's curative instructions are adequate on their face, the record also offers an external validation of their efficacy. As the district court noted, the "loaded gun" metaphor "related primarily" to the intent element of the CSA and honest-services predicates. Gurry, 427 F. Supp. 3d at 199 n.94. Thus, Gurry's acquittal on these two predicates lends considerable credence to the conclusion that the district court's curative instructions ensured that any damage done by the prosecutor's improper metaphor did not affect the outcome of the trial. See Kuljko, 1 F.4th at 95.

We summarize succinctly. In view of the isolated nature of the gun metaphor, the timely and effective curative instructions given by the district court, the government's independently strong case against the defendants, and the jury's acquittal of Gurry on the CSA and honest-services predicates, we hold that the prosecutor's comment, though unacceptable, was harmless. See Kuljko, 1 F.4th at 95.

XIV

The penultimate leg of our odyssey brings us to the defendants' challenges to the district court's restitution orders. They argue that the district court's calculation of the restitution amounts reflected only "a kind of rough justice," unsupported by the record. The government defends the district court's calculations.

We paint the backdrop. In the wake of the jury verdicts, the government sought $306,000,000 in restitution. This figure reflected the value of all Subsys prescriptions written during the racketeering period (2012-2015). The defendants objected, challenging the government's method of computation and asserting that the government's suggested price tag was exorbitant. The district court found a middle ground, ordering restitution in lesser amounts. See United States v. Babich, No. 16-CR-10343, 2020 WL 759380, at *6 (D. Mass. Feb. 14, 2020); see also supra note 3 (listing inter alia per-defendant restitution amounts).

En route the court made five specific rulings. First, the court awarded restitution to six patient victims. See Babich, 2020 WL 759380, at *3-4. Second, the court declined the government's invitation to base restitution on the totality of Subsys prescriptions written during the life of the conspiracy. See id. at *6. Even so, the court acknowledged that sifting the legitimate prescriptions from the fraudulent ones would "be too complicated and unduly prolong and burden the sentencing process." Id. With that in mind, the court made its third ruling, limiting restitution to losses traceable to

prescriptions written solely by thirteen bribed coconspirator doctors identified by the government. See id.

Fourth, the court awarded as restitution 100 percent of the insurers' paid claims for Subsys prescriptions written by those thirteen coconspirator-prescribers. See id. In making these awards, the court refused to apply two reductions urged by the defendants. See id. One requested reduction was "to account for only those claims that passed through the IRC." Id. The other was "to account for only those prescriptions made for non-cancer patients." Id. Figures reported by the government for these two categories, the defendants argued, should be deemed a cap for permissible restitution. [18] The district court rejected ***64** this two-pronged argument, stating that "[a]lthough the Court finds the amount of restitution owed beyond the thirteen co-conspirator doctors to be too complicated to calculate, it is clear that the amount that would be owed is at least equal to the total value of prescriptions written by the bribed doctors." Id.

Fifth, the court apportioned restitution. It held Kapoor fully responsible for the total amount of restitution owed — $59,755,362.45 — and capped the restitution obligations of the other defendants at lesser levels. [19] See Babich, 2020 WL 1235536, at *10.

[89] The central restitution-related issue on appeal revolves around the district court's decision to award insurers 100 percent of paid claims for Subsys prescriptions written by the thirteen coconspirator-prescribers. "We review restitution orders for abuse of discretion, examining the court's subsidiary factual findings for clear error and its answers to abstract legal questions de novo." United States v. Chiaradio, 684 F.3d 265, 283 (1st Cir. 2012); see Padilla-Galarza, 990 F.3d at 92.

[90] **[91]** **[92]** **[93]** A defendant convicted of certain federal crimes (including, as relevant here, crimes "committed by fraud or deceit," 18 U.S.C. § 3663A(c)(1)(A)(ii), "must make restitution to victims commensurate with the victims' actual losses," United States v. Naphaeng, 906 F.3d 173, 179 (1st Cir. 2018). "[R]estitution is designed to compensate the victim, not to punish the offender." Id. In awarding restitution, the court's goal is "to make the victim whole again." United States v. Innarelli, 524 F.3d 286, 293 (1st Cir. 2008). Thus, a restitution order should "not confer a windfall upon [the] victim." Naphaeng, 906 F.3d at 179.

[94] For the purpose of calculating restitution, actual loss is the beacon by which federal courts must steer. See id. In this context, actual loss is "limited to [the] pecuniary harm that would not have occurred but for the defendant's criminal activity." Id. (quoting United States v. Alphas, 785 F.3d 775, 786 (1st Cir. 2015)). This standard obligates the government to show both that the particular loss would not have occurred but for the conduct undergirding the offense of conviction and that a causal nexus exists between the loss and the conduct — a nexus that is neither too remote factually nor too remote temporally. See United States v. Cutter, 313 F.3d 1, 7 (1st Cir. 2002).

[95] Restitution is serious business, but hearings to quantify restitution amounts should not be allowed to spawn mini-trials. As we previously have explained, we do not expect a sentencing court to "undertake a full-blown trial" in order to arrive at an appropriate restitution amount. Naphaeng, 906 F.3d at 179. Nor do we hold a sentencing court to a standard of "absolute precision" when fashioning restitution orders. Id. (quoting United States v. Mahone, 453 F.3d 68, 74 (1st Cir. 2006)); see United States v. Sánchez-Maldonado, 737 F.3d 826, 828 (1st Cir. 2013). In the end, we will uphold a sentencing court's restitution award "[a]s long as the court's order reasonably responds ***65** to some reliable evidence." Sánchez-Maldonado, 737 F.3d at 828; see Naphaeng, 906 F.3d at 179 ("[A] restitution award requires only 'a modicum of reliable evidence.' " (quoting United States v. Vaknin, 112 F.3d 579, 587 (1st Cir. 1997))).

[96] **[97]** Although this standard is "relatively modest in application," Padilla-Galarza, 990 F.3d 60 at 92, it has some teeth. A sentencing court's "[m]ere guesswork will not suffice." Naphaeng, 906 F.3d at 179; see Vaknin, 112 F.3d at 587. Similarly, "rough approximation[s]" that do not 'sufficiently reflect[ ] ... the losses" of the victims are not appropriate grist for the restitution mill. Innarelli, 524 F.3d at 294. The court must resolve any genuine and material disputes about "the fact, cause, or amount of the loss" by a preponderance of the evidence. Vaknin, 112 F.3d at 582-83; see 18 U.S.C. § 3664(d).

[98] Given this framework, we conclude that the district court's determination to award as restitution 100 percent of

Subsys claims linked to the thirteen coconspirator-prescribers is insupportable. To be specific, the court's determination that all of the claims traceable to the thirteen coconspirator-prescribers constituted actual losses caused by the defendants' fraudulent conduct was not borne out by the preponderance of the evidence. For one thing, no party offered evidence that supported the 100-percent figure. In fact, a government expert opined, without contradiction, that "approximately 80.9% percent of all Subsys prescriptions passed through the IRC." 80.9 percent is not 100 percent, and the government represented to the court that the expert's figure was "a fair and consistent, reasonable approach for the court to use." According this figure due weight, it is evident that the government did not establish but-for causation for all of the claims traceable to the thirteen coconspirator-prescribers. Indeed, the government's steadfast reliance on the expert's calculations is functionally equivalent to an admission that not every Subsys prescription written by these doctors received prior authorization as a result of IRC fraud.

For another thing, the district court appears to have taken a shortcut to compensate for the difficulty of calculating restitution with respect to Subsys prescriptions written by unbribed physicians. See Babich, 2020 WL 759380, at *6. In justifying its finding of actual loss generated through coconspirator-prescribers, the district court pointedly referred to the incalculable losses caused by non-bribed doctors. See id. This reference, though, was out of step with the court's earlier determination that restitution would take account only of the losses caused by the coconspirator-prescribers. See id. To this extent, then, the court's award was internally inconsistent: on the one hand, the court appears to have found that the losses generated by non-bribed doctors were incalculable but, on the other hand, to have found that those losses nonetheless justified more munificent restitution awards.

[99] **[100]** These infirmities doom the restitution orders. Every loss that factors into the restitutionary amount must "have an adequate causal link to the defendant[s'] criminal conduct." Alphas, 785 F.3d at 786. The blending of two distinct sets of losses, one of which was incalculable, fails to satisfy the causality requirement. Consequently, the challenged restitution orders must be vacated. On remand, the district court should recalculate the amounts of restitution consistent with its earlier determination that restitution should be limited to prescriptions written by the coconspirator-prescribers. What remains is for the court to "tak[e] into account the extent (if at all) to which the [coconspirator-prescribers'] claims encompassed ***66** legitimate losses" not processed through the IRC, id., and to refashion the restitution orders accordingly. Although the court's "reasoning and the calculations leading to the amounts ordered" must be clear, Innarelli, 524 F.3d at 295, its bottom-line determination need only amount to a reasonable response to reliable evidence in the record, see Sánchez-Maldonado, 737 F.3d at 828.

XV

[101] The finish line is in sight. The district court ordered monetary forfeitures in varying amounts, see supra note 3, and the affected parties (including the government) ask us to resolve dueling claims of error pertaining to these forfeiture orders. In evaluating forfeiture orders, we assay the court's legal conclusions de novo and examine its factual findings for clear error. See United States v. George, 886 F.3d 31, 39 (1st Cir. 2018).

The baseline rule is uncontroversial. A defendant who has been convicted of RICO conspiracy is liable to forfeit "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. § 1963(a)(3). Following the defendants' convictions, the government sought forfeitures equaling the gross proceeds obtained by Lee, Simon, Gurry, and Rowan, respectively, during the racketeering period. Ruling that "any proceeds obtained from Insys during the time of the conspiracy are forfeitable," the district court obliged. Babich, 2020 WL 1235536, at *5. The court went on to hold that "the Defendants' salaries and exercised stock options constitute 'proceeds' that were obtained 'directly or indirectly' from the RICO conspiracy."[20] Id. As an offset, though, the court held that the income taxes that each defendant had paid were not "proceeds" under section 1963(a)(3) because those amounts never "ended up in the Defendants' pockets for them to spend in the way in which they wanted." Id. at *7 (alterations omitted). Accordingly, the court — in shaping its forfeiture orders as to Lee, Simon, Gurry, and Rowan — deducted from their respective gross incomes "the amount of the tax withheld" during the racketeering period. Id.

Gurry lands the first blow. He contends that the district court erred as a matter of law because "it declined to determine what portion of [his] income was tainted by racketeering activity." The government counterpunches. In a cross-appeal, it contends that the tax offsets were erroneous as a matter of law.[21] We deal with each contention in turn.

A

[102] **[103]** A defendant's proceeds from racketeering activity are "subject to a rule of proportionality." Cadden, 965 F.3d at 37 (quoting United States v. Angiulo, 897 F.2d 1169, 1211 (1st Cir. 1990)). This guardrail ensures that proceeds are subject to forfeiture only to "the extent they are tainted by the racketeering activity." Id. (quoting Angiulo, 897 F.2d at 1212). It follows that a district court's forfeiture order must determine "the portion of [the defendant's] earnings ... over the relevant time period that were tainted by the racketeering activity and therefore subject to forfeiture." Id. at 38.

***67** **[104]** Gurry advances three arguments as to why certain portions of his work at Insys cannot be linked to the racketeering activity and as to why, as a result, the forfeiture of his entire salary was in error. Lee, Simon, and Rowan adopt these arguments.

[105] Gurry first notes that although he was an Insys employee until 2016, his work at the IRC ended in May of 2014. Because "[t]here is no evidence that his job responsibilities after May 2014 included any racketeering activity," he posits, any subsequent proceeds are not subject to forfeiture. This is too crabbed a view of the facts: Gurry's relinquishment of the responsibility for supervising the IRC did not end his furtherance of, participation in, and profiting from the racketeering scheme. By 2014, Gurry had negotiated with insurance companies to add Subsys to their compendia of approved drugs. Those efforts helped the IRC to continue its fraudulent scheme and garner additional revenue for Insys even after Gurry's responsibilities changed. To the extent that Gurry's racketeering activities on behalf of the IRC generated profits for him after his departure from the IRC, that revenue constitutes proceeds "obtained from the racketeering activity ... that formed the basis of [his] convictions." Id. at 37. Those proceeds were, therefore, forfeitable. See id. And in any event, "[m]ere cessation of activity in furtherance of the conspiracy does not constitute withdrawal" from the conspiracy. United States v. Leoner-Aguirre, 939 F.3d 310, 319 (1st Cir. 2019) (quoting United States v. Ciresi, 697 F.3d 19, 27 (1st Cir. 2012)).

Next, Gurry maintains that his work for the IRC comprised only 20 percent of his job responsibilities. But he cites no authority to support a reduction in his forfeiture amount based on the percentage of his time devoted to the scheme. It would be perverse to provide an incentive for racketeering efficiency, and we do not think that a racketeer can limit his forfeiture liability by the simple expedient of devoting some of his time to legitimate work. Forfeiture calculations depend on the proceeds gained directly or indirectly from racketeering activity, see 18 U.S.C. § 1963(a)(3), not on the percentage of a defendant's time devoted to the conspiracy.[22]

Gurry also contends that his forfeiture order should reflect only the percentage of fraudulent Subsys sales during the racketeering period, not all Subsys sales during that period. The government confesses error and agrees that a remand on this ground is appropriate. That confession is premised upon our opinion in Cadden, 965 F.3d at 37-38, which was decided while these appeals were pending. There, we vacated a forfeiture order because "the government failed to prove that all [drug] sales over the period in question were generated by fraud." Id. Profits from non-fraudulent sales, we said, are not proceeds obtained (directly or indirectly) from the racketeering activity. See id. at 37-38. We ordered the district court, on remand, "to assess ... the portion of [the defendant's] earnings ... that were tainted by racketeering activity." Id. at 38.

The same instruction is warranted here. As a matter of law, any Subsys prescription processed independently of the IRC falls outside the scope of the fraudulent ***68** scheme. And since the IRC did not seek prior authorization for every Subsys prescription, the district court must determine the percentage of Subsys prior authorizations that were successful through the IRC's efforts. Forfeiture of the whole of Gurry's earnings was, therefore, in error. The forfeiture orders pertaining to Lee, Simon, and Rowan suffer from the same defect, and those orders also must be revisited.

Gurry is barking up the wrong tree, however, when he tries to convince us that "the IRC did not lie about every prescription it processed." The defendants agreed below that

73 percent of the IRC's authorizations involved prescriptions for non-cancer patients and the district court found that the IRC "misled insurers in a number of ways," even when the patients had cancer. Babich, 2020 WL 1235536, at *6. The IRC's deceptions included dissembling about patients experiencing breakthrough cancer pain, having a history of cancer, having tried-and-failed other medications, and having difficulty swallowing. See id. These tactics were systematically employed by the IRC and did not become honest or accurate by virtue of a patient having cancer. See id. Mendacity was a hallmark of the IRC's operations — a hallmark that permeated its prior authorization efforts.

We agree with the district court that "the fact that a prescription was requested for a cancer patient is insufficient to establish that it was not fraudulent." Id. Based on the overwhelming evidence that these sleazy tactics were business as usual at the IRC, we find that the district court's determination that each prescription processed by the IRC during the racketeering period was tainted by fraud is grounded upon reasonable inferences drawn from adequately established facts. The district court's determination was not clearly erroneous.

B

[106] We turn next to the government's cross-appeal. We conclude that the district court's decision to offset the defendants' forfeiture obligations based on the income taxes they paid on those earnings constituted error. Two recent cases inform this conclusion.

In Cadden, the defendant argued that "the District Court erred in calculating the forfeiture amount without deducting the amount in taxes that he paid on those proceeds." 965 F.3d at 38. We disagreed, holding that "the word 'proceeds' in the forfeiture statute refers to gross proceeds, not net profits." Id. (quoting United States v. Hurley, 63 F.3d 1, 21 (1st Cir. 1995)). Because the defendant "clearly 'obtained' the amount of funds subject to forfeiture before they were subject to taxation," that amount was "subject to forfeiture, even though the amount he obtained was itself taxable." Id.

Our decision in United States v. Chin, 965 F.3d 41 (1st Cir. 2020), is to like effect. There, we concluded that "the fact that the offender is required to pay a certain portion of his salary to the federal government as taxes does not affect the fact that he 'obtained' that portion," id. at 57. Taken together, Cadden and Chin resolve the issue. The defendants in this case were taxed on the proceeds subject to forfeiture precisely because they had "obtained" those proceeds.

C

Consistent with these rulings, we vacate the district court's forfeiture orders as to Lee, Simon, Gurry, and Rowan. The district court must assess what percentage of Subsys prior authorizations were successful ***69** independently of the IRC, and reduce the forfeiture amounts of each defendant by that percentage. See Cadden, 965 F.3d at 38. It should not, however, apply any tax offset. We remand for the purpose of recalculating these forfeiture amounts.

XVI

We need go no further.[23] Insys and Kapoor deserve great credit for developing Subsys — a medication which, appropriately dispensed, would have been an important weapon in society's continuing battle to alleviate breakthrough cancer pain. But Subsys was not appropriately dispensed. Instead, the defendants — driven by unalloyed greed — marketed the medication through a pattern of racketeering activity and conspired to ensure that it would be dispensed outside the usual course of medical practice and without a legitimate medical purpose. "Pill mills for us meant dollar signs" and — from the defendants' coign of vantage — Subsys prescriptions, like snake oil on the frontier, became above all else a means of generating revenue. In taking this cynical approach, the defendants turned what should have been a blessing into a curse.

The jury, after a protracted trial presided over with great care and circumspection by a no-nonsense judge, heard detailed evidence with respect to the defendants' pernicious practices regarding the marketing of Subsys. The jury found the evidence sufficient to hold the defendants guilty beyond a reasonable doubt on virtually all of the charges lodged in the indictment. The jury's findings and verdicts are, we think, fully supportable, and the defendants' multifaceted challenges to them, though skillfully presented, are without force. We conclude, therefore, that the findings and verdicts must stand.

We reach a different result with respect to certain monetary awards made by the district court ancillary to sentencing. Although the defendants do not challenge their sentences as such (and those sentences must remain intact), the restitution and forfeiture orders are attacked (some by the defendants, some by the government, and some by both). We find that the challenged amounts were not properly calculated in certain respects. Thus, certain restitution and forfeiture orders, identified above, must be vacated, and the case must be remanded for further proceedings consistent with this opinion.

To summarize, we set aside the district court's vacation of certain of the jury's special findings regarding the guilt of Kapoor, Lee, Simon, and Rowan vis-à-vis the CSA and honest-services predicates and order reinstatement of those findings. We affirm the jury's special findings and verdicts as to all defendants. We also affirm the district court's denial of the defendants' sundry motions for judgments of acquittal and/or new trials. So, too, we affirm the district court's orders with respect to challenged pretrial and mid-trial rulings. Finally, we affirm the defendants' sentences,[24] but vacate the district court's restitution and forfeiture orders (except for the forfeiture order regarding Kapoor) and remand for recalculation of the appropriate restitution and forfeiture amounts.

***70 Affirmed in part, reversed in part, vacated in part, and remanded.**

All Citations

12 F.4th 1, 116 Fed. R. Evid. Serv. 621

Footnotes

* Of the District of Puerto Rico, sitting by designation.

1 To avoid any confusion between Richard Simon and Shawn Simon, we subsequently refer to Richard Simon — and only Richard Simon — as “Simon.”

2 Babich and Burlakoff were also named as defendants. Both of them entered guilty pleas before trial.

3 The court sentenced Kapoor to a sixty-six-month term of immurement, ordered restitution of $59,755,362.45, and directed forfeiture of $1,914,771.20. As to Lee, the court imposed a prison sentence of a year and a day, ordered restitution of $5,000,000, and directed forfeiture of $1,170,274. As to Simon, the court imposed a thirty-three-month term of immurement, ordered restitution of $5,000,000, and directed forfeiture of $2,338,078.72. Gurry's sentence was identical to Simon's, except that he was ordered to forfeit $3,390,472.89. Finally, the court sentenced Rowan to serve a twenty-seven-month prison term, ordered restitution of $5,000,000, and directed forfeiture of $2,078,217.66.

4 At various points, some of the defendants purport to incorporate by reference arguments made by other defendants. See Fed. R. App. P. 28(i). For example, a footnote in Rowan's brief purports to “adopt[ ] and incorporate[ ] the facts and arguments in the briefs of co-defendants Dr. John Kapoor, Richard Simon, Michael Gurry, and Sunrise Lee, whether or not this brief explicitly mentions them.” Lee's and Gurry's briefs each contains similar statements.

The rule in this circuit is that “[a]doption by reference ... cannot occur in a vacuum; to be meaningful, the arguments adopted must be readily transferrable from the proponent's case to the adopter's case.” United States v. David, 940 F.2d 722, 737 (1st Cir. 1991). Given this rule, the shorthand adoption by reference attempted by these defendants is partially an empty gesture. And to the extent that the incorporated arguments pass through this screen, they fail on the merits (except with respect to certain incorporated arguments, identified in Parts XIV and XV, infra, regarding restitution and forfeiture).

5 Unscrupulous practitioners apparently welcomed the direct-ship option. In one of the weekly sales representative reports, Kapoor was informed that Dr. Ahmad had committed to write "more scripts than [Insys] can handle ... once the pharmacy issue is resolved." Other practitioners, including Drs. Couch, Ruan, and Awerbuch, also benefited from direct-ship agreements.

6 Gurry separately challenges these findings in his motion for a new trial. See infra Part XII.

7 For the sake of completeness, we note that the challenged language tracked one of the government's earlier theories of fraud liability. The government originally alleged that each time Insys submitted a Subsys authorization request on behalf of a bribed doctor, the defendants committed fraud just by omitting information about the bribe. The district court rejected this theory, ruling from the bench that not "every prescription is bogus just because there was a kickback behind it." Hence, the court said, there was "[no] obligation to disclose [the kickback]." From that point forward, the government elected to pursue only the remaining mail-fraud allegations in the indictment.

8 The government asserts that Rowan failed to preserve this claim of error and that, therefore, review is only "for clear and gross injustice." United States v. Foley, 783 F.3d 7, 12 (1st Cir. 2015). We assume, without deciding, that the claim was preserved and, therefore, engenders de novo review. See Kilmartin, 944 F.3d at 325.

9 We have observed before that "all evidence is meant to be prejudicial." Rodriguez-Estrada, 877 F.2d at 156. If it was not intended to influence the jury in one way or another, it is unlikely that any party would seek to introduce it.

10 Although the other four defendants advanced similar contentions in their briefs, those contentions have been rendered moot by our vacatur of the district court's partial grant of their Rule 29(c) motions. See supra Part III (A)-(D); see also Mubayyid, 658 F.3d at 73 (holding claim of prejudicial spillover without merit after appellate court reinstated the previously vacated conviction).

11 In all likelihood, the claim of misjoinder — which was available before trial but not raised by any pretrial motion — was waived. See Fed. R. Crim. P. 12(b)(3)(B)(iv). Here, however, the government has not suggested waiver, and we assume for argument's sake that the misjoinder claim is subject to appellate review (albeit only for plain error).

12 Lee argues in passing that the "[a]dmission" of the email "would offend" the Confrontation Clause. See U.S. Const. amend. VI. This argument collapses of its own weight: the email was never admitted into evidence and, in any event, the court told the jury that it could not consider the contents of the email for the truth of the matter asserted. Consequently, the right to confrontation was not implicated. See United States v. Cabrera-Rivera, 583 F.3d 26, 33 (1st Cir. 2009).

13 We add that Rowan's explanations for why the alleged evidence would be exculpatory and material are unconvincing: they are woven with nothing more than wispy threads of speculation and surmise. Mere conjecture that certain communications "might contain exculpatory evidence" without "any supporting evidence or arguments to indicate this was, in fact, the case," is inadequate to ground a claimed Brady violation. United States v. Brandon, 17 F.3d 409, 456 (1st Cir. 1994); see Flete-Garcia, 925 F.3d at 34 (concluding that "district court's refusal to compel production of requested information is not an abuse of discretion" when "theory of materiality is based entirely on conjecture"); Prochilo, 629 F.3d at 269 (explaining that defendant's Brady showing "cannot consist of mere speculation").

14 At trial, attorney Tyrrell did press a condonation defense on Simon's behalf: he argued that "when [Simon] started, the actions that he took were in line with the strategies that were mapped out by the company's leaders and communicated to the entire sales force, and there's no evidence that [he] knew or understood that any aspect of those strategies was illegal." Because this defense substantially covered the defense that Simon now says was impaired and because the findings of the internal investigation remain largely shrouded in mystery, it is apparent to us that Simon has failed to articulate any benefit that his proposed strategy plausibly might have achieved. Thus, there is no basis to conclude that Tyrrell's choice to refrain from trying to pierce the attorney-client privilege "actually affected the adequacy of [Simon's] representation." Familia-Consoro v. United States, 160 F.3d 761, 764 (1st Cir. 1998) (quoting Cuyler v. Sullivan, 446 U.S. 335, 349, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)); cf. Brien, 695 F.2d at 15 (finding no actual conflict of interest when "the tactics [defendant] suggests that his attorney could have pursued appear to be merely hypothetical choices that in reality could not have benefited [him]").

15 We do not mean to imply that corroboration was a sine que non to a conviction. It was not. See United States v. Martínez-Medina, 279 F.3d 105, 115 (1st Cir. 2002) (holding that the "uncorroborated testimony of a government informant is ... enough to convict" because "the law of this circuit ... leaves in the hands of the jury decisions about credibility of witnesses 'so long as the testimony is not incredible or insubstantial on its face' " (quoting United States v. Andujar, 49 F.3d 16, 21 (1st Cir. 1995)).

16 This verity has been part and parcel of the human experience from time immemorial. Over four centuries ago, the Bard of Avon famously wrote "To beguile the time, look like the time — bear welcome in your eye, your hand, your tongue. Look like the innocent flower, but be the serpent under't." William Shakespeare, Macbeth, act 1, sc. 5 (circa 1606).

17 Rowan requested that the court tell the jury that the challenged comment "was not a correct statement of the law." The court declined that request.

18 According to a government expert, "approximately 80.9% of all Subsys prescriptions" were processed by the IRC. And according to a second government expert, prescriptions written for non-cancer patients accounted for approximately 73 percent of Subsys prescriptions written by the thirteen coconspirator-prescribers.

19 Of course, liability for restitution under federal law may be joint and several and may be apportioned by the court among the responsible parties. See 18 U.S.C. § 3664(h). In this instance, the court apportioned that liability among the defendants who went to trial and those that pleaded guilty before trial (Burlakoff and Babich).

20 Insofar as the forfeiture orders are based upon the monetization of exercised stock options, neither side has challenged the district court's calculations.

21 Due to his unique compensation package, Kapoor neither sought nor received a tax offset. See Babich, 2020 WL 1235536, at *6 n.6. As a result, the government's cross-appeal does not implicate his forfeiture order.

22 At any rate, Gurry has not established whether the 80 percent of his work allegedly unrelated to the racketeering activity generated earnings for him that were independent of fraudulent Subsys sales. What counts is that the record supports the conclusion that Gurry knowingly joined and furthered the insurance-fraud scheme and that his earnings during that time for the "non-IRC work" flowed at least indirectly from his IRC efforts.

23 To the extent, if at all, that particular defendants have alluded to other potential claims of error in their extensive briefing, those claims are either insufficiently developed or patently meritless. Thus, we reject them without further elaboration.

24 The government has not requested that, upon reinstatement of the special findings concerning the CSA and honest-services predicate, see supra Part III, we remand for resentencing of the four affected defendants (Kapoor, Lee, Simon, and Rowan). In the absence of such a request, we see no need to do so.

KeyCite Yellow Flag - Negative Treatment
Distinguished by U.S. v. Jones, D.C.Cir., January 5, 2007

392 F.3d 450
United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America, Appellee
v.
Jake WEST, Appellant

No. 03-3149.
|
Argued Oct. 14, 2004.
|
Decided Dec. 10, 2004.

Synopsis
Background: The United States District Court for the District of Columbia denied defendant's motion to withdraw his plea to two charges related to the embezzlement of funds from a union pension fund, and defendant appealed.

Holdings: The Court of Appeals, Roberts, Circuit Judge, held that:

[1] court did not abuse its discretion in refusing defendant's motion to withdraw his guilty plea;

[2] defendant's waiver of right to appeal his sentence was binding on defendant because he did not contested it, and therefore defendant could only appeal his sentence on a ground that fell within one of the waiver's exceptions; and

[3] exception to defendant's waiver of appeal rights allowing him to appeal if court sentenced him to a period of imprisonment longer than the statutory maximum did not allow him to attack his sentence under *Blakely* and *Apprendi*.

Affirmed.

West Headnotes (10)

[1] **Criminal Law** Withdrawal
Criminal Law Time for Application

Court looks to three considerations in reviewing denials of motions to withdraw guilty plea: (1) whether the defendant has asserted a viable claim of innocence; (2) whether the delay between the guilty plea and the motion to withdraw has substantially prejudiced the government's ability to prosecute the case; and (3) whether the guilty plea was somehow tainted. Fed.Rules Cr.Proc.Rule 11(d)(2)(B), 18 U.S.C.A.

14 Cases that cite this headnote

[2] **Criminal Law** Amendments and Rulings as to Indictment or Pleas

Court reviews refusals of motions to withdraw guilty plea for abuse of discretion. Fed.Rules Cr.Proc.Rule 11(d)(2)(B), 18 U.S.C.A.

2 Cases that cite this headnote

[3] **Criminal Law** Grounds for Allowance

District court did not abuse its discretion in refusing defendant's motion to withdraw his guilty plea to two charges related to embezzlement of funds from a union pension fund; there were no unwritten unfulfilled promises which tainted the guilty plea, defendant did not assert a viable defense based on advice of counsel since his counsel acted as an accomplice, and government would be prejudiced by withdrawal. Fed.Rules Cr.Proc.Rule 11(d)(2)(B), 18 U.S.C.A.

13 Cases that cite this headnote

[4] **Criminal Law** Representations, Promises, or Coercion; Plea Bargaining

Inferring unwritten promises by either party to plea agreement is virtually foreclosed where the district court has conducted a flawless plea proceeding at which the defendant was made

fully aware of, and assented to, the important terms of the agreement. Fed.Rules Cr.Proc.Rule 11, 18 U.S.C.A.

4 Cases that cite this headnote

[5] **Criminal Law** Innocence or Doubt as to Guilt

A general denial of guilt is not enough to justify withdrawal of guilty plea; defendant must affirmatively advance an objectively reasonable argument that he is innocent. Fed.Rules Cr.Proc.Rule 11(d)(2)(B), 18 U.S.C.A.

5 Cases that cite this headnote

[6] **Criminal Law** Good Faith; Advice of Counsel

Defense of advice of counsel necessarily fails where counsel acts as an accomplice to the crime.

4 Cases that cite this headnote

[7] **Criminal Law** Good Faith; Advice of Counsel

A criminal defendant may avail himself of an advice of counsel defense only where he makes a complete disclosure to counsel, seeks advice as to the legality of the contemplated action, is advised that the action is legal, and relies on that advice in good faith.

7 Cases that cite this headnote

[8] **Criminal Law** Withdrawal

A district court need hold an evidentiary hearing on a plea withdrawal only where the defendant offers substantial evidence that impugns the validity of the plea. Fed.Rules Cr.Proc.Rule 11(d)(2)(B), 18 U.S.C.A.

4 Cases that cite this headnote

[9] **Criminal Law** Issues Considered

Defendant's waiver of right to appeal his sentence. which was explicitly contained in plea agreement, was binding on defendant because he did not contest it; thus, defendant could only appeal his sentence on a ground that fell within one of the waiver's exceptions.

2 Cases that cite this headnote

[10] **Criminal Law** Representations, Promises, or Coercion; Plea Bargaining

Criminal Law Issues Considered

Exception to defendant's waiver of appeal rights allowing him to appeal if court sentenced him to a period of imprisonment longer than the statutory maximum did not allow him to attack his sentence under *Blakely* and *Apprendi*; reading the "statutory maximum" exception as preserving an *Apprendi* attack on the Guidelines was inconsistent with the rest of defendant's plea agreement.

18 Cases that cite this headnote

***451** ****81** Appeals from the United States District Court for the District of Columbia. (No. 01cr00292-01) (No. 02cr00218-02).

Attorneys and Law Firms

Jack R. Ormes argued the cause and filed the briefs for appellant. Phillis Payne entered an appearance.

Suzanne Grealy Curt, Assistant U.S. Attorney, argued the cause for appellee. ***452** ****82** With her on the brief were Kenneth L. Wainstein, U.S. Attorney, and John R. Fisher, Roy W. McLeese, III, and Steven W. Pelak, Assistant U.S. Attorneys. Thomas J. Tourish, Jr., Assistant U.S. Attorney, entered an appearance.

Before: GINSBURG, Chief Judge, and HENDERSON and ROBERTS, Circuit Judges.

Opinion

ROBERTS, Circuit Judge.

Appellant Jake West pled guilty to two charges related to the embezzlement of funds from a union pension fund. He later asked the district court to allow him to withdraw his plea; the court refused. West now urges us to reverse that ruling, and

also presents several challenges to his sentence. We find that the district court did not abuse its discretion in denying West's motion to withdraw his plea. With regard to the sentence, we decide that under the plea agreement West has waived the right to appeal. Since he offers no reasons why we should not treat the waiver as valid, we honor it and uphold the sentence.

I.

Jake West is the former president of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (IWU). In December 2001, the government charged him in a 51-count indictment with conspiracy, embezzlement from the IWU, making false statements in Department of Labor (DOL) reports, and obstruction of justice. The indictment alleged that West had appropriated union funds for his personal benefit and had covered up his activities by filing false and misleading reports with the DOL. A second indictment, filed in August 2002, charged both West and a former IWU General Secretary, LeRoy Worley, with conspiracy, embezzlement from the union, and embezzlement from the union's pension fund. According to the government, West arranged to have Worley paid a full pension from the IWU's retirement plan even though he did not meet the applicable requirements; Worley, in exchange, dropped his bid to challenge West for presidency of the union.

Trial on the charges contained in the second indictment began with jury selection on October 15, 2002. Ten days later the jury was sworn, and West changed his mind about going to trial. He instead agreed to plead guilty to embezzlement from a pension fund, 18 U.S.C. § 664, and to one count of making a false statement in a DOL report, 29 U.S.C. § 439(b). In return, the government dismissed all remaining charges against him. [1]

The plea agreement that West signed includes an integration clause providing that "[t]he terms of this written Agreement constitute the entire plea offer and agreement in this matter." Appellee's Record Material (RM) at 7 (Plea Agreement). The agreement twice recites that no "promises, conditions, understandings, or agreements" have been made or entered into by the government other than those in the agreement itself. *Id.* at 8. The government "reserves allocution or its right to speak at Mr. West's sentencing," *id.* at 5, and the government and West "make no promises to one another and make no agreement with one another with regard to defendant West's sentencing in these matters," *id.* at 6. In addition, the agreement states that "West understands that his sentence will be imposed in accordance with the United States Sentencing Guidelines." *Id.* at 6. Finally, under the agreement West explicitly waives the right to appeal his sentence unless the court ***453 **83** sentences him to a prison term in excess of the statutory maximum or departs upward beyond the Sentencing Guidelines range. *Id.* at 6-7.

The district court conducted a hearing to ensure that West was aware of the terms of the agreement and that he was entering his plea knowingly and voluntarily. West was represented at this hearing by counsel. With respect to the integration clause, the court asked West directly, "Other than the promises in this plea agreement, are there any other promises that have induced ... you [to] plead guilty?" West responded, "no." Plea Hr'g Tr. at 20.

At the plea hearing, the government also proffered the factual basis for its charges against West. As trustee of the IWU's retirement plan, West was familiar with plan provisions setting out criteria for receiving benefits, including one that restricts normal pension benefits to persons 60 years of age or older. In December 1998, West arranged for Worley, who was younger than 60 at the time, to receive a normal pension. The apparent purpose of this maneuver was to persuade Worley to retire early and thus remove a rival in the next election for IWU president. By the government's calculation, Worley received $59,380 in excess pension benefits between December 1998 and November 1999.

As to the false statement count, the government's proffer states that in December 1997 West signed and declared true and correct a Form LM-2 Labor Organization Annual Report that was submitted to DOL. The LM-2 stated that disbursements to the IWU president, other than salary and expense allowance payments, totaled $8,556; the true figure, which West knew, was close to $98,500. Disbursements to Worley and three other IWU officials were also understated on the 1997 LM-2 by amounts ranging from $25,000 to $70,000. According to the proffer, the union's LM-2 filings for 1995 and 1996 also underreported the true amounts of disbursements to the president by "more than $70,000 and $80,000, respectively." Proffer of Facts at 6.

On August 19, 2003, as the date of West's sentencing approached, the probation office issued its final presentence investigation report. The report calculated West's sentence under the Sentencing Guidelines. It first assigned West a

base offense level of four. Enhancements were then applied for several aspects of West's crimes: twelve points for the loss associated with his embezzlement, which exceeded $500,000, U.S.S.G. § 2B1.1 (1998); four points for being the organizer or leader of the embezzlement, § 3B1.1(a); two points for abusing a position of trust, § 3B1.3; two points for involvement in an offense of more than minimal planning, § 2B1.1(b)(4)(A); and two points for obstructing justice by providing false information to the grand jury, § 3C1.1. The total offense level was therefore 26. For criminal history category I, this yielded a sentence under the relevant Guidelines of 63 to 78 months. Because the statutory maximum for violations of 18 U.S.C. § 664 is five years and for violations of 29 U.S.C. § 439(b) one year, the longest sentence West could receive was 72 months.

The government filed its sentencing memorandum in late August 2003. The memorandum agreed with the presentence report "in all material aspects" and requested that West receive a sentence of 63 to 72 months in prison and be ordered to pay restitution. Sentencing Memorandum at 2. It also offered an extensive view of West's criminal activity. West was revealed as not an especially frugal union president. He spent, by the government's calculation, more than $51,000 in IWU funds on dinners, golf, and items for his home in Virginia. He allowed relatives to ***454** ****84** dine and go shopping in Washington, D.C., at the union's expense. He had the union pay for golf vacations in Palm Springs, California, for both his personal waiter and his tailor. These expenses went unreported in the union's LM-2 filings.

West also had other top officials pay his tabs so as to conceal the true amount of his own expenses. An opponent had used West's reported disbursements against him in the 1991 campaign for IWU president; West hoped to avoid a repeat of this by shifting reported expenses to lower-ranking officials. In many cases, these officials did not report these expenses at all and, according to the memorandum, were given license to spend the union's money freely themselves. The government argued that all these disbursements-both those unreported and those attributed to other officials-should be treated as relevant conduct for purposes of calculating West's sentence.

The memorandum made similar contentions with respect to West's deal with Worley. In addition to the $59,384 embezzled from the retirement plan, West arranged to have $74,620 improperly paid to Worley from the union's supplemental pension plan. At West's direction, Worley also continued to receive a salary and expense allowance from IWU-amounting to about $217,000-for more than a year after his retirement. In all, the government calculated that conduct relevant to West's offense resulted in a loss of at least $555,000. It is also significant that, according to the government's memorandum, West collaborated in almost every aspect of these schemes with IWU General Counsel Victor Van Bourg.

On September 22, 2003, almost a year after entering his guilty plea, West moved the district court to allow his plea to be withdrawn or, alternatively, to order specific performance of the plea agreement. In the event the court was inclined to deny these requests, he asked that it hold an evidentiary hearing to consider the evidence against him. He advanced two arguments in support of the motion. First, he claimed that the prosecutor who negotiated the plea agreement had assured him that, in West's phrasing, "there would be no further reference" to the dropped charges. RM at 18 (West Declaration). As he saw it, the government was now reneging on this promise by, in effect, re-introducing these charges at sentencing. Second, West argued that he did not know that his conduct as union president was illegal because he relied on attorney Van Bourg's assurances that-again, West's words-"all was proper and legal and that I had nothing to worry about." *Id.*

The district court denied West's motion. Applying our framework in *United States v. Hanson,* 339 F.3d 983 (D.C.Cir.2003), the court ruled that West had not shown that his plea was tainted or presented a viable claim of innocence so as to warrant withdrawal. It also found that the government would suffer prejudice by having to reconstruct a complex criminal case that West's guilty plea cut short eleven months before. Finally, the court saw no reason to hold an evidentiary hearing or to order specific performance of the plea agreement.

The district court then proceeded to sentence West. West challenged four aspects of the presentence report's recommendations: the amount of loss, the four-point enhancement for his leadership role, the two-point increase for obstruction of justice, and the failure to deduct points for acceptance of responsibility. The court rejected all of West's claims. It found facts by the preponderance of the evidence that supported the application of the leadership and obstruction of justice enhancements. With respect to amount of loss, the court determined that the government had sufficiently proven that the loss caused ***455** ****85** by West's conduct was more than $500,000

but less than $800,000, entailing a 12-point enhancement. The government's calculations were established "through pleadings, through testimony, [and] through trial exhibits before the Court." Sentencing Hr'g Tr. at 39. West was also denied any reduction for acceptance of responsibility due to his last-minute attempt to withdraw his plea. Ultimately, however, the court departed downward from the Guidelines range because of West's poor health. He was sentenced to 36 months in prison followed by two years' supervised release and ordered to pay approximately $185,000 in fines and restitution. West appeals.

II.

[1] **[2]** West first challenges the district court's refusal to grant his motion to withdraw his plea. A defendant may withdraw a guilty plea before sentencing if he "can show a fair and just reason for requesting the withdrawal." FED. R. CRIM. P. 11(d)(2)(B). We look to three considerations in reviewing denials of motions to withdraw: "(1) whether the defendant has asserted a viable claim of innocence; (2) whether the delay between the guilty plea and the motion to withdraw has substantially prejudiced the government's ability to prosecute the case; and (3) whether the guilty plea was somehow tainted." *Hanson,* 339 F.3d at 988; *United States v. McCoy,* 215 F.3d 102, 106 (D.C.Cir.2000). The last of these is the most important, *see* *United States v. Horne,* 987 F.2d 833, 837 (D.C.Cir.1993), and usually requires a showing that the taking of the plea did not conform to the requirements of Federal Rule of Criminal Procedure 11. "[A] defendant who fails to show some error under Rule 11 has to shoulder an extremely heavy burden if he is ultimately to prevail." *United States v. Cray,* 47 F.3d 1203, 1208 (D.C.Cir.1995). We review refusals of motions to withdraw for abuse of discretion. *United States v. Weaks,* 388 F.3d 913, 916 (D.C.Cir.2004); *Hanson,* 339 F.3d at 988.

[3] A. We begin then with the issue of taint. West contends that the government promised not to use any of the dismissed charges against him at sentencing and that its failure to carry out this promise taints his plea. Along with his motion in the district court, West submitted an affidavit stating that the prosecutor "assured me that there would be only the two counts and that the others would be dismissed and that there would be no further reference to them." RM at 18 (West Declaration). [2]

As the district court recognized, the suggestion that such a promise was made is belied by the plea agreement itself, which could hardly be clearer on this point. It contains an integration clause that states: "The terms of this written Agreement constitute the entire plea offer and agreement in this matter." RM at 7 (Plea Agreement). It makes clear that "[o]ther than the offer and agreements noted in this document, there are no other promises, conditions, understandings, or agreements by Jake West or the [United States Attorney's Office (USAO)]." *Id.* at 8. Under the heading, "Defendant's Acceptance of Guilty Plea Agreement," where West signed the agreement, it again reads, ****86** ***456** "Absolutely no promises, agreements, understandings, or conditions have been made or entered into in connection with my decision to plead guilty except those set forth in this Guilty Plea Agreement." *Id.* What the agreement does say about West's sentencing is similarly unequivocal: "The USAO and defendant West make no promises to one another and make no agreement with one another with regard to defendant West's sentencing in these matters." *Id.* at 6. It also states that the government "reserves allocution or its right to speak at Mr. West's sentencing." *Id.* at 5.

[4] By itself, this language argues strongly against the existence of any unwritten promises by either party to the agreement. *See* *United States v. Ahn,* 231 F.3d 26, 36 (D.C.Cir.2000); *United States v. Alegria,* 192 F.3d 179, 185 (1st Cir.1999). Inferring such promises is virtually foreclosed where, as here, the district court has also conducted a flawless plea proceeding at which the defendant was made fully aware of, and assented to, the important terms of the agreement. *See* *Ahn,* 231 F.3d at 36. At the plea hearing, the court reviewed all the relevant aspects of the agreement with West, including the integration clause and the disclaimer of promises with regard to sentencing. West, represented by counsel at the hearing, was then asked whether any other promises induced him to plead guilty; he replied "no." If the government had made any unwritten promises to West about his sentence, this was the time for West (or his counsel) to say something. Neither did. In consequence, the district court did not abuse its discretion in deciding that West's plea was not tainted by any unwritten promise by the government.

[5] B. Having found no taint to West's plea, we next consider whether West presents a sufficiently viable claim

of innocence to meet the "heavy burden" imposed by *Cray,* 47 F.3d at 1208. A general denial of guilt is not enough; West "must affirmatively advance an objectively reasonable argument that he is innocent." *Id.* at 1209. West argues that the district court erred in ruling that his reliance on Van Bourg, IWU's General Counsel, did not amount to a viable claim of innocence. West argues that "at all times" that he was involved in the acts for which he pled guilty "he was acting in accord with his attorney's advice." RM at 13 (Motion to Withdraw Plea). According to West, Van Bourg "consistently advised" him that all his actions were proper and that "no criminal liability could result." *Id.*

The district court gave two reasons for rejecting West's advice-of-counsel claim. First, it found that the defense was not applicable to 18 U.S.C. § 664, on the ground that the offense of embezzlement from a pension fund does not require that the defendant know that his conduct was illegal. Second, it ruled that the defense was inapplicable in any case because here Van Bourg was acting not as a legitimate attorney but as an accomplice, who would have been indicted along with West had he not died. The court made this finding by the preponderance of the evidence based on Van Bourg's untruthful responses to government subpoenas and on evidence that he pressured union accountants to cover up improper disbursements.

[6] We agree that West does not present a viable claim of innocence because Van Bourg was properly deemed to have acted as his accomplice.[3] The defense of ***457 **87** advice of counsel necessarily fails where counsel acts as an accomplice to the crime. *See* *United States v. Carr,* 740 F.2d 339, 347 (5th Cir.1984) ("When the lawyer is a partner in a venture, takes a share of the profits, or is not a lawyer who had no interest save to give sound advice for a reasonable fee the advice of counsel defense is unavailable.") (internal quotation marks omitted).

The proffers included with the guilty pleas of other top union officials, as outlined in the government's sentencing memorandum, adequately show that Van Bourg was a co-participant in the embezzlement scheme. Van Bourg was integral to the decision to cover-up the true amount of disbursements to West in the union's LM-2 Reports. At a meeting between IWU officials and the union's accountants, Van Bourg indicated that he did not want to comply with LM-2 reporting requirements. He then asked the accountants what they would say if subpoenaed to testify about the meeting. When Van Bourg was told by the accountants that they would testify truthfully, he recommended that West fire them.

[7] The evidence suggests that Van Bourg was also a participant in the arrangement to secure full pension benefits for Worley. Van Bourg had earlier advised local union agents, in the presence of West, that it was a crime to inflate pension benefits. West nevertheless states that Van Bourg "assured [West] that he could make it all legal." RM at 17 (West Declaration). A defendant may avail himself of an advice of counsel defense only where he makes a complete disclosure to counsel, seeks advice as to the legality of the contemplated action, is advised that the action is legal, and relies on that advice in good faith. *See* *SEC v. Savoy Industries,* 665 F.2d 1310, 1314 n. 28 (D.C.Cir.1981). Van Bourg's mere assurance that he could "make it all legal" falls well short of these requirements and, in light of the other evidence on which the district court relied, does nothing to undermine the conclusion that Van Bourg was himself part of the criminal enterprise. The district court was warranted in finding that Van Bourg acted as an accomplice and properly concluded that West could not present an advice-of-counsel defense. It was therefore no abuse of discretion for the district court to rule that West did not present a viable claim of innocence.

[8] C. Finally, the district court placed some reliance on the possible prejudice the government would suffer if West were allowed to withdraw his plea. While prejudice may properly be taken into account, it "has never been dispositive in our cases." *Hanson,* 339 F.3d at 988; *see also Cray,* 47 F.3d at 1208. Although it certainly appears that the government would be prejudiced here, we need not consider the matter further. West has not shown that his plea was tainted, nor has he satisfied *Cray*'s "heavy burden" by presenting a viable claim of innocence. These considerations suffice to decide that the district court did not abuse its discretion in refusing West's withdrawal motion. *See Cray,* 47 F.3d at 1208.[4]

***458 **88 III.**

The remainder of West's appeal involves several challenges to his sentence. He offers three reasons why his sentence should be vacated: (1) the district court relied on improper evidence in applying enhancements to his sentence under the Sentencing Guidelines; (2) the court did not give him an opportunity to cross-examine other union officials about the proffers submitted with their guilty pleas, in purported

violation of his Sixth Amendment Confrontation Clause right; and (3) his sentence violated his Sixth Amendment right to a jury trial, as understood in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), because it was based on facts that were neither admitted nor found by a jury beyond a reasonable doubt. Before we reach any of these arguments, however, we must first address whether West has waived the right to appeal his sentence.

[9] The plea agreement between the government and West contains an explicit waiver of the right to appeal the sentence, which reads:

> Mr. West is aware that federal law, specifically 18 U.S.C. § 3742, affords him the right to appeal his sentence in these matters. Knowing that, Mr. West waives the right to appeal his sentence or the manner in which it was determined pursuant to 18 U.S.C. § 3742, except to the extent that (a) the Court sentences Mr. West to a period of imprisonment longer than the statutory maximum or (b) the Court departs upward from the applicable Sentencing Guideline range pursuant to the provisions of U.S.S.G. § 5K2.

RM at 6-7 (Plea Agreement). [5]

The government asks us to give this waiver full effect. It argues that we have enforced a similar waiver before, *see In re Sealed Case,* 283 F.3d 349, 355 (D.C.Cir.2002), and that other circuits have honored such waivers in certain circumstances, *see, e.g., United States v. Hahn,* 359 F.3d 1315, 1324-28 (10th Cir.2004); *United States v. Hernandez,* 242 F.3d 110, 113 (2d Cir.2001). *Sealed Case* helps the government, but does not resolve the issue. First, in *Sealed Case,* the defendant agreed, *after* he was tried and convicted, to waive the right to appeal that conviction. His waiver thus applied to a proceeding that had already taken place, not, as here, to one that had yet to occur. Moreover, the only ground on which the defendant in *Sealed Case* challenged his waiver was that his plea had not been taken in accordance with Rule 11. If the plea was not valid then the plea agreement-including the waiver of the right to appeal-would not be enforceable. Once we determined that there was no Rule 11 error, the defendant offered no other reason to deny effect to the waiver with respect to the defendant's other claims.

West, for his part, offers no reason why we should not honor the waiver here. His opening brief simply raises his challenges to the sentence, without addressing the explicit waiver barring such challenges. In his reply brief, he reserves one short paragraph for a response to the government's contentions. He first asserts that the waiver is void because the entire plea agreement was the result of "fraud in the inducement," *i.e.,* because it was the product of false promises by the government regarding his sentence. Reply Br. at 8. This is merely a reprise of his argument that his plea was tainted-one we have already rejected.

***459** ****89** West then suggests that his *Blakely* challenge falls within an exception to the waiver allowing appeal if "the Court sentences Mr. West to a period of imprisonment longer than the statutory maximum." This argument, of course, does not deny that a waiver of appeal rights is valid, but only that this particular waiver does not cover West's *Blakely* claim. If anything, this argument implicitly *acknowledges* the waiver's validity. [6]

We find that we need not question the validity of West's waiver because he has not. Ordinarily, we "refuse to disturb judgments on the basis of claims not adequately briefed on appeal." *McBride v. Merrell Dow and Pharmaceuticals, Inc.,* 800 F.2d 1208, 1210 (D.C.Cir.1986). This practice is rooted in the Federal Rules of Appellate Procedure, *see* Rule 28(a)(9)(A) (appellant's brief must contain his "contentions and reasons for them"), and is essential to our system of appellate review, *Carducci v. Regan,* 714 F.2d 171, 177 (D.C.Cir.1983) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."). Rulings on issues that have not been fully argued run the risk of being "improvident or ill-advised." *McBride,* 800 F.2d at 1211. There is even greater cause to be wary where,

as here, the consequences of our ruling are potentially far-reaching. *See* *Alabama Power Co. v. Gorsuch,* 672 F.2d 1, 7 (D.C.Cir.1982) (per curiam). A decision as to whether, and in what circumstances, waivers of appeal rights are valid could affect a large number of criminal defendants. We therefore decline to decide the issue without adequate briefing, and treat the waiver as binding on West because he has not contested it.

[10] The upshot is that West may only appeal his sentence on a ground that falls within one of the waiver's exceptions. Because he does not argue that an exception applies either to his challenge to the district court's application of the Guidelines or to his Confrontation Clause claim, his waiver bars these claims. The lone remaining issue is whether he can fit his *Blakely* claim into the exception allowing him to appeal if "the Court sentences [him] to a period of imprisonment longer than the statutory maximum." RM at 7 (Plea Agreement). West contends that the term "statutory maximum," as used in the plea agreement, should be read as it is "defined in *Blakely.*" Reply Br. at 8. If the exception is understood in this way, West argues, his *Blakely* claim survives.

This requires some explication. The Supreme Court held in *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that, except for the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Apprendi,* "statutory maximum" had a relatively clear meaning: it was the maximum penalty allowed by the criminal statute that the defendant was charged with violating. *See* *id.* at 468-69, 120 S.Ct. at 2351-52 (judge's finding of fact raised statutory maximum from 10 to 20 years). In *Blakely* the Supreme Court applied *Apprendi* to a state sentencing guidelines scheme, and explained that, in that context, "the 'statutory ***460** ****90** maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely,* 124 S.Ct. at 2537.

West claims that the Sentencing Guidelines operate in the same manner as the statute struck down in *Blakely* and are therefore unconstitutional. Most important for present purposes he contends that this claim is not barred by his appeal waiver because the waiver's "statutory maximum" exception contemplates precisely this kind of *Blakely*-based challenge to the Guidelines.

The question is one of interpretation, informed by principles of contract law. *Ahn,* 231 F.3d at 35; *United States v. Jones,* 58 F.3d 688, 691 (D.C.Cir.1995). Applying those principles, we find it implausible that at the time of the plea agreement the parties could have understood "statutory maximum" to mean "statutory maximum for *Apprendi* purposes," as West suggests. If the exception means what West says, it could only relate to a challenge under *Apprendi.* But this court certainly did not give West any reason to believe that the exception's language would preserve an *Apprendi* attack on the Guidelines. Indeed, our decisions, like those of other circuits, consistently refused to apply *Apprendi* to the Guidelines or to interpret "statutory maximum" as West urges us now to do. *United States v. Fields,* 251 F.3d 1041, 1043 (D.C.Cir.2001); *In re Sealed Case,* 246 F.3d 696, 698-99 (D.C.Cir.2001) ("it is hard to see how the [Supreme Court] could have intended to mandate the heightened standard for application of the Guidelines' enhancement instructions when the resulting sentence remains within the statutory maximum").

Indeed, West himself seems to have read the exception differently before *Blakely.* In his opening brief, submitted before *Blakely* was decided, he did not raise any *Apprendi* claim at all; it was only in his reply brief-and after the Supreme Court decided *Blakely*-that he argued that the exception covered a challenge to the Guidelines. *See* RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. b (1981) ("In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made.").

Furthermore, reading the "statutory maximum" exception as preserving an *Apprendi* attack on the Guidelines is flatly inconsistent with the rest of West's plea agreement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted

together."). The same section of the agreement sets out the maximum fines and periods of imprisonment for violations of 18 U.S.C. § 664 and 29 U.S.C. § 439(b). *See* RM at 6 (Plea Agreement). The most reasonable inference is that "statutory maximum" in the waiver exception refers to these. In addition, as the agreement makes clear, West "understands that his sentence will be imposed in accordance with the United States Sentencing Guidelines ... and that the Judge, in his sole discretion, will determine the facts relevant to sentencing under the Sentencing Guidelines." *Id.* Having consented in such plain terms to sentencing under the Guidelines, West would have us believe that he nevertheless reserved a constitutional challenge to the Guidelines through an exceedingly subtle employment of "statutory maximum." We find such a reading of the agreement untenable.

We emphasize that we decide here only the narrow issue of whether the exception to West's waiver of appeal rights allows him to attack his sentence under *Blakely* and *Apprendi.* It does not. We do not ***461** ****91** reach either the question whether such waivers are valid as a general matter-because appellant does not argue otherwise-or whether by simply pleading guilty West waived, or could have waived, his *Blakely* rights. What we do decide is that a waiver of the right to appeal a sentence will be enforced if the defendant gives us no argument why it should not be, and that this particular waiver covers all the sentencing claims West seeks to advance on appeal.

Affirmed.

All Citations

392 F.3d 450, 176 L.R.R.M. (BNA) 2193, 364 U.S.App.D.C. 80, 150 Lab.Cas. P 10,427

Footnotes

1 Worley proceeded to trial and, after a mistrial for a hung jury, reached an agreement with the government to have the charges dismissed in exchange for restitution.

2 Several months later, West submitted additional affidavits from his daughter and his attorney in support of a motion in the district court for bail pending appeal. We need not consider these affidavits because they were not part of the record before the court when it denied West's motion to withdraw his plea. *See* FED. R. APP. P. 10(a); *Kirshner v. Uniden Corp. of America,* 842 F.2d 1074, 1077 (9th Cir.1988) ("Papers submitted to the district court *after* the ruling that is challenged on appeal should be stricken from the record on appeal."). Even if we were to consider them, they would not affect our disposition of West's appeal.

3 We therefore do not address whether the defense of advice of counsel would have applied had West's attorney not been deemed an accomplice. *See* *United States v. DeFries,* 129 F.3d 1293, 1308 (D.C.Cir.1997) (good faith reliance on advice of counsel is a defense to the charge of embezzlement under 29 U.S.C. § 501(c)).

4 We are easily persuaded that the district court did not abuse its discretion in denying West an evidentiary hearing or the alternative relief of specific performance. A district court need hold an evidentiary hearing on a plea withdrawal only where the defendant offers "substantial evidence that impugns the validity of the plea." *United States v. Redig,* 27 F.3d 277, 280 (7th Cir.1994) (internal quotation marks omitted). As explained, that was not the case here. With regard to specific performance, West does not allege any breach of the express terms of the plea agreement, and since the district court properly found no enforceable promise by the government regarding sentencing, such a promise obviously could not provide the basis for any form of relief.

5 Under the agreement, West reserves the right to attack his sentence collaterally under 28 U.S.C. § 2255, but only "if new and currently unavailable information becomes known to him." RM at 7 (Plea Agreement).

6 At oral argument, counsel argued that the waiver's exception for upward departures under § 5K2 of the Guidelines permits an appeal of the enhancements applied to West's sentence. When the court pointed out the distinction between sentencing enhancements and upward departures under the Guidelines, counsel acknowledged his mistake and conceded the point. He did not challenge the waiver's validity.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Dixit v. Smith, W.D.Tenn., August 11, 2023

143 S.Ct. 1900
Supreme Court of the United States.

Ashot YEGIAZARYAN, aka
Ashot Egiazaryan, Petitioner
v.
Vitaly Ivanovich SMAGIN, et al.
CMB Monaco, fka Compagnie
Monegasque de Banque, Petitioner
v.
Vitaly Ivanovich Smagin, et al.

No. 22-381, No. 22-383
|
Argued April 25, 2023
|
Decided June 22, 2023 *

Synopsis
Background: Judgment creditor, a Russian citizen and resident who had obtained a multimillion dollar California judgment, brought action against judgment debtor, who was a California resident, bank to which debtor transferred funds, and other purported accomplices, alleging that debtor with the assistance of the bank engaged in a pattern of criminal activity, predominantly in and targeted at California, to prevent creditor from collecting on his judgment in violation of Racketeer Influenced and Corrupt Organizations Act (RICO). The United States District Court for the Central District of California, R. Gary Klausner, J., 2021 WL 2124254, dismissed for failure to allege a "domestic injury." Creditor appealed. The United States Court of Appeals for the Ninth Circuit, Graber, Circuit Judge, 37 F.4th 562, reversed. Debtor and bank filed petitions for writ of certiorari. Certiorari was granted, and the cases were consolidated.

Holdings: The Supreme Court, Justice Sotomayor, held that:

[1] in determining whether a plaintiff has alleged a domestic injury for purposes of a private civil RICO suit, courts should look to the circumstances surrounding the alleged injury to assess whether it arose in the United States; abrogating *Armada (Sing.) PTE Ltd. v. Amcol Int'l Corp.*, 885 F.3d 1090, and

[2] creditor alleged domestic injury, as required to maintain private civil RICO suit.

Affirmed and remanded.

Chief Justice Roberts, and Justices Kagan, Kavanaugh, Barrett, and Jackson, joined.

Justice Alito filed a dissenting opinion, in which Justice Thomas joined, and in which Justice Gorsuch joined as to Part I.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion to Dismiss.

West Headnotes (14)

[1] **International Law** Presumption against extraterritoriality

The presumption against extraterritoriality represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate.

[2] **International Law** Presumption against extraterritoriality

The "presumption against extraterritoriality" provides that absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.

[3] **International Law** Presumption against extraterritoriality

Dual rationales support the presumption against extraterritoriality; on the one hand, it reflects concerns of international comity insofar as it serves to protect against unintended clashes between the laws of the United States and those of other nations which could result in international discord, and on the other hand, the

presumption is informed by the commonsense notion that Congress generally legislates with domestic concerns in mind.

[4] **International Law** Presumption against extraterritoriality

The first step of the presumption against extraterritoriality asks whether the statute gives a clear, affirmative indication that it applies extraterritorially, and if the answer is "yes," then the presumption is rebutted, obviating any need to proceed to step two; if the presumption is not rebutted, however, then step two asks whether the case involves a domestic application of the statute, which is assessed by looking to the statute's focus.

1 Case that cites this headnote

[5] **International Law** Presumption against extraterritoriality

While it will usually be preferable to begin with step one of the presumption against extraterritoriality, which asks whether the statute gives a clear, affirmative indication that it applies extraterritorially, courts have the discretion to begin at step two in appropriate cases and assess the statute's focus to determine whether the case involves a domestic application of the statute.

1 Case that cites this headnote

[6] **Racketeer Influenced and Corrupt Organizations** Foreign activity

The substantive provisions of Racketeer Influenced and Corrupt Organizations Act (RICO) apply extraterritorially to the same extent that RICO's predicates do. 18 U.S.C.A. § 1961 et seq.

[7] **Racketeer Influenced and Corrupt Organizations** Business, property, or proprietary injury; personal injuries

Racketeer Influenced and Corrupt Organizations Injury; causation

Under step two of the presumption against extraterritoriality, which asks whether the case involves a domestic application of the statute at issue, a private Racketeer Influenced and Corrupt Organizations Act (RICO) plaintiff must allege and prove a domestic injury to its business or property. 18 U.S.C.A. § 1964(c).

[8] **Racketeer Influenced and Corrupt Organizations** Business, property, or proprietary injury; personal injuries

Determining whether a plaintiff has alleged a domestic injury for purposes of provision of Racketeer Influenced and Corrupt Organizations Act (RICO) creating a private right of action for persons injured in business or property is a context-specific inquiry that turns largely on the particular facts alleged in a complaint; specifically, courts should look to the circumstances surrounding the alleged injury to assess whether it arose in the United States; abrogating *Armada (Sing.) PTE Ltd. v. Amcol Int'l Corp.*, 885 F.3d 1090. 18 U.S.C.A. § 1964(c).

4 Cases that cite this headnote

[9] **Racketeer Influenced and Corrupt Organizations** Causal relationship; direct or indirect injury

An alleged violation of Racketeer Influenced and Corrupt Organizations Act (RICO) must have proximately caused the injury in order for the plaintiff to be able to sue under provision of RICO creating a private right of action for persons injured in business or property. 18 U.S.C.A. § 1964(c).

[10] **Racketeer Influenced and Corrupt Organizations** Injury in general

The domestic-injury requirement for a private civil suit under Racketeer Influenced and Corrupt Organizations Act (RICO) does not

mean that foreign plaintiffs may not sue under RICO. 18 U.S.C.A. § 1964(c).

[11] **Racketeer Influenced and Corrupt Organizations** Business, property, or proprietary injury; personal injuries

Racketeer Influenced and Corrupt Organizations Causal relationship; direct or indirect injury

In the context of provision of Racketeer Influenced and Corrupt Organizations Act (RICO) creating a private right of action for persons injured in business or property, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. 18 U.S.C.A. § 1964(c).

[12] **Racketeer Influenced and Corrupt Organizations** Business, property, or proprietary injury; personal injuries

In assessing whether a plaintiff has alleged a domestic injury for purposes of provision of Racketeer Influenced and Corrupt Organizations Act (RICO) creating a private right of action for persons injured in business or property, courts should engage in a case-specific analysis that looks to the circumstances surrounding the injury; if those circumstances sufficiently ground the injury in the United States, such that it is clear the injury arose domestically, then the plaintiff has alleged a domestic injury. 18 U.S.C.A. § 1964(c).

7 Cases that cite this headnote

[13] **Racketeer Influenced and Corrupt Organizations** Foreign activity

Racketeer Influenced and Corrupt Organizations Business, property, or proprietary injury; personal injuries

Judgment creditor, a Russian citizen and resident who had obtained multimillion dollar California judgment, alleged domestic injury, as required to maintain private civil suit under Racketeer Influenced and Corrupt Organizations Act (RICO) against judgment debtor, a California resident, and bank to which debtor transferred funds, alleging that debtor engaged in pattern of criminal activity to prevent creditor from collecting on judgment in violation of RICO, although some components of purported scheme occurred abroad; creditor alleged he was injured in his ability to collect his judgment, that much of the alleged racketeering activity, including the creation of domestic shell companies to hide assets, occurred in United States, and that injurious effects of activity manifested in California as judgment was obtained in California and rights provided by judgment existed only in California. 18 U.S.C.A. § 1964(c).

1 Case that cites this headnote

[14] **Racketeer Influenced and Corrupt Organizations** Injury in general

A plaintiff has alleged a domestic injury for purposes of a private civil Racketeer Influenced and Corrupt Organizations Act (RICO) suit when the circumstances surrounding the injury indicate it arose in the United States. 18 U.S.C.A. § 1964(c).

5 Cases that cite this headnote

****1902** *Syllabus* *

Respondent Vitaly Smagin won a multimillion dollar arbitration award in 2014 against petitioner Ashot Yegiazaryan stemming from the misappropriation of investment funds in a joint real estate venture in Moscow. Because Yegiazaryan has lived in California since 2010, Smagin, who lives in Russia, filed suit to confirm and enforce the award in the Central District of California pursuant to the Convention on the Recognition and Enforcement

of Foreign Arbitral Awards. The District Court initially froze Yegiazaryan's California assets before finally entering judgment against him. The District Court also entered several postjudgment orders barring Yegiazaryan and those acting at his direction from preventing collection on the judgment. While the action was ongoing, Yegiazaryan himself was awarded a multimillion dollar arbitration award in an unrelated matter and sought to avoid the District Court's asset freeze by concealing the funds, which were ultimately transferred to a bank account with petitioner CMB Monaco.

In 2020, Smagin filed this civil suit under the Racketeer Influenced and Corrupt Organizations Act (RICO), which provides a private right of action to "[a]ny person injured in his business or property by reason of a violation of" RICO's substantive provisions. 18 U.S.C. § 1964(c). As relevant, Smagin alleges Yegiazaryan and others worked together to frustrate Smagin's collection on the California judgment through a pattern of wire fraud and other RICO predicate racketeering acts, including witness tampering and obstruction of justice. The District Court dismissed the complaint on the ground that Smagin had failed to plead a "domestic injury" as required by *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 346, 136 S.Ct. 2090, 195 L.Ed.2d 476. Smagin's Russian residency weighed heavily in the District Court's decision. The Ninth Circuit reversed. Rejecting the District Court's rigid, residency-based approach to the domestic-injury inquiry, the Ninth Circuit instead applied a context-specific approach and concluded that Smagin had pleaded a domestic injury because he had alleged that his efforts to execute on a California judgment in California against a California resident were foiled by a pattern of racketeering activity that largely occurred in California and was designed to subvert enforcement of the judgment there.

Held: A plaintiff alleges a domestic injury for purposes of § 1964(c) when the circumstances surrounding the injury indicate it arose in the United States. Pp. 1907 – 1912.

(a) The "domestic-injury" requirement for private civil RICO suits stems from *RJR Nabisco*, a case in which the Court was asked whether RICO applies extraterritorially. To answer the question, the Court applied the presumption against extraterritoriality, a canon of construction that provides "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." 579 U.S. at 335, 136 S.Ct. 2090. Guided by concerns of international comity and the reasonable discernment of congressional intent, the Court distilled the presumption against extraterritoriality into two steps. The first asks "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.*, at 337, 136 S.Ct. 2090. If the answer is "yes," the presumption is rebutted, and the test ends. If the answer is "no," the inquiry proceeds and step two asks whether the case involves a domestic application of the statute, which is assessed "by looking to the statute's 'focus.' " *Ibid.* Applying this framework, the Court assessed the extraterritoriality of RICO's private right of action, § 1964(c), and determined that it does not overcome the presumption at step one. Proceeding to step two, the Court held that "[a] private RICO plaintiff ... must allege and prove a *domestic* injury to its business or property." *Id.*, at 346, 136 S.Ct. 2090. Because the *RJR Nabisco* plaintiffs were not seeking redress for domestic injuries, the Court did not have occasion to explain what constitutes a "domestic injury." Pp. 1907 – 1909.

(b) The parties advance competing approaches to the domestic-injury inquiry. Petitioners urge a bright-line rule that locates a plaintiff's injury at the plaintiff's residence. They argue that because a private RICO action remedies only economic injuries and a plaintiff necessarily suffers that injury at its residence where the economic injury is felt, *any* cognizable § 1964(c) injury is necessarily suffered at the plaintiff's residence. Alternatively, petitioners argue that at least when *intangible* property is concerned, common-law principles locate the intangible property at the plaintiff's residence, such that the injury is also located there. Smagin defends a contextual approach that considers all case-specific facts bearing on where the injury arises. Pp. 1908 – 1909.

(c) The Court agrees with Smagin and the Ninth Circuit that the domestic-injury inquiry is context specific and turns largely on the facts alleged in the complaint. Specifically, courts should look to the circumstances surrounding the alleged injury to assess whether it arose in the United States. Here, that means looking to the nature of the alleged injury, the racketeering activity that directly caused it, and the injurious aims and effects of that activity.

The context-specific approach is most consistent with *RJR Nabisco*. The Court's statements in *RJR Nabisco* that the

domestic-injury requirement "does not mean that foreign plaintiffs may not sue under RICO," 579 U.S. at 353, n. 12, 136 S.Ct. 2090, and that "application of [the] rule in any given case will not always be self-evident," point toward a case-specific inquiry that considers the particular facts surrounding the alleged injury, *id.*, at 354, 136 S.Ct. 2090. That approach also better reflects the requirement's origin in step two, which assesses whether there is a domestic application of a statute by looking to the statute's focus. *RJR Nabisco* implied that § 1964(c)'s focus is injuries in "business or property by reason of a violation of" RICO's substantive provisions. So understood, § 1964(c)'s focus is not on the isolated injury but on the injury as a product of racketeering activity. This requires courts to look to the circumstances surrounding the injury to see if those circumstances sufficiently ground the injury in the United States. Pp. 1909 – 1910.

(d) The circumstances surrounding Smagin's injury make clear that the injury arose in the United States. Smagin's alleged injury is his inability to collect his judgment. Much of the alleged racketeering activity that caused that injury occurred in the United States. And while some of Yegiazaryan's scheme to avoid collection occurred abroad, the scheme was directed toward frustrating the California judgment. Further, the injurious effects of the racketeering activity largely manifested in California. Smagin obtained a judgment in California where Yegiazaryan lives, and the rights provided by that judgment exist only in California. The alleged RICO scheme thwarted those rights, thereby undercutting the orders of the California District Court and Smagin's efforts to collect on Yegiazaryan's assets in California. Under a contextual approach, Smagin's allegations suffice to state a domestic injury. Pp. 1910 – 1911.

(e) Petitioners argue that a contextual approach is inconsistent with certain common-law principles governing "the situs" of injuries to intangible property. Specifically, petitioners point to the Restatement (First) of Conflict of Laws—under which fraud is typically deemed felt at the plaintiff's residence—and to the principle of *mobilia sequuntur personam*—which generally locates intangible property at the domicile of its owner—and argue that both principles locate Smagin's alleged injury at his residence. Petitioners fail both to explain the relevance of these principles and to show that they were principles settled at common law at the time of RICO's enactment. The core problem with petitioners' reliance on legal fictions concerning the situs of injuries in other areas of the law is that the justifications of that approach do not necessarily translate to the presumption against extraterritoriality, with its distinctive concerns for comity and discerning congressional meaning. Indeed, petitioners' approach generates results counter to comity and far afield from any reasonable interpretation of what qualifies as a domestic application of § 1964(c). Consider two U. S. businesses targeted by racketeering activity, one owned by a U. S. resident and one owned by someone living abroad. There is no evidence that Congress intended that only the former business owner can bring a § 1964(c) suit, especially since doing so runs the risk of generating international discord. Finally, petitioners argue that a contextual approach is unworkable because it does not provide a bright-line rule. Such concerns about a fact-intensive test cannot displace congressional policy choices, where a more nuanced test is true to the statute's meaning. Pp. 1910 – 1912.

37 F.4th 562, affirmed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KAGAN, KAVANAUGH, BARRETT, and JACKSON, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined, and in which GORSUCH, J., joined as to Part I.

Attorneys and Law Firms

Vincent Levy, New York, NY, for Petitioners.

Nicholas O. Kennedy, Dallas, TX, for Respondents.

Michael C. Tu, Counsel of Record, Peter J. Brody, Cooley LLP, Los Angeles, CA, for petitioner CMB Monaco, fka Compagnie Monégasque de Banque.

Vincent Levy, Counsel of Record, Gregory Dubinsky, Kevin D. Benish, Brian T. Goldman, Holwell Shuster & Goldberg LLP, New York, NY, for petitioner, Ashot Yegiazaryan, aka Ashot Egiazaryan.

Alexander D. Burch, Counsel of Record, Baker & McKenzie LLP, Houston, Texas, Nicholas O. Kennedy, Baker & McKenzie LLP, Dallas, TX, for respondent Vitaly Smagin.

Opinion

Justice SOTOMAYOR delivered the opinion of the Court.

****1905** ***536** Respondent Vitaly Smagin holds a multimillion dollar California judgment against petitioner Ashot Yegiazaryan, who lives in California. Smagin, who resides in Russia, filed suit in the Central District of California alleging that Yegiazaryan, with the assistance of petitioner CMB Monaco (formerly Compagnie Monégasque de Banque), engaged in a pattern of ***537** criminal activity, predominantly in and targeted at California, to prevent him from collecting on his California judgment, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968. The District Court dismissed the complaint after concluding that Smagin had failed to allege a "domestic injury," as required by *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 334, 136 S.Ct. 2090, 195 L.Ed.2d 476 (2016). The Ninth Circuit reversed, concluding that Smagin had alleged a domestic injury. This Court agrees with the Ninth Circuit.

I

A

The essential facts as alleged by Smagin are as follows. From 2003 to 2009, Yegiazaryan committed fraud against Smagin, stealing his shares in a joint real estate venture in Moscow. To avoid a Russian criminal indictment for that fraud, Yegiazaryan fled to a mansion in Beverly Hills in 2010, where he has lived ever since. In 2014, Smagin, who lives in Russia, won an arbitration award in London against Yegiazaryan for the misappropriation of his real estate investment (London Award). Yegiazaryan refused to pay that award, which is over $84 million.

Seeking to collect, Smagin filed an enforcement action in the Central District of ****1906** California to confirm and enforce the London Award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U. S. T. 2517, T. I. A. S. No. 6997, as implemented by 9 U.S.C. §§ 201–208. The District Court issued a temporary protective order, followed by a preliminary injunction, freezing Yegiazaryan's California assets.

In his application for injunctive relief, Smagin informed the District Court that Yegiazaryan had been granted a substantial arbitration award in an unrelated proceeding involving Yegiazaryan and yet another Russian businessman, Suleymon Kerimov (Kerimov Award). At the time, no funds had yet been paid to Yegiazaryan in satisfaction of that ***538** award, but Smagin was concerned that when they were paid, Yegiazaryan would take steps to transfer the money out of Smagin's reach.

Smagin's concerns were justified. In May 2015, Yegiazaryan received a $198 million settlement in satisfaction of the Kerimov Award. To avoid the District Court's asset freeze, Yegiazaryan accepted the money through the London office of an American law firm headquartered in Los Angeles. Yegiazaryan then created "a complex web of offshore entities to conceal the funds," App. 56a, and ultimately transferred the funds to a bank account with petitioner CMB Monaco. Yegiazaryan also directed those in his inner circle to file fraudulent claims against him in foreign jurisdictions, which he would not oppose, in an attempt to obtain sham judgments that would encumber the $198 million, thereby blocking Smagin's access to it.

Around the same time, Yegiazaryan was hiding his assets in the United States through a system of "shell companies" owned by family members. *Id.,* at 61a. This included a Nevada company, which was owned by his brother and created "for the purpose of sheltering [Yegiazaryan's] U. S. assets from his creditors," including Smagin. *Id.,* at 44a.

Smagin did not learn about the $198 million settlement, Yegiazaryan's efforts to hide it, or the U. S. shell companies until February 2016, when Smagin was granted leave to intervene in Yegiazaryan's California divorce proceedings. The next month, the California District Court in the London Award enforcement action granted Smagin's motion for summary judgment on his petition for confirmation of the Award and entered judgment against Yegiazaryan for $92 million, including interest. The court also issued several postjudgment orders barring Yegiazaryan and those acting at his direction from preventing collection on the judgment.

For failing to comply with those orders, the District Court subsequently found Yegiazaryan in contempt of court. To avoid having to comply with the contempt order, however, ***539** Yegiazaryan falsely claimed he was too ill, and submitted a forged doctor's note to the District Court.

When Smagin notified Yegiazaryan that he would be seeking to depose the doctor in question, who resides in California, Yegiazaryan used "intimidation, threats, or corrupt persuasion," *id.,* at 82a, to get the doctor to avoid service of the subpoena.

B

At issue here is a civil RICO suit that Smagin brought in 2020 based on the allegations just described. RICO provides a private right of action to "[a]ny person injured in his business or property by reason of a violation of" RICO's substantive provisions. 18 U.S.C. § 1964(c). Invoking that cause of action, Smagin sued Yegiazaryan and CMB Bank (the two petitioners here), as well as 10 other defendants, in ****1907** the Central District of California.[1] The complaint asserts two claims against each: a substantive RICO violation, § 1962(c), and a RICO conspiracy claim, § 1962(d). The thrust of Smagin's allegations is that the defendants worked together under Yegiazaryan's direction to frustrate Smagin's collection on the California judgment through a pattern of wire fraud and other RICO predicate racketeering acts, including witness tampering and obstruction of justice. For these violations, Smagin seeks not only actual damages "no less than $130 million," App. 100a, but also attorney's fees and treble damages as authorized under RICO. See § 1964(c).

***540** The District Court dismissed the complaint on the ground that Smagin had "fail[ed] to adequately plead a domestic injury," *id*., at 31a, as required by this Court's decision in *RJR Nabisco*. See 579 U.S. at 346, 136 S.Ct. 2090 ("A private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property"). The District Court "place[d] great weight on the fact that Smagin is a resident and citizen of Russia and therefore experiences the loss from his inability to collect on his judgment in Russia." App. 27a (internal quotation marks and alterations omitted).

The Ninth Circuit reversed. It rejected petitioners' invitation to follow the domestic-injury approach of the Seventh Circuit, "which has adopted a rigid, residency-based test for domestic injuries involving intangible property," such as a judgment. 37 F.4th 562, 568, 570 (2022) (citing *Armada (Sing.) PTE Ltd. v. Amcol Int'l Corp.*, 885 F.3d 1090 (2018)). Under the Seventh Circuit's rule, which locates an injury to intangible property at the plaintiff 's residence, Smagin could not allege a domestic injury because he resides in Russia. See *Armada,* 885 F.3d, at 1094. The Ninth Circuit instead adopted a "context-specific" approach to the domestic-injury inquiry, which it found consistent with the approaches of the Second and Third Circuits. 37 F.4th, at 568–570; see *Bascuñán v. Elsaca*, 874 F.3d 806, 809 (CA2 2017); *Humphrey v. GlaxoSmithKline PLC*, 905 F.3d 694, 696 (CA3 2018). Applying that approach, the Ninth Circuit concluded that Smagin had pleaded a domestic injury because he had alleged that his efforts to execute on a California judgment in California against a California resident were foiled by a pattern of racketeering activity that largely "occurred in, or was targeted at, California" and was "designed to subvert" enforcement of the judgment in California. 37 F.4th, at 567–568.

This Court granted certiorari to resolve the Circuit split. 598 U. S. ——, 143 S.Ct. 645, 646, —— L.Ed.2d —— (2023). Because a context-specific inquiry is ***541** most consistent with this Court's decision in *RJR Nabisco*, and because the context here makes clear Smagin has alleged a domestic injury, the Court affirms.

II

A

[1] **[2]** The "domestic-injury" requirement for private civil RICO suits stems from this Court's decision in *RJR Nabisco*. There, the question before the Court was whether RICO applies extraterritorially. ****1908** To answer that question, the Court employed the presumption against extraterritoriality, which "represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010). The presumption provides that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco*, 579 U.S., at 335, 136 S.Ct. 2090.

[3] Dual rationales support the presumption against extraterritoriality. On the one hand, it reflects concerns of international comity insofar as it " 'serves to protect

against unintended clashes between our laws and those of other nations which could result in international discord.' " *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013) (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991)). On the other hand, the presumption is informed by "the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204, n. 5, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993). In fact, consistent application of the presumption "preserv[es] a stable background against which Congress can legislate with predictable effects." *Morrison*, 561 U.S., at 261, 130 S.Ct. 2869.

[4] **[5]** *RJR Nabisco* distilled the presumption against extraterritoriality into two steps. The first asks "whether the statute gives a clear, affirmative indication that it applies extraterritorially." ***542** 579 U.S. at 337, 136 S.Ct. 2090. If the answer is "yes," then the presumption is rebutted, obviating any need to proceed to step two. If the presumption is not rebutted, however, then step two asks whether the case involves a domestic application of the statute, which is assessed "by looking to the statute's 'focus.' " *Ibid.* [2]

[6] **[7]** Applying this framework, the Court assessed the extraterritoriality of two of RICO's substantive provisions and, as relevant here, its private cause of action. As to the substantive provisions, the Court held at step one that they apply extraterritorially to the same extent that RICO's predicates do, making it unnecessary to proceed to step two. *Id.*, at 340, 136 S.Ct. 2090. Regarding RICO's private right of action, § 1964(c), however, the Court's conclusion was different. The Court determined that § 1964(c) does not overcome the presumption at step one because there is no "clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States." *Id.*, at 349, 136 S.Ct. 2090. "If anything," the Court reasoned, by "cabining" the private cause of action to "injur[ies] to 'business or property,' " "Congress signaled that the civil remedy is not coextensive with § 1962's substantive prohibitions." *Id.*, at 350, 136 S.Ct. 2090. Accordingly, in reference to step two, the Court held that "[a] private RICO plaintiff ... must allege and prove a *domestic* injury to its business or property." *Id.*, at 346, 136 S.Ct. 2090.

In announcing this "domestic-injury" requirement, the Court did not have occasion to explain what constitutes a "domestic-injury," because the plaintiffs in ****1909** *RJR Nabisco* had stipulated that they were not seeking redress for domestic injuries. *Id.*, at 354, 136 S.Ct. 2090. The question now before the Court is whether Smagin has alleged a domestic injury.

***543** B

The parties advance competing approaches to the domestic injury inquiry. Petitioners urge the Court to adopt a bright-line rule, akin to the Seventh Circuit's, that locates a plaintiff 's injury at the plaintiff 's residence. Petitioners advance two different versions of this rule.

As their primary position, petitioners argue that *any* injury cognizable under § 1964(c) is necessarily suffered at the plaintiff 's residence because "the private cause of action remedies only economic injuries, and a plaintiff necessarily suffers that injury at its residence" where the economic injury is felt. Brief for Petitioners 2. In the alternative, petitioners argue that, at least when the alleged injury involves *intangible* property, such as the judgment here, relevant common-law principles locate the intangible property at the plaintiff 's place of residence, such that the injury is also located there. *Id.*, at 2–3, 43–44. On either version of petitioners' rule, Smagin cannot allege a domestic injury because he lives in Russia.

Smagin, in contrast, defends a contextual approach that considers all case-specific facts bearing on where the injury "arises," not just where it is "felt." Brief for Respondent 9. In the context of this suit, Smagin argues that he has stated a domestic injury because he has alleged that he was injured in his ability to enforce a California judgment, against a California resident, through racketeering acts that were largely "designed and carried out in California" and were "targeted at California." *Id.*, at 3, 21.

C

[8] **[9]** The Court agrees with Smagin and the Ninth Circuit that "determining whether a plaintiff has alleged a domestic injury [for purposes of RICO] is a context-specific inquiry that turns largely on the particular facts alleged in a complaint." 37 F.4th, at 570. Specifically, courts should look to the circumstances surrounding the alleged injury to assess whether ***544** it arose in the United States. In this suit, that means looking to the nature of the alleged injury, the racketeering activity that directly caused it, [3] and the injurious aims and effects of that activity.

[10] This approach to the domestic-injury requirement is most consistent with *RJR Nabisco*. There, the Court clarified that its domestic-injury requirement "does not mean that foreign plaintiffs may not sue under RICO." 579 U.S. at 353, n. 12, 136 S.Ct. 2090. Similarly, the Court explained that "application of [the domestic-injury] rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic.' " *Id.*, at 354, 136 S.Ct. 2090. These remarks point toward a case-specific inquiry that considers the particular facts surrounding the alleged injury. Petitioners' bright-line rule, in contrast, dispenses with any such subtlety. It makes the location of the plaintiff 's residence determinative, thus barring all foreign plaintiffs, exactly as *RJR Nabisco* said it was not doing.

****1910** **[11]** **[12]** A contextual approach to the domestic-injury requirement also better reflects the requirement's origin in step two of the extraterritoriality framework, which assesses whether there is a domestic application of a statute by looking to the statute's focus. *RJR Nabisco* implied that the focus of § 1964(c) is injuries in "business or property by reason of a violation of [RICO's substantive provisions]." § 1964(c). This focus makes sense because, in the context of RICO, "the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." ***545** *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 497, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). So understood, § 1964(c)'s focus is on the injury, not in isolation, but as the product of racketeering activity. Thus, in assessing whether there is a domestic injury, courts should engage in a case-specific analysis that looks to the circumstances surrounding the injury. If those circumstances sufficiently ground the injury in the United States, such that it is clear the injury arose domestically, then the plaintiff has alleged a domestic injury.

Because of the contextual nature of the inquiry, no set of factors can capture the relevant considerations for all cases. RICO covers a wide range of predicate acts and is notoriously "expansive" in scope. *Id.*, at 498–499, 105 S.Ct. 3275. Thus, depending on the allegations, what is relevant in one case to assessing where the injury arose may not be pertinent in another. While a bright-line rule would no doubt be easier to apply, fealty to the statute's focus requires a more nuanced approach.

D

[13] This suit illustrates well why the domestic-injury inquiry must account for the facts of the case, rather than rely on a residency-based rule. While it may be true, in some sense, that Smagin has felt his economic injury in Russia, focusing solely on that fact would miss central features of the alleged injury. Zooming out, the circumstances surrounding Smagin's injury make clear it arose in the United States.

Smagin alleges that he "has been injured in his inability to collect [his] massive judgment." App. 38a. Much of the alleged racketeering activity that caused the injury occurred in the United States. Yegiazaryan took domestic actions to avoid collection, including allegedly creating U. S. shell companies to hide his U. S. assets, submitting a forged doctor's note to a California District Court, and intimidating a U. S.-based witness. It is true that other components of the scheme occurred abroad. As Smagin alleges, however, even those "wrongful acts and plans were devised, initiated, and ***546** carried out ... through acts and communications initiated in and directed towards Los Angeles County, California," with the "central purpose of frustrating enforcement of [the] California judgment." *Id.*, at 45a–46a.

Further, the injurious effects of the racketeering activity largely manifested in California. Smagin obtained a judgment in California because that is where Yegiazaryan lives, and where Smagin had thus hoped to collect. The rights that the California judgment provides to Smagin exist only in California, including the right to obtain postjudgment discovery, the right to seize assets in California, and the right to seek other appropriate relief from the California District Court. The alleged RICO scheme thwarted those rights,

thereby undercutting the orders of the California District Court and Smagin's efforts to collect on Yegiazaryan's assets in California.

****1911** In sum, Smagin's interests in his California judgment against Yegiazaryan, a California resident, were directly injured by racketeering activity either taken in California or directed from California, with the aim and effect of subverting Smagin's rights to execute on that judgment in California. On the Court's contextual approach, those allegations suffice to state a domestic injury in this suit.

III

Petitioners argue that a contextual approach is inconsistent with certain common-law principles, which instead favor their bright-line rule. According to petitioners, because Smagin has alleged an "economic injury" or an "injury in intangible property," Brief in Opposition 15–16, courts should look to common-law principles governing "the situs" of such injuries, when determining whether those injuries are foreign or domestic. Specifically, as to economic injuries, petitioners point to the Restatement (First) of Conflict of Laws § 377 (1934), from which they discern the principle that "a fraud plaintiff suffers an economic loss at the plaintiff ***547** 's domicile." Brief for Petitioners 36; see also *Sack v. Low*, 478 F.2d 360, 366 (CA2 1973) (Under the First Restatement, "loss from fraud is deemed to be suffered where its economic impact is felt, normally the plaintiff 's residence"). As to intangible injuries, petitioners further rely on the principle of *mobilia sequuntur personam*, which they claim "generally locat[es] intangible property at the domicile of its owner." Brief for Petitioners 44. Both principles, they argue, locate Smagin's alleged injury at his residence.

Petitioners fall short, however, when explaining the relevance of these principles. They do not clearly explain why choice-of-law principles are germane here, let alone why the First Restatement dictates those principles.[4] Meanwhile, it is far from clear that petitioners' gloss on the principle of *mobilia sequuntur personam* was as well established or as wide sweeping as petitioners take it to be, in light of the many twists and turns in the doctrine across a range of contexts. See A. Simowitz, Siting Intangibles, 48 N. Y. U. J. Int'l L. & Pol. 259, 270–292 (2015). In short, at the time of RICO's enactment, both principles were hardly "settled ... at common law." *Beck v. Prupis*, 529 U.S. 494, 500, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000).

The core problem with petitioners' approach is that it is unmoored from the presumption against extraterritoriality. While legal fictions regarding the situs of economic injuries and intangible property have their justifications in other areas of law, those justifications do not necessarily translate to the presumption against extraterritoriality, with its distinctive ***548** concerns for comity and discerning congressional meaning.

Indeed, it is because petitioners' view invokes these fictions that it generates results so counter to comity and so far afield from any reasonable interpretation of what qualifies as a domestic application of § 1964(c). On petitioners' primary view, a business owner who resides abroad but ****1912** owns a brick-and-mortar business in the United States cannot bring a § 1964(c) suit even if an American RICO organization burns down her storefront. Perhaps aware of how odd this seems, petitioners offer a fallback rule for intangible property. That rule fares no better. It provides that if racketeering activity targets the intangible business interests of two U. S. businesses, one owned by a U. S. resident and one owned by someone living abroad, only the former business owner can bring a § 1964(c) suit. There is no evidence Congress intended to impose such a double standard, especially because doing so runs its own risks of generating international discord. These implausible consequences are strong evidence that petitioners have gone astray in assessing the focus of § 1964(c) and, thus, the meaning of "domestic injury" as contemplated by *RJR Nabisco*.

Finally, petitioners, as well as the dissent, *post*, at 5 (opinion of ALITO, J.), argue that a contextual approach is unworkable because it does not provide a bright-line rule. Reply Brief 17–18. An approach is not unworkable, however, merely because it directs courts to consider the case-specific circumstances surrounding an injury when assessing where it arises. While "the ease with which [petitioners'] bright-line rule can be applied gives it some surface appeal," *Humphrey*, 905 F.3d at 709, a look beneath the surface quickly reveals that the test is inconsistent with *RJR Nabisco*, the presumption against extraterritoriality, and the thrust of § 1964(c) itself. Concerns about a fact-intensive test cannot displace

congressional policy choices, where a more nuanced test is true to the statute's meaning.

***549**

* * *

[14] A plaintiff has alleged a domestic injury for purposes of § 1964(c) when the circumstances surrounding the injury indicate it arose in the United States. Smagin alleges that he was injured in California because his ability to enforce a California judgment in California against a California resident was impaired by racketeering activity that largely occurred in or was directed from and targeted at California. Those allegations state a domestic injury. The judgment of the Ninth Circuit is affirmed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice THOMAS joins, and with whom Justice GORSUCH joins as to Part I, dissenting.

These are the first cases in which we have been required to decide when injury to intangible property that a civil plaintiff attributes to a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) qualifies as a "domestic injury" and may therefore provide the basis for recovery under 18 U.S.C. § 1964(c). See *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 346–354, 136 S.Ct. 2090, 195 L.Ed.2d 476 (2016). This question has divided the lower courts, but the Court's decision resolves very little. It holds only that ascertaining the site of intangible injuries for purposes of civil RICO requires a court to consult a variety of factors and that two factors it identifies show that respondent has suffered a domestic injury. This analysis offers virtually no guidance to lower courts, and it risks sowing confusion in our extraterritoriality precedents. Rather than take this unhelpful step, I would dismiss the writ of certiorari as improvidently granted.

I

We granted certiorari "to resolve [a] Circuit split" between, on the one hand, the Third and Ninth Circuits, which ***550** embrace ****1913** a totality-based inquiry like the one the Court adopts here, and, on the other hand, the Seventh Circuit, which has held that RICO injuries to intangible property are sited at the plaintiff 's residence. *Ante*, at 1907; compare *Humphrey v. GlaxoSmithKline PLC*, 905 F.3d 694, 706–707 (CA3 2018), and 37 F.4th 562, 567–568 (CA9 2022) (case below), with *Armada (Sing.) PTE Ltd. v. Amcol Int'l Corp.*, 885 F.3d 1090, 1094–1095 (CA7 2018). [1] The Seventh Circuit's decision, however, contains little analysis and simply declares that "[i]t is well understood that a party experiences or sustains injuries to its intangible property at its residence." *Id.*, at 1094; see also *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 471, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017) (THOMAS, J., dissenting) (referring to a dearth of "reasoned opinions ... from the courts of appeals" regarding "a novel and important question"). The Third and Ninth Circuits, for their parts, did not coalesce around any common set of factors to guide the civil RICO domestic-injury inquiry for intangible-property claims. See *Humphrey*, 905 F.3d, at 706–707; 37 F.4th, at 567–568. And no court of appeals has even broached the possibility that different categorical rules might be available for different types of intangible property (*e.g.*, perhaps there could be a rule that injuries to trademark rights should be sited in the country that provided the trademark). "[W]e would greatly benefit from the views of additional courts of appeals on this question." *Czyzewski*, 580 U.S., at 472, 137 S.Ct. 973 (THOMAS, J., dissenting).

Bringing clarity to this area of the law is not an easy task, and I must conclude that the Court falls short. It cites petitioners' domestic racketeering conduct and the California rights conferred by the California judgment Smagin has obtained to enforce his London arbitral award, but it gives no ***551** indication of the relative import of each of these factors. *Ante*, at 1910 – 1911. And while the Court appears to envision a long list of factors that might be relevant to this inquiry, see *ante*, at 1910, it mentions none other than these two. Nor does it say anything about the circumstances that would call for consideration of additional factors, when such factors might outweigh one or both of the ones it mentions, or what these other factors might be.

Of course, under the majority's all-factors-considered approach, many other features of this very suit *could* be relevant, such as the history and location of the underlying dispute, where any relevant business relationships were formed, Smagin's residence, and the existence of the London arbitral award. Are future courts to infer that these matters have no import? It is difficult to come to any other conclusion

given that the Court pays them no heed in undertaking what is ostensibly an examination of all relevant "contex[t]." *Ante*, at 1909 – 1910. But it is equally difficult to see why they are irrelevant (especially in light of the Court's unexplored acknowledgment that "in some sense, ... Smagin has felt his economic injury in Russia," *ante*, at 1910), or what room the Court is leaving for additional factors to be identified if none of these counts. And because the Court sets aside the factors that would favor petitioners, it also provides no guidance on how to weigh competing considerations that do not all point toward the same result.

One might additionally think that the nature of the intangible property itself ****1914** could be relevant under the majority's approach, such as whether the property is a debt, a stock, a trademark, etc. In these cases, however, the relationship between the California judgment Smagin has obtained and the underlying arbitral award that that judgment confirmed is uncertain, so the precise property at issue is another aspect of this suit that is shrouded in confusion. Smagin acknowledged at oral argument that even though he has obtained multiple judgments confirming the arbitral award, he can collect on only one. See Tr. of Oral Arg. 49. There is ***552** thus at least some relevant relationship between the California judgment and the London arbitral award—the latter of which is not "domestic" in any way—but the Court does not address this point, either.

Even with respect to the two factors it focuses on, the Court engenders confusion. It offers no hint which of the two might be more important (should they point in different directions), whether either or both are necessary, or whether either is sufficient. And the Court acknowledges that there was also substantial foreign conduct in these cases, but writes that off because it was " 'initiated in and directed towards' " the United States. *Ante*, at 1910. Once more, I am unsure of the origin or scope of this rule. If domestic conduct is "initiated in" a foreign nation, does that make it foreign? What exactly does it mean to direct conduct "towards" the United States? All in all, were I a lower-court judge, I would struggle to apply today's decision to any set of facts other than the precise combination present here. In my view, it is not worth our deciding a case when we provoke so many more questions than we provide answers. That is especially so now that the lower courts must additionally decide whether and how today's cryptic decision binds them, rather than continuing to think through unencumbered when intangible-property injuries are the basis of a domestic application of civil RICO.

II

It is not just that we are contributing little by deciding these cases, however; we are also risking significant harm, particularly to the uniformity of our case law. A thrust of our international-comity jurisprudence is that we should not lightly give foreign plaintiffs access to U. S. remedial schemes that are far more generous than those available in their home nations. See *RJR Nabisco*, 579 U.S., at 347–348, 136 S.Ct. 2090; *F. Hoffmann-La Roche Ltd v. Empagran S. A.*, 542 U.S. 155, 166–167, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004). In light of RICO's unusually plaintiff-friendly remedies, that concern applies in spades here. See *RJR Nabisco*, 579 U.S., at 348, 136 S.Ct. 2090. But in today's decision, the ***553** Court countenances that the plaintiff 's residence may play no role *at all* in the civil RICO extraterritoriality inquiry. The Court justifies this result with the assertion that favoring U. S. plaintiffs' access to American courts over that of foreign plaintiffs "runs its own risks of generating international discord," *ante*, at 1912, a concern that the Court directly rejected in *RJR Nabisco*, see 579 U.S., at 361, 136 S.Ct. 2090 (Ginsburg, J., dissenting in relevant part).

Additionally, we have placed a premium on workability in our extraterritorial-application cases. The Court acknowledges that a bright-line rule would be preferable here, but essentially shrugs: RICO is too "nuanced" for that. *Ante*, at 1910, 1911 – 1912. Our cases do not let us off the hook so easily. Compare *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 258–259, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010) ("There is no more damning indictment of the [Second Circuit's] 'conduct' and 'effects' tests than the Second Circuit's own ****1915** declaration that 'the presence or absence of any single factor which was considered significant in other cases ... is not necessarily dispositive in future cases' "), with *ante*, at 1910 ("[N]o set of factors can capture the relevant considerations for all cases").

Perhaps there is a reason why RICO justifies these departures from our customary rules, but I have no confidence in reaching that conclusion now (let alone *sub silentio*). *RJR Nabisco* was relatively recent, and there have been only a small number of court of appeals decisions implementing it, and even fewer with respect to intangible property. Moreover, unlike in our typical extraterritoriality case, we have received

no input here from the sovereign states our rules will affect, including the U. S. Government. *RJR Nabisco*, 579 U.S., at 348, 136 S.Ct. 2090; *Morrison*, 561 U.S., at 269, 130 S.Ct. 2869; *F. Hoffmann-La Roche*, 542 U.S., at 167–168, 124 S.Ct. 2359.

* * *

The only rule of law that the Court announces today is that there is no rule, and despite offering such minimal guidance regarding how to site a RICO injury, the Court nonetheless ***554** manages to sow confusion regarding our broader law of extraterritoriality. Respectfully, the most we could contribute to this issue at this juncture is to stay away from it. I would dismiss the writ of certiorari as improvidently granted.

All Citations

599 U.S. 533, 143 S.Ct. 1900, 216 L.Ed.2d 521, 2023 Daily Journal D.A.R. 6027, 29 Fla. L. Weekly Fed. S 988

Footnotes

* Together with No. 22–383, *CMB Monaco, fka Compagnie Monegasque de Banque v. Smagin et al.*, also on certiorari to the same court.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Only Yegiazaryan and CMB Bank petitioned for this Court's review. The other defendants include three family members (Suren Yegiazaryan, Artem Yegiazaryan, and Stephan Yegiazaryan); an alleged Russian accomplice (Vitaly Gogokhia); French, Russian, and Luxembourger individuals who have been administrators of the trust holding the $198 million (Natalia Dozortseva, Murielle Jouniaux, and Alexis Gaston Thielen); an allegedly corrupt Russian bankruptcy officer (Ratnikov Evgeny Nikolaevich); and a registered company hired by Yegiazaryan (Prestige Trust Company, Ltd.) and its U. S. lawyer (H. Edward Ryals).

2 "While 'it will usually be preferable' to begin with step one, courts have the discretion to begin at step two 'in appropriate cases.' " *WesternGeco LLC v. ION Geophysical Corp.*, 585 U. S. ——, ——, 138 S.Ct. 2129, 2136, 201 L.Ed.2d 584 (2018) (citing *RJR Nabisco,* 579 U.S., at 338, n. 5, 136 S.Ct. 2090).

3 The alleged RICO violation must have proximately caused the injury in order for the plaintiff to be able to sue under § 1964(c). See *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457–458, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006) (describing the proximate causation requirement as a "directness requiremen[t]").

4 Although the First Restatement was in effect in 1970, when RICO was enacted, numerous jurisdictions had by then moved away from the First Restatement's methodology and toward a " 'most significant relationship' " test, which resembles "the kind of 'multi-factor' analysis the Court of Appeals conducted here." Brief for George A. Bermann as *Amicus Curiae* 15. This shift was reflected in § 145 of the Restatement (Second) of Conflict of Laws, which superseded the First Restatement the following year in 1971. Thus, even assuming choice-of-law principles are relevant, petitioners' identification and application of those principles is questionable.

1 The Second Circuit has adopted a bright-line rule that RICO injuries to *tangible* property are sited at the location of the property. *Bascuñán v. Elsaca*, 874 F.3d 806, 818–824 (2017). The Second Circuit's holding is not implicated in this split, nor did that court offer any analysis of intangible property relevant to these cases.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against- S6 22-cr-0673 (LAK)

SAMUEL BANKMAN-FRIED,

Defendant.

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MEMORANDUM OPINION

Appearances:

Danielle R. Sassoon
Nicolas Roos
Danielle Marie Kudla
Samuel Raymond
Thane Rehn
Assistant United States Attorneys
Jil Simon
Trial Attorney
DAMIAN WILLIAMS
UNITED STATES ATTORNEY

Mark Stewart Cohen
Christian R. Everdell
S. Gale Dick
Sri K. Kuehnlenz
Alexandra Theobald
David Lisner
Drew Dean
Sharon L. Barbour
COHEN & GRESSER LLP
Attorneys for Defendant

LEWIS A. KAPLAN, *District Judge.*

Defendant awaits trial on two substantive counts alleging wire fraud as well as five counts charging conspiracies to commit wire fraud, securities fraud, commodities fraud, and money laundering. The matter is before the Court on the government's motion *in limine* to preclude the defendant from arguing or adducing evidence regarding the involvement of attorneys in certain events at FTX and Alameda absent defendant's assertion of what often is referred to as a formal "advice-of-counsel defense." The Court previously has deferred ruling on the motion.

Discussion

It is helpful at the outset to clear the verbal underbrush.

What the government (and some courts in prior cases) refers to as a formal "advice-of-counsel defense" is proof that the defendant "[1] made a complete disclosure to counsel [concerning the matter at issue], [2] sought advice as to the legality of his conduct, [3] received advice that his conduct was legal, and [4] relied on that advice in good faith."[1] But the characterization of such evidence as a "defense" frequently is not accurate in one sense of the term. As the Second Circuit has written:

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1 *Markowski v. S.E.C.*, 34 F.3d 99, 105 (2d Cir. 1994) (citing *S.E.C. v. Savoy Industries, Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir.1981)).

> An affirmative defense is '[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true.' [citations omitted] In a fraud case, however, the advice-of-counsel defense is not an affirmative defense that defeats liability even if the jury accepts the government's allegations as true. Rather, the claimed advice of counsel is evidence that, if believed, can raise a reasonable doubt in the minds of the jurors about whether the government has proved the required element of the offense that the defendant had an 'unlawful intent.' [citation omitted] The government must carry its burden to prove [the defendant's] intent to defraud, and that burden does not diminish because [the defendant] raised an advice-of-counsel defense.[2]

Thus, evidence concerning the presence, involvement and even advice of lawyers in relevant events is viewed best as evidence probative of the defendant's intent to defraud or lack thereof.[3]

Mr. Bankman-Fried does not assert what commonly is referred to as a formal advice-of-counsel defense, which would require him to establish the four elements set forth above. Rather,

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2 *United States v. Scully*, 877 F.3d 464, 476 (2d Cir. 2017) (citations omitted).

3 *Id.* at 476-77 (citing *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1194 (2d Cir. 1989)); *see also Markowski*, 34 F.3d at 105 (reliance on the advice of counsel "is not a complete defense, but only one factor for [the jury's] consideration"); *Howard v. S.E.C.*, 376 F.3d 1136, 1147 (D.C. Cir. 2004).

he argues that "evidence that [he] was aware that counsel . . . were involved in decisions related to [the use of ephemeral messaging applications and auto-deletion policies at FTX, the formation and incorporation of the North Dimension entities, the banking relationship between Silvergate Bank and Alameda, North Dimension, and FTX, loans given to FTX and Alameda executives, the Terms of Service, intercompany agreements between FTX and Alameda,] and other matters is directly relevant to his good faith and lack of criminal intent, even if not introduced as part of a formal advice of counsel defense."[4] The government disputes this -- at least in the way it has been stated by the defendant. It seeks to preclude the defendant "from *unduly* focusing on the fact of attorneys' involvement" in such matters or "suggesting that attorneys *blessed*, for instance, the loans, bank documents, or message deletions."[5] But these formulations beg at least the following important questions:

- What would constitute "undue" focus on attorney involvement?
- What could suggest inappropriately that attorneys had "blessed" a particular course of conduct?

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4 Dkt 246, at 29.

5 Dkt 204, at 45 (emphasis added).

The government seeks also to preclude the defendant "from referencing the involvement of attorneys in his opening statement" and requests that the Court provide "a cautioning instruction" if he attempts to "introduce evidence of the involvement of attorneys during trial." *Id.*

- Assuming for the sake of argument that the defendant were to offer evidence of attorney involvement that did not focus "unduly" on that involvement or "suggest" a "blessing" that the lawyers never intended, on what theory would the evidence be relevant?

These problems are illustrated by a number of decisions in other cases.

In *S.E.C. v. Tourre*, the defendant was precluded "from placing undue focus on the fact of a lawyer's presence at a meeting or that counsel reviewed disclosures" given the defendant's concession that he would "not be able to prove the required elements of a reliance on advice of counsel defense."[6] The Court reasoned that "it would be irrelevant, misleading, or both to emphasize the presence of counsel" given the risk that the jury could be led to believe that counsel "blessed" the legality of the transactions at issue.[7] Accordingly, it precluded evidence that (1) would be "relevant solely to show that lawyers attended meetings or set up meetings" and (2) could "only be intended" to "suggest that counsel blessed the relevant disclosures."[8]

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6 950 F. Supp. 2d 666, 684 (S.D.N.Y. 2013).

7 *Id.*

8 *Id.*

The Court held also that counsel could not include references to the presence and involvement of lawyers in their openings and that, "to the extent [the defendant] d[id] reference the involvement of lawyers in a manner that could suggest he relied on their advice, the Court [would] give a limiting instruction." *Id.*

Similarly, in *S.E.C. v. Lek Securities Corporation*, Judge Cote held that "references to counsel's communications [was] not relevant in the absence of an advice-of-counsel defense and should be excluded . . . pursuant to Rule 403."[9] That was so, she held, because "[t]he intimation that counsel ha[d] blessed a transaction or practice without waiver of the attorney-client privilege 'would give the defendant all of the essential benefits of an advice of counsel defense without having to bear the burden of proving any of the elements of the defense.'"[10] She held also that "any probative value of such references [would be] substantially outweighed by the danger of undue prejudice to the SEC, which was denied discovery of the confidential communications, and the risk that such references [would] sow confusion and mislead the jury by suggesting" that counsel for the defendants were fully informed and approved the transaction at issue.[11]

The defendant relies on an *in limine* ruling issued before the start of trial in *United States v. Tagliaferri*.[12] That decision precluded any testimony or argument that the defendant relied on his attorney's advice because, "according to [defense counsel], [the defendant] did not receive

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9 No. 17 Civ. 1789 (DLC), 2019 WL 5703944, at *3-4 (S.D.N.Y. Nov. 5, 2019).

10 *Id.* (quoting *Tourre*, 950 F. Supp. 2d at 684).

11 *Id.*

12 No. 13 Cr. 115 (RA) (S.D.N.Y. 2014), Trial Tr. (Dkt 63), at 83-85.

any advice about what was required to be disclosed."[13] The *in limine* ruling, however, nevertheless permitted the defendant "to elicit testimony that attorneys were involved in the transactions (which [would have] in any event come out on the government's case)" and "to argue that this involvement affected his state of mind, thus bearing on whether he acted with fraudulent intent."[14] It held also that "if [the defendant] has an evidentiary basis for doing so, [he] may argue that attorneys who drafted or reviewed documents related to the charged transactions did not inform him of the illegality of his receiving fees or that formal disclosure of them was required, and that the defendant took comfort in the attorney silence."[15] But this is not the endorsement of defendant's position that he suggests.

As an initial matter, defendant's argument ignores the factual context. The defendant was an investment advisor who allegedly took fees -- kickbacks -- from companies in which he caused his clients to invest and did so, moreover, without disclosing those payments to his clients. The defendant's lawyer drafted or reviewed for the defendant documents that provided for the defendant to receive the allegedly concealed kickbacks. The likelihood that the kickbacks were illegal, or that the defendant at least had a duty to disclose them to his clients, thus was obvious

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13 *Id.* at 83.

14 *Id.* at 83-84.

15 *Id.* at 84.

from the very tasks for which the lawyer was were engaged. In consequence, the lawyer's alleged silence at least arguably seemed probative to some degree of the defendant's state of mind.[16] But this ruling was not the last word on the subject in that case.

The defendant in *Tagliaferri* took the witness stand at the trial. He testified that the lawyer in question never told him that he was obliged to disclose the "advisory fees" – the kickbacks – to his client.[17] Judge Abrams in a sidebar then expressed concern that "the jury is getting this misleading impression that advice was sought and given and that the lawyer advised him that he didn't need to disclose his fees and that what he was doing was perfectly appropriate. And I don't want them to be left with the misleading impression . . . ."[18] At that point, defendant's counsel dropped the line of examination.[19] And on cross-examination, the defendant admitted that he neither had asked for nor received any advice from the lawyer about whether or not the kickbacks

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16 Additionally, the defendant in *Tagliaferri* waived the attorney-client privilege, whereas Mr. Bankman-Fried has not waived, and perhaps lacks the authority to waive, the attorney-client privilege over any of the alleged communications at issue. *See Lek*, 2019 WL 5703944, at *3-4 ("The intimation that counsel has blessed a transaction or practice *without waiver of the attorney-client privilege* 'would give the defendant all of the essential benefits of an advice of counsel defense without having to bear the burden of proving any of the elements of the defense.'") (internal quotation marks omitted) (emphasis added).

17 *Tagliaferri*, Trial Tr. (Dkt 83), at 2123:10-2125:3.

18 *Id.* at 2127:9-13.

19 *Id.* at 2128:1-14.

should have been disclosed.[20] Thus, the Court's intervention at the sidebar eliminated the risk of creating a misleading impression that advice was sought and given on one of the precise alleged breaches of duty at issue in the criminal case.

In light of the foregoing, the risk of confusion and unfair prejudice to the government were defendant to focus on the presence or involvement of lawyers at or for FTX and Alameda – without any degree of specificity about what they were present for or involved in, what their tasks were, what exactly they knew, and what the defendant knew about what the lawyers knew and were doing – is palpable. Cutting the other way may be circumstances in which lawyer presence, involvement, or advice known to the defendant at the time of his alleged misconduct might have a real bearing on whether he acted with or without fraudulent intent. So whether and to what extent the defendant should be permitted to argue or adduce evidence regarding the presence or involvement of lawyers will depend on the circumstances. The best that can be done for now is to ensure that the Court will have sufficient notice to make appropriate rulings on a case-by-case basis.

Conclusion

Accordingly, the government's motion in this respect (Dkt 204) is granted to the extent that it seeks to preclude the defendant from referring in his opening statement to the presence

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[20] *Tagliaferri*, Trial Tr. (Dkt 85), at 2302:23-2303:5.

or involvement of attorneys and from offering any evidence, argument, or testimony on those subjects absent prior notice to the Court and the government outside of the presence of the jury. It is denied without prejudice in all other respects.

SO ORDERED.

Dated: October 1, 2023

Lewis A. Kaplan
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

LAWRENCE RAY,

Defendant.

20-cr-110 (LJL)

OPINION & ORDER

LEWIS J. LIMAN, United States District Judge:

On September 13, 2021, the Court issued an Order directing Ray to provide notice to the government by November 15, 2021, of an intent to offer expert evidence of a mental condition pursuant to Federal Rule of Criminal Procedure 12.2(b) as well as notice of an intent to rely on the defense of advice of counsel. Dkt. No. 211. That same Order directed the parties to meet and confer regarding a schedule for the disclosure of expert witnesses pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G) and 16(b)(1)(C). *Id.* On September 27, 2021, the defense submitted a letter on behalf of itself and the government containing a proposed schedule for a number of other events in the case, including that government expert disclosures would be made by November 15, 2021, defense expert disclosures would be made by December 6, 2021, and government responses would be made two weeks later, on December 20, 2021. Dkt. No. 219. The Court adopted that schedule by order of September 28, 2021. Dkt. No. 222.

The defense made a notice on November 15, 2021. The notice was addressed to counsel for the government and stated:

> We are writing pursuant to the Court's order of September 13, 2021, to provide notice with respect to two matters. First, please take notice that, pursuant to Rule

> 12.2(b) of the Federal Rules of Criminal Procedure, the defendant Lawrence Ray, by his attorneys Marne Lenox, Peggy Cross-Goldenberg, Allegra Glashausser, and Neil Kelly of the Federal Defenders of New York, intend to introduce expert testimony relating to mental disease or defect or any other mental condition of Lawrence Ray bearing on the issue of guilt, at the trial under docket number 20 Cr. 110.
>
> Second, please take notice of our intent to rely on a defense of advice of counsel at the trial of this action.

Dkt. No. 247.

By letter motion, the government complains that this notice is inconsistent with the Federal Rules of Criminal Procedure and asks the Court to issue an order precluding the defense from offering either defense unless it supplements its notice with additional information by November 22, 2021. Dkt. No. 250. The defense responds that its notice of both defenses is sufficient, but it also provides supplemental notice that the defense "anticipates introducing expert evidence from a doctor certified by the American Board of Psychiatry and Neurology, who the defense anticipates will reach a diagnosis subsequent to a neuropsychiatric evaluation (including, potentially, an evaluation of delusional thinking) and a review of Mr. Ray's past medical and psychosocial evaluations," Dkt. No. 254 at 3, and that the attorney who provided "the legal advice at issue was Glenn Ripa," *id.* at 8. The defense also argues that the government's motion is procedurally barred by the Local Criminal Rules for the Southern and Eastern Districts of New York. *Id.* at 1.[1]

[1] The defense cites Local Criminal Rule 16.1, which requires counsel for the moving party to submit "an affidavit certifying that counsel has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without the intervention of the Court and has been unable to reach agreement" in advance of filing a "motion addressed to a bill of particulars or any discovery matter." The court declines to procedurally bar the government's motion under Rule 16.1. The facts proffered by the defense demonstrate that the government did make a good faith effort to resolve the matter with defense counsel, and only sought "clarification from the Court" when the defense did not provide the additional notice

A. Rule 12.2(b) Notice

The language of Rule 12.2(b) is terse. It states: "If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defense must . . . notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk." Fed. R. Cr. P. 12.2(b). The Advisory Committee notes reflect that the objective of the rule is "to give the government time to prepare to meet the issue, which will usually require reliance upon expert testimony" and that "[t]he purpose [of the rule] is to prevent the need for a continuance when such evidence is offered without prior notice." Fed. R. Cr. P. 12.2(b), advisory committee's note.

Rule 12.2(b) itself does not prescribe the information that must be contained within the notice. The rulemakers' intent, however, may be gleaned from reviewing the language of Rule 12.2(b) in context and within the framework of the Rule as a whole. Rule 12.2(c)(1)(B) provides, in relevant part, "[i]f the defendant provides notice under Rule 12.2(b), the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court." Rule 12.2(d) provides, in pertinent part, that if the defendant does not give notice under Rule 12.2(b), "[t]he court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt."[2] It thus follows that the defense's notice must specify the general nature

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requested. Dkt. No. 255. In such circumstances, the Court opts to excuse any violation of the Local Rules. *See Somlyo v. J. Lu-Rob Enterprises, Inc.*, 932 F.2d 1043, 1048 (2d Cir. 1991) ("[T]he district court has the inherent power to decide when a departure from its Local Rules should be excused or overlooked.").

[2] The Court has not quoted those portions of the rule that address evidence of a mental disease or defect in the penalty phase of a capital case because those provisions are not relevant to the issue before the Court.

of the mental disease or defect or mental condition as to which the defense intends to offer evidence. Were it otherwise, the objectives of Rule 12.2(b)(1(B) and 12.2(d) would be frustrated. The government could not decide whether to make a motion for an examination and the Court would not know what kind of examination to order. *See United States v. Johnson*, 362 F. Supp. 2d 1043, 1079 (N.D. Iowa 2005) (holding that notice of intent must be "meaningful" and reflect the kinds of mental professionals the defense has selected in light of the Rule's purpose to permit a mental examination to be conducted without unnecessary delay); *see also United States v. Sampson*, 335 F. Supp. 2d 166, 242–43 (D. Mass. 2004) (noting that the Advisory Committee cited favorably to caselaw grounding the need for pretrial notice "in the government's right to develop rebuttal evidence fairly and efficiently" and in the opportunity to conduct the kind of investigation needed to acquire rebuttal evidence). Were the defense not to give notice or to give only a partial notice, the Court would not know what expert evidence to exclude.

Using the same mode of analysis, it is equally clear that the notice required by Rule 12.2(b) need not contain all of the detail and the opinions that would be in an expert report. That is for two reasons. First, Rule 12.2(c)(3) requires the defense to disclose to the government "the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence" "*[a]fter* disclosure under Rule 12.2(c)(2)" of the government's examination. Although that provision is directed to capital cases, the rule to which it refers back (Rule 12.2(c)(1)) does not distinguish between reports of mental disease and disability with respect to guilt in all cases and such reports with respect to penalties in capital cases; it includes any examination ordered by a court after a Rule 12.2(b) notice. It follows that the Rule 12.2(b) notice need not itself contain the results of mental

examinations, the reports setting out those results, or what courts have determined to be its equivalent. *See Sampson,* 335 F. Supp. 2d at 243 (explaining that, under revised Rule 12.2, requiring the defendant to provide information on the nature of a defendant's mental condition "is no longer permissible because 'the nature of the proffered mental condition(s)' is essentially the same as the 'results and reports' for which early disclosure is barred.") (quoting Fed. R. Crim. P. 12.2(c)(2)); *see also United States v. Johnson*, 362 F. Supp. 2d 1043, 1080–82 (N.D. Iowa 2005) (finding "no clear fallacy" in the logic that "reading Rule 12.2(b) in conjunction with Rule 12.2(c)(3), the current version of the Rule does, indeed, make it impermissible to require the defendant to provide [information regarding the nature of the defendant's mental condition] in its notice"). Second, a separate Federal Rule of Criminal Procedure addresses expert reports. Rule 16(b)(1)(C) requires the defense, at the government's request, to provide the government "a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 706 of the Federal Rules of Evidence as evident at trial if . . . (ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition." It goes on to say that "[t]his summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Cr. P. 16(b)(1). It too follows that if the expert's opinions are to be provided in the report submitted pursuant to Rule 16(b)(1)(C), then they need not be provided in the notice. A contrary reading would render portions of Rule 16(b)(1)(C) superfluous.

Courts considering the content for a Rule 12.2(b) notice thus require it to be meaningful and, in particular, to indicate "the kinds of mental health experts the defense presently intends to call, and the specific tests those experts have performed," *United States v. Brandon Michael Council*, 2018 WL 7821136, at *1 (D.S.C. Oct. 31, 2018), or put otherwise, "the kinds of mental

health professionals who have evaluated the defendant and the specific nature of any testing that the defense experts would perform or have performed," *United States v. Lujan*, 530 F. Supp. 2d 1224, 1238 (D. N.M. 2008); *see also United States. v. Wilson*, 493 F. Supp. 2d 348, 353 (E.D.N.Y. 2006) ("Disclosure of the kinds of mental health experts the Defendant will call and the nature of the tests these experts will be performing is sufficient to provide meaningful notice in compliance with Rule 12.2. It is unreasonable to require more."); *Johnson*, 362 F. Supp. 2d at 1080 (meaningful notice includes the kinds of mental-health professionals the defendant has selected to evaluate him and the nature of the tests that the defendant's experts have performed or will perform); *Sampson,* 335 F. Supp. 2d at 242–43 (adopting the parties' view that Rule 12.2(b) requires disclosure of the kinds of mental-health professional who evaluated the defendant and the specific nature of any testing the experts performed and holding that disclosure of the types of mental health experts and tests conducted is "the type of information that [is] necessary to enable the government to hire the right type of rebuttal experts and conduct the proper tests."). This type of information is "sufficient to allow the government to find mental health experts from the same field" and "to enable the government to choose the type of expert it needs." *Lujan*, 530 F. Supp. 2d at 1239.

Ray's initial notice merely stated that the defense "intend(s) to introduce expert testimony relating to mental disease or defect or any other mental condition of Lawrence Ray bearing on the issue of guilt," without providing any indication of the type of professional(s) the defense has retained to provide such testimony or the tests that they have performed or would perform. This notice falls short of what was required to satisfy Rule 12.2(b). It does not provide sufficient notice to allow the government to choose a rebuttal expert. It also does not provide sufficient notice for the government to decide what tests it might need to have administered to Ray to

prepare a rebuttal report. If permitted to stand uncorrected, it would have interfered with the schedule for trial in this long-outstanding case. If the kinds of professionals Ray retained and the type of tests taken or planned were not revealed to the government until the service of defense expert reports on December 6, the Court could not possibly require the government to serve its rebuttal expert reports two weeks later. Fundamental fairness and the design of the Federal Rules of Criminal Procedure would permit the government first to make a motion for an examination of the defendant and then would permit that examination to go forward before the government expert would have to render a rebuttal report. As a practical matter, the Court would have to set the date for the government rebuttal report for the eve of trial—if that. The notice was thus deficient and failed to satisfy Rule 12.2(b).

Defendant's letter somewhat ameliorates the gaps in his initial notice. His letter states that the defense intends to call a doctor certified in psychiatry and neurology who will perform a "neuropsychiatric evaluation (including, potentially, an evaluation of delusional thinking) and a review of Mr. Ray's past medical and psychosocial evaluations." Dkt. No. 254 at 3. This notice appears to sufficiently identify the type of medical expert. However, it does not identify the testing that the defense has carried out or intends to carry out, nor does it adequately identify the "specific nature of [the] testing" to guide a rebuttal expert's evaluation of the defendant. *Lujan*, 530 F. Supp. 2d at 1238.

Accordingly, the Court will order the defense to amend its notice to reflect the specific tests the identified expert has administrated or intends to administer to Ray. Such amended notice shall be served on the government and filed with the clerk of court by 5:00 p.m. on

November 26, 2022, on pain that if it is not timely amended and served, the defense will be precluded from offering evidence of mental disease or defect at trial. [3]

B. Advice of Counsel Defense

The government asks the Court to order the defense to provide (i) written notice of his advice-of-counsel defense, including its bases, scope, and to which specific counts he believes it applies; and (ii) any discovery materials in support of this defense, to the extent that they are not already in the government's possession. Dkt. No. 250 at 5. It asks that any grace period for the production of this information be short. It states if the defense provides additional notice, including the names of attorneys, the government will need time to subpoena and interview the relevant attorneys and to review otherwise privileged materials that have been segregated from the other evidence the government seized pursuant to warrant. *Id.*

The Federal Rules of Criminal Procedure do not explicitly require the defense to provide notice of an advice-of-counsel defense. Rule 12, which addresses certain notices that must be made by the defense prior to trial, requires the defense to provide notice of an alibi defense, Fed. R. Cr. P. 12.1, an insanity defense or reliance on evidence of mental disease or defect, Fed. R. Cr. P. 12.2, and a public-authority defense, Fed. R. Cr. P. 12.3. It does not by its terms require notice of an advice-of-counsel defense or any other defense. *See United States v. Wilkerson*, 388 F. Supp. 3d 969, 974 (E. D. Tenn. 2019) (noting that where the Federal Rules of Criminal Procedure required the defense to give advance notice of a defense, they did so with respect to

[3] The government asks the Court to require the defense to disclose the alleged mental disease/defect, whether the defense would be relying on an expert opinion or report, and the name of any expert and the nature of his/her opinion. Dkt. No. 250 at 1. For reasons stated in this Opinion and in the very cases upon which the government relies, it is not entitled to this level of detail. *See, e.g., Sampson*, 335 F. Supp. 2d at 242–43 (rejecting government request that the defense notice include the nature of the proffered mental condition and the identity and qualifications of the expert who would testify or whose opinions would be relied upon).

"certain, carefully enumerated defenses"). Accordingly, there is no consensus among federal courts regarding the existence and extent of any authority for a court to require pretrial disclosure by the defense of information regarding its advice-of-counsel defense. *Compare United States v. Dallmann*, 433 F. Supp. 3d 804, 812-13 (E.D. Va. 2020) (holding that court has inherent authority to impose requirement of pretrial notice of advice-of-counsel defense and requiring notice ten days prior to trial in light of complexity of advice-of-counsel defense and potential for discovery of otherwise-privileged documents) *and United States v. Crowder*, 325 F. Supp. 3d 131, 138 (D. D.C. 2019) ("Although the Federal Rules of Criminal Procedure do not specifically require defendants to provide pretrial notice of an advice-of-counsel defense, courts have broad discretion to impose disclosure and notice requirements outside the rules.") *with Wilkerson*, 388 F. Supp. 3d at 974–75 ("[C]ourts should not *ad hoc* invent new ways to coerce criminal defendants to assist the government in their prosecution—absent compelling reason to do so") *and United States v. Espy*, 1996 WL 560354 (E.D. La. Oct. 2, 1996) (holding that the court has no authority to require pretrial notice of advice-of-counsel defense); *see also United States v. Meredith*, 2014 WL 897373, at *1 (E.D. Ky. Mar. 6, 2014) (stating that "[a]defendant need not provide the United States with any information pretrial beyond that which is required to be disclosed under Fed. R. Crim. P. 16(b) or unless otherwise ordered by the court" and rejecting government request for information regarding the charges to which the defendant intends to offer a defense of reliance on advice of counsel, the identities of any attorney-witnesses he intends to call at trial, and disclosure of documents relating to the defense beyond those required by Rule 16(b)); *United States v. Mubayyid*, 2007 WL 1826067, at *2 (D. Mass. June 22, 2007) (stating that the court "may, at least under some circumstances, order that the defendant give notice of an intent to rely on an advice-of-counsel defense" but also noting that the fact "that the rules

enumerate certain notice requirements, but not others, gives the Court some pause" and deferring a ruling on the government's request for notice of an advice of counsel defense because "[t]he fact that the Court appears to have the power to order such notice does not . . . necessarily require that it be exercised to the fullest extent, particularly given the potential burden on the exercise of the attorney-client privilege."); *United States v. Afremov*, 2007 WL 2475972 at * 4 (D. Minn. Aug. 27, 2007) ("[T]he prosecution [does not] have a right to notice from the defense that it intends to assert an advice of counsel defense at trial."); *United States v. Atias*, 2017 WL 563978 at * 4 (E.D.N.Y. Feb. 10, 2017) (concluding that "the government has not established that is has a 'right' to pretrial notice as to the defense [of advice of counsel]" and ordering that the defense proffer evidence of advice-of-counsel defense at least 24 hours prior to calling a witness to the stand to support such a defense); *United States v. Lacour*, 2008 WL 5191596 at * 1 n.1 (M.D. Fla. Dec. 10, 2008) ("Defendants are not obligated to put on *any* defense, and, except for certain [enumerated] defenses which must be disclosed prior to trial, Defendants are free to make that decision at trial.").

The government argues that the defense should be required to provide it the nature of its advice-of-counsel defense, the subject to which it pertains and its scope, the identities of the counsel providing advice, and the counts to which it pertains for certain practical substantive reasons. It notes that the assertion of an advice-of-counsel defense will effect a waiver of the attorney-client privilege with respect to all communications within the scope of the defense (whether supportive of it or not) and that it already has otherwise privileged materials in its possession that have been segregated and not reviewed by the prosecution team. It asserts that were the privilege to be waived, it would need time to review the documents. It also expresses skepticism that the defense should have an advice-of-counsel defense to the charges of extortion

and sex trafficking contained in the indictment and raises the point that the introduction of evidence regarding the advice-of counsel defense could risk confusing the issues or misleading the jury—and thus subject to exclusion under Federal Rule of Evidence 403—should it turn out that the defense never had enough evidence to satisfy each of the elements of an advice-of-counsel defense. The government argues, "[n]o lawyer, acting properly, would advise a client to violently extort or sex traffic his victims in order to seek repayment for supposed wrongdoing." Dkt. No. 250 at 5. It points out that, under Federal Rule of Evidence 104, preliminary questions concerning the admissibility of evidence, including whether evidence is relevant or if a privilege exists, are to be determined by the Court, Fed. R. Evid. 104(a), and the Court can hold a pretrial evidentiary hearing to determine whether a defense fails as a matter of law. *See United States v. Paul*, 110 F.3d 869, 871 (2d Cir. 1997); *United States v. Scali*, 2018 WL 461441, at *8 n.4 (S.D.N.Y. Jan. 18, 2018) ("Guided by efficiency and judicial economy, it behooves the Court to address [an advice-of -counsel defense] before trial."). Finally, it argues that it needs the information in order to be able to subpoena and interview the attorneys on whose advice Ray supposedly relied.

The authority to require notice of an advice-of-counsel defense derives from the court's inherent authority to manage the trial before it, *Dallmann*, 433 F. Supp. 3d at 812-13; *Crowder*, 325 F. Supp. 3d at 138, as well as from Rule 16 of the Federal Rules of Criminal Procedure, including the reciprocal obligation on the defense to produce discovery under Rule 16(b) and the power of the court to regulate discovery under Rule 16(d). Under those principles, the government is not entitled to either the names of the attorneys whom Ray intends to call as witness or upon whose advice he intends to rely, and the government is not entitled at the pretrial stage to be informed of the charges to which Ray intends to assert an advice-of-counsel defense.

The request for the names of the attorneys is tantamount to a request for a witness list. Pretrial, the government argued vigorously that Ray is not entitled to the names of the witnesses the government intends to present to support its case-in-chief and to meet the elements of the offenses charged in the indictment. *See* Dkt. No. 117 at 15, 19-20 (citing *United States v. Bejasa*, 904 F.2d 137, 139 (2d Cir. 1990) (Federal Rule of Criminal Procedure 16 "does not require the government to furnish the names and addresses of its witnesses."); *United States v. Alessi*, 638 F.2d 466, 481 (2d Cir. 1980) ("[T]he prosecution [is] under no obligation to give [a defendant] advance warning of the witnesses who [will] testify against him.")). The Court accepted that argument. Dkt. No. 166 at 41–43. The government has lesser entitlement to require the defense to disclose the witnesses it would call to negate the government's proof. *Meredith*, 2014 WL 897373, at *1. Nor is the government entitled pretrial to information regarding the specific charges to which the defendant intends to assert an advice-of-counsel defense. "Such disclosure would require the defendant to reveal his trial strategy pretrial." *Id.*

The government's request that Ray produce the documents upon which he intends to rely at trial for his advice-of-counsel defense presents a closer question. The government is entitled to production by the defense of the *non-privileged* documents that relate to the asserted advice-of-counsel defense, whether the documents support that defense or not. The defense may satisfy that obligation either by producing the documents in the first instance or by certifying that all such documents are already in the possession of the government and providing the government with sufficient information so the government may locate the relevant documents without intruding into Ray's privilege. Although the defense identified the attorney who it asserts provided the advice at issue, doing so without further identifying any non-privileged documents concerning the defense does not satisfy this requirement. The purposes of Rule 16 are "to avoid unfair surprise and unwarranted delay by providing both the government and the defense with a

broad, reciprocal, right to discovery." *Crowder*, 325 F. Supp. 3d at 136. This discovery obligation includes documents that may contain the names of counsel but that do not request or relay legal advice or that are not confidential and were shared outside the attorney-client relationship. The defense shall either provide the production or make the identification by November 29, 2021.[4]

The Court will not require the defense to produce *privileged* documents before the earlier of either (1) the defense's unequivocal assertion of the advice-of-counsel defense, including before the jury through opening statements or any cross-examination during the government's case, or (2) the close of the government's case-in-chief. A client has impliedly waived the attorney-client privilege (1) "when a client testifies concerning portions of the attorney-client communication, … [(2)] when a client places the attorney-client relationship directly at issue, … and [(3)] when a client asserts reliance on an attorney's advice as an element of a claim or defense." *In re County of Erie*, 546 F.3d 222, 228 (2d Cir. 2008). In *United States v. Schulte*, 2020 WL 133620 (S.D.N.Y. Jan. 13, 2020), the court found that the defendant had impliedly waived the attorney-client privilege and that disclosure to the government of his otherwise privileged communications was required where "[t]he defendant ha[d] no fewer than five times relied on advice of counsel in seeking to persuade th[e] Court to grant a variety of extraordinary measures including a third severance of his trial, the disqualification of the entire Federal Defenders of New York, and an adjournment of trial based on an unprecedented claim of ineffective assistance of counsel." *Id.* at *4. The defendant himself thus had inserted attorney-

[4] If the defense elects not to produce documents and instead rely upon the documents already in the government's possession, the government may use a taint team to review potentially privileged documents to determine whether a privilege attaches. The Court will resolve any questions requiring judicial determination *in camera* on notice to the defense but outside the presence of the prosecution team.

client communications into the case. The court rejected the argument that there had been no waiver because the defendant had not announced a final decision whether to present his lawyer's testimony at trial, *id.* at *1, and because the defendant had made "no formal announcement," *id.* at *5. Defense counsel had submitted evidence to the Court ex parte of the privileged communications and had already sought to use the privilege as a sword and a shield by "seek[ing] to influence the Court to grant extraordinary relief while denying the government the ability to respond." *Id.* Thus, the privilege had already been waived.

Ray has not "yet waived the privileged by 'an assertion of fact to influence the decisionmaker.'" *In re County of Erie*, 546 F.3d at 230. Thus, the government has "not been placed in a disadvantaged position at trial." *Id.* He has not disclosed attorney-client communications, nor has he sought relief from the Court on the basis of an attorney-client communication. He has not made an unequivocal or irreversible election to present an advice-of-counsel defense. The defendant complied with a court order that required him to indicate whether he intended to rely on an advice-of-counsel defense on pain that if he did not the defense would be deemed waived. He therefore has not yet waived the privilege.[5]

[5] Some courts have held that the assertion of an advice-of-counsel defense in an answer in a civil case effects a waiver of the privilege and that "'the party who intends to rely at trial on a good faith defense' [must] 'make a full disclosure during discovery' and the 'failure to do so constitutes a waiver of that defense.'" *United States v. Wells Fargo Bank N.A.*, 2015 WL 3999074, at*1 (S.D.N.Y. June 30, 2015) (quoting *Arista Records LLC v. Lime Grp., LLC*, 2011 WL 1642434, at *2 (S.D.N.Y. Apr. 20, 2011)). However, "federal civil and criminal procedure are different, and that 'unlike their civil counterparts, criminal proceedings have no extensive discovery . . . procedures requiring both sides to lay their evidentiary cards on the table before trial.'" *United States v. Sampson*, 898 F.3d 270, 280 (2d Cir. 2018) (quoting *United States v. Pope*, 613 F.3d 1255, 1259-60 (10th Cir. 2010) (Gorsuch, J.)). Moreover, even in the civil context, courts are sensitive not to quickly find a waiver of the privilege from the mere assertion of the defense in an answer. *See Madanes v. Madanes*, 199 F.R.D. 135, 152 (S.D.N.Y. 2001) (finding that, since "parties commonly modify their legal claims during the course of litigation," there was no waiver of attorney-client privilege by the assertion of a broad advice-of-counsel

In the Court's view, to require Ray to now, months before trial, choose between (1) waiving the privilege and disclosing all of his communications with counsel and (2) being barred from later relying on an advice-of-counsel defense to negate the government's proof, would impermissibly burden the attorney-client privilege. No jury has been impaneled and the government has not opened, much less offered evidence that would support a jury verdict in its favor and require the defense to answer its allegations. The disclosure of confidential communications with counsel is a consequential event. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."). Once the privilege is waived, that confidentiality is lost forever. The privilege can never again be asserted—either in this case or in any other case. *See SEC v. Beacon Hill Asset Mgmt. LLC*, 231 F.R.D. 134, 146 (S.D.N.Y. 2004) ("Voluntary disclosure to a party outside the attorney-client relationship destroys the attorney-client privilege because it destroys the confidentiality of the communication.").

The Court need not now decide whether it has the authority to require the defense to make an unequivocal assertion of privilege prior to the end of the government's case and to produce privileged documents on pain that if it fails to do so it will be precluded from relying on an advice-of-counsel defense. Here, the government's case is expected to be lengthy, last several weeks, and consist of witnesses who would not have been involved in any attorney-client

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defense in defendant's answer where defendant partially withdrew advice-of-counsel defense prior to trial).

privileged communications and as to whom there is, at most, a de minimis risk of the government's expressed concern that the defense will elicit evidence of attorney advice that ultimately would not go to the jury. The indictment contains lurid charges of extortion and sex trafficking; it is unlikely in the extreme that the occasional question on cross-examination about attorney advice (were there to be such a question) would prejudice the jury and, even if there were such a question and there were a risk of prejudice, the Court could address that in its jury charge. Notably, the government does not argue that there is a risk that the defense would ask questions of any of the witnesses it intends to call regarding advice of counsel. To the contrary, it asserts that it "is unaware of any factual basis to find that, prior to engaging in the charged conduct, the defense spoke to any attorney for the 'purpose of securing advice on the lawfulness of [the defendant's] possible future conduct.'" Dkt. No. 250 at 5 (quoting *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1194 (2d Cir. 1989)).

In these circumstances, the Court is confident that there will be time enough for the Court to test whether there is a viable advice-of-counsel defense to any of the charges and, if there is, for the defense to produce documents that relate to the advice of counsel, even if it waits until the end of the government's case.

For the same reasons, the Court is not persuaded that prior to the start of trial it should hold a hearing to determine whether the defense has evidence to satisfy each of the elements of the advice-of-counsel defense. The Court has discretion over whether and when to hold a hearing regarding the admissibility of evidence under Federal Rule of Evidence 104.[6] In the

[6] The government relies on language from *United States v. Paul*, 110 F.3d at 871, that "it is appropriate for a court to hold a pretrial evidentiary hearing to determine whether a defense fails as a matter of law," but *Paul* and the cases it relied upon involved defenses of duress and necessity. *See also United States v. Bailey*, 444 U.S. 394, 415-16 (1980); *United States v.*

Court's judgment, the better exercise of discretion is to wait to hold such a hearing until after the earlier of the unequivocal assertion of the privilege by defense or the close of the government's case. At that point, the Court will hear an application from the government for a hearing as to whether the defense can put on evidence of advice of counsel and will be prepared to proceed directly to a hearing.

Thus, the defense shall inform the Court and the government no later than the close of the government's case-in-chief whether it intends to assert an advice-of-counsel defense. In the event that it elects to assert such a defense, it will also at the same time inform the Court and the government of (1) the charges to which it contends such a defense is relevant; (2) the witnesses it intends to present in support of that defense (including whether the witnesses include the defendant himself); and (3) the evidence it contends will satisfy each element of an advice-of-counsel defense. The Court will be prepared to hold a Federal Rule of Evidence 104 hearing before the start of the defense case to determine whether there is sufficient evidence for the defense to present such a defense. In addition, the Court will hear an application by the government pretrial whether it should enter an order that, at the moment that the defense elects to assert the advice-of-counsel defense, the defense shall produce all documents relating to the defense (whether supportive or not) in its possession, custody, or control (regardless whether the

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Bifield, 702 F.2d 342, 346–47 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983) (defense of duress and necessity); *Untied States v. Bakhtiari*, 913 F.2d 1053, 1057 (2d Cir. 1990). These cases also turn upon the question of whether it is proper for the Court to hold a Federal Rule of Evidence 104 hearing at all to determine whether the evidence would satisfy all of the elements of the defense and not upon the timing of that hearing. *See Bailey*, 444 U.S. at 416 (emphasizing "the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses"); *Bakhtiari*, 913 F.2d at 1057 (finding that hearing "procedure enabled [the court], upon finding that the defense failed as a matter of law, to preclude the evidence and thereby avoid unnecessary jury confusion").

documents were produced to the defense by the government and are already in the government's possession) and shall provide the government sufficient information for the government to be able to conduct its own independent search of the otherwise privileged documents to determine those documents as to which the privilege has been waived.

SO ORDERED.

Dated: November 22, 2021
New York, New York

LEWIS J. LIMAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	*	
	*	
v.	*	**CRIMINAL NO. 23-cr-257 (TSC)**
	*	
DONALD J. TRUMP,	*	
	*	
Defendant.	*	
	*	

GOVERNMENT'S OPPOSED MOTION FOR FORMAL PRETRIAL NOTICE OF THE DEFENDANT'S INTENT TO RELY ON ADVICE-OF-COUNSEL DEFENSE

The defendant has provided public notice that he intends to rely on an advice-of-counsel defense at trial. When a defendant invokes such a defense in court, he waives attorney-client privilege for all communications concerning that defense, and the Government is entitled to additional discovery and may conduct further investigation, both of which may require further litigation and briefing. To prevent disruption of the pretrial schedule and delay of the trial, the Court should exercise its inherent authority to require the defendant to provide notice in court of his intent to assert such a defense by the date exhibit lists are due, December 18, 2023. Through counsel, the defendant opposes this motion.

I. Background

During the course of the Government's investigation, at least 25 witnesses withheld information, communications, and documents based on assertions of the attorney-client privilege under circumstances where the privilege holder appears to be the defendant or his 2020 presidential campaign. These included co-conspirators, former campaign employees, the campaign itself, outside attorneys, a non-attorney intermediary, and even a family member of the defendant.

In the time since the grand jury returned the indictment against the defendant on August 1, 2023, the defendant and his counsel have repeatedly and publicly announced that he intends to

assert the advice of counsel as a central component of his defense at trial. On the night of August 1, for example, defense counsel told a national audience on Fox News that the defendant "had an advice of counsel, a very detailed memorandum from a constitutional expert."[1] Hours later on CNN, defense counsel argued that "Mr. Trump had the advice of counsel, Mr. Eastman, who was one of the most respected constitutional scholars in the United States, giving him advice and guidance."[2]

The following day defense counsel was asked on National Public Radio "to talk a little about your legal strategy" and "give us a summary of your legal defense to these criminal charges."[3] Defense counsel responded, "Well, it's not a big surprise," and the defendant "got advice from counsel – very, very wise and learned counsel – on a variety of constitutional and legal issues."

Three days after the defendant's arraignment, defense counsel made appearances on a circuit of Sunday news shows. On NBC, defense counsel explained that "what [the defendant]'s being indicted for, ultimately, is following legal advice from an esteemed scholar, John Eastman" and "one thing for certain, President Trump acted under the advice of counsel when he petitioned, under the First Amendment, petitioned Mr. Pence . . . [a]nd that's legally protected speech."[4] Likewise, on CBS, defense counsel claimed that the defendant "believed" a certain course of action described in the indictment was appropriate because he was "following the advice of John

[1] Fox News, Aug. 1, 2023, at minute 3:03, *available at* https://www.foxnews.com/video/6332255292112.

[2] CNN, Aug. 1, 2023, at minute 2:20, *available at* https://www.youtube.com/watch?v=GW7Bixvkpc0.

[3] NPR All Things Considered, Aug. 2, 2023, *available at* https://www.npr.org/2023/08/02/1191627739/trump-charges-indictment-attorney-jan-6-probe.

[4] Meet the Press (NBC), Aug. 6, 2023, *available at* https://www.nbcnews.com/meet-the-press/meet-press-august-6-2023-n1307001.

Eastman."[5] And on CNN, defense counsel argued that the conduct alleged in the indictment was sanctioned because the defendant "was following the advice of his lawyer."[6] Weeks later, the defendant himself explained in a Twitter interview that "we had some lawyers, not all, we had some lawyers that said" that a particular course of action described in the indictment was appropriate.[7]

On August 28, 2023, the Court entered the Pretrial Order to organize pretrial proceedings. *See* ECF No. 39. Among other reasoned deadlines therein, the Court set December 18, 2023, as the date for the parties to "exchange lists of exhibits they intend to use in their cases in chief." *Id.* ¶ 8. By that date, the defendant will be required to identify (and, if he has not already done so, produce) any exhibits to be used in his case-in-chief, including ones supportive of an advice-of-counsel defense.

II. Applicable Law

In order to assert at trial an advice-of-counsel defense—an affirmative defense, *United States v. White*, 887 F.2d 267, 270 (D.C. Cir. 1989)—the defendant will be required to "introduce[] evidence that (1) 'he relied in good faith on the counsel's advice that his course of conduct was legal,' and (2) 'he made full disclosure of all material facts to his attorney before receiving the advice at issue,'" *United States v. Gray-Burriss*, 920 F.3d 61, 66 (D.C. Cir. 2019) (quoting *United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Cir. 1997)). If the defendant satisfies the burden to produce evidence that would support an advice-of-counsel defense, the Court should instruct the

[5] Face the Nation (CBS), Aug. 6, 2023, at minute 24:11, *available at* https://www.cbsnews.com/news/face-the-nation-full-transcript-2023-08-06/.

[6] CNN, Aug. 6, 2023, at minute 7:58, *available at* https://www.cnn.com/videos/politics/2023/08/06/sotu-lauro-full.cnn.

[7] Donald Trump interview with Tucker Carlson, Aug. 23, 2023, at minute 34:35, *available at* https://twitter.com/TuckerCarlson/status/1694513603251241143?lang=en.

jury on the defense, and the Government retains the burden of proving the defendant's *mens rea* beyond a reasonable doubt. *See United States v. Westbrooks*, 780 F.3d 593, 596 (4th Cir. 2015) (defendant bears burden of production while Government bears burden of proof); *United States v. Dallmann*, 433 F. Supp. 3d 804, 810 (E.D. Va. 2020) ("the defendant bears the initial burden of production, but the prosecution always retains the burden of persuasion, namely the burden of proving the defendant's guilty state of mind beyond a reasonable doubt").

In invoking the advice-of-counsel defense, the defendant waives attorney-client privilege on all communications concerning the defense. *See White*, 887 F.2d at 270; *United States v. Crowder*, 325 F. Supp. 3d 131, 137 (D.D.C. 2018). Accordingly, once the defense is invoked, the defendant must disclose to the Government (1) all "communications or evidence" the defendant intends to rely on to establish the defense and (2) any "otherwise-privileged communications" the defendant does "not intend to use at trial, but that are relevant to proving or undermining" it. *Crowder*, 325 F. Supp. 3d at 138 (emphasis in original). *See United States v. Stewart Rhodes*, 22-cr-15 (D.D.C.), ECF No. 318 at 2 (quoting *Crowder*); *Dallman*, 740 F. Supp. 2d at 814 (waiver is for "information defendant submitted to the attorney on which the attorney's advice is based, the attorney's advice relied on by the defendant, and any information that would undermine the defense"); *United States v. Hatfield*, 2010 WL 183522, at *13 (E.D.N.Y. Jan. 8, 2010) ("This disclosure should include not only those documents which support [defendants'] defense, but also all documents (including attorney-client and attorney work product documents) that might impeach or undermine such a defense."); *United States v. Scali*, 2018 WL 461441, at *8 (S.D.N.Y. Jan. 18, 2018) (quoting *Hatfield*).

Accordingly, waiting until the eve of trial—or, worse, when jeopardy attaches—to raise an advice-of-counsel defense risks causing substantial disruption and delay, particularly in this case

given the number of attorneys involved. To avoid such disruption, courts in this District and others have concluded that, while the Federal Rules of Criminal Procedure do not address this defense specifically, judges retain inherent authority to order defendants to provide formal notice of an advice-of-counsel defense before trial. *See Crowder*, 325 F. Supp. 3d at 138 ("Courts have broad discretion to impose disclosure and notice requirements outside the [Federal Rules of Criminal Procedure]."); *Rhodes*, ECF No. 318 (imposing pretrial notice requirement and citing *Crowder*); *Dallman*, 433 F. Supp. 3d at 812 ("The majority of district courts that have considered the question have sensibly exercised their inherent authority to impose a pretrial notice and discovery requirement regarding the advice-of-counsel defense . . . .") (collecting cases); *United States v. Mubayyid*, 2007 WL 1826067, at *2 (D. Mass. June 22, 2007) ("Upon review of the cases, the Court concludes that it may, at least under some circumstances, order that defendant give notice of an intent to rely on an advice-of-counsel defense."); *United States v. Cooper*, 283 F. Supp. 2d 1215, 1225 (D. Kan. 2003) (ordering defendant who indicated intention to rely on advice-of-counsel defense to provide pretrial disclosure if he intends to rely on the defense); *Hatfield*, 2010 WL 183522, at *13 (requiring defendants to provide pretrial notice and disclosure of advice-of-counsel defense); *Scali*, 2018 WL 461441, at *8 (same and scheduling hearing on "whether the Defendant has proffered the factual prerequisites of an advice of counsel Defense"); *United States v. Crinel*, 2016 WL 6441249, at *12 (E.D. La. Nov. 1, 2016) (requiring defendant to file pretrial motion if he wishes to assert advice-of-counsel defense); *United States v. Impastato*, 535 F. Supp. 2d 732, 740 (E.D. La. 2008) (same).

A number of courts, in cases unlike this one, have denied such notice. *See United States v. Ray*, 2021 WL 5493839, at *4 (S.D.N.Y. Nov. 22, 2021) (declining to impose notice requirement and collecting cases showing "no consensus among federal courts"); *United States v. Wilkerson*,

388 F. Supp. 3d 969, 974-75 (E.D. Tenn. 2019) (finding no good cause to compel the defendants to provide notice before trial); *United States v. Atias*, 2017 WL 563978, at *4 (E.D.N.Y. Feb. 10, 2017) (concluding that prosecution in the case had not established a "right" to pretrial notice); *United States v. Meredith*, 2014 WL 897373, at *1 (E.D. Ky. Mar. 6, 2014) (declining to require notice and discovery of the defense pretrial); *United States v. Lacour*, 2008 WL 5191596, at *1 n.1 (M.D. Fla. Dec. 10, 2008) ("Defendants are not obligated to put on *any* defense, and, except for certain [enumerated] defenses which must be disclosed prior to trial, Defendants are free to make that decision at trial.").

Those out-of-circuit cases are readily distinguishable, and the factors animating their contrary rulings are not present here. For example, some courts have refrained from requiring notice because it would force the defendant to reveal an intended defense before trial. *See Meredith*, 2014 WL 897373, at *1 (declining to require notice of advice-of-counsel defense because it "would require the defendant to reveal his trial strategy pretrial"); *Ray*, 2021 WL 5493839, at *5 (declining to require the defendant to disclose his defense). But here the defendant has broadcast to the world his intent to rely on this defense. Another court expressed concern that requiring the defendant to give pretrial notice would not place "reciprocal discovery" burdens on the Government. *See Wilkerson*, 388 F. Supp. 3d at 973. Here, as explained below, related non-privileged discovery in the possession of the Government already has been provided to the defendant as part of the Government's early and robust discovery productions. Courts have also denied pretrial notice because the defense was unlikely to arise during the Government's case-in-chief. *See Ray*, 2021 WL 5493839, at *7 ("The Court need not now decide whether it has the authority to require the defense to make an unequivocal assertion of privilege prior to the end of the government's case ….") . Here though, given the nature of the charges and the defense

statements regarding the defendant's reliance on the advice of counsel, little doubt exists that the defense will arise in opening statements and during the questioning of Government witnesses, and may affect voir dire.

III. Argument

The defendant has made public statements regarding his forthcoming reliance on the advice-of-counsel defense, but he has not provided formal notice of such a defense to the Government or the Court—notice that would trigger discovery obligations. *See Scali*, 2018 WL 461441, at *8 (where a defendant had signaled his "unequivocal[]" intent to rely on an advice of counsel defense "in his pleadings," district court concluded that defendant had triggered pretrial discovery obligation). By December 18, 2023, however, the defendant is required to produce any exhibits he intends to introduce in his case-in-chief, including ones on which to base an advice-of-counsel defense. To promote fairness and efficiency, by that same date the defendant should be required to provide formal notice to the Government of his intent to rely on the defense, and promptly produce the concomitant required discovery. *See Mubayyid*, 2007 WL 1826067, at *2 ("[T]he requirement of a notice should be imposed only to the extent reasonably necessary to ensure a fair and reasonably efficient trial").

A. Requiring Notice Promotes Fairness

Fairness dictates that the Government should be provided notice and discovery regarding the defense sufficiently before trial. As the *Mubayyid* court found, the three enumerated defenses in Rule 12.1 (alibi), Rule 12.2 (insanity), and Rule 12.3 (public authority) for which pretrial notice is required under the Federal Rules of Criminal Procedure "share a basic characteristic with the advice-of-counsel defense: they are ordinarily fact-intensive defenses that are likely to create substantial problems of fairness and efficiency if raised for the first time during the trial." *Id.* at

2. *See also Dallmann*, 433 F. Supp. 3d at 811 (relying on reasoning of *Mubayyid* that advice-of-counsel defense is fact-intensive and should be addressed before trial). Given the defendant's obligation to provide discovery that arises from advancing the defense, the defendant should not be permitted to pepper his exhibit list with documents that support his advice-of-counsel defense, be coy with formally noticing the defense so as to withhold discovery undermining it, and then ambush the Government with the defense during trial. *Cf. United States v. Hitselberger*, 991 F. Supp. 2d 91, 99 (D.C. Cir. 2013) (defendant does not have constitutional right to withhold all defense and surprise the Government); *United States v. Poindexter*, 725 F. Supp. 13, 33-34 (D.D.C. 1989) ("[I]t is of course hardly a novel proposition that defendants in criminal cases may be required to disclose elements of their defenses in advance of trial.").

In addition to having publicly advanced the defense, the defendant knows what information the Government has—and does not have—that might support or undermine the defense. The Government produced in discovery the privilege logs for each witness who withheld material on the basis of a claim of privilege on behalf of the defendant or his campaign, and in some cases the defendant's campaign was directly involved in discussions regarding privilege during the course of the investigation. In other instances, the Government produced court orders requiring the production of material claimed to be privileged. Compelling the defendant to provide notice, and thereby discovery, would be reciprocal of what the Government already has produced. For example, defense counsel publicly identified one attorney on whose advice the defense intends to rely at trial, and the Government has produced in discovery substantial evidence regarding that attorney and his advice, including relevant search warrant returns.[8] Any material relevant to that

[8] That same attorney asserted an attorney-client privilege with the defendant and his campaign to shield material from disclosure to Congress. *See Eastman v. Thompson*, Case No. 8:22-cv-00099 (C.D. Cal.), ECF No. 260 at 15 ("The evidence clearly supports an attorney-client

attorney's advice that remains shielded by the attorney-client privilege should be produced to the Government at the earliest date to avoid disruption of the trial schedule.

In filing this motion, the Government does not concede that the defendant is entitled to offer an advice-of-counsel defense at trial or that such a defense is supported by competent evidence. Indeed, if the evidence disclosed by the defendant shows that the advice-of-counsel defense is unavailable as a matter of law, in fairness the Government should be permitted to raise that matter in advance of trial before questioning, evidence, and argument. *See Rhodes*, ECF No. 318 at 1 ("Such disclosure is necessary to assess the viability of the defense."); *United States v. West*, 392 F.3d 450, 456-57 (D.C. Cir. 2004) ("The defense of advice of counsel necessarily fails where counsel acts as an accomplice to the crime."). Juxtaposed against such a defense, the indictment alleges that the defendant ignored the advice of attorneys and was not acting in good faith, *see* ECF No. 1 ¶¶ 92-94, and the Court may need to hold a hearing in advance of trial to determine if the defendant should be permitted to present evidence of the defense at trial. *See* Fed. R. Evid. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible."); Fed. R. Evid. 103(d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.").

Finally, while fairness warrants pretrial notice of the advice-of-counsel defense in this case, requiring it imposes no unfairness on the defense. Given his extensive public statements, the defendant cannot complain that formal notice will prematurely or unfairly reveal a hidden trial strategy. And since the defendant must produce exhibits in support of an advice-of-counsel defense by December 18 anyway, he will suffer no prejudice in also formally noticing his intent

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relationship between President Trump, his campaign, and [plaintiff] during January 4-7, 2021.").

to rely on the defense. After all, producing and identifying an otherwise-privileged document will operate as a subject-matter waiver for all related communications. *See White*, 887 F.2d at 271 ("Under the law of this circuit, a defendant can waive his attorney-client privilege by releasing documents to . . . an investigative body at the pretrial stage."); *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) ("[V]oluntary disclosure of privileged material subject to the attorney-client privilege to unnecessary third parties in the attorney-client privilege context 'waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter.'" (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)); *Protect Democracy Project, Inc. v. Nat'l Sec. Agency*, 10 F.4th 879, 891 (D.C. Cir. 2021) (describing the attorney-client privilege as taking an "all-or-nothing approach" to waiver (quoting *In re Sealed Case*, 121 F.3d at 741)). Since waiver will occur otherwise by operation of law, there is no unfairness to requiring defendant to provide formal notice, thereby triggering the requirement to produce the potentially extensive discovery to which the Government will then be entitled.

B. Requiring Notice Promotes Efficiency

Requiring pretrial disclosure will prevent disruption of the Court's schedule and further judicial efficiency to allow for the defendant to produce the discovery that such a defense would entail. The defendant publicly claims to have had multiple lawyers providing advice in the post-election period, and at least 25 witnesses withheld information on attorney-client privilege grounds during the course of the Government's investigation. The process of disclosure, review, and further investigation by the Government, followed by potential litigation as to the applicability of the defense in this case, may be time-consuming, and—if not done in advance of trial—"risks unnecessary interruption and delay." *Crowder*, 325 F. Supp. 3d at 138; *Mubayyid*, 2007 WL 1826067, at *1-2 (recognizing that once defense is invoked, the Government will need to obtain

discovery and conduct investigations which could lead to delay). Moreover, the discovery and investigation process surrounding the advice-of-counsel defense "may raise issues requiring additional briefing before trial" in connection with the discovery process and the scope of the defense itself. *See Crowder*, 325 F. Supp. 3d at 138. And if the defendant fails to provide timely notice and discovery, the Court is within its discretion to preclude the defendant from asserting an advice-of-counsel defense during trial. *Id.*; *Rhodes*, ECF No. 318 at 3 ("The court may preclude a defendant from asserting an advice-of-counsel defense if they fail to provide the notice required by this Order.").

Pretrial notice is all the more warranted here because the defense is likely to arise during the opening days of trial. For example, the defendant may wish to discuss it in his opening statement. Or, on cross-examination of a witness in the Government's case-in-chief, the defendant could elicit privileged information previously shielded from the Government, thus sandbagging the Government and necessitating an interruption of testimony or an adjournment. There is no benefit in allowing the defendant to wait until trial to advance his defense. Rather, efficiency requires that the Government receive notice and discovery in advance of presenting its case so that it can fairly prepare for direct and cross-examination and avoid recalling witnesses either in its case-in-chief or in rebuttal. *See, e.g.*, *United States v. Philip Morris USA, Inc.*, 219 F.R.D. 198, 200 (D.D.C. 2004) ("The underlying purpose [of case management orders] has been to ensure efficient and orderly management of the case so that trial would proceed [on the scheduled date], and to avoid last-minute 'trial-by-ambush' tactics which might jeopardize that trial date.").

C. Notice Should Be Given When Exhibit Lists Are Due

Once the decision is made to require pretrial notice, the Court should set the deadline most reasonable to accomplish the twin goals of fairness and efficiency. The deadline most directly

related to the advice-of-counsel defense is December 18, 2023—the date on which "the parties shall exchange lists of exhibits they intend to use in their cases in chief." ECF No. 39 ¶ 8.[9] By that date the defendant already is required to provide functional notice by way of the exhibits he intends to offer into evidence; the Court should formalize the defendant's requirement to produce discovery by requiring notice at that point.

The defendant's intention to pursue an advice-of-counsel defense has direct bearing on the exhibits he will seek to introduce at trial. Presumably he would try to rely on, for example, the "very detailed memorandum from a constitutional expert" his counsel described in an interview, and therefore would need to identify that document on his exhibit list. He also would need to identify as an exhibit any document showing that he "made full disclosure of all material facts to his attorney before receiving the advice at issue" and that "he relied in good faith on the counsel's advice that his course of conduct was legal." *Gray-Burriss*, 920 F.3d at 66. This could come in the form of emails, text messages, attorney notes, communications, or other documents, any of which would result in a subject-matter waiver over any other privileged materials.

Requiring the defendant to give formal notice at the time he designates exhibits on December 18 is a natural complement to the Pretrial Order. *In limine* motions, including ones seeking to admit or exclude certain evidence, are due by December 27, 2023. ECF No. 39 ¶ 4. Objections to exhibits are due by January 3, 2024. *Id.* ¶ 8. And January 15, 2024, is the date by which the parties must jointly submit a short narrative description of the case to be read to the

[9] The defendant's "case in chief" means not only what the defendant will introduce after the Government rests, but also substantive, non-impeachment evidence introduced during the Government's case-in-chief. *See Crowder*, 325 F. Supp. 3d at 136 (finding that "the phrase 'case-in-chief' in Rule 16(b)(1)(A) refers to any substantive evidence [the defendant] affirmatively intends to introduce to prove [his] theory of the case or defenses, as opposed to for the purpose of impeachment only, regardless of when during the trial such evidence will be offered," collecting cases, and stating that "[n]early every court to consider the issue has concluded the same").

prospective jurors, proposed voir dire questions, and jury instructions. *Id.* ¶ 5. The parties will not be able to submit an effective joint proposal without advance notice of the defendant's intent to rely on the advice-of-counsel defense. For example, the asserted defense may inform what questions the parties and the Court want to ask the venire during voir dire, and the Court would benefit from the parties putting forth an agreed (or disputed) jury instruction regarding the advice of counsel. The Redbook does not contain a generic iteration of the instruction, so necessarily the Court will have to decide on the most appropriate language based on current law and the facts introduced at trial. *See id.* ¶ 5 ("To the extent that the parties seek to use pattern jury instructions from the current version of the DC Redbook, it is sufficient simply to list the numbers of those instructions. Special instructions shall be submitted verbatim with citations to cases and other authorities to support each instruction."). The parameters of that instruction should operate as guardrails throughout the trial and therefore should be determined by the Court prior to opening statements.

In more simple cases with fewer attorneys on whose advice a defendant purportedly relied, courts that have ordered pretrial disclosure of an intent to rely on an advice-of-counsel defense ordinarily have required that it be provided within weeks of the start of trial. These cases are factually distinguishable. *See, e.g.*, *Crowder*, 325 F. Supp. 3d at 139 (requiring notice two weeks before trial, in two defendant case involving scheme to defraud D.C. public schools); *Dallman*, 433 F. Supp. 3d at 813 (requiring notice ten days before trial, where defense arose from three interactions involving two attorneys); *Cooper*, 283 F. Supp. 2d at 1225 (requiring notice two weeks before trial, in health care fraud case with three defendants). In addition to the prudential reasons to peg the defendant's notice to the deadline for exhibit lists, a more substantial notice period is warranted in this case because the defense likely will involve multiple lawyers, there will be

discovery obligations and additional litigation, and the required notice will not expose any defense secrets. As set forth above, lead counsel has identified one attorney by name, the defendant has spoken of getting advice from multiple attorneys, and at least 25 witnesses have withheld information from this investigation on the basis of attorney-client privilege.

Given the potential number of attorneys and breadth of advice involved, the defendant's notice should describe with particularity the following: (1) the identity of each attorney who provided advice; (2) the specific advice given, including whether the advice was oral or written; (3) the date on which the advice was given; and (4) the information the defendant communicated or caused to be communicated to the attorney concerning the subject matter of the advice, including the date and manner of the communication.

IV. Conclusion

The Court, the parties, the jury, and the public have an interest in an orderly and efficient trial. The Court should build an appropriate interval into the pretrial schedule to ensure that all disclosure, investigation, and litigation resulting from notice of the advice-of-counsel defense can be addressed and resolved in an orderly fashion. For that reason, the Court should enter an order requiring the defendant to provide notice of his intent to rely on such a defense by December 18, 2023. A proposed order is attached.

Respectfully submitted,

JACK SMITH
Special Counsel

By: /s/Thomas P. Windom
Thomas P. Windom
Molly Gaston
Senior Assistant Special Counsels
950 Pennsylvania Avenue NW
Room B-206
Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	*	
	*	
v.	*	**CRIMINAL NO. 23-cr-257 (TSC)**
	*	
DONALD J. TRUMP,	*	
	*	
Defendant.	*	
	*	

PROPOSED ORDER

The Government has moved to require the defendant to provide notice, by December 18, 2023, of his intent to rely at trial on the advice-of-counsel defense. For the reasons stated in the Government's motion, and for good cause shown, the motion is **GRANTED**.

The defendant's notice, if any, should describe with particularity the following: (1) the identity of each attorney who provided advice; (2) the specific advice given, including whether the advice was oral or written; (3) the date on which the advice was given; and (4) the information the defendant communicated or caused to be communicated to the attorney concerning the subject matter of the advice, including the date and manner of the communication.

If the defendant serves notice, he must at the same time produce in discovery to the Government (1) all "communications or evidence" the defendant intends to rely on to establish the defense and (2) any "otherwise-privileged communications" the defendant does "not intend to use at trial, but that are relevant to proving or undermining" it. *United States v. Crowder*, 325 F. Supp. 3d 131, 138 (D.D.C. 2018).

TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE

9-110.000 - ORGANIZED CRIME AND RACKETEERING

9-110.010	Introduction
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9-110.010 - Introduction

This chapter focuses on investigations and prosecutions involving RICO, (18 U.S.C. §§ 1961-1968), illegal gambling (18 U.S.C. §§ 1511 and 1955), loansharking (18 U.S.C. §§ 891-896), violent crimes in aid of racketeering (18 U.S.C. § 1959), and gambling ships (18 U.S.C. §§ 1081-1083). The Organized Crime and Gang Section of the Criminal Division supervises prosecutions of each of these statutes. For an additional discussion of RICO, see "Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors," available from OCGS.

[updated May 1999]

9-110.100 - Racketeer Influenced and Corrupt Organizations (RICO)

On October 15, 1970, the Organized Crime Control Act of 1970 became law. Title IX of the Act is the Racketeer Influenced and Corrupt Organizations Statute (18 U.S.C. §§ 1961-1968), commonly referred to as the "RICO" statute. The purpose of the RICO statute is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S.Rep. No. 617, 91st Cong., 1st Sess. 76 (1969). However, the statute is sufficiently broad to encompass illegal activities relating to any enterprise affecting interstate or foreign commerce.

Section 1961(10) of Title 18 provides that the Attorney General may designate any department or agency to conduct investigations authorized by the RICO statute and such department or agency may use the investigative provisions of the statute or the investigative power of such department or agency otherwise conferred by law. Absent a specific

designation by the Attorney General, jurisdiction to conduct investigations for violations of 18 U.S.C. § 1962 lies with the agency having jurisdiction over the violations constituting the pattern of racketeering activity listed in 18 U.S.C. § 1961.

[cited in JM 9-110.812]

9-110.101 - Division Approval

No RICO criminal indictment or information or civil complaint shall be filed, and no civil investigative demand shall be issued, without the prior approval of the Criminal Division. See RICO Guidelines at JM 9-110.200.

[cited in JM 6-4.210]

9-110.200 - RICO Guidelines Preface

The decision to institute a federal criminal prosecution involves balancing society's interest in effective law enforcement against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned. Despite the broad statutory language of RICO and the legislative intent that the statute ". . . shall be liberally construed to effectuate its remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved. Further, the Criminal Division will not approve "imaginative" prosecutions under RICO which are far afield from the congressional purpose of the RICO statute. A RICO count which merely duplicates the elements of proof of traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be approved unless it serves some special RICO purpose. Only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose.

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

[updated October 2016]

[cited in JM 9-110.101; JM 9-110.811]

9-110.210 - Authorization of RICO Prosecution—The Review Process

The review and approval function for all RICO matters has been centralized within the Organized Crime and Gang Section of the Criminal Division. To commence the review process, the *final* draft of the proposed indictment or information and a RICO prosecution memorandum shall be forwarded to the Organized Crime and Gang Section. Separate approval is required for superseding indictments or indictments based upon a previously approved information. Attorneys are encouraged to seek guidance from the Organized Crime and Gang Section by telephone prior to the time an investigation is undertaken and well before a final indictment and prosecution memorandum are submitted for review.

RICO reviews are handled on a first-in-first-out basis. Accordingly, the submitting attorney must allocate sufficient lead time to permit review, revision, conferences, and the scheduling of the grand jury. *Unless there is a backlog, 15 working days is usually sufficient.* The review process will not be dispensed with because a grand jury, which is about to expire, has been scheduled to meet to return a RICO indictment. Therefore, submitting attorneys are cautioned to budget their time and to await receipt of approval before scheduling the presentation of the indictment to a grand jury.

If modifications in the indictment are required, they must be made by the submitting attorney before the indictment is returned by the grand jury. Once the modifications have been made and the indictment has been returned, a copy of the

indictment filed with the clerk of the court shall be forwarded to Organized Crime and Gang Section. If, however, it is determined that the RICO count is inappropriate, the submitting attorney will be advised of the Section's disapproval of the proposed indictment. The submitting attorney may wish to redraft the indictment based upon the Section's review and submit a revised indictment and/or prosecution memorandum at a later date.

[updated January 2020]

9-110.300 - RICO Guidelines Policy

It is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the Criminal Division having supervisory responsibility for this statute.

9-110.310 - Considerations Prior to Seeking Indictment

Except as hereafter provided, a government attorney should seek approval for a RICO charge only if one or more of the following requirements is present:

1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying charges would not;

2. A RICO prosecution would provide the basis for an appropriate sentence under all the circumstances of the case in a way that prosecution only on the underlying charges would not;

3. A RICO charge could combine related offenses which would otherwise have to be prosecuted separately in different jurisdictions;

4. RICO is necessary for a successful prosecution of the government's case against the defendant or a codefendant;

5. Use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct;

6. The case consists of violations of State law, but local law enforcement officials are unlikely or unable to successfully prosecute the case, in which the federal government has a significant interest;

7. The case consists of violations of State law, but involves prosecution of significant or government individuals, which may pose special problems for the local prosecutor.

The last two requirements reflect the principle that the prosecution of state crimes is primarily the responsibility of state authorities. RICO should be used to prosecute what are essentially violations of state law only if there is a compelling reason to do so.

[updated January 2020]

9-110.320 - Approval of Organized Crime and Gang Section Necessary

A RICO prosecution memorandum and draft indictment, felony information, civil complaint, or civil investigative demand shall be forwarded to the Organized Crime and Gang Section, Criminal Division, 1301 New York Ave., NW, Suite 700, Washington, DC 20005, *at least 15 working days prior to the anticipated date of the proposed filing or the seeking of an indictment from the grand jury.*

No criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Gang Section, Criminal Division. Prior authorization from the

Criminal Division to conduct a grand jury investigation based upon possible violations of 18 U.S.C. § 1962 is not required.

A RICO prosecution memorandum and draft pleading or civil investigative demand shall be forwarded to the Organized Crime and Gang Section. It is essential to the careful review which these factually and legally complex cases require that the attorney handling the case in the field not wait to submit the case until the grand jury or the statute of limitations is about to expire. Authorizations based on oral presentations will not be given.

These guidelines do not limit the authority of the Federal Bureau of Investigation to conduct investigations of suspected violations of RICO. The authority to conduct such investigations is governed by the FBI Guidelines on the Investigation of General Crimes. However, the factors identified here are the criteria by which the Department of Justice will determine whether to approve the proposed RICO. The fact that an investigation was authorized, or that substantial resources were committed to it, will not influence the Department in determining whether an indictment under the RICO statute is appropriate.

Use of RICO in a prosecution, like every other federal criminal statute, is also governed by the Principles of Federal Prosecution. See JM 9-27.000, *et seq*. Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts is not appropriate and would violate the Principles of Federal Prosecution.

[updated January 2020] [cited in JM 9-63.1200]

9-110.330 - Charging RICO Counts

A RICO charge where the predicate acts consist only of state offenses will not be approved except in the following circumstances:

A. Local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the Federal government has significant interest;

B. Significant organized crime involvement exists; or

C. The prosecution of significant political or governmental individuals may pose special problems for local prosecutors.

9-110.400 - RICO Prosecution (Pros) Memorandum Format

A well written, carefully organized prosecution memorandum is the greatest guarantee that a RICO prosecution will be authorized quickly and efficiently. OCGS maintains sample prosecution memoranda available to Department attorneys.

Once a RICO indictment has been approved by the Organized Crime and Gang Section and has been returned by the grand jury, a copy of a file-stamped copy of the indictment shall be provided to the Section. The Section shall also be notified in writing of any significant rulings which affect the RICO statute—for example, any ruling which results in a dismissal of a RICO count, or any ruling affecting or severing any aspect of the forfeiture provisions under RICO. In addition, copies of RICO motions, jury instructions and briefs filed by the United States Attorney's Office (USAO), as well as the defense, should be forwarded to the Organized Crime and Gang Section for retention in a central reference file. The government's briefs and motions will provide assistance to other USAOs handling similar RICO matters.

Once a verdict has been obtained, the USAO shall forward the following information to the Section for retention:

a. the verdict on each count of the indictment;
b. a copy of the judgment of forfeiture;
c. estimated value of the forfeiture; and
d. judgment and sentence(s) received by each RICO defendant.

[updated January 2020] [cited in JM 9-110.815]

9-110.800 - Violent Crimes in Aid of Racketeering Activity (18 U.S.C. § 1959)

Section 1959 makes it a crime to commit any of a list of violent crimes in return for pecuniary compensation from an enterprise engaged in racketeering activity, or for the purpose of joining, remaining with, or advancing in such an enterprise. The listed violent crimes are murder, kidnapping, maiming, assault with a dangerous weapon, assault resulting in serious bodily injury, and threatening to commit a "crime of violence," as defined in 18 U.S.C. § 16. The listed crimes may be violations of State or Federal law. In addition, attempts and conspiracies to commit the listed crimes are covered. The maximum penalty varies with the particular violent crime involved, ranging from a fine and/or three years imprisonment up to a fine and/or life imprisonment, except for any murder occurring on or after September 13, 1994, which are subject to the death penalty.

For any murder occurring on or after September 13, 1994, the prosecutor must comply with the Department's death penalty protocol (see JM 9-10.000).

See approval guidelines at JM 9-110.811 through 816.

9-110.801 - Violent Crimes in Aid of Racketeering (18 U.S.C. § 1959)—Division Approval

No criminal prosecution under Section 1959 shall be initiated by indictment or information without the prior approval of the Organized Crime and Gang Section (OCGS). All requests for approval must be submitted at least 15 days in advance and accompanied by a prosecution memorandum and final proposed indictment.

See approval guidelines at JM 9-110.811 through 816.

[updated May 2011] [cited in JM 9-63.1200]

9-110.802 - Violent Crimes in Aid of Racketeering (18 U.S.C. § 1959)—Approval Guidelines

Because Section 1959 reaches conduct within state and local jurisdictions, there is, absent compelling circumstances, a need to avoid encroaching on state and local law enforcement authority. Moreover, Section 1959 complements the RICO statute, 18 U.S.C. §§ 1961-1968, and incorporates RICO concepts and terms, namely "enterprise" and "racketeering activity," and there is a need to maintain consistent applications and interpretations of the elements of RICO. All proposed prosecutions under Section 1959 therefore must be submitted to the Organized Crime and Gang Section Criminal Division, for approval in accordance with the following guidelines.

[updated May 2011]

9-110.811 - The Review Process for Authorization under Section 1959

The review process for authorization of prosecutions under Section 1959 is similar to that for RICO prosecutions under 18 U.S.C. §§ 1961 to 1968. See JM 9-110.200, *et seq*. To commence the formal review process, submit a final draft of the proposed indictment and a prosecution memorandum to the Organized Crime and Gang Section. Before the formal review process begins, prosecuting attorneys are encouraged to consult by telephone the Organized Crime and Gang Section in order to obtain preliminary guidance and suggestions.

The review process can be time-consuming because of the likelihood that modifications will be made to the indictment and because of the heavy workload of the reviewing attorneys. Therefore, unless extraordinary circumstances justify a shorter time frame, *a period of 15 working days must be allowed for the review process*.

[updated May 2011] [cited in JM 9-110.800; JM 9-110.801]

9-110.812 - Specific Guidelines for Section 1959 Prosecutions

A. In deciding whether to approve a prosecution under Section 1959, the Organized Crime and Gang Section will analyze the prosecution memorandum and proposed indictment to determine whether there is a legitimate reason the offense cannot or should not be prosecuted by state or local authorities. For example, federal prosecution may be appropriate where local authorities do not have the resources to prosecute, where local authorities are reasonably believed to be corrupt, where local authorities have requested federal participation, or where the offense is closely related to a federal investigation or prosecution. A prosecution will not be authorized over the objection of local authorities in the absence of a compelling reason. Accordingly, every prosecution memorandum must state the views of local authorities with respect to the proposed prosecution, or the reasons for not soliciting them. In addition, the specific factors set forth in the following sections will be considered with respect to all proposed prosecutions.

B. Section 1959 was enacted to combat "contract murders and other violent crimes by organized crime figures." *See* S.Rep. No. 225, 98th Cong., 1st Sess. 304-307, 306 (1983), *reprinted in* 1984 U.S. Code & Admin. News (U.S.C.A.N.) 3182, 3483-3487. The statutory language is extremely broad, in that it covers such conduct as a threat to commit an assault, and other relatively minor conduct normally prosecuted by local authorities. Thus, although the involvement of traditional organized crime will not be a requirement for approval of proposed prosecutions, a prosecution will not be authorized unless the violent crimes involved are substantial because of the seriousness of injuries, the number of incidents, or other aggravating factors.

C. The statutory definition of "enterprise" also is very broad; it is closely related to the definition of the same term in the RICO statute, 18 U.S.C. § 1961(4). (It should be noted that the definition in section 1959, unlike the RICO definition, includes a requirement of an effect on interstate commerce as part of the definition, and does not include an "individual" within the definition.) No prosecution under section 1959 will be approved unless the enterprise has an identifiable structure and purpose apart from the racketeering activity and crimes of violence it is engaged in, and otherwise meets the standards for a RICO prosecution.

D. The term "racketeering activity" is borrowed directly from the RICO statute, 18 U.S.C. Sec. 1961(1). It will be construed in the same way under Section 1959 as it is under RICO, for purposes of approval. See JM 9-110.100, *et seq.*

[updated May 2011]

9-110.815 - Prosecution Memorandum —Section 1959

Every request for approval of a proposed prosecution under section 1959 must be accompanied by a final draft of a proposed indictment and by a thorough prosecution memorandum. The prosecution memorandum should generally conform to the standards outlined for RICO prosecutions. See JM 9-110.400. The memorandum must contain a concise summary of the facts and a statement of the evidentiary basis for each count, a statement of the applicable law, a discussion of anticipated defenses and unusual legal issues (federal, and where applicable, state), and a statement of justification for using section 1959. It is especially important that the memorandum include a discussion of the nexus between the enterprise and the crime of violence, the defendant's relationship to the enterprise, and the evidentiary basis for each section 1959 count. Submission of a thorough memorandum is particularly important, because of the complexity of the issues involved and because of the statute's similarity to RICO. OCGS maintains sample prosecution memoranda available to Department attorneys.

[updated January 2020]

9-110.816 - Post-Indictment Duties—Section 1959

Once the indictment or information has been approved and filed, it is the duty of the prosecuting attorney to submit to the Organized Crime and Gang Section a copy bearing the seal of the clerk of the court. In addition, the attorney should keep the Organized Crime and Gang Section informed of any unusual legal problems that arise in the course of the case, so those problems can be considered in providing guidance to other prosecutors.

[updated May 2011] [cited in JM 9-110.800; JM 9-110.801]

9-110.901 - Approval Requirement for Wire Act

No criminal prosecution under 18 U.S.C. § 1084 shall be initiated by indictment, information, or complaint without the prior approval of the Organized Crime and Gang Section (OCGS). All requests for approval must be submitted at least 7 days in advance and accompanied by a prosecution memorandum and final proposed indictment, information, or complaint.

[updated January 2019]

‹ 9-105.000 - Money Laundering up 9-111.000 - Forfeiture/Seizure ›

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Summary

Congress enacted the federal Racketeer Influenced and Corrupt Organization (RICO) provisions as part of the Organized Crime Control Act of 1970. Despite its name and origin, RICO is not limited to "mobsters" or members of "organized crime" as those terms are popularly understood. Rather, it covers those activities that Congress felt characterized the conduct of organized crime, no matter who actually engages in them.

RICO proscribes no conduct that is not otherwise criminal. Instead, under certain circumstances, it enlarges the civil and criminal consequences of a list of state and federal crimes.

In simple terms, RICO condemns

(1) any person

(2) who

(a) uses for or invests in, or
(b) acquires or maintains an interest in, or
(c) conducts or participates in the affairs of, or
(d) conspires to invest in, acquire, or conduct the affairs of

(3) an enterprise

(4) which

(a) engages in, or
(b) whose activities affect, interstate or foreign commerce

(5) through

(a) the collection of an unlawful debt, or
(b) the patterned commission of various state and federal crimes.

Violations are punishable by (a) the forfeiture of any property acquired through a RICO violation and of any property interest in the enterprise involved in the violation, (b) imprisonment for not more than 20 years, or for life if one of the predicate offenses carries such a penalty, and/or (c) a fine of not more than the greater of twice the amount of gain or loss associated with the offense or $250,000 for individuals ($500,000 for organizations). RICO has generally survived constitutional challenges, although its forfeiture provisions are subject to an excessive fines clause analysis and perhaps a cruel and unusual punishment disproportionality analysis.

RICO violations also subject the offender to civil liability. The courts may award anyone injured in their business or property by a RICO violation treble damages, costs and attorneys' fees, and may enjoin RICO violations, order divestiture, dissolution or reorganization, or restrict an offender's future professional or investment activities. Civil RICO has been often criticized and, at one time, commentators urged Congress to amend its provisions. Congress found little consensus on the questions raised by proposed revisions, however, and the issue seems to have been put aside at least for the time being.

The text of the RICO sections, citations to state RICO statutes, and a selected bibliography are appended.

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I. Introduction

Congress enacted the federal Racketeer Influenced and Corrupt Organization (RICO) provisions[1] as part of the Organized Crime Control Act of 1970.[2] Despite its name and origin, RICO is not limited to "mobsters" or members of "organized crime," as those terms are popularly understood.[3] Rather, it covers those activities which Congress felt characterized the conduct of organized crime, no matter who actually engages in them.[4]

RICO builds on other crimes.[5] It enlarges the civil and criminal consequences of the patterned commission of other state and federal offenses (otherwise known as predicate offenses or racketeering activity), making it a crime to be a criminal, under certain circumstances.[6]

In simple terms, RICO condemns

(1) any person

(2) who

(a) invests in, or
(b) acquires or maintains an interest in, or
(c) conducts or participates in the affairs of, or
(d) conspires to invest in, acquire, or conduct the affairs of

(3) an enterprise

(4) which

(a) engages in, or
(b) whose activities affect, interstate or foreign commerce

[1] 18 U.S.C. §§ 1961 -1968 (text is appended). This report appears in an abridged form, without footnotes, full citations, or appendixes, as CRS Report RS20376, *RICO: An Abridged Sketch*, by Charles Doyle.

[2] 84 Stat. 941 (1970).

[3] Boyle v. United States, 556 U.S. 938, 950-51 (2009) ("'We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe[]'. . . declining to read 'an organized crime limitation into RICO's pattern concept' . . . [and] rejecting the view that RICO provides a private right of action 'only against defendants who had been convicted on criminal charges, and only where there had occurred a racketeering injury.'." (quoting Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 660 (2008); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 481 (1985); and H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 244 (1989))).

[4] "To avoid classifying defendants according to such ancillary characteristics as group association and national origin, the Act basically says 'racketeer is as racketeer does' and then tries to define what a racketeer does indeed do." Andrew P. Bridges, *Private RICO Litigation Based Upon "Fraud" in the Sale of Securities*, 18 GA. L. REV. 43, 49 (1983); *see also*, Gerard E. Lynch, *RICO: The Crime of Being a Criminal: Parts I & II*, 87 COLUM. L. REV. 661, 686-88 (1987).

[5] Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 938-39 (1987); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L. Q. 1009, 1021 n.71 (1980) ("RICO is not a criminal statute: it does not make criminal conduct that before its enactment was not already prohibited, since its application depends on the existence of 'racketeering activity' that violates an independent criminal statute.").

[6] The statute describes these underlying offenses as "racketeering activities." See 18 U.S.C. § 1961(1) (defining "racketeering activity" to mean "any act of threat involving" specified state offenses, any "act which is indictable under" specified federal statutes, and certain federal "offenses"). They are often referred to as "predicate offenses." RJR Nabisco, Inc. v. Eur. Cmty, 136 S. Ct. 2090, 2096 (2016) ("RICO is founded on the concept of racketeering activity. The statute defines racketeering activity to encompass dozens of state and federal offenses known in RICO parlance as predicates."); Eller v. EquiTrust Life Ins. Co., 778 F.3d 1089, 1092 (9th Cir. 2015) ("A RICO claim requires a racketeering activity (known as predicate acts).").

(5) through

(a) the collection of an unlawful debt, or
(b) the patterned commission of various state and federal crimes.[7]

RICO violations subject the offender to a range of criminal penalties: (a) forfeiture of any property acquired through a RICO violation and of any property interest in the enterprise involved in the violation, and (b) imprisonment for not more than 20 years, or life if one of the predicate offenses carries such a penalty, and/or a fine of not more than the greater of twice of amount of gain or loss associated with the offense or $250,000 for individuals and $500,000 for organizations.[8] RICO shares predicate offenses with the federal money laundering statute[9] and to a limited extent with the Travel Act,[10] so that conduct constituting a RICO violation or a RICO predicate offense violation may also trigger criminal liability under the Travel Act and money laundering provisions. Federal law also features a kind of RICO-enterprise's "hitman" offense that outlaws committing various crimes of violence at the behest of a RICO enterprise.[11]

RICO violations may also subject the offender to civil liability. The courts may award anyone injured in his business or property by a RICO violation treble damages, costs and attorneys'

[7] In exact terms, 18 U.S.C. § 1962 declares the following:

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, 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. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection, if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

"(b) 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.

"(c) 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 conduct, or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

[8] *Id.* §§ 1963, 3571.

[9] *Id.* § 1956(c)(7)(A) ("the term 'specified unlawful activity' means – (A) any act or activity constituting an offense listed in section 1961(1) of this title . . ."); *id.* § 1957(f)(3) ("the term[] 'specified unlawful activity' . . . shall have the meaning given th[is] term[] in section 1956 of this title.").

[10] *Id.* § 1952(b) ("As used in this section (i) 'Unlawful activity' means (1) ant business enterprise involving gambling … narcotics or controlled substances … (2) extortion, bribery, or arson … or (3) any act which is indictable … under section 1956 or 1957 of this title ….").

[11] *Id.* § 1959(a) ("Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished . . ."). The full text of 18 U.S.C. § 1959, with accompanying penalties, appears in **Appendix A**).

fees,[12] and may enjoin RICO violations, order divestiture, dissolution or reorganization, or restrict an offender's future professional or investment activities.[13]

The RICO provisions also provide (1) for service of process in RICO criminal and civil cases, and for venue in civil cases;[14] (2) for expedited judicial action in certain RICO civil cases brought by the United States;[15] (3) for in camera proceedings in RICO civil cases initiated by the United States;[16] and (4) for the Department of Justice's use of RICO civil investigative demands.[17] RICO prosecutions and civil actions have been attacked on a host constitutional grounds and have generally survived.[18]

II. A Closer Look at the Elements

A. Any person

Any person may violate RICO.[19] The "person" need not be a mobster or even a human being; "any individual or entity capable of holding a legal or beneficial interest in property" will do.[20] Although the "person" and the "enterprise" must be distinct in the case of a subsection 1962(c) violation (a person, employed by an enterprise, conducting the enterprise's activities through racketeering activity),[21] a corporate entity and its sole shareholder are sufficiently distinct to satisfy the enterprise and person elements of a subsection (c) violation.[22] Conversely, the "person" and "enterprise" need not be distinct for purposes of subsection 1962(a) (investing the racketeering activity proceeds in an enterprise) or subsection 1962(b) (acquiring or maintaining an enterprise through racketeering activity) violations.[23]

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[12] *Id.* § 1963(c).

[13] *Id.* § 1964(a).

[14] *Id.* § 1965.

[15] *Id.* § 1966.

[16] "In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons." *Id.* § 1967.

[17] *Id.* §1968. The civil investigative demand process, borrowed from antitrust law like so many of the other features of RICO, permits the Attorney General to demand the production of documentary evidence from anyone prior to the initiation of civil or criminal RICO investigation.

[18] The challenges, ranging from Article III forfeiture issues to questions of Eighth Amendment cruel and unusual punishment questions, are discussed toward the end of this report.

[19] *Id.* § 1962(a), (b), (c), (d).

[20] *Id.* § 1961(3).

[21] Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001) ("[U]nder § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person' and (2) an enterprise. . . . The Act says it applies to 'person[s]' who are 'employed by . . . the enterprise.' In ordinary English one speaks of . . . being employed by . . . others not oneself."); CGC Holding Co., LLC v. Hutchens, 974 F.3d 1201, 1212 (10th Cir. 2020); Cisneros v. Petland, Inc., 972 F.3d 1204, 1215 (11th Cir. 2020); U1it4less, Inc. v. Fedex, Inc., 871 F.3d 199, 205 (2d Cir. 2017); United States v. Bergrin, 650 F.3d 257, 266 (3d Cir. 2011); Abraham v. Singh, 480 F.3d 351, 357 (5th Cir. 2007); Living Designs, Inc. v. E.I. DuPont de Nemours and Co., 431 F.3d 353, 361 (9th Cir. 2005); United States v. London, 66 F.3d 1227, 1244-45 (1st Cir. 1995).

[22] *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 163; *CGC Holding Co., LLC*, 974 F.3d at 1212; Ray v. Spirit Airlines, Inc., 836 F.3d 1340, 1345 (11th Cir. 2016).

[23] Churchill Village, L.L.C. v. General Electric, 361 F.3d 566, 574 (9th Cir. 2004) ("Churchill has pleaded non-frivolous claims under § 1962(a) and (b). We have not required that the RICO 'person' and 'enterprise' be distinct in

Even though governmental entities may constitute a corrupted RICO enterprise[24] or in some instances the victims of a RICO offense,[25] they are not considered "persons" capable of committing a RICO violation either because a governmental entity does not have *mens rea* capacity or by virtue of sovereign immunity.[26]

B. Conduct

1. Invest or Use

RICO addresses four forms of illicit activity reflected in the four subsections of section 1962: (a) acquiring or operating an enterprise using racketeering proceeds; (b) controlling an enterprise using racketeering activities; (c) conducting the affairs of an enterprise using racketeering activities; and (d) conspiring to so acquire, control, or conduct.

The first, 18 U.S.C. 1962(a), was designed as something of a money laundering provision.[27] "The essence of a violation of §1962(a) is not commission of predicate acts but investment of racketeering income."[28] Section 1962(a), which has been described as the most difficult to prove,[29] has several elements. Under its provisions, it is unlawful for

(1) any person

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actions under these subsections."); Gentry v. Resolution Trust Corp., 937 F.2d 899, 907 (3d Cir. 1991); *In re* Managed Care Litig., 150 F. Supp. 2d 1330, 1351 (S.D. Fla. 2001).

[24] United States v. Shamah, 624 F.3d 449, 454-55 (7th Cir. 2010) (police department); United States v. Urban, 404 F.3d 754, 770-71 (3d Cir. 2005) (city department); United States v. Cianci, 378 F.3d 71, 83 (1st Cir. 2004) (mayor's office); Michalowski v. Rutherford, 82 F. Supp. 3d 775, 785 (E.D. Ill. 2015) (state agency); Ferluga v. Eickhoff, 408 F. Supp. 2d. 1153, 1162 (D. Kan. 2006) (municipality).

[25] County of Oakland v. City of Detroit, 866 F.2d 839, 851 (6th Cir. 1989); Illinois Department of Revenue v. Phillips, 771 F.2d 312, 316-17 (7th Cir. 1985). The United States, however, is not a "person" who may bring a suit for treble damages under 18 U.S.C. § 1964(c). Chevron Corp. v. Donziger, 833 F.3d 74, 138 (2d Cir. 2016).

[26] Ivanenko v. Yanukovich, 995 F.3d 232, 240 (D.C Cir. 2021) (Foreign Sovereign Immunities Act precludes suit); Abcarian v. Levine, 972 F.3d 1019, 1027 (9th Cir. 2020) ("[G]overnment entities are incapable of forming a malicious intent."); Gil Ramirez Group, LLC v. Houston Independent School District, 786 F.3d 400, 411-12 (5th Cir. 2015) ("RICO requires demonstrating an underlying criminal act, which entails a *mens rea* requirement that a government entity cannot form."); Brown v. Nationsbank Corp., 188 F.3d 579, 587 (5th Cir. 1999) (Federal Bureau of Investigation) ("[A] federal agency is not chargeable, indictable, or punishable for violations of state or federal criminal provisions."); *Gentry*, 937 F.2d at 914 (municipal corporation); Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991) (Federal Insurance Administration); Bloch v. Executive Office of the President, 164 F. Supp. 3d 841, 856 (E.D. Va. 2016) (federal agency); BEG Investments, LLC v. Alberti, 85 F. Supp. 3d 13, 28-30 (D.D.C. 2015) (D.C. Alcohol Beverage Control Bd.); Naples v. Stefanelli, 972 F. Supp. 2d 373, 389 (E.D.N.Y. 2013) (Suffolk Cty, N.Y.).

[27] Brittingham v. Mobil Corp., 943 F.2d 297, 303 (3d Cir. 1991) (citing 116 Cong. Rec. 35199 (1970) (remarks of Rep. St. Germain), 116 Cong. Rec. 607 (1970) (remarks of Sen. Byrd), and 115 Cong. Rec. 6993 (1969) (remarks of Sen. Hruska)), *abrogated on other grounds*, Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc., 46 F.3d 258 (3d Cir. 1995) (en banc); Sadighi v. Daghighfekr, 36 F. Supp. 2d 279, 286 (D.S.C. 1999). RICO predates 18 U.S.C. §§ 1956, 1957, the principal federal money laundering statutes, by close to a decade and a half.

[28] Gristede's Foods, Inc. v. Unkechauge Nation, 532 F. Supp. 2d 439, 446 (E.D.N.Y. 2007) (quoting, Ouaknine v. MacFarlane, 897 F.2d 75, 83 (2d Cir. 1990)); *see also*, Ideal Steel Supply Corp. v. Anza, 652 F.3d 310, 321 (2d Cir. 2011) ("Subsection (a), in contrast, focuses the inquiry on conduct different from the conduct constituting the pattern of racketeering activity. After there have been sufficient predicate acts to constitute such a pattern, what is forbidden by subsection (a) is the investment or use of the proceeds of that activity to establish or operate a commerce-affecting enterprise.").

[29] BCCI Holdings (Lux.) S.A. v. Khalil, 56 F. Supp. 2d 14, 63 (D.D.C. 1999), *aff'd in part, rev'd in part*, 214 F.3d 168 (D.C. Cir. 2000); G. Robert Blakey & Ronald Goldstock, *On the Waterfront: RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 356 (1980).

(2) who is liable as a principal
  (a) in the collection of an unlawful debt or
  (b) in a pattern of predicate offenses
(3) to use or invest
(4) the income from such misconduct
(5) to acquire, establish or operate
(6) an enterprise in or affecting commerce.[30]

The "person," the pattern of predicate offenses, and the enterprise elements are common to all of the subsections. For purposes of 1962(a), however, a legal entity that benefits from the offense may be both the "person" and the "enterprise."[31] The person must have committed usury or a pattern of predicate offenses or aided and abetted in their commission,[32] have received income that would not otherwise have been received as a result, and used those proceeds to acquire or operate an enterprise in or whose activities have an impact on interstate or foreign commerce.[33] That is, "[t]o state a claim under 18 U.S.C. § 1962(a), Plaintiffs must allege that: (1) 'the Defendants derived income [through the collection of an unlawful debt; [and] (2) the income was used or invested, directly or indirectly, in the establishment or operation; (3) of an enterprise; (4) which is engaged in or the activities of which affect interstate or foreign commerce.'"[34]

2. Acquire or Maintain

The second proscription, 18 U.S.C. 1962(b), is much the same, except that it forbids acquisition or control of an enterprise through the predicates themselves rather than through the income derived from the predicates. It makes it unlawful for

(1) any person

[30] 18 U.S.C. § 1962(a); N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare, 781 F.3d 182, 202 (5th Cir. 2015); United States v. Vogt, 910 F.2d 1184, 1194 (4th Cir. 1990); Brice v. Plain Green, LLC, 372 F. Supp. 3d 955, 984 (N.D. Cal. 2019).

More precisely, the subsection declares, "(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, 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. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection, if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer." 18 U.S.C. § 1962(a).

[31] Churchill Village, L.L.C. v. General Electric, 361 F.3d 566, 574 (9th Cir. 2004) ("Where a corporation engages in racketeering activities and is the direct or indirect beneficiary of the pattern of racketeering activity, it can be both the 'person' and the 'enterprise' under section 1962(a)"); Gentry v. Resolution Trust Corp., 937 F.2d 899, 907 (3d Cir. 1991); Downing v. Halliburton & Associates, Inc., 812 F. Supp. 1175, 1178 (M.D. Ala. 1993), *aff'd without written op*., 13 F.3d 410 (11th Cir. 1995).

[32] Brady v. Dairy Fresh Products Co., 974 F.2d 1149, 1152 (9th Cir. 1992); United States v. Wyatt, 807 F.2d 1480, 1482 (9th Cir. 1987).

[33] National Organization for Women, Inc. v. Scheidler, 968 F.2d 612, 625 (7th Cir. 1992), *rev'd on other grounds*, 510 U.S. 249 (1994); *In re* Burzynski, 989 F.2d 733, 744 (5th Cir. 1993); Ideal Steel Supply Corp. v. Anza, 373 F.3d 251, 264 (2d Cir. 2004), *rev'd on other grounds*, 547 U.S. 451 (2006); Kerrigan v. ViSalus, Inc., 112 F. Supp. 3d 580, 610-11 (E.D. Mich. 2015); Johnson v. GEICO Cas. Co., 516 F. Supp. 2d 351, 361 (D. Del. 2007).

[34] Gibbs v. Haynes Inv., LLC, 368 F. Supp. 3d 901, 929-30 (E.D. Va. 2019) (quoting Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union et al., 633 F. Supp. 2d 214, 222 (E.D. Va. 2008)).

(2) to acquire or maintain an interest in or control of
(3) a commercial enterprise
(4) through
    (a) the collection of an unlawful debt or
    (b) a pattern of predicate offenses.[35]

As in the case of subsection 1962(a), the "person" and the "enterprise" may be one and the same.[36] There must be a nexus between the predicate offenses and the acquisition of control.[37] Exactly what constitutes "interest" or "control" is a case-by-case determination. The defendant must be shown to have played some significant role in the management of the enterprise, but a showing of complete control is unnecessary.[38] In summary as one court explained, "To establish a violation of § 1962(b), Plaintiffs musts allege that: '(1) the Defendants engaged in [collection of an unlawful debt]; (2) in order to acquire or maintain, directly or indirectly; (3) any interest or control over an enterprise; (4) which is engaged in, or the activities of which affect interstate or foreign commerce.'"[39]

3. Conduct of Affairs

Subsection 1962(c) makes it unlawful for

(1) any person,
(2) employed by or associated with,
(3) a commercial enterprise
(4) to conduct or participate in the conduct of the enterprise's affairs
(5) through
    (a) the collection of an unlawful debt or
    (b) a pattern of predicate offenses.[40]

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[35] 18 U.S.C. § 1962(b) ("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."); Tal v. Hogan, 453 F.3d 1244, 1268 (10th Cir. 2006); Advocacy Organization for Patients and Providers v. Auto Club Ins. Ass'n, 176 F.3d 315, 321-22 (6th Cir. 1999).

[36] *Churchill Village, L.L.C.*, 361 F.3d 566, 574 (9th Cir. 2004); Landry v. Air Line Pilots Ass'n, 901 F.2d 404, 425 (5th Cir.1990); Gentry v. Resolution Trust Corp., 937 F.2d 899, 907 (3d Cir. 1991); Whaley v. Auto Club Ins. Ass'n, 891 F. Supp. 1237, 1241-242 (E.D. Mich. 1995).

[37] Wagh v. Metris Direct, Inc., 363 F.3d 821, 830 (9th Cir. 2003), rev'd *on other grounds*, Odom v. Microsoft Corp., 486 F.3d 541, 551 (9th Cir. 2007) (en banc); *Advocacy*, 176 F.3d at 329; Banks v. Wolk, 918 F.2d 418, 421 (3d Cir. 1990); Andrews Farms v. Calcot, Ltd., 527 F. Supp. 2d 1239, 1256 (E.D. Cal. 2007).

[38] *Tal*, 453 F.3d at 1268-269 ("'Interest in or control of' requires more than a general interest in the results of its actions, or the ability to influence the enterprise through deceit ... Rather, it requires some ownership of the enterprise or an ability to exercise dominion over it"); Ikuno v. Yip, 912 F.2d 306, 310 (9th Cir. 1990) (citing Sutliff, Inc. v. Donovan Co., 727 F.2d 648, 653 (7th Cir. 1984), and Cincinnati Gas & Elec. Co. v. Gen. Elec. Co., 656 F. Supp. 49, 85 (S.D. Ohio 1986)); Nafta v. Feniks Intern'l House of Trade (USA), Inc., 932 F. Supp. 422, 428 (E.D.N.Y.1996); Griffin v. NBD Bank, 43 F. Supp. 2d 780, 791-92 (W.D. Mich. 1999) (includes the control evidenced by the ability to select one or more of members of a corporation's board of directors). Control may also be indirect as for example where the defendant exercises a measure of control over a subsidiary by virtue of his control over its parent organization. BCCI Holding (Lux.) S.A. v. Khalil, 56 F. Supp. 2d 14, 51 (D.D.C. 1999), *aff'd in part, rev'd in part*, 214 F.3d 168 (D.C. Cir. 2000).

[39] Gibbs v. Stinson, 421 F. Supp. 3d 267, 311 (E.D. Va. 2019) (quoting Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union et al., 633 F. Supp. 2d 214, 222 (E.D. Va. 2008)); *see also* Sarpolis v. Tereshko, 26 F. Supp. 3d 407, 429-30 (E.D. Pa. 2014).

[40] "(c) 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 conduct, or participate, directly or indirectly, in the conduct of such

Subsection 1962(c) is the most common substantive basis for RICO prosecution or civil action.[41] Although on its face subsection 1962(c) might appear to be less demanding than subsections 1962(a) and (b), the courts have not always read it broadly. Thus, in any charge of a breach of its provisions, the "person" and the "enterprise" must ordinarily be distinct.[42] A corporate entity and its sole shareholder, however, are sufficiently distinct for purposes of subsection 1962(c).[43]

The Supreme Court has identified a managerial stripe in the "conduct or participate in the conduct" element of subsection 1962(c) under which only those who direct the operation or management of the enterprise itself satisfy the "conduct" element.[44] Liability is not limited to the "upper management" of an enterprise, but extends as well to those within the enterprise who exercise broad discretion in carrying out the instructions of upper management.[45] Conviction requires neither an economic predicate offense nor a predicate offense committed with an economic motive.[46]

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c).

Muskegan Hotels, LLC v. Patel, 986 F.3d 692, 698 (7th Cir. 2021) ("To state a claim under § 1962(c), the complaint must allege that [the defendant] engaged in the (1) conduct (2) of an enterprise (3) through a pattern of racketeering activity or collection of an unlawful debt." (citing Salinas v. United States, 522 U.S. 52, 62 (1997))); Molina-Aranda v. Black Magic Enterprises, L.L.C., 983 F.3d 779, 785 (5th Cir. 2020) (quoting Sedima, S.P.R.L. v. Imrex Co.473 U.S. 479, 496 (1985)) ("To state a claim under § 1962(c), a plaintiff must adequately plead that the defendant engaged in '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'"); United States v. Fowler, 535 F.3d 408, 418 (6th Cir. 2008) ("A substantive RICO charge requires the Government to prove: (1) the existence of an enterprise which affects interstate or foreign commerce; (2) the defendant's association with the enterprise; (3) the defendant's participation in the conduct of enterprise's affairs; and (4) that the participation was through a pattern of racketeering activity."); *see also* CGC Holding Co., LLC v. Hutchens, 974 F.3d 1201, 1212 (10th Cir. 2020); United States v. Godwin, 765 F.3d 1306, 1320 (11th Cir. 2014); Crest Const. II, Inc. v. Doe, 660 F.3d 346, 353 (8th Cir. 2011); United States v. Brandao, 539 F.3d 44, 50-1 (1st Cir. 2008); Cordero v. TransAmerica Annuity Service Corp., 452 F. Supp. 3d 1292, 1303 (S.D. Fla. 2020); Brown v. Knoxville HMA Holding, LLC, 447 F. Supp. 3d 639, 645 (M.D. Tenn. 2020).

[41] Randy D. Gordon, *Crimes That Count Twice: A Reexamination of RICO's Nexus Requirements Under 18 U.S.C. §§1962(c) and 1964(c)*, 32 VT. L. REV. 171, 173 (2007).

[42] RJR Nabisco, Inc. v. Eur. Cmty, 136 S. Ct. 2090, 2104 (2016) (citing Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001)); Safe Streets Alliance v. Hickenlooper, 859 F.3d 865, 883 (10th Cir. 2019); Bible v. United Student Aid Funds, Inc., 799 F.3d 633, 655 (7th Cir. 2015); N. Cypress Med. Ctr. v. Cigna Healthcare, 781 F.3d 182, 202 (5th Cir. 2015); *In re* ClassicStar Mare Lease Litig., 727 F.3d 473, 490 (6th Cir. 2013); City of New York v. Smokes-Spirits.Com, Inc., 541 F.3d 425, 446-47 (2d Cir. 2008), *rev'd on other grounds sub nom*., Hemi Group v. City of New York, 559 U.S. 1, 11 (2010); Myers v. Provident Life and Accident Ins. Co., 472 F. Supp. 3d 1149, 1172 (M.D. Fla. 2020); Compound Property Management LLC v. Build Realty, Inc., 462 F. Supp. 3d 839, 856 (S.D. Ohio 2020).

[43] Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001).

[44] Reves v. Ernst & Young, 507 U.S. 170, 184-85 (1993); *see also* Muskegan Hotels, LLC v. Patel, 986 F.3d 692, 698 (7th Cir. 2021); United States v. Rodriguez-Torres, 939 F.3d 16, 28 (1st Cir. 2019) ("Prosecutors also had to prove that the defendant had some part in directing [the enterprise]. . . ." (quoting *Reves*, 507 U. S. at 184)); D'Addario v. D'Addario, 901 F.3d 80, 103 (2d Cir. 2018).

[45] *Muskegan Hotels*, 986 F.3d at 698 ("This operation-or-management requirement does not necessarily limit the scope of liability to an enterprise's upper management. Lower-rung participants and even third-party outsiders can be liable, provided they play a part in operating or managing the enterprise. . . . But the law is equally clear that the operation-or-management requirement is not met through the mere provision of professional services to the alleged racketeering enterprise."); *Rodriguez-Torres*, 939 F.3d at 28; Allstate Ins. Co. v. Plambeck, 802 F.3d 665, 674-75 (5th Cir. 2015): United States v. Godwin, 765 F.3d 1306, 1320 (11th Cir. 2014); Ouwinga v. Benistar 419 Plan Services, Inc., 694 F.3d 783, 791-92 (6th Cir. 2012).

[46] National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 256-61 (1994).

4. Conspiracy

Conspiracy under subsection 1962(d) is

(1) the agreement of
(2) two or more
(3) to invest in, acquire, or conduct the affairs of
(4) a commercial enterprise
(5) in a manner which violates 18 U.S.C. 1962(a), (b), or (c).[47]

The heart of the crime lies in the agreement rather than any completed, concerted violation of the other three RICO subsections.[48] Unlike the general conspiracy statute, RICO conspiracy is complete upon the agreement, even if none of the conspirators ever commit an overt act toward the accomplishment of its criminal purpose.[49] Contrary to the view once held by some of the lower courts, there is no requirement that a defendant commit or agree to commit two or more predicate offenses himself.[50] It is enough that the defendant, in agreement with another, intended to further an endeavor which, if completed, would satisfy all of the elements of a RICO violation.[51] In some circuits, both the government and private litigants may be required to prove the existence of a RICO qualified enterprise.[52]

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[47] 18 U.S.C. § 1962(d) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section"); United States v. Onyeri, 998 F.3d 274, 280 (5th Cir. 2021) ("The elements of a RICO conspiracy are: (1) an agreement between two or more people to commit a substantive RICO offense; and (2) Knowledge of and agreement to the overall objective of the RICO offense."); United States v. Brown, 973 F.3d 667, 682 (7th Cir. 2020) ("To prove a RICO conspiracy [to violate §1962(c)], 'the government must show (1) an agreement to conduct or participate in the affairs (2) of an enterprise (3) through a pattern of racketeering activity.'" (quoting United States v. Olson, 450 F.3d 655, 664 (7th Cir. 2006))); United Sates v. Williams, 974 F.3d 320, 369-70 (3d Cir. 2020).

[48] United States v. Tisdale, 980 F.3d 1089, 1096 (6th Cir. 2020) (quoting Salinas v. United States, 522 U.S. 52, 63 (1997)) ("To prove guilt of a RICO conspiracy like this one, the government had to show that [the defendant] 'adopt[ed] the goal of furthering or facilitating the criminal endeavor.'"); United States v. Delgado, 972 F.3d 63, 79 (2d Cir. 2020) ("Importantly, the crime of RICO conspiracy 'centers on the act of agreement. . . . [T]he government 'need only prove that the defendant knew of, and agreed to, the general criminal objective of a jointly undertaken scheme.'" (quoting United States v. Arrington, 941 F.3d 24, 36-7 (2d Cir. 2019))).

[49] Salinas v. United States, 522 U.S. 52, 63 (1997); *Williams*, 974 F.3d at 368; United States v. Wilkerson, 966 F.3d 828, 841 (D. C. Cir. 2020); United States v. Ruan, 966 F.3d 1101, 1147 (11th Cir. 2020); United States v. Leoner-Aguirre, 939 F.3d 310, 317 (1st Cir. 2019); *see also Salinas*, 522 U.S. at 65 ("[A] conspiracy may exist and be punished whether or not the substantive crime ensures, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.").

[50] *Id.*, 522 U.S. at 65-6; United States v. Millán-Machuca, 991 F.3d 7, 18 1st Cir. 2021); *Williams*, 974 F.3d at 369; *Brown*, 973 F.3d at 684.

[51] *Salinas*, 522 U.S. at 65; Millán-Machuca, 991 F.3d at 18 (quoting *Salinas*, 522 U.S. at 65); United States v. Rosenthal, 805 F.3d 523, 530 (5th Cir. 2015) ("The elements of a conspiracy under §1962(d) are simply (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense."); United States v. Cornell, 780 F.3d 616, 621 (4th Cir. 2015); United States v. Lawson, 535 F.3d 434, 445 (6th Cir. 2008); United States v. Fernandez, 388 F.3d 1119, 1228 (9th Cir. 2004); United States v. Warneke, 310 F.3d 542, 547-48 (7th Cir. 2003).

[52] Bucher v. Wendt, 975 F.3d 236, 241 (2d Cir. 2020) ("To state a claim for RICO conspiracy under § 1962(d), the plaintiff must also allege the existence of an agreement to violate RCO's substantive provisions.") (quotation marks omitted); *Williams*, 974 F.3d at 367-68 ("The fountainhead of any criminal conspiracy is the agreement . . . ."); United States v. Arrington, 941 F.3d 24, 36-7 (2d Cir. 2019) ("To prove a RICO conspiracy, the Government need not establish the existence of an enterprise, or that the defendant committed any predicate act. It need only prove that the defendant knew of, and agreed to, the general criminal objective of a jointly undertaken scheme."); United States v. Cornelius, 696 F.3d 1307, 1317 (10th Cir. 2012); United States v. Ramirez-Rivera, 800 F.3d 1, 18 (1st Cir. 2015) ("For a defendant to be found guilty of conspiring to violate RICO, the government prove (1) the existence of an enterprise

A conspirator is liable not only for the conspiracy but for any foreseeable substantive offenses committed by any of the conspirators in furtherance of the common scheme, until the objectives of the plot are achieved, abandoned, or the conspirator withdraws.[53] The statute of limitations for a RICO conspiracy runs until the scheme's objectives are accomplished or abandoned, or until the defendant withdraws.[54] As a general rule, "[t]o withdraw from a conspiracy, an individual must take some affirmative action either by reporting to authorities or communicating his intentions to his coconspirators."[55] The individual bears the burden of showing he has done so.[56]

C. Pattern of Racketeering Activity

1. Predicate Offenses

The heart of most RICO violations is a pattern of racketeering activities, that is, the patterned commission of two or more designated state or federal crimes. The list of state and federal crimes upon which a RICO violation may be predicated includes the following:

(A) any act or threat, chargeable under state law and punishable by imprisonment for more than one year, involving—

murder
kidnapping
gambling
robbery
arson
bribery
extortion
dealing in obscene material, or
dealing in controlled substances or listed chemicals;

(B) any violation of—

18 U.S.C. § 201 (bribery of federal officials)
18 U.S.C. § 224 (bribery in sporting contests)
18 U.S.C. §§ 471, 472, 473 (counterfeiting)
18 U.S.C. § 659 (theft from interstate shipments) (if felonious)
18 U.S.C. § 664 (theft from employee benefit plan)

18 U.S.C. §§ 891-894 (loansharking)
18 U.S.C. § 1028 (fraudulent identification documents) (if for profit)
18 U.S.C. § 1029 (computer fraud)
18 U.S.C. § 1084 (transmission of gambling information)
18 U.S.C. § 1341 (mail fraud)

affecting interstate or foreign commerce. . . ."); United States v. Cornell, 780 F.3d 616, 621 (4th Cir. 2015) ("To satisfy §1962(d), the government must prove that an enterprise affecting interstate commerce existed. . . .").

[53] Pinkerton v. United States, 328 U.S. 640, 646-47 (1946); *Williams*, 974 F.3d at 368; United States v. Portillo, 969 F.3d 144, 166 (5th Cir. 2020); United States v. McGill, 815 F.3d 917-18 (D.C. Cir. 2016); United States v. Christensen, 801 F.3d 970, 999-1000 (9th Cir. 2015); United States v. Garcia, 754 F.3d 460, 470-71 (7th Cir. 2014); *see also*, Smith v. United States, 568 U.S. 106, 111 (2013) ("Withdrawal terminates the defendant's liability for postwithdrawal acts of his co-conspirators, but he remains guilty of conspiracy.").

[54] United States v. Wilkerson, 966 F.3d 828, 840 (D.C. Cir. 2020) ("As the Supreme Court has explained, however, 'the offense in … conspiracy … continues until termination of the conspiracy or, as to a particular defendant, until the defendant's withdrawal.' Put simply, 'a defendant who has joined a conspiracy continues to violate the law through every moment of the conspiracy's existence.'" (quoting *Smith*, 568 U.S. at 113, 111)).

[55] United States v. Bostick, 791 F.3d 127, 143-44 (D.C. Cir. 2015); United States v. Ilarraza, 963 F.3d 1, 10 (1st Cir. 2020); United States v. Harris, 695 F.3d 1125, 1136-137 (10th Cir. 2012).

[56] *Smith*, 568 U.S. at 111; *Williams*, 974 F.3d at 368.

18 U.S.C. § 1343 (wire fraud)
18 U.S.C. § 1344 (bank fraud)
18 U.S.C. § 1351 (fraud in foreign labor contracting),
18 U.S.C. § 1425 (procuring nationalization unlawfully)
18 U.S.C. § 1426 (reproduction of naturalization papers)
18 U.S.C. § 1427 (sale of naturalization papers)

18 U.S.C. §§ 1461-1465 (obscene matter)
18 U.S.C. § 1503 (obstruction of justice)
18 U.S.C. § 1510 (obstruction of criminal investigation)
18 U.S.C. § 1511 (obstruction of state law enforcement)
18 U.S.C. § 1512 (witness tampering)
18 U.S.C. § 1513 (witness retaliation)

18 U.S.C. §§ 1542, 1543, 1544, 1546 (passport or similar document fraud)
18 U.S.C. §§ 1581-1592 (peonage & slavery)
18 U.S.C. § 1831 (economic espionage)
18 U.S.C. § 1832 (theft of trade secrets)
18 U.S.C. § 1951 (Hobbs Act (interference with commerce by threat or violence)
18 U.S.C. § 1952 (Travel Act (interstate travel in aid of racketeering)
18 U.S.C. § 1953 (transportation of gambling paraphernalia)

18 U.S.C. § 1954 (bribery to influence employee benefit plan)
18 U.S.C. § 1955 (illegal gambling business)
18 U.S.C. §§ 1956, 1957 (money laundering)
18 U.S.C. § 1958 (murder for hire)
18 U.S.C. § 1960 (illegal money transmitters)

18 U.S.C. §§ 2251, 2251A, 2252, 2260 (sexual exploitation of children)
18 U.S.C. §§ 2312, 2313 (interstate transportation of stolen cars)
18 U.S.C. §§ 2314, 2315 (interstate transportation of stolen property)
18 U.S.C. §§ 2318-2320 (copyright infringement)
18 U.S.C. § 2321 (trafficking in certain motor vehicles or motor vehicle parts)
18 U.S.C. §§ 2341-2346 (contraband cigarettes)
18 U.S.C. §§ 2421-2424 (Mann Act)

(C) indictable violations of—
29 U.S.C. § 186 (payments and loans to labor organizations)
29 U.S.C. § 501(c) (embezzlement of union funds)

(D) any offense involving—
fraud connected with a case under title 11 (bankruptcy)
fraud in the sale of securities
felonious violations of federal drug law

(E) violation of the Currency and Foreign Transactions Reporting Act [31 U.S.C. §§ 5311-5332]

(F) violation (for profit) of the Immigration and Nationality Act, section 274 (bringing in and harboring aliens), section 277 (helping aliens enter the U.S. unlawfully), or section 278 (importing aliens for immoral purposes), and

(G) violation of [a statute identified as a federal crime of terrorism in 18 U.S.C. § 2332b(g)(5)(B)]—

18 U.S.C. § 32 (destruction of aircraft or aircraft facilities)
18 U.S.C. § 37 (violence at international airports)
18 U.S.C. § 81 (arson within special maritime and territorial jurisdiction)
18 U.S.C. § 175 or 175b (biological weapons)
18 U.S.C. § 175c (variola virus)

18 U.S.C. § 229 (chemical weapons)
18 U.S.C. § 351(a), (b), (c), or (d) (congressional, cabinet, and Supreme Court assassination and kidnaping)
18 U.S.C. § 831 (nuclear materials)
18 U.S.C. § 832 (participating in foreign nuclear program)
18 U.S.C. § 842(m) or (n) (plastic explosives)

18 U.S.C. § 844(f)(2) or (3) (arson and bombing of Government property risking or causing death)
18 U.S.C. § 844(i) (arson and bombing of property used in interstate commerce)
18 U.S.C. § 930(c) (killing or attempted killing during an attack on a Federal facility with a dangerous weapon)
18 U.S.C. § 956(a)(1) (conspiracy to murder, kidnap, or maim persons abroad)
18 U.S.C. § 1030(a)(1) (protection of computers)

18 U.S.C. § 1030(a)(5)(A)(damage to protected computers under § 1030(a)(4)(A)(i)(II) through (VI))
18 U.S.C. § 1114 (killing or attempted killing of officers and employees of the United States)
18 U.S.C. § 1116 (murder or manslaughter of foreign officials, official guests, or internationally protected persons)
18 U.S.C. § 1203 (hostage taking)
18 U.S.C. § 1361 (destruction of government property)

18 U.S.C. § 1362 (destruction of communication lines, stations, or systems)
18 U.S.C. § 1363 (injury to buildings or property within special maritime and territorial jurisdiction of the United States)
18 U.S.C. § 1366(a) (destruction of an energy facility)
18 U.S.C. § 1751(a), (b), (c), or (d) (presidential and presidential staff assassination and kidnaping)
18 U.S.C. § 1992 (attacks on trains or mass transit)

18 U.S.C. §§ 2155-2156 (destruction of national defense materials, premises, or utilities)
18 U.S.C. § 2280 (violence against maritime navigation)
18 U.S.C. § 2280a (maritime safety)
18 U.S.C. § 2281 (violence against maritime fixed platforms)
18 U.S.C. § 2281 (additional offenses against maritime fixed platforms)
18 U.S.C. § 2332 (homicide and other violence against United States nationals occurring outside of the United States)

18 U.S.C. § 2332a (use of weapons of mass destruction)

18 U.S.C. § 2332b (acts of terrorism transcending national boundaries)
18 U.S.C. § 2332f (bombing public places and facilities)
18 U.S.C. § 2332g (anti-aircraft missiles)
18 U.S.C. § 2332h (radiological dispersal devices)
18 U.S.C. § 2332i (nuclear terrorism)
18 U.S.C. § 2339 (harboring terrorists)

18 U.S.C. § 2339A (providing material support to terrorists)
18 U.S.C. § 2339B (providing material support to terrorist organizations)
18 U.S.C. § 2339C (financing terrorism)
18 U.S.C. § 2339D (receipt of training from foreign terrorist organization)
18 U.S.C. § 2340A (torture)

21 U.S.C. § 960A (narco-terrorism)
42 U.S.C. § 2122 (atomic weapons)
42 U.S.C. § 2284 (sabotage of nuclear facilities or fuel)
49 U.S.C. § 46502 (aircraft piracy)
49 U.S.C. § 46504 (2d sentence) (assault on a flight crew with a dangerous weapon)

49 U.S.C. § 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft)
49 U.S.C. § 46506 (if homicide or attempted homicide is involved, application of certain criminal laws to acts on aircraft)
49 U.S.C. § 60123(b) (destruction of interstate gas or hazardous liquid pipeline facility).[57]

Offenses "involving" controlled substance felonies are predicate offenses under 18 U.S.C. § 1961(1)(D). The Controlled Substances Act outlaws attempt and conspiracies to violate its felon proscriptions.[58] As a general rule, "predicate racketeering acts that are themselves conspiracies may form the basis for a charge and eventual conviction under §1962(d)."[59] Consequently, conspiracy to commit a controlled substance felony constitutes a RICO predicate offense even under the RICO conspiracy provision.[60]

To constitute "racketeering activity," the predicate offense need only be *committed*; there is no requirement that the defendant or anyone else have been *convicted* of a predicate offense before a RICO prosecution or action may be brought.[61] Conviction of a predicate offense, on the other

[57] 18 U.S.C. § 1961(1). Paragraph 1961(1)(G) simply states that the crimes listed in 18 U.S.C. § 2332b(g)(5)(B) (*i.e.*, federal crimes of terrorism) are predicate offenses; thus, whenever a crime is added to subparagraph 2332b(g)(5)(B) it becomes a RICO predicate offense, sub silentio.

[58] 21 U.S.C. § 846.

[59] United States v. Rodriguez, 971 F.3d 1005, 1013-14 (9th Cir. 2020) (citing in accord First, Second, Third, Fifth, Sixth, and Seventh Circuit decisions).

[60] United States v. Wilkerson, 966 F.3d 828, 839 (D.C. Cir. 2020) (Several circuits have thus held that section 1961(1)(D) encompasses related conspiracy offenses. … We agree and now hold that a narcotics conspiracy offense constitutes racketeering activity under section 1961(1)(D).").

[61] Sedima, S.P.L.R. v. Imrex Co., 473 U.S. 479, 488 (1985); American Chiropractic v. Trigon Healthcare, 367 F.3d 212, 233 (4th Cir. 2004). A civil RICO cause of action based on fraud in the purchase or sale of securities requires a prior conviction, 18 U.S.C. 1964(c) ("… [E]xcept that no person upon any conduct that would have been actionable as fraud in in the purchase or sale of securities to establish a violation of section 1962…"); Menzies v. Seyfarth Shaw LLP

hand, does not preclude a subsequent RICO prosecution, nor is either conviction or acquittal a bar to a subsequent RICO civil action.[62]

2. Pattern

The pattern of racketeering activities element of RICO requires (1) the commission of two or more predicate offenses, (2) that the predicate offenses be related and not simply isolated events, and (3) that they are committed under circumstances that suggest either a continuity of criminal activity or the threat of such continuity.[63]

i. Predicates: The first element is explicit in section 1961(5): "'Pattern of racketeering activity' requires at least two acts of racketeering activity." The two remaining elements, relationship and continuity, flow from the legislative history of RICO. That history "shows that Congress indeed had a fairly flexible concept of a pattern in mind. A pattern is not formed by sporadic activity. . . . [A] person cannot be subjected to the sanctions [of RICO] simply for committing two widely separate and isolated criminal offenses. Instead, the term 'pattern' itself requires the showing of a relationship between the predicates and of the threat of continuing activity. It is this factor of *continuity plus relationship* which combines to produce a pattern."[64]

ii. Related predicates: The commission of predicate offenses forms the requisite related pattern if the "criminal acts . . . have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[65]

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943 F.3d 328, 334 (7th Cir. 2019) ("[T]he bar in 1964(c) . . . requires asking whether the fraud Menzies alleged in his complaint would be actionable under the securities laws."); Dusek v. JPMorgan Chase & Co., 832 F.3d 1243, 1249 (11th Cir. 2016); Lerner v. Coleman, 485 F. Supp. 3d 319, 333 (D. Mass. 2020) ("When it passed the Private Securities Litigation Reform Act in 1995, 'Congress meant not only to eliminate securities fraud as a predicate offense in a civil RICO action, but also to prevent a plaintiff from pleading other specified offenses, such as mail or wire fraud, as predicate acts under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud.'").

[62] McCarthy v. Pacific Loan, Inc., 629 F. Supp. 1102, 1108 (D. Haw. 1986); *cf.* Appley v. West, 832 F.2d 1021, 1024-25 (7th Cir. 1987); see discussion of double jeopardy constitutional issue *infra* at 20.

[63] H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 240 (1989); RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2096-97 (2016); United States v. Millán-Machuca, 991 F.3d 7, 18 (1st Cir. 2021); United States v. Williams, 974 F.3d 320, 369 (3d Cir. 2020); Cisneros v. Petland, Inc., 972 F.3d 1204, 1216 (11th Cir. 2020); United States v. Vernace, 811 F.3d 609, 615 (2d Cir. 2016).

[64] *H.J., Inc*., 492 U.S. at 239 (1989) (emphasis of the Court) (citing S. Rep. No. 617, 91st Cong., 1st Sess. at 158 (1969) and 116 Cong. Rec. 18940 (1970) (remarks of Sen. McClellan)); Grubbs v. Sheakley Group, Inc., 807 F.3d 785, 804 (6th Cir. 2015); Bible v. United Student Aid Funds, Inc., 799 F.3d 633, 659 (7th Cir. 2015); Stonebridge Collection, Inc. v. Carmichael, 791 F.3d 811, 823 (8th Cir. 2015).

[65] *H.J., Inc*., 492 U.S. at 240 (quoting, 18 U.S.C. 3575(e)); *see also* United States v. Stepanets, 989 F.3d 88, 107 (1st Cir. 2021); Menzies v. Seyfarth Shaw, LLP, 943 F.3d 328, 337 (7th Cir. 2019); United States v. Pinson, 860 F.3d 152, 161 (4th Cir. 2017); United States v. Vernace, 811 F.3d 609, 615 (2d Cir. 2016); United States v. Henley, 766 F.3d 893, 907 (8th Cir. 2014); United States v. Godwin, 765 F.3d 1306, 1321 (11th Cir. 2014). There may be some question whether the predicate offenses must relate to each other as well as to the enterprise. *Compare* United States v. Vernace, 811 F.3d at 615-16 (internal citations omitted) ("[P]redicate acts must be related to each other ('horizontal' relatedness), and they must be related to the enterprise ('vertical relatedness'). Vertical relatedness requires that the defendant was enabled to commit the offense solely because of his position in the enterprise or his involvement in or control over the enterprise's affairs, or because the offense related to the activities of the enterprise. It is not necessary, however, that the offense be in furtherance of the enterprise's activities for the offense to be relate the activities of the enterprise. Further, the same or similar proof that establishes vertical relatedness may also establish horizontal relatedness, because the requirements of horizontal relatedness can be established by linking each predicates act to enterprise"); United States v. Henley, 766 F.3d at 907 *with* United States v. Fowler, 535 F.3d 408, 420 (6th Cir. 2008)

iii. Continuity: The law recognizes continuity in two forms, pre-existing ("closed-ended") and anticipated ("open-ended").[66] The first is characterized by "a series of related predicates, extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement."[67] The second exists when a series of related predicates has begun and, but for intervention, would be a threat to continue in the future.[68] The Supreme Court has characterized a pattern extending over a period of time but which posed no threat of reoccurrence as a pattern with "closed-ended" continuity; and a pattern marked by a threat of reoccurrence as a pattern with "open-ended continuity."[69]

In the case of a "closed-ended" pattern, the lower courts have been reluctant to find predicate activity extending over less than a year sufficient for the "substantial period[s] of time" required to demonstrate continuity.[70]

Whether the threat of future predicate activity is sufficient to recognize an "open-ended" pattern of continuity depends upon the nature of the predicate offenses and the nature of the enterprise. "Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an

("It may be true that Fowler's predicate acts are not directly interrelated with each other, but that is not required. Instead, the predicate acts must be connected to the affairs and operations of the criminal enterprise").

[66] *H.J., Inc.*, 492 U.S. at 242; *see also Chin*, 965 F.3d 41, 48 (1st Cir. 2020); Grubbs v. Sheakley Group, Inc., 807 F.3d at 804; Stonebridge Collection, Inc. v. Carmichael, 791 F.3d at 823; United States v. Pierce, 785 F.3d 832, 838 (2d Cir. 2015).

[67] *H.J., Inc*., 492 U.S. at 242.

[68] *Id.* (emphasis added); United States v. Richardson, 167 F.3d 621, 626 (D.C. Cir. 1999) ("fortuitous interruption of racketeering activity such as by arrest does not grant defendants a free pass to evade RICO charges.").

[69] *H.J., Inc*., 492 U.S. at 242; *Chin*, 965 F.3d at 48.

[70] United States v. Stepanets, 989 F.3d 88, 108 (1st Cir. 2021) ("While the Supreme Court has made clear that it is not enough to show that the acts extended over a few weeks or months, we have previously recognized that a twenty-one month period is longer than what the Supreme Court has required." (citing *H.J., Inc*. 492 U.S. at 242, and Efron v Embassy Suites (P.R.), Inc., 223 F.3d 12, 17 (1st Cir. 2000)); Cisneros v. Petland, Inc., 972 F.3d 1204, 1216 (11th Cir. 2020) ("We measure a 'substantial period of time' in years, not in weeks. . . . 'The overwhelming weight of case authority suggest that nine months is not an adequate substantial period of time.'" (quoting Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1267 (11th Cir. 2004))); United States v. Pinson, 860 F.3d 152 163 ("These fragmented schemes do not reveal a scope and persistence that poses a special threat to social wellbeing. . . . Indeed, we have required much greater closed-ended time periods to establish a pattern of racketeering activity. *See, e.g., GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 550-51 (4th Cir. 2001) (holding fraudulent conduct lasting 17 months did not establish closed-ended continuity); *Flip Mortg. Corp. v. McElhone*, 841 F.2d 531, 528 (4th Cir. 1988) (holding fraudulent acts lasting seven years by single entity against single victim did not establish racketeering pattern)."); Reich v. Lopez, 858 F.3d 55, 60 (2d Cir. 2017) ("As such, closed-ended continuity is primarily a temporal concept, and it requires that the predicate acts extend over a substantial period of time. Predicate acts separated by only a few months will not do; this Circuit generally requires that the crimes extend over at least two years."); Grubbs v. Sheakley Group, Inc., 807 F.3d 785, 804-5 (6th Cir. 2015) (predicate offenses over an 8-month period were not sufficient to show closed-ended continuity); Stonebridge Collection, Inc. v. Carmichael, 791 F.3d 811, 823 (8th Cir. 2015) (emphasis added) ("Continuity can be shown by related acts *continuing over a period of time last at least one year* (closed ended continuity), or by acts which by their very nature threaten repetition (open ended continuity)"); United States v. Wilson, 605 F.3d 985, 1021 (D.C. Cir. 2010) (15 months, sufficient); Spool v. World Child International Adoption Agency, 520 F.3d 178, 184 (2d Cir. 2008) (16 months, insufficient); Jennings v. Auto Meter Products, Inc., 495 F.3d 466, 474-75 (7th Cir. 2007) (10 months, insufficient); North Bridge Associates, Inc. v. Boldt, 274 F.3d 38, 43 (1st Cir. 2001) (4 months, insufficient).

ongoing entity's regular way of doing business."[71] The threat "is generally presumed when the enterprise's business is primarily or inherently unlawful."[72]

D. Collection of an Unlawful Debt

Collection of an unlawful debt may trigger RICO criminal and civil liability in either of two ways. First, each of the substantive RICO offenses is predicated on either "a pattern of racketeering activity" or upon the "collection of an unlawful debt."[73] Collection of an unlawful debt appears to be the only instance in which the commission of a single predicate offense will support a RICO prosecution or cause of action. No proof of pattern seems to be necessary.[74]

The predicate covers only the collection of usurious debts or unlawful gambling debts:

> "[U]nlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.[75]

Second, the collection of an unlawful debt, when coupled with the threat of harm, constitutes an extortionate credit transaction (loan sharking), a separate criminal offense.[76] This criminal offense falls within the definition of racketeering activity[77] and thus as a predicate offense may trigger RICO liability *when* part of a "pattern of racketeering activity."[78]

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[71] *H.J., Inc.*, 492 U.S. at 242; Cisneros, 972 F.3d at 1216; United States v. Cadden, 965 F.3d 1, 16 (1st Cir. 2020) ("There are at least two types of racketeering enterprises that, by their nature, extend into the future and therefore demonstrate open-ended continuity: those that 'involve a distinct threat of long-term racketeering activity, either implicit or explicit' and those where 'the predicate acts or offenses are part of an ongoing entity's regular way of doing business.'" (quoting *H.J., Inc*., 492 U.S. at 242)); Menzies v. Seyfarth Shaw LLP, 943 F.3d 328, 337 (7th Cir. 2019); Reich v. Lopez, 858 F.3d 55, 60 (2d Cir. 2017); Heinrich v. Waiting Angels Adoption Services, Inc., 668 F.3d 393, 411 n.2 (6th Cir. 2012); Abraham v. Singh, 480 F.3d 351, 355(5th Cir. 2007); GE Investment Private Placement Partners II v. Parker, 247 F.3d 543, 549 (4th Cir. 2001).

[72] Spool v. World Child International Adoption Agency, 520 F.3d at 185; *cf.*, United States v. Burden, 600 F.3d 204, 219 (2d Cr. 2010).

[73] *E.g*., 18 U.S.C. § 1962(a) ("It shall be unlawful for any person who has received any income derived . . . *from a pattern of racketeering activity or through collection of an unlawful debt* . . . to use . . . any part of such income . . . in acquisition of any enterprise. . . ."); subsections 1962(b) and (c) are similarly worded.

[74] United States v. Grote, 961 F.3d 105, 119 (2d Cir. 2020); Goldenstein v. Repossessors Inc., 815 F.3d 142, 147-48 n.5 (3d Cir. 2016); United States v. Oreto, 37 F.3d 739, 751 (1st Cir. 1994); United States v. Aucoin, 964 F.2d 1492, 1495-497 (5th Cir. 1992) (quoting dicta in H.J., Inc., 492 U.S. at 232 (1989)); Dillon v. BMO Harris Bank, N.A., 16 F. Supp. 3d 605, 618 (M.D.N.C. 2014); *but see*, Wright v. Shepard, 919 F.2d 665, 673 (11th Cir. 1990).

Oreto also rejected the argument to the effect that the equal protection clause precludes requiring proof of only a single loansharking violation while demanding proof of the patterned commission of at least two violations for every other predicate offense, 37 F.3d at 751-52 ("Congress could rationally have decided that collections of unlawful debt were central to the evils at which RICO was directed. Accordingly, it could rationally have chosen to make guilt more easily provable in unlawful debt cases than in cases involving other forms of racketeering activity.").

[75] 18 U.S.C. 1961(6); *e.g*., United States v. Moseley, 980 F.3d 9, 17-26 (2d Cir. 2020); Home Orthopedics Corp. v. Rodriguez, 781 F.3d 521, 528 n.8 (1st Cir. 2015); United States v. Lyons, 740 F.3d 702, 730 (1st Cir. 2014); Community State Bank v. Strong, 651 F.3d 1241, 1259 (11th Cir. 2011) (usurious non-gambling debt).

[76] 18 U.S.C. §§ 891-896.

[77] *Id.* § 1961.

[78] *E.g*., United States v. Gjeli, 867 F.3d 418, 420 & n. 2 (3d Cir. 2017); Mitchell v. First Call Bail and Surety, Inc., 412

E. Enterprise in or Affecting Interstate or Foreign Commerce

1. Enterprise

The statute defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[79] The enterprise may be devoted to entirely legitimate ends or to totally corrupt objectives.[80] It may be governmental as well as nongovernmental.[81] As noted earlier, an entity may not serve as both the "person" and the "enterprise" whose activities are conducted through a pattern of racketeering activity for a prosecution under subsection 1962(c).[82] No such distinction is required, however, for a prosecution under either subsection 1962(a) (investing the racketeering activity proceeds in an enterprise) or subsection 1962(b) (acquiring or maintaining an enterprise through racketeering activity) violations.[83] Even under subsection 1962(c), a corporate entity and its sole shareholder are sufficiently distinct to satisfy the "enterprise" and "person" elements of a subsection (c) violation.[84]

As for "associated in fact" enterprises, the Supreme Court in *Boyle* rejected the suggestion that such enterprises must be "business-like" creatures, having discernible hierarchical structures, unique modus operandi, chains of command, internal rules and regulations, regular meetings regarding enterprise activities, or even a separate enterprise name or title.[85] The statute demands only "that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[86]

F. Supp. 3d 1208, 1226 (D. Mont. 2019).

[79] 18 U.S.C. § 1961(4); Cisneros v. Petland, Inc., 972 F.3d 1204, 1211 (11th Cir. 2020).

[80] United States v. Turkette, 452 U.S. 575, 580-93 (1981); United States v. Palacios, 677 F.3d 234, 248 (4th Cir. 2012); United States v. Cianci, 378 F.3d 71, 83 (1st Cir. 2004).

[81] United States v. Warner, 498 F.3d 666, 694 (7th Cir. 2007) (state); *Cianci*, 378 F.3d at 83 (mayor's office); DeFalco v. Bernas, 244 F.3d 286, 307-8 (2d Cir. 2001) (town); United States v. Massey, 89 F.3d 1433, 1440 (11th Cir. 1995) (state court); Pelfresne v. Village of Rosemont, 22 F. Supp. 2d 756, 761-62 (N.D. Ill. 1998) (mayor's office); *cf*. Salinas v. United States, 522 U.S. 52 (1997) (sheriff's office).

[82] Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001); Bible v. United Student Aid Funds, Inc., 799 F.3d 633, 655 (7th Cir. 2015); Abraham v. Singh, 480 F.3d 351, 357 (5th Cir. 2007); Living Designs, Inc. v. E.I. Dupont de Nemours and Co., 431 F.3d 353, 361 (9th Cir. 2005); Branon v. Boatmen's First National Bank, 153 F.3d 1144, 1146 (10th Cir. 1998); United States v. London, 66 F.3d 1227, 1244 (1st Cir. 1995).

[83] Gentry v. Resolution Trust Corp., 937 F.2d 899, 907 (3d Cir. 1991); Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995); *In re* Managed Care Litigation, 150 F. Supp. 2d 1330, 1351 (S.D. Fla. 2001); *cf*., Churchill Village v. General Electric, 361 F.3d 566, 574-75 (9th Cir. 2004).

[84] *Cedric Kushner Promotions, Ltd*., 533 U.S. at 161; *Living Designs, Inc*., 431 F.3d at 361; First Capital Asset Management v. Satinwood, Inc., 385 F.3d 159, 173 (2d Cir. 2004).

[85] Boyle v. United States, 556 U.S. 938, 948 (2009); *see also* United States v. McClaren, 998 F.3d 203, 217 (5th Cir. 2021); United States v. Brown, 973 F.3d 667, 682 (7th Cir. 2020).

[86] *Boyle*, 556 U.S. at 946; *see also McClaren*, 998 F.3d at 217; United States v. Cruz-Ramos, 987 F.3d 27, 36 (1st Cir. 2020); United States v. Williams, 974 F.3d 320, 368-69 (3d Cir. 2020); *Brown*, 973 F.3d at 682; Cisneros v. Petland, 972 F.3d 1204, 1211 (11th Cir. 2020); United States v. Mathis, 932 F.3d 242, 259 (4th Cir. 2019); *Plambeck*, 802 F3d. 665, 673 (5th Cir. 2015); Ouwinga v. Benistar 419 Plan Services, Inc., 694 F.3d 783, 794 (6th Cir. 2012); Crest Construction II v. Doe, 660 F.3d 346, 354 (8th Cir. 2011).

"Although the evidence establishing an enterprise and a pattern of racketeering activity 'may in particular cases coalesce,' the two elements themselves remain 'at all times' distinct.[87]

2. In or Affecting Interstate or Foreign Commerce

To satisfy RICO's jurisdictional element, the corrupt or corrupted enterprise must either engage in interstate or foreign commerce or engage in activities that affect interstate or foreign commerce.[88] An enterprise that orders supplies and transports its employees and products in interstate commerce is "engaged in interstate commerce" for purposes of RICO,[89] as is an enterprise that uses telephones, the mail, or internet communications.[90] Generally, the impact of the enterprise on interstate or foreign commerce need only be minimal to satisfy RICO requirements.[91] Where the predicate offenses associated with an enterprise have an effect on interstate commerce, the enterprise is likely to have an effect on interstate commerce.[92] However, "where the enterprise itself [does] not engage in economic activity, a minimal effect on commerce" may not be enough.[93]

III. RICO Abroad

Generally, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. … When a statute gives no clear indication of an extraterritorial application, it has none."[94] The Supreme Court in *RJR Nabisco, Inc.* provided guidance on the application of this general presumption to RICO. The Court held that RICO's criminal prohibitions apply abroad when they are grounded on a predicate offense that has

[87] *Williams*, 974 F.3d at 369 (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)).

[88] 18 U.S.C. § 1962(a), (b), (c).

[89] United States v. Robertson, 514 U.S. 669, 671-72 (1995); *see also* United States v. Velasquez, 881 F.3d 314, 329 (5th Cir. 2018); United States v. Keltner, 147 F.3d 662, 669 (8th Cir. 1998) (multistate travel by the participants in furtherance of the enterprise's activities with RICO predicates committed in more than one state).

[90] *Velasquez*, 881 F.3d at 329 ("Use of instrumentalities of interstate commerce such as telephones, the U.S. Postal Service, and pagers to communicate in furtherance of the enterprise's criminal purposes can also constitute the enterprise affecting interstate commerce.").

[91] *McClaren*, 998 F.3d at 217; United States v. Millán-Machuca, 991 F.3d 7, 18 (1st Cir. 2021) ("The enterprise must be one affecting interstate or foreign commerce, but it need only have a de minimis effect on interstate or foreign commerce to demonstrate the required nexus"); United States v. Zelaya, 908 F.3d 920, 926 (4th Cir. 2018) ("MS-13 is an enterprise with at least a de minimis effect on interstate commerce."); United States v. Garcia, 793 F.3d 1194, 1210 (10th Cir. 2015) ("Most other circuits, however, have held that RICO requires only a minimal effect on interstate commerce."); United States v. Flores, 572 F.3d 1254, 1267 (11th Cir. 2009); United States v. Gardiner, 463 F.3d 445, 458 (6th Cir. 2006); United States v. Johnson, 440 F.3d 832, 841 (7th Cir. 2006); United States v. Rodriguez, 360 F.3d 949, 955 (9th Cir. 2004); United States v. Miller, 116 F.3d 641, 673-74 (2d Cir. 1997).

[92] United States v. White, 116 F.3d 903, 925-26 (D.C. Cir. 1997); United States v. Miller, 116 F.3d 641, 673-74 (2d Cir. 1997).

[93] Waucaush v. United States, 380 F.3d 251, 256 (6th Cir. 2004).

[94] RJR Nabisco, Inc. v. Eur. Cmty, 136 S Ct. 2090, 2100 (2016) (quoting Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255 (2010)).

extraterritorial application,[95] but that RICO's civil liability provision applies only to injuries suffered domestically.[96]

IV. Consequences

The commission of a RICO violation exposes offenders to a wide range of criminal and civil consequences: imprisonment, fines, restitution, forfeiture, treble damages, attorneys' fees, and a wide range of equitable restrictions.

A. Criminal Liability

RICO violations are punishable by fine *or* by imprisonment for life in cases where the predicate offense carries a life sentence, *or* by imprisonment for not more than 20 years in all other cases.[97] Although an offender may be sentenced to *either* a fine *or* a term of imprisonment under the strict terms of the statute, the operation of the applicable sentencing guidelines makes it highly likely that offenders will face *both* fine *and* imprisonment.[98] The maximum amount of the fine for a

[95] *Id*. at 2012 ("Congress's incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that §1962 applies to foreign racketeering activity – but only to the extent that the predicates allege in a particular case themselves apply extraterritorially."); *see also* United States v. Perez, 962 F.3d 420, 440 (9th Cir. 2020) (overturning a RICO conspiracy conviction because of an erroneous jury instruction stating that RICO applied extraterritorially and failing to note the requirement that the underlying predicate offense must apply abroad).

The Supreme Court's endorsement was not without reservation, *RJR Nabisco*, 136 S. Ct. at 2103, 2105-106 ("[W]e assume without deciding that respondents have pleaded a *domestic* investment of racketeering income in violation of § 1962(a) … and assume without deciding that § 1962(d)'s extraterritoriality tracks that of the [predicate] provision underlying the alleged conspiracy. … [We] assume without deciding that the alleged pattern of racketeering activity consists entirely of predicate offenses that were either committed in the United States or committed in a foreign country in violation of a predicate statute that applies extraterritorially. … On these premises respondents' allegations that RJR violated §§ 1962(b) and (c) do not involve an impermissible extraterritorial application of RICO." (emphasis added)).

[96] *Id*. at 2106 ("Irrespective of any extraterritorial application of § 1962, we conclude that § 1964(c) does not overcome the presumption against extraterritoriality. A private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property."); *see also* Bascuñán v. Elsaca, 927 F.3d 108, 117 (2d Cir. 2019) ("Whether an injury is domestic will, as a general matter, depend on the particular facts alleged in each case. Absent extraordinary circumstances, when a foreign plaintiff maintains tangible property in the United States, the misappropriation of that property constitutes a domestic injury." (internal quotation marks and citations omitted)); Humphrey v. GlaxoSmithKline PLC, 905 F.3d 694, 706-707 (3d Cir. 2018) ("[T]he analysis of whether a plaintiff has alleged a domestic injury must focus principally on where the plaintiff has suffered the alleged injury. … Whether an alleged injury to an intangible interest was suffered domestically is a particular fact-sensitive question requiring consideration of multiple factors. These include, but are not limited to, where the injury itself arose, the location of the plaintiffs residence or principal place of business; where the alleged services were provided; where the plaintiff received or expected to receive the benefits associated with providing such services; where any relevant business agreements were entered into and the laws binding such agreements; and the location of the activities giving rise to the underlying dispute.").

[97] 18 U.S.C. § 1963(a).

[98] U.S.S.G. § 2E1.1. Federal courts were at one time required to sentence an offender within the range provided by the United States Sentencing Guidelines, unless the court found that the case involved factors not sufficiently considered in the Guidelines, 18 U.S.C. § 3553(b)(2000 ed.). The once-mandatory Guidelines are now advisory, but continue to carry considerable weight, United States v. Booker, 543 U.S. 220, 264 (2005) ("The district courts, while not bound by the Guidelines, must consult those Guidelines and take them into account when sentencing"); Gall v. United States, 552 U.S. 38, 50-53 (2007) (holding that district courts must begin the sentencing process by calculating the sentencing range recommended by the Guidelines and justify a deviation from the recommended range); United States v. Christensen, 801 F.3d 970, 1019-20 (9th Cir. 2015) ("A sentence may be set aside if substantively unreasonable or if procedurally erroneous in a way that is not harmless. Procedural error includes failing to calculate or calculating incorrectly the proper Guidelines range, failing to consider the factors outlined in 18 U.S.C. § 3553(a), choosing a

RICO violation is the greater of twice the amount of the gain or loss associated with the crime, or $250,000 for an individual, $500,000 for an organization.[99] Offenders sentenced to prison are also sentenced to a term of supervised release of not more than three years to be served following their release from incarceration.[100] Most RICO violations also trigger mandatory federal restitution provisions, that is, one of the RICO predicate offenses will be a crime of violence, drug trafficking, or a crime with respect to which a victim suffers physical injury or pecuniary loss.[101] Finally, property related to a RICO violation is subject to confiscation.[102]

Even without a completed RICO violation, committing any crime designated a RICO predicate offense opens the door to additional criminal liability. It is a 20-year felony to launder the proceeds from any predicate offense (including any RICO predicate offense) or to use them to finance further criminal activity.[103] The proceeds of any RICO predicate offense are subject to civil forfeiture (confiscation without the necessity of a criminal conviction) by virtue of the RICO predicate's status as a money laundering predicate.[104]

B. Civil Liability

RICO violations may result in civil as well as criminal liability. "Any person injured in his business or property by reason" of a RICO violation has a cause of action for treble damages and

sentence based on clearly erroneous facts, or failing to explain the sentence selected").

[99] 18 U.S.C. §§ 1963(a), 3571.

[100] 18 U.S.C. § 3583(a) ("The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor may include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment ... "); § 3559(a)(3). Although the language of the statute is discretionary, the Sentencing Guidelines require a term of supervised release in cases in which the term of imprisonment imposed is more than a year, U.S.S.G. § 5D1.1(a).

[101] 18 U.S.C. § 3663A. Restitution in other cases is discretionary, 18 U.S.C. § 3663.

[102] 18 U.S.C. § 1963(a) ("Whoever violates any provision of section 1962 . . . shall forfeit to the United States, irrespective of any provision of State law – (1) any interest the person has acquired or maintained in violation of section 1962; (2) any – (A) interest in; (B) security of; (C) claim against; or (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962. . . .").

[103] 18 U.S.C. § 1956 ("(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity - (A)(i) with the intent to promote the carrying on of specified unlawful activity; or . . . (B) knowing that the transaction is designed in whole or in part - (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . . shall be sentenced to a fine . . . or imprisonment for not more than twenty years, or both. . . . (c) As used in this section . . . (7) the term 'specified unlawful activity' means - (A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31 [relating to financial transaction reporting requirements]. . . .").

[104] 18 U.S.C. § 981("(a)(1) The following property is subject to forfeiture to the United States . . . (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting 'specified unlawful activity (as defined in section 1956(c)(7) of this title). . . ."). For a general overview of federal forfeiture law, *see* CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

attorneys' fees.[105] No prior criminal conviction is required, except in the case of certain security fraud based causes of action.[106]

Liability begins with a RICO violation under subsections 1962(a), (b), (c), or (d). If the underlying violation involves subsection 1962(a) (use of predicate-offense-tainted proceeds to acquire an interest in an enterprise), it is the use or investment of the income rather than the predicate offenses that must have caused the injury.[107]

If the underlying violation involves subsection 1962(b) (use of predicate offenses to acquire an enterprise), it is the access or control of the RICO enterprise rather than the predicate offenses that must have caused the injury.[108]

If the underlying violation involves subsection 1962(c) (use of the patterned commission of predicate offenses to conduct the activities of an enterprise), it is the use of the patterned commission of the predicate offenses to operate the enterprises' activities that must have caused the injury.[109]

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[105] 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.").

[106] Sedima S.P.R.L. v. Imrex Co, Inc., 473 U.S. 479, 493 (1985); Smith v. Husband, 376 F. Supp. 2d 603, 613 (E.D. Va. 2005).

[107] N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare, 781 F.3d 182, 202 (5th Cir. 2015) ("To state a claim under § 1962(a), North Cypress had to plead: (1) the existence of an enterprise, (2) the defendant's derivation of income from a pattern of racketeering activity, and (3) the use of any part of that income in acquiring an interest in or operating the enterprise. Additionally, North Cypress had to show a nexus between the claimed violations and the injury. The injury must flow from the use or investment of racketeering income. Alleging an injury solely from the predicate racketeering acts themselves is not sufficient . . . ." (internal quotation marks omitted)); Eur. Cmty v. RJR Nabisco, Inc., 764 F.3d 129, 138 n.5 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090, 2111 (2016); Rao v. BP Products North America, Inc., 589 F.3d 389, 398 (7th Cir. 2009); Myers v. Provident Life and Accident Ins. Co., 472 F. Supp. 3d 1149, 1174 (M.D. Fla. 2020) ("[T]he majority of courts that have addressed the issue have determined that a claimant under § 1962(a) must plead an injury that stems not from the racketeering predicate acts themselves but from the use or investment of racketeering income." (internal quotation marks omitted)); *In re* National Prescription Opiate Litigation, 452 F. Supp. 3d 745, 772 (N.D. Ohio 2020); *In re* Honey Transshipping Litigation, 87 F. Supp. 3d 855, 865-66 (N.D. Ill. 2015); Macauley v. Estate of Nicholas, 7 F. Supp. 3d 468, 484-85 (E.D. Pa. 2014).

[108] D'Addario v. D'Addario, 901 F.3d 80, 97 (2d Cir. 2018) ("Our Circuit, like many others, requires a plaintiff who brings a civil RICO claim for a 1962(b) violation to demonstrate an injury arising from the defendants' acquisition of an interest in, or maintenance of control over, an alleged enterprise."); *N. Cypress*, 781 F.3d at 202 ("To state a claim under § 1962(b), North Cyrus had to show that its injuries were proximately caused by a RICO person gaining an interest in, or control of, the enterprise through a pattern of racketeering activity -- a nexus requirement. The district court found that North Cyprus did not successfully plead a nexus between its injuries and Cigna's acquisition or maintenance of an interest in the enterprise. . . . The district court was correct in dismissing the claim."); Puerto Rico Medical Emergency Grp., Inc. v. Iglesia Episcopal Puertorriqueña, Inc., 118 F. Supp. 3d 447, 459 (D.P.R. 2015) ("[T]o state a section 1962(b) claim, a plaintiff must allege that it was injured 'by reason of [the defendant's] acquisition or maintenance of control of an enterprise through a pattern of racketeering activity.' . . . It is not enough for a plaintiff to allege an injury caused by defendant's predicate acts of racketeering." (quoting Compagnie De Reassurnce D'll de France v. N.E. Reinsurance Corp., 57 F.3d 56, 92 (1st Cir. 1995))).

[109] Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 647 (2008) ("RICO provides a private right of action for treble damages to any person injured in his business or property by reason of the conduct of a qualifying enterprise's affairs through a pattern of [predicate] acts ... "); *see also* Cisneros v. Petland, Inc., 972 F.3d 1204, 1211 (11th Cir. 2020) ("A private plaintiff suing under the civil provisions of RICO must plausibly allege six elements: that the defendants: (1) operated or managed (2) an enterprise (3) through a pattern (4) of racketeering activity that included at

If the underlying violation involves subsection 1962(d) (conspiracy to violate subsections 1962(a), (b), or (c)), the injury must flow from the conspiracy. Although a criminal conspiracy prosecution under subsection 1962(d) requires no overt act, RICO plaintiffs whose claim is based on a conspiracy under subsection 1962(d) must prove an overt act that is a predicate offense or one of the substantive RICO offenses, since a mere agreement cannot be the direct or proximate cause of an injury.[110]

To recover, a plaintiff must establish an injury to his or her business or property directly and proximately caused by the defendant's RICO violation.[111] The presence of an intervening victim or cause of the harm is fatal.[112] A couple of lower federal appellate courts "have identified in [*Holmes*, *Anza*, and *Hemi*] three functional factors" that may foretell the absence of proximate cause under RICO. "These are (1) 'concerns about proof' because the less direct an injury is the more difficult it becomes to ascertain the amount of the plaintiff's damages attributable to the violation, as distinct from other independent factors; (2) concerns about admissibility and the avoidance of multiple recoveries; and (3) a societal interest in deterring illegal conduct and whether that interest would be served in a particular case."[113] Thus, "a link between the RICO

least two predicate acts of racketeering, which (5) caused (6) injury to the business or property of the plaintiff."); Abcarian v. Levine, 972 F.3d 1019, 1028 (9th Cir. 2020); Sergeants Benevolent Ass'n Health and Welfare v. Sanofi-Aventis U.S., 806 F3d 71, 86 (2d Cir. 2015); CGC Holding Co., LLC v. Broad and Cassel, 773 F.3d 1076, 1088 (10th Cir. 2014).

[110] Davis-Lynch, Inc. v. Moreno, 667 F.3d 539, 552 (5th Cir. 2012) ("Injury caused by acts that are not racketeering activities or otherwise wrongful under RICO will not establish a viable civil RICO claim"); Morganroth & Morganroth v. Norris, McLaughlin & Marcus, 331 F.3d 406, 415 (3d Cir. 2003); Bowman v. Western Auto Supply Co., 985 F.2d 383, 387-88 (8th Cir. 1993); *cf.*, Beck v. Prupis, 529 U.S. 494, 507 (2000); Domanus v. Locke Lord, LLP, 847 F.3d 469, 479 (7th Cir. 2017).

[111] 18 U.S.C. § 1964(c); Molina-Aranda v. Black Magic Enterprises, L.L.C., 983 F.3d 779, 784 (5th Cir. 2020) (citing Holmes v. Secs. Inv. Prot. Corp., 503 U.S. 258, 28 (1992); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006); and Hemi Grp, LLC v. City of New York, 559 U.S. 1, 110, 12 (2010)) ("A RICO plaintiff must also plausibly allege that the RICO violation proximately caused the plaintiff's injuries. The proximate causation standard in this context is not one of foreseeability; instead, the plaintiff must demonstrate that the alleged violation led directly to the injuries. If some other conduct directly caused the harm, the plaintiff cannot sustain a RICO claim."); CGC Holding Co., LLC v. Hutchens, 974 F.3d 1201, 1213 (10th Cir. 2020) ("RICO requires that a plaintiff prove both but-for and proximate cause.").

[112] Hemi Grp v. City of New York, 559 U.S. 1, 11 (2010) (the City, claiming that Hemi sold untaxed cigarettes to City residents but fraudulently failed to report the sale to state authorities who then would have passed the information on to City tax authorities, did not suffer a direct RICO injury: "the disconnect between the asserted injury and the alleged fraud in this case is even sharper than in *Anza*. There, we viewed the point as important because the same party – National Steel – had both engaged in the harmful conduct and committed the fraudulent act. We nevertheless found the distinction between the relevant acts sufficient to defeat Ideal's RICO claim. Here, the City's theory of liability rests not just on separate *actions*, but separate actions carried out by separate *parties*") (emphasis of the Court); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 460-61 (2006) (competitors, claiming that Anza could lower prices because he failed to collect sales tax from cash customers and then used mail and wire fraud to cover his tax evasion, did not suffer a direct or proximate RICO injury); Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 265-68 (1992) (the Corporation, that reimbursed the customers of defaulting brokers following the defendant's alleged stock manipulation, did not suffer a direct or proximate RICO injury); *Molina-Aranda*, 983 F.3d at 784; *see generally* CRS Report RS22470, *Civil RICO and Standing: Anza v. Ideal Steel Supply Corporation* (available to congressional clients upon request).

[113] Sterling Suffolk Racecourse, LLC v. Wynn Resorts, Ltd., 990 F.3d 31, 35-36 (1st Cir. 2021) ("This court has identified in [*Holmes*, *Anza*, and *Hemi*] three functional factors with which to assess whether proximate cause exist under RICO. These are (1) 'concerns about proof' because the less direct an injury is the more difficult it becomes to ascertain the amount of the plaintiff's damages attributable to the violation, as distinct from other independent factors; (2) concerns about admissibility and the avoidance of multiple recoveries; and (3) a societal interest in deterring illegal conduct and whether that interest would be served in a particular case." (quoting *Hemi*, 559 U.S. at 9 and *Holmes*, 503 U.S. at 271)); St. Luke's Health Network, Inc. v. Lancaster Gen. Hosp., 967 F.3d 295, 300-301 (3d Cir. 2020) ("The Supreme Court has also articulated three judicially practicable reasons for requiring directness of injury. First, 'the

predicate acts and plaintiff's injuries that is 'too remote,' 'purely continent,' or 'indirect' is insufficient to show proximate cause."[114] The courts agree generally that personal injuries may not form the basis for recovery, since they are not injuries to "business or property."[115]

"Fraud in the sale of securities" is a RICO predicate offense.[116] However, the Private Securities Litigation Reform Act amended the civil RICO cause of action to bar suits based on allegations of fraud in the purchase or sale of securities.[117] In other private civil RICO cases, Rule 9(b) of the Federal Rules of Civil Procedure demands that plaintiffs plead allegations of fraud with particularity.[118]

Although the United States is apparently not a "person" that may sue for treble damages under RICO,[119] the term does include state and local governmental entities.[120] On the other hand, private parties have enjoyed scant success when they have sought to bring a RICO suit for damages against the United States or other governmental entities.[121] Nor in most instances have the courts

indirect injuries make it difficult to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors.' Second, and relatedly, indirect injuries risk double recovery so the 'courts would have to adopt complicated rules apportioning damages to guard against this risk.' Third, directly injured victims can be counted on and are best positioned to 'vindicate the law as private attorneys general,' so there is no need to extend civil RICO's private right to those whose injuries are more remote.'" (quoting *Holmes*, 503 U.S. at 269-70)).

[114] *Sterling Suffolk Racecourse, LLC*, 990 F.3d at 35 (quoting *Hemi*, 559 U.S. at 9); St. Luke's Health Network, Inc., 967 F.3d at 301 ("To demonstrate 'some direct relation between the injury asserted and the injurious conduct alleged,' the manipulation alleged must not be 'purely contingent' o another event or action. . . . [T]he cause of an injury that is 'entirely distinct from the alleged RICO violation 'may be too attenuated to meet the proximate cause requirement. Relatedly, a more direct victim of the purported violation or independent intervening factors may also break the chain of causation." (quoting *Holmes*, 503 U.S. at 271 and *Anza*, 547 U.S. at 458)).

[115] RJR Nabisco. Inc. v. Eur. Cmty, 136 S. Ct. 2090, 2108 (2016); Bascuñán v. Elsaca, 874 F.3d 806, 817 (2d Cir. 2017); Sabrina Roppo v. Travelers Commercial Ins. Co., 869 F.3d 568, 590 (7th Cir. 2017); Safe Streets Alliance v. Hickenlooper, 859 F.3d 865, 888-89 (10th Cir. 2017); Blevins v. Aksut, 849 F.3d 1016, 1021 (11th Cir. 2017).

[116] 18 U.S.C. § 1961(1)(D).

[117] 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, *except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final*" (emphasis added)).

[118] Muskegan Hotels, LLC v, Patel, 986 F.3d 692, 698 (7th Cir. 2021) ("Where, as here, the alleged predicate acts of racketeering involve fraud, the complaint must describe the 'who, what, where, and how' of the fraudulent activity to meet the heightened pleading standard demanded by Rule (b)); Molina-Aranda v. Black Magic Enterprises, L.L.C., 983 F.3d 779, 784 (5th Cir. 2020); *Cisneros*, 972 F.3d at 1215 ("Like any allegation of fraud, Cisneros's alleged [mail and wire fraud] predicate acts must satisfy the heightened pleading standards embodied in Federal Rule of Civil Procedure 9(b), which requires the plaintiff to 'state with particularity the circumstances constituting fraud.'").

[119] United States v. Bonanno Organized Crime Family, 879 F.2d 20, 21-7 (2d Cir. 1989); Peia v. United States, 152 F. Supp. 2d 226, 234 (D. Conn. 2001).

[120] City of New York v. Smokes-Spirits.Com, Inc., 541 F.3d 425, 444-45 (2d Cir. 2008), *rev'd on other grounds sub nom.*, Hemi Group v. City of New York, 559 U.S. 1, 11 (2010); County of Oakland v. City of Detroit, 866 F.2d 839, 851 (6th Cir. 1989); Illinois Department of Revenue v. Phillips, 771 F.2d 312, 316-17 (7th Cir. 1985). Some courts, however, believe that a governmental entity may only sue under RICO for injuries related to a commercial transactions, Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 976 (9th Cir. 2008); Township of Marlboro v. Scannapuieco, 545 F. Supp. 2d 452, 458 (D.N.J. 2008) (citing dicta subsequently repudiated in *Smokes-Spirits.Com, Inc.*).

[121] Ivanenko v. Yanukovich, 995 F.3d 232, 234-35 (D.C. Cir. 2021) (foreign government); Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996) (municipality); McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993) (Federal Deposit Insurance Corp.); Genty v. Resolution Trust Corp., 937 F.2d 899, 908-14 (3d Cir. 1991) (municipality); Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991) (Federal Insurance Administration); Smith v. Babbitt, 875 F. Supp. 1353,

been receptive to RICO claims based solely on allegations that the defendant aided and abetted commission of the underlying RICO violation.[122]

Notwithstanding the inability of the United States to sue for treble damages under RICO, the Attorney General may seek to prevent and restrain RICO violations under the broad equitable powers vested in the courts to order disgorgement, divestiture, restitution, or the creation of receiverships or trusteeships.[123] The government has invoked this authority relatively infrequently, primarily to rid various unions of organized crime elements and other forms of

1365 (D. Minn. 1995), *aff'd*, 100 F.3d 556 (8th Cir. 1996) (Indian tribal government); McMaster v. State of Minnesota, 819 F. Supp. 1429, 1434 (D. Minn. 1993), *aff'd*, 30 F.3d 976 (8th Cir. 1994) (state); Keller v. Central Bank of Nigeria, 277 F.3d 811, 820 (6th Cir. 2002) (foreign governmental entity); Donahue v. Federal Bureau of Investigation, 204 F. Supp. 2d 169, 173-74 (D. Mass. 2002); Banks v. Dept. of Motor Vehicles, 419 F. Supp. 2d 1186, 1192 (C.D. Cal. 2006).

[122] Eliahu v. Jewish Agency for Israel, 919 F.3d 709, 714 (2d Cir. 2019) ("There is no private cause of action . . . for aiding and abetting a civil RICO violation."); *see also* Pennsylvania Association of Edwards Heirs v. Rightenour, 235 F.3d 839, 843 (3d Cir. 2000); Cobbs v. Sheahan, 385 F. Supp. 2d 731, 738 (N.D. Ill. 2005) ("Many courts have applied the logic of Central Bank [v. First Interstate Bank, 511 U.S. 164 (1994)] to RICO and concluded that §1962(c) does not provide for [civil] aiding and abetting liability."); *In re* Chrysler-Dodge-Jeep Ecodiesel Marketing Sales Practices and Product Liability Litigation, 295 F. Supp. 3d 927, 984 (N.D. Cal. 2018) ("Plaintiffs also seek to hold the Bosch defendant liable for violating RICO under an aiding and abetting theory. Such a theory of liability is not available under RICO."); *In re* Trilegiant Corp. Inc., 11 F. Supp. 3d 132, 139 (D. Conn. 2014); *In re* Countrywide Financial Corp. Mortgage Marketing and Sales Practice, 601 F. Supp. 2d 1201, 1219 (S.D. Cal. 2009); *In re* MasterCard International Inc., Internet Gambling Litigation, 132 F.Supp.2d 468, 493-95 (E.D.La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002); *contra*, *In re* Managed Care Litigation, 298 F.Supp.2d at 1272; First American Corp. v. Al-Nahyan, 17 F.Supp.2d 10, 23-4 (D.D.C. 1998)(preliminarily finding *Central Bank* distinguishable, but finding it unnecessary to resolve the issue in light of the prospect of the defendants' RICO liability on other grounds); American Automotive Accessories, Inc. v. Fishman, 991 F. Supp. 987, 993 (N.D. Ill. 1998) (noting that the Seventh Circuit has yet to "comment on the possibility of aiding and abetting liability in civil RICO actions").

[123] 18 U.S.C. § 1964 ("(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons. (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper."); *e.g.*, United States v. Local 560, 780 F.2d 267, 295-96 (3d Cir. 1985) (equitable remedies available under RICO include court authority to remove union officials and place the union in trusteeship); United States v. Sasso, 215 F.3d 283, 292 (2d Cir. 2000) (RICO grants the court authority to order a defendant to contribute to cost of monitoring a previously corrupted union).

The courts have treated RICO requests to order disgorgement cautiously. United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995) ("Ordinarily, the disgorgement of gains ill-gotten long in the past will not serve the goal of 'preventing and restraining future violations' unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose."); Richard v. Hoechst Celanese Chemical Grp., Inc., 355 F.3d 345, 354-55(5th Cir. 2003) (emphasis of the court) (quoting *Carson*, 52 F.3d at 1182) (internal citations omitted) ("This Court has not decided whether equitable relief is available to a private civil RICO plaintiff. . . . The circumstances before us do not necessitate that we reach this question today. . . . The Second Circuit interpreted § 1964(a) to mean that equitable remedies are only proper to 'prevent and restrain *future* conduct rather than to punish *past* conduct.'. . . With respect to the disgorgement remedy sought, the Second Circuit noted that disgorgement is generally available under §1964. However, when disgorgement is sought for the purpose of compensating a party for past injuries, the court held that the plain language of § 1964 bars relief. We agree with the Second Circuit's reasoning in *Carson*."). One circuit has concluded that disgorgement is not a remedy available under RICO under any circumstances, United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1199 (D.C. Cir. 2005) (The order of disgorgement is not within the terms of that statutory grant (i.e., § 19634(a)], nor any necessary implication of the language of the [IROCO] statute."); *see,* Christopher L. McCall. Comment. *Equity Up in Smoke: Civil RICO, Disgorgement, and United States v. Philip Morris*, 74 FORDHAM L. REV. 2461 (2006).

corruption.[124] There is some question whether private plaintiffs, in addition to the Attorney General, may seek injunctive and other forms of equitable relief for RICO violations.[125]

On the procedural side, RICO's long-arm jurisdictional provisions authorize nationwide service of process.[126] In addition, the Supreme Court has held that: (1) state trial courts of general jurisdiction have concurrent jurisdiction over federal civil RICO claims;[127] (2) under the appropriate circumstances, parties may agree to make potential civil RICO claims subject to arbitration;[128] (3) in the absence of an impediment to state regulation, the McCarran-Ferguson Act

[124] *E.g.*, *Sasso*, 215 F.3d 283 (2d Cir. 2000); United States v. Private Sanitation Industry Association, 995 F.2d 375 (2d Cir. 1993); United States v. Local 560, 974 F.2d 315 (3d Cir. 1992); United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers (IBT), 931 F.2d 177 (2d Cir. 1991); United States v. Local 30, 871 F.2d 401 (3d Cir. 1989); United States v. Dougherty, 98 F. Supp. 3d 721 (E.D. Pa. 2015).

The *Teamsters* cases, perhaps the best known and most heavily litigated of these instances, arose by and large under a consent decree negotiated to settle the government's RICO suit, rather than issues as to the government's prerogatives under civil RICO, United States v. IBT, 172 F.3d 217, 219 (2d Cir. 1999); United States v. IBT, 170 F.3d 136, 140 (2d Cir. 1999); United States v. IBT, 168 F.3d 645, 647 (2d Cir. 1999); United States v. Boggia, 167 F.3d 113, 113 (2d Cir. 1999); United States v. IBT, 156 F.3d 354, 356 (2d Cir. 1998); United States v. IBT, 141 F.3d 405, 407 (2d Cir. 1998); United States v. IBT, 120 F.3d 341, 343 (2d Cir. 1997); United States v. IBT, 86 F.3d 271, 273 (2d Cir. 1996); United States v. IBT, 19 F.3d 816, 818-19 (2d Cir. 1994); United States v. IBT, 12 F.3d 360, 361 (2d Cir. 1993); United States v. IBT, 3 F.3d 634, 636 (2d Cir. 1993); United States v. IBT, 998 F.2d 1101, 1104 (2d Cir. 1993); United States v. IBT, 998 F.2d 120, 121 (2d Cir. 1993); United States v. IBT, 986 F.2d 15, 17 (2d Cir. 1993); United States v. IBT, 981 F.2d 1362, 1364 (2d Cir. 1992); United States v. IBT, 970 F.2d 1132, 1134 (2d Cir. 1996); United States v. IBT, 968 F.2d 1506, 1508 (2d Cir. 1992); United States v. IBT, 968 F.2d 1472, 1474 (2d Cir. 1992); United States v. IBT, 964 F.2d 180, 181 (2d Cir. 1992); United States v. IBT, 955 F.2d 171, 173 (2d Cir. 1992); United States v. IBT, 950 F.2d 94, 95 (2d Cir. 1991); United States v. IBT, 931 F.2d 177, 179 (2d Cir. 1991).

The United States also called upon the authority under Section 1964(a) in its RICO litigation against various tobacco companies, United States v. Philip Morris Inc., 396 F.3d 1190, 1191 (D.C. Cir. 2005).

[125] Chevron Corp. v. Donziger, 833 F.3d 74, 137 (2d Cir. 2016) (We conclude that a federal court is authorized to grant equitable relief to a private plaintiff who has proven injury to its business or property by reason of a defendant's violation of § 1962 largely for the reasons stated by the Seventh Circuit opinion in NOW 1." (citing National Organization for Women, Inc. v. Scheidler, 267 F.3d 687, 695-700 (7th Cir. 2001) (concluding that private RICO plaintiffs are entitle to equitable relief), *rev'd on other grounds*, 537 U.S. 393 (2003)); *In re* Managed Care Litigation, 298 F. Supp. 2d 1259, 1281-283 (S.D. Fla. 2003); *contra*, Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1088 (9th Cir. 1986) ("Taken together, the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO."); Dan River v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983) ("While we do not undertake to resolve the question, nevertheless, the probability of success is affected adversely by the very existence of the uncertainty."); Minter v. Wells Fargo Bank, 593 F. Supp. 2d 788, 794-95 (D. Md. 2009) ("Faced with such a split, this Court finds that the Ninth Circuit [in *Wollersheim*] provides a more well-reasoned and convincing argument.").

[126] 18 U.S.C. § 1965. Laurel Gardens, LLC v. McKenna, 948 F.3d 105, 116-17 (3d Cir. 2020) ("There is a circuit split regarding which specific subsection of the RICO provision governs the exercise of personal jurisdiction in this case. Plaintiffs recognize that two circuits (the Fourth and the Eleventh Circuits) have looked to § 1965(d) [service of process in any district in which the person resides, is found, has an agent, or does business]. . . . Five circuits (the Second, Seventh, Ninth, Tenth, and D.C. Circuits) have stated that subsection (b) [nation-wide service when the 'ends of justice require'] governs nation-wide service of process and personal jurisdiction over 'other parties.'. . . We agree with the majority approach." (citing Republic of Panama v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 942 (11th Cir. 1997))); ESAB Grp. v. IFX Markets, Ltd., 126 F.3d 617, 626 (4th Cir. 1997); FC Inv. Grp. v. IFX Markets, Ldt., 529 F.3d 1087, 1098-1100 (D.C. Cir. 2008); Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1229-233 (10th Cir. 2006); PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 71 (2d Cir. 1998); Lisak v. Merchantile Bancorp, Inc., 834 F.2d 668, 671-72 (7th Cir. 1987); Butchers' Union Local 498 v. SDC Inv., Inc., 788 F.2d 535, 538-39 (9th Cir. 1986)).

[127] Tafflin v. Lavitt, 493 U.S. 455, 458 (1990). An injured party may also have a cause of action under an applicable state RICO statute, citations for which are appended.

[128] Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 242 (1987); *cf.*, Pacificare Health Systems, Inc. v. Book, 538 U.S. 401, 406-407 (2003); *e.g.*, Miccosukee Tribe of Indians of Florida v. Cypress, 814 F.3d 1202, 1206-207 (11th Cir. 2015); Uthe Technology Corp. v. Aetrium, 808 F.3d 755, 756 (9th Cir. 2015).

does not bar civil RICO claims based on insurance fraud allegations;[129] and (4) the Clayton Act's four-year period of limitation applies to civil RICO claims as well,[130] and that the period begins when the victim discovers or should have discovered the injury.[131]

V. Violent Crimes in Aid of Racketeering (VICAR)

Violence in aid of racketeering (VICAR), under 18 US.C. §1959 is a series of RICO-related federal proscriptions that ban committing, attempting to commit, or conspiring to commit, any of several specific violent state or federal predicate offenses with an eye to a reward from a RICO enterprise.[132] "To support a VICAR conviction, the government must show: '(1) that the criminal organization exists; (2) that the organization is a racketeering enterprise; (3) that the defendants committed [or attempted or conspired to commit] a violent crime; and (4) that they acted for the purpose of promoting their position in [or gaining entrance to] the racketeering enterprise.'"[133]

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[129] Humana, Inc. v. Forsyth, 525 U.S. 299, 302-03 (1999) ("Under the McCarren-Ferguson Act, the federal legislation may be applied if it does not invalidate, impair, or supersede the State's regulation. The federal law at issue, RICO, does not proscribe conduct that the State's laws governing insurance permit. . . . When federal law is applied in aid or enhancement of state regulation, and does not frustrate any declared state policy or disturb the State's administrative regime, the McCarran-Ferguson Act does not bar the federal action"); Ludwick v. Harbinger Group, Inc., 854 F.3d 400, 403-07 (8th Cir. 2017); Riverview Health Inst. LLC v. Medical Mut. of Ohio, 601 F.3d 505, 513-19 (6th Cir. 2010); American Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc., 367 F.3d 212, 230-32 (4th Cir. 2004); Bancoklahoma Mortgage Corp. v. Capital Title Co., Inc., 194 F.3d 1089, 1198-1100 (10th Cir. 1999); Myers v. Provident Life and Accident Ins. Co., 472 F. Supp. 3d 1149, 1169-70 (M.D. Fla. 2020); Flores v. United Airlines, 426 F. Supp. 3d 520, 537-39 (N.D. Ill. 2019); Mitchell v. First Call Bail and Surety, Inc., 412 F. Supp. 3d 1208, 1221-22 (D. Mont. 2019); The William Powell Co. v. National Indemnity Co., 141 F. Supp. 3d 773, 781-82 (S.D Ohio 2015) ("Determining whether the McCarran-Ferguson Act reverse preempts a federal statute is a three-step process. First, the court must determine whether the federal statute at issue relates specifically to the business of insurance. If it does, then the McCarran-Ferguson Act does not apply and the federal statute will not be reverse preempted. Second, the court must determine whether the state law at issue was enacted for the purpose of regulating the business of insurance. If the state law was not enacted for the purpose of regulating the business of insurance, then reverse preemption does not apply. Third, the court must determine whether application of the statute would invalidate, supersede or impair the state statute. If application of the federal statute would not invalidate, supersede or impair the state statute, then reverse preemption does not apply. . . . NICO and Resolute point out that: 1) RICO does not specifically relate to the business of insurance; 2) Ohio has enacted a complex statutory and administrative scheme to regulate unfair insurance practices, including unfair claims handling; and 3) because Ohio does not provide a private cause of action to insureds for unfair insurance practices, a statute like RICO, which permits recovery of treble damages against the defendant in the event of a violation, would invalidate, impair or superseded Ohio's ability to regulate the business of insurance. . . . Consequently, Powell's RICO claim is reverse preempted by state law pursuant to the McCarran-Ferguson Act.").

[130] Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143, 156 (1987); Klehr v. A.O.Smith Corp., 521 U.S. 179, 183 (1997). The Court also held that a plaintiff must have exercised due diligence to discover the violation before statute of limitations will be tolled because of the defendant's fraudulent concealment, *id.* at 194, and that unlike the statute of limitations in criminal cases, a civil cause of action does not date from the "last predicate act" of the RICO violation, *id.* at 186-87; *see also* Álvarez-Maurás v. Banco Popular of Puerto Rico, 919 F.3 617, 625 (1st Cir. 2019); CVLR Performance Horses, Inc. v. Wynne, 792 F.3d 469, 476 (4th Cir. 2015); Evans v. Arizona Cardinals Football Club, LLC, 231 F. Supp. 3d 342, 346 (N.D. Cal. 2017); State Farm Mut. Auto. Ins. Co. v. Grafman, 655 F. Supp. 2d 212, 225 (E.D.N.Y. 2009). The statute of limitations for a RICO criminal prosecution is five years, 18 U.S.C. § 3282; United States v. Schiro, 679 F.3d 521, 528 (7th Cir. 2012).

[131] Rotella v. Wood, 528 U.S. 549, 552-53 (2000); *Álvarez-Maurás*, 919 F.3d at 625; *CVLR Performance Horses, Inc.*, 792 F.3d at 476; Mathews v. Kidder, Peabody & Co., Inc., 260 F.3d 239, 244-45 (3d Cir. 2001); *Evans*, 231 F. Supp. 3d at 346; *Grafman*, 655 F. Supp. 2d at 225.

[132] The text of 18 U.S.C. § 1959 is attached.

[133] United States v. Rodriguez, 971 F.3d 1005, 1009 (9th Cir. 2020) (parentheticals of the court) (quoting United States v. Bracy, 67 F.3d 1421, 1429 (9th Cir. 1995); *see also* United States v. Millán-Machuca, 991 F.3d 7, 19 (1st Cir. 2021); United States v, Portillo, 969 F.3d 144, 164 (5th Cir. 2020) ("In order to establish a violation of this statute, the government must prove: '(1) an enterprise engaged in racketeering; (2) the activities affected interstate commerce; (3) a

The list of predicate state and federal offenses consists of:

- Murder;
- Kidnapping;
- Maiming;
- Assault with a deadly weapon;
- Assault resulting in serious bodily injury;
- Threat to commit a crime of violence;
- Attempt or conspiracy to commit a predicate offense.[134]

The penalties for a VICAR violation turn upon the nature of the predicate offense:

- Murder—death or life imprisonment;
- Kidnapping—any term of years or life;
- Maiming—not more than 30 years' imprisonment;
- Assault with a deadly weapon—not more than 20 years' imprisonment;
- Assault resulting in serious bodily injury—not more than 20 years' imprisonment;
- Threat to commit a crime of violence—not more than 5 years' imprisonment;
- Attempt or conspiracy to commit a predicate offense (other than a threat)—not more than 10 years' imprisonment (murder or kidnapping); not more than 3 years' imprisonment (maiming or assault).[135]

Accomplices face the same sanctions.[136]

murder [or other predicate offense of violence]; and (4) the murder was committed for payment by the enterprise or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise.'" (parenthetical added) (quoting United States v. Owens, 724 F. App'x 289, 296 (5th Cir. 2018) ("cleaned up"))); United States v. Keene, 955 F.3d 391, 394 (4th Cir. 2020) ("Accordingly, to establish that a defendant violated the VICAR statute, the government must prove: (1) the existence of a RICO enterprise; (2) that the enterprise was engaged in racketeering activity; (3) that the defendant 'had a position in the enterprise;' (4) that the defendant committed one of the crimes specified in the VICAR statute. . . ; and (5) that the defendant's purpose was 'to maintain or increase his position in the enterprise.'" (quoting United States v. Zelaya, 908 F.3d 20, 926-27 (4th Cir. 2018))); United States v. Arrington, 941 F.3d 24, 37 (2d Cir. 2019) .

[134] 18 U.S.C. §1959(a).

[135] *Id.* § 1959(a)(1)-(6). Offenders are also subject to a fine of the greater of $250,000 ($500,000 for organizations) or twice the pecuniary loss or gain associated with the offense. *Id.* § 3571.

[136] 18 U.S.C. § 2; *see, e.g.*, United States v. Cruz-Ramos, 987 F.3d 27, 38 (1st Cir. 2020) ("Cruz-Ramos contests his VICAR conviction for aiding and abetting Pekeke's murder. . . . He is wrong,"); United States v. Portillo, 969 F.3d 144, 164-65 (5th Cir. 2020) ("Count Three charged Pike with aiding and abetting Anthony Benesh's murder in support of a racketeering enterprise, a crime under the [VICAR] Act. . . .There was sufficient evidence presented at trial for the jury to find Pike guilty of Count Three."); *cf.* United States v. Brown, 973 F.3d 667, 689-90 (7th Cir. 2020) ("Council, Bush, and Ford join Derrick in arguing that the evidence was insufficient to support the jury's special findings that their racketeering activity included the commission, *or aiding and abetting*, of Bluitt's and Neeley's murders. . . . The jury . . . could reasonably find that Derrick participated in the murders, without shooting, *on an accountability theory*. . . . Derrick took affirmative steps in furtherance of the murders by conducting surveillance before the murders and serving as backup." (emphasis added)). Mere association with murderers is not enough to establish accomplice liability. United States v. Delgado, 972 F.3d 63, 78-9 (2d Cir. 2020).

VICAR uses the RICO definition of "racketeering activity"[137] and the RICO description of "enterprise,"[138] but VICAR does not define murder or any of the other predicate offenses. The omission introduces uncertainty as to whether the predicate offenses should be defined by reference to federal law, the law of jurisdiction that provides the predicate offense, the common law, or some generic definition reflecting the consensus of U.S jurisdictions.[139]

VICAR "'requires that an animating purpose of the defendant's action was to maintain or increase his position' in the gang," a requirement that may be satisfied by a defendant's position of "shooter" in the gang,[140] by obligations imposed by virtue of membership in gang,[141]or by

[137] *Id.* §§ 1959(b)(1), 1961(1).

[138] RICO defines "enterprise" broadly in section 1961(4), but waits until the description of RICO's substantive offenses before introducing the commercial feature of a RICO enterprises. *See, e.g.*, 18 U.S.C. 1962(c) ("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 conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt" (emphasis added)). VICAR incorporates RICO's commercial feature within its definition of "enterprise." *Id.* § 1959(b)(2) ("'[E]nterprise' includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, *which is engaged in, or the activities of which affect, interstate or foreign commerce*." (language in italics is unique to section 1959(b)(2) which is otherwise identical to section 1961(4)). *See also* United States v. Millán-Machuca, 991 F3.d 7, 20 (1st Cir. 2021) ("[N]othing in the statutory definition of enterprise requires that the enterprise be defined solely by a criminal purpose. Indeed, the Supreme Court has recognized that RICO, and, thus also VICAR, extends to 'both legitimate and illegitimate enterprises.'" (quoting United States v, Turkette, 452 U.S. 576, 580-81 (1981))). United States v. Aquart, 912 F.3d 1, 17 (2d Cir. 2018) (finding that the jurisdictional requirement "'can be satisfied by even a *de minimis* effect on interstate commerce.'" (quoting United States v, Mejia, 545 F.3d 179, 203 (2d Cir. 2008))).

[139] United States v. Savage, 970 F.3d 217, 274 (3d Cir. 2020) ("Some jurisdictions view generic definitions as appropriate in RICO cases. . . . But the VICAR statute requires a predicate act that is chargeable under state or federal law. . . . So as the Second Circuit has observed, trial courts frequently instruct juries on the elements of the specific state or federal offense that is charged as the predicate act rather than outlining a 'generic' version of the crime." (citing United States v. Carrillo, 229 F.3d 177, 184-85 (2d Cir. 2000)); *see also Keene*, 955 F.3d at 398-99 ("Reading the language of the VICAR statute under which the defendants were charged, we conclude that Congress intended for individuals to be convicted of VICAR assault with a dangerous weapon by engaging in conduct that violated both that enumerated federal offense as well as a state law offense, regardless whether the two offenses are a categorical 'match.' Here, before convicting a defendant, a jury must find he engaged in the conduct alleged in the indictment, namely, assaulting the named victim with a dangerous weapon in violation of the Virginia brandishing statute.").

[140] United States v. Tisdale, 980 F.3d 1089, 1095-96 (6th Cir. 2020) (quoting United States v. Ledbetter, 929 F.3d 338, 358 (6th Cir. 2019)); *id*. at 1096 ("Did [Tisdale] commit the assault to maintain or increase his position in the gang? Remember that Tisdale was a 'shooter' in the gang, which meant that, if something happened, he was expected to protect other gang members. According to his colleagues in the gang, he fired back at the Stout Street house to do just that. That's what someone of his rank was expected to do, and the statute applies to actions designed to 'maintain' status." (citing Ledbetter, 929 F.3d at 358)).

[141] United States v. Brown, 973 F.3d 667, 686 (7th Cir. 2020) ("Next, the defendants argue that even if they actually committed the murder, the government failed to present sufficient evidence that it was 'for the purpose of maintaining or increasing position in' the Hobos enterprise, as required under 18 U.S.C. § 1959(a)(1). The question here is whether there was evidence permitting the jury to 'infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.'") (quoting United States v. DeSilva, 505 F.3d 711, 715 (7th Cir. 2007)); United States v. Arrington, 941 F.3d 24, 38 (2d Cir. 2019) ("This motive requirement is 'satisfied if the jury could properly infer that Arrington committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership,'" (quoting United States v. Thai, 29 F.3d 785, 817 (2d Cir. 1994))).

expectations of a leader of an enterprise.[142] That purpose, however, need not be the sole purpose or even the main purpose.[143]

Juveniles convicted of murder in aid of racketeering have sometimes challenged their sentences on grounds of Eighth Amendment limitations.[144] In *Miller*, the Supreme Court held that the Eighth Amendment's ban on cruel and unusual punishments precludes a mandatory sentence of life imprisonment without any possibility of parole for an offense the defendant committed while a juvenile.[145] However, Congress has largely abolished parole, and the VICAR provision states that murder "shall be" punished by one of two sentences -- death or life imprisonment.[146] The Fifth Circuit resolved the issue under a similarly worded statute by concluded that in the case of juveniles the language establishes alternative maximum penalties and "provides discretion to the sentencing judge to sentence anywhere between no penalty and the maximum penalty."[147] Most recently, the Supreme Court in *Jones v. Mississippi*[148]observed that a juvenile who commits a homicide when under the age of 18 may be sentenced to life imprisonment without the possibility of parole as long as the sentencing authority did so as a matter of discretion and might have imposed a less severe sentence.[149] A number of other lower federal courts have rejected *Miller* protection claims from over-aged VICAR murder defendants.[150]

[142] United States v. Aquart, 912 F.3d 1, 20 (2d Cir. 2018) ("[The defendant] was the leader of the charged enterprise, and the evidence was sufficient to allow a reasonable jury to infer that he was 'expected to act based on the threat posed to the enterprise' by [the murdered victim's] drug sales, 'and failure to do so would have undermined *his position* within that enterprise.'') (quoting United States v. Dhinsa, 243 F.3d 635, 671 (2d Cir. 2001)).

[143] United States v. Millán-Machuca, 991 F.3d 7, 22 (1st Cir. 2021) ("To meet the elements of a murder in aid of racketeering conviction, the government must show that the defendant acted with such a purpose, and we have previously recognized that the statute does not require that the government prove this was 'the sole purpose,'") (quoting United States v. Brandao, 539 F.3d 44, 56 (1st Cir. 2008)); United States v. Rodriguez, 971 F.3d 1005, 1009-10 (9th Cir. 2020) ("[T]he VICAR statute is limited 'to those cases in which the jury finds that one of the defendant's general or dominant purposes was to enhance his status *or that the violent act was committed as an integral aspect of gang membership.'* Recognizing that '[p]eople often act with mixed motives,' we rejected a more stringent reading of VICAR that would require the gang or racketeering enterprise purpose to be the only purpose or the main purpose behind the violent conduct.") (emphasis added) (quoting United States v. Banks, 514 F.3d 959, 969-70 (9th Cir. 2008)).

[144]United States v. Gonzalez, 981 F.3d 11, 18-21(1st Cir. 2020); United States v. Sierra, 933 F3d 95, 97 (2d Cir. 2019); United States v. Chavez, 894 F.3d 593, 609 (4th Cir. 2018).

[145] Miller v. Alabama, 567 U.S. 460, 479 (2012).

[146] See 18 U.S.C. §1959(a)(1)

[147] United States v. Bonilla-Romero, 984 F.3d 414, 417 (5th Cir. 2020) (affirming a sentence of 460 months' imprisonment for first degree murder under 18 U.S.C. §1111 (which carries a maximum sentence of death or imprisonment for life), for a defendant who committed the offense when he was 17 years old).

[148] 141 S. Ct. 1307 (2021).

[149] *Id*. at 1311 (citing *Miller*). The Court held in *Jones* that there is no requirement that the sentencing authority first determine that the accused is permanently incorrigible. *Id*. at 1318-19.

[150] *Gonzalez*, 981 F.3d at 19 ("[T]he defendant fails adequately to explain why the multitude of factors comprising the Eighth Amendment inquiry compel an extension of Eighth Amendment protections to a defendant who was twenty years old when he committed the offense conviction."); *Sierra*, 933 F3d at 97 ("Each defendant was between 18 and 22 years of age at the time of the murders in aid of racketeering. . . . Since the Supreme Court has chosen to draw the constitutional line at the age of 18 for mandatory sentences, the defendants' age-based Eighth Amendment challenges to their sentences must fail.") (citing *Miller*, 567 U.S. at 465); *Chavez*, 894 F.3d at 609 (At the time of the crimes of conviction, Cerna was 18 years old and Guevara was 19. The Supreme Court has held that mandatory life sentences are unconstitutional as to defendants who committed their crimes as juveniles. But this is no help to the defendants, both of whom were adults at the time they committed murder in aid of racketeering.").

The Eighth Amendment also cabins sentencing authority in capital cases. It forbids imposing the death penalty upon juveniles;[151] execution of the mentally "retarded";[152] and forbids sentencing to death those convicted of felony-murder who neither killed, attempted to kill, nor intended to kill.[153] In *United States v. Savage*, the Third Circuit upheld a sentence of death for a drug dealer convicted of RICO conspiracy, twelve counts of murder in aid of racketeering, conspiracy to commit murder in aid of racketeering, witness retaliation, and fire bombing.[154] Savage, who ordered the firebombing that killed his intended victim and five other occupants of the house, argued unsuccessfully that the *Enmund* felony-murder limitation should be extended to accomplices who incur liability by operation of the transferred intent doctrine.[155]

VI. Constitutional Questions

Over the years, various aspects of RICO have been challenged on a number of constitutional grounds. Most either attack the RICO scheme generally or its forfeiture component. The general challenges have been based on vagueness, ex post facto, and double jeopardy. Attacks on the constitutionality of RICO forfeiture have been grounded in the right to counsel, excessive fines, cruel and unusual punishment, and forfeiture of estate. While the challenges have been unsuccessful by and large, some have helped to define RICO's outer reaches.

A. General

1. Legislative Authority Under the Commerce Clause

The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," and "to make all Laws which shall be necessary and proper for carrying to Execution" that authority.[156] The powers which the Constitution does not confer upon the federal government, it reserves to the states and the people, U.S. CONST. amend. X. Although RICO deals only with enterprises "engaged in, or the activities of which affect, interstate or foreign commerce," some have suggested that RICO has been applied beyond the scope of Congress's constitutional authority to legislate under the commerce clause.[157] The courts have yet to agree.[158]

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[151] Roper v. Simmons, 543 U.S. 551 (2005).

[152] Atkins v. Virginia, 536 U.S. 304 (2002).

[153] Enmund v. Florida, 458 U.S. 782 (1982).

[154] 970 F.3d 217, 235-36, 316 (3d Cir. 2020).

[155] *Id.* at 280. The doctrine of transferred intent is something of a doctrine of liability for collateral consequences where the intent to kill one victim is "transferred" for the purposes of satisfying the intent element for killing a bystander. As explained by Professor LaFave, "In the unintended victim (or bad aim) situation – where A aims at B but misses, hitting C – it is the view of the criminal law that A is just as guilty as if his aim had been accurate." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6(d) (2d ed. 2003).

[156] U.S. CONST. art. I, § 8, cls. 3, 18.

[157] Matthew Hardwick. Note. *RICO Overreach: How the Federal Government's Escalating Offensive Against Gangs Has Run Afoul of the Constitution,* 62 VAND. L. REV. 211 (2009); WILLIAM ROQUEMORE TAYLOR. COMMENT. *Federalizing Street Crime: The Improper Broadening of RICO's "Affecting Commerce" Requirement*, 46 HOUS. L. REV. 139 (2009).

[158] United States v. Adams, 722 F.3d 788, 804 n.8 (6th Cir. 2013); United States v. Nascimento, 491 F.3d 25, 45(1st Cir. 2007); United States v. Palfrey, 515 F. Supp. 2d 120, 124-25 (D.D.C. 2007). Courts have also rejected contentions that VICAR exceeds congressional authority under the Commerce Clause. United States v. Umana, 750 F.3d 323, 336

2. Double Jeopardy

Even a general description of RICO evokes double jeopardy and ex post facto questions. RICO rests on a foundation of other crimes. At a glance, double jeopardy might appear to block any effort to base a RICO charge on a crime for which the accused had already been tried. By the same token, ex post facto might appear to bar a RICO charge built upon a predicate offense committed before RICO was enacted or before the crime was added to the list of RICO predicates. On closer examination, neither presents insurmountable obstacles in most instances.

The Constitution's double jeopardy clause commands that no person "be subject for the same offense to be twice put in jeopardy of life or limb."[159] In general terms, it condemns multiple prosecutions or multiple punishments for the same offense.[160] The bar on multiple punishments is a precautionary presumption. Unless a contrary intent appears, it presumes that Congress does not intend to inflict multiple punishments for the same misconduct.[161] Nevertheless, the courts have concluded that Congress did intend to authorize "consecutive sentences for both predicate acts and the RICO offense,"[162] as well as for both the substantive RICO offense and the RICO conspiracy to commit the substantive RICO offense.[163]

The bar on multiple prosecutions is more formidable. For it, the Supreme Court has long adhered to the so-called *Blockburger* test under which offenses are considered the same when they have the same elements, that is, unless each requires proof of an element not required of the other.[164] In the RICO context, the courts have held that the Double Jeopardy Clause does not bar successive RICO prosecutions of the same defendants on charges of involving different predicate offenses, enterprises, or patterns.[165] They have been more receptive to double jeopardy concerns in the case of successive prosecutions of the same enterprise. There, they have invoked a totality of the circumstances test which asks: "(1) the time of the various activities charged as parts of [the] separate patterns; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the activities took place under each charge."[166] The Supreme Court's confirmation in *Gamble v.*

(4th Cir. 2014); United States v. Mills, 378 F. Supp. 3d 563, 572 (E.D. Mich. 2019).

[159] U.S. CONST. amend. V.

[160] United States v. Dixon, 509 U.S. 688, 696 (1993) ("The Double Jeopardy Clause ... applies both to successive punishments and to successive prosecutions for the same criminal offense.").

[161] United States v. Garcia, 754 F.3d 460, 474 (7th Cir. 2014) (quoting Missouri v. Hunter, 459 U.S. 359, 365 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended"); *see also* United States v. Ayala, 601 F.3d 256, 265 (4th Cir. 2010).

[162] *Garcia*, 754 F.3d at 474; *see also*, United States v. Ayala, 601 F.3d 256, 265 (4th Cir. 2010); United States v. Basciano, 599 F.3d 184, 205 (2d Cir. 2010); United States v. Mahdi, 598 F.3d 883, 889 (D.C. Cir. 2010); United States v. Marino, 277 F.3d 11, 39 (1st Cir. 2002); United States v. Beale, 921 F.2d 1412, 1437 (11th Cir. 1991).

[163] United States v. Pratt, 728 F.3d 463, 478 n. 59 (5th Cir. 2013), *abrogated on other grounds*, Molina-Martinez v. United States, 136 S. Ct. 1338 (2016); United States v. Kehoe, 310 F.3d 579, 587-88 (8t Cir. 2002); United States v. Marino, 277 F.3d at 39; United States v. Diaz, 176 F.3d 52, 115-16 (2d Cir. 1999); United States v. Rone, 598 F.2d 564, 569-71 (9th Cir. 1979).

[164] Blockburger v. United States, 284 U.S. 299, 304 (1932); *see also* United States v. Ledbetter, 929 F.3d 338, 366 (6th Cir. 2019); United States v. Zemlyansky, 908 F.3d 1, 11-12 (2d Cir. 2018) (holding trial for a predicate offense does not preclude a RICO conspiracy prosecution).

[165] United States v. Schiro, 679 F.3d 521, 525-28 (7th Cir. 2012); United States v. DeCologero, 530 F.3d 36, 71 (1st Cir. 2008); United States v. Jones, 482 F.3d 60, 71-2 (2d Cir. 2006).

[166] United States v. Wheeler, 535 F.3d 446, 450 (6th Cir. 2008) (quoting United States v. Russotti, 717 F.2d 27, 33 (2d

United States of the continued validity of the dual sovereign doctrine makes clear that the Double Jeopardy Clause does not preclude successive state-federal prosecutions.[167]

3. Ex post facto

The ex post facto clauses preclude (1) punishment of past conduct which was not a crime when it was committed, (2) increased punishment over that which attended a crime when it was committed, and (3) punishment made possible by elimination of a defense which was available when a crime was committed.[168] Yet because RICO offenses are thought to continue from the beginning of the first predicate offense to the commission of the last, a RICO prosecution survives ex post facto challenge even if grounded on pre-enactment predicate offenses as long as the pattern of predicate offenses straddles the date of legislative action.[169] Moreover, as time goes on, prosecutions are less likely to rely on pre-RICO enactment predicate offenses.[170]

4. Vagueness

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[171] Vagueness became a more common constitutional object to RICO, after Justice Scalia and three other Justices implied its vulnerability to such an attack.[172] Subsequent lower courts appear to have uniformly

Cir. 1983); and United States v. Dean, 647 F.2d 779, 788 (8th Cir. 1981)).

[167] 139 S. Ct. 1960, 1964 (2019); *see also*, United States v. Brown, 973 F.3d 667, 702 (7th Cir. 2020); United States v. Leoner -Aguirre, 939 F.3d 310, 321 (1st 2019).

[168] U.S. CONST. art. I, §9, cl.3; art .I, §10, cl.1; Collins v. Youngblood, 497 U.S. 37, 52 (1990).

[169] United States v. Flemmi, 245 F.3d 24, 27 n.3 (1st Cir. 2001) ("The government did not seek to indict Flemmi for the crime of murder because there is no federal statute that can be applied to the 1967 slayings without violating the Ex Post Facto Clause. This fact, however, does not prohibit reference to the slayings as predicate acts in connection with the RICO counts. *See also* United States v. Brown, 555 F.2d 407, 416-17 (5th Cir. 1977) (upholding, against constitutional challenge, government's use of predicate acts occurring prior to RICO's effective date in conjunction with predicate acts occurring after that date)."); United States v. Caporale, 806 F.2d 1487, 1516 (11th Cir. 1986).

The fact that the defendant may be adversely affected by a procedural change likewise does not trigger ex post facto concerns. Thus, when Congress amended RICO to permit the confiscation of substitute assets should the forfeitable property become unavailable, the ex post facto clause did not preclude application of the change to cases arising before the amendment, United States v. Reed, 924 F.2d 1014, 1016-17 (11th Cir. 1991); United States v. Martenson, 780 F. Supp. 492, 495 (N.D. Ill. 1991).

[170] Since the inception of RICO, amendments have largely involved the addition of new predicate offenses or procedural matters. 18 U.S.C. §§ 1961 note, 1962 note. Contemporary challenges are more likely to involve application of Sentencing Guidelines amendments, which often require more severe sentences than those in effect when the offense was committed, *see, e.g.*, Peugh v. United States, 569 U.S. 530, 544 (2013) ("A retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an ex post facto violation."); United States v. Ponzo, 853 F.3d 558, 586 (1st Cir. 2017); United States v. DeLeon, 437 F. Supp. 3d 955, 962 (D.N.M. 2020).

[171] Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 525 (1994) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[172] H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 251, 254-55 (1989) (Scalia, J., concurring in the judgment) ("Four terms ago . . . we gave lower courts . . . four clues concerning the meaning of the enigmatic term 'pattern of racketeering activity'. . . . Today, four years and countless millions in damages and attorney's fees later (not to mention prison sentences under the criminal provisions of RICO), the Court does little more than repromulgate those hints as to what RICO means. . . . It is, however, unfair to be so critical of the Court's effort, because I would be unable to provide an interpretation of RICO that gives significantly more guidance concerning its application. . . . Today's opinion has added nothing to improve our prior guidance, which has created a kaleidoscope of Circuit positions, except to clarify that RICO may additionally be violated when there is a 'threat of continuity.' It seems to me this increases rather than

rejected the suggestion that RICO is unconstitutionally vague either generally or as applied to the facts before them.[173]

5. Cruel and Unusual Punishment

The Eighth Amendment's Cruel and Unusual Punishment Clause precludes imposition or execution of punishment that is disproportionate to the crime of conviction.[174] It accordingly bars imposition of a *mandatory* sentence of life imprisonment without the possibility of parole for a homicide committed when the accused was under 18 years of age,[175] but not if the sentencing authority has the *discretion* impose a less severe sentence.[176]

B. Forfeiture

1. Eighth Amendment

RICO forfeitures can be severe. The Eighth Amendment supplies the constitutional bounds within which criminal sentences must be drawn. Under its directives, fines may not be excessive nor punishments cruel and unusual.[177] Any more precise definition becomes somewhat uncertain. When presented with the issue in *Harmelin*, a majority of the Supreme Court appeared to believe that the Eighth Amendment's Cruel and Unusual Punishment Clause forbids sentences which are "grossly disproportionate" to the seriousness of the crimes for which they are imposed.[178] Prior to *Harmelin*, the lower courts felt that at some point RICO forfeitures might be so disproportionate as to constitute cruel and unusual punishment.[179] Perhaps understandably, especially in light of

removes the vagueness.").

[173] United States v. Fattah, 914 F.3d 112, 167 n. 20 (3d Cir. 2019); United States v. Burden, 600 F.3d 204, 228 (2d Cir. 2010); United States v. Keltner, 147 F.3d 662, 667 (8th Cir. 1998); Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1106-109 (6th Cir. 1995); United States v. Oreto, 37 F.3d 739, 752 (1st Cir. 1994); United States v. Korando, 29 F.3d 1114, 1119 (7th Cir. 1994); Cox v. Administrator, U.S. Steel & Carnegie, 17 F.3d 1386, 1398 (11th Cir. 1994); United States v. Bennett, 984 F.2d 597, 606 (4th Cir. 1993); United States v. Pirk, 267 F. Supp. 3d 406, 423-24 (W.D.N.Y. 2017); Buchanan County v. Blankenship, 545 F. Supp. 2d 553, 555 (W.D. Va. 2008); United States v. Stevens, 778 F. Supp. 2d 683, 694-95 (W.D. La. 2011).

[174] Miller v. Alabama, 567 U.S. 460, 469-70 (2012).

[175] *Id*. at 480.

[176] Jones v. Mississippi, 141 S. Ct. 1307, 1312 (2021) ("*Miller* held that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits *mandatory* life without parole sentences for murderers under 18, but the Court allowed *discretionary* life without parole sentences for those offenders.").

[177] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[178] Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding the imposition of a state mandatory term of life in prison without the possibility of parole upon conviction for possession of more than 650 grams of cocaine.) Of the nine Justices, two (Justice Scalia and Chief Justice Rehnquist) voted to affirm and would limit proportionality analysis to capital punishment cases; three others (Justices O'Connor, Kennedy and Souter) voted to affirm but pursuant to a proportionality analysis where the seriousness of the offense carried the day, 501 U.S. at 996; and the remaining four (Justices White, Marshall, Blackmun and Stevens) dissented in favor of a proportionality test placing greater emphasis on the comparative harshness of the penalty and a comparison with the penalties imposed for other crimes, 501 U.S. at 1009, 1027, 1028.

[179] United States v. Feldman, 853 F.2d 648, 664 (9th Cir. 1988) ("For eighth amendment purposes, however, we must consider the total punishment. Feldman's penalty is unconstitutional only if it is grossly disproportionate to his offense. No gross disparity appears here. Feldman's offenses were serious, and the penalty is not unduly harsh. We are not faced with a situation in which a defendant is being made to forfeit a 92% interest in a $3 million corporation as well as another corporation and considerable real estate, for fraudulent conduct amounting to $335,000." (citations omitted)).

developments under the Excessive Fines Clause, the argument seems to have been rarely pressed since *Harmelin*.[180]

The Eighth Amendment's Excessive Fines Clause jurisprudence follows the same path and is slightly more instructive. Historically, the clause was only infrequently invoked. The Supreme Court changed that when it noted that the clause marks one of the boundaries of permissible RICO criminal forfeiture.[181] In *Bajakajian*, the Court explained that forfeiture offends the Excessive Fines Clause when it is "grossly disproportionate to the gravity of the offense."[182] Looking to *Bajakajian*, lower courts "weigh a number of factors in determining whether a forfeiture was grossly disproportional, including: (1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of criminal activity; (3) the relationship between the charged crime and other crimes; and (4) the harm caused by the charged crime. . . ."). [183] Although the gravity of most RICO violations would seem to weigh heavily against most excessive fines clause challenges,[184] at least one circuit holds that the appropriate excessive fines analysis must include consideration of the impact of confiscation upon the property owner's livelihood.[185] One federal district court has found the confiscation of a motorcycle gang's trademark of its logo would constitute an excessive fine in light of the other sanctions imposed upon the gang and First Amendment implications.[186]

[180] Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?* 53 U. PITT. L. REV. 1 (1991).

[181] Alexander v. United States, 509 U.S. 544, 558-59 (1993).

[182] United States v. Bajakajian, 524 U.S. 321, 334-37 (1998).

[183] United States v. Bennett, 986 F.3d 389, 399 (4th Cir. 2021) United States v. Suarez, 966 F.3d 376, 385 (1st Cir. 2020); United States v. Bikundi, 926 F.3d 791, 795-96 (D.C. Cir. 2019)

[184] *See generally Bennett*, 986 F.3d at 399-400 (finding that criminal forfeiture of $14 million was not grossly disproportionate following conviction for wire and bank fraud for which the court might have imposed a $28 million fine); United States v. Bradley, 969 F.3d 585, 592 (6th Cir. 2020) (holding that forfeiture judgment which left the defendant with a debt of $250,000 was not excessive given his years at the head of a opioid trafficking conspiracy); *Suarez*, 966 F.3d at 387 (upholding a $52.042 forfeiture, following a money laundering conviction, with the observation that "[b]ecause the $52,042 forfeiture falls well within the $250,000 maximum fine prescribed by Congress, there is a strong presumption that the forfeiture is constitutional."); *Bikundi*, 926 F.3d at 795-96 ("All four [*Bajakajian*] factors confirm that the [$79 million] forfeitures imposed against [the defendants] do not violate the Excessive Fines Clause. (1) The essence of their crime was grave. They personally orchestrated a sprawling fraud . . . [that] lasted for years. . . . (2) [The defendants] fall squarely within the class of criminals targeted by the relevant forfeiture statutes. . . . (3) The statutes of conviction and the Sentencing Guidelines authorize heavy prison sentences and fines. . . . (4) [The defendants] caused significant harm . . . .").

[185] United States v. Levesque, 546 F.3d 78, 83-5 (1st Cir. 2008); *See also* United States v. Chin, 965 F.3d 41, 58 (1st Cir. 2020) ("The District Court's findings about Chin's net worth, familial obligations, and inability to earn a professional-level salary simply are not sufficient to ground a determination that the full forfeiture order sought by the government would constitute the type of 'ruinous monetary punishment[]' that might conceivably be 'so onerous as to deprive a defendant of his or her future ability to earn a living' and thus violate the Eighth Amendment's Excessive Fines Clause."(quoting *Levesque*, 546 F.3d at 84-5)).

[186] United States v. Mongol Nation, 370 F. Supp. 3d 1090, 1119-1120 (C.D. Cal. 2019) ("The Government has secured prison sentences and significant forfeiture of the criminal organization's assets and property, including motorcycles. And as a result of the conviction in this case, the Government will secure forfeiture of weapons, ammunition, body armor, and items of personal property seized during raids. The Government will also pursue fines at sentencing. Given the punishments already secured by the United States, the forfeiture of the collective membership [trade]marks is grossly disproportionate to the gravity of the RICO conspiracy.").

2. First Amendment

Forfeiture may raise First Amendment issues. The First Amendment guarantees the right of free speech and freedom of the press.[187] It generally precludes government prior restraint of expression.[188] In contrast to prior restraint, however, it generally permits punishment of the unlawful distribution of obscene material.[189] In the view of a majority of the Justices in *Alexander*, the application of RICO's provisions to confiscate the inventory of an adult entertainment business as punishment for a RICO conviction based upon obscenity predicates does not offend the First Amendment.[190]

The district court in *Mongol Nation* rejected a proposed preliminary forfeiture order for the confiscation of the trademark covering a motorcycle gang's logo.[191] Although the gang had been convicted of substantive and conspiracy RICO violations, the court held that the proposed order would violate the First Amendment's protections of expression and association.[192]

3. Right to the Assistance of Counsel

In two cases decided under the criminal forfeiture provisions of the federal drug law, the Supreme Court held that a criminally accused's Sixth Amendment right to the assistance of counsel does not invalidate statutory provisions which call for the confiscation of forfeitable property paid as attorneys' fees or which permit the court, upon a probable cause showing of forfeitability, to freeze assets which the accused had intended to use to pay attorneys' fees.[193] The same can be said of the RICO forfeiture provisions.[194] The Sixth Amendment right to the assistance of counsel of choice does preclude the pre-trial restraint of untainted property needed to retain and compensate counsel,[195] but does not require post-conviction access to confiscated substitute assets.[196]

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[187] "Congress shall make no law ... abridging the freedom of speech, or of the press.... " U.S. CONST. amend. I.

[188] Near v. Minnesota *ex rel*. Olson, 283 U.S. 697 (1931); Alexander v. United States, 509 U.S. 544, 550 (1993).

[189] Ginzburg v. United States, 383 U.S. 463, 464-65 (1966); Smith v. United States, 431 U.S. 291, 296 (1977).

[190] *Alexander*, 509 U.S. at 550-58.

[191] *Mongol Nation*, 370 F. Supp. 3d at 1130.

[192] *Id*. at 1111-1116.

[193] United States v. Monsanto, 491 U.S. 600, 614-16 (1989); Caplin & Drysdale v. United States, 491 U.S. 617, 624-32 (1989).

[194] United States v. Saccoccia, 433 F.3d 19, 31 (1st Cir. 2005) ("Fees paid to attorneys from the criminal proceeds of their clients are not held sacred. They may be reached by the government and, Congress, under RICO, has set clear parameters for the forfeiture of attorneys' fees."); United States v. Borromeo, 954 F.2d 245, 249 (4th Cir. 1992); United States v. Jefferson, 632 F. Supp. 2d 608, 616 (E.D. La. 2009) ("The Government's argument analogizing *Caplin & Drysdale* . . . and forfeiture under 21 U.S.C. 853 is persuasive. . . . In *Caplin* and *United States v. Monsanto*, the Court held that the forfeiture provisions of § 853 contained no specific exception for property used to pay bona fide attorneys' fees. Citing language from § 853(c) that is identical to 18 U.S.C. § 1963(c) . . . the Court offered the following: 'Permitting a defendant to use assets for his private purposes that, under this provision, will become the property of the United States if a conviction occurs cannot be sanctioned.'"); United States v. Wingerter, 369 F. Supp. 2d 799, 810-12 (E.D. Va. 2005).

[195] Luis v. United States, 136 S. Ct. 1083, 1096 (2016); United States v. Chamberlain, 868 F.3d 290, 291 (4th Cir. 2017) (en banc); *see also* United States v. Hopkins, 920 F.3d 690, 702-04 (10th Cir. 2019) (holding that *Luis* does not apply retroactively to cases on federal habeas review.).

[196] United States v. Marshall, 872 F.3d 213, 221-22 (4th Cir. 2017).

4. Right to Jury Trial

The Supreme Court concluded in *Libretti* that a property owner had no right to have a jury decide factual disputes in a forfeiture case, because forfeiture was a sentencing matter and the Sixth Amendment right to jury trial did not apply to sentencing questions.[197] After *Libretti* had been decided, the Court's announced view of the role of the jury as a fact finder changed somewhat, first in *Apprendi*, then in *Blakely*, and finally in *Booker*.[198] In *Booker* the Court redefined the line between sentencing factors that the Constitution allows to be assigned to the court and factors that it insists be found by the jury as a matter of right. Henceforth, "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[199] Dicta in *Booker* might be construed as an indication that property owners are still bound by the holding in *Libretti*—there is no constitutional right to have a jury decide factual questions in criminal forfeiture.[200] The lower courts appear to agree.[201]

5. Forfeiture of Estate

The "forfeiture of estate" argument was among the first constitutional challenges raised and dispatched. Article III, in its effort to protect against misuse of the law of treason, empowers Congress to set the punishment for treason but only with the understanding that "no attainder of treason shall work corruption of blood, or forfeiture."[202]

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[197] Libretti v. United States, 516 U.S. 29, 48-9 (1995) ("Libretti would have us equate [his] statutory right to a jury determination of forfeitability with the familiar Sixth Amendment right to a jury determination of guilt or innocence. *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 511 (1995) ('The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged'). Without disparaging the importance of the right provided by Rule 31(e), our analysis of the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection. Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 789, 93 (1986) ('[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact'); Cabana v. Bullock, 474 U.S. 376, 385 (1986) ('The decision whether a particular punishment . . . is appropriate in any given case is not one that we have ever required to be made by a jury')." (parallel citations omitted)).

[198] Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005).

[199] *Id.*, 543 U.S. at 244.

[200] *Id.* at 258 ("Most of the statute [(the Sentencing Reform Act)] is perfectly valid. *See, e.g.*, 18 U.S.C. . . . 3554 (forfeiture). . . . "). Section 3554 declares that "The *court*, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 [RICO] of this title. . . shall order . . . that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title. . . . " 18 U.S.C. § 3554 (emphasis added).

[201] United States v. Bradley, 969 F.3d 585, 591 (6th Cir. 2020); United States v. Carpenter, 941 F.3d 1, 11-12 (1st Cir. 2019); United States v. Elbeblawy, 899 F.3d 925, 941 (11th Cir. 2018); United States v. Sigillito, 759 F.3d 913, 934-35 (8th Cir. 2014); United States v. Simpson, 741 F.3d 539, 559-60 (5th Cir. 2014); United States v. Phillips, 704 F.3d 754, 769-71 (9th Cir. 2012); United States v. Day, 700 F.3d 713, 732-33 (4th Cir. 2012); United States v. Leahy, 438 F.3d 328, 331-33 (3d Cir. 2006); United States v. Fruchter, 411 F.3d 377, 382-83 (2d Cir. 2005).

Rule 32.2(b)(5) of the *Federal Rules of Criminal* procedure, however, provides a limited right to have the jury determine "whether the government has established the requisite nexus between the property and the offense committed by the defendant." The jury is only available following a jury's verdict of guilty and not with respect to substitute assets, Rule 32.2(e)(3). *See, e.g.*, United States v. Marshall, 872 F.3d 213, 222-23 (4th Cir. 2017).

[202] U.S. CONST. art. III, § 3, cl. 2.

Article III speaks only of treason, but due process would likely preclude this type of forfeiture of estate as a penalty for lesser crimes as well. RICO forfeiture, however, is not properly classified as a forfeiture of estate. Forfeiture of estate occurs, when as a consequence of an offense, all of an offender's property is subject to confiscation, regardless of the absence of any nexus between the property and the crime which triggered the forfeiture. RICO forfeiture is, by contrast, a "statutory" forfeiture that turns on the relationship of the property to the crime and consequently is not forbidden by the due process corollary of Article III.[203]

[203] United States v. Thevis, 474 F. Supp. 134, 140-41 (N.D. Ga. 1979), *abrogated on other grounds*, Russello v. United States, 464 U.S. 16, 22 (1983); United States v. Grande, 620 F.2d 1026, 1037-39 (4th Cir. 1980).

Appendix A. Text of RICO Statutory Provisions

18 U.S.C. 1961
Definitions

As used in this chapter –
(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), sections 1831 and 1832 (relating to economic espionage and theft of trade secrets), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons) , sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the

act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);
(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;
(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
(4) "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;
(5) "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;
(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;
(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;
(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;
(9) "documentary material" includes any book, paper, document, record, recording, or other material; and
(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. 1962
Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, 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. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) 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.

(c) 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 conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. 1963
Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law –

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any –

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes –

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section –

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that –

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that

the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.
(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to –
(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;
(2) compromise claims arising under this section;
(3) award compensation to persons providing information resulting in a forfeiture under this section;
(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and
(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to –
(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;
(2) granting petitions for remission or mitigation of forfeiture;
(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;
(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and
(6) the compromise of claims arising under this chapter.
Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may –
(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l) (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.
(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.
(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.
(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.
(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.
(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant –

(1) cannot be located upon the exercise of due diligence;
(2) has been transferred or sold to, or deposited with, a third party;
(3) has been placed beyond the jurisdiction of the court;
(4) has been substantially diminished in value; or
(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

18 U.S.C. 1964
Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. 1965
Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

18 U.S.C. 1966
Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

18 U.S.C. 1967
Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

18 U.S.C. 1968
Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—
(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;
(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;
(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and
(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—
(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or
(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—
(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;
(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or
(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.
(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.
(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.
(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.
(5) Upon the completion of—
(i) the racketeering investigation for which any documentary material was produced under this chapter, and
(ii) any case or proceeding arising from such investigation,
the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.
(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filedc in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

18 U.S.C. 1959
Violent crimes in aid of racketeering

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished-

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of 1 under this title, or both.

(b) As used in this section-

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

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Appendix C. State RICO Citations[204]

ARIZ. REV. STAT. ANN. §§ 13-2301, 13-2312 to 13-2315;
ARK. CODE ANN. §§ 5-74-101 to 5-74-109;

CAL. PENAL CODE §§ 186 to 186.8;

COLO. REV. STAT. §§ 18-17-101 to 18-17-109;

CONN. GEN. STAT. ANN. §§ 53-393 to 53-403;

DEL. CODE tit.11 §§ 1501 to 1511;

FLA. STAT. ANN. §§ 772.101 tom 772.19, 895.01 to 895.09;

GA. CODE ANN. §§ 16-14-1 to 16-14-15;

HAWAII REV. STAT. §§ 842-1 to 842-12;

IDAHO CODE §§ 18-7801 to 18-7805;

IND. CODE ANN. §§ 35-45-6-1 to 35-45-6-2;

IOWA CODE ANN. §§ 706A.1 to 706A.5;

KY. REV. STAT. § 506.120;

LA. REV. STAT. ANN.§§ 15:1351 to 15:1356;

MASS. GEN. LAWS ANN. ch. 271A §§ 1 to 3;

MICH. COMP. LAWS ANN. §§ 750.159f to 750.159x;

MINN. STAT. ANN. §§ 609.901 to 609.912;

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NEB. REV. STAT. ANN. §§ 28-1352 to 28-1356;

NEV. REV. STAT. §§ 207.350 to 207.520;

N.J. STAT. ANN. §§ 2C:41-1 to 2C:41-6.2;

N.M. STAT. ANN. §§ 30-42-1 to 30-42-6;

N.Y. PENAL LAW §§ 460.00 to 460.80;

N.C. GEN. STAT. §§ 75D-1 to 75D-14;

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OHIO REV. CODE §§ 2923.31 to 2923.36;

OKLA. STAT. ANN. tit.22 §§ 1401 to 1419;

ORE. REV. STAT. §§ 166.715 to 166.735;

PA. STAT. ANN. tit.18 § 911;

R.I. GEN. LAWS §§ 7-15-1 to 7-15-11;

TENN. CODE ANN. §§ 39-12-201to 39-12-210;

TEX. PENAL CODE §§ 71.01 to 71.05;

UTAH CODE ANN. §§ 76-10-1601 to 76-10-1610;

VA. CODE §§ 18.2-512 to 18.2-517;

WASH. REV. CODE ANN. §§ 9A.82.010 to 9A.82.170;

W.VA. CODE ANN. §§ 61-13-1 to 61-13-6;

WIS. STAT. ANN. §§ 946.80 to 946.88.

Author Information

Charles Doyle
Senior Specialist in American Public Law

[204] For an early comparative analysis of the content of many of the state RICO provisions, *see* G. Robert Blakey & Thomas Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?*, 43 VAND. L. REV. 851, 988-1011 (1990); *see also* John E. Floyd, RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES (2011).

A few states do not have RICO statutes as such, but have enacted provisions which enhance the penalties for, and provide procedural tools against, various forms of commercialized criminal activity, frequently modeled after the federal drug kingpin statute, 21 U.S.C. § 848, *see, e.g.*, ILL. COMP. LAWS ANN. ch.725 §§175/1 to 175/9 (narcotics racketeering); MD. CODE ANN. CRIM. LAW §5-613 (drug kingpin).

Disclaimer

COMMENTARY

RICO Is Often Used to Target the Mob and Cartels—but Trump and His Associates Aren't the First Outside Those Worlds to Face Charges

Racketeering charges are complex but generally speak to dishonest business dealings. Many racketeering prosecutions involve lucrative criminal enterprises, such as illegal drug operations or the Mafia.

September 05, 2023 at 06:57 PM

Commentary

By Gabriel J. Chin | September 05, 2023 at 06:57 PM

It might seem odd to some that former President Donald Trump and his co-defendants, many of whom are lawyers and served as senior government officials, were charged with racketeering regarding their alleged attempt to overturn the results of the 2020 election in Georgia.

Racketeering charges are complex but generally speak to dishonest business dealings. Many racketeering prosecutions involve lucrative criminal enterprises, such as illegal drug operations or the Mafia.

Whatever the lawfulness of Trump's efforts to overturn the 2020 election, no one claims his conduct was part of a Mafia scheme.

I am a scholar of criminal law and procedure. Prosecutors sometimes charge white-collar defendants who are not part of a mob with RICO violations.

Trump is set to be arraigned on Wednesday in Atlanta, for his alleged attempt to overturn the election in that state. He has pleaded not guilty and waived his arraignment so he doesn't have to appear in court that day.

A grand jury in Fulton County indicted Trump and 18 other political associates on Aug. 15. They are facing charges under Georgia's Racketeer Influenced and Corrupt Organizations Act, often called RICO.

Trump and others, including former Trump attorney Rudolph Giuliani, are also charged with a number of other specific crimes such as forgery, filing false documents and solicitation of violation of oath by a public officer.

RICO's Relatively Short History

In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations law.

Before 1970, prosecutors could prosecute individuals only for conspiracy and other specific offenses, even if they were allegedly Mafia-related crimes and even if the defendants were alleged to be career or professional offenders.

At least 31 states, including Georgia, have since enacted so-called "little RICO" or "state RICO" laws modeled after federal RICO, allowing such prosecutions to be brought in their courts.

The federal and state versions of RICO are notoriously detailed and complex.

In essence, however, most versions of the law create a new, and more serious, offense – namely, engagement in a pattern of specified criminal activity as part of an organization. Sometimes the organization is a criminal gang of some kind that exists to make an illegal profit, such as robbery teams, loan sharks, narcotics manufacturers, professional gamblers or human traffickers.

The organization could also be an otherwise legitimate business or governmental entity. Making money is sometimes, but not always, a factor in racketeering cases.

So-called RICO predicates – the underlying crimes that form the pattern – encompass a wide range of illegal conduct, including crimes as diverse as bribery, mail fraud, kidnapping and murder.

In general, both federal and state judges have interpreted RICO broadly, in both allowing charges and convicting defendants. RICO claims may also be brought by civil plaintiffs. But in such cases only monetary damages and other forms of civil relief may be awarded, and this does not result in imprisonment.

Anyone Can Get Charged With RICO

In 1989, the Supreme Court explained that while RICO was originally intended for gangsters, it could apply to companies and other people who are not part of an organized crime operation, as long as they violated the terms of the statute.

That year, the Supreme Court was considering a case in which the telephone company Northwestern Bell, which was serving the Minneapolis area, was accused of bribing state officials at the Minnesota Public Utilities Commission with gifts and employment in order to win rate increases.

The Supreme Court explained that Congress had organized crime in mind when it drafted the law but intentionally made it broader, encompassing a wider range of criminal conduct.

So, if otherwise upstanding citizens who work for legitimate businesses commit acts of bribery and corruption, this can lead to a RICO charge.

A few years later, in 1994, the Supreme Court unanimously ruled that abortion clinics could use the federal RICO law to sue anti-abortion protesters who conspired to shut them down.

In 1997, the federal government charged a Texas sheriff with RICO after he accepted money from a federal prisoner in exchange for conjugal visits with the prisoner’s wife or girlfriend. The sheriff, Mario Salino, was sentenced to three years in prison and fined $5,000.

Cases in the U.S. Supreme Court included liquor dealers suspected of evading Canadian export taxes and a person accused of transporting automobile titles with falsified odometer readings.

Over the past few decades, many business leaders, politicians and other government officials have been convicted of state and local RICO offenses for various crimes.

In August 2023, for example, a former mayor of Humacao, Puerto Rico, was sentenced to three years and one month in prison for his involvement in a bribery scheme. According to the Department of Justice, the politician, Reinaldo Vargas-Rodriguez, privately accepted cash from two companies in exchange for his giving them municipal contracts.

Georgia Courts Are On Board

Georgia courts agree with the Supreme Court that their state RICO law requires no allegation or proof of "nexus with organized crime."

A range of people in Georgia have been hit with RICO charges. In 2005, Georgia prosecutors charged a former DeKalb County sheriff named Sidney Dorsey with killing his successor, as well as racketeering and other crimes. Dorsey is serving life in prison. Truck stop owners and operators accused of doctoring the prices and fuel quality labels on gas pumps have also been prosecuted.

Perhaps most relevant to the charges against Trump and his associates, the Georgia Supreme Court rejected a claim by Georgia's elected commissioner of labor that officeholders seeking reelection were exempt from RICO: "By its express terms, the RICO act includes as a crime a reelection campaign by the holder of public office in which 2 or more similar or interrelated predicate offenses specified in the act are committed."

It is not yet clear how Trump and his former associates will fare with RICO charges in a Georgia court. But they are far from the first people with no involvement in an organized criminal organization to be forced to defend themselves against racketeering charges.

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Gabriel J. Chin teaches criminal law, immigration, and race and law at UC Davis School of Law.

Insys Executives Are Sentenced to Prison Time, Putting Opioid Makers On Notice

Insys Therapeutics founder John Kapoor leaving federal court in Boston on March 13, 2019. (Pat Greenhouse/The Boston Globe via Getty Images)

In partnership with: (https://www.ft.com/)

JANUARY 23, 2020

by · Hannah Kuchler (https://www.pbs.org/wgbh/frontline/person/hannah-kuchler/) · Nick Verbitsky (https://www.pbs.org/wgbh/frontline/person/nick-verbitsky/) · Tom Jennings (https://www.pbs.org/wgbh/frontline/person/tom-jennings/) · Shaunagh Connaire (https://www.pbs.org/wgbh/frontline/person/shaunaugh-connaire/)

This story and video are part of a collaboration with the Financial Times*, which includes an upcoming documentary.*

U.S. pharmaceutical executives have been put on notice that they could be held criminally liable for fueling America's epidemic of opioid addiction, after the founder of the drugmaker Insys was sentenced to five-and-a-half years in prison for masterminding a scheme to bribe doctors to prescribe a dangerous painkiller.

Using laws designed to catch mob bosses, prosecutors secured the conviction of John Kapoor and six other Insys executives and employees last year on charges including racketeering conspiracy. The company funneled money to doctors to boost sales of Subsys, a painkilling spray containing fentanyl, an opioid 50 to 100 times stronger than heroin.

Earlier in the day, Alec Burlakoff, Insys's former head of sales, received a 26-month sentence for the same charges. Michael Babich, the former chief executive, has been sentenced to two-and-a-half years.

The prison terms have been handed down as other opioid makers and distributors are being criminally investigated and prosecutors are aiming to hold executives accountable in a pharma industry that has frequently dismissed fines as a cost of doing business.

As part of a joint investigation between the Financial Times and FRONTLINE, Mr Burlakoff spoke to journalists under the supervision of federal prosecutors in Boston. The interview took place last year, on the condition that it was only published after sentencing.

Acknowledging that he did not have “morals, ethics and values” and that he did his job knowing the scheme orchestrated with Mr Kapoor was illegal, Mr Burlakoff said he still had “no idea that criminally there would be consequences . . . I don’t want to go to jail. Who wants to go to jail?”

He described his thinking: “Not only is the company going to get fined an astronomical amount of money, which I’ve seen a million times, but worse case scenario, which I’ve never seen before, they might actually take my money.”

Subsys was approved for cancer patients already taking opioids who were experiencing the sharp pangs of what is called breakthrough pain. But the vast majority of doctors Insys targeted were not oncologists.

Mr Burlakoff said that no one at the company cared whether the doctors were prescribing it “on-label” for cancer patients or “off-label” for anyone else. If Insys had just stuck to cancer patients, he said, “you never would have heard of the company.”

Mr Kapoor, now 76, is a serial pharma entrepreneur who emigrated to the U.S. from India in his early 20s. He founded Insys in 1990, and the company received regulatory approval for its fentanyl spray in 2012. Since then, hundreds of deaths have been linked to the drug.

As the U.S. reels from an opioid crisis that has turned 2m Americans into addicts, according to the Center for Disease Control and Prevention, Insys and Purdue Pharma — a company owned by members of the billionaire Sackler family, which makes OxyContin — have both gone bankrupt under the weight of legal liabilities. Other opioid makers and distributors are trying to negotiate a

settlement deal with state and local governments.

Speaker program sponsored by drug companies are common practice, paying doctors to educate their peers, but Mr Burlakoff described how Insys went far beyond what was legal to create a quid pro quo with those who prescribed its painkiller. Some 13 medical professionals have already been charged and some have served jail time.

Under the scheme, doctors could earn up to $125,000 a year in "honorariums" for speaking about the drug at events that were often simply dinners with sales reps and the prescriber's own friends — or that sometimes did not happen at all. At the executives' trial in Boston in the spring of 2019, prosecutors presented a spreadsheet Insys used to show the return on investment of speakers' payments.

Mr Kapoor insisted on receiving a minimum two dollars of revenue from the drug for every dollar it spent on doctors, according to Mr Burlakoff.

"He insisted on being able to draw a direct correlation between the dollars we pay the speaker and the number of dollars we received back via prescriptions that they prescribed," Mr Burlakoff said.

Mr Kapoor's lawyers did not respond to a request for comment. In a court filing, they argued their client was portrayed as a "caricature" of a mob boss, rather than an "immigrant success story" who developed the drug after seeing his wife die from cancer.

The court heard how Insys sales representatives also pushed doctors to increase patients' dose of Subsys, a medical practice known as titration, because higher doses generated more revenue. Prosecutors said that it was tantamount to bribing doctors to overdose their patients.

The callous culture was demonstrated by an internal video played to the jury, in which Insys sales reps perform a rap about the drug while a man dressed as a giant Subsys bottle dances around. "I love titration, yeah, it's not a problem," they rap. "I got new patients and I got a lot of them."

At the end, it is revealed that Mr Burlakoff is inside the costume — though he claimed he was not wearing it for the entire video.

"I realize how gross and disgusting and offensive it is now, but I was just so impressed with the work and the money and the detail that they put into it, I was like, emotional," he said.

Mr Burlakoff said at first he admired the video but now views appearing in it as one of his biggest mistakes.

"I showed it to my wife and my kids and they enjoyed it. They didn't know anything about Subsys or titration and that patients were actually dying as a result of it."

While pharmaceutical companies are frequently fined by regulators, it is rare for executives to go to jail. In all, seven Insys executives and employees were found guilty of racketeering conspiracy, an offense introduced in the 1970s to pursue organized crime, as well as charges of wire fraud conspiracy and mail fraud conspiracy. As well as Mr Kapoor, Mr Babich and Mr Burlakoff, they include Richard Simon, national director of sales, and Michael Gurry, who oversaw the unit responsible for getting reimbursements from insurers. Both received sentences of 33 months. Two regional sales managers were also convicted.

Convictions for honest services fraud and violations of the Controlled Substances act were overruled by the judge in November.

The use of the Racketeer Influenced and Corrupt Organizations act placed criminal liability for misdeeds on the people at the top of outfits such as the mafia and, more recently, other organizations, including in the Fifa football corruption case in 2015, where several officials pleaded guilty to the charge.

While criminal cases against corporate leaders are still very rare, there has been a rapid expansion in civil suits attempting to use the statute; it is one of the charges in a case against other opioid makers and distributors.

Jeff Grell, a lawyer from Grell Feist, said that in "a normal criminal case, you essentially have to have blood on your hands, pulling the trigger, robbing the money, selling the drugs. Under Rico, that's not necessary. Rico seeks to impose liability on persons who are knowingly operating and managing the people who are directly committing a crime."

Fred Wyshak, one of the federal prosecutors who led the Insys case, began his career prosecuting a mob family he compared to the Sopranos, and he later helped convict James "Whitey" Bulger, an Irish-American organized crime boss in the Boston area, of being complicit in 11 murders. He said he hoped the Insys convictions would encourage other prosecutors to consider similar cases.

"If you're in business and you can make billions of dollars and then pay a fine [of] maybe a fraction of that, you're earning a profit by engaging in criminal activity," Mr Wyshak said.

Nathaniel Yeager, head of the Massachusetts healthcare fraud unit, added that the convictions should send a message to drug industry executives that "their conduct is going to be treated just like any other criminal conduct."

Since making his deal to assist federal prosecutors, Mr Burlakoff said, he had been trying to take responsibility for his actions — but he insisted Insys was not alone in the pharma industry.

"The reality of the matter is, I made terrible mistakes, I'm in trouble for it, I'm paying the price," he said. "Are there other people doing the exact same thing I'm doing, right now? Absolutely."

Additional reporting by Annie Wong and Rebecca Blandon.

Editor's Note: *Text in the video accompanying this story has been amended to correctly reflect the number of deaths linked to Subsys.*

Hannah Kuchler (https://www.pbs.org/wgbh/frontline/person/hannah-kuchler/), Financial Times

Nick Verbitsky (https://www.pbs.org/wgbh/frontline/person/nick-verbitsky/)

EMAIL:
nick@bluechipfilms.com (mailto: nick@bluechipfilms.com)

Tom Jennings (https://www.pbs.org/wgbh/frontline/person/tom-jennings/)

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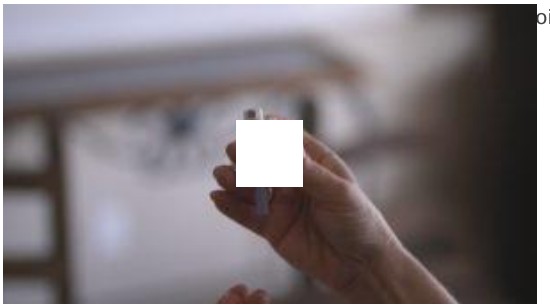

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TRIALS AND EVIDENTIARY RULINGS

Second Circuit Remands for New Trial Based on District Court's Improper Exclusion of Advice-of-Counsel Testimony

DECEMBER 27, 2017

Jacqueline L. Bonneau and Harry Sandick

In *United States v. Scully*, 16-3073-cr (Pooler, *Lynch*, Cogan[1]), the Second Circuit vacated the defendant's conviction for various offenses, including mail and wire fraud, conspiracy to defraud the United States, the sale of misbranded and unapproved drugs, and the unlicensed wholesale distribution of prescription drugs, finding that the District Court erred in excluding evidence related to his advice-of-counsel defense. The opinion provides a helpful overview of the requirements of Rule 403 balancing and the nature of the burden in establishing an advice-of-counsel defense.

Background

William Scully's conviction arose out of a drug distribution company – Pharmalogical – that he founded in 2002. Although Pharmalogical was initially set up as a wholesale distributor, when that business model did not prove sufficiently lucrative, Scully began using the company to import foreign versions of FDA-approved drugs and medical devices at reduced prices for resale in the United States at slightly below the prevailing market rate.

When one of Pharmalogical's first customers expressed a concern that the labels on the products were missing a National Drug Code, Scully consulted an attorney – Richard Gertler – to research whether Pharmalogical could legally resell the products it imported in the U.S. market. Gertler produced an opinion letter stating that Pharmalogical was in full compliance with U.S. laws and regulations. When Scully later received a letter from the FDA indicating that foreign-made versions of FDA-approved drugs are considered unapproved new drugs, Scully again approached Gertler, who prepared a second opinion letter indicating that Pharmalogical's business model did not violate any federal criminal laws. Scully continued to import and resell foreign drugs and medical devices despite increased scrutiny from the FDA. Eventually the FDA raided Pharmalogical's offices and Scully and his business partner were indicted.

The trial and conviction

At his trial, Scully sought to advance an advice-of-counsel defense, arguing that because he relied in good faith on advice from Gertler and another attorney – Peter Tomao – he lacked the requisite intent for the crimes with which he had been charged. Scully called Gertler as a witness, but the Government was able to successfully undermine the defense on cross examination, establishing that

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Jacqueline L. Bonneau
212.336.2564
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Harry Sandick
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Scully had only consulted Gertler after he started his importing business and that he had provided Gertler with incomplete and false information when seeking an opinion.

Although defense counsel did not call Tomao as a witness, Scully sought to introduce evidence of Tomao's legal advice through his own testimony. The Government moved to strike Scully's testimony on this issue as hearsay and the District Court granted the objection. The next day, Scully moved for reconsideration on the grounds that the testimony about Tomao's advice to Scully was not being offered for the truth of the matter asserted, but to establish Scully's state of mind in connection with the advice-of-counsel defense. The District Court agreed that the testimony was not hearsay, but still upheld the Government's objection under the balancing test of Rule 403, noting that although the challenged testimony was important to Scully's defense, its probative value was outweighed by the prejudice to the Government, especially in light of the fact that Tomao was available to offer direct testimony on the subject.

When the case was submitted to the jury, the District Court included an explanation of the advice-of-counsel defense in the jury instructions and on the verdict form. The instructions stated that Scully bore the burden of producing evidence in support of the defense, but noted that the Government bore the burden of proof in the case. With respect to the verdict form, the District Court directed the jury to first consider whether Scully was guilty on a particular count, and if he was, to then consider whether the advice-of-counsel defense was established, in which case Scully would be acquitted on that particular charge. Scully was ultimately convicted on almost all counts.

The appeal: Conviction reversed and remanded

Scully appealed his conviction based mainly on the grounds that the District Court improperly excluded his testimony regarding Tomao's advice, and that the District Court's instructions to the jury on the advice-of-counsel defense had been improper.

The district court erred in excluding evidence relevant to the advice of counsel defense

In addressing Scully's evidentiary arguments, the Court remarked that although the District Court abandoned its initial hearsay ruling, hearsay concerns "permeated the court's reasoning" with respect to the Rule 403 balancing. The Court held that these concerns were misplaced because circumstantial evidence of the defendant's state of mind is by definition not hearsay since it is not offered for the truth of the matter asserted. Because this evidence was completely beyond the scope of the hearsay rule and its exceptions, the Court found that it was error for the trial court to weigh this factor in the Rule 403 balancing.

The Court also held that it was inappropriate for the District Court to require Scully to call Tomao to ensure the reliability of his own testimony. Although Scully's credibility may have been doubtful, that was an issue for the jury to decide. Thus, it was inappropriate for the trial court to weigh the risk that Scully's testimony might be false if uncorroborated as part of the prejudice to the Government in the Rule 403 balancing process. The Court also noted that Scully's proffered testimony about Tomao's advice was not cumulative of Gertler's testimony because the Government had successfully cross-examined Gertler and thus the testimony regarding Tomao's advice remained vital for establishing Scully's advice-of-counsel defense. For these reasons, the Court concluded that the District Court erred in balancing the probative value and prejudicial effect of this testimony.

The Court further concluded that this error was not harmless, noting that courts weigh several factors in the harmless error analysis, including the extent to which the defendant was otherwise permitted to advance the defense and the overall strength of the prosecution's case. Here, the Court found that evidence of Tomao's advice was necessary to rebut the Government's case with respect to Scully's intent. Although Tomao's direct testimony would have been the most persuasive evidence on this subject, Scully was competent to testify as to his own state of mind and it was for the jury to determine whether his testimony was credible. The Court therefore held that Scully was entitled to a new trial.

The district court's jury instructions regarding advice of counsel constituted error

The Court next turned to Scully's challenge to the District Court's jury instructions regarding the advice-of-counsel defense. The Court held that Scully had waived his right to challenge the instructions because he failed to object to them during the trial. Because the case was being

remanded for a new trial on other grounds, however, the panel decided to provide some guidance to the trial court on the issue.

Specifically, the Court explained that although a defendant bears the burden of establishing an affirmative defense at trial, in a fraud case such as the one at bar, the claimed advice of counsel is not an affirmative defense. Rather this evidence is used to establish reasonable doubt with respect to the *mens rea* element of the crime. The Court also noted that because an advice-of-counsel instruction should only be given where there are sufficient facts in the record to support the defense, it can be confusing to instruct the jury that the defendant bears the burden of producing evidence to satisfy the elements of the defense.

The panel thus noted that on remand, the jury should be instructed that the Government bears the burden at all times of establishing that Scully had the requisite intent. The panel further explained that the jury should not receive a verdict form requiring them to determine whether Scully is guilty before considering the advice-of-counsel defense. The Court specifically cited Sand's pattern jury instructions[2] and the Seventh Circuit's model jury instructions[3] as acceptable for use in this case, and noted that any instructions on the advice-of-counsel defense should include the admonition that a defendant need not establish his good faith.

> *The Circuit rejected the argument that Scully's acts were not criminal in nature and also found sufficient evidence of guilt*

At the end of its opinion, the panel addressed Scully's two substantive challenges to his conviction: (1) that all counts premised on the distribution of drugs not bearing English-language labeling should be dismissed because these requirements are imposed by FDA regulation and therefore cannot serve as the basis for a crime; and (2) that there was insufficient evidence to convict him of two counts related to sales to a certain Dr. Jacob because Dr. Jacob did not testify at trial. The Court rejected both arguments.

With respect to the labelling charges, the Court noted that a drug is misbranded if it lacks adequate instructions for use or fails to bear the admonition "Rx only." Because the Bill of Particulars alleged that each of the drugs Scully sold lacked the "Rx only" label, and Scully did not claim otherwise during trial or on appeal, the evidence of his guilt on these charges was sufficient. The Court also noted that the Government's theory with respect to foreign-language labels was also sufficient to establish a crime since drugs bearing labels in languages other than the prevailing language in the market lack adequate instructions for use.

Finally, the Court rejected Scully's arguments with respect to the charges related to sales to Dr. Jacob. The Court noted that the victim's reliance is not an element of felony introduction of misbranded drugs into commerce and thus the fact there was no evidence that Dr. Jacob relied on Scully's misrepresentations when purchasing the drugs at issue was immaterial. The Court further explained that the Government need not call each of Scully's victims to establish its case, since it introduced ample evidence of Scully's fraudulent scheme through other witnesses.

Conclusion

There are several takeaways from this relatively rare decision reversing a conviction and remanding for a new trial. Most of them relate to the advice-of-counsel defense, which is infrequently presented in part because it depends on the defendant having disclosed all relevant facts to counsel, and in part because it can be a complicated defense for a jury to understand.

First, the advice-of-counsel defense typically involves testimony from the attorney who gave the relied upon advice. However, there is no requirement that this be so, and the Court of Appeals frowned on the District Court's attempt to make this into a requirement. The hearsay rule does not apply at all when the statement is offered for a non-hearsay purpose, as here. It was error for the district court to have imported hearsay-like reasoning when it excluded the defense testimony.

Second, in an era in which there is increasingly complicated regulation of private conduct, it is to be expected that more defendants will want to present an advice of counsel defense. In some cases, the defense may be less strong than in other cases. It is hard to say whether the defense would have been meritorious in this case, but as the Circuit explains, the question is up to the jury to decide. There are no summary judgment motions in criminal cases.

Third, when the advice-of-counsel defense is present, care must be taken not to make the jury think that the defendant has a burden of persuasion, as it might in the context of affirmative defense. The advice-of-counsel defense is meant to permit the defendant to negate criminal intent. It is not hard to see why the jury – already having checked the "guilty" box on the verdict form – would not have reversed itself based on the advice-of-counsel defense.

Fourth, the Court gave the misbranding statutes a broad but logical reading when it stated that it would be sufficient under the statute if the label was not written in English, even if it did convey adequate directions for use in another language. Although many people in the United States are fluent in other languages, the Court concluded that "medical products bearing labels in languages other than the prevailing language in the relevant marketplace . . . are, in effect, not labelled at all." Individuals who would resell products made for use outside of the United States will often be subject to a misbranding prosecution on this theory alone. In general, products made for sale outside of the United States should not be sold within the United States. Contracts often prohibit such resales, and the Second Circuit has interposed another barrier to this practice.

-By Jacqueline Bonneau and Harry Sandick

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[1] Judge Brian M. Cogan of the United States District Court for the Eastern District of New York, sitting by designation.

[2] 1 Leonard B. Sand, et al., Modern Federal Jury Instructions: Criminal, Instruction 8-4, at 8-19 (2017). There are no pattern instructions in the Second Circuit, but many judges treat those in the treatise authored by the late Judge Sand as having similar – if not more – persuasive value.

[3] Seventh Circuit Pattern Criminal Jury Instructions, § 6.12 (2012 ed.).

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REASSESSING THE OVEREXPANSION OF RICO IN WHITE COLLAR CASES

By Joe Whitley, Luke Cass, Britt Biles, Will Curtis, and Brett Switzer[1]

La Cosa Nostra, biker gangs, drug cartels. All of these organizations have at least one thing in common: they are archetypal targets of the Racketeer Influenced and Corrupt Organizations Act ("RICO" or the "Act"). Enacted as Section 901(a) of the Organized Crime Control Act of 1970, RICO was a profound leap forward in the federal government's fight against organized crime and its infiltration of legitimate business and other aspects of daily life. The purpose of the RICO statute was "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."[2] Federal prosecutors, long searching for a tool to bring federal charges against organized crime for mostly state-law offenses, finally had a legitimate chance to put some of America's most notorious criminals behind bars, and indeed did so several times.

Over the years, in a marked departure from the Act's original intent, RICO has been applied to an increasingly diverse array of situations and defendants, including some of the most well-known businesses in the world and core "white collar" defendants, cementing its status as one of broadest, if not the broadest, criminal statute in the United States Code.[3] Concededly, RICO casts its net wide enough to facilitate its application to a wide range of situations, and the Department of Justice has clear latitude to use RICO in a variety of situations. However, on a basic level, in light of punishment considerations, policy considerations, and the intent of the Act, one fundamental question persists in the white collar criminal context: why use RICO?

RICO: Background and Elements

The Racketeer Influenced and Corrupt Organization Act was passed by Congress with the declared purpose of seeking to eradicate organized crime in the United States.[4] A violation of Section 1962(c), requires: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.[5]

In order to be found guilty of violating the RICO statute, the government must prove beyond a reasonable doubt: (1) that an enterprise existed; (2) that the enterprise affected interstate commerce; (3) that the defendant was associated with or employed by the enterprise; (4) that the defendant engaged in a pattern of racketeering activity; and (5) that the defendant conducted or

[1] The authors are Attorneys at Womble Bond Dickinson (US) LLP.
[2] S.Rep. No. 617, 91st Cong., 1st Sess. 76 (1969).
[3] Congress inserted a clause into RICO at the time of its passing directing that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).
[4] *Russello v. United States*, 464 U.S. 16, 26-27, 104 S. Ct. 296, 302-303, 78 L. Ed. 2d 17 (1983); *United States v. Turkette*, 452 U.S. 576, 589, 101 S. Ct. 2524, 2532, 69 L. Ed. 2d 246 (1981).
[5] *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985).

participated in the conduct of the enterprise through that pattern of racketeering activity through the commission of at least two acts of racketeering activity as set forth in the indictment.[6]

An "enterprise" is defined to include any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity.[7] Many courts have held that the term "enterprise" has an expansive statutory definition, noting that Congress mandated a liberal construction of the RICO statute to effectuate its remedial purposes.[8]

A "[p]attern of racketeering activity" requires at least two acts of racketeering activity committed within ten years of each other.[9] Congress intended a fairly flexible concept of a pattern.[10] The racketeering predicates must be proven related, and that they amount to, or pose a threat of, continued criminal activity.[11] Racketeering predicates are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.[12] Furthermore, the degree in which these factors establish a pattern may depend on the degree of proximity, or any similarities in goals or methodology, or the number of repetitions.[13] The key aspect of RICO is its ability to tie numerous crimes together, whether or not they were committed contemporaneously or over long periods of time, and then charge those who ordered the crimes, as opposed to only those who committed them.

After its passage, the "traditional" — and perhaps intended — use of RICO was plain to see. The target was the "[m]afia as a whole, tying the big bosses to the crimes of their underlings by claiming they were all part of a 'criminal enterprise.'"[14] "The necessity which mothered this statutory invention was caused by the inability of the traditional criminal law to punish and deter organized crime."[15] In that vein, "prosecutors have used RICO to pursue some of the highest-profile organized-crime families, including the Gambino and Genoveses . . . ."[16] The "traditional" use of RICO is apparent from the DOJ's own guidelines, specifically that "[n]o criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Gang Section, Criminal Division ["OCGS"]."[17]

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[6] *United States v. Phillips*, 664 F. 2d 971, 1011 (5th Cir. Unit B Dec. 1981), cert. denied, 457 U.S. 1136, 102 S. Ct. 1265, 73 L. Ed. 2d 1354 (1982).
[7] 18 U.S.C.A. § 1961(4).
[8] *United States v. Delano*, 825 F. Supp. 534, 538-39 (W.D.N.Y. 1993), aff'd in part, rev'd in part, 55 F. 3d 720 (2d Cir. 1995), cases cited therein.
[9] 18 U.S.C.A. § 1961(5).
[10] *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 2900, 106 L. Ed. 2d 195 (1989).
[11] *Id.*
[12] *Id.* at 240, 109 S. Ct. at 2901; *Ticor Title Ins. Co. v. Florida*, 937 F. 2d 447, 450 (9th Cir. 1991).
[13] *United States v. Indelicato*, 865 F. 2d 1370, 1382 (2d Cir.), cert. denied, 493 U.S. 811, 110 S. Ct. 56, 107 L. Ed. 2d 24 (1989).
[14] Nathan Koppel, *They Call It RICO, and It Is Sweeping*, Wall Street Journal (Jan. 20, 2011), https://www.wsj.com/articles/SB10001424052748704881304576094110829882704
[15] *United States v. Elliott*, 571 F.2d 880, 911 (5th Cir. 1978).
[16] *Id.*
[17] Department of Justice Manual, *Approval of Organized Crime and Gang Section Necessary*, 9-110.320, https://www.justice.gov/jm/jm-9-110000-organized-crime-and-racketeering#9-110.320

The Expansive Use of RICO by Federal Prosecutors

As years passed following the passage of RICO, prosecutors began to apply the Act in increasingly more diverse situations against defendants who were further and further from the typical RICO defendant. Recently, federal prosecutors have continued the broad application of RICO[18] and added a large international bank to the long list of RICO targets. A Wall Street bank joined the ranks of Wall Street giants ensnared by RICO, including Michael Milken and his firm Drexel Burnham Lambert. In 2018, federal prosecutors charged four traders employed by the bank on its precious metals commodities trading desk with violations of RICO, and alleged that the bank itself was criminally liable under RICO, accusing the financial institution of, for all intents and purposes, operating a criminal enterprise, specifically through its precious metals trading business.

The allegations leveled at the bank and its traders centered around the use of a trading technique called spoofing. Spoofing, in its most basic form, is market manipulation. A trader will place an order to buy or sell a security or commodity with the intent to cancel the trade. The goal is to induce other traders to react to the trade, which will move the market, allowing the original trader to withdraw the spoofed order, and make a new order on the other side of the market to capitalize on the market reaction set off by the spoofed order. The Dodd-Frank Act of 2010 amended the Commodity Enforcement Act to make spoofing unlawful and defined spoofing as "bidding or offering with the intent to cancel the bid or offer before execution."[19] The Department of Justice has the power to criminally prosecute spoofing violations, in addition to its power to prosecute mail, wire, and commodities fraud.

The use of RICO to charge the bank and its traders with alleged spoofing was unusual, given that the alleged predicate offenses — including securities fraud, commodities fraud, spoofing, and wire fraud —, standing alone, would have been sufficient to charge the traders and the bank itself with serious criminal offenses.

DOJ's choice to charge RICO, despite the availability of alternative charges, is somewhat baffling, given that "[t]he necessity which mothered this statutory invention [of RICO] was caused by the inability of the traditional criminal law to punish and deter organized crime."[20] Certainly, charging the bank and its traders under RICO did not arise from the "inability of traditional criminal law to punish and deter" the alleged activities.

Is RICO the Appropriate Charge?

In assessing whether RICO is the appropriate mechanism to address conduct, such as spoofing and other financial crimes, the DOJ's published guidelines, which prosecutors are urged to consider before seeking a RICO indictment, are instructive. The Justice Manual guidelines

[18] "[B]y far the greater number of RICO indictments in the white collar area have no connected whatsoever to organized crime. Rather, they run the gamut of ordinary business regulatory offenses."); Gerard E. Lynch, *RICO: The Crime of Being a Criminal Parts 1 and II*, 87 COLUM. L. REV. 661, 750 (1987) Available at: https://scholarship.law.columbia.edu/faculty_scholarship/132?utm_source=scholarship.law.columbia.edu%2Ffaculty_scholarship%2F132&utm_medium=PDF&utm_campaign=PDFCoverPages

[19] 7 U.S.C. § 6c(a)(5).

[20] *Elliott*, 571 F.2d at 911.

dictate that the government should seek approval from the OCGS for a RICO indictment only if one or more of the following requirements is met:

1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying charges would not;

2. A RICO prosecution would provide the basis for an appropriate sentence under all the circumstances of the case in a way that prosecution only on the underlying charges would not;

3. A RICO charge could combine related offenses which would otherwise have to be prosecuted separately in different jurisdictions;

4. RICO is necessary for a successful prosecution of the government's case against the defendant or a codefendant;

5. Use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct;

6. The case consists of violations of State law, but local law enforcement officials are unlikely or unable to successfully prosecute the case, in which the federal government has a significant interest; [and]

7. The case consists of violations of State law, but involves prosecution of significant or government individuals; which may pose special problems for the local prosecutor.[21]

As a threshold matter, do white collar prosecutions like the spoofing case above, fit the criteria described above? It appears not – at least not in any "clear cut" manner. Although it could have been argued that the pattern of trading activity present in the spoofing case could not have been adequately addressed outside of RICO, that seems unlikely given that a plethora of other federal criminal statutes address spoofing activities.[22] Moreover, it appears that there was not even an arguable basis for claiming that any of the other guidelines were met or weighed in favor of prosecuting the spoofing activities under RICO.

To be sure, federal prosecutors have the discretion to investigate and ultimately charge white collar crimes under RICO. The Supreme Court has made clear that RICO is broad and its applicability is not limited to organized crimes cases, stating:

[21] Department of Justice Manual, *Approval of Organized Crime and Gang Section Necessary*, 9-110.310, https://www.justice.gov/jm/jm-9-110000-organized-crime-and-racketeering#9-110.320

[22] These include laws precluding insider trading under the Securities Exchange Act of 1934 and the Sarbanes-Oxley Act of 2002, prohibitions of Securities and Commodities Fraud under 18 U.S.C. § 1348; against mail fraud under 18 U.S.C. §1341; wire fraud under 18 U.S.C. § 1343; and against spoofing in particular under the Commodity Exchange Act, Section 4c(a)(5)(C), as amended by the Dodd-Frank Act of 2010.

> The notion that RICO is limited to organized crime finds no support in the Act's text and is at odds with the tenor of its legislative history . . . . Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.[23]

There could have been any number of tactical reasons for the government's choice to proceed under RICO for the spoofing case. Perhaps the use of RICO was punishment driven: the federal prosecutors were seeking stiffer sentences to deter similar schemes by other bankers in the future. Certainly, charging RICO changes the calculus for defendants who might be inclined to plead guilty to securities fraud, thinking they would face only a short prison sentence, restitution, and probation. In contrast, a RICO conviction, which defendants likely would be compelled to fight at trial, could result in a 20-year prison sentence, plus government seizure of the business associated with the criminal enterprise. The significantly greater punishments that could result from a RICO conviction would work as a serious deterrent for anyone engaging in, or planning to engage in, similar conduct.

Plus, being charged under RICO opens a defendant up to consecutive sentences for the RICO offense and the predicate offenses, if convicted.[24] The statutory maximum criminal punishment for RICO predicate offenses common to financial crimes, including securities fraud, wire fraud, and mail fraud, is in the 25-to-30-year range.[25] Under RICO, the statutory maximum in 20 years.[26] But a defendant convicted of RICO and a predicate offense would, consistent with Congressional intent, face very lengthy consecutive sentences.[27]

In addition to the penalty differences, other impacts of RICO may influence the government's decision to charge RICO instead of the predicate offenses individually. For example, RICO has a number of advantages that could be strategically or tactically significant in a given case:

- Under RICO, every additional racketeering offense committed in furtherance of the enterprise within 10 years extends the statute of limitations another 5 years.[28] In practical

[23] *H.J. Inc. v. Northwestern Tel. Co.*, 492 U.S. 229 (1989).

[24] *See United States v. Rone*, 598 F.2d 564, 571-72 (9th Cir. 1979) (holding that convictions and consecutive sentences for RICO violations and underlying predicate offenses of extortion did not violate "double jeopardy," rather they followed the spirit of what Congress intended when it passed RICO to provide enhanced penalties in addition to those imposed for the underlying predicate offenses).

[25] *See* 18 U.S.C. § 1348 (establishing that a person convicted of securities or commodities fraud "shall be fined under this title, or imprisoned not more than 25 years, or both."); 18 U.S.C. § 1348 (establishing that a person convicted of fraud by wire "shall be fined . . . or imprisoned not more than 30 years . . . .").

[26] *See* 18 U.S.C. § 1963 ("Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment) . . . .").

[27] *See United States v. Garcia*, 754 F.3d 460, 4747 (7th Cir. 2014) (holding that Congress intended to "allow defendants to receive consecutive sentences for both the predicate acts and the RICO offense.")."

[28] *See e.g, Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997) ("We recognize that RICO's criminal statute of limitation runs from the last, *i.e.*, the most recent predicate act.").; *see also Detrick v. Panalpina, Inc.*, 108 F.3d 529, 536 n. 11 (4th Cir. 1997) ("Despite RICO's failure to provide a statute of limitations for criminal violations, the general five-year "catchall" federal criminal statute of limitations applies to criminal RICO prosecutions only because Congress has provided such a criminal limitations period when no other period is specified." (internal quotations omitted)); *United States v. Pizzonia*,, 577 F.2d 455 (2d Cir. 2009) (upholding a RICO conspiracy conviction even

effect, this means that defendants could face criminal liability offenses that were committed as many as 20 years before charging, which is a dramatic increase on the normal 5-year statute of limitations for most federal crimes;

- In dealing with RICO, the usual rules on joinder, severance, and unfair prejudice are stripped away, meaning that a single jury can hear about multiple and various crimes that would not be permitted to be heard together under normal circumstances under the Federal Rules of Evidence;[29]

- Under RICO, rules regarding jurisdiction and venue are modified, allowing state crimes, sometimes even acquitted conduct, to be included in a RICO indictment and trial;[30] and

- Under RICO, a defendant can be charged twice for the same conduct – once for the predicate offense and once under RICO. Ordinarily, the principle of "double jeopardy" would prohibit this.[31]

While side-stepping double jeopardy and other procedural safeguards is permissible on the face of the Act, commentators have raised certain constitutional concerns about RICO's expanded use. Chiefly, certain aspects of RICO seemingly disregard due process, including the "the power to freeze a defendant's assets at the time of indictment and confiscate them after conviction."[32] The seizures are not limited in nature, and could amount to an entire business being seized.[33] This creates an added and especially sharp arrow in the quiver of prosecutors. "[B]y allowing the government to seize entire businesses connected even indirectly, with a defendant at the time of indictment, before any proof of guilty, is a major exception" to the general principal that defendants are presumed innocent and not subject to punishment until they are found guilty.[34] "The government is authorized, in effect, to act as a prosecutor, judge, and jury in the same case."[35] This departure from typical criminal practice in the RICO context is potentially drastic and far

though the two predicate acts occurred outside of the applicable limitations period because the government proved that the conspiracy continued into the limitations period).

[29] *See* U.S. Department of Justice, Organized Crime and Gang Section, *Criminal RICO: 18 U.S.C. §§ 1961-1968, A Manual for Federal Prosecutors*, 6th Ed., pp. 306-307 (May 2016) ("The advantages of charging a RICO conspiracy offense are the advantages associated with general conspiracy prosecutions: ease of joinder."). *See generally* Fed. R. Evid. 404(b), 403, 401; *see also United States v. Scarfo*, 2012 U.S. Dist. LEXIS 134169, at *31 (D. N.J. Sept. 19, 2012) (discussing permissive joinder rules in RICO prosecutions); Gerard E. Lynch, *RICO: The Crime of Being a Criminal Parts III and IV*, 87 COLUM. L. REV. 920, 940 (1987) Available at: https://scholarship.law.columbia.edu/faculty_scholarship/132?utm_source=scholarship.law.columbia.edu%2Ffaculty_scholarship%2F132&utm_medium=PDF&utm_campaign=PDFCoverPages

[30] *See United States v. Coonan*, 938 F.2d 1553, 1562 (2d. Cir. 1991) (discussing using state law crimes for which defendant was acquitted as predicate offenses for RICO in the context of the "chargeable under state law" language in the RICO Act).

[31] *See Rone*, 598 F.2d at 571-72 (holding that convictions and consecutive sentences for RICO violations and underlying predicate offenses of extortion did not violate "double jeopardy," rather they followed the spirit of what Congress intended when it passed RICO to provide enhanced penalties in addition to those imposed for the underlying predicate offenses); *see also United States v. Coonan*, 938 F.2d 1553, 1562 (2d. Cir. 1991).

[32] Fischel, Daniel R., *Payback: The Conspiracy to Destroy Michael Milken and His Financial Revolution*, 122-123 (1995), New York, HarperBusiness.

[33] Fischel, *Payback: The Conspiracy to Destroy Michael Milken and His Financial Revolution*, at 122-123.

[34] *Id.*

[35] *Id.*

reaching for financial institutions charged under RICO because the criminal seizure of their assets and profits could have far-reaching consequences for the financial markets and economic stability. In addition to other constitutional concerns, at least one Supreme Court justice has expressed concern that RICO is unconstitutionally vague.[36]

However, the use of RICO may not be solely a function of penalties and strategic and tactical advantages to DOJ. Granted, the tools RICO offers and changes to criminal procedure are powerful incentives for the government. But, there are other statutory tools with similar maximums available to the government. So, the question still remains: Why use RICO in white collar crime cases like the spoofing case?

What we may be seeing through the use of RICO is a strategic decision by the government, an attempt to use RICO — with all of its ramifications, criminal and financial —to secure guilty pleas to lesser charges.[37] Faced with the complications and implications of a RICO prosecution, defendants may be more inclined to plead guilty to a "lesser" offense, such a securities or commodities fraud.

Indeed, whether intended or not, this was the result in the spoofing case. The bank entered into a deferred prosecution agreement with the government and agreed to pay financial penalties for the spoofing scheme as well as another fraudulent trading scheme. Some of the individual defendants also pled guilty to "lesser" offenses, including: commodities fraud, conspiracy to commit wire fraud, spoofing, and commodities price manipulation. Other charged defendants recently failed to obtain a dismissal of the racketeering charges, leaving open the possibility that some of the former commodities traders will go to trial on RICO charges.

Regardless of how the spoofing case is finally resolved, the use of RICO in the context of securities fraud and other financial crimes is a profound shift by the Department. Attorney General Holder's 2010 memorandum and the Justice Manual requires prosecutors to charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction."[38] Given the available penalties, the most serious offense typically is the underlying substantive offense, not RICO. While we do not question the motives of the federal prosecutors who made these decisions, given this game-changing nature and increasing application in areas outside of the traditionally understood original purpose, we ask: is it time to reassess the use of RICO for white collar offenses?

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[36] *H.J., Inc. v. Northwestern Bell Tel. Co*., 492 U.S. 229, 255-256 (1989) (Scalia, J. Concuring) ("No constitutional challenged to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge [concerning RICO's unconstitutional vagueness] is presented."). It is worth noting that a significant number of courts who have assessed the constitutionality of RICO have rejected those concerns. *See, inter alia, United States v. DeRosa*, 670 F.2d 889, 895 (9th Cir. 1982), *cert denied* 495 U.S. 993 (1982).

[37] This would not be the first time the government has been accused of utilizing RICO as a coercive weapon to get defendants to plead, as the accusation was leveled at Giuliani and his office during the prosecution of Princeton/Newport in the 1980s. Scot J. Paltrow, *Six in Princeton/Newport Case Escape Tough RICO Sentences*, LOS ANGELES TIMES, Nov. 7, 1989, Six in Princeton/Newport Case Escape Tough RICO Sentences - Los Angeles Times (latimes.com).

[38] Justice Manual § 9-27.300; *see also* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf

WHITE COLLAR WATCH

RICO Offers a Powerful Tool to Punish Executives for the Opioid Crisis

By Peter J. Henning

May 23, 2019

Get the DealBook newsletter to make sense of major business and policy headlines — and the power-brokers who shape them.

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The conviction of John Kapoor, the Insys Therapeutics founder, and four other executives at the pharmaceutical firm on racketeering charges this month was a significant step toward imposing substantial penalties on corporate officials for contributing to the nation's opioid epidemic.

Prosecutors rarely use the Racketeer Influenced and Corrupt Organizations Act, or RICO, in corporate criminal prosecutions because it can be a difficult offense to prove, but the law allows them to pull together disparate defendants into a single case.

And in the prosecution of the Insys executives, the Justice Department was able to bring together a number of different violations — drug distribution, mail and wire fraud, and breach of the duty of honest services — into one case. The RICO conspiracy provision allowed prosecutors to establish that Insys engaged in a long-term plan to distribute Subsys, a fentanyl-based pain reliever that is highly addictive, by bribing doctors and misleading insurers about the needs of patients who were not supposed to receive the drug.

The trial lasted 10 weeks, and the jury deliberated for 15 days, which shows how complicated a RICO conspiracy case can be for prosecutors. Mr. Kapoor's attorney said the length of the deliberations confirmed "that this was far from an open-and-shut case."

The next issue will be how much prison time to impose on the defendants. By obtaining convictions under the federal racketeering law, the Justice Department is likely to seek a more significant prison term than typical for corporate misconduct.

To prove a RICO conspiracy, prosecutors must show an agreement to violate other federal laws through what is called a pattern of racketeering activity. The indictment in the Insys case referred to the drug distribution statute as one of the predicate acts for the RICO violation, which may enable the Justice Department to seek a significant prison term for Mr. Kapoor.

The maximum penalty authorized for a RICO violation is 20 years. Under the federal sentencing guidelines, a defendant convicted of a RICO conspiracy will be sentenced based on the underlying criminal violations. For a drug offense, the amount of Subsys improperly prescribed will be a key determinant of the recommended sentence.

For example, if the amount of drugs illegally distributed was more than 36 kilograms, the recommended sentence could be as long as 235 months in a federal prison, which would be just under the 20-year punishment cap in RICO. If the government proves that only a smaller amount of drugs were improperly distributed, that would most likely result in a recommended sentence of at least 10 years.

Insys also received significant income from its sales of Subsys, so if prosecutors focus on the company's profits from the illegal conduct, the recommended sentence could be as much as 15 years in prison.

Another punishment that could be imposed under RICO is mandatory asset forfeitures of any gains from the illegal activity, which means bonuses and stock awards from the company for meeting sales targets. In addition, prosecutors can seek Mr. Kapoor's 47 million shares of Insys, which constitute more than a 60 percent ownership stake.

The question now is whether this RICO conspiracy prosecution will become the template for cases against corporate executives for their role in the opioid crisis.

RICO cases require the government to gather evidence that there was a systematic pattern of violations, not just isolated misconduct. That means proving that an enterprise, which can be the company itself, was operated through illegal acts.

The case against Mr. Kapoor and other Insys executives involved extensive testimony about bribes paid to doctors and lies to insurers to get them to pay for the drug, which made it much easier to show a pattern of illegal conduct. But if the violations occur at a lower level in a pharmaceutical company, linking them to the top executives may be difficult.

Nevertheless, the successful prosecution of the Insys executives is sure to embolden the Justice Department to look at RICO.

The breadth of the law, enacted to help fight organized crime, makes it a potentially powerful tool to police the conduct of pharmaceutical firms that helped fuel the opioid crisis. The hefty penalties that can be imposed are a potent stick to get cooperation from those who participated in illegal activity.

For those reasons, it would hardly be surprising if RICO became the tool of choice for federal prosecutors looking to build a case against pharmaceutical executives.

PRESS RELEASE

Founder and Four Executives of Insys Therapeutics Convicted of Racketeering Conspiracy

Thursday, May 2, 2019

For Immediate Release

U.S. Attorney's Office, District of Massachusetts

First successful prosecution of top pharmaceutical executives for crimes related to the prescribing of opioids

BOSTON – The founder and four former executives of Insys Therapeutics Inc. were convicted today by a federal jury in Boston in connection with bribing medical practitioners to prescribe Subsys, a highly-addictive sublingual fentanyl spray intended for cancer patients experiencing breakthrough pain, and for defrauding Medicare and private insurance carriers.

Insys founder and former Executive Chairman John N. Kapoor, 76, of Phoenix, Ariz.; Richard M. Simon, 48, of Seal Beach, Calif., the former National Director of Sales; Sunrise Lee, 38, of Bryant City, Mich., a former Regional Sales Director; Joseph A. Rowan, 45, of Panama City, Fla., a former Regional Sales Director; and Michael J. Gurry, 55, of Scottsdale, Ariz., the former Vice President of Managed Markets, were convicted by a federal jury of RICO conspiracy. Sentencing dates have not yet been set.

Prior to the start of the trial, two other high-level Insys executives pleaded guilty and testified during the trial: Michael Babich, of Scottsdale Ariz., the former CEO and President of the company, and Alec Burlakoff, of Charlotte, N.C., the former Vice President of Sales.

From May 2012 to December 2015, the defendants conspired to bribe practitioners, many of whom operated pain clinics, in order to induce them to prescribe Insys' fentanyl-based pain medication, Subsys, to patients often when medically unnecessary. Subsys is a powerful, rapid-onset opioid intended to treat cancer patients suffering intense breakthrough pain.

The defendants used pharmacy data to identify practitioners who either prescribed unusually high volumes of rapid-onset opioids, or had demonstrated a capacity to do so, and bribed and provided kickbacks to the practitioners to increase the number of new Subsys prescriptions, and to increase the dosage and number of units of Subsys. The defendants also measured the success of their criminal enterprise by comparing the net revenue earned from targeted practitioners with the total value of bribes and kickbacks paid. The defendants used this information to reduce or eliminate bribes paid to practitioners who failed to meet satisfactory prescribing requirements, which they determined to be the net revenue equal to at least twice the amount of bribes paid to the practitioner.

The bribes and kickbacks took multiple forms. In March 2012, Insys began using "speaker programs" purportedly intended to increase brand awareness of Subsys through peer-to-peer educational lunches and dinners. However, the programs were used as a vehicle to pay bribes and kickbacks to targeted practitioners in exchange for increased Subsys prescriptions and increased dosage. In most instances, the programs were shams.

The defendants also conspired to mislead and defraud health insurance providers who were reluctant to approve payment for the drug when it was prescribed for non-cancer patients. The defendants conspired to achieve this by setting up the "Insys Reimbursement Center," (IRC) which was dedicated to obtaining prior authorization for payment directly from insurers and pharmacy benefit managers. Beginning in October 2012, employees of the IRC posed as employees of the practitioner and used "the spiel" – a script of false and misleading representations about patient diagnoses in order to secure approval for the drug by the insurance provider. For example, since insurers were more likely to authorize payment for Subsys if a patient was being treated for cancer-related pain, IRC employees were instructed to mislead insurers regarding the true diagnosis of the patient.

"Today's convictions mark the first successful prosecution of top pharmaceutical executives for crimes related to the illicit marketing and prescribing of opioids," said United States Attorney Andrew E. Lelling. "Just as we would street-level drug dealers, we will hold pharmaceutical executives responsible for fueling the opioid epidemic by recklessly and illegally distributing these drugs, especially while conspiring to commit racketeering along the way. I applaud the prosecutors and investigators who fought this case to the finish and won. This is a landmark prosecution that vindicated the public's interest in staunching the flow of opioids into our homes and streets."

“These executives exploited vulnerable patients and cashed in on dishonest doctors by bribing them to prescribe one of the most powerful, addictive opioid painkillers to patients who should never have received it. Motivated by sheer greed, they lied to insurance companies and are no better than street level drug dealers,” said Joseph R. Bonavolonta, Special Agent in Charge of the FBI Boston Division. “Today’s verdict marks an important step in holding pharmaceutical company executives responsible for their role in fueling the opioid epidemic. Rest assured, the FBI will continue to identify and bring to justice corrupt individuals and companies whose business practices promote fraud with a total disregard for patient safety.”

“Combating the opioid epidemic remains a top priority for HHS OIG. For too long executives have not been held accountable for corporate wrongdoing. These verdicts underscore our continued commitment to holding individuals and corporations accountable for their fraudulent conduct,” said Phillip Coyne, Special Agent in Charge, U.S Department of Health and Human Services, Office of the Inspector General. “No matter what the scheme or how elaborately disguised, we will follow the evidence where it takes us, including to the corporate ranks. HHS OIG and our law enforcement partners will continue to investigate and prosecute healthcare fraud to the fullest extent of the law.”

“The opioid epidemic is one of the largest public health tragedies our country has faced, and as the FDA continues to forcefully confront the opioid crisis, ensuring safe and appropriate use of these powerful medications remains a cornerstone of our efforts,” said Melinda K. Plaisier, FDA Associate Commissioner for Regulatory Affairs. “In this case, we’ve seen unacceptable behavior from the defendants who influenced health care providers to prescribe the most powerful type of opioid – an immediate release form of fentanyl – to patients who did not need it, putting them at serious risk of overdose and in some cases, death. The FDA has taken recent steps to strengthen our risk mitigation program for this specific class of products to better ensure the safe use of these products, and we will continue to work with our law enforcement partners to pursue and bring to justice those who place profits before the public health.”

“The reckless actions by these executives whose products included controlled medications increased the potential for diversion and addiction, which jeopardizes the public health and safety,” said DEA Special Agent in Charge Brian D. Boyle. “DEA pledges to work with our law enforcement and regulatory partners to ensure that rules and regulations are followed.”

“The integrity of TRICARE, the U.S. Defense Department's health care program for military members and their dependents, is a top priority for the Defense Criminal Investigative Service (DCIS),” stated Special Agent-in-Charge Leigh-Alistair Barzey, DCIS Northeast Field Office. “Today’s verdicts are the direct result of a joint effort by several agencies and is demonstrative of their commitment to investigate and prosecute individuals and companies that commit health care fraud. The DCIS will continue to work with its law enforcement partners and the U.S. Attorney's Office to protect the TRICARE program and ensure that TRICARE patients receive the excellent health care that they deserve.”

“This case shows that healthcare fraud will not be tolerated. The Employee Benefits Security Administration will work together with our law enforcement partners in these important investigations to protect participants in private sector health plans, detect and deter health care fraud, and contribute to fighting the opioid epidemic,” said Carol S. Hamilton, Acting Regional Director of the U.S. Department of Labor, Employee Benefits Security Administration, Boston Regional Office.

“Today’s verdict highlights our commitment to defending our mail system from illegal misuse and ensuring public trust in the mail,” said Inspector in Charge Joseph W. Cronin of the U.S. Postal Inspection Service’s Boston Division. “We are committed to investigating and bringing to justice those who contribute to the opioid abuse epidemic. We would not be successful in doing so without our fellow law enforcement partners and the U.S. Attorney’s Office.”

“The verdict in this case sends a clear message to pharmaceutical companies that tactics like these will not be tolerated,” said Matthew Modafferi, Special Agent in Charge of the United States Postal Service Office of Inspector General in the Northeast Area Field Office. “This is a win for the public in the war against opioids. The Special Agents of the U.S. Postal Service Office of Inspector General will continue to work closely with the U.S. Attorney’s Office and our law enforcement partners to bring those to justice who commit these kind of offenses.”

“Bribing doctors and misrepresenting patient’s medical conditions in order to boost profits by overprescribing a highly addictive opioid is reprehensible criminal conduct,” said Sean J. Smith, Special Agent in Charge of the Department of Veterans Affairs, Office of Inspector General, Criminal Investigations Division. “Today’s verdict is an important step in holding those in the industry that commit crimes accountable. Targeting veterans’ dependents in the CHAMPVA program with these corrupt practices is unacceptable and we are pleased to have contributed to this outstanding multi-agency criminal investigation.”

“Every day, millions of Americans struggle with opioid addiction,” said Thomas W. South, OPM Deputy Assistant Inspector General for Investigations. “These executives put the health and wellbeing of Federal employees, annuitants, and their families at risk in order to make a profit. I would like to recognize the incredible work done by the United States Attorney’s Office, OPM OIG agents, and our law enforcement partners to hold these executives accountable. The OPM OIG remains committed in working to stop such unscrupulous behavior.”

The charge of RICO conspiracy provides for a sentence of no greater than 20 years in prison, three years of supervised release and a fine of $250,000, or twice the amount of pecuniary gain or loss. Sentences are imposed by a federal district court judge based upon

the U.S. Sentencing Guidelines and other statutory factors.

The U.S. Attorney's Office would like to acknowledge the cooperation and assistance of the U.S. Attorney's Offices around the country engaged in parallel investigations, including the District of Connecticut, Eastern District of Michigan, Southern District of Alabama, Southern District of New York, District of Rhode Island and the District of New Hampshire. The efforts of the Central District of California and the Justice Department's Civil Fraud Section of the Department of Justice are also greatly appreciated.

Assistant U.S. Attorneys K. Nathaniel Yeager, Chief of Lelling's Health Care Fraud Unit, David Lazarus, Chief of Lelling's Asset Recovery Unit, and Fred M. Wyshak, Chief of Lelling's Public Corruption & Special Prosecutions Unit, are prosecuting the case.

Updated May 2, 2019

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Laurie Brecher is a litigator who focused her practice on white-collar criminal and regulatory enforcement defense and prosecutions, internal investigations, and complex federal and state civil litigation. She served for a decade as an AUSA in the Criminal Division of the U.S. Attorney's Office for the Southern District of NY, holding several positions, including Chief of the General Crimes Unit and Senior Trial Counsel of the Securities & Commodities Fraud Task Force. After her government service, Laurie was Deputy General Counsel, Litigation & Regulatory for Pitney Bowes, Inc. Prior to her government service, she was a litigation associate at Cravath, Swaine & Moore, and Howard, Darby & Levin. (now Covington & Burling). She was also honored to have served as a law clerk to the Hon. Jon O. Newman, U.S. Court of Appeals for the Second Circuit. Laurie earned her law degree with highest honors from New York University School of Law (1983), where she was the Senior Articles Editor of the *NYU Law Review.* She received her undergraduate degree, *summa cum laude*, from Union College in 1980, where she was elected to *Phi Beta Kappa.* She has been active in the NY City Bar Assn. (former member of International Law and Judiciary Committees) and the ABA (former Chair of Criminal Litigation Committee and former Division Director for the Litigation Section). She has been a member of the Inn's White Collar Team for 11 years, having served as a co-leader for 6 years. Among her public service commitments, she is a college coach for Yonkers Partners in Education, a former board and founding member of Friends of Chappaqua Performing Arts Center, and a member of the Legal Advisory Council for Sanctuary for Families.

Brian S. Choi is a partner at Kasowitz Benson Torres, where his practice focuses on complex commercial litigation and white collar defense and investigations. He has represented companies, boards of directors, and individuals under investigation by the United States Department of Justice, the Securities Exchange Commission, and other regulatory enforcement agencies. He also has significant experience representing clients in a broad spectrum of commercial litigation matters in federal and state courts, including securities fraud, antitrust and breach of contract cases. Brian has been recognized on Benchmark Litigation's 40 & Under Hot List. Prior to joining the firm, Brian clerked for the Honorable William H. Pauley III in the Southern District of New York. Brian is a 2011 cum laude graduate of Duke University School of Law, and he received his B.A. with distinction from University of Michigan in 2008.

Glenn Colton is a partner in the White Collar and Government Investigations practice at ArentFox Schiff. He represents individuals, companies, and boards of directors in white collar criminal and civil enforcement investigations. Glenn previously served for nearly 10 years as an Assistant United States Attorney in both the civil and criminal divisions in the Southern District of New York. In that capacity, he was lead or co-lead trial counsel in approximately 25 trials, and all but one ended in conviction, government verdict (in civil cases) or resolution on terms favorable to the government. He has served as an instructor at the FBI Academy at Quantico, the US DOJ National Advocacy Center, and the National Institute of Trial Advocacy. Glenn frequently is called upon to provide expert legal analysis to a wide variety of publications and media outlets, including *The New York Times*, *The Wall Street Journal*, *The National Law Journal*, TruTV, CNBC, CBS Radio, Law360, The Street.com, Reuters.com, and The Deal.com. In addition to his law practice, Glenn is a sports radio host on SiriusXM, and one of approximately 20 members of the Fantasy Sports and Gaming Association Hall of Fame, in large part for his work on the save-the-industry litigation. He received his Bachelor of Science degree, *summa cum laude*, from

SUNY-Binghamton, and his J.D. degree from the New York University School of Law.

Jonathan Coppola is a Trial Attorney in the Division of Enforcement at the U.S. Commodity Futures Trading Commission ("CFTC"). Before joining the CFTC, he clerked for Judge Lee G. Dunst of the United States District Court for the Eastern District of New York and worked for nearly five years in the litigation group at Hogan Lovells US LLP. At Hogan Lovells, Jonathan was a member of multiple successful trial teams. He received his Bachelor of Arts, *summa cum laude*, from Fordham University and his J.D., *cum laude*, from Fordham University School of Law. While at Fordham Law School, he externed with Judge Eric N. Vitaliano of the United States District Court for the Eastern District of New York, the Public Corruption Unit of the United States Attorney's Office for the Southern District of New York, and the Public Corruption Unit of the New York County District Attorney's Office. Jonathan was also a member of the Presidential Succession Clinic, where he worked to solve gaps in the Twenty-Fifth Amendment to the United States Constitution.

Mary Diaz is an associate at Walden Macht & Haran LLP where she focuses on white collar defense and investigations. She is a member of the Federal Bar Council, Hispanic National Bar Association, and the Cafecitos Network, and enjoys international travel, cooking, and running during her free time. After graduating from Wesleyan University with a Bachelor of Arts degree in Government in 2014, Mary earned her Juris Doctor from Fordham University School of Law in 2020. While at Fordham Law she was a member of the Fordham Moot Court, Environmental Law Review, Stein Scholars for Public Interest, LALSA, Fordham Law Advocates for Voter Rights, and held internships at the U.S. Securities and Exchange Commission and Department of Justice. Prior to law school, Mary spent three years as a paralegal at the U.S. Attorney's Office for the Southern District of New York in the Securities and Commodities Fraud Unit.

Richard Diorio is an associate at Sitaras & Associates, PLLC. His practice focuses on commercial litigation and arbitration, representing individuals and businesses. Prior to joining S&A, Richard worked on a broad range of litigation and regulatory matters. Richard graduated from the Benjamin N. Cardozo School of Law, where he served as the Senior Articles Editor for the Cardozo Journal of Conflict Resolution and as an extern at the New York State Office of the Attorney General and New York State Department of Financial Services.

Richard is licensed to practice in New York State and the United States District Courts for the Southern District and Eastern District of New York. He is a member of the New York State Bar Association, New York City Bar Association, and American Inn of Court.

Harry Dixon is a Vice President for Americas Exam and Audit Management in the Global Financial Crimes Division of MUFG Bank, Ltd. In this role, he provides reporting, advisory, and oversight to regulatory exams and internal audits across MUFG's Americas region, with a special focus on exams with the OCC and the Federal Reserve Board.

He is active on MUFG's Pro Bono Council, and he is a graduate of Leadership New York. He joined the New York American Inn of Court in August 2021. Before moving to New York in 2019, Harry practiced law for almost six years in his home state of Georgia, where he focused on commercial litigation and white-collar criminal defense. He also served as the co-Chair to the American Bar Association's International Anti-Money Laundering Committee; was elected as a

Fellow of the American Bar Foundation; and graduated from the State Bar of Georgia's Young Lawyers Division Leadership Academy. He is licensed to practice in both New York and Georgia, and he graduated from the University of Georgia Honors Program and the University of Georgia School of Law, where he served as an Articles Editor on the Journal of Intellectual Property Law.

Milosz Gudzowski is a Trial Attorney at the Department of Justice – Antitrust Division. Milosz has been at the Antitrust Division for ten years and has prosecuted both criminal and civil antitrust matters in a variety of industries, including construction, municipal contracting, airlines, telecommunications, and automotive. Milosz likes to play tennis and lives on the upper east side in Manhattan.

Jeffrey Gross is a partner in the New York office of Reid Collins & Tsai LLP. Jeff has represented clients in a wide variety of high-stakes, complex commercial litigation through trial. He appears in federal and state courts and arbitrations across the country representing plaintiffs in professional-liability litigation, including legal and audit malpractice, financial-fraud-based litigation, and insolvency-related disputes. Jeff received his J.D. from the University of Pennsylvania Law School, where he was an Arthur Littleton Legal Writing Instructor. He is a Phi Beta Kappa graduate of the University of Virginia, where he was an Echols Scholar.

Diana Haladey is happy to be celebrating her 17th anniversary on the White Collar Team, serving as co-leader for 12 years, and winning two national American Inns of Court Outstanding Program awards (for Insider Trading Under the Microscope and Orange is the New Varsity Blue – From Bribe Agreement to Plea Agreement). She was previously at White & Case LLP, and interned at the U.S. Attorney's Office EDNY Civil Division. She went to Fordham University School of Law where she won best oralist in the first-year moot court competition and competed on the Jessup International Law and National Moot Court teams. She received an A.B. in English from Dartmouth College where she co-captained the women's rugby club. She loves being part of a team and wishes to thank all her White Collar teammates over the years.

Meredith Jones is General Counsel of New York City Economic Development Corporation. NYCEDC's mission is to create shared prosperity across the City's five boroughs by strengthening neighborhoods and growing good jobs. It is the City's official economic development corporation. Before joining NYCEDC, she was a transactional lawyer in Palo Alto, California. Prior thereto, she served as Chief of the Cable Services Bureau of the Federal Communication Commission in Washington, D.C., involved in multichannel video and telecom competition issues. Before joining the FCC, she was General Counsel to the National Oceanic and Atmospheric Administration in Washington, D.C., which includes the National Weather Service and is the nation's trustee for marine mammals and anadromous fish and the lead agency for oceanic and atmospheric issues. She was a member of the legal team of the Bechtel group of companies in San Francisco, California and was a partner in a San Francisco law firm. Meredith began her legal career in NY City.

John Moscow has spearheaded and been involved in some of the most complicated fraud cases of the past 25 years. John has led investigations and conducted prosecutions and defenses involving money laundering and theft by high-ranking corporate individuals and major financial institutions both domestically and throughout the world.

John spent 30 years with the New York County District Attorney's Office, where he prosecuted

international economic crime, securities fraud and criminal violations of fiduciary duties. His knowledge and involvement in the investigation and prosecution of cases involving financial and corporate fraud led to the development of the theory of jurisdiction that has become widely adopted by lawyers prosecuting cases out of Manhattan.

In private practice he has handled forfeiture cases for a foreign government, for third party claimants and for defendants.

Deanna Paul is an associate at Walden Macht & Haran LLP. She previously served as a New York City prosecutor, in both the Brooklyn and Queens District Attorney's Offices; where she specialized in child homicides, violent crimes against children and other felony sex crimes, and tried more than two dozen cases to verdict.

Between practicing and joining WMH, Deanna was a national and breaking news reporter for *The Washington Post* and a legal correspondent for *The Wall Street Journal*. She was part of the Post team that was a finalist for the 2019 Pulitzer Prize in Explanatory Reporting, and in 2022, Deanna received the New York Press Club Award for political reporting and the Newswoman's Club of New York's Front Page Award for her reporting in the wake of the ruling that overturned *Roe v. Wade*.

She has previously taught trial advocacy at Fordham University's School of Law and currently teaches media law at Columbia University School of Journalism.

Amanda Raines is a senior associate at Arnold & Porter, where she practices in the white collar defense and investigations group. Amanda has performed internal fraud and corruption investigations on behalf of corporations and individuals, and has represented clients against enforcement actions by governmental agencies including the Department of Justice and the U.S. Securities and Enforcement Commission. Within the firm, Amanda serves on the Well-Being Committee and acts as the New York office senior associate cohort representative for the Committee of Associates. From 2019-2020, Amanda clerked for the Honorable Stewart D. Aaron of the U.S. District Court for the Southern District of New York. She is a magna cum laude graduate of Fordham University School of Law, and received her B.A., also magna cum laude, in English and Human Rights from Columbia University, school of General Studies. While in law school, she was symposium editor for the *Fordham Urban Law Journal*. In addition, she was a judicial intern in the U.S. District Court for the Southern District of New York.

Walter Ricciardi was a partner at Paul, Weiss Rifkind Wharton & Garrison LLP from 2008 through 2022 is currently Of Counsel to the firm. He is also an Adjunct Professor at NYU School of Law where he has taught a seminar on SEC Enforcement Issues since 2007. He has extensive experience defending a broad variety of investigations conducted by the U.S. Securities and Exchange Commission, the Public Company Accounting Oversight Board and other regulatory authorities. He also has conducted internal investigations for public companies and audit committees, including investigations related to allegations of accounting and financial fraud. Walter is recognized for Securities Regulation: Enforcement in *Chambers USA* (2013-2023), where clients report he is "terrific and well placed to deal with challenging matters" and "brings a wealth of experience." He served as a note and comment editor of the *New York University Law Review.*

Walter was appointed and served a three-year term from 2012 to 2014, on the Public Company Accounting Oversight Board's Standing Advisory Group ("SAG"). The role of the SAG is to assist the Board in reviewing existing auditing and related professional practice standards and evaluating proposed standards, and to recommend to the Board new or amended standards. He was a member of the Independent Standards Council of the Sustainability Accounting Standards Board ("SASB") which oversees the development of SASB's sustainability accounting standards from January 2015 to March 2016.

Prior to joining Paul, Weiss in June 2008, Walter was the Deputy Director of the SEC's Division of Enforcement, where he supervised many of the Commission's most significant investigations related to financial fraud, insider trading, investment advisers and broker-dealers. Upon his departure from the SEC, the Commission's chairman stated that "Walter Ricciardi, as much as anyone in the Commission's modern history, has professionalized the management of the SEC's enforcement program." *The Wall Street Journal* reported that his departure from the SEC was a "blow to the enforcement program - he has won the affections of the staff and has boosted morale." Prior to joining the SEC, Walter spent 20 years with PricewaterhouseCoopers and its predecessor, Coopers & Lybrand, where he was in charge of defending the firm's litigation and regulatory matters. While at PwC, he was elected by his partners to serve on the firm's board, which is responsible for overseeing the management of the firm. He was also elected by the partners to serve on the Global Oversight Board of the PwC global organization.

Jared M. Rosen is an Assistant District Attorney with the Bronx District Attorney's Office. As an ADA with the Public Integrity Bureau, he is involved in the prosecution and investigation of corruption committed by public servants, including government employees, and appointed and elected officials, as well as excessive uses of force and misconduct by police officers. He was formerly in the Rikers Island Prosecution Bureau, where he was involved in the investigation and prosecution of criminal activity in New York City jails, including gang assaults and contraband smuggling. Previously, Mr. Rosen was an Executive Agency Counsel and the Market Manager at the Business Integrity Commission, an agency tasked with eliminating organized crime influence, anti-competitive practices and corruption from New York City's trade-waste industry and public wholesale markets. Prior to this, Jared was an Assistant Counsel at the Waterfront Commission of New York Harbor, a bi-state agency created to eliminate corruption and unfair hiring practices in the Port of New York/New Jersey. Jared graduated from Cornell University with a B.S. in Industrial & Labor Relations and received his law degree from Brooklyn Law School.

Solomon Shinerock is a partner at Lewis Baach Kaufmann Middlemiss, where he focuses on white-collar crime and regulatory investigations, as well as cases arising from civil frauds. Mr. Shinerock spent over seven years in public service, as both a federal prosecutor in the Northern District of New York and an Assistant District Attorney at the Manhattan District Attorney's Major Economic Crimes Bureau. In those roles, he coordinated with multiple law enforcement agencies, regulatory bodies, and prosecuting offices to investigate complex fraud, tax evasion, and money laundering cases arising from domestic and cross-border transactions. He played a lead role in several high-profile matters. In recognition of his work prosecuting an international bank fraud and $35 million money laundering case involving the parent company of Newsweek, he was awarded the 2021 FinCEN Director's Law Enforcement Award in the Significant Fraud Investigation category. Mr. Shinerock also served as a law clerk to the Honorable Harold Baer, Jr., of the U.S. District Court for the Southern District of New York and spent four years as an associate at an international law firm in New York.

Steven Tugander is a Trial Attorney in the New York Office of the United States Justice Department's Antitrust Division and has investigated and prosecuted numerous criminal antitrust cases affecting various industries in jurisdictions located throughout the Northeast. In 2022 and 2023, Mr. Tugander served as the New York Office's Acting Assistant Chief. In 2017 and 2018, Steven served as the Antitrust Division's Criminal Special Projects Coordinator, reporting directly to the Deputy Assistant Attorney General and the Director of Criminal Enforcement. Steven has served on the Executive Committee of the New York State Bar Association's Antitrust Law Section since January 2000. He served as Chair of the Section from January 2005 through January 2006, having previously served as Vice-Chair and Secretary of the Section. In addition, he also currently serves on the Section's Cartel and Criminal Practice subcommittee. Since 2004, Steven has been a member of the New York American Inn of Court. During his tenure with the Inn, Steven has organized a number of Continuing Legal Education programs related to various white-collar criminal law topics. In December 2017, Steven was honored as the first recipient of Antitrust Division's Ralph T. Giordano Award. The award recognizes excellence in cartel enforcement. In January 2023, Steven received the NYSBA Antitrust Law Section's William T. Lifland Award, presented to antitrust practitioners in recognition of their contributions and

accomplishments in the field of antitrust. The Service Award acknowledges those who throughout their professional careers have distinguished themselves as leading antitrust practitioners as well as serving the broader antitrust community in a leadership role. Beginning in January 2024, Steven will teach antitrust as an adjunct professor at Hofstra Law School.
Mr. Tugander graduated from SUNY-Stony Brook in 1986 with a B.A. in Political Science, earned a J.D. from Hofstra Law School in 1989, and was admitted to the New York State Bar in 1990.