



RICO

The RICO Act (18 U.S.C. § 1962) provides for criminal prosecution of racketeering activities as part of an ongoing criminal organization. RICO is designed to address the infiltration of legitimate enterprises by organized crime and other illegal ventures.

Relevant Statutes

- 18 U.S.C. § 1962(a)-(d) (Prohibited Activities)
- 18 U.S.C. § 1961(1)-(10) (Definitions)
- 18 U.S.C. § 1963(a)-(m) (Criminal Penalties)

Predicate Acts

A “predicate act” is an enumerated crime in a RICO conspiracy used to constitute a RICO violation

(e.g. murder, kidnapping, gambling, arson, robbery, extortion etc.)

VS.

Overt Acts

An “overt act” is an outward act, however innocent in itself, done in furtherance of a conspiracy

(e.g. transfer of a firearm to another gang member to further the conspiracy)

Overt Acts are not necessarily the same as acts that would constitute RICO predicates.

Frequently Asked Questions

When determining the base offense level under the RICO guidelines, am I comparing the alternative minimum offense level 19 to each of the underlying offenses individually?

No. Compare the 19 (including any Chapter Three Adjustments) to the combined offense level determined for the underlying offenses. That is, apply Chapters Two and Three Parts A, B, C and D to the underlying offenses and determine a combined offense level.

What is the burden of proof required when there is more than one underlying offense?

The majority of circuits that have addressed the issue (1st, 2nd, 6th and 7th) have held that uncharged, underlying offenses may be accounted for under relevant conduct as long as the court finds the offense has been proved by a preponderance of evidence. The Eleventh Circuit, however, employs a beyond a reasonable doubt standard.

When the defendant has prior convictions that are part of the pattern of racketeering activity, are these priors counted for criminal history and not part of the instant offense?

Yes, if the previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, see §2E1.1, Application Note 4.

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Relevant Case Law

Burden of Proof for Uncharged Underlying Offenses

Preponderance of the Evidence

United States v. Carrozza, 4 F.3d 70 (1st Cir. 1993)

United States v. Yannotti, 541 F.3d 112 (2d Cir. 2008)

United States v. Massino, 546 F.3d 123 (2d Cir. 2008)

United States v. Corrado, 227 F.3d 528 (6th Cir. 2000)

United States v. Garcia, 754 F.3d 460 (7th Cir. 2014)

Beyond a Reasonable Doubt

United States v. Nguyen, 255 F.3d 1335 (11th Cir. 2001)

Analogizing State Crimes

United States v. Scott, 642 F.3d 791, 801-02 (9th Cir. 2011) (“The special verdict form indicates the jury found [defendant] guilty of conspiring to murder under state law, so the district court properly analogized to the federal offense of conspiracy to murder.”).

United States v. Minicone, 960 F.2d 1099, 1110 (2d Cir. 1992) (defendant convicted of RICO conspiracy based on his involvement in the enterprise’s gambling activity and second degree murder under the New York Penal Code; district court properly analogized the definition of first degree murder in 18 U.S.C. § 1111 and used the applicable guideline for first degree murder at §2A1.1).

See also, *United States v. Carr*, 424 F.3d 213, 231 (2d Cir. 2005) (district court properly applied base offense level for federal offense of first degree murder, reiterating its conclusion in *Minicone* that the absence of reference to premeditation or malice aforethought in the state second degree murder statute does not mean that federal first degree murder is not the most analogous federal offense).

Prior Sentence Rule - §2E1.1, Application Note 4

United States v. Minicone, 960 F.2d 1099, 1111 (2d Cir. 1992) (rejecting government’s argument that district court erred in assessing prior conviction only in calculating criminal history and not in calculating base offense level; “district court reasonably construed Note 4 to mean that the conduct underlying the previously imposed sentence should not be used in calculating the base offense level for the instant [RICO] offense”).

United States v. Riccobene, 709 F.2d 214, 232 (3d Cir. 1983) (“The predicate offenses . . . are not themselves the RICO violation[;] they are merely one element of the crime. [RICO] does not prohibit the commission of the individual racketeering acts. Rather, it bans the operation of an ongoing enterprise by means of those acts.”).

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts’ sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.