
RECENT CASES

CRIMINAL LAW — FIFTH AMENDMENT — SEVENTH CIRCUIT HOLDS THAT RICO CONSPIRACY CHARGES CAN PROCEED TO TRIAL DESPITE UNRESOLVED DOUBLE JEOPARDY CLAIMS. — *United States v. Calabrese*, 490 F.3d 575 (7th Cir. 2007).

Even before the Sopranos won their Emmys, organized crime families fascinated America and frustrated its law enforcement. From Al Capone and Frank Nitti to Bugsy Siegel and John Gotti, mobsters and their gangs have often ruled and bullied America's major cities, raking in millions through criminal activity and illicit business. Seeking to solve this problem by strengthening the legal arsenal available to federal law enforcement agents and prosecutors battling organized crime across the country, Congress in 1970 enacted the Racketeer Influenced and Corrupt Organizations Act¹ (RICO) to combat the infiltration of organized crime into lawful business.² Since its creation, RICO has simultaneously been hailed for its ingenuity and effectiveness and derided for its all-encompassing breadth.³ Critics have argued that such an overly broad statute unduly subjects defendants to double jeopardy, inappropriate prosecutorial discretion, and guilt by association.⁴ In spite of these criticisms, the Seventh Circuit, in *United States v. Calabrese*,⁵ recently upheld a RICO conspiracy indictment despite the defendants' unresolved claims that they had already served time for at

¹ 18 U.S.C.A. §§ 1961–1968 (West 2000 & Supp. 2007).

² See *United States v. Turkette*, 452 U.S. 576, 591–92 & nn.13–14 (1981).

³ Compare G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1048 (1980) (predicting that RICO would one day be seen as “a valuable effort by the legislature to launch a broad-based attack on the special challenge of group crime”), and Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 800–01 (1988) (arguing that RICO’s “apparent breadth has been tempered by both its structural requirements and cautious judicial interpretations” and that “any reform should be based both on the legislative record and on a full appreciation of RICO’s potential”), with Gerard E. Lynch, *RICO: The Crime of Being a Criminal* (pts. 1 & 2), 87 COLUM. L. REV. 661, 665 (1987) (suggesting that RICO is the product of a politically popular “crusade against a shadowy and threatening enemy” culminating in a “virtually all-encompassing” statute), Barry Tarlow, *RICO: The New Darling of the Prosecutor’s Nursery*, 49 FORDHAM L. REV. 165, 305–06 (1980) (criticizing Congress for enacting so vague a statute and the courts for interpreting it so broadly), and Alain L. Sanders, *Showdown at Gucci Gulch*, TIME, Aug. 21, 1989, at 48 (quoting criminal law professor Alan Dershowitz as calling RICO “legislation on the cheap” and “an attempt to use one statute to solve all the evils of society”).

⁴ See Lynch, *supra* note 3, at 719–21; Gerald E. Lynch, *RICO: The Crime of Being a Criminal* (pts. 3 & 4), 87 COLUM. L. REV. 920, 981–82 (1987); see also Jeremy M. Miller, *RICO and Conspiracy Construction: The Mischief of the Economic Model*, 104 COM. L.J. 26, 39, 44 (1999); Jeremy M. Miller, *RICO and the Bill of Rights: An Essay on a Crumbling Utopian Ideal*, 104 COM. L.J. 336, 371 (1999).

⁵ 490 F.3d 575 (7th Cir. 2007).

least part of the newly charged crime. In doing so, the court effectively denied the defendants their Fifth Amendment right to ensure before trial that they were not being tried a second time for the same crime. Furthermore, the fact that a complicated double jeopardy issue even arose in this case is a consequence of RICO's overly broad scope.

The present-day Chicago Outfit descends from Al "Scarface" Capone's own infamous gang. In its early days during Prohibition, the Outfit ruled the Chicago underworld through bootlegging, labor racketeering, and loan sharking.⁶ With a cast of usual suspects including those known on the streets of Chicago as Big Tuna, Johnny Bananas, No Nose, Pizza Man, and the Hook,⁷ the Chicago Outfit and its affiliated crime families have long been suspected of running illegal gambling rings, collecting usurious "juice" loans, extorting street taxes from local businesses,⁸ and otherwise terrorizing neighborhoods with assaults, murders, arson, intimidation, and witness tampering.⁹ In the early 1990s, federal prosecutors finally gathered sufficient evidence to indict and convict several Outfit crime bosses for conspiring to violate RICO during a period from the late 1970s to the early 1990s.¹⁰ Among the convicted were Frank Calabrese, Sr., and James Marcello.¹¹ Calabrese had operated the Calabrese Street Crew under the governing eye of the Outfit and had earned a reputation as an unusually talented hit man.¹² Marcello, meanwhile, had managed the affairs of the Carlisi Street Crew¹³ and eventually rose to become the head of the Chicago Outfit.¹⁴ Calabrese and Marcello were sentenced to 118 and 150 months in federal prison, respectively, for their first RICO conspiracy convictions.¹⁵

While the defendants were serving time in prison, the FBI labored to create new indictments against them.¹⁶ This time, however, the prosecutors leveled RICO conspiracy charges against the defendants spanning back as far as the mid-1960s and extending into 2005, the

⁶ See GUS RUSSO, *THE OUTFIT: THE ROLE OF CHICAGO'S UNDERWORLD IN THE SHAPING OF MODERN AMERICA* 27, 56 (2001); MICHAEL WOODIWISS, *ORGANIZED CRIME AND AMERICAN POWER: A HISTORY* 194 (2001).

⁷ Third Superseding Indictment at 4-5, *United States v. Calabrese*, No. 02 CR 1050, 2007 WL 2802460 (N.D. Ill. Mar. 8, 2007); Jeff Coen, *Outfit's Hit, but not KO'd*, CHI. TRIB., Sept. 30, 2007, § 4, at 1.

⁸ Third Superseding Indictment, *supra* note 7, at 2; see also Coen, *supra* note 7.

⁹ *Calabrese*, 490 F.3d at 577.

¹⁰ *Id.*

¹¹ Marcello's original indictment covered a conspiracy stretching from 1979 through 1990, and Calabrese's covered 1978 to 1992. See *id.*

¹² See *id.*; Coen, *supra* note 7.

¹³ *Calabrese*, 490 F.3d at 577.

¹⁴ See Coen, *supra* note 7.

¹⁵ *Calabrese*, 490 F.3d at 577.

¹⁶ See John Kass, *Outfit's Fate Signed, Sealed, Delivered*, CHI. TRIB., Sept. 30, 2007, § 1, at 2.

date of the second indictment.¹⁷ Although many of the charges were new, including allegations that the defendants continued to operate the Outfit from prison, the indictment entirely encompassed the time frame of the first conspiracy and included various crimes that had previously served as predicate offenses for the first convictions.¹⁸

Nevertheless, the prosecution emphasized that the new conspiracy involved a distinct enterprise from the one previously charged.¹⁹ The prosecution asserted that in the original conviction the court found the defendants guilty of conspiring to violate RICO within their various independent street crews. The new grand jury indictment, they argued, alleged a more extensive conspiracy to operate the overarching Chicago Outfit itself through a pattern of racketeering. The defendants responded that their impending trial would unconstitutionally subject them to double jeopardy because the grand jury had indicted them for multiple offenses for which they had already served time under their initial RICO convictions. The defendants alternatively argued that, if the court were unwilling to throw out the entire indictment, it should at least trim out the portions that overlapped with their first conspiracy convictions.²⁰ The district court denied the defendants' motions to dismiss the indictments without considering their alternative proposal,²¹ and their timely appeal made its way to the Seventh Circuit Court of Appeals.

Writing for the panel, Judge Posner affirmed the district court's decision.²² Judge Posner began by acknowledging that the Double Jeopardy Clause protects against not only repetitive punishments, but also duplicate trials.²³ He also agreed that the government could not increase its odds of winning a conviction by strategically charging a succession of smaller RICO violations when it could have brought a larger one all at once.²⁴ He ultimately decided, however, that prior to a trial on the merits, there was no reason to assume that the government would fail to prove that the alleged conspiracies were, in fact, entirely distinct.²⁵

¹⁷ *Calabrese*, 490 F.3d at 577.

¹⁸ *Id.*

¹⁹ Government's Response to Defendants James Marcello's and Frank Calabrese Sr.'s Motions To Dismiss Count One on Double Jeopardy Grounds at 2-4, *United States v. Calabrese*, No. 02 CR 1050, 2006 WL 4752861 (N.D. Ill. Aug. 25, 2006).

²⁰ *Calabrese*, 490 F.3d at 578.

²¹ *United States v. Calabrese*, No. 02 CR 1050-2, 2007 WL 1141922, at *4 (N.D. Ill. Apr. 17, 2007).

²² *Calabrese*, 490 F.3d at 581. Judge Posner was joined by Judge Sykes.

²³ *Id.* at 577 (citing *Abney v. United States*, 431 U.S. 651, 659-62 (1977)).

²⁴ *Id.* at 578.

²⁵ *Id.* at 580-81.

Moreover, he wrote, some overlap between the predicate crimes of the conspiracies was not a cause for concern because the defendants were not being charged with the predicate crimes themselves. Using the analogy of an accomplice who simultaneously drives his two friends to an intersection and waits while they individually rob adjacent banks, Judge Posner noted that the driver could receive two separate punishments for aiding and abetting.²⁶ Likewise, he said, the officers of a parent company and its subsidiary could justly receive two punishments if both entities benefited from the exact same pattern of illegal activity, even if the officers were the same for both companies.²⁷ In both instances, there would be no fear of double jeopardy because separate proof would be needed to uphold each conviction.²⁸ In the robbery case, prosecutors would have to prove separately that two robberies had occurred. In the corporate scenario, they would have to prove that both the subsidiary and the parent company had been intentionally enriched by the illicit behavior, thus proving two crimes, not one.²⁹

Judge Posner also noted that the court had no reason to think that the prosecution would fail to prove two separate conspiracies.³⁰ And because the defendants would undoubtedly have to stand trial at least for the pattern of racketeering that allegedly continued throughout their incarcerations to the present day, it was a “modest” burden to allow the government a chance at trial to prove that two separate conspiracies had existed in the 1980s.³¹ If the government failed to prove sufficiently that two conspiracies in fact existed, and if the court convicted the defendants nevertheless, Marcello and Calabrese could then raise post-trial double jeopardy arguments to that effect.³²

Concurring in part and dissenting in part, Judge Wood agreed that the defendants could not escape the entire trial. They would have to stand trial for allegedly continuing and guiding the Outfit’s conspiracy while behind bars.³³ Judge Wood contended, however, that the court should have affirmed the defendants’ alternate motion to strike those portions of the indictment that overlapped with the time period of their earlier convictions.³⁴ By not doing so, the majority was offering the defendants only “half a loaf” of justice by assuring them that *after* their trial they could move to dismiss their convictions if the prosecu-

²⁶ *Id.* at 579 (citing *United States v. Dixon*, 509 U.S. 688, 704 (1993)).

²⁷ *Id.* at 578–79.

²⁸ *Id.* at 579.

²⁹ *See id.*

³⁰ *Id.* at 580.

³¹ *See id.* at 581.

³² *Id.*

³³ *Id.* at 582 (Wood, J., concurring in part and dissenting in part).

³⁴ *Id.* at 586.

tion had simply “recycled” evidence from the earlier trials.³⁵ Furthermore, Judge Wood remained unconvinced that the Chicago Outfit and the various street crews acted with the degree of autonomy that would support a second conspiracy indictment covering the same predicate crimes. In Judge Wood’s analysis, the original prosecution had lumped together all aspects of the conspiratorial operation, and only in preparation for the second round of indictments had the prosecution devised an artificial distinction between the supposedly discrete Chicago Outfit and its street crew subsidiaries.³⁶ In essence, the prosecution was trying to untangle two discrete conspiracies from a knot tied in the mid-1990s.

By entirely rejecting the defendants’ double jeopardy claims, the Seventh Circuit ensured that if any separate yet overlapping conspiracy possibly existed then it would be tried, but it did so only by curtailing the defendants’ Fifth Amendment rights and by perpetuating RICO’s overly broad reach. The court rightly acknowledged that the protection against double jeopardy includes not only the right to avoid a second punishment for the same crime, but also the right to avoid a second trial. Unfortunately, the majority minimized this constitutional right because it was unsure whether and how much the old conspiracy was subsumed within the new, broader indictment. The majority instead ruled in favor of allowing the prosecution to try its case first to see “how great the overlap will be.”³⁷ The majority ought to have protected against the possible infringement of the defendants’ rights at the expense of procedural convenience, and not the other way around.

It is firmly established that the Double Jeopardy Clause protects against not only double punishments, but also duplicative trials. In *Abney v. United States*,³⁸ the Supreme Court affirmed that the Double Jeopardy Clause protects defendants from having “to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense,” thereby protecting “interests wholly unrelated to the propriety of any subsequent conviction.”³⁹ The *Abney* Court went on to say that “even if the accused . . . has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was de-

³⁵ *Id.* at 582.

³⁶ *See id.* at 585.

³⁷ *Id.* at 581 (majority opinion).

³⁸ 431 U.S. 651 (1977).

³⁹ *Id.* at 661. The Court went on to say that “these aspects of the guarantee’s protections would be lost if the accused were forced to ‘run the gauntlet’ a second time before an appeal could be taken.” *Id.* at 662. *See also* *United States v. Dixon*, 509 U.S. 688, 696 (1993) (“This protection applies both to successive punishments and to successive prosecutions for the same criminal offense.” (emphasis added)).

signed to prohibit.”⁴⁰ This proposition seems to be directly at odds with the *Calabrese* majority’s decision to allow the trial to proceed without first resolving the double jeopardy claim. Instead of directly answering the defendants’ appeal, the majority assured them that they could appeal *after* their trial if they believed the prosecution failed to prove that the conspiracies were distinct.⁴¹

The court could have chosen one of several alternative options to better protect the defendants’ Fifth Amendment rights. It could have ordered that the indictment be amended as Judge Wood suggested, only allowing a follow-on indictment for a completely distinct and discrete enterprise with an entirely different pattern of racketeering.⁴² Alternatively, it could have required the trial court to conduct a pre-trial review of the prosecution’s evidence — and not simply the indictment — to decide whether the enterprises were in fact distinct.⁴³ At the very least, the burden would have appropriately shifted to the prosecution to rebut the defendants’ constitutional claims. Instead, the majority improperly leaned on the prosecution’s side of the scale by allowing it to proceed directly to trial.

When the two are in direct conflict, the efficiency of criminal procedure ought to conform to the demands of constitutional rights.⁴⁴ By making an exception in this case because the potential double jeopardy burden faced by the defendants was “incremental,”⁴⁵ the court effectively subjected the defendants to a known possibility of a Fifth Amendment violation. The court would have been wise to recognize the danger of setting a precedent of favoring the convenience of courts and prosecutors over defendants’ constitutional rights in such a setting. The majority failed in this regard because it spent the bulk of its analysis defending the legal possibility that a single pattern of racketeering activity could underlie separate though overlapping RICO con-

⁴⁰ *Abney*, 431 U.S. at 662.

⁴¹ *Calabrese*, 490 F.3d at 581.

⁴² See *id.* at 586 (Wood, J., concurring in part and dissenting in part).

⁴³ See *United States v. Sertich*, 95 F.3d 520, 523–24 (7th Cir. 1996) (stating that, after the defense has established a prima facie case of double jeopardy, the government has the burden of establishing by a preponderance of the evidence that the conspiracies are distinct). This type of pre-trial evidentiary hearing is the majority approach among the circuits. See, e.g., *United States v. Ragins*, 840 F.2d 1184, 1192 (4th Cir. 1988) (collecting cases to show that “eight of the federal circuits — indeed, every circuit that has addressed the issue — have held that when a defendant puts double jeopardy in issue with a non-frivolous showing that an indictment charges him with an offense for which he was formerly placed in jeopardy, the burden shifts to the government to establish that there were in fact two separate offenses”).

⁴⁴ See *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (“[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general . . . that [it was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.” (citation omitted)).

⁴⁵ *Calabrese*, 490 F.3d at 581.

spiracies. Judge Wood's opinion, however, succeeded in addressing the pertinent question at hand: Was the original conspiracy really separate and distinct from the newly alleged one, or was the prosecution creating a false distinction?

Even if two separate enterprises could theoretically rely on the exact same pattern of racketeering, the prosecution must still prove two distinct conspiracies and enterprises, as Judge Posner rightly concluded. This is where the defendants' double jeopardy claim becomes crucial. The court admitted the possibility that the first conspiracy was indeed included within the broader second charge.⁴⁶ It nevertheless foreclosed the defendants' constitutional right to settle the issue before trial.⁴⁷ Consequently, the court denied the defendants their right to avoid trial for that portion of the indictment if it were truly duplicative. To be sure, the defendants would still have been required to face trial for allegedly continuing to operate the Outfit from prison throughout the 1990s and 2000s, but they would not have had to defend themselves a second time for their first conspiracy if the prosecution were simply reusing old evidence.

Courts should not so easily reject double jeopardy claims raised in the context of consecutive RICO conspiracy indictments. Prosecutors will often face the choice of charging either one conspiracy or several consecutive and overlapping ones.⁴⁸ They now have precedent encouraging them to charge several overlapping ones, since they may proceed to trial even though the defendants have raised credible double jeopardy claims beforehand. Unfortunately for defendants, it is quite reasonable to assume that both trial and appellate courts will be more reluctant to overturn convictions *ex post* than to trim indictments *ex ante*.

Moreover, the RICO statute is already designed so broadly that it ensnares more potential defendants than prosecutors will be able to prosecute. As Professor William Stuntz has noted, the design behind RICO-type statutes is not necessarily to punish the entire range of crimes that are included, but to give prosecutors cheaper and more ef-

⁴⁶ See *id.* at 580.

⁴⁷ To be sure, the trial judge analyzed the new indictment and concluded in large part that the two conspiracies could not possibly have been the same for double jeopardy purposes because the second one allegedly continued while the defendants were in prison for the first conspiracy. *United States v. Calabrese*, No. 02 CR 1050-2, 2007 WL 1141922, at *2-4 (N.D. Ill. Apr. 17, 2007) (order denying defendants' motions to dismiss on double jeopardy grounds). The trial judge did not, however, discuss the alternative request to amend the indictment to include only the portion of the second conspiracy that did not subsume the first.

⁴⁸ See *Calabrese*, 490 F.3d at 579 ("Prosecutors often have a choice between charging a single conspiracy or multiple conspiracies when dealing with members of a loose-knit, reticulated criminal enterprise.").

fective tools to prove the guilt of prize offenders.⁴⁹ “The government may wish to punish people who satisfy criminal elements X, Y, and Z, but if Z is difficult to prove it is cheaper to criminalize X and Y and let prosecutors separate the wheat from the chaff.”⁵⁰ The RICO conspiracy provision⁵¹ does exactly this by criminalizing the bare agreement itself apart from the actual operation of the enterprise through a pattern of racketeering.⁵² By making enough things illegal, Congress has finally created a dragnet wide enough to trap all of organized crime. It is altogether possible that the broad reach of RICO’s conspiracy provision, and the complex indictments that ensue, may too easily trap defendants in situations of double jeopardy.

Unfortunately for defendants, the momentum of federal criminal law has for some time invariably moved in just one direction: ratcheting up punishments and expanding the list of substantive crimes.⁵³ Courts are reluctant to counteract this movement, especially in the context of RICO, out of fear that they will infringe on congressional lawmaking authority.⁵⁴ One fear is that by broadening RICO so far, society is no longer punishing individual criminals for their own individual actions, but rather punishing organized crime in the aggregate, hoping that it will average out in the end. And even though the legislature is unlikely to amend RICO anytime soon, if the judiciary does not seize opportunities such as the present case to reduce RICO’s scope by upholding similar constitutional objections, then critics of the current RICO regime may just have to find a sympathetic candidate and follow Al Capone’s advice to “vote early and vote often.”

⁴⁹ William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 58 (1997).

⁵⁰ *Id.*

⁵¹ 18 U.S.C. § 1962(d) (2000).

⁵² The statute states that “[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.”

⁵³ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (describing how the political process incentivizes legislatures and courts to overcriminalize behavior); see also William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2007–10 (2008) (same).

⁵⁴ See Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, LAW & CONTEMP. PROBS., Winter 1998, at 47, 51 (“[C]ourts regularly take the position that they are powerless to read limiting principles into RICO and other broadly worded statutes on the ground that adopting them would infringe on Congress’ exclusive lawmaking prerogatives.”).