

# Primer

## RICO Offenses (Racketeer Influenced and Corrupt Organizations)

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## I. INTRODUCTION

This primer provides a general overview of the statutes, sentencing guidelines, and case law regarding the Racketeer Influenced and Corrupt Organizations Act,<sup>1</sup> commonly referred to as the “RICO Act” or simply “RICO.” This primer focuses primarily on application of the RICO guideline and related sentencing issues. Although the primer identifies some of the key cases and concepts, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

## II. THE STATUTORY SCHEME

The RICO Act, 18 U.S.C. §§ 1961–68, provides for criminal prosecution of racketeering activities as part of an ongoing criminal organization. As noted in its legislative history, RICO is designed to address the infiltration of legitimate enterprises by organized crime and other illegal ventures.<sup>2</sup> Some examples provided in the legislative history include the infiltration of legitimate businesses, such as laundry services, retail stores, restaurants and nightclubs, or labor unions, to commit gambling, money laundering, loan sharking, or extortion.<sup>3</sup> Leaders of criminal organizations can be held liable under RICO for crimes they order others to commit, or assist in committing, in furtherance of the ongoing criminal organization. As discussed below, section 1962 sets forth three substantive offenses and makes it a crime to conspire to commit any of the three, section 1961 defines terms used in the RICO statute, and section 1963 establishes criminal penalties, including imprisonment, fines, and criminal forfeiture.<sup>4</sup>

### A. 18 U.S.C. § 1962 (PROHIBITED ACTIVITIES)

Section 1962(a), (b), and (c) sets forth the substantive prohibited activities.<sup>5</sup> Section 1962(d) makes it unlawful to conspire to commit any such prohibited activities.<sup>6</sup> Each of the prohibited activities requires, as a necessary element, proof of a “pattern of racketeering activity” or “collection of an unlawful debt.”<sup>7</sup>

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<sup>1</sup> Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-68).

<sup>2</sup> See S. REP. NO. 91-617, at 76-77 (1969).

<sup>3</sup> *Id.*

<sup>4</sup> The RICO Act also provides for civil remedies against persons who engage in racketeering activities and sets forth other procedural requirements. 18 U.S.C. §§ 1964-68.

<sup>5</sup> *Id.* § 1962(a)-(c).

<sup>6</sup> *Id.* § 1962(d).

<sup>7</sup> *Id.* § 1962.

### 1. 18 U.S.C. § 1962(a)

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Under section 1962(a), it is a crime to “use or invest” any income derived from a “pattern of racketeering activity” or through “collection of an unlawful debt” to establish, acquire an interest in, or operate “any enterprise” engaged in or affecting interstate commerce.<sup>8</sup> To establish an offense under section 1962(a), the government must show that the defendant had derived income from a pattern of racketeering or collection of unlawful debt, and then used or invested some of that income to establish or operate an enterprise engaged in or affecting interstate commerce.<sup>9</sup> For example, a drug dealer violates section 1962(a) by using the proceeds of a pattern of drug trafficking crimes to invest in or operate a legitimate business.<sup>10</sup>

### 2. 18 U.S.C. § 1962(b)

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Section 1962(b) prohibits acquiring or maintaining an interest in, or control of, any enterprise that is engaged in or affects interstate commerce “through a pattern of racketeering activity or through collection of an unlawful debt.”<sup>11</sup> This provision makes it unlawful to take over an enterprise that affects interstate commerce through a pattern of racketeering activity or collection of unlawful debt. For example, an organized crime figure violates section 1962(b) by taking over a legitimate business through a pattern of extortionate and loansharking acts designed to intimidate the owners into selling the business.<sup>12</sup>

### 3. 18 U.S.C. § 1962(c)

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Section 1962(c) makes it unlawful for any person “employed by or associated with any enterprise engaged in” or affecting 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.”<sup>13</sup> For example, employees of

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<sup>8</sup> *Id.* § 1962(a).

<sup>9</sup> *See, e.g.,* United States v. Robertson, 73 F.3d 249, 251 (9th Cir. 1996) (“Unlike § 1962(c), § 1962(a) prohibits not the engagement in racketeering acts to conduct an enterprise affecting interstate commerce, but rather the *use or investment of the proceeds* of racketeering acts to acquire, establish or operate such an enterprise.”); United States v. Vogt, 910 F.2d 1184, 1194 (4th Cir. 1990) (identifying same elements).

<sup>10</sup> *See, e.g.,* United States v. Robertson, 514 U.S. 669 (1995) (per curiam) (defendant violated § 1962(a) by investing the proceeds of narcotic offenses in a gold mine).

<sup>11</sup> 18 U.S.C. § 1962(b).

<sup>12</sup> *See, e.g.,* United States v. Biasucci, 786 F.2d 504, 506–07 (2d Cir. 1986) (acquisition of interests in and control over businesses through loansharking activities involving collection of unlawful debt); *see also* United States v. Jacobson, 691 F.2d 110, 112 (2d Cir. 1982) (per curiam) (acquisition of bakery’s lease as security for usurious loan).

<sup>13</sup> 18 U.S.C. § 1962(c); *see also* United States v. Grote, 961 F.3d 105, 120 n.5 (2d Cir. 2020) (cautioning that, because “some degree of discretionary authority is sufficient” to establish participation in the conduct of the enterprise, “many ‘lower rung’ employees remain potentially subject to RICO charges for their activities

the New York State Department of Motor Vehicles violated this provision by using the DMV to process fraudulent licenses and registrations for stolen vehicles in exchange for money.<sup>14</sup>

Section 1962(c) requires the existence of two distinct entities: “a ‘person’ and an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.”<sup>15</sup> Criminal liability depends on showing that the person “conducted or participated in the conduct of the enterprise’s affairs.”<sup>16</sup> For purposes of RICO, a corporate employee (a natural person) is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status, even where the employee is the corporation’s sole owner.<sup>17</sup> Likewise, the existence of an enterprise is separate from the pattern of racketeering activity in which the enterprise engages.<sup>18</sup> The enterprise is “proved by evidence of an ongoing organization . . . and by evidence that the various associates function as a continuing unit,” while the pattern of racketeering activity is proved by evidence of at least two racketeering acts committed by participants in the enterprise.<sup>19</sup> However, evidence establishing the pattern of racketeering activity and evidence establishing an enterprise “may in particular cases coalesce.”<sup>20</sup>

#### ***4. 18 U.S.C. § 1962(d)***

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Section 1962(d) provides 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.”<sup>21</sup> Unlike the general conspiracy statute applicable to federal crimes, which requires proof that at least one of the conspirators committed an “act to effect the object of the conspiracy,”<sup>22</sup>

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relating to a RICO enterprise,” though suggesting that § 1962(c) “likely shields the lowest rung of employees from RICO liability”).

<sup>14</sup> *United States v. Alkins*, 925 F.2d 541, 551–53 (2d Cir. 1991).

<sup>15</sup> *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001) (numbering and certain punctuation omitted).

<sup>16</sup> *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (internal quotation marks and emphasis omitted).

<sup>17</sup> *See Cedric Kushner Promotions*, 533 U.S. at 163 (“After all, incorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.”).

<sup>18</sup> *United States v. Turkette*, 452 U.S. 576, 583 (1981) (“The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute.”).

<sup>19</sup> *Id.*

<sup>20</sup> *Boyle v. United States*, 556 U.S. 938, 947 (2009) (quoting *Turkette*, 452 U.S. at 583).

<sup>21</sup> 18 U.S.C. § 1962(d).

<sup>22</sup> *Id.* § 371.

section 1962(d) does not require the commission of an “overt” or specific act in furtherance of a RICO conspiracy.<sup>23</sup>

The RICO conspiracy provision focuses on the “act of agreement.”<sup>24</sup> Therefore, a defendant who conspires to commit a substantive offense under section 1962(a), (b), or (c) can be convicted of a RICO conspiracy, even without personally committing or agreeing to commit a racketeering activity or collection of unlawful debt, as would be required for conviction of an underlying substantive offense.<sup>25</sup> Nor does a RICO conspiracy require proof that an enterprise actually existed or that a pattern of racketeering activity actually occurred.<sup>26</sup> Rather, it requires only that the conspirator “intend[s] to further an endeavor which, if completed, would satisfy all of the elements” of a substantive criminal offense.<sup>27</sup>

## B. 18 U.S.C. § 1961 (DEFINITIONS)

The RICO Act broadly defines certain terms and concepts, including the following.

### 1. Racketeering Activity

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RICO defines “racketeering activity” as any crime enumerated in paragraphs A through G of subsection (1).<sup>28</sup> The listed crimes often are referred to as “predicate acts,” because committing an enumerated crime is the foundation for a RICO offense. Criminal acts committed outside of the United States can serve as RICO predicate offenses, “but only

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<sup>23</sup> See *id.* § 1962(d); see also *Salinas v. United States*, 522 U.S. 52, 63 (1997) (“There is no requirement of some overt act or specific act in the [RICO] statute before us, unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an ‘act to effect the object of the conspiracy.’” (quoting 18 U.S.C. § 371)).

<sup>24</sup> *United States v. Delgado*, 972 F.3d 63, 79 (2d Cir. 2020) (internal quotation and emphasis omitted), *as amended* (Sept. 1, 2020).

<sup>25</sup> See *Salinas*, 522 U.S. at 65–66. In *Salinas*, the Supreme Court held that a defendant could violate section 1962(d) without “himself commit[ting] or agree[ing] to commit two or more” acts of racketeering activity. *Id.* at 66. The Ninth Circuit subsequently held that after *Salinas*, a defendant is guilty of conspiracy to violate section 1962(c) if he knowingly agreed to facilitate a scheme that includes the operation or management of a RICO enterprise, regardless of whether he actually conspired to operate or manage the enterprise himself. *United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004); see also *United States v. Tisdale*, 980 F.3d 1089, 1096 (6th Cir. 2020) (a defendant acquitted “of the underlying predicate acts for a substantive RICO conviction” still could be found “guilty of RICO conspiracy” under § 1962(d)).

<sup>26</sup> See, e.g., *United States v. Rich*, 14 F.4th 489, 493 (6th Cir. 2021) (“[A]n agreement to associate with and participate in a yet-to-be-formed racketeering [offense] that would affect interstate commerce constitutes a completed offense under § 1962(d).”); *Delgado*, 972 F.3d at 79 (“Nor must [the government] establish that a pattern of racketeering activity actually took place.”); *United States v. Williams*, 974 F.3d 320, 368 (3d Cir. 2020) (“Nor even must the conspiracy actually achieve any or all of its criminal ends.”).

<sup>27</sup> *Williams*, 974 F.3d at 369 (quoting *Salinas*, 522 U.S. at 65).

<sup>28</sup> 18 U.S.C. § 1961(1).

to the extent that the predicates alleged in a particular case themselves apply extraterritorially.”<sup>29</sup>

Subdivision A includes “any act or threat involving” certain state offenses, including murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in a controlled substance, and other serious crimes, punishable by imprisonment for more than one year.<sup>30</sup> This definition does not list specific state statutes. Rather, the Supreme Court has held that a state statutory offense may constitute a racketeering act under subdivision A provided it substantially conforms to the “generic” definition of the state offense referenced at the time RICO was enacted.<sup>31</sup> Further, the statute restricts the listed offenses to those “chargeable under state law,” meaning that the offense must have been chargeable under state law at the time the underlying conduct was committed.<sup>32</sup>

Subdivisions B, C, E, F, and G include “any act which is *indictable* under” certain federal statutes.<sup>33</sup> These provisions are narrower than subdivision A because the act must have been “indictable under” one of the listed federal statutes at the time the subdivision was enacted. Attempts and conspiracies may not be used as racketeering acts unless they are expressly included within the terms of the statute.<sup>34</sup> For example, a conspiracy to violate the Hobbs Act may be used as a predicate racketeering act under subdivision B because the Hobbs Act statute expressly makes conspiracy a crime.<sup>35</sup>

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<sup>29</sup> *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 339 (2016) (also giving the example that “a violation of § 1962 could be premised on a pattern of killings of Americans abroad in violation of § 2332(a)—a predicate that all agree applies extraterritorially—whether or not any domestic predicates are also alleged”).

<sup>30</sup> 18 U.S.C. § 1961(1)(A).

<sup>31</sup> *See Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (for a state extortion offense to serve as a RICO predicate, “the conduct must be capable of being generically classified as extortionate”); *see also, e.g.*, *United States v. Kirsch*, 903 F.3d 213, 225–26 (2d Cir. 2018) (extortion under New York statute satisfied generic definition); *United States v. Ferriero*, 866 F.3d 107, 115–16 (3d Cir. 2017) (bribery under New Jersey statute satisfied generic definition); *United States v. Adams*, 722 F.3d 788, 802–03 (6th Cir. 2013) (vote buying under Kentucky statute satisfied generic definition of bribery). The Sixth Circuit has held that “the categorical approach does not apply to . . . § 1961(1)(A).” *United States v. Johnson*, 64 F.4th 715, 728 (6th Cir. 2023).

<sup>32</sup> *See, e.g.*, *United States v. Licavoli*, 725 F.2d 1040, 1045–47 (6th Cir. 1984) (conspiracy to murder and murder were treated as separate crimes under Ohio law and could each serve as predicate offenses, despite statutory provision providing that a person could not “be convicted of or sentenced for both conspiracy to commit murder and the murder crime itself”); *United States v. Forsythe*, 560 F.2d 1127, 1134–37 (3d Cir. 1977) (recodification of state bribery statute to provide for a term of imprisonment not exceeding one year did not preclude prosecution under RICO for conduct prior to the recodification).

<sup>33</sup> 18 U.S.C. § 1961(1)(B), (C), (E), (F), and (G) (emphasis added) (listing specific federal statutes constituting racketeering acts). Notably, subdivision G describes racketeering activity as any act indictable under any provision listed in section 2332b(g)(5)(B) of title 18, which adds approximately 50 terrorism-related offenses to the list of racketeering acts. *See* 18 U.S.C. § 2332b (Acts of terrorism transcending national boundaries).

<sup>34</sup> *See id.* § 1961(1)(B), (C), (E), (F), and (G).

<sup>35</sup> *Id.* § 1951(a) (“Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . .”).



Subdivision D includes “any offense involving” listed categories of federal offenses.<sup>36</sup> Unlike in subdivisions B, C, E, F, and G, the phrase “any offense involving” in subdivision D includes attempts and conspiracies.<sup>37</sup>

## 2. Pattern of Racketeering Activity

A “pattern of racketeering activity” requires “at least two acts of racketeering activity,” one of which occurred after the effective date of the RICO statute and the last of which occurred within ten years after the commission of a prior racketeering act.<sup>38</sup> The ten-year limitation excludes any period of imprisonment.<sup>39</sup> The Supreme Court has held that establishing a pattern of racketeering activity requires more than simply proving two racketeering acts within a statutorily prescribed time period; there also must be proof that the racketeering acts are related and amount to, or pose a threat of, continued criminal activity.<sup>40</sup>

## 3. Unlawful Debt

RICO defines an “unlawful debt” as a debt (A) “incurred or contracted in gambling activity which was in violation of” state or federal law, or which is unenforceable under state or federal law “in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling” in violation of state or federal law, or the business of “lending money or a thing of value at a rate usurious” under state or federal law, where the usurious rate is at least twice the

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<sup>36</sup> *Id.* § 1961(1)(D).

<sup>37</sup> *See, e.g.,* *United States v. Haynie*, 8 F.4th 801, 805 (8th Cir. 2021) (“In the context of RICO, this court and other circuits uniformly have held that inchoate offenses of attempt and conspiracy to commit an enumerated offense that would be racketeering activity require an act ‘involving’ the enumerated offense.”); *United States v. Rodriguez*, 971 F.3d 1005, 1014 (9th Cir. 2020) (RICO convictions may be premised on attempts and conspiracies as predicate racketeering acts); *United States v. Wilkerson*, 966 F.3d 828, 839 (D.C. Cir. 2020) (narcotics conspiracy constitutes RICO predicate act); *United States v. Darden*, 70 F.3d 1507, 1524–25 (8th Cir. 1995) (conspiracy to distribute and possession with intent to distribute controlled substances constitute RICO predicate acts, but simple possession of cocaine does not); *United States v. Echeverri*, 854 F.2d 638, 648 (3d Cir. 1988) (conspiracy to possess and distribute a controlled substance and possession with intent to distribute constitute RICO predicate acts); *United States v. Weisman*, 624 F.2d 1118, 1123–24 (2d Cir. 1980) (conspiracy to commit offense involving bankruptcy fraud or securities fraud is a RICO predicate act), *abrogation on other grounds recognized by Ianniello v. United States*, 10 F.3d 59, 62 (2d Cir. 1993).

<sup>38</sup> 18 U.S.C. § 1961(5).

<sup>39</sup> *Id.*

<sup>40</sup> *See H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240 (1989) (“RICO’s legislative history tells us . . . that the relatedness of racketeering activities is not alone enough to satisfy § 1962’s pattern element. To establish a RICO pattern it must also be shown that the predicate themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity.”); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) (“[W]hile two acts are necessary, they may not be sufficient . . . [T]wo isolated acts of racketeering activity do not constitute a pattern.”).

enforceable rate.<sup>41</sup> Thus, an unlawful debt is a debt that arises from illegal gambling or loansharking activities. The prohibition on the “collection of unlawful debt” encompasses all efforts to collect on a usurious loan, whether by demanding payment in cash or by repossessing property pledged as collateral.<sup>42</sup> While a “pattern of racketeering activity” must consist of at least two racketeering acts, the “collection of an unlawful debt” can be predicated on a single occurrence, such as the collection of a single unlawful debt.<sup>43</sup>

#### 4. Person

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For purposes of the RICO Act, a “person” includes “any individual or entity capable of holding a legal or beneficial interest in property.”<sup>44</sup>

#### 5. Enterprise

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An “enterprise” includes two categories of associations. The first category encompasses “any individual, partnership, corporation, association, or other legal entity.”<sup>45</sup> The second category covers “any union or group of individuals associated in fact although not a legal entity.”<sup>46</sup> Each category describes a separate type of enterprise covered by the statute—those that are recognized as legal entities, and those that are not.<sup>47</sup> Thus, the term “enterprise” includes both legitimate and illegitimate enterprises.<sup>48</sup>

The “enterprise” referenced in the substantive offenses in section 1962(a) and (b) is formed through an unlawful pattern of racketeering activity or by money obtained from an unlawful pattern of racketeering activity.<sup>49</sup> By contrast, the “enterprise” referred to in the substantive offense in section 1962(c) is the vehicle through which the unlawful pattern of

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<sup>41</sup> 18 U.S.C. § 1961(6).

<sup>42</sup> See *Goldenstein v. Repossessors, Inc.*, 815 F.3d 142, 148 (3d Cir. 2016) (“[T]he prohibition on the ‘collection of unlawful debt’ under the statute encompasses efforts to collect on a usurious loan, without distinguishing whether the collection is cash or collateral; in either case the defendants’ actions effect the collection of the unlawful debt.”).

<sup>43</sup> See, e.g., *United States v. Grote*, 961 F.3d 105, 119 (2d Cir. 2020) (“RICO offenses may be predicated on a single instance of collection of unlawful debt, as well as on a pattern of racketeering activity.”); *United States v. Ponzo*, 853 F.3d 558, 581 n.15 (1st Cir. 2017) (“The government proves racketeering . . . ‘when it proves the collection of a single unlawful debt.’” (quoting *United States v. Weiner*, 3 F.3d 17, 23 (1st Cir. 1993))); *United States v. Vastola*, 899 F.2d 211, 228 n.21 (3d Cir.) (same), *vacated and remanded on other grounds*, 497 U.S. 1001 (1990).

<sup>44</sup> 18 U.S.C. § 1961(3).

<sup>45</sup> *Id.* § 1961(4); see also *United States v. Turkette*, 452 U.S. 576, 580 (1981).

<sup>46</sup> 18 U.S.C. § 1961(4).

<sup>47</sup> *Boyle v. United States*, 556 U.S. 938, 945 (2009).

<sup>48</sup> See *Turkette*, 452 U.S. at 584–85 (“There is no inconsistency or anomaly in recognizing that § 1962 applies to both legitimate and illegitimate enterprises.”).

<sup>49</sup> 18 U.S.C. § 1962(a), (b).

racketeering is committed.<sup>50</sup> The Supreme Court has held that “RICO both protects a legitimate ‘enterprise’ from those who would use unlawful acts to victimize it, and also protects the public from those who would unlawfully use an ‘enterprise’ (whether legitimate or illegitimate) as a ‘vehicle’ through which ‘unlawful . . . activity is committed.’ ”<sup>51</sup> Thus, under section 1962(c), a legitimate enterprise may be the “victim” of racketeering activity.

### C. 18 U.S.C. § 1963 (CRIMINAL PENALTIES)

The RICO Act establishes criminal penalties for a violation of section 1962. Pursuant to section 1963(a), a violation of section 1962 is punishable by a fine, a term of imprisonment not to exceed 20 years, or both.<sup>52</sup> However, if the RICO violation is based on racketeering activity that is charged as a predicate act and has a maximum penalty of life imprisonment, the maximum penalty for the RICO violation is also life imprisonment,<sup>53</sup> provided that the predicate act is proven beyond a reasonable doubt.<sup>54</sup>

In addition, section 1963(a) mandates forfeiture of all involved property to the United States, irrespective of any provision of state law.<sup>55</sup> This requirement includes any property interest acquired or maintained in violation of section 1962,<sup>56</sup> any interest in, security of, claim against, or property or contract right of any kind affording a source of influence over the RICO enterprise,<sup>57</sup> and any proceeds from the racketeering activity or

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<sup>50</sup> See *id.* § 1962(c).

<sup>51</sup> *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164–65 (2001) (first quoting *Turkette*, 452 U.S. at 591; and then quoting *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994)).

<sup>52</sup> 18 U.S.C. § 1963(a).

<sup>53</sup> See *United States v. Brown*, 973 F.3d 667, 709 (7th Cir. 2020) (holding that RICO conspiracy was “based on” murders for which the maximum penalty under state law was life imprisonment and rejecting argument that the court needed to “discern a ‘generic’ definition” of the predicate offense or analogize to the state law offense of conspiracy to commit murder); see also *United States v. Perez*, 21 F.4th 490, 493–94 (7th Cir. 2021) (“The proper inquiry is whether the RICO ‘violation’—here, conspiracy—was *based on* a predicate crime punishable by life imprisonment . . . . The RICO violation was based in part on the predicate racketeering act of attempted murder . . . .” by a co-conspirator, and under state law “that version of attempted murder is punishable by life imprisonment.”).

<sup>54</sup> If the government seeks a sentence exceeding the 20-year statutory maximum, a jury must find beyond a reasonable doubt (or the defendant must have admitted in pleading guilty) that the defendant committed a racketeering act for which the maximum penalty includes life imprisonment. See 18 U.S.C. § 1963(a); see also *United States v. Simmons*, 11 F.4th 239, 256–57 (4th Cir. 2021) (“*Apprendi* required the jury to find that [the defendants] committed the alleged murders for each to have received a life sentence” under § 1963(a) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000))); *United States v. Nguyen*, 255 F.3d 1335, 1343–44 (11th Cir. 2001) (RICO sentences greater than 20 years ran afoul of *Apprendi*, where the jury did not find the defendants committed a racketeering act carrying a potential life sentence).

<sup>55</sup> 18 U.S.C. § 1963(a).

<sup>56</sup> *Id.* § 1963(a)(1).

<sup>57</sup> *Id.* § 1963(a)(2)(A)–(D).

unlawful debt collection.<sup>58</sup> Section 1963(b) specifies the type and nature of “property” subject to criminal forfeiture under the RICO Act, including real property and tangible and intangible personal property,<sup>59</sup> and extends criminal forfeiture to any property that is subsequently transferred to a person other than the defendant, unless the transferee can establish that he or she is a bona fide purchaser.<sup>60</sup> Section 1963(d)–(m) sets forth procedures that the government must follow to dispose of property forfeitable under the RICO Act.<sup>61</sup> RICO criminal forfeiture is imposed “in addition to any other sentence” for a violation of section 1962.<sup>62</sup> A criminal forfeiture order is a part of the defendant’s sentence, not part of the substantive offense of conviction.<sup>63</sup>

#### D. DOUBLE JEOPARDY CONSIDERATIONS FOR RICO CONSPIRACY AND SUBSTANTIVE OFFENSES

The Double Jeopardy Clause prohibits successive prosecutions or punishments for the same offense.<sup>64</sup> Two offenses are separate if each contains an element not contained in the other.<sup>65</sup> In the RICO context, double jeopardy issues may be triggered in two ways: (1) a defendant is prosecuted for a RICO conspiracy and a substantive RICO offense; and (2) a defendant is prosecuted for a substantive RICO offense and for offenses charged as racketeering acts underlying the RICO offense.

The Supreme Court long has recognized that “in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end.”<sup>66</sup> “Because a RICO conspiracy contains a different element than a substantive RICO violation, namely an agreement with others to commit a substantive RICO violation,” a RICO conspiracy and a substantive RICO violation are not treated as the same offense under the Double Jeopardy Clause and, accordingly, may be punished separately.<sup>67</sup> Likewise,

<sup>58</sup> *Id.* § 1963(a)(3).

<sup>59</sup> *Id.* § 1963(b).

<sup>60</sup> *Id.* § 1963(c).

<sup>61</sup> *Id.* § 1963(d)–(m).

<sup>62</sup> *Id.* § 1963(a).

<sup>63</sup> *See* *Libretti v. United States*, 516 U.S. 29, 39 (1995) (“Congress plainly intended forfeiture of assets to operate as punishment for criminal conduct in violation of the federal drug and racketeering laws, not as a separate substantive offense.”). Indeed, the Supreme Court has observed that criminal forfeiture as authorized by the RICO statute “is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional ‘fine,’ ” and, therefore, is subject to the Eighth Amendment’s prohibition against “cruel and unusual punishment” or “excessive fines.” *Alexander v. United States*, 509 U.S. 544, 558 (1993).

<sup>64</sup> *See* *United States v. Ursery*, 518 U.S. 267, 273 (1996).

<sup>65</sup> *See* *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

<sup>66</sup> *Iannelli v. United States*, 420 U.S. 770, 777–78 (1975).

<sup>67</sup> *United States v. Marino*, 277 F.3d 11, 39 (1st Cir. 2002); *see, e.g., United States v. Sessa*, 125 F.3d 68, 71 (2d Cir. 1997) (“We have repeatedly ruled that RICO conspiracy and substantive RICO are not the same offense.”); *see also United States v. Rone*, 598 F.2d 564, 569–71 (9th Cir. 1979) (Wharton’s Rule, providing

courts have held that a RICO substantive or conspiracy offense and its underlying racketeering acts are separate offenses for double jeopardy purposes and may be prosecuted separately and cumulatively punished.<sup>68</sup>

Furthermore, a jury's finding in an earlier trial (federal or state) that a defendant did not commit a crime does not preclude the government from later proving that he or she knowingly agreed to facilitate a racketeering scheme under RICO.<sup>69</sup> The government may predicate a RICO conspiracy charge on acquitted conspiracy counts from a previous trial when "[a] comparison of 'basic' and RICO conspiracy makes clear that acquittal of the former does not compel the conclusion that a jury necessarily decided an essential element of the latter" because "RICO conspiracy and 'basic' conspiracy . . . have qualitatively different *mens rea* requirements as to agreement and intent."<sup>70</sup> Therefore, "[a] jury's finding that a defendant did not conspire to commit a particular predicate act does not necessarily preclude a subsequent finding that he or she knowingly agreed to facilitate a racketeering scheme that involved, or was intended to involve, that same predicate act."<sup>71</sup>

### III. THE RICO GUIDELINE: SECTION 2E1.1 (UNLAWFUL CONDUCT RELATING TO RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS)

#### A. GENERALLY

The guidelines instruct users to determine the applicable Chapter Two offense guideline by referring to Appendix A (Statutory Index) for the offense of conviction (*i.e.*, the offense conduct charged in the indictment or information of which the defendant was

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that "an agreement between two people to commit a particular crime cannot be prosecuted as a conspiracy where the crime necessarily requires the participation of two persons for its commission," does not preclude conviction for both RICO conspiracy and substantive RICO).

<sup>68</sup> See, e.g., *United States v. Masters*, 978 F.2d 281, 285 (7th Cir. 1992) (rejecting the defendant's argument that cumulative terms for racketeering and racketeering conspiracy violate the Double Jeopardy Clause); *United States v. Pungitore*, 910 F.2d 1084, 1105–08 (3d Cir. 1990) (double jeopardy considerations did not preclude prosecution for RICO offenses charging predicate acts for which the defendant was previously tried and acquitted or previously convicted); *United States v. Ciancaglini*, 858 F.2d 923, 928 (3d Cir. 1988) (defendant's prior RICO conviction did not bar, on double jeopardy grounds, successive prosecution for RICO conspiracy and substantive RICO offense involving same enterprise because second indictment alleged different pattern of racketeering activity).

<sup>69</sup> See, e.g., *United States v. Zemlyansky*, 908 F.3d 1, 10–12 (2d Cir. 2018) (defendant's prior acquittal on substantive counts of insurance-related mail fraud and money laundering did not preclude government from predicating his RICO conspiracy charge on conduct mirroring those same counts in subsequent trial); *United States v. Burden*, 600 F.3d 204, 228–29 (2d Cir. 2010) (acquittal on state murder charge did not bar its use as a predicate racketeering act for RICO violation under the dual sovereignty principle); *United States v. Licavoli*, 725 F.2d 1040, 1047 (6th Cir. 1984) (same); *United States v. Malatesta*, 583 F.2d 748, 757 (5th Cir. 1978) (same); *United States v. Frumento*, 563 F.2d 1083, 1086–89 (3d Cir. 1977) (same).

<sup>70</sup> *Zemlyansky*, 908 F.3d at 11.

<sup>71</sup> *Id.* at 11–12.

convicted).<sup>72</sup> For a violation of the RICO Act, 18 U.S.C. § 1962, Appendix A specifies the offense guideline at §2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations).<sup>73</sup> Section 2E1.1 instructs the court to apply the greater of two alternative base offense levels.<sup>74</sup> There are no specific offense characteristics.

Section 2E1.1 refers the court to other offense guidelines based on the underlying racketeering activity. The Commentary to §2E1.1 directs the court to look ahead to certain parts of Chapter Three (Adjustments) and, in some instances, to Chapter Four (Criminal History)<sup>75</sup> to determine the appropriate offense level for the RICO offense. In many instances, the offense level for the RICO offense will be determined by the offense level for the underlying racketeering activity due to the wide variety of criminal conduct covered under §2E1.1.

## B. DETERMINING THE OFFENSE LEVEL FOR A RICO OFFENSE

Section 2E1.1(a) specifies that the base offense level is the greater of:

- (1) 19; or
- (2) “the offense level applicable to the underlying racketeering activity.”<sup>76</sup>

Section 2E1.1(a) establishes an alternative minimum base offense level of 19—a floor under which the RICO offense level may not be set regardless of the offense level for the underlying racketeering activity.<sup>77</sup> As such, a RICO defendant’s base offense level will not be less than 19.<sup>78</sup>

<sup>72</sup> U.S. SENT’G COMM’N, GUIDELINES MANUAL §1B1.2 (Nov. 2023) [hereinafter USSG] (explaining how to determine the applicable guidelines).

<sup>73</sup> USSG App. A.

<sup>74</sup> USSG §2E1.1(a).

<sup>75</sup> See USSG §2E1.1, comment. (n.1) (requiring application of Chapter Two offense guideline and adjustments in Chapter Three, Parts A, B, C, and D); USSG §2E1.1, comment. (n.4) (discussing the treatment of a “prior sentence” as defined in Chapter Four in determining the appropriate offense level). In addition, certain offense guidelines require application of the criminal history provisions under Chapter Four to determine the appropriate base offense level, such as Chapter Two, Part D (Offenses Involving Drugs and Narco-Terrorism), Part K (Offenses Involving Public Safety), and Part L (Offenses Involving Immigration, Naturalization, and Passports).

<sup>76</sup> USSG §2E1.1(a).

<sup>77</sup> See USSG §2E1.1(a)(1); USSG §2E1.1, comment. (n.3); see also *United States v. Morgano*, 39 F.3d 1358, 1378–79 (7th Cir. 1994) (district court properly found RICO base offense level of 19 because §2E1.1(a)’s alternative minimum base offense level of 19 establishes “a floor under which the base offense level may not be set no matter what the offense level may be for the predicate acts associated with the RICO violation”); *United States v. Olson*, 22 F.3d 783, 786–87 (8th Cir. 1994) (per curiam) (district court erred in calculating the defendant’s base offense level at 17 for her RICO conspiracy because §2E1.1(a) provides that the base offense level for a RICO offense is 19 unless the offense level applicable to the underlying racketeering activity is greater); *United States v. Butler*, 954 F.2d 114, 121–22 (2d Cir. 1992) (same).

<sup>78</sup> USSG §2E1.1, comment. (n.3).



## 1. Relevant Conduct

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### a. Generally

Section 1B1.3(a) directs the court to consider all relevant conduct in determining base offense levels, specific offense characteristics, cross references in Chapter Two, and adjustments in Chapter Three.<sup>79</sup> Relevant conduct includes “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant” and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.<sup>80</sup>

In determining the base offense level applicable to the underlying racketeering activity, relevant conduct under §1B1.3 thus includes all activity that qualifies as a racketeering act under section 1961(1),<sup>81</sup> including uncharged conduct.<sup>82</sup> Thus, the underlying racketeering activity consists of any underlying offense that qualifies under the statute as racketeering activity or collection of unlawful debt.<sup>83</sup> By contrast, an act that may be within the scope of a RICO conspiracy cannot be considered in determining the offense level if it is not chargeable under a statute in section 1961(1).<sup>84</sup> In a RICO conspiracy, the most serious underlying racketeering activity is used in determining “the offense level applicable to the underlying racketeering activity” and need not involve an overt act personally committed by the defendant.<sup>85</sup> Rather, it may be set by conduct of others that is

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<sup>79</sup> USSG §1B1.3(a).

<sup>80</sup> USSG §1B1.3(a)(1); *see also* United States v. Carrozza, 4 F.3d 70, 74–77 (1st Cir. 1993) (“[R]elevant conduct in a RICO case includes all conduct reasonably foreseeable to the particular defendant in furtherance of the RICO enterprise to which he belongs.”).

<sup>81</sup> *See* 18 U.S.C. § 1961(1) (defining “racketeering activity”).

<sup>82</sup> *See* United States v. Flemmi, 245 F.3d 24, 30 n.4 (1st Cir. 2001) (“To be sure, a sentencing judge may consider uncharged predicate acts in a RICO case, . . . but the judge nonetheless must stay below the maximum penalty allowed under the charges delineated in the indictment and submitted to the jury.” (citation omitted)).

<sup>83</sup> *See, e.g.,* United States v. Flores, 912 F.3d 613, 621–22 (D.C. Cir. 2019) (*Flores I*) (“[I]n RICO cases, the relevant conduct that can be considered must also qualify as ‘racketeering activity.’” (citation omitted)); United States v. Flores, 995 F.3d 214, 222–23 (D.C. Cir. 2021) (*Flores II*) (on remand from *Flores I*, the district court properly considered as relevant conduct other violent conduct in Mexico because the defendant’s “guilty plea effectively concede[d] that his violent conduct was related to the drug smuggling conspiracy and therefore was racketeering activity”).

<sup>84</sup> *See, e.g., Flores I*, 912 F.3d at 622 (defendant’s murder of a Mexican national in Mexico was not relevant conduct under §1B1.3(a)(1)(A) because it was not “ ‘indictable,’ ‘chargeable,’ or ‘punishable’ under one of the statutes identified in § 1961(1)” and thus fell outside the scope of “racketeering activity” (citation omitted)).

<sup>85</sup> USSG §2E1.1(a)(2); *see, e.g.,* United States v. Porraz, 943 F.3d 1099, 1103 (7th Cir. 2019) (§2A1.5 (Conspiracy or Solicitation to Commit Murder) was properly used to calculate defendant’s guideline range in a RICO conspiracy offense because murder by other gang members was a reasonably foreseeable result of gang activity).

the “reasonably foreseeable” result of a defendant’s involvement in the criminal enterprise.<sup>86</sup>

### b. Burden of proof for uncharged underlying offenses

In some cases, a jury verdict may not indicate which of multiple underlying offenses were found to have been committed in furtherance of the RICO violation, or the jury may find some of the charged underlying offenses were committed, but not others. There also may be additional uncharged underlying offenses that may be accounted for as relevant conduct in determining the offense level for the underlying racketeering activity.

The majority of circuits have held that uncharged underlying offenses (*i.e.*, “predicate acts”) may be accounted for as relevant conduct if the court finds the underlying offense has been proven by a preponderance of the evidence.<sup>87</sup> These circuits reason that, unlike a multi-object conspiracy, which is treated under §1B1.2(d) (Applicable Guidelines) as if each object constitutes a single-object conspiracy, a RICO conspiracy is a single-object conspiracy to engage in racketeering in violation of section 1962.<sup>88</sup> That is, “the underlying acts of racketeering in a RICO conspiracy are not considered to be the *objects* of the conspiracy, but simply conduct that is relevant to the central objective—participating in a criminal enterprise.”<sup>89</sup> A conviction for a RICO conspiracy, therefore, does not require proof of the actual commission of an underlying offense by the defendant or any other conspirator.<sup>90</sup> The underlying offenses serve only to demonstrate the existence of the charged agreement among members of the conspiracy to violate the RICO Act; they do not constitute separate criminal objectives that each must be proven beyond a reasonable doubt.<sup>91</sup>

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<sup>86</sup> USSG §1B1.3(a)(1)(B).

<sup>87</sup> *United States v. Sandoval*, 6 F.4th 63, 104 (1st Cir. 2021); *United States v. Yannotti*, 541 F.3d 112, 129–30 (2d Cir. 2008); *United States v. Gutierrez*, 963 F.3d 320, 342–43 (4th Cir. 2020); *United States v. Corrado*, 227 F.3d 528, 542 (6th Cir. 2000); *United States v. Garcia*, 754 F.3d 460, 482–83 (7th Cir. 2014); *United States v. Barragan*, 871 F.3d 689, 717 (9th Cir. 2017); *see also* *United States v. Massimino*, 641 F. App’x 153, 170 (3d Cir. 2016); *United States v. Churuk*, 797 F. App’x 680, 694–95 (3d Cir. 2020).

<sup>88</sup> *See* cases cited *supra* note 87. Section 1B1.2(d) instructs that “[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.” USSG §1B1.2(d). The Commentary to §1B1.2 cautions courts to take “[p]articular care” in applying subsection (d); in cases where the verdict or guilty plea does not specify which offense was the object of the conspiracy, “subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.” USSG §1B1.2, comment. (n.4).

<sup>89</sup> *Corrado*, 227 F.3d at 542.

<sup>90</sup> *See Salinas v. United States*, 522 U.S. 52, 64 (1997) (“The RICO conspiracy statute, § 1962(d), broadened conspiracy coverage by omitting the requirement of an overt act . . .”).

<sup>91</sup> *See Gutierrez*, 963 F.3d at 342–43; *Garcia*, 754 F.3d at 482–83; *Yannotti*, 541 F.3d at 129–30; *Corrado*, 227 F.3d at 542; *United States v. Carrozza*, 4 F.3d 70, 79–80 (1st Cir. 1993).



By contrast, the Eleventh Circuit has held that where a jury finds a defendant guilty of a RICO conspiracy but does not indicate which of the underlying offenses the defendant committed, the defendant's offense level is properly based upon the underlying offenses that the court finds are proven beyond a reasonable doubt as if the court were sitting as trier of fact.<sup>92</sup>

## 2. Calculating the Offense Level for a RICO Offense

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To determine which offense level to use under §2E1.1, the court must calculate the offense level for both subsections (a)(1) and (a)(2) and determine which is greater.<sup>93</sup> To calculate the offense level for subsection (a)(1), the court uses the minimum base offense level 19 and applies the applicable Chapter Three adjustments from Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction and Related Adjustments).<sup>94</sup> Likewise, to calculate the offense level applicable to the underlying racketeering activity under subsection (a)(2), the court calculates the applicable Chapter Two offense guidelines for the underlying offenses<sup>95</sup> and the Chapter Three adjustments from Parts A, B, and C, and then applies the grouping rules in D (Multiple Counts) as needed.<sup>96</sup> The court then compares the offense level for subsection (a)(1) to the offense level for subsection (a)(2) and uses whichever subsection results in the greater offense level.<sup>97</sup>

### a. Single underlying offense

Underlying racketeering activity may consist of a single racketeering act, such as the collection of a single unlawful debt.<sup>98</sup> In that case, the court follows the approach outlined above to calculate the offense level for both subsections (a)(1) and (a)(2) and uses whichever subsection results in the greater offense level.

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<sup>92</sup> See *United States v. Nguyen*, 255 F.3d 1335, 1341 (11th Cir. 2001) (reaffirming its previous holding that defendants' offense level was properly based upon predicate acts that the court found the defendants had committed beyond a reasonable doubt).

<sup>93</sup> See USSG §2E1.1, comment. (n.1).

<sup>94</sup> *Id.*

<sup>95</sup> See USSG §2E1.1, comment. (n.3) ("If the offense level for the underlying racketeering activity is less than the alternative minimum level specified (*i.e.*, 19), the alternative minimum base offense level is to be used.").

<sup>96</sup> See USSG §2E1.1, comment. (n.1).

<sup>97</sup> *Id.* ("Use whichever subsection results in the greater offense level."); see also USSG §3D1.3, comment. (n.1) (defining the "offense level" for a count as "the offense level from Chapter Two after all adjustments from Parts A, B, and C of Chapter Three").

<sup>98</sup> See, *e.g.*, *United States v. Grote*, 961 F.3d 105, 119 (2d Cir. 2020) ("RICO offenses may be predicated on a single instance of collection of unlawful debt . . ."); *United States v. Weiner*, 3 F.3d 17, 24 (1st Cir. 1993) ("[A] single collection of an unlawful debt satisfies section 1962(c)'s 'collection of unlawful debt' requirement.").

## b. Multiple underlying offenses

Application Note 1 to §2E1.1 provides specific guidance for calculating a combined offense level for multiple underlying racketeering activities to determine whether subsection (a)(1) or (a)(2) results in the greater offense level. Specifically, Application Note 1 instructs the court to treat each underlying offense as if it were a separate count of conviction.<sup>99</sup> For each underlying offense, the court applies the applicable Chapter Two offense guideline, including specific offense characteristics, cross-references, and Chapter Three adjustments from Parts A, B, and C.<sup>100</sup> The court then applies the grouping rules in Chapter Three, Part D, to determine the combined offense level for the underlying racketeering activity.<sup>101</sup>

For offense guidelines that are determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm (*i.e.*, drug trafficking, bribery, money laundering, fraud, and other similar offenses), the offense guideline is applied once and the offense level is calculated based on the aggregate harm or quantity.<sup>102</sup> Thus, where multiple underlying offenses use the same offense guideline and group under §3D1.2(d), the court applies the Chapter Two offense

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<sup>99</sup> USSG §2E1.1, comment. (n.1).

<sup>100</sup> See USSG §1B1.5(c) (“If the offense level is determined by a reference to another guideline . . . the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided.”); USSG §1B1.5, comment. (n.2) (instructing that a reference to use another guideline if that guideline results in a greater offense level requires taking into account only the Chapter Two offense, “*unless* the offense guideline expressly provides for consideration of both the Chapter Two offense level and applicable Chapter Three adjustments,” such as the Commentary to §2E1.1 (emphasis added)).

Not every court has followed the approach laid out in the guidelines. See, e.g., *United States v. Ivezaj*, 568 F.3d 88, 99 (2d Cir. 2009) (district court properly determined that the role adjustment in subsection (a)(2) is applied based on the defendant’s role in the overall RICO enterprise; “the language of the Guidelines is clear that the requirement to look at each individual act in a RICO offense is only for the purpose of establishing the base level offense, not for applying the Chapter Three adjustments”); *United States v. Yeager*, 210 F.3d 1315, 1316–17 (11th Cir. 2000) (per curiam) (concluding that it is appropriate to judge a RICO defendant’s role in the offense in subsection (a)(2) with respect to the overall RICO conspiracy for the purpose of applying an enhancement under §3B1.1(a)); *United States v. Coon*, 187 F.3d 888, 899 (8th Cir. 1999) (affirming aggravating role adjustments in subsection (a)(2) based on defendants’ role in the overall RICO enterprise); *United States v. Damico*, 99 F.3d 1431, 1436–38 (7th Cir. 1996) (district court properly applied the four-level leadership role adjustment in subsection (a)(2) based on defendant’s role in the overall RICO conspiracy, holding “the predicate-by-predicate approach of Application Note 1 applies, as the note states, only for the purpose of establishing a RICO defendant’s base offense level, and not for the purpose of applying the Chapter Three adjustments”); see also *United States v. López*, 957 F.3d 302, 308 (1st Cir. 2020) (adopting the approach set forth in *Damico*).

<sup>101</sup> See USSG §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts), 3D1.2 (Groups of Closely Related Counts), 3D1.3 (Offense Level Applicable to Each Group of Closely Related Counts), 3D1.4 (Determining the Combined Offense Level).

<sup>102</sup> See USSG §3D1.2(d) (listing offenses that are grouped based on aggregate harm or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior).

guideline once and any adjustments in Chapter Three, Parts A, B, and C based on the aggregate harm or quantity.<sup>103</sup>

Offenses that use different offense guidelines do not group under §3D1.2(d) merely by both being listed on the “included” list; rather, they must be of the “same general type.”<sup>104</sup> Different offense guidelines, however, may group under a different rule in §3D1.2. Specifically, offenses may group if the offense conduct involves “the same victim and the same act or transaction” or involves “the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.”<sup>105</sup> In addition, offenses may group when one predicate act “embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to” another predicate act.<sup>106</sup>

Similarly, certain offense guidelines are specifically excluded from grouping under §3D1.2(d), such as robbery, assault, murder, kidnapping, and other similar crimes.<sup>107</sup> Such offenses, however, may group with other offenses under a different rule in §3D1.2.

*i. Example 1*

The defendant was convicted of one count of violating section 1962(d) (RICO conspiracy). The underlying racketeering activity consists of three racketeering acts of distribution of a controlled substance and possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841. The defendant possessed a firearm and supervised at least two other participants in committing the drug trafficking offenses.

To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, the court calculates the offense level for subsection (a)(1) by starting with the minimum base offense level 19 and adding two levels for the defendant’s supervisory role in the RICO offense (§3B1.1(c)), resulting in an offense level of 21.

To determine the offense level applicable to the underlying racketeering activity under subsection (a)(2), the court determines that the applicable Chapter Two guideline for each of the underlying offenses is §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Because §2D1.1 is on the “included” list under §3D1.2(d), the underlying offenses are grouped together as if they were a single count of conviction and the offense guideline is applied once. For the purposes of this example, the aggregate quantity of drugs yields a base offense level 32. Two levels are added for possession of a

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<sup>103</sup> See USSG §3D1.3(b); USSG §3D1.3, comment. (n.3).

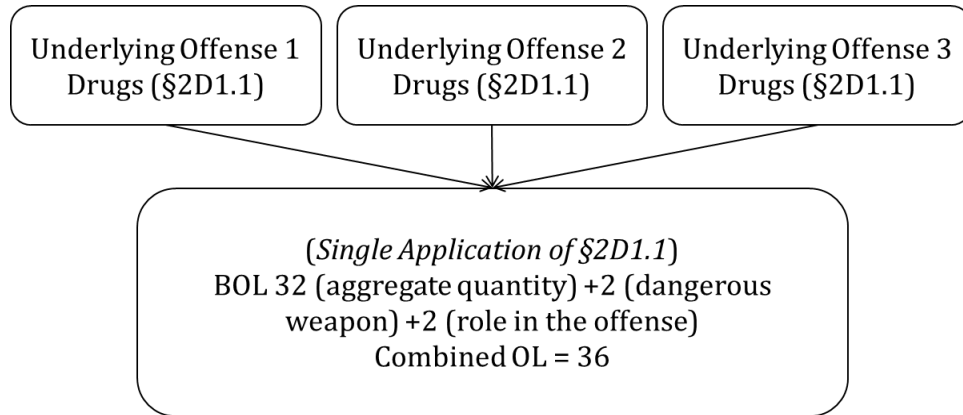
<sup>104</sup> See USSG §3D1.2(d); USSG §3D1.2, comment. (n.6); USSG §3D1.3(b); USSG §3D1.3, comment. (n.3).

<sup>105</sup> USSG §3D1.2(a), (b).

<sup>106</sup> USSG §3D1.2(c).

<sup>107</sup> USSG §3D1.2(d) (providing list of offenses excluded from operation of subsection (d)).

dangerous weapon (§2D1.1(b)(1)) and two levels are added for supervisory role in the offense (§3B1.1(c)). The resulting offense level for the underlying racketeering activity is level 36.



Because the offense level for subsection (a)(2), level 36, is greater than the offense level for subsection (a)(1), level 21, the court uses subsection (a)(2) as the offense level for the RICO offense.

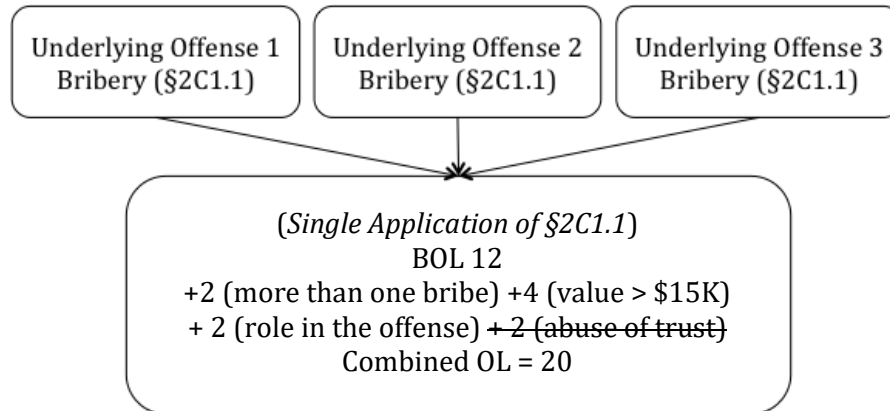
*ii. Example 2*

The defendant was convicted of one count of violating section 1962(d) (RICO conspiracy). The underlying offenses consist of three racketeering acts of bribery totaling more than \$15,000, in violation of 18 U.S.C. § 201. The defendant managed fewer than five participants in the RICO enterprise. Although the defendant was not a public official, the defendant used his position of trust in a private corporation to commit the bribery offenses in furtherance of the RICO enterprise.

To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, the court calculates the offense level for subsection (a)(1) by starting with the minimum base offense level 19 and adding two levels for the defendant's managerial role in the overall RICO enterprise (§3B1.1(c)) and two levels for abuse of a position of trust (§3B1.3), resulting in an offense level of 23.

In determining the offense level for subsection (a)(2), the applicable Chapter Two guideline for the underlying bribery offenses is §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe). Because §2C1.1 is on the "included" list under §3D1.2(d), the court treats the underlying bribery offenses as if they were a single count of conviction and applies the offense guideline once. Starting with base offense level 12, two levels are added for more than one bribe (§2C1.1(b)(1)) and four levels are added for aggregate loss of more than \$15,000 (§2C1.1(b)(2)). Two levels are added for the defendant's managerial role in the bribery offenses involving fewer than five participants (§3B1.1(c)). Although the defendant abused a position of trust in the bribery scheme, the Commentary to §2C1.1 instructs that the abuse of trust adjustment (§3B1.3) is inapplicable under the §2C1.1

offense guideline.<sup>108</sup> The resulting offense level for the underlying racketeering activity is level 20.



Because the offense level for the underlying racketeering activity under subsection (a)(2), level 20, is less than the offense level for subsection (a)(1), level 23, the court uses subsection (a)(1) as the offense level for the RICO offense.

### iii. Example 3

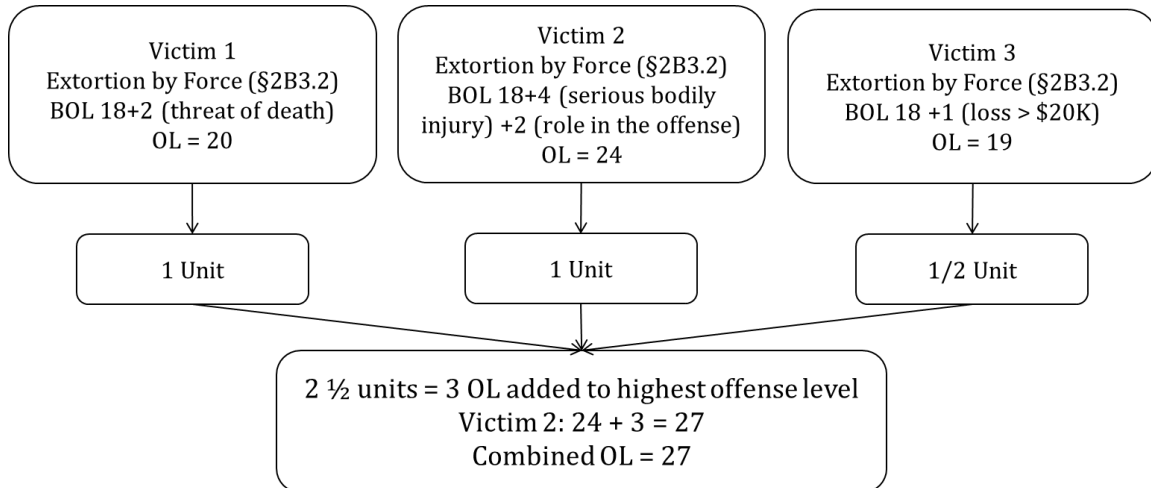
The defendant was convicted of one count of violating section 1962(c). The underlying racketeering activity consists of three racketeering acts of extortion by force involving three victims. A participant in the RICO enterprise threatened to kill the first victim and seriously injured the second victim. The third victim ultimately complied with the extortion and lost his business as a result. The business was valued at \$85,000. The defendant was the leader of the overall RICO enterprise involving more than five participants and personally supervised another associate in the extortion of the second victim.

To determine whether the offense level for subsection (a)(1) or (a)(2) is greater, the court determines that the offense level for subsection (a)(1) is level 23: the minimum base offense level 19, plus four levels for the defendant’s leadership role in the overall RICO enterprise (§3B1.1(a)). For subsection (a)(2), the applicable Chapter Two guideline for the underlying extortion offenses is §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). The extortion offenses are not grouped because each offense involves a different victim.<sup>109</sup> Extortion One (victim one) has an offense level of 20: base offense level 18, plus two levels for threat of death (§2B3.2(b)(1)). Extortion Two (victim two) has an offense level of 24: base offense level 18, plus four levels for serious bodily injury (§2B3.2(b)(4)(B)) and two levels for the defendant’s supervisory role in the extortion of

<sup>108</sup> USSG §2C1.1, comment. (n.6); *see also* United States v. Butt, 955 F.2d 77, 88–90 (1st Cir. 1992) (subsection (a)(1), as a generic RICO base offense level, does not fall within the limitation of §3B1.3, and thus applying abuse of trust adjustment is not impermissible double counting).

<sup>109</sup> *See* USSG §3D1.2(d); USSG §3D1.2, comment. (backg’d.).

the second victim (§3B1.1(c)). Extortion Three (victim three) has an offense level of 19: base offense level 18, plus one level for loss of more than \$20,000 (§2B3.2(b)(2)). Pursuant to §3D1.4, three levels are added to the offense with the highest offense level, resulting in a combined offense level of 27 for the underlying racketeering activity.



Because the resulting offense level for subsection (a)(2), level 27, is greater than the offense level for subsection (a)(1), level 23, the court uses subsection (a)(2) as the offense level for the RICO offense.

### c. Applying cross references in offense guidelines

In some cases, the Chapter Two offense guideline for an underlying offense may include a “cross reference” to another offense guideline, such as the cross reference in the robbery guideline at §2B3.1(c), the extortion guideline at §2B3.2(c), or the drug trafficking guideline at §2D1.1(d). In the event the cross reference applies, the court applies the Chapter Two offense guideline applicable to the cross reference and the Chapter Three adjustments from Parts A, B, C, and D to determine the combined offense level for the underlying racketeering activity.

### d. Analogizing state crimes (Application Note 2)

When the underlying offense that constitutes a racketeering act is a violation of state law, the Application Note 2 to §2E1.1 instructs the court to use the Chapter Two offense guideline corresponding to the most analogous federal offense.<sup>110</sup> For instance, if the underlying offense is conspiracy to commit murder under state law, the offense guideline for the most analogous federal offense is §2A1.5 (Conspiracy or Solicitation to

<sup>110</sup> See USSG §2E1.1, comment. (n.2); see also USSG §2X5.1 (for a felony offense with no specified guideline, apply the “most analogous offense guideline”).



Commit Murder).<sup>111</sup> Similarly, if the underlying offense is murder under state law, the offense guideline for the most analogous federal offense is §2A1.1 (First Degree Murder), even absent premeditation or malice aforethought.<sup>112</sup>

**e. “Prior sentence” rule (Application Note 4)**

Application Note 4 to §2E1.1 explains that conduct may be charged in the RICO count of conviction as part of a pattern of racketeering activity even when the defendant previously was convicted and sentenced for that conduct.<sup>113</sup> However, for purposes of calculating the RICO guideline, if the previously imposed sentence resulted from a conviction that occurred before “the last overt act” (*i.e.*, the last underlying offense) of the instant RICO offense, that previously imposed sentence is to be treated as a prior sentence under §4A1.2(a)(1) (Prior Sentence) as part of the defendant’s criminal history.<sup>114</sup> It should not be treated as relevant conduct for purposes of determining the offense level for the instant RICO offense.<sup>115</sup>

Notably, Application Note 4 refers to the “last overt act of the instant offense”<sup>116</sup> and not to the last overt act that is charged in the indictment or other charging instrument. Thus, the applicability of the “prior sentence” rule in Application Note 4 turns on the date

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<sup>111</sup> See *United States v. Scott*, 642 F.3d 791, 801–02 (9th Cir. 2011) (per curiam) (“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.”).

<sup>112</sup> See *United States v. Millán-Machuca*, 991 F.3d 7, 28–29 (1st Cir. 2021) (defendant’s “emphasis on Puerto Rico law [was] misplaced” because there was “no doubt that the murder” was most analogous to 18 U.S.C. § 1111, and so the applicable guideline was §2A1.1(a)); *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” (internal quotation and alterations omitted)); *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).

<sup>113</sup> See USSG §2E1.1, comment. (n.4).

<sup>114</sup> *Id.*; see also *United States v. Cruz-Ramos*, 987 F.3d 27, 45 (1st Cir. 2021) (“Even if some convictions count as part of the underlying racketeering conduct, if the defendant got convicted of them before ‘the last overt act of the [RICO] offense,’ the judge can treat them as part of the defendant’s criminal history.” (alteration in original and quoting USSG §2E1.1, comment. (n.4))).

<sup>115</sup> See USSG §2E1.1, comment. (n.4). Application Note 4 was intended “to clarify the treatment of certain conduct for which the defendant previously has been sentenced as either part of the instant offense or prior criminal record.” USSG App. C, amend. 142 (effective Nov. 1, 1989); see also *Minicone*, 960 F.2d at 1111 (rejecting government’s argument that the district court erred in assessing prior conviction only in calculating criminal history and not in calculating the base offense level, explaining that the “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”).

<sup>116</sup> USSG §2E1.1, comment. (n.4).

the last underlying offense occurred regardless of whether that underlying offense was charged in the indictment.

The distinction between treating a previously convicted racketeering act as relevant conduct or as a prior sentence highlights that the RICO Act allows the government to prosecute the underlying acts of racketeering activity separately from the subsequent RICO violation.<sup>117</sup> Similarly, a RICO violation should be considered separate from a previously sentenced racketeering act. Although racketeering activity constitutes an element of the RICO offense, a previously sentenced racketeering act indicates that the defendant is a repeat offender who violated the law once by committing the predicate act—for which the defendant was convicted and sentenced—and again by engaging in a pattern of racketeering activity in violation of the RICO Act.

## C. APPLICATION CONSIDERATIONS

### 1. RICO Count and Other Counts of Conviction

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When the RICO count is one of multiple counts of conviction, the court must determine the offense level for the RICO count and for each of the other counts of conviction, and apply the grouping rules in Chapter Three, Part D, to determine a single combined offense level that encompasses all counts of conviction.<sup>118</sup> For example, if the defendant was convicted of one count of RICO conspiracy charging two racketeering acts of extortion and two substantive counts of extortion, in violation of 18 U.S.C. § 1951(a), or if the defendant was convicted of one count of RICO conspiracy and one count of obstruction of justice, in violation of 18 U.S.C. § 1510, the court would apply the grouping rules in Chapter Three, Part D, to determine a combined offense level for all counts of conviction.<sup>119</sup>

### 2. RICO Conviction as a Predicate Offense for the Career Offender Guideline (§4B1.1) and 18 U.S.C. § 924(c)

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A RICO conviction may qualify as a predicate offense for purposes of the career offender guideline at §4B1.1 and for a violation of 18 U.S.C. § 924(c). Section 4B1.1 provides that a defendant is a career offender if the defendant is at least 18 years old at the time of the instant offense, the instant offense is a felony “crime of violence” or “controlled substance offense” as those terms are defined at §4B1.2, and the defendant has at least two

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<sup>117</sup> See *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 on-going enterprise by means of those acts.”), *overruled in part on other grounds by* *Griffin v. United States*, 502 U.S. 46 (1991), *as recognized by* *United States v. Bergrin*, 650 F.3d 257, 266 n.5 (3d Cir. 2011); see also *supra* notes 67–68 and accompanying text.

<sup>118</sup> USSG Ch.3, Pt.D, intro. comment.

<sup>119</sup> A defendant who has accepted responsibility in accordance with §3E1.1 qualifies for a decrease of two to three levels. USSG §3E1.1. The acceptance of responsibility adjustment is applied after determining the offense level for the RICO count (and the combined offense level for multiple counts of conviction).



prior felony convictions of either a “crime of violence” or a “controlled substance offense.”<sup>120</sup> Because a RICO conviction hinges on proof of the underlying offenses comprising a “pattern of racketeering activity,” the court must determine whether the underlying offenses qualify as “crimes of violence” or “controlled substance offenses” under §4B1.2 to determine whether the RICO conviction qualifies as a predicate offense for the career offender enhancement.<sup>121</sup>

Section 924(c) provides that a person who uses or carries a firearm during and in relation to, or possesses a firearm in furtherance of, a “crime of violence” or “drug trafficking crime,” as those terms are defined in section 924(c), shall be sentenced to a term of imprisonment ranging from five to 25 years, consecutive to the sentence for the underlying offense.<sup>122</sup> In the past, the Second and Fourth Circuits held that where there is proof of the commission of at least two racketeering acts (*i.e.*, a pattern of racketeering activity) that qualify either as a “crime of violence” or a “drug trafficking crime” under section 924(c), a RICO conviction can serve as a predicate offense for a violation of section 924(c).<sup>123</sup>

However, the Second Circuit has questioned the continued validity of this approach following the Supreme Court’s decision in *United States v. Davis*.<sup>124</sup> In *Davis*, the Supreme Court invalidated the “residual clause” of the definition of “crime of violence” in section 924(c)(3) as unconstitutionally vague.<sup>125</sup> That clause included offenses “that, by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”<sup>126</sup> With that clause invalidated, the Second Circuit has questioned whether a racketeering scheme can continue to constitute a crime of violence.<sup>127</sup> And at least four circuits have held that a RICO

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<sup>120</sup> USSG §4B1.1(a).

<sup>121</sup> *See, e.g.*, *United States v. Brown*, 945 F.3d 72, 76 (2d Cir. 2019) (per curiam) (career offender enhancement applied based on RICO conspiracy with predicate acts of bank robbery, which is a crime of violence under §4B1.2(a)); *United States v. Scott*, 642 F.3d 791, 801 (9th Cir. 2011) (per curiam) (same for RICO conspiracy with underlying predicate acts of murder).

<sup>122</sup> 18 U.S.C. § 924(c).

<sup>123</sup> *See, e.g.*, *United States v. Ayala*, 601 F.3d 256, 267 (4th Cir. 2010) (RICO conspiracy to commit crimes including murder, kidnapping, and robbery is a crime of violence for purposes of 18 U.S.C. § 924(c) liability); *United States v. Ivezaj*, 568 F.3d 88, 96 (2d Cir. 2009) (RICO count qualifies as crime of violence where government proved at least two underlying racketeering acts qualified as crimes of violence under 18 U.S.C. § 924(c)).

<sup>124</sup> 588 U.S. 445 (2019).

<sup>125</sup> *Id.* at 470.

<sup>126</sup> *Id.* at 449 (quoting 18 U.S.C. § 924(c)(3)(B)).

<sup>127</sup> *United States v. Heyward*, 3 F.4th 75, 86 (2d Cir. 2021) (logic of earlier *Ivezaj* holding “appears to have been firmly grounded in our belief at the time that conduct posing a ‘substantial risk that physical force . . . would be used’ was a crime of violence,” but in light of *Davis*, “it is unclear the extent to which *Ivezaj* retains any of its force” (citations omitted)); *United States v. Martinez*, 991 F.3d 347, 355–59 (2d Cir. 2021) (noting that “Supreme Court precedents . . . have certainly called into question, if not the premises directly underlying

conspiracy offense is not a crime of violence under section 924(c) because it only requires an agreement to commit an offense and thus does not require the force necessary to meet the “elements clause”<sup>128</sup> of the definition of crime of violence.<sup>129</sup>

### 3. *Ex Post Facto* Issues and the “One Book” Rule

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Section 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)) directs the court to use the *Guidelines Manual* in effect on the date of sentencing.<sup>130</sup> But if application of the current guidelines would violate the *Ex Post Facto* Clause of the U.S. Constitution,<sup>131</sup> the court shall use the version of the *Guidelines Manual* in effect on the date that the offense was committed—and use that version in its entirety.<sup>132</sup> This directive is referred to as the “one book” rule.

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*Ivezaj*, many of the principles and precedents that formed the legal background against which the case was decided” but holding that the district court did not plainly err in accepting the defendant’s guilty plea to violating § 924(c) based on underlying RICO offense that was premised in part on a murder).

<sup>128</sup> The elements clause (sometimes called the force clause) includes felonies which have “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” *Davis*, 139 S. Ct. at 2324 (quoting 18 U.S.C. § 924(c)(3)(A)).

<sup>129</sup> See *United States v. Capers*, 20 F.4th 105, 118–28 (2d Cir. 2021) (RICO conspiracy does not necessarily meet the force clause in 18 U.S.C. § 924(c); even if there is an “aggravated RICO conspiracy” where the maximum penalty is life due to conspiracy to commit murder, it would not categorically involve force since a defendant could violate it by merely conspiring to attempt murder); *United States v. Simmons*, 11 F.4th 239, 248 (4th Cir. 2021) (“RICO conspiracy, even when denominated as ‘aggravated,’ does not categorically qualify as a ‘crime of violence’ ” under § 924(c)); *United States v. Green*, 981 F.3d 945, 951–52 & n.3 (11th Cir. 2020) (holding that RICO conspiracy cannot serve as a predicate crime of violence for a conviction under § 924(c) but declining to address whether an “aggravated RICO conspiracy” carrying a maximum penalty of life imprisonment—if such exists as a “distinct crime”—would qualify); *United States v. Jones*, 935 F.3d 266, 271–74 (5th Cir. 2019) (per curiam) (it was plain error to convict defendants of § 924(c) offenses based on RICO conspiracy as a crime of violence); see also *United States v. McClaren*, 13 F.4th 386, 413–14 (5th Cir. 2021) (applying *Jones* and explaining that “the ‘aggravated RICO’ statute does not describe a crime of violence”).

However, the First Circuit has held that it was not plain error for a district court to rule that “aggravated RICO conspiracy based on murder is not a crime of violence” under 18 U.S.C. § 16, which defines crime of violence similarly to section 924(c). *United States v. Solís-Vásquez*, 10 F.4th 59, 66 (1st Cir. 2021) (relying in part on *United States v. Nguyen*, 255 F.3d 1335, 1343 (11th Cir. 2001)). The First Circuit did not consider whether RICO conspiracy is in fact an aggravated conspiracy, holding merely that such a ruling was not plainly erroneous. *Id.*; see also *United States v. Mendoza*, 25 F.4th 730, 741 n.11 (9th Cir. 2022) (recognizing that other courts have concluded RICO conspiracy is not a crime of violence, but not reaching that question). See *supra* note 31 (discussing the categorical approach as applied to state law convictions and whether they qualify as predicates under 18 U.S.C. § 1961(A)).

<sup>130</sup> USSG §1B1.11(a).

<sup>131</sup> U.S. CONST. art. I, § 9, cl. 3 (prohibiting the passage of a law that criminally punishes conduct that was lawful when committed or increases punishment for conduct after it has occurred).

<sup>132</sup> USSG §1B1.11(b); see also *Peugh v. United States*, 569 U.S. 530, 533 (2013) (“[T]here is an *ex post facto* violation when a defendant is sentenced under [g]uidelines promulgated after he committed his criminal acts and the new version provides a higher applicable [g]uidelines sentencing range than the version in place at the time of the offense.”).

Notably, RICO offenses are continuing offenses and may extend across different versions of the *Guidelines Manual* without violating the *Ex Post Facto* Clause.<sup>133</sup> Thus, a defendant who participates in a RICO conspiracy and who does not withdraw from that conspiracy before the effective date of a *Guidelines Manual* providing a higher offense level will be sentenced pursuant to the more recent edition of the *Guidelines Manual*.<sup>134</sup> For example, consider a defendant who was convicted of a RICO conspiracy spanning 15 years from 2001 to 2016 with two racketeering acts, one of which was a 2002 attempted murder of a rival gang member. Prior to November 1, 2004, the base offense level for attempted murder under §2A2.1(a)(1) was level 28.<sup>135</sup> Effective November 1, 2004, the base offense level for attempted murder under §2A2.1(a)(1) increased to level 33.<sup>136</sup> Because the defendant's involvement in the RICO conspiracy continued beyond 2004, the later edition of the *Guidelines Manual* in effect at the time of the defendant's sentencing is applied, and the base offense level for the underlying attempted murder offense is 33.<sup>137</sup>

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<sup>133</sup> See, e.g., *United States v. Jackson*, 983 F.2d 757, 771 (7th Cir. 1993) (defendant was properly sentenced under the guidelines where “his conspiracy continued after the [g]uidelines went into effect”), *overruled on other grounds by* *Ratzlaf v. United States*, 510 U.S. 135 (1994); *United States v. Eisen*, 974 F.2d 246, 268–69 (2d Cir. 1992) (“The Court may find a continuation of conspiratorial liability even though the particular defendant has ceased to engage in overt conduct relating to the conspiracy prior to November 1, 1987, if it was foreseeable that the conspiracy would continue past that date.”); *United States v. Moscony*, 927 F.2d 742, 754–56 (3d Cir. 1991) (sentencing guidelines applied to defendant who engaged in “acts of obstruction of justice . . . designed to cover up the illegal affairs of the [RICO] enterprise” after the guidelines went into effect); see also *United States v. Delgado*, 971 F.3d 144, 157 (2d Cir. 2020) (possession of firearm in violation of 18 U.S.C. § 924(c) was a “continuing offense that continued through the life of the . . . RICO conspiracy” (internal quotations omitted)).

<sup>134</sup> USSG §1B1.11, comment. (backg'd.); see, e.g., *United States v. Korando*, 29 F.3d 1114, 1120 (7th Cir. 1994) (“[W]here a harsher [g]uideline becomes effective during the course of a conspiracy, a defendant who does not withdraw from the conspiracy before the effective date of the more severe [g]uideline should be sentenced pursuant to the more recent [g]uideline.”).

<sup>135</sup> See USSG App. C, amend. 311 (effective Nov. 1, 1990).

<sup>136</sup> See USSG §2A2.1(a)(1).

<sup>137</sup> See, e.g., *United States v. Hurley*, 63 F.3d 1, 19–20 (1st Cir. 1995) (district court properly applied the money laundering guideline in effect at the time of sentencing where the RICO conspiracy continued at least until after November 1, 1991, when the new and broader money laundering guideline took effect), *abrogated on other grounds by* *Salinas v. United States*, 522 U.S. 52 (1997), *as stated in* *United States v. Ramos-David*, 16 F.4th 326, 332 (1st Cir. 2021); *United States v. Minicone*, 960 F.2d 1099, 1111 (2d Cir. 1992) (no *ex post facto* violation where RICO conspiracy continued after sentencing guidelines took effect in 1987, even though predicate acts occurred prior to date of the guidelines).