ORIGINAL

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

ARNALDO MIRANDA

Defendant-Appellant.

Case No. 2012-1741

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals Case No. 11AP-788

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FILED
JUN 25 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION

Defendant Arnaldo Miranda was the "money guy" in a large-scale marijuana-trafficking enterprise. Police seized a total of almost 4,000 pounds of marijuana from three separate locations. When arrested, defendant was carrying nearly $1 million cash.

Along with multiple counts of trafficking and possessing marijuana—all second-degree felonies—defendant was indicted for first-degree-felony engaging in a pattern of corrupt activity (RICO) under R.C. 2923.32(A)(1). That statute states: "No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt." A "pattern of corrupt activity" requires two or more "predicates"—i.e., "incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise." R.C. 2923.31(E). Defendant ultimately pleaded guilty to second-degree-felony RICO and one of the trafficking counts. The trial court sentenced him to 14 years—six for the RICO, and eight for the trafficking.

Defendant argues that trial courts must look to R.C. 2941.25 and *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, to determine whether the Double Jeopardy Clause allows multiple punishments for RICO and its predicates. Defendant's argument is without merit.

To start, even assuming the trafficking count is a predicate to the RICO count—it is not—the RICO statute itself shows the General Assembly's intent to allow multiple punishments for RICO and its predicates. Like the federal RICO statute, the purpose behind Ohio's RICO statute was to establish "new penal prohibitions" and establish "enhanced sanctions" for organized crime. That a "prior conviction" may serve as a RICO predicate further confirms the General Assembly's intent that RICO be punished separately

from its predicates. In short, the General Assembly intended that punishment for RICO be in addition to, not a substitute for, punishment for the underlying predicates.

Defendant argues that the 2007 deletion of former R.C. 2923.32(D), which provided that the criminal penalties for RICO did not preclude any other criminal or civil remedy, changed everything. Not so. The deletion was part of a bill designed to adopt the Criminal Sentencing Commission's recommendations to revise Ohio's forfeiture laws. The Commission recommended that R.C. 2923.32(D) be repealed as "unnecessary." Thus, the deletion of R.C. 2923.32(D) was not some watershed event meant to negate the General Assembly's intent to allow multiple punishments for RICO and its predicates.

Because the RICO statute itself allows multiple punishments, this Court need not address whether R.C. 2941.25 requires that RICO merge with its predicates. But if this Court does choose to address R.C. 2941.25, the State respectfully request that this Court clarify that trial courts must address whether the multiple offenses are committed by the same conduct is a *separate* inquiry from whether the offenses are allied offenses of similar import. While former Chief Justice Brown's three-vote opinion in *Johnson* collapses the "allied offense" inquiry into the "same conduct" inquiry, the plain text of R.C. 2941.25 mandates that trial courts treat the two inquiries as separate. Ultimately, however, under any view of R.C. 2941.25, the RICO and trafficking counts would not merge.

In short, defendant's 14-year sentence is consistent with the General Assembly's intent—expressed through both the RICO statute itself and R.C. 2941.25—to allow multiple punishments for RICO and its predicates. And because the General Assembly intended multiple punishments, defendant's sentence does not violate double jeopardy. The Tenth District's judgment should therefore be affirmed.

STATEMENT OF THE FACTS

In February 2011, defendant, his brother Luis Miranda, and Hector Martinez were each indicted on one count of first-degree-felony RICO, three counts of second-degree-felony trafficking in marijuana, and three counts of second-degree-felony possession of marijuana. Trial Doc. 2. Jermaine Howell was also a co-defendant on the RICO count, one of the trafficking counts, and one of the possession counts. *Id.*

Defendant ultimately agreed to plead guilty to second-degree-felony RICO as a lesser-included offense to count one, as well as to one of the trafficking counts. Trial Doc. 52-54. At the plea hearing, the prosecutor recited the following facts:

In December 2010, a drug task force identified Howell as a "fairly high-level" drug trafficker. Plea Hrg. Tr., 8. While officers in the task force were conducting surveillance on Howell, they saw a van drop off approximately 1,200 pounds of marijuana at Howell's residence. *Id.* Howell ultimately agreed to cooperate with the task force and identified defendant as his supplier. Plea Hrg. Tr., 9. While wearing a wire, Howell met with defendant and convinced him that he (Howell) had not been implicated in the drug bust and persuaded defendant to continue serving as his supplier. *Id.* Defendant then convinced his "superior" over the phone to keep Howell as a customer. *Id.*

Howell provided the task force with another key piece of information: He identified an address on Carbondale Avenue as the location where he was to deliver the money he owed defendant. Plea Hrg. Tr., 10. A GPS tracking device placed on a vehicle at the Carbondale address led the task force to a warehouse on South 7th Street. *Id.* While conducting surveillance at the warehouse, the officers saw a van deliver a shipment of suspected drugs. Plea Hrg. Tr., 9-10. After the delivery, the officers stopped two vehicles

leaving the warehouse—one driven by Martinez, the other by Luis—and seized additional marijuana. Plea Hrg. Tr., 10-11.

Shortly thereafter, defendant and his girlfriend were apprehended while leaving the Carbondale address in a "hurried manner" and carrying two suitcases; inside the suitcases was about $960,000 cash. Plea Hrg. Tr., 11. At that point, defendant confessed that he was the "money guy" in the drug-trafficking enterprise. *Id.* The officers' investigation then took them to an address on Fishinger Road, where they seized about 800 pounds of marijuana. Plea Hrg. Tr., 11-12. In all, the marijuana seized from the three locations—Howell's residence, the 7th Street warehouse, and the Fishinger Road address—weighed almost 4,000 pounds. Plea Hrg. Tr., 12.

Prior to the sentencing hearing, the defense filed a sentencing memorandum requesting concurrent prison terms. Trial Doc. 66. The defense renewed this request at the sentencing hearing. Sent. Hrg. Tr., 9. The trial court ultimately sentenced defendant to the mandatory eight years on the trafficking count, to be served consecutively to six years on the RICO count. Sent. Hrg. Tr., 24-25; Trial Doc. 71-75.

Defendant appealed his sentence to the Tenth District, claiming that (1) the trial court's imposition of multiple sentences for RICO and trafficking counts violates R.C. 2941.25 and Double Jeopardy, and (2) the trial court's imposition of consecutive sentences was contrary to law. The Tenth District affirmed. *State v. Miranda*, 10th Dist. No. 11AP-788, 2012-Ohio-3971. Defendant then sought discretionary review in this Court, raising three propositions of law. This Court accepted review on defendant's first proposition of law. *State v. Miranda*, 134 Ohio St.3d 1448, 2013-Ohio-347, 982 N.E.2d 727 .

ARGUMENT

Response to Proposition of Law: RICO and its predicates are not the "same offense" for purposes of double jeopardy, and the General Assembly—through both the RICO statute itself and R.C. 2941.25—intended to allow multiple punishments for RICO and its predicates.

Defendant's proposition of law claims that a trial court must apply R.C. 2941.25 and *Johnson*, 128 Ohio St.3d 153, in determining whether the Double Jeopardy Clause permits the imposition of multiple punishments for RICO and its predicates. Defendant denies that he is asking for a blanket rule that would prohibit multiple punishments for RICO and its predicates. Appellant's Brief, 11. Yet defendant acknowledges that, under his view of R.C. 2941.25, trial courts would be required to merge RICO with its predicates "in most if not all instances." *Id.* at p. 13. To be clear, defendant's proposed rule would *always* result in merger.

The defense did not raise this issue in the trial court, thereby waiving all but plain error. (Indeed, the defense not only failed to object, but affirmatively requested concurrent—i.e., multiple—prison terms.) And defendant's argument is without merit, both factually and legally. Factually, defendant's argument fails because the trafficking count to which he pleaded guilty is not a predicate to the RICO count. But even assuming the trafficking count is a predicate to the RICO count, defendant's argument would still fail legally. The trial court's imposition of multiple punishments does not violate double jeopardy because RICO and its predicates are not the "same offense." Even if they were the "same offense," there would still be no double jeopardy violation because the General Assembly—through both the RICO statute itself and R.C. 2941.25—intended to allow multiple punishments for RICO and its predicates.

I. THE TRAFFICKING COUNT TO WHICH DEFENDANT PLEADED GUILTY IS NOT A PREDICATE TO THE RICO COUNT.

Defendant's arguments all flow from the factual premise that the trafficking count to which he pleaded guilty is a predicate to the RICO count. But this factual premise is wrong. Defendant was indicted on three counts of drug trafficking and three counts of drug possession stemming from marijuana seized from three separate locations: Howell's residence, the 7th Street warehouse, and the Fishinger Road address. Each drug-trafficking and drug-possession count qualifies as "corrupt activity." R.C. 2923.31(I)(2)(c). A "pattern of corrupt activity" requires "two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event." R.C. 2923.31(E).

Because each trafficking count has a corresponding possession count relating to the same marijuana, there are a total of three "incidents of corrupt activity." But defendant pleaded guilty to only one trafficking count, which related to marijuana at the Fishinger Road address. This leaves the incidents of corrupt activity associated with Howell's residence and the 7th Street warehouse to serve as the two RICO predicates. Although the RICO count in the indictment listed all six trafficking and possession counts, the trafficking count to which defendant pleaded guilty was unnecessary to prove RICO.

Indeed, there is good reason to believe that the trafficking count was not one of the RICO predicates. The trafficking count is a second-degree felony. But when one of the RICO predicates is a second-degree felony, then RICO is a first-degree felony. R.C. 2923.32(B)(1). That defendant pleaded guilty to second-degree-felony RICO is strong proof that the parties did not intend the trafficking count to be a predicate to the RICO

count. If the trafficking count was meant to be a predicate to the RICO count, the RICO count would have been a first-degree felony.

Accordingly, defendant's appeal flows from a faulty factual premise, which alone justifies rejecting defendant's proposition of law (if not dismissing the appeal as improvidently granted). The conduct underlying the trafficking count was not the same as the conduct underlying the RICO count, so R.C. 2941.25 would not require merger, even after *Johnson*. But even if this Court accepts defendant's factual premise, for the reasons that follow the Tenth District's judgment should be affirmed.

II. THE DOUBLE JEOPARDY CLAUSE DOES NOT APPLY BECAUSE RICO AND ITS PREDICATES ARE NOT THE "SAME OFFENSE."

A. The Double Jeopardy Clause Applies Only When a Defendant Is Being Prosecuted or Sentenced for the "Same Offense."

The Double Jeopardy Clause of the United States Constitution states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amdt. 5. Ohio's Double Jeopardy Clause similarly states that "[n]o person shall be twice put in jeopardy for the same offense." Ohio Const., Section 10, Art. I. The protections afforded by the two clauses are coextensive. *State v. Martello*, 97 Ohio St.3d 398, 399, 780 N.E.2d 250 (2002), citing *State v. Gustafson*, 76 Ohio St.3d 425, 432, 668 N.E.2d 435 (1996).

Double jeopardy protects defendants in three respects: (1) against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; and (3) against multiple punishments for the same offense. *State v. Moss*, 69 Ohio St.2d 515, 518, 433 N.E.2d 181 (1982), citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 565 (1969). The common

denominator in these protections is that the Double Jeopardy Clause applies only if the defendant is prosecuted or punished for the "same offense." Limiting double jeopardy to the "same offense" also adheres to the text of both the federal and Ohio constitutions.

The phrase "same offense" has the same meaning in both the multiple-prosecution and multiple-punishment contexts. *United States v. Dixon*, 509 U.S. 688, 704, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). Whether offenses are the same for purposes of double jeopardy is governed by *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under the *Blockburger* test—also known as the "same elements" test—offenses are not the same when "each offense contains an element not contained in the other." *Dixon*, 509 U.S. at 697; see also, *Brown v. Ohio*, 432 U.S. 161, 166, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (*Blockburger* test "emphasizes the elements of the two crimes"); *State v. Best*, 42 Ohio St.2d 530, 534, 330 N.E.2d 421 (1975).

Blockburger is a "rule of statutory construction" that courts use "to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." *Albernaz v. United States*, 450 U.S. 333, 337, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), quoting *Whalen v. United States*, 445 U.S. 684, 691, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Accordingly, *Blockburger* is "not controlling when the legislative intent is clear from the face of the statute or the legislative history." *Garrett v. United States*, 471 U.S. 773, 778-779, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985). So even when two offenses are the same under *Blockburger*, the multiple-punishment prong of the Double Jeopardy Clause allows imposition of sentence on both offenses if the legislature has "evinced an intent to permit multiple punishments for a single offense." *State v. Childs*, 88 Ohio St.3d 558, 561, 728 N.E.2d 379 (2000). "With respect to cumulative sentences

imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

When offenses are not the same, however, the constitutional analysis "stop[s] at that point" because "cumulative punishments can presumptively be assessed after conviction for two offenses that are not the 'same' under *Blockburger*." *Id.* at 367. In other words, *Blockburger* is the constitutional baseline. When offenses are the same under *Blockburger*, the Double Jeopardy Clause potentially applies, but the trial court's constitutional authority to impose multiple punishments is ultimately governed by legislative intent. But when offenses are not the same under *Blockburger*, the Double Jeopardy Clause is inapplicable and a trial court's authority to impose multiple punishments is governed purely by statute.

Defendant's proposition of law appears to equate R.C. 2941.25 with double jeopardy, such that any violation of the statute also violates the constitution. To be sure, courts sometimes treat the multiple-punishment prong of the Double Jeopardy Clause as synonymous with the statutory authority to impose multiple punishments. *Moss*, 69 Ohio St.2d 515, syllabus ("In determining the constitutionality of the trial court's imposition in a single criminal proceeding of consecutive sentences, appellate review is limited to ensuring that the trial court did not exceed the sentencing authority which the General Assembly granted it."). This is true to the extent that, if multiple punishments are authorized by statute, there is no need to apply *Blockburger* because the imposition of multiple punishments would be constitutional "regardless of whether the two statutes proscribe the 'same' conduct under *Blockburger*." *Hunter*, 459 U.S. at 368-369.

But when the offenses are not the same under *Blockburger*, the Double Jeopardy Clause does not apply at all. In such a case, a statutory bar to imposing multiple punishments would be just that—a *statutory* bar.

B. Imposing Separate Sentences for RICO and Its Predicates Does Not Violate Double Jeopardy Because They Are Not the "Same Offense."

To the extent defendant claims that the trial court's imposition of multiple punishments for RICO and drug trafficking violated the Double Jeopardy Clause, his argument is a non-starter because RICO and its predicates are not the "same offense." To be sure, when one offense requires proof of every element of another offense, the two offenses are viewed as the same. *Whalen*, 445 U.S. at 694; *Harris v. Oklahoma*, 433 U.S. 682, 682-683, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) (per curiam); *Brown*, 432 U.S. at 168. But RICO is qualitatively different from a traditional compound offense.

Garrett is instructive on the question whether RICO and its predicates are the "same offense." In *Garrett*, the United States Supreme Court stated that "continuing criminal enterprise" (CCE) under 21 U.S.C. § 848 "is not, in any commonsense or literal meaning of the term, the 'same' offense as one of the predicate offenses." *Garrett*, 471 U.S. at 786. "[T]here is a good deal of difference between the classic relation of the 'lesser included offense' to the greater offense presented in *Brown*, on the one hand, and the relationship between the [predicate] offense and the CCE charge involved in this case, on the other." *Id.* at 787. Unlike in *Brown*, where "every moment" of the defendant's conduct "was as relevant to the joyriding charge as it was to the auto theft charge," a CCE charge "does not lend itself to the simple analogy of a single course of conduct—stealing a car—comprising a lesser included misdemeanor within a felony." *Id.* at 787-788. "These significant differences caution against ready transposition of the 'lesser included offense'

principles of double jeopardy from the classically simple situation presented in *Brown* to the multilayered conduct, both as to time and to place, involved in this case." *Id.* at 789.

"The CCE statute is very similar to RICO in its requirements, structure and application." *United States v. Gonzalez*, 921 F.2d 1530, 1537 (11th Cir.1991). Accordingly, several federal and state courts have followed *Garnett* to hold that RICO and its predicates are not the "same offense." *Id.* at 1537-1538; *United States v. Crosby*, 20 F.3d 480, 485-486 (D.C. Cir.1994); *United State v. O'Connor*, 953 F.2d 338, 342 (7th Cir.1992); *United States v. Arnoldt*, 947 F.2d 1120, 1126 (4th Cir.1991); *United States v. Pungitore*, 910 F.2d 1084, 1110-1111 (3rd Cir.1990); *State v. Allen*, 646 N.E.2d 965, 969-970 (Ind. Ct. App.1995). "The difficulty with applying [*Blockburger*] to the RICO statute is self-evident: unlike traditional greater and lesser included offenses, such as armed robbery and robbery, or aggravated rape and rape, which arise in fact from the 'same act or transaction,' RICO and the underlying predicate offenses do not." *United States v. Hawkins*, 658 F.2d 279, 288 (5th Cir.1981).

Accordingly, the trial court's imposition of sentences on both the trafficking and RICO counts does not violate double jeopardy because the two counts are not the "same offense." But even if they were the "same offense," there would be no double jeopardy violation because the RICO statute itself shows the General Assembly's intent to allow multiple punishments for RICO and its predicates. This Court therefore need not address R.C. 2941.25, but even under that statute, RICO would not merge with its predicates.

III. IN ENACTING OHIO'S RICO STATUTE, THE GENERAL ASSEMBLY INTENDED MULTIPLE PUNISHMENTS FOR RICO AND ITS PREDICATES.

Whether the General Assembly intends to allow multiple punishments is most frequently gleaned from R.C. 2941.25. But R.C. 2941.25 "is not the sole legislative

declaration in Ohio on the multiplicity of indictments." *Childs*, 88 Ohio St.3d at 561. Just as the General Assembly may "impose an additional limitation upon multiple punishments," *id.*, so too may it expand a trial court's authority to impose multiple punishments beyond what R.C. 2941.25 would allow.

This Court need not address whether R.C. 2941.25 allows a trial court to impose multiple punishments for RICO and its predicates, because the RICO statute itself is dispositive on this issue. The General Assembly's purpose in enacting the statute, along with the plain text of the statute, show that the General Assembly intended that defendants be punished for both RICO and its predicates.

A. The Purpose of RICO Is to Establish "New Penal Prohibitions" and Provide "Enhanced Sanctions," Which Can Be Achieved Only By Imposing Multiple Punishments for RICO and Its Predicates.

Ohio's RICO statute is based on the federal RICO statute, so Congress's purpose in enacting the federal statute is instructive in addressing the Ohio statute. *State v. Schlosser*, 72 Ohio St.3d 329, 332, 681 N.E.2d 911 (1998). Quoting from the "Statement of Findings and Purpose" in Congress's Organized Crime Control Act of 1970, this Court in *Schlosser* stated that that the purpose of the federal RICO statute—and thus the purpose behind Ohio's RICO statute—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." *Schlosser*, 72 Ohio St. 3d at 332, quoting Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, reprinted in 1970 U.S. Code Cong. & Adm. News at 1073; see also, *United States v. Turkette*, 452 U.S. 576, 588, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

The Sixth Circuit has held that "examin[ing] congressional purpose for enacting RICO is extremely illuminating on the question of whether multiple punishments were intended," and that RICO's purposes can be achieved only by imposing multiple punishments for RICO and its predicates:

> The clear legislative intent expressed concurrently with the enactment of RICO is to permit, perhaps even to encourage, courts to impose cumulative sentences for RICO offenses and the underlying crimes. Cumulative sentences are the "enhanced sanctions" which Congress deemed necessary to treat the spreading disease of organized crime. In fact, if cumulative convictions and sentences were disallowed by courts, Congress' purpose to eradicate organized crime would be thwarted because the RICO penalties are in many cases lighter than penalties for underlying offenses.

United States v. Sutton, 700 F.2d 1078, 1080-1081 (6th Cir.1983), citing *United States v. Rone*, 598 F.2d 564, 572 (9th Cir.1978).

Other federal courts have likewise concluded that Congress intended multiple punishments for RICO and its predicates. *United States v. Morgano*, 39 F.3d 1358, 1368 (7th Cir.1994); *United States v. Kragness*, 830 F.2d 842, 864 (8th Cir.1987); *United States v. Truglio*, 731 F.2d 1123, 1128-1129 (4th Cir.1984); *United States v. Greenleaf*, 692 F.2d 182, 189 (1st Cir.1982); *United States v. Hartley*, 678 F.2d 961, 992 (11th Cir.1982); *Hawkins*, 658 F.2d at 287; *United States v. Boylan*, 620 F.2d 359, 361 (2nd Cir.1980). "It is well settled that Congress sought to permit cumulative sentences for a RICO conviction and the predicate offenses upon which the RICO violation is premised." *United States v. Walsh*, 700 F.2d 846, 856 (2d Cir.1983).

Both before and after *Schlosser*, Ohio courts have also relied on Congress's "Statement of Findings and Purpose" in holding that the General Assembly intended multiple punishments for RICO and its predicates. *State v. Thomas*, 3rd Dist. Nos. 1-11-

25, 1-11-26, 2012-Ohio-5577, ¶¶ 61-62; *State v. Dodson*, 12th Dist. No. CA2010-08-191, 2011-Ohio-6222, ¶ 68; *State v. Moulton*, 8th Dist. No. 93726, 2010-Ohio-4484, ¶¶ 35-38; *State v. Dudas*, 11th Dist. No. 2008-L-109, 2008-L-110, 2009-Ohio-1001, ¶¶ 47-48; *State v. Lemaster*, 4th Dist. No. 96CA 18, 1998 WL 27937 (Jan. 27, 1998); *State v. Nieves*, 9th Dist. No. 96CA6379, 1997 WL 89213 (Feb. 27, 1997); *State v. Thrower*, 62 Ohio App.3d 359, 377, 575 N.E.2d 863 (9th Dist.1989); *State v. Hughes*, 2nd Dist. No. 90-CA-54, 1992 WL 52473 (Mar. 13, 1992). Other state courts have reached the same conclusion. *People v. Hoover*, 165 P.2d 784, 799 (Colo. Ct. App.2006); *State v. Blossom*, 88 Or.App. 75, 77, 744 P.2d 281 (1987); *Chavez v. State*, 722 N.E.2d 885, 894-895 (Ind. Ct. App.2000); *Carroll v. State*, 459 So.2d 368, 369 (Fla. Ct. App.1984).

Defendant misses the point by arguing that *Schlosser* did not involve the multiple-punishment issue but rather addressed whether R.C. 2923.32(A)(1) is a strict-liability offense (this Court held that it is). *Schlosser* is important to this case—and indeed any case involving Ohio's RICO statute—because it held that the General Assembly had the same purpose in enacting Ohio's RICO statute that Congress did in enacting the federal RICO statute. Because legislative intent is the "paramount concern" in interpreting a statute, *Smith v. Landfair*, 135 Ohio St.3d 89, 2012-Ohio-5692, 984 N.E.2d 1016, ¶ 18, citing *State v. S.R.*, 63 Ohio St.3d 590, 594, 589 N.E.2d 1319 (1992), identifying the General Assembly's purpose in enacting Ohio's RICO statute has implications far beyond the strict-liability issue addressed in *Schlosser*.

Indeed, if anything, the passage from Congress's "Statement of Findings and Purpose" quoted in *Schlosser*—particularly the "new penal prohibitions" and "enhanced sanctions" language—is more relevant to the multiple-punishment issue than it is to the

strict-liability issue. So although *Schlosser* did not specifically address the multiple-punishment issue, this Court likely had this language in mind when it observed that "[t]he RICO statute was designed to impose cumulative liability for the criminal enterprise." *Schlosser*, 72 Ohio St.3d at 335; see also, *id.* ("The intent of the statute is to impose additional liability for the pattern of corrupt activity involving the criminal enterprise.") (emphasis removed). (Contrary to defendant's assertion, the term "liability" in this context is synonymous with, not distinguishable from, "punishment." Appellant's Brief, p. 10.)

B. Prohibiting Multiple Punishments for RICO and Its Predicates Would Thwart the General Assembly's Intent By Allowing Many RICO Offenses to Go Unpunished.

Like the federal RICO statute, if Ohio's RICO statute did not allow multiple punishments for RICO and its predicates, the General Assembly's "purpose to eradicate organized crime would be thwarted because the RICO penalties are in many cases lighter than penalties for underlying offenses." *Sutton*, 700 F.2d at 1081. This case is a prime example. If the trial court had merged the second-degree RICO count with the second-degree trafficking count, the State would have elected to have defendant sentenced on the trafficking count because that count carries a mandatory eight-year prison term, R.C. 2925.03(C)(3)(g), whereas the RICO count carries no mandatory prison term. (Prison is mandatory for RICO only if the most serious predicate is a first-degree felony. R.C. 2929.13(F)(10); R.C. 2929.14(B)(3) (formerly (D)(3)(a)). The RICO offense would have gone unpunished, meaning that defendant would have been sentenced the same as if he committed the trafficking count unassociated with any criminal enterprise.

Another example: When at least one of the predicates is aggravated murder or murder, RICO is a first-degree felony. R.C. 2923.32(B)(1). If multiple punishments were

disallowed, the State would elect to have the defendant sentenced on the more serious aggravated-murder or murder count, and no sentence would be imposed on the RICO count. Thus, the defendant who commits aggravated murder or murder while participating in an enterprise would be punished no more severely than a defendant who commits these crimes unassociated with any enterprise.

In short, if multiple punishments are disallowed, then whenever one of the predicates alone or all the predicates together would result in a more serious sentence than the RICO count, the RICO count would go unpunished. The RICO statute would result in no "new penal prohibitions," and the defendant would escape the "enhanced sanctions" that the General Assembly intended. Of course, there will be times when the RICO count would result a more serious sentence than the predicates. But the General Assembly never would have intended that multiple punishments be allowed in some RICO cases but not others. The mere possibility that disallowing multiple punishments would thwart the General Assembly's intent in *some* cases is strong proof that the General Assembly intended to allow multiple punishment in *all* cases.

C. The Text of Ohio's RICO Statute Further Confirms the General Assembly's Intent to Allow Multiple Punishments for RICO and Its Predicates.

The text of Ohio's RICO statute further confirms the General Assembly's intent to allow multiple punishments for RICO and its predicates. "Pattern of corrupt activity" is defined as "two or more incidents of corrupt activity, *whether or not there has been a prior conviction* * * *." R.C. 2923.31(E) (emphasis added). Because a "conviction" consists of a guilty verdict and the imposition of sentence, *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 12, this reference to "prior conviction" shows that the

General Assembly specifically contemplated that a defendant may be sentenced for RICO even though sentence has already been imposed for one or more of the predicates.

Again, federal RICO law is instructive. "Pattern of racketeering activity" is defined as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). This reference to "period of imprisonment" shows that "Congress envisioned the situation where a defendant is convicted and sentenced for a racketeering act and subsequently charged with a RICO violation based on the prior conviction." *United States v. Grayson*, 795 F.2d 278, 282 (3rd Cir.1986); see also, *United States v. Crosby*, 20 F.3d 480, 483-484 (D.C. Cir.1984); *United States v. Aleman*, 609 F.2d 298, 306 (7th Cir.1979). Congress's express intent to allow multiple punishments after successive prosecutions further confirms that it did not "intend[] to prohibit the imposition of cumulative punishments in the same criminal proceeding." *Hawkins*, 658 F.2d at 288.

So too for Ohio's RICO statute. By expressly allowing a prior conviction to serve as a predicate, the General Assembly intended that a trial court may sentence a defendant for RICO even though the defendant has already been convicted and sentenced for the predicate. The result should be no different when the defendant is found guilty of RICO and the predicate during the same proceeding.

D. The Deletion of R.C. 2923.32(D) Does Not Negate the General Assembly's Intent to Allow Multiple Punishments for RICO and Its Predicates.

Defendant attempts to draw significance from the General Assembly's 2007 deletion of former R.C. 2923.32(D), which stated that "[c]riminal penalties under this

section are not mutually exclusive, unless otherwise provided, and do not preclude the application of any other criminal or civil remedy under this or any other section of the Revised Code." According to defendant, this deletion signals the General Assembly's intent that RICO and its predicates be subject to the normal merger analysis under R.C. 2941.25.

But, as the Tenth District below recognized, the deletion was part of Sub.H.B. 241, which revised Ohio's forfeiture laws by deleting various forfeiture provisions throughout the Revised Code and enacting Chapter 2981. *Miranda* at ¶ 11. Nothing in Sub.H.B. 241 was meant to change RICO's non-forfeiture provisions. To the contrary, the preamble to the bill states that the General Assembly's purpose was to "[a]dopt the Criminal Sentencing Commission's recommendations regarding revision of the Forfeiture Laws." The Sentencing Commission's recommendation specifically stated that "[t]he offense of engaging in a pattern of corrupt activity and the penalties laid out in divisions (A) and (B)(1) – (3) would remain unchanged, except that a reference authorizing forfeiture under new Chapter 2981 should be added to (B)(3)." "A Plan for Ohio's Criminal Asset Forfeiture Law: A Report of the Ohio Criminal Sentencing Commission" (March 2003), p. 64.[1] The Commission stated that R.C. 2923.32(D) dealing with "nonexclusive penalties seems unnecessary. If it remains it would become (C)." *Id.*; see also, *id.* at p. 65 (conversion table: recommended change to R.C. 2923.32(D) was "Repeal-unnecessary").

Moreover, deleting R.C. 2923.32(D) does not change the fact that the purpose behind Ohio's RICO statute was to establish "new penal prohibitions" and provide "enhanced sanctions." Nor does deleting R.C. 2923.32(D) change the fact that R.C. 2923.31(E) expressly allows a trial court to sentence a defendant for RICO even though the

[1]Available at http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/Publications/forfeiture.pdf

defendant has already been convicted and sentenced for one or more of the predicates. Thus, even beyond the forfeiture context, it is easy to see why the Sentencing Commission felt that R.C. 2923.32(D) was "unnecessary." R.C. 2923.32(D) merely expressed what was already clear—i.e., that the General Assembly intended multiple punishments for RICO and its predicates.

It is of course true that the General Assembly's amendment of a statute is "presumed to have been made to effect some purpose." *Canton Malleable Iron Co. v. Porterfield*, 30 Ohio St.2d 163, 175, 283 N.E.2d 434 (1972). Reading Sub.H.B. 241 as a whole and in the proper context, the General Assembly's purpose in deleting R.C. 2923.32(D) was simply to follow the Sentencing Commission's recommendation to repeal an unnecessary provision. The purpose was not, as defendant argues, to address some perceived "unfairness" in how trial courts punish defendants for RICO and its predicates. Appellant's Brief, p. 11. If the General Assembly really wanted to fundamentally reconceptualize Ohio's principal effort to combat organized crime, "it would have done so with unambiguous language." *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 539, 721 N.E.2d 1044 (2000), citing *State ex rel. Sinay v. Sodders*, 80 Ohio St.3d 224, 231-232, 685 N.E.2d 754 (1997). It would not have done so by deleting an "unnecessary" provision in a bill designed to revise Ohio's forfeiture laws.

In the end, the purpose and text of the RICO statute shows the General Assembly's intent to allow multiple punishments for RICO and its predicates. The deletion of R.C. 2923.32(D) did not negate this intent. Indeed, even after the deletion, Ohio courts have continued to hold that the purpose behind the RICO statute is to provide for "new penal

prohibitions" and establish "enhanced sanctions." *Thomas* at ¶¶ 61-62; *Dodson* at ¶ 68; *Moulton* at ¶ 35.

IV. R.C. 2941.25 FURTHER SHOWS THE GENERAL ASSEMBLY'S INTENT TO ALLOW MULTIPLE PUNISHMENTS FOR RICO AND ITS PREDICATES.

Because the RICO statute allows multiple punishments for RICO and its predicates, this Court need not address whether RICO merges with its predicates under R.C. 2941.25. But even under R.C. 2941.25 and *State v. Johnson*, 128 Ohio St.3d 153, defendant's merger argument fails.

A. *Johnson* Does Not Eliminate the Requirement that Offenses Be Allied Offenses of Similar Import Before They Can Merge.

R.C. 2941.25 states as follows:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

In *Johnson*, this Court partially overruled its prior decision in *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999), which had held that courts must compare the elements of the offenses in the abstract in determining whether offenses are allied offenses of similar import. The *Johnson* syllabus states: "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Johnson*, 128 Ohio St.3d 153, syllabus.

The holding of the *Johnson* syllabus is narrow, stating only that "the conduct of the accused must be considered" in determining whether offenses are allied offenses of similar import. But beyond the narrow syllabus, nothing else precedential emerges from *Johnson*. None of the opinions in *Johnson* garnered the necessary four votes to create binding authority. *Kraly v. Vannewirk*, 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (1994). Indeed, *Johnson* lacks even a plurality opinion because none of the opinions garnered more votes than all the others.

The lead opinion authored by former Chief Justice Brown (concurred in by J. Pfeifer and J. Stratton) essentially would adopt a "can result" test. Under the Brown opinion, there would be no comparison of the "similar import" of the offenses as such but only an assessment of whether the offenses could be committed by the same conduct. *Johnson* at ¶¶ 47-51. The opinion authored by former Justice O'Connor (concurred in by J. Pfeifer and J. Cupp) stated that the relative "significance of the criminal wrongs committed and the resulting harms" could factor into the analysis. "Offenses are of 'similar import' when the underlying conduct involves similar criminal wrongs and similar resulting harm." *Id.* at ¶ 67. A third opinion authored by Justice O'Donnell (concurred in by J. Stratton) stated that "the one-size-fits-all *Rance* test directing an abstract comparison of elements failed to consider factual differences in the manner of commission of the offenses because it never factored the conduct of the actor and never allowed two offenses to be allied in some cases but not allied in other cases." *Id.* at ¶ 82. Justice Lanzinger did not sign onto any opinion but concurred in the syllabus and the judgment.

Because none of the opinions in *Johnson* garnered four votes, no test emerges from that case to supplant *Rance*'s element-comparison test. Accordingly, in determining

whether offenses are allied offenses of similar import, lower courts must return to the basics—i.e., legislative intent.

The plain text of R.C. 2941.25 shows that the General Assembly intended that the "similar import" of the offenses be considered, not just the "conduct of the accused." R.C. 2941.25(A) imposes two requirements for merger: *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657, ¶ 17 ("[A] court need only engage in the allied-offense analysis when the same conduct, or single act, results in multiple convictions."). Under R.C. 2941.25(B), crimes of "dissimilar import" shall not be merged, even when they arise from the same conduct. In addition to the "dissimilar import" and "committed separately" restrictions, R.C. 2941.25(B) states that there is no merger when the offenses are committed "with a separate animus." *Moss*, 69 Ohio St.3d at 520 (even if offenses were allied, no merger required because they were "committed separately").

Thus, the requirement in *Johnson* that courts consider "the conduct of the accused" cannot be read to exclude consideration of the "similar import" criterion. Indeed, disregarding the "similar import" requirement would amount to judicial legislation by effectively striking that requirement from R.C. 2941.25. "'[T]he General Assembly is not presumed to do a vain or useless thing[.] * * * [W]hen language is inserted in a statute it is inserted to accomplish some definite purpose.'" *State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1437 (1997) (quotation omitted). Because it is presumed that "every word in a statute is designed to have *some* effect," every part of the statute "shall be regarded." *Ford Motor Co. v. Ohio Bur. of Emp. Serv.*, 59 Ohio St.3d 188, 190, 571 N.E.2d 729 (1991) (emphasis sic).

The question, then, is what test governs whether offenses share a similar import. On this point, the Brown opinion in *Johnson* should not be elevated to the status of precedent. The "can result" test proposed in that opinion, without the support of four justices, could not overrule *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶ 19, which just eleven months before *Johnson* had explicitly rejected a "can result" test. More importantly, the Brown opinion would contradict the express language of R.C. 2941.25, which mandates consideration of the similar import of the offenses.

Because the *Johnson* syllabus overruled *Rance*, and because *Johnson* provided no substitute test for determining whether offenses are "allied offenses of similar import," what remains are this Court's many pre-*Rance* cases—untouched by *Johnson*—stating that, in determining whether multiple offenses share a similar import, courts are to compare the elements to determine whether the commission of one offense will necessarily result in the commission of the other offense. See, e.g., *State v. Blankenship*, 38 Ohio St.3d 116, 118, 526 N.E.2d 816 (1988) ("[W]e do not find that the elements correspond to such a degree that the commission of kidnapping necessarily results in the commission of felonious assault."); *State v. Preston*, 23 Ohio St.3d 64, 65, 491 N.E.2d 685 (1986) ("will automatically result"); *State v. Talley*, 18 Ohio St.3d 152, 155-156, 480 N.E.2d 439 (1985) (no merger because offenses "not necessary" or "not essential" to each other); *State v. Bickerstaff*, 10 Ohio St.3d 62, 66, 481 N.E.2d 829 (1984) ("the crimes and their elements must correspond to such a degree that commission of one offense constitutes commission of the other offense"); *State v. Mitchell*, 6 Ohio St.3d 416, 453 N.E.2d 593 (1983), syllabus (element of aggravated burglary and theft do not correspond to such a degree to constitute allied offenses of similar import); *State v. Rice*, 69 Ohio St.2d 422, 425, 433 N.E.2d 175

(1982) (offenses "are not the same, one to the other."); *State v. Logan*, 60 Ohio St.2d 126, 130, 397 N.E.2d 1345 (1979) ("implicit within every forcible rape * * * is a kidnapping"); *State v. Donald*, 57 Ohio St.2d 73, 75, 386 N.E.2d 1341 (1979) (stating that rape "necessarily" results in a kidnapping). An element-comparison test is also most consistent with the judicial doctrine of merger, which focuses on whether the "component elements" of one crime includes as "inherent therein" the elements of another crime. *State v. Botta*, 27 Ohio St.2d 196, 201, 271 N.E.2d 776 (1971).

B. RICO and Its Predicates Are Not Allied Offenses of Similar Import.

Under an element-comparison test, RICO and its predicates are not allied offenses of similar import. Numerous offenses can constitute "corrupt activity." R.C. 2923.31(I). Conversely, committing a predicate offense will not automatically result in committing RICO. Because neither RICO nor any of its predicates necessarily results in the other, they are of dissimilar import. *Dudas* at ¶ 49; *Hughes, supra*; *State v. Brown*, 9th Dist. Nos. 90CA-4836, 90CA-4838, 1991 WL 70817 (1991); *State v. Burge*, 88 Ohio App.3d 91, 94, 623 N.E.2d 146 (10th Dist.1993); *Thrower*, 62 Ohio App.3d at 377.

Nor are RICO and its predicates allied offense of similar import under the O'Connor opinion in *Johnson* because the two offenses do not involve "similar criminal wrongs and similar resulting harm." *Johnson* at ¶ 67. The purpose of RICO is not to criminalize the underlying predicate acts, but rather "to impose additional liability for the *pattern* of corrupt activity involving the criminal enterprise." *Schlosser*, 79 Ohio St.3d at 335 (emphasis sic); see also, *Dudas* at ¶ 47. While a "pattern of corrupt activity" requires proof of individual predicate acts, the RICO statute addresses criminal wrongs and resulting harm distinct from predicate acts themselves. RICO and its predicates protect

different "societal interests." *Moulton* at ¶ 33, following *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149.

C. Defendant Committed the RICO and Trafficking Offenses with a Separate Animus.

Finally, *Johnson* has no effect on R.C. 2941.25(B), which states that even when the same conduct results in two or more offenses of similar import, the offenses do not merge if they are committed with a separate animus. Just as RICO and its predicates do not address "similar criminal wrongs and similar resulting harm," a defendant's animus in committing a RICO offense differs from the animus for the predicates. Engaging in a pattern of corrupt activity as part of an enterprise "requires an additional state of mind" than what is necessary to commit the predicates. *Thomas* at ¶ 61, quoting *Dodson* at ¶ 67. In *Dodson*, the Twelfth District held that the RICO and trafficking offenses were committed with a separate animus because the defendant not only "possessed the intent to traffic in drugs, which does not require him to form an enterprise," but he also "intentionally formed relationships" and "maintained these relationships" to transport marijuana from Arizona to Ohio. *Dodson* at ¶ 67.

Likewise here. Defendant was the "money guy" in the drug-trafficking enterprise. In addition to trafficking drugs, defendant formed an enterprise by entering into and maintaining relationships with Howell, Luis, and Martinez. Also, as defense counsel stated at sentencing, the money from the enterprise gets shipped back to Arizona, and from there perhaps to Mexico. Sent. Tr., 6. So defendant has cultivated relationships in Arizona as well, including with an individual referred to as "Big Dog," the person defendant convinced to continue supplying Howell with marijuana. Sent Tr., 14-15. The prosecutor

also stated that the enterprise also ships drugs to the Bronx, New York; Birmingham, Alabama; and Norfork, Virginia. Sent. Tr., 16.

In sum, under any view of R.C. 2941.25, the trial court was not required to merge the RICO count with the trafficking count. But, again, this Court need not address R.C. 2941.25 because the RICO statute itself shows the General Assembly's intent to allow multiple punishments for RICO and its predicates.

CONCLUSION

For the foregoing reasons, the Tenth District's judgment should be affirmed.[2]

Respectfully submitted,

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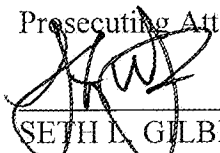

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[2] If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988).

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent regular U.S. Mail, this 25th day of June, 2013, to DAVID P. REISER, Two Miranova Place, Suite 500, Columbus, Ohio 43215.

SETH L. GILBERT 0072929
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