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Reversal of a RICO Predicate Offense on Appeal: Should the RICO Count be Vacated?

INTRODUCTION

The Organized Crime Control Act of 1970 was enacted in response to organized crime's increasing threat to the economic and social welfare of the nation, and the inability of traditional criminal procedures and sanctions to arrest this menace effectively. The Act provides law enforcement officials with sharper legal tools for gathering evidence and adds new substantive criminal prohibitions, more effective sanctions, and other novel remedies to deal with the unlawful activities of those engaged in organized crime.

The Organized Crime Control Act is composed of twelve separate titles. This comment deals with Title IX, which is entitled Racketeer Influenced and Corrupt Organizations (RICO). Often the penalties for a violation of RICO are more severe than the penalties for the crimes which constitute the definition of "racketeering activity." The RICO penalties include fines equal to twice the gross profits or other proceeds from an offense, imprisonment for as long as 20 years, and forfeiture of interests acquired or maintained in violation of RICO. 

RICO is exceptional in many respects. It is unusual not only because of its sweeping nature, its incursions into state law, and its severe penalties, but also because of its attempt to alter a traditional principle of statutory construction. This principle is that penal statutes shall be subject to strict interpretation, or, at the very least, that their words shall be given no more than normal meaning. See United States v. Enmons, 410 U.S. 396, 411 (1973). RICO, on the other hand, specifically provides that "provisions of this title shall be liberally construed to effectuate its remedial purposes." RICO, § 904(a), 84 Stat. 947 (1971).
A person may fall within the ambit of RICO's prohibitions by engaging in one or more of four activities: (1) using income derived from a pattern of racketeering activity to acquire an interest in an enterprise in interstate or foreign commerce; (2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity; (3) conducting the affairs of an enterprise through a pattern of racketeering activity; or (4) conspiring to commit any of these offenses. The "pattern of racketeering activity" must include at least two predicate acts of "racketeering activity." The requirement of two predicate acts is satisfied if there exists a violation of two or more existing state or federal offenses, "one of which occurred after the effective date of this chapter and the last of which occurred within...


7. Id. § 1962(a).

8. Id. § 1962(b).

9. Id. § 1962(c).

10. Id. § 1962(d). For a defendant to be convicted of a RICO conspiracy violation, the defendant need not have actually participated in any of the predicate crimes. United States v. Torres Lopez, 851 F.2d 520 (1st Cir. 1988). RICO is a continuing violation statute, that is, "a member of a RICO enterprise is responsible for all the offenses committed by the enterprise regardless of whether he directly participated in each racketeering act." Id. at 524.

11. 18 U.S.C. § 1961(5) (1988). The Supreme Court defined a "pattern of racketeering activity" in H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893 (1989). The Court stated that "[i]t is not the number of predicate acts but the relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged.'" Id. at 2900. The "plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." Id. Examples the Court gave were: "a distinct threat of long-term racketeering activity . . .; predicate acts or offenses are part of an ongoing entity's regular way of doing business . . .; [or] the predicates are a regular way of conducting defendant's ongoing legitimate business . . . ." Id. at 2902.

12. 18 U.S.C. § 1961(5) (1988). The defendant must be guilty of a "pattern of racketeering activity," which requires at least two separate racketeering acts (often called "predicate acts" or "predicate offenses"). "If convictions for all of the predicate offenses underlying a RICO count are vacated, then the conviction for the RICO count must also be vacated." United States v. Walgren, 885 F.2d 1417, 1424 (9th Cir. 1989). Additionally, it is improper to charge two predicate offenses when one act by the defendant happens to violate two separate statutes. A pattern of racketeering activity requires two acts, not two statutory offenses. Id.; see also United States v. Kragness, 830 F.2d 842 (8th Cir. 1987).

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ten years (excluding any period of imprisonment) after the commis-
sion of a prior act of racketeering activity."16 The commission of
these predicate offenses in conjunction with the "enterprise"16 forms
the basis for a RICO conviction.16

However, federal courts differ on whether a RICO conviction may
stand after some of a defendant's convictions for the predicate acts,
on which his RICO conviction is based, are vacated by a reviewing
court but at least two such convictions remain.17 The Fifth Circuit
(the majority view) will uphold a RICO conviction after a predicate
act is vacated on appeal, while the Third Circuit (the minority view)
will vacate the RICO conviction thereby avoiding an inconsistent
verdict with the lower court. Several problems arise due to this con-
lict among federal circuits. Routine dismissal of RICO convictions
in the minority view jurisdictions is unfair to defendants who are

14. Id. § 1961(5).
15. Id. § 1961(4). An "enterprise" includes "any individual, partnership, corpo-
ration, association, or other legal entity, and any union or group of individuals associated in
fact although not a legal entity." Id. To be convicted of a RICO violation, the defendant
"person must be a separate and distinct entity from the 'enterprise.'" Schreiber Dist.
Corp. v. Serv-Well Furniture Co., 806 F.2d 1393, 1396 (9th Cir. 1986). A corporation
possesses an existence separate from its incorporator; therefore, a defendant cannot shield
himself from RICO by claiming that a corporate enterprise is an extension of himself.
United States v. Feldman, 853 F.2d 648 (9th Cir. 1988).

A RICO enterprise also requires a common purpose and continuity. RICO requires
neither intentional nor purposeful behavior, rather it requires a common purpose which is
"proved by evidence of an ongoing organization, formal or informal, and by evidence that
the various associates function as a continuing unit." United States v. Turkette, 452 U.S.
576, 580 (1981); see United States v. Feldman, 853 F.2d 648 (9th Cir. 1988) (discussion
of the continuity concept).

Some courts hold that the enterprise must have an existence separate and apart from
the pattern of racketeering activity. For a Ninth Circuit discussion of the issue, see
United States v. Kirk, 844 F.2d 660, 664 (9th Cir. 1988) and United Energy Owners
1988).

16. United States v. Hooker, 841 F.2d 1225 (4th Cir. 1988) outlined the five re-
quirements to prove a substantive RICO offense. They are: "(1) the existence of an en-
terprise; (2) the defendant's association with the enterprise; (3) the defendant's participation
in the affairs of the enterprise; (4) a pattern of racketeering activity; and (5) the
enterprise's effect on interstate or foreign commerce." Id. at 1227.

Conviction for a violation of RICO results in severe criminal penalties and forfeiture of
have violated RICO is liable for treble damages, costs, and attorneys fees. Id. § 1964(c).
A criminal conviction will allow for consecutive sentencing for a substantive RICO con-
viction and a RICO conspiracy conviction. For example, the defendants in United States
v. Yarbrough, 852 F.2d 1522 (9th Cir. 1988), were sentenced to consecutive 20 year
terms. The sentence withstand an eighth amendment cruel and unusual punishment at-
tack. Id.

17. See McCulloch v. United States, 822 F.2d 63 (11th Cir.), cert. denied, 484
prosecuted in majority view jurisdictions because their defendant counterparts in the minority view jurisdictions get their sentences drastically reduced simply because of where the prosecutor decided to prosecute the case. Allowing such unevenhanded administration of RICO convictions not only prejudices certain defendants but also encourages prosecutors of multidistrict enterprises to forum shop. Prosecutors whose RICO convictions are methodically reversed in the minority view jurisdictions are also unduly burdened.

This comment begins by discussing the concept of verdict consistency in a RICO conviction and then examines the judicial reasoning supporting each of the two views in the federal circuits: the majority view, which upholds the RICO conviction regardless of subsequent court action on a predicate conviction; and the minority view, which vacates the RICO conviction if a predicate offense is vacated on appeal. This comment analyzes the two views to demonstrate that the majority view is the more effective and concludes by discussing possible solutions to the problem through congressional reform of the RICO Act.

I. RICO AND VERDICT CONSISTENCY

Inconsistent verdicts are a familiar phenomena which have received the most attention when the jury itself returns inconsistent verdicts. This Comment deals with inconsistent verdicts arising in a different context: inconsistency resulting from the reversal of a predicate offense on appeal. The legal theories concerning inconsistent jury verdicts should apply to inconsistent verdicts resulting from appellate review.

Recently, in United States v. Powell, the United States Supreme Court reaffirmed the general rule that inconsistent verdicts may stand. The Powell Court followed the rule established in Dunn v. United States, in which the Supreme Court noted that "[c]onsistency in the verdict is not necessary" and "[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt."

The defendant in Dunn was tried pursuant to a three count indictment charging violations of the federal liquor laws. The first count

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19. Id.
20. 284 U.S. 390 (1932) (Holmes, J., citing Steckler v. United States, 7 F.2d 59, 60 (1925)).
21. Id. at 393.
22. Id.
23. Id. at 391.
alleged that the defendant had maintained a "common nuisance" by selling alcohol; the second and third counts charged unlawful possession and sale of alcohol. The jury convicted the defendant of the first count and acquitted him of the second and third counts. The Supreme Court rejected the claim that the defendant was entitled to discharge because the verdicts were inconsistent by concluding that although the jury has no legal "right" to return verdicts resulting from compromise, it has the authority to do so.

Chief Justice Rehnquist stated for the Powell Court that "inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the government at the defendant's expense." This is because the government cannot petition for appellate re-evaluation regarding the sufficiency of the evidence, which provides sufficient protection to a criminal defendant. Rehnquist also noted that, because inconsistent verdicts may also support a criminal defendant's case, there is adequate protection to prevent review of such judgments at a defendant's request. Since this uncertainty always exists and since an acquittal may not be challenged by the government, it is unacceptable to permit new trials for defendants as a common policy. Also probable is "that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or leniency, arrived at an inconsistent conclusion on the lesser offense."

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24. Id.
25. Id.
26. Id. at 391-92.
27. Id. at 393. The Dunn rule was later invoked in United States v. Dotterweich, 320 U.S. 277 (1943), to support a jury verdict finding the president of a corporation guilty of introducing adulterated or misbranded drugs into interstate commerce, but acquitting the corporation of the same charge. The rule was reaffirmed in Harris v. Rivera, 454 U.S. 339 (1981), which held that a defendant could not obtain relief by writ of habeas corpus on the basis of inconsistent verdicts rendered after a state bench trial. In Harris, the Supreme Court noted that Dunn and Dotterweich establish "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." Id. at 346.
29. Id. at 64-67. The Court further noted that the government cannot attack an inconsistent acquittal, even if palpably erroneous, because of the Constitution's double jeopardy clause.
30. Id. at 65.
31. Id.
32. Id. The Powell Court also rejected an argument that would have permitted a defendant to contest inconsistent verdicts on the basis that "some error [was] worked against them." Id. at 66; see Smith v. Phillips, 455 U.S. 209, 217 (1982) ("due process does not require a new trial every time a juror has been placed in a potentially compro-
The consistency question must also be considered when an inconsistency in verdicts arises after an appellate court reverses a predicate offense upon which the jury may have relied in issuing a guilty verdict on a RICO charge. Such a determination is crucial because the predicate offense, of which the defendant obtained reversal, may have been one of the two offenses necessary to prove the pattern of racketeering activity. Juries usually issue general verdicts since special verdicts are disfavored in criminal law. In a general verdict, the jury does not specify which two predicate offenses satisfied the “pattern” requirement. Thus it may be unclear after a reversal of one of the convictions charged whether the jury used it to find the requisite pattern to obtain the RICO conviction.

Although Powell deals with a jury itself initially returning an inconsistent verdict, as opposed to a verdict whose basis is questioned as a result of an appellate reversal of a predicate offense, this fact should actually add to the strength of the majority view’s argument that the jury’s decision on the RICO verdict should not be disturbed. If we are not going to upset a jury verdict when the jury itself controlled the inconsistency, why should the verdict be upset simply because the inconsistency was created by a decision of a reviewing court?

The Ninth Circuit held, in United States v. McCall, that its role in reviewing such cases is not to rationalize the jury’s verdict or to reconcile apparently inconsistent findings, rather, it only decides if adequate evidence existed to support a guilty verdict. Since neither rationality nor consistency is required by the jury verdict and the

34. 592 F.2d 1066 (9th Cir.), cert. denied, 441 U.S. 936 (1979).
35. Id. at 1068; see Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 482 (5th Cir. 1986) (court “under a constitutional mandate to search for a view of the case that makes the jury’s answers consistent”) (quoting Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355, 364 (1962)); see also R.B. Co. v. Aetna Ins. Co., 299 F.2d 753, 759 (5th Cir. 1962). The court in Armco reviewed the verdicts and reconciled the irreconcilable by concluding the “most logical explanation [was] that the verdict was the result of the trial judge’s instructions regarding justifiable reliance.” Armco, 782 F.2d at 482.
36. Dunn v. United States, 284 U.S. 390, 393 (1932); see Hoag v. New Jersey, 355 U.S. 464, 472 (1958) (the leading case on the permissibility of inconsistent verdicts in a criminal context: “jury verdicts are sometimes inconsistent or irrational”); see also Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 485 (1933). In civil cases, the rule is less clear. See, e.g., Bickel, Judge and Jury- Inconsistent Verdicts in the
jury is presumed to have followed the court’s instructions, a reversal of a RICO conviction upon reversal of a predicate offense would involve an unwarranted and unwelcome intrusion into the jury’s deliberations.

Given most courts' hesitancy to probe the internal operations of a jury, the double jeopardy clause which precludes acquittal review, and the potential for jury leniency, the best policy is to shield jury verdicts from appellate review and allow a jury’s inconsistent verdict in a criminal case to stand. Such a rule allows a defendant to be convicted on one count of a multiple count indictment and acquitted on another count, even when the commission of one crime without the other would have been impossible. The Powell Court reasoned that since a defendant receives a benefit upon an acquittal on some counts it is “neither irrational nor illogical to require ... [the defendant] to accept the burden of conviction on the counts on which

38. Harris v. Rivera, 454 U.S. 339, 347-48 (1981) (suggesting that a codefendant might have been acquitted due to some unexpressable lingering doubt, a misunderstanding of legal standards, or simple leniency); see also Standefer v. United States, 447 U.S. 10, 22-23 (1980) (considering the possibilities that the jury acquitted out of compassion or that the government presented different evidence against the alleged cohort).
39. United States v. Powell, 469 U.S. 57, 68-69 (1984). The Powell Court specifically stated, however, that it was not deciding the proper disposition of a case “where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilty on the other...” Id. at 69 n.8.
40. Los Angeles v. Heller, 475 U.S. 796, 804 (1986) (Stevens, J., dissenting); see United States v. Messerlian, 832 F.2d 778, 797 (3d Cir. 1987). The court stated: [A]lthough ... [the defendant] was acquitted of perjury, there is ample evidence that he testified untruthfully at the federal grand jury proceedings. Inconsistency of the verdicts does not necessarily mean that the jury did not consider the evidence of perjury in deciding whether a conspiratorial act had occurred ... [The] jury verdicts in criminal cases will stand, despite internal inconsistencies, so long as there is sufficient evidence to support the verdict. Id.; see United States v. Andrews, 850 F.2d 1557, 1561 (11th Cir. 1988) (“Consistent verdicts are unrequired in joint trials for conspiracy: where all but one of the charged conspirators are acquitted, the verdict against the one can stand.”).
41. Powell, 469 U.S. at 69; see also Harris, 454 U.S. at 345 (“[i]nconsistency in a verdict is not a sufficient reason for setting it aside ... [both] with respect to inconsistency between verdicts on separate charges against one defendant” (citing Dunn v. United States, 284 U.S. 390 (1932)) and “also with respect to verdicts that treat codefendants in a joint trial inconsistently” (citing United States v. Dotterweich, 320 U.S. 277, 279 (1943)). See generally Dunn v. United States, 284 U.S. 390, 394 (1932) (“verdicts cannot be upset by speculation or inquiry into such matters”).
II. DIVISION AMONG THE FEDERAL CIRCUITS

The Supreme Court recently denied certiorari to a RICO case in which one of the predicate offenses, but not all, had been vacated upon appellate review.\textsuperscript{43} The court below had followed a prior decision of the Fifth Circuit, \textit{United States v. Peacock}.\textsuperscript{44} The \textit{Peacock} court had vacated several convictions for predicate acts committed by three RICO defendants, but concluded that when “each of the appellants were properly convicted by the jury of at least two racketeering acts which were related to the . . . enterprise,”\textsuperscript{45} their RICO convictions remain valid. The Fifth Circuit recognized that this holding conflicted with the Third Circuit’s decision in \textit{United States v. Brown}.\textsuperscript{46}

In \textit{Brown},\textsuperscript{47} the Third Circuit reversed two defendants’ RICO convictions when two of their four convictions for predicate acts were invalidated upon review. The Ninth Circuit\textsuperscript{48} has recognized this conflict, but has declined to adopt either position to date. The Seventh Circuit recently attempted to dispel the conflict by stating that the \textit{Brown} decision contained

no suggestion that the jury would have been acting irrationally if it had acquitted the defendant of the racketeering charge even though two predicate offenses were properly proved; whereas in both [a previous Seventh Circuit case\textsuperscript{49} and the \textit{Peacock} decision], where racketeering convictions were upheld, the jury would have been acting irrationally to have done this.\textsuperscript{50}

The Seventh Circuit doubted whether the \textit{Brown} jurisdiction “would overturn the conviction in such a case” and if such a conjecture was correct then there would be no conflict.\textsuperscript{51}

\textsuperscript{42.} \textit{Powell}, 469 U.S. at 69. The court also relied on the fact that \textit{Dunn} had withstood exception for 53 years.


\textsuperscript{44.} 654 F.2d 339 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983).

\textsuperscript{45.} Id. at 348.

\textsuperscript{46.} 583 F.2d 659 (3d Cir. 1978), cert. denied, 464 U.S. 965 (1983).

\textsuperscript{47.} Id.

\textsuperscript{48.} \textit{United States v. Lopez}, 803 F.2d 969, 976 (9th Cir. 1986), cert. denied, 481 U.S. 1030, \textit{reh’g denied}, 483 U.S. 1012 (1987) (Court recognized both \textit{Brown} and \textit{Peacock}, but concluded that even assuming \textit{Brown} was correct, other grounds precluded reversal of the RICO conviction).

\textsuperscript{49.} \textit{United States v. Anderson}, 809 F.2d 1281, 1284-85 (7th Cir. 1987). This court avoided the applicability of a rule consonant with \textit{Peacock} by holding that the evidence was sufficient to support a finding that defendant committed each of the substantively charged predicate acts. The court said that it was not faced with the question that would arise if the evidence was sufficient only as to some of the substantively charged acts.

\textsuperscript{50.} \textit{United States v. Holzer}, 840 F.2d 1343, 1351 (7th Cir. 1988).

\textsuperscript{51.} Id. The \textit{Holzer} court reversed the RICO count calling it a “crazy-quilt” since the predicate federal crimes were not separately charged and eligible separately charged
However, such reasoning is an oversimplification. It fails to consider that a jury may still be acting rationally when it acquits on the RICO count while upholding the predicate acts. The jury simply may not have found the required pattern of racketeering activity or the required nexus with an enterprise to uphold the RICO count.

A. The Brown Rule (Minority View)

The Court of Appeals for the Third Circuit, in Brown, agreed with the defendant's argument that the racketeering counts required reversal as a matter of law if one of the predicate offenses was reversed on appeal. The Brown court followed the reasoning of United States v. Dansker in which “defendants were charged in one count with a conspiracy to bribe” two individuals, Ross and Serota. The district court directed that if the unlawful objective of the claimed conspiracy was to bribe either Ross or Serota that the jury may convict the defendants. The jury received the conspiracy charge (Count I) on two alternate theories. The jury came back with a general verdict of guilty on the conspiracy count. Since the general verdict only stated the jury’s conclusion, it was impossible upon appeal to determine which of the alternative theories formed the basis of the jury's resolution. Counts II and III charged the defendants with the bribery of Ross and Serota. The appellate court held that there was insufficient evidence at the trial level to justify a conviction for bribing Serota (Count III), but that the evidence was sufficient to convict the defendants of bribing Ross (Count II).

The defendants argued that because of the appellate court's decision to reverse on Count III (bribery of Serota), it was impossible to ascertain whether the government had properly charged and established the conspiracy count. The defendants argued that their convictions may have been based exclusively on the grounds that they had conspired to bribe Serota and that if such was the case their

53. 537 F.2d 40 (3d Cir. 1976).
54. Id. at 51.
55. Id.
56. Id.
57. Id.
58. Id. at 44.
59. Id. at 40.
60. Id. at 51.
convictions must be reversed because such a verdict would be inconsistent.\textsuperscript{61}

The government responded that since the jury concluded that defendants collectively had bribed Ross (Count II), the jury must have also resolved that the “Ross bribe (Count II) was at least one of the conspiracy’s objectives” (Count I). Therefore, the conspiracy conviction was not threatened by the appellate court’s reversal of the Serota bribery charge.\textsuperscript{62}

The \textit{Dansker} court rejected this argument because the “crime of conspiracy is separate and distinct from the related substantive offense.”\textsuperscript{63} Therefore, a jury could quite possibly conclude that an alleged conspiracy is “non-existent” while simultaneously convicting the defendants of the underlying crimes charged.\textsuperscript{64} The court reversed the conspiracy conviction and remanded for a new trial, reasoning that “the possibility remains, albeit slim, that the jury found that the defendants engaged in a conspiracy to bribe Serota alone (Count III) in spite of its guilty verdict on (Count II).”\textsuperscript{65}

In \textit{Brown}, the defendants were convicted of extortion, three counts of mail fraud, a RICO section 1962(b) violation, and a RICO section 1962(d) violation.\textsuperscript{66} The four substantive counts were charged as predicate acts of the RICO counts. The \textit{Brown} court reversed two counts of mail fraud for insufficient evidence; the defendants then made the same argument as the \textit{Dansker} defendants.\textsuperscript{67}

They argued that because the general verdict made it impossible “to determine upon which two counts the jury relied in returning a guilty verdict” under the RICO section 1962(b) and section 1962(d) violations, the RICO counts should be vacated.\textsuperscript{68} The substantive offenses charged as predicate acts were distinct and hence it was arguably impossible to determine from the verdict which offenses the jury relied upon for finding the necessary pattern of racketeering activity. The court agreed with the defendants that if they had reversed any of the other substantive counts, then reasoning analogous to \textit{Dansker} would have required reversal of the RICO counts.\textsuperscript{69} The

\begin{itemize}
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} United States v. Brown, 583 F.2d 659, 661 (3d Cir. 1978). A section 1962(b) violation forbids “any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain ... any interest in ... any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.” 18 U.S.C. § 1962(b) (1988). A § 1962(d) violation forbids “any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” \textit{Id.} § 1962(d).
\item \textsuperscript{67} \textit{Brown}, 583 F.2d at 661.
\item \textsuperscript{68} \textit{Id.} at 669.
\item \textsuperscript{69} \textit{Id.}
\end{itemize}
reasoning was that the possibility existed that the jury may have depended on either of the two counts reversed for insufficient evidence to reach its guilty verdict on the two RICO counts.  

Some courts have distinguished Brown when the predicate act that is reversed is a conspiracy to commit one of the substantive predicate acts. If the conspiracy counts cover the substantive offenses charged as predicate acts and, as long as there are convictions on the remaining substantive predicate acts which occurred in the conduct of the enterprise, the court will not vacate the RICO count. Where the jury believed that the conspiracy was a part of the enterprise, the reviewing court will conclude that the substantive offenses of the conspiracy were likewise part of the enterprise.

B. The Peacock Rule (Majority View)

The Court of Appeals for the Fifth Circuit, in United States v. Peacock, faced a fact situation similar to that in Brown and upheld the RICO conviction. The indictment had charged the Peacocks with twenty-four counts including “racketeering, 18 U.S.C. [section] 1962(c) [Count 1], mail fraud, 18 U.S.C. [section] 1510 [Counts 2-23], and obstruction of justice, [Count 24].” The appellants argued that, because the jury gave a general verdict of guilty against each appellant on Count I (the RICO count), if the appellate court were to reverse any of the predicate racketeering acts “the Court must also reverse [the RICO Count] because it is impossible to determine upon which two counts the jury relied in returning a guilty verdict.” The court then addressed the Brown decision and Brown’s reliance upon Dansker, stating that even if Dansker was decided correctly, the situation here was different:

[The] danger, if any, in a conspiracy case alleging several objectives is that

70. Id.
71. United States v. Weisman, 624 F.2d 1118 (2d Cir. 1980).
72. 654 F.2d 339 (5th Cir. 1981).
73. Id. at 340. “The racketeering enterprise was, in essence, an arson ring.” Id. at 341. This enterprise’s pattern of racketeering activity “included ten arsons, one murder, twenty-two mail frauds (these are the same twenty-two mail frauds which were charged substantively in Counts 2-23) and an act of obstruction of justice which involved two additional murders.” (this was also Count 24). Id.
74. Id. at 348 (this was the argument in Brown). But see United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989) (if one of the two predicate offenses underlying a substantive RICO count is vacated, the RICO count must also be vacated); United States v. Holzer, 840 F.2d 1343, 1352 (7th Cir. 1988); United States v. Joseph, 781 F.2d 549, 554 (6th Cir. 1986); United States v. Truglio, 731 F.2d 1123, 1132 (4th Cir.), cert. denied, 469 U.S. 862 (1984).
if one of the objectives is not supported by evidence, it cannot be determined whether or not the jury's verdict of guilty rested upon its conclusion that the defendants had an objective which can be supported by the evidence (that is, there is a sufficiency of evidence problem that would require reversal of the conspiracy count).

The Peacock court distinguished Dansker by reasoning that a conviction under RICO section 1962(c) is unlike a Dansker conspiracy situation. A section 1962(c) charge requires (1) the defendant be convicted of two racketeering acts and (2) "the two or more predicate crimes . . . be related to the affairs of the enterprise but . . . not [that they] be related to each other." Therefore, no sufficiency of evidence problem arises. However, in a conspiracy situation, the crime of conspiracy is separate and distinct from the related substantive offense.

The Peacock court concluded that, as long as the jury convicted the defendants of at least two racketeering acts "which were related to the enterprise," the RICO count would stand.79 The court then upheld the RICO count despite reversing one defendant's arson conviction (Count 1, 3(a)) and the other two defendants' murder (Count

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75. Peacock, 654 F.2d at 348.
76. 18 U.S.C. § 1962(c) (1988) states:
[I]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or 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.

Id.

77. Peacock, 654 F.2d at 348 (quoting United States v. Elliot, 571 F.2d. 880, 889 n.23 (5th Cir. 1978); see United States v. Phillips, 664 F.2d 971, 1009 n.55 (5th Cir. 1981) (congressional intent dictates that RICO and its predicate acts are separate and distinct). Thus, Phillips held that a "defendant could [properly] be convicted for the predicate acts which form the [pattern of racketeering activity] basic to a RICO charge, and later [be prosecuted] under RICO." Id. (citing United States v. Anderson, 626 F.2d 1358, 1367 (8th Cir.), cert. denied, 450 U.S. 912 (1980)); United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

78. Peacock, 654 F.2d at 348.
79. United States v. Peacock, 654 F.2d 339 (5th Cir. 1981); see United States v. Corona, 885 F.2d 775 (11th Cir. 1989) (affirms the Peacock rule); see also United States v. Parness, 503 F.2d 430 (2d Cir. 1974). The court in Parness decided it is not necessary to indict a person specifically for a predicate act in order to charge the person under RICO, although it is necessary to specify the predicate acts in the RICO indictment. Peacock, 654 F.2d at 441. For example, if a person engages in a fraud scheme for which two acts of mail fraud are the predicate offenses, it is not necessary to issue a three count indictment charging two counts of mail fraud and one RICO count; a single RICO count is sufficient. However, in practice, prosecutors usually indict for predicate offenses as well as for RICO. The Parness court agreed that the reversal of a predicate offense did not justify interfering with the jury's deliberations. The defendant was convicted of interstate "transportation of stolen property" (2 counts), "causing a person to travel in interstate commerce in furtherance of a scheme to defraud" (one count), and a RICO section 1962(b) violation. Id. The court decided that "a conviction on any two of [the three alleged acts of racketeering] was sufficient to establish the necessary pattern of racketeering activity," and sustain a RICO conviction for acquiring an enterprise affecting interstate or foreign commerce. Id.
1, 3(l)) and related mail fraud (Counts 16-23) convictions. The court reasoned that due to the jury's use of special verdict forms and due to its verdict on Counts 2-24, the jury had sufficiently indicated each defendant was convicted "of at least two racketeering acts which were related to the arson enterprise." Additional support for the court's holding was evidenced from the fact that "a RICO conspiracy is by definition broader than an ordinary conspiracy to commit a discrete crime." A RICO conspiracy is broader because each RICO conspiracy participant need only conspire to take part in the operation of the alleged enterprise by engaging in two predicate crimes and because "unrelated crimes" by others who engage in the enterprise's activities qualify as components of the RICO conspiracy.

A recent Tenth Circuit case upheld a RICO conviction because it was "assured by the separate convictions [on other substantive counts] that the jury had found defendant guilty of committing at least two of the predicate acts necessary for conviction." The Tenth Circuit was adhering to dicta set forth in United States v. Weisman, in which the defendants sought reversal of their RICO counts because they believed that some of the conspiracy counts were improperly considered as predicate acts. However, since the separate substantive crimes were also charged in the RICO count as predicate acts, the court had available at least two predicate acts.

C. Reconciliation of the Conflict

When a particular fact situation exists it is possible to reconcile the conflicting viewpoints. If it is clear that the RICO conviction is amply supported by the jury's finding of numerous other "legally sufficient" predicate acts, the RICO conviction will be upheld in both jurisdictions. For example, if the predicate acts were also substantively charged offenses, and the defendant was convicted of all,

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80. Peacock, 654 F.2d at 348; see United States v. Erwin, 793 F.2d 656, 670 n.21 (5th Cir. 1986) (court held that the reversal of one of the four predicate acts did not affect the RICO conviction). The jury convicted the defendant of one other predicate offense and he had previously been convicted of another. Therefore, "even if the jury disbelieved the evidence of the third . . . the requisite two nevertheless remain." Id.
81. Id.
82. Id.
83. United States v. Friedman, 854 F.2d 535 (2d Cir. 1988).
84. Colorado Interstate Gas v. Natural Gas Pipeline, 885 F.2d 683 (10th Cir. 1989).
85. 624 F.2d 1118, 1124 (2d Cir.), cert. denied, 449 U.S. 871 (1980).
then the court is not left to speculate as to the grounds for the substantive RICO conviction. The court in *United States v. Brennan* analyzed this fact situation. In *Brennan*, fourteen Travel Act offenses were separately charged as substantive counts against the defendant and also served as predicate acts for the RICO count. The court stated that “the separate Travel Act counts ‘operated like special verdicts; by finding guilt on (all) those counts the jury also found that [the predicate acts] had been shown.’”

The Third Circuit (the *Brown* jurisdiction), in *United States v. Zauber*, recognized this distinction. In *Brown*, it was impossible to ascertain on which predicate acts the jury had based the RICO conviction. However, in the case before it, the court concluded that the defendants were convicted of enough predicate acts to affirm the RICO conviction. Therefore, in situations where the substantive counts and the predicate acts of the RICO count are closely related or identical, both jurisdictions will uphold the RICO conviction. The substantive convictions are utilized as a type of special verdict to reconstruct what the jury must have concluded.

**D. Comparison to the Double Jeopardy Issue**

Anyone convicted of a RICO offense, by the definition of “racketeering activity,” will also be found to have committed the predicate offenses on which the RICO charge was based. To illustrate, if the predicate offenses of the RICO charge are two acts of mail fraud and the defendant is found guilty, then the defendant has not only committed a RICO offense but has also committed two acts of mail fraud. It is common practice to indict persons for both the RICO offenses and the predicate offenses using separate counts for each. This raises the issue of whether a conviction violates the constitutional rule against double jeopardy or the rules against multiplicity.

The Court of Appeals for the Tenth Circuit, in *United States v. Hampton*, discussed Congress’s intentions in enacting the RICO

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87. Id. at 115; see also United States v. Pepe, 747 F.2d 632, 668 (11th Cir. 1984).
89. Id. at 151-54.
90. “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .” U.S. CONST. amend. V.
91. Multiplicity is charging the same defendant for a single offense in several counts. United States v. DeRosa, 670 F.2d 889, 895 (9th Cir.), cert. denied sub. nom. Bertman v. United States, 459 U.S. 993 (1982) and cert. denied sub. nom. DeSantis v. United States, 459 U.S. 1014 (1982). It is distinguished from “duplicity” which is the joining in a single count of two or more distinct and separate offenses.
92. 786 F.2d 977 (10th Cir. 1986) (court upheld consecutive sentences for appellant for substantive RICO violations and the underlying predicate acts).
provisions with regard to the double jeopardy clause of the fifth amendment. The court stated:

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

The court analyzed RICO's "statutory framework and legislative history" and asserted Congress had indicated its intent that RICO impose enhanced sanctions. It found allowance of "cumulative punishment for substantive RICO violations and the underlying predicate acts" served the congressional purpose of providing new and greater penal prohibitions. Accordingly, there was no multiplicity in convicting and sentencing a defendant separately on both the RICO count and the substantive counts.

The Ninth Circuit, in United States v. Rone, addressed the argument that a defendant is placed in double jeopardy either when a


94. Hampton, 786 F.2d at 980 (citing The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (emphasis added by the court)). Another common rationale is that even though both charges arise out of the same conduct, the RICO offense has the added element of a "pattern"; the government must prove at least two separate instances of racketeering activity.

95. Id.; see United States v. Hartley, 678 F.2d 961, 991-92 (11th Cir.), reh'g denied, 688 F.2d 852 (1982), cert. denied, 459 U.S. 1170, cert. denied sub. nom. Treasure Isle, Inc. v. United States, 459 U.S. 1183 (1983); see also United States v. Hawkins, 658 F.2d 279, 288 (5th Cir. 1981) (a RICO offense may be based in part upon a predicate offense for which the defendant has already been convicted and served a sentence).

96. United States v. Boylan, 620 F.2d 359, 361 (2d Cir.), cert. denied, 449 U.S. 833 (1980) (the multiplicity argument is "unpersuasive on both statutory and constitutional grounds").

97. 598 F.2d 564, 571 (9th Cir. 1979), cert. denied sub. nom. Little v. United States, 445 U.S. 946 (1980). Blockburger v. United States, 284 U.S. 299, 304 (1932), states that the statutory offenses must be examined to ascertain "whether each provision requires proof of a fact which the other does not." Id. In Rone, if the section 1962(c) RICO charge had exclusively consisted of the two extortions, Blockburger problems might have arisen. Rone, 598 F.2d at 571. However, in Rone, the jury found defendants guilty of three murders in addition to the two acts of extortion. See also Braverman v. United States, 317 U.S. 49, 54 (1942), in which the court stated that one conspiratorial agreement generally equals one conspiracy, regardless of the number or diversity of its objectives. But, when the conduct in question violated two separate conspiracy statutes, the Supreme Court, in American Tobacco Co. v. United States, 328 U.S. 781, 788 (1946), permitted conviction under section 1 and section 2 of the Sherman Act, even though the defendants made only one agreement.
RICO conviction is based upon a predicate crime for which the defendant has already been punished due to a prior conviction or when the defendant might be punished due to a contemporaneously charged substantive (predicate) offense. The 

Rone defendants argued "consecutive sentences" were inappropriate for a substantive RICO violation and for their extortion violations because the extortion charges also counted as predicate offenses for the RICO count. The Ninth Circuit held that "[t]here is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and [for] the underlying or predicate crimes which make up the racketeering pattern." Congress specifically stated that "nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title." The preceding cases and provisions indicate that Congress intended broad application of the RICO Act and courts have sustained convictions where the appeal has addressed the double jeopardy issue. It seems unusual to presume, as the Brown court did, that Congress intended to limit the application of RICO and go against traditional jurisprudence regarding verdict consistency simply because of the nature of RICO. There is nothing in RICO's text that suggests that a rule other than the traditional rule should govern RICO jury verdicts.

III. ALTERNATIVES TO DISMISSING THE RICO COUNT

A. Specific Findings Required

By a two to one majority, in United States v. Coonan, the Second Circuit approved a proposed jury charge allowing specific findings in a RICO case in which the RICO count consisted of "thirty-two predicate acts of racketeering activity." The jury instructions

98. Rone, 598 F.2d at 571. An example of the former would be when a defendant was previously convicted for the crime of extortion and now that same act of extortion is being used by the prosecution as a possible predicate act to support a subsequent RICO charge. An example of the latter would be when a defendant is charged concurrently with the substantive crime of extortion and also a RICO count which is supported by that same act of extortion as is charged in the substantive extortion count.

99. Id.

100. Id.


102. 839 F.2d 886 (2d Cir. 1988).

103. Id. at 886-87. The racketeering activities included "eight murders, three attempted murders, five conspiracies to commit murder, four kidnappings, and various acts of loansharking, extortion, narcotics trafficking, illegal gambling, mail fraud, and counterfeiting." Id.
defined a RICO enterprise, membership in the enterprise, and instructed that the enterprise must have influenced interstate commerce.\textsuperscript{104} The jury was to be instructed concerning the predicate acts of the RICO count which had not been dismissed, the parties’ contentions regarding those predicate acts, and the requirement that the predicate acts be “related to the enterprise.”\textsuperscript{106} However, the jury was not to be required to decide whether any defendant joined in enterprise activities “through a pattern of racketeering activity.”\textsuperscript{106}

Instead of rendering a general verdict, the jury would utilize special verdicts to indicate if the government had established (1) membership in the enterprise, (2) that the enterprise existed, and (3) culpability beyond a reasonable doubt regarding each predicate offense.\textsuperscript{107} The trial judge would then deduce any RICO culpability “mechanically” from the jury’s decree.\textsuperscript{108} For example, if the jury found both the existence of an enterprise and the defendant’s membership therein, the trial judge would determine the guilt or innocence on the RICO counts “merely by counting the number of predicate acts found by the jury to have been committed by each defendant.”\textsuperscript{109} However, only with the defendant’s consent could such an instruction be given.\textsuperscript{110} In this case, the defendant agreed but the government objected arguing that the proposed instruction constituted an extraordinary seizure of control by the jury.\textsuperscript{111} The government claimed a “right to a general verdict.”\textsuperscript{112} It also claimed the instruction intruded “upon its jury-trial rights” because the jury was not instructed regarding “the existence of a ‘pattern of racketeering activity.’”\textsuperscript{113}

The Second Circuit provided an alternate solution which ad-

\textsuperscript{104} Id. at 893.
\textsuperscript{105} Id. at 887; see Beck v. Mfg. Hanover Trust Co., 820 F.2d 46, 51 (2d Cir. 1987), cert. denied, 484 U.S. 1005, reh’g denied, 485 U.S. 1030 (1988).
\textsuperscript{106} Coonan, 839 F.2d at 888.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.; see also United States v. Benevento, 836 F.2d 60, 72 (2d Cir. 1987), cert. denied, 486 U.S. 1043 (1988); United States v. Ianniello, 808 F.2d 184, 189-93 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987) (“the government must prove that the defendant committed at least two . . . predicate acts”). In Coonan, the trial judge adopted the special findings charge because he thought it would be “beneficial to defendants.” 839 F.2d at 888. He stated that if a jury is told that they have to find two predicate acts to find a defendant guilty of a RICO count that the jury would step back and think that if they need two acts they had better be careful not to acquit on other predicate acts. Id.
\textsuperscript{110} Coonan, 839 F.2d at 888.
\textsuperscript{111} Id. at 889.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
dressed some of the government’s concerns. The court suggested bifurcating jury deliberations into two phases: first, participation in the predicate offenses; and second, guilt on the RICO count itself. The jury would respond to special interrogatories regarding the predicate offenses before being advised that two predicate acts were required for a RICO conviction. Subsequently, the jury would be instructed as to the definition of a “pattern of racketeering activity” and the need for the “existence of an enterprise.” They would then arrive at a general verdict on the RICO count. Such a procedure allows any defendant found not to have committed at least two predicate acts to be acquitted on the RICO count after the jury’s first phase of deliberations. This procedure also removes the “possibility . . . of obtaining guilty [RICO] verdicts through prejudicial spillover from the numerous violent and otherwise criminal acts before [the jury].”

The dissent in Coonan argued special verdicts usurp the jury’s historic function and conflict with the law’s historical preference for general verdicts which is due to the exceptional protections conferred upon criminal defendants. The dissent considered several factors underlying the law’s distaste for specific findings: (1) fear that extracting a “yes” or “no” may drive a juror to mechanically infer guilt when an acquittal may have been generated by “a more generalized” evaluation; and (2) the potential that dividing a RICO count into several subparts may provide a split jury the occasion to settle its divergence to the detriment of the defendant, indicating “yes” to some offenses and “no” to others, when a consolidated determination of the RICO count may have yielded “an acquittal or at least a hung jury.”

B. Special Verdicts

Special verdicts, like the previous solution, eliminate the consistency issue altogether. Special verdicts consist of responses by the
jury to a series of questions submitted by the court, and are generally accepted in the civil arena. Rule 49(a) of the Federal Rules of Civil Procedure allows special verdicts in federal civil cases at the discretion of the court. The purpose of a rule 49(a) special verdict is to avoid "confusion," appellate skepticism, and the necessity for further proceedings by identifying the bases upon which the jury rendered its verdict. In cases involving multiple, alternative theories of recovery, the special verdict has been described as a "wonder to behold."

The use of a special verdict in multiple theory of recovery cases eliminates the uncertainty as to whether the jury's verdict was wholly based on an improper theory requiring retrial of the case as may occur with a general verdict. In addition, a special verdict also "reveals the whole case for what it is, both fact and law, for complete and final acceptance of the correct legal theory by the reviewing court." Because general verdicts consist of numerous factual variables, designing unobjectionable jury instructions is an arduous responsibility, especially those which set forth "alternative mandatory general verdicts if specific facts" are established.

124. See Loffland Bros. Co. v. Roberts, 386 F.2d 540, 546 (5th Cir. 1967), cert. denied, 389 U.S. 1040 (1968). The trial court also has discretion over the nature and scope of the issues submitted to the jury. This discretion is limited, however, if special interrogatories are used such that the trial court "must submit all material issues raised by the pleadings and the evidence." Simien v. S.S. Kresge Co., 566 F.2d 551, 555 (5th Cir. 1978).
125. Jamison Co., Inc. v. Westvaco Corp., 526 F.2d 922, 935 (5th Cir. 1976); see also Jurors Say They Were Confused: DeLorean Acquittal Fuels Furor, Nat'l L.J., Jan. 12, 1987, at 3 (former automaker John Z. DeLorean was acquitted of federal racketeering charges. After the trial the jurors told the judge that they had misunderstood the instructions and that three of them were still convinced of Delorean's guilt.).
126. Jamison, 526 F.2d at 935; see also United States v. Torres-Lopez, 851 F.2d 520, 523 (1st Cir. 1988), cert. denied, 109 S. Ct. 1144 (1989) (illustration of the use of a special verdict form in determining the predicate acts upon which the jury relied).
128. Id. at 345.
129. See Structural Rubber Prod. Co. v. Park Rubber Co., 749 F.2d 707, 723 (Fed. Cir. 1984) (example of a case where a special verdict form would be helpful: a 14 month trial; 54 verdicts; 215 articles of evidence; summations consumed 4½ days; jury deliberated 38 days; and the trial transcript totaled 46,802 pages). The use of special verdicts in federal courts generally has been confined to complex cases. See also Envirex, Inc. v. Ecological Recovery Assoc., Inc., 454 F. Supp. 1329, 1339-40 (M.D. Pa. 1978), aff'd mem., 601 F.2d 574 (3d Cir. 1979) (special verdict procedure localizes evidentiary problems in complicated cases and allows the jury to direct its focus to specific factual issues). For a discussion of the special verdict practice under Federal Rules of Civil Pro-
Although special verdicts are generally discouraged in criminal cases as an intrusion upon the jury's functions, they are sanctioned in criminal forfeiture cases under rule 31(e) of the Federal Rules of Criminal Procedure. Courts have been reluctant to use special verdicts in regular criminal trials for two reasons. First, the criminal jury's duty does not stop at factfinding. Second, the courts see the special verdict as judicial encroachment upon the jury's function.

However, the Supreme Court has upheld special verdicts in capital punishment cases. The Court stated it has never held:

1. Criminal forfeiture "is an in personam proceeding against a defendant in a criminal case and is imposed as a sanction against the defendant upon his conviction." S. REP. No. 225, 98th Cong., 2d Sess. 193, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3376. In contrast, civil forfeiture is an in rem proceeding against the property that the government seeks to obtain, without regard to the guilt or innocence of the property owner "because the theory is that the property itself has committed the wrong." United States v. Nichols, 841 F.2d 1485, 1486 (10th Cir. 1988) (citing to Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-81 (1974)).

2. FED. R. CRIM. P. 31(e) states: "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." The note of the Advisory Committee on Rules states that 31(e) is "intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963 [which is the criminal penalties subsection of RICO] and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408(a)(2)." The draft assumes that "the amount of interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved." FED. R. CRIM. P. 7(c)(2) advisory committee note. Special verdicts are exceptional in criminal cases, but they do exist. See United States v. Torres-Lopez, 851 F.2d 520, 523 (1st Cir. 1988), cert. denied, 109 S. Ct. 1144 (1989) (a reproduction of a special verdict form and an illustration of how it simplified the reviewing court's function); United States v. Spock, 416 F.2d 165 (1st Cir. 1969) (especially footnote 41 where authorities are cited); see also United States v. Washington, 782 F.2d 807, 822-24 (9th Cir. 1986) (alternative special verdict form).


4. Id.

5. Id.

6. United States v. Spock, 416 F.2d 165, 181 (1st Cir. 1969). The Spock court argued that a court should allow the jury to act as the "conscience of the community" by permitting the jury to "look at more than mere logic" and that by allowing special verdicts the jury is discouraged from tempering rules of law with common sense and fairness. Id. at 182. (Consider why this court assumes a jury cannot likewise temper rules of law with a sense of fairness as it responds to each interrogatory of the special verdict?) Cf. United States v. O'Looney, 544 F.2d 385, 392 (9th Cir.), cert. denied, 429 U.S. 1023 (1976); see also United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980). The court allowed a special verdict in Huber not only in regard to the rule 31(e) forfeiture provision, but also for the determination of the defendant's interest in the enterprise and for identifying membership in the enterprise.

7. See Franklin v. Lynaugh, 487 U.S. 164, 168-69 n.1 (1988). The Special Issues that went to the jury asked whether it found "from the evidence beyond a reasonable doubt that [the murder] was committed deliberately and with a reasonable expectation that the death would result?" and whether there was a "probability that [petitioner] would constitute a continuing threat to society?" Id. The petitioner argued that this statement alone to the jury limited the jury's consideration of mitigating evidence in

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jury discretion [is to] be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty.\textsuperscript{108}

A special verdict will be upheld in the sentencing phase of a capital case if the jury is permitted to weigh mitigating factors and any exceptional attributes of the defendant, thereby affording the jury some discretion.\textsuperscript{137}

If the Supreme Court is willing to allow special verdicts in so serious a matter as a capital punishment, when one is especially concerned with fairness to the criminal defendant, there seems to be no reason the special verdict can not also be utilized in criminal RICO trials. Of course, the issues would have to be framed so as to afford the defendant procedural safeguards while not limiting RICO's breadth.

Special verdicts in all criminal RICO cases would serve such a dual purpose. First, they would allow a reviewing court to uphold a RICO conviction when one is justified, rather than simply reversing because of uncertainty pertaining to the predicate acts on which the jury relied for conviction. Upholding the conviction also serves to uphold Congress's intent by not limiting RICO's effectiveness. The second advantage of special verdicts in a RICO case is that they protect a criminal defendant when used in a manner to insure the jury uses its discretion to temper rules of law with fairness.

In \textit{United States v. Ruggiero},\textsuperscript{138} the court reversed one defendant's RICO conviction because it was unable to tell from the jury's verdict whether the jury's determination of guilt rested on at least two legally sufficient predicate acts.\textsuperscript{139} In ordering a new trial on the RICO count, the court suggested the trial judge "request the jury to record their specific dispositions on the separate predicate acts charged, in addition to their verdict of guilt or innocence on the RICO charge."\textsuperscript{140} Such a practice avoids automatic retrials and "facilitate[s] sound management of judicial resources."\textsuperscript{141}
Recently, the Sixth Circuit, in *Callanan v. United States*, had to decide whether to vacate a RICO conviction when several of the defendant's mail fraud convictions, which also served as predicate acts of the RICO conviction, were reversed. No special verdicts were used by the trial court. However, the court concluded that "other verdicts of the same jury may serve the function of special verdicts on the predicate acts, where those other verdicts necessarily required a finding that the RICO defendant had committed the predicate acts." For example, if a codefendant is convicted on at least two counts of bribery which involved the defendant and these same two counts were also charged against the defendant as RICO predicate acts, the court may assume that the defendant's RICO conviction also rested on the same "pattern of at least two predicate acts of bribery."

Given the multitude of theories and predicate offenses asserted in RICO cases, special verdicts are a more appropriate procedural tool than general verdicts. They should be utilized in all cases in which a RICO count is involved rather than just in criminal forfeiture cases pursuant to Federal Rule of Criminal Procedure 31(e).

**C. Congressional Reformation of RICO**

The RICO debate has shifted from the courts to Congress mainly because the "judiciary is a somewhat artificial turf for the philosophical contest that is the heart of the controversy." As recently as in 1984 and in 1986, Congress enacted substantial amendments to RICO, generally expanding its breadth. For instance, the definition of racketeering activity was expanded to include "tampering with a witness, victim, or informant"; "retaliating against a witness, victim, or informant"; "laundering of monetary instruments"; "engaging in monetary transactions in property derived from specified unlawful activity"; "prohibition of illegal gambling businesses"; "any act which is indictable under the Currency and Foreign Transactions Reporting Act"; and many other things. In section 1963, subsections (d) through (m) were added to sharpen the government's tools for fighting organized crime. Changes were made to enable courts

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142. 881 F.2d 229 (6th Cir. 1989).
143. *Id.* at 234.
144. *Id.* at 235.
147. *Id.* § 1963.
to enter restraining orders; "require the execution of a satisfactory performance bond";148 or order "any other action to preserve the availability of property . . . for forfeiture." These changes permit the United States to seize property without notice or opportunity for a hearing if proper conditions are met.149 Additionally, they enable the admission of evidence otherwise inadmissible under the Federal Rules of Evidence and authorize the Attorney General to seize all property forfeited upon such terms as the court deems proper.150

The preceding amendments and many others afford the government stronger procedural tools to fulfill Congress's intent to eradicate organized crime. Moreover, several bills recently have been introduced in Congress which would strengthen RICO further on the criminal side.151 Since the trend is to strengthen RICO, it seems

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148. Id. § 1963(d)(1).
149. Id. § 1963(d)(3), (c).
150. Id.

§ 154(f) increases the maximum penalty under the RICO statute, 18 U.S.C. § 1963(a), for cases in which the maximum penalty for one of the underlying predicate RICO acts of racketeering is life in prison. The penalty under RICO would be raised in such circumstances. Currently, RICO carries a uniform maximum penalty of 20 years imprisonment. In many RICO cases, this punishment does not fit the crime. For example, in the Angiulo and LCN "Commission" cases, the defendants committed several murders which would have been punishable by life imprisonment under state law. A similar sentence for such crimes under RICO is available only if the defendant is convicted of multiple counts and consecutive sentences are imposed. This amendment remedies this deficiency by elevating the maximum penalty for RICO offenses to life imprisonment where the underlying acts are crimes punishable by life imprisonment or death.

Id. at 7450; H.R. 1203, 100th Cong., 2d Sess., 134 CONG. REC. H1203 (daily ed. Mar. 29, 1988) (statement of Rep. Ridge regarding Pornographic Mail Prohibition Act) (Act will subject civil defendants to a fine of $25,000 and such a violation would be defined as "racketeering activity" and would be subject to RICO forfeiture penalties); S. 2205, 100th Cong., 2d Sess., 134 CONG. REC. S3131 (daily ed. Mar. 25, 1988) (discusses California and New York's proposed anti-gang legislation which is patterned after RICO, "such state RICO statutes will enable prosecutors to seek longer prison terms for gang leaders convicted on other charges"); S. 1203., 100th Cong., 2d Sess., 133 CONG. REC. S6449 (daily ed. May 14, 1987) (letter from Sen. Robert Dole to U.S. Sec. of State & U.S. Pres.) (regarding the Anti-Terrorism Act; asks for an authoritative administrative position on whether the PLO office is subject to the RICO Act); S. 13436, 100th Cong., 2d Sess.; 134 CONG. REC. S13436 (daily ed. Sept. 28, 1988) (statement of Sen. Heinz in
likely that Congress would favorably consider the codification of the Peacock rule or the utilization of jury special verdict forms.

V. Conclusion

Organized crime poses a serious threat to legitimate business and to society as a whole. It warrants resort to extraordinary measures and novel sanctions. Courts have repeatedly upheld RICO convictions in the face of criminal defendants’ arguments that RICO’s cumulative and consecutive sentences, special forfeiture provisions, and strong penalties are unconstitutional. Moreover, Congress continues to increase the number of offenses which may be the basis for a RICO offense. There are current legislative efforts to increase the possible penalty to life imprisonment in certain circumstances. While commentators express concern about a need to curb RICO’s breadth on the civil side, this does not appear to be the case on the criminal side.

Congress should easily be able to address the issues raised in this Comment, especially when so many changes are being implemented in RICO. RICO was designed as a tool to help untie the hands of the government in prosecuting organized crime. However, in prosecuting a case in a Brown (minority) jurisdiction, the government is currently unreasonably restricted. The government must elect between seeking a conviction under RICO, which includes the risk of losing the RICO conviction if any one of a number of predicate offense is reversed on appeal, or not seeking the RICO conviction at all. Surely, such a Hobson’s choice does not coincide with the congressional intent to provide new procedural tools to aid in the prosecution of organized crime.

Codification of the Peacock rule would eliminate this problem. If the defendant is charged and convicted of substantive counts, which also constituted the predicate offenses for the RICO conviction, then the RICO conviction should remain valid if at least two of the substantive counts remain in effect after appellate review. This is so because the verdict still indicates that the jury found the defendant guilty of at least two racketeering acts related to the enterprise. It does not matter whether these two acts were related to each other

support of child protection & obscenity amendments to S.2033: a legislative package in which child pornography would be made an offense under RICO).

152. One court stated:

Although it is clear that infiltration of legitimate businesses by organized crime was a primary concern of Congress in enacting RICO, we join every other circuit which has considered the issue in concluding that [RICO] ... is not so limited, and that its prohibitions apply to the use of racketeering activities to promote any enterprise affecting interstate commerce.

United States v. Whitehead, 618 F.2d 523, 525 n.1 (4th Cir. 1980).
because the statute only requires that the acts be related to the enterprise.

However, if Congress is unwilling to go this far, it should at least require special verdicts in all criminal RICO cases. Such a requirement provides advantages to the government and defendants alike. It eliminates the uncertainty as to specifically which acts the jury thought were related to the enterprise and which acts the jury relied on as the basis of the RICO conviction. Special verdicts and specific findings do not usurp the jury's function because the jury still would be instructed on each specific requirement of a RICO conviction and it would still have the ability to temper rules of law with fairness on each issue. Additionally, special verdicts would clarify the issues for the jury and help eliminate prejudicial spillover when the jury thinks the defendant is an exceptionally bad person.

The trend is to utilize special verdicts, even though defendants are being denied certiorari in cases in which the trial court's jury returned only a general verdict. This is unfair to the defendants who are prosecuted in the Peacock jurisdictions because their counterparts in the Brown jurisdictions are getting their RICO convictions reversed. Such unevenhanded administration of the law is unfair. Moreover, it may cause forum shopping by prosecutors with cases involving large multidistrict enterprises\(^\text{153}\) spanning jurisdictions which apply both the majority and minority views. It is also unfair to the prosecution which has to bear additional burdens since convictions perfectly lawful in some circuits are routinely reversed in others. Since the Supreme Court has been unwilling to act on this issue, Congress should consider implementing the preceding solutions to eliminate this split among the federal circuits.

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\(^{153}\) United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976). The term “enterprise” is broadly defined and is not restricted solely to legitimate business enterprises.