IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10373

JERRY MICHAEL COLLINS

Plaintiff-Appellant

v.

RICHARD LAWRENCE, ET AL

Defendants - Appellees

JOHN PARRISH, TRUMAN PRICE, ROXIE CLUCK, MALCOLM MCGREGOR, TOMMY W. WALLACE, JENNA L. SCOTT, PATRICIA KIMBLE, HARRY TOM PETERSEN, LESLIE P. DIXON, RICHARD CURRIN, ROBERT DAVIS, JOYCE FUGATE, DORIS SIPES, CHARLES VAN CLEEF, COYE CONNER, JR., GREG K. WINSLETT, LOUIS B. GOHMERT, JR.

Defendants – Appellees

BRIEF FOR APPELLANT

Appeal from the United States District Court
For the Northern District of Texas
Dallas Division, Action No. 3:99-cv-00641

JERRY MICHAEL COLLINS, PRO SE
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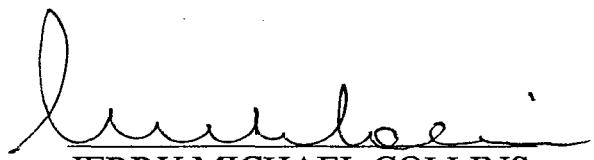
CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1.	Jerry Michael Collins	Plaintiff-Appellant
2.	John Parrish	Defendant-Appellee, and counsel of record
3.	Truman Price	Defendant-Appellee, and counsel of record
4.	Roxie Cluck	Defendant-Appellee, and counsel of record
5.	Malcolm McGregor	Defendant-Appellee, and counsel of record
6.	Tommy W. Wallace	Defendant-Appellee, and counsel of record
7.	Jenna L. Scott	Defendant-Appellee, and counsel of record
8.	Patricia Kimble	Defendant-Appellee, and counsel of record
9.	Harry T. Petersen	Defendant-Appellee, and counsel of record
10.	Leslie P. Dixon	Defendant-Appellee, and counsel of record
11.	Doris Sipes	Defendant-Appellee, and counsel of record
12.	Richard Currin	Defendant-Appellee, and counsel of record
13.	Robert Davis	Defendant-Appellee, and counsel of record
14.	Joyce Fugate	Defendant-Appellee, and counsel of record
15.	Charles Van Cleef	Defendant-Appellee, and counsel of record
16.	Coye Conner, Jr.	Defendant-Appellee, and counsel of record

CERTIFICATE OF INTERESTED PERSONS
(continued)

17.	Greg K. Winslett	Defendant-Appellee, and counsel of record
18.	Louis B. Gohmert, Jr.	Defendant-Appellee, and counsel of record



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REQUEST FOR ORAL ARGUMENT

Collins respectfully requests oral argument. This cause brings out the interplay between the immunity doctrine and a plaintiff's rights to bring suit under substantive law. Oral argument will benefit this court because public officials, judges, and lawyers are defendants.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument, and accompanying computer disc ("WORD") has been served upon all counsel of record via Certified Mail, Return Receipt Requested on this the 6th day of June, 2000.

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STATEMENT OF JURISDICTION

A. LOWER COURT JURISDICTION

This lawsuit was premised on the Racketeering Influenced and Corrupt Organization Act (RICO). 18 U.S.C § 1961, *et seq*. Jurisdiction was conferred upon the court below pursuant to 28 U.S.C. § 1331.

B. APPELLANT COURT JURISDICTION

On March 10, 2000, the District Court filed its Judgment that Collins shall take nothing from all of his RICO and state law claims against defendants Wallace, Gohmert, Lawrence, Zimmermann, Dixon, Price, B. Davis, Parrish, Fugate, Scott, Petersen, Kimble, and Conner. Collins shall take nothing from his RICO and RICO conspiracy claims against defendants Cluck, Sipes, McGregor, Currin, R. Davis, Van Cleef, and Winslett; Collins' breach of fiduciary duty claims against defendants Cluck, Currin, R. Davis, Van Cleef, and Winslett were dismissed without prejudice and dismissed the case. This Court has jurisdiction over the appeal of the District Court's final decision pursuant to 28 U.S.C § 1291.

STANDARD OF REVIEW

Collins is seeking review of the District Court trial judge's "Order" (Docket Ref. 95) granting Appellees' Motions to Dismiss Under 12(b)(6) and Motions for Summary Judgments, and of the "Final Judgment" (Docket Ref. 96).

A district court's dismissal of a complaint under this subsection may be upheld only if, taking the plaintiff's allegations as true, it appears that no relief could be granted based on the plaintiff's alleged facts." Bass v. Parkwood Hosp., 180 F.3d 234, 240 (5th Cir. 1999), citing Bradley v. Puckett, 157 F.3d 1022, 1025 (5th Cir. 1998). All well-pleaded facts must be accepted as true and viewed in the light most favorable to the plaintiff. Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995). This Court review the district court's ruling under Rule 12(b)(6) *de novo*. See Lowrey v. Texas A & M University System, 117 F.3d 242, 246 (5th Cir. 1997)

"This court reviews the grant of summary judgment de novo. S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 (5th Cir. 1996). Summary judgment is proper, "**if** the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). A factual dispute is "genuine", if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). When ruling on a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party

opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986) (quoting United States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962)); Hansen v. Continental Ins. Co., 940 F.2d 971, 975 (5th Cir. 1991). The presiding judge is not to weigh the evidence nor engage in credibility determinations. Anderson, 477 U.S. at 249, 106 S.Ct. at 2551."

(From *Crowe v. Henry*, 5th Cir. June 4, 1997, HTML Document 96-30588-cv0.htm, June 4, 1997)

Be it remembered that the record reflects that despite 95+ entries on the Docket Sheet, there was no discovery, no depositions, no interrogatories, no admissions, and no hearing whatsoever in this nearly one year old cause now making its way to this Appeals Court along with a 2300 page Record on Appeal.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT TRIAL JUDGE ERRED IN MAKING FINDINGS OF FACT UPON COLLINS CIVIL RICO CAUSE OF ACTION WHICH THE LAW DOES NOT ALLOW HIM TO MAKE

II. WHETHER THE DISTRICT COURT ERRED IN APPLYING CIVIL RIGHTS IMMUNITY CASE LAW TO PLAINTIFF'S RICO CAUSE OF ACTION

III. WHETHER THE DISTRICT COURT TRIAL JUDGE ERRED IN FAILING TO FIND WHAT THE REAL FACTS WERE TO DETERMINE THE ISSUE OF IMMUNITY

IV. WHETHER COLLINS RICO COMPLAINT IS GENUINE

V. WHETHER COLLINS HAD A RIGHT TO BRING A RICO CAUSE OF ACTION UPON EVERYONE WHO PARTICIPATED IN THE ILLICIT SCHEME, INCLUDING PUBLIC OFFICIALS

VI. WHETHER THE DISTRICT COURT TRIAL JUDGE ERRED IN DISMISSING COLLINS' RICO CAUSE EVEN THOUGH COLLINS PLEAD ALL ELEMENTS OF RICO AND GAVE FAIR NOTICE TO THE DEFENDANTS

VII. WHETHER DEFENDANTS WHO MOVED FOR SUMMARY JUDGMENT FAILED TO MAKE A SHOWING UPON COLLINS' SUMMARY JUDGMENT EVIDENCE

VIII. WHETHER THE DISTRICT COURT TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT, WHEN CONSIDERING THAT "THE ISSUE OF MATERIAL FACT", THE ONLY ISSUE OF FACT AT THAT POINT, WAS THE QUESTION FOR A JURY, "DID ANY OF THE DEFENDANTS VIOLATE RICO?"

IX. WHETHER THE PARTICIPATION OF PUBLIC OFFICIALS IN AN ALLEGED SCHEME TO DEFRAUD COLLINS OF THE INTANGIBLE RIGHT OF HONEST SERVICES VIOLATED RICO.

X. WHETHER A PRIOR NON-RICO CAUSE CAN PROVIDE RES JUDICATA TO THESE DEFENDANTS

XI. WHETHER THE DISTRICT COURT TRIAL JUDGE'S FINDINGS UPON EACH DEFENDANT ARE IN ERROR, STARTING WITH THE FIRST SENTENCE

STATEMENT OF THE CASE

A. Proceedings below

On March 24, 1999, Collins Pro Se filed his Complaint (Docket Ref. 1) alleging numerous violations of the Racketeering Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, on the part of 18 named defendants. The Docket Sheet shows that thereupon numerous defendants sought either absolute immunity or various versions of derived absolute immunity, and asked for SCHULTEA determinations as to such entitlements (Docket Ref. 21, 31, 39), and severe sanctions (Docket Ref. 32) upon Collins for having brought such suit. Thereupon Collins retained legal counsel (Docket Ref. 45).

When Collins filed his First Amended Complaint (Docket Ref. 78), he dropped a State District judge, and the Van Zandt County judge at the insistence of his legal counsel. Of the 16 remaining named defendants, three were Collins' own previous lawyers, one was the Van Zandt County Tax Collector, one was a precinct constable, one was Van Zandt County Sheriff, one was the District Attorney in Van Zandt County, two were lawyers defending Van Zandt County employees, one was a lawyer defending one of Collins' former lawyers, two were State District judges, three of the remaining five were lawyers from El Paso, and two were individuals who flew in from El Paso to participate in the July 1995 break-in of Collins home.

Reference to the Dallas District Court Docket Sheet shows that there was a flurry of motions and activity, but no timely SCHULTEA determination upon the central issue of entitlement to absolute immunity in the face of a Civil Racketeering suit.

Motions to dismiss for absolute immunity were replaced by motions for summary judgment (Docket Ref. 54, 57) and motions to stay discovery (Docket Ref. 65), which were granted (Docket Ref. 86), supplemental motions to dismiss and for sanctions (Docket Ref. 66), amended motions for summary judgment (Docket Ref. 76), supplemental motions to dismiss (Docket Ref. 90), and more.

Then on March 7, 2000, nearly a full year after filing of suit, without ever a SCHULTEA determination, the District Court entered the Order (Docket Ref. 95) and Final Judgment (Docket Ref. 96) that is the subject of this Appeal.

Be it remembered that the record reflects that despite all the entries on the Docket Sheet, and the accompanying documents, there was no discovery, no depositions, no interrogatories, no admissions, and no hearing whatsoever in this nearly one year old cause now making its way to this Appeals Court along with a 2300 page Record on Appeal.

On March 27, 2000 Collins filed a memorandum (Docket Ref. 97) in opposition to Texas District Judge Gohmert's May 4, 1999 motion for Rule 11

sanctions (Docket Ref. 32). On April 4, 2000 Collins timely filed Notice of Appeal (Docket Ref. 98)

B. Statement of the facts

Collins alleges a RICO "enterprise" upon him, with beginnings in El Paso, Texas around 1991, which followed him and became virulent upon him in Van Zandt County in 1995 in the guise of a "divorce".

The unusual aspect of this case is that it primarily involves defendants who are State judges, lawyers, public officials, and law enforcement officers. This case is about lawyers who used their special privileges, via the Court, to put a small businessman, Collins, out of his home, out of his business, broke, and tied up in court for years for speaking out about corruption in the legal industry in the first place.

For over twenty (20) years Collins had the honorable and enlightening experience of serving dozens of times as one of the most essential elements of our society – a juror!

From that experience Collins recognized an urgent need within the legal system. Collins left his 20-year banking career to dedicate himself to creating a new service to fulfill that need. Over the following 15 years he and his family

successfully developed that business which took him into all levels of courts across many States.

That experience gave Collins an insight into the legal system which non-lawyers can never get. Along with continuing the development for his unique law related service, Collins developed a respect for the legal industry in which he provided his services.

On the other hand, Collins got to see, first hand, "the other side" of that industry. And, over the years he became vocal about the corruption he saw within the legal industry. As his service became more known and his not hesitating to voice his opinions about lazy, corrupt lawyers, television and newspaper media invited him for many news stories.

It was not long after Collins began providing his services, that some lawyers began to file complaints accusing Collins of the unauthorized practice of law. Collins always answered their complaints and no legal action was ever taken against him, because he was not guilty of what he was being accused.

In about 1991, while Collins was providing his services for an uneducated, uninformed, Mexican-American woman in the El Paso area, he witnessed a lawyer attempting to "steal" nearly one million dollars from that woman who had been rendered a paraplegic in a traffic collision.

Collins did not sit by and let it happen. But shortly after that is when Collins home was first illegally invaded by police officers and all of his business property seized for the first time.

When all efforts by Collins to recover his seized property failed, Collins hired a lawyer and filed his first legal action related to those "out to put him out of business". After one year of being out of business, rather than insisting that his case go to trial, Collins agreed to accept a cash settlement for the losses.

Then in 1992, Collins re-established his service in East Texas and it was not long before his reputation in the media became one of "Collins to the rescue" with his unique skill and technique of designing and building demonstrative evidence. His clients prevailed in 100% of the criminal cases, and over 98% of the civil cases he provided his skills for (over 600 cases total).

And thus in 1994, with more positive news stories about Collins being published, even The State Bar of Texas inviting Collins to be a panelist on their various seminars and conventions across the State. But there also came more sophisticated steps by certain lawyers to "*Stop Collins*".

The scheme to put Collins out of business in the East Texas area in 1995 had the same pattern as was used in the El Paso area, i.e. have police officers illegally invade his home and business, and seize what records they wanted or wanted to destroy. And once they had Collins out of his home and business they needed to

keep him out of his home, out of business, broke and above all, keep him tied up in court for years.

The major difference in the El Paso area scheme and the East Texas scheme is that Collins had a lawyer represent him in El Paso scheme, but no lawyer would represent him in East Texas.

Another difference in the two schemes was that a fraudulent "divorce" was to be used in the east Texas scheme. When Collins learned of the enterprise's "divorce" scheme (See First Amended Complaint, Docket Ref. 78), he spoiled it by filing for a divorce himself, in East Texas, before it could be filed in El Paso.

That is when the "enterprise" had to once again invade his home and seize hundreds of his business records to keep him out of his home and business. Collins alleges that Parrish assisted in illegally invading his home. Collins' summary judgment evidence even shows that Parrish came back later that evening, assisted by another officer, as indicated by the Sheriff's radio log, all contrary to the defendants' version of the truth.

If Collins would have been allowed discovery in the Van Zandt "divorce", all of this would of course have come out. But the enterprise used its special privileges in the court to keep the facts from coming out.

Shortly after the 1995 break-in Collins filed suit for the illegal invasion and seizure of his property by all those involved. But with Collins broke and living

"on the street", the lawyers again called on the court, this time to shield the public officials, police officers, and every one else they needed in their scheme, through the use of the "immunity" doctrine. A well protected "enterprise", indeed!

All of the litigation that has taken place since 1995 has not ended those lawyers' scheme to "*stop Collins*". Collins filed his Federal lawsuit in this case in March 1999. That suit has not deterred those out to "*stop Collins*". One defendant, Gohmert, wants the District Court to severely "hammer" Collins for exercising his First Amendment Right of free speech and access to the courts. (Docket Ref. 66, Gohmert's Supplemental Motion to Dismiss and for Sanctions: "should be hammered with all available force")

And, in February 2000, Collins' current home, a vacated feed store, was invaded by law enforcement officers in Henderson County. Collins fully intends to take legal action thereon.

SUMMARY OF THE ARGUMENT

The District Court trial judge abused the immunity doctrine customarily used to properly shield public officials from a flood of frivolous civil rights litigation.

However, Collins suit is not a civil rights suit. Therefore, when the District Court trial judge applied civil rights law instead of abiding by RICO case law, he denied Collins his substantive rights under RICO.

Also, the District Court trial judge painstakingly ignored the facts relevant to RICO which Collins presented in his complaint. In doing so, he was able to create his own version of the relevant facts, upon which he would make his findings (see Issue 11). As one example, (Order, page 2, line 6) the District Court trial judge chose to find, *"This lawsuit apparently had its beginning in July 1995 when Collins and defendant Jenna Scott were involved in a divorce proceeding in the state district court of Van Zandt County, Texas."*

Looking at just that part, it sounds like this whole matter started with a divorce, which is far from the truth. This lawsuit did not "apparently have its beginning in 1995 when Collins and defendant Scott were involved in a divorce . ." Nowhere in Collins' Complaint did Collins make such statement. The "divorce", which defendant Scott swears she paid defendant Cluck $20,000 for, was only one part of the defendants' scheme which Collins foiled.

ARGUMENT

ISSUE 1 RESTATED

THE DISTRICT COURT TRIAL JUDGE ERRED IN MAKING FINDINGS OF FACT UPON COLLINS CIVIL RICO CAUSE OF ACTION WHICH THE LAW DOES NOT ALLOW HIM TO MAKE

The District Court Trial Judge's "Order" (Docket Ref. 95, Record Excpt. 3) begins with what surely must a typographical error - ***"This is a civil rights suit ...*** " (Order, page 1, line 1). This is **not** a Civil Rights suit. This is a RICO suit against the defendants for conducting and facilitating a fraudulent scheme upon Collins.

Collins' allegations against the named public official defendants is for their participation in a scheme to defraud Collins of his "intangible right of honest services" (First Amended Complaint, Docket Ref 78, page 12).

The RICO Statute itself legislates the issues relevant to Collins' cause, and even defines the terms it uses. At issue is whether these defendants' conduct violated RICO! No other issue is relevant to Collins' cause of action, not even a claim for immunity.

> "[T]his Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action". *Crawford-El, 523 U.S.574 (1998), quoting Gomez. 446 U.S., at 640, (1980)*

A pleading of absolute immunity under RICO is NOT available to the public official defendants in this case. Collins' RICO allegations are that those public

official defendants participated in an alleged scheme on behalf of the other defendants, as well for as their participation in defrauding Collins of "honest services". Intent to participate in a scheme to defraud anyone of "honest service" is certainly not an individual judicial or prosecutorial act nor is it a judicial or prosecutorial function.

As for dismissal and/or summary judgment as the District Court's "Order"/ "Judgment" did, such is NOT available under RICO either. The matter has to go before a jury, to find upon largely circumstantial evidence. Case law clearly shows it is that simple:

> "Complaint which alleged that defendants "established, conducted and participated in an enterprise * * * which engaged in a pattern of racketeering activity and affected interstate commerce" stated cause of action under this chapter sufficient to **withstand motion to dismiss.**" *Bunker Ramo Corp. v. United Business Forms, Inc., C.A.Ill.1983, 713 F.2d 1272*
>
> "Material issues of genuine fact existed with respect to existence of an enterprise as defined by this chapter, association of defendant printing company with such an enterprise, association of the alleged enterprise with organized criminal activity, the intent and knowledge of defendant concerning the underlying predicate acts and the existence of injury caused by alleged violation of this chapter, **precluding summary judgment** in favor of defendant in action alleging the kickback scheme." *Estee Lauder, Inc. v. Harco Graphics, Inc., D.C.N.Y.1983, F.Supp. 83. (emphasis added)*
>
> "In prosecution under this chapter, **jury** is entitled to infer existence of enterprise on basis of largely or wholly **circumstantial** evidence." *U.S. v. Elliott, C.A.Ga 1978, 571 F.2d 880, rehearing denied 575 F.2d 300, certiorari denied 99 S.Ct. 349,439 U.S. 953, 59 L.Ed.2d 344.*

The operative facts under RICO are the issues of RICO, *i.e.* existence of an enterprise, participating in the affairs thereof, and doing so by a "pattern of racketeering activity", etc.

As this Fifth Circuit Court of Appeals Court can ascertain for itself, the District Court trial judge was not authorized to make a finding upon any of the material issues of Collins' RICO cause of action. The District Court trial judge was not to weigh the evidence nor engage in credibility determinations.

In sum, the District Trial Judge erred in making findings of fact upon Collins Civil Rico cause of action which the law does not allow him to make.

ISSUE 2 RESTATED

THE DISTRICT COURT ERRED IN APPLYING CIVIL RIGHTS IMMUNITY CASE LAW TO COLLINS' RICO CAUSE OF ACTION

The District Court trial judge erred by shielding all public officials and all other defendants from ever having to show why they were absolutely immune from a Civil RICO cause of action, denying Collins all discovery, even upon the claim of absolute immunity, and shielding all other defendants seeking summary judgment from ever making a showing as to why Collins could not prevail upon his evidence.

Collins does not argue that judges are absolutely immune from lawsuits for their judicial acts. Collins does not argue that prosecutors are absolutely immune

from lawsuits for their acts in initiating and pursuing a prosecution. Collins does not argue that other public official defendants in his cause of action may be entitled to qualified immunity for their official acts.

> "Officials enjoying ***absolute immunity*** to suits for money damages include legislators for acts in their legislative capacity, judges for their judicial acts, prosecutors for acts in initiating and pursuing a prosecution, other executive officers performing prosecutorial or adjudicative functions, and the President of the United States." *Elliott v. Perez, 751 F.2d 1477, n 12 (5th Cir. 1985)*

> "Under the ***qualified immunity*** standard, government officials are shielded from liability for civil damages as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald. Qualified immunity has been recognized for certain Executive Branch officials, see *Butz v. Economou*, governors and their aids, and police officers." *Elliott v. Perez, 751 F.2d 1477, n 13 (5th Cir. 1985)*

However, Collins did NOT bring a garden-variety § 1983 Civil Rights suit upon the defendants' individual acts. Collins brought a Civil RICO cause of action upon all defendant's illicit conduct, i.e. their "pattern of racketeering" acts on behalf of an "enterprise", etc., which are NOT judicial, prosecutorial, or otherwise proper functions. Such conduct is clearly unlawful under RICO:

> "The Court observed that "[I]mmunity does not change the character of the judge's action or that of his co-conspirators. Indeed, his immunity is dependent on the challenged conduct being an official act within his statutory jurisdiction, broadly construed." *Dennis v. Sparks, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980)*

> "When judges tortuously injure other citizens by acting in violation of clear and specific constitutional or statutory provisions, they are properly held liable, and some courts have indicated that they then lack jurisdiction". *Jacobson v. Shaefer, 441 f.2d 127 (7th Cir. 1971).*

It is "the nature of the function performed, not the identity of the actor who performed it, that inform[s] our immunity analysis." *Forrester v. White, 484 U.S. at 225-229, S.Ct. at 453-55.*

The recent *Crawford-El v. Britton (1998)* Supreme Court case addresses the entire issue of how the immunity doctrine plays out upon a plaintiff suing a public official, alleging illicit intent, as Civil RICO must surely involve:

> "This last rationale of fairness does not provide any justification for the imposition of special burdens on plaintiffs who allege misconduct that was plainly unlawful when it occurred. While there is obvious unfairness in imposing liability - indeed, even in compelling the defendant to bear the burdens of discovery and trial - for engaging in conduct that was objectively reasonable when it occurred, no such unfairness can be attributed to holding one accountable for actions that she knew, or should have known, violated the constitutional rights of the plaintiff. Harlow itself said as much: "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." Id., at 808-819; see also *Butz*, 438 U.S. at 506 ("[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law ... .") . *Crawford-El v. Britton, 523 U.S. 574 (1998) (emphasis added)*
>
> "In *Harlow*, ... we further emphasized: "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Id.*, at 814. Social costs that adequately justified the elimination of the subjective component of an affirmative defense do not necessarily justify serious limitations upon "the only realistic" remedy for the violation of constitutional guarantees." *Crawford-El v. Britton, 523 U.S. 574 (1998) (emphasis added)*
>
> "The reasoning in Harlow, like its specific holding, does not justify a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved. *Crawford-El v. Britton, 523 U.S. 574 (1998) (emphasis added)*

The District Court trial judge placed a heavy thumb on the defendants' side of the scale, so much so that he never properly addressed Collins' RICO cause of action, nor as to whether the defendants were "absolutely immune" from Collins' Civil RICO cause of action.

All of the case law so freely quoted by the defendants and the District Court trial judge was §1983 Civil Rights case law, not RICO case law. Collins did NOT file his cause of action under §1983 Civil Rights. Collins filed his cause of action under Civil RICO. Collins has found no immunity case law applicable under RICO! RICO case law clearly shows that it was Congress' intent that the Law "apply across the board, reaching whosoever, including public officials:"

> "The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth" Harco, Inc. v. American National Bank & Trust Co. of Chicago, *supra, at 398 U.S. Supreme Court, Sedima v. Imrex, 473 U.S. (1985)*
>
> "Purpose and history of this chapter and substance of its provisions demonstrate clear congressional intent that chapter be interpreted to apply to activities that corrupt public or governmental entities". *U.S. v. Angelili, C.A.N.Y.1981, 660 F.2d 23, certiorari denied 102 S.Ct. 1258, 1442, 455 U.S. 910, 945, 71 L.Ed.2d 449, 657, rehearing denied 102 S.CT. 1998, 1999, 2024, 456 U.S. 939, 951, 72 L.Wd.2d 460, 476. (emphasis added)*
>
> "Congress did not limit scope of this chapter to those persons involved in what traditionally has been thought of as "organized crime," but, rather, any "person" as the term is broadly defined in this chapter, whether associated with organized crime or not, can commit violation, and any person injured in his business or property by such violation may then sue violator for damages in federal court". *Lode v. Leonardo, D.C.Ill.1982, 557 F.Supp. 675. (emphasis added)*

(18 U.S.C. § 1962): "Whoever engages in prohibited patterns of racketeering activities comes within purview of this chapter, including public officials". *U.S. v. Mandel, D.C. Md. 1976, 415 F.Supp. 997, supplemented 415 F.Supp. 1025. (emphasis added)*

(18 U.S.C. § 1964): "A link to organized crime is not a requirement of a civil cause of action under this chapter". *Kimmel v. Peterson, D.C.Pa.1983, 565 F.Supp. 476*

"Since Harlow's holding related only to the scope of the affirmative defense, it provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation. "*Crawford-El, 523 U.S.574 (1998)*

"[Qualified immunity's] rationale of fairness does not provide any justification for the imposition of special burdens on plaintiffs who allege misconduct that was plainly unlawful when it occurred. While there is obvious unfairness in imposing liability - - indeed, even compelling the defendant to bear the burdens of discovery and trial - - for engaging in conduct that was objectively reasonable when it occurred, no such unfairness can be attributed to holding one accountable for actions that she knew, or should have known, violated the constitutional rights of the plaintiff. Harlow itself said as much: "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." Id., at 818, 819, see also Butz, 438 U.S. at 506 ("[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law . . . . .")" *Colston v. Barnhart, 5th Cir. Jul. 14, 1998, N. 96-40634, 5th Cir. Website.* (dissenting opinion from order on application for rehearing en banc).

The District Court trial judge erred in not allowing Collins discovery. *Baur v. Abermale Corporation (5th Cir. 1999)* clearly indicates that discovery is required before summary judgment in all but the most unusual circumstances:

"We now address the timing of the motion for summary judgment ... . This court recently held that summary judgment can be decided without any discovery. *United States v. Bloom, 112 F.3d 200 n. 17 (5th Cir. 1997).* "'To obtain a continuance of a motion for summary judgment in order to obtain

> further discovery, a party must indicate to the court by some statement, preferably in writing (but not necessarily in the form of an affidavit), why he needs additional discovery and how the additional discovery will create a genuine issue of material fact.'" *Stults v. Conoco, Inc. 76 F.3d 651, 657-58 (6th Cir 1996) (quoting Krimm v. BancTexas Group, Inc., 989 F.2d 1435, 1442 (5th Cir. 1993))).* Baur v. Abermale Corporation *(5th Circuit 97-30595-CVO.HTM (March 29, 1999)*

Also, Collins has found no case law requiring any special pleading standard to apply to RICO, whether suing a public official or anyone else. There are, of course, the RICO elements to be plead, as shown above. Certainly, Collins should be held to proper pleadings. But Collins should not have the burden of having to sue public officials as RICO conspirators in the first place, or a heightened burden in persuading the District Court trial judge that the sued officials were indeed rogues, and that Collins' complaint is indeed genuine. (See Issue 4)

As for complaints brought against public officials, this Circuit uses a heightened pleading standard under Elliott v. Perez. In sum, the District Court erred in applying such Civil Rights immunity case law to Collins' RICO cause of action.

ISSUE 3 RESTATED

THE DISTRICT COURT TRIAL JUDGE ERRED IN FAILING TO FIND WHAT THE REAL FACTS WERE TO DETERMINE THE ISSUE OF IMMUNITY

Collins alleged violations of clearly established statutes, namely 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1962 (c) and (d) ("RICO"). Some of the

defendants nevertheless pleaded absolute immunity. It is well established what the District Court trial judge should have done upon a complaint alleging statutory violations, and a pleading of immunity therefrom:

> "[I]f the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery. Harlow, *457 U.S. at 818*. To do so, the court must determine whether, assuming the truth of plaintiff's allegations, the official's conduct violated clearly established law." *Crawford-El v. Britton 93 F.3d 813 (1998) (emphasis added) (should be 523 U.S. 574 (1998)*
>
> "Of course, the judge should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible." *Crawford-El v. Britton 93 F.3d 813 (1998)*
>
> "Chief Justice Rehnquist, writing for the Court *(Siegert v. Gilley, 500 U.S. 2265, 111 S.Ct 1789, 114 L.Ed.2d 277 (1991))* explained that the Court had taken the case "to clarify the analytical structure under which a claim of qualified immunity should be addressed." *Id at 231, 111 S.Ct at 1793.* Reaffirming *Gomez*, the Court noted that qualified immunity is a defense to be pleaded by a defendant official. When a defendant pleads the defense of qualified immunity, the trial judge should determine both what the current applicable law is and whether it was clearly established when the action occurred. *Id."* *Schultea v. Wood, 47 F.3d 1432 (emphasis added)*
>
> "Probably of greatest importance is that the burden of being able to ascertain what the real facts are in order to determine the defense of immunity is placed squarely on the district judge. The trial judge may not wait on motions or other actions by the parties or counsel." *Elliott v. Perez, 751 F.2d 1480 (5th Cir. 1985)*

After the first public official defendants filed their claim of immunity and motions for summary judgments, (April 21, 1999, volume 1, page 33) the District Court trial judge did issue a "Summary Judgment Briefing Schedule" (Docket Ref.

23), but he clearly erred by not engaging the allegations of violations of clearly established law and should have taken direct charge according to the mandates in *Elliot v. Perez* or *Schultea*:

> "The trial judge has several means to determine the specific facts on which plaintiff relies, from which the judge can draw the legal conclusion on the availability of the immunity defense. First, the judge can, and must demand full compliance with Rule 11." *Elliott v. Perez, 751 F.2d 1482 (5th Cir. 1985)*

Despite a suit as onerous as "racketeering" (filed in March 1999) and the repeated, loud complaint of a public official defendant (Docket Ref. 32, Judge Gohmert, May 3, 1999) seeking "severe" sanctions against Collins under Rule 11 for having been accused of "racketeering" and other public official defendants filing motions to stay discovery, (Docket Ref. 21, April 26, 1999), nothing timely moved the District Court's trial judge to demand full compliance with Rule 11.

It wasn't until March 7, 2000 that the District Court trial judge made his first reference to the matter of sanctions and immunity. That reference was in very small print in a footnote on page 6 of the District Court trial judge's "Order".

> " [1] Judge Gohmert has also filed a motion for sanctions against Collins to which Collins has not responded. That motion will be addressed by separate order at the conclusion of this case. Collins is directed to file a response to Judge Gohmert's motion for sanctions within 20 days of this order."

The District Court trial judge failed to engage Collins' Complaint of an ongoing illicit RICO enterprise. The District Court Trial Judge failed to take charge upon claims of immunity and a motion for severe sanctions for bringing

suit. Had the District Court's trial judge taken charge and made a timely determination, this case could have either been terminated earlier without all the burden and expense to the parties, or at least the record could have been "reduced" through discovery as indicated in Section 7, instead of this case going to this Appeals Court with an unreduced record of over two thousand (2300) pages.

The "Summary Judgment Briefing Schedule" (Docket ref. 23) reads as follows:

> 1) Within thirty (30) days after entry of this Summary Judgment Briefing schedule, the parties shall file their Motions for Summary Judgment, Memorandum in Support thereof, and any other papers ancillary to such motions.
>
> 2) Within thirty (30) days after service of the Motion for Summary Judgment, the parties shall file their Memorandum in Opposition, and any other papers ancillary to such Memoranda. The Memorandum in Opposition shall not exceed thirty-five pages.
>
> 3) Within fifteen (15) days after service of the Memorandum in Opposition, the parties shall file their Reply. The Reply shall not exceed fifteen (15) pages.

There never was a reply by any of the defendants (item 3) as ordered, to make a showing Collins' Response (item 2) had the absence of any "genuine issue of material fact". See Issue 7.

In sum, the District Court Trial Judge erred in failing to find what the real facts were to determine the issue of immunity.

ISSUE 4 RESTATED

COLLINS RICO COMPLAINT IS GENUINE

Collins complaint is genuine! Collins alleged all of the elements of Civil RICO in his complaint, i.e., the existence of an enterprise, names of the defendants Collins knew at that time to be in the affairs of the enterprise, and defendants' specific acts showing a "pattern" of illicit acts in the on-going activities of that enterprise. Each defendant's illicit acts violated RICO.

Such illicit acts began as early as April 1991 (see Record Excerpt 5) and did not begin in July 1995 as the District Court trial judge "found" in his "Order".

In sum, Collins RICO complaint is genuine.

ISSUE 5 RESTATED

COLLINS HAD A RIGHT TO BRING A RICO CAUSE OF ACTION UPON EVERYONE WHO PARTICIPATED IN THE ILLICIT SCHEME, INCLUDING PUBLIC OFFICIALS

The Law allows for a private action upon violations upon *18 U.S.C § 1961 et seq.* ("RICO") by any person for conduct violative of "RICO". Congress' intent is that RICO apply across the board, to everyone, including public officials:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee". *(18 U.S.C. § 1964c, "Civil RICO")*

"Purpose and history of this chapter and substance of its provisions demonstrate clear congressional intent that chapter be interpreted to apply to activities that corrupt public or governmental entities. *U.S. v. Angelili, C.A.N.Y.1981, 660 F.2d 23, certiorari denied 102 S.Ct. 1258, 1442, 455 U.S. 910, 945, 71 L.Ed.2d 449, 657, rehearing denied 102 S.CT. 1998, 1999, 2024, 456 U.S. 939, 951, 72 L.Wd.2d 460, 476. (emphasis added)*

"Congress did not limit scope of this chapter to those persons involved in what traditionally has been thought of as "organized crime," but, rather, any "person" as term is broudly defined in this chapter, whether associated with organized crime or not, can commit violation, and any person injured in his business or property by such violation may then sue violator for damages in federal court." *Lode v. Leonardo, D.C.Ill.1982, 557 F.Supp. 675. (emphasis added)*

(18 U.S.C. § 1962): Whoever engages in prohibited patterns of racketeering activities comes within purview of this chapter, including public officials. *U.S. v. Mandel, D.C.Md.1976, 415 F.Supp. 997, supplemented 415 F.Supp. 1025. (emphasis added)*

(18 U.S.C. § 1964): A link to organized crime is not a requirement of a civil cause of action under this chapter. *Kimmel v. Peterson, D.C.Pa.1983, 565 F.Supp. 476.*

Collins, under the RICO statute, has the right to a private cause of action.

Collins also has the right to include all those participating in the scheme, including the named public officials:

"In *Harlow*, ... we further emphasized: "In situations of abuse of office, an action for damages may offer the **only realistic avenue** for vindication of constitutional guarantees." *Id.*, at 814. Social costs that adequately justified the elimination of the subjective component of an affirmative defense do not necessarily justify serious limitations upon **"the only realistic"** remedy for the violation of constitutional guarantees." *Crawford-El v. Britton, 523 U.S. 574 (1998) (emphasis added)*

In sum, Collins had a right to bring a Rico cause of action upon everyone who participated in the illicit scheme, including public officials.

ISSUE 6 RESTATED

THE DISTRICT COURT TRIAL JUDGE ERRED IN DISMISSING COLLINS' RICO CAUSE EVEN THOUGH COLLINS PLEAD ALL ELEMENTS OF RICO AND GAVE FAIR NOTICE TO THE DEFENDANTS

Collins plead all of the elements of RICO and gave fair notice to all of the defendants. The words in the RICO statute, together with case law, shows what all, and also what little, has to be plead:

> " It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce". *18 U.S.C. § 1962*
>
> "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section". *18 U.S.C. § 1962(d)*
>
> "There are eight elements which must be pled before a plaintiff may avail himself of the enhanced damage and attorney fees provision of this section: (1) that defendant (2) through commission of the two of the enumerated predicate acts, (3) which constitute a "Pattern" of (4) "racketeering activity," (5) directly or indirectly participates in the conduct of (6) and "enterprise," (7) the activities of which affect interstate or foreign commerce, and that (8) plaintiff was injured in his business or property by reason of such conduct. *Taylor v. Bear Stearns & Co., D.C.Ga.1983, 572 F.Supp. 667.*
>
> "In alleging under this chapter a civil conspiracy, it is necessary to plead fraudulent conspiracy with enough specificity to inform defendants of facts

> forming basis of conspiracy charge". *Kirschner v. Cable/Tel Corp, D.C.Pa.1983, 576 F.supp. 234.*
>
> "Complaints which alleged that defendants "established, conducted and participated in an enterprise * * * which engaged in a pattern of racketeering activity and affected interstate commerce" stated cause of action under this chapter sufficient to withstand motion to dismiss" *Bunker Ramo Corp. v. United Business Forms, Inc. C.A.Ill.1983, 713 F.2d 1272.*

Collins First Amended Complaint (Docket Ref. 78), together with the attached "Chronology", had all the right allegations. Collins' Response, Memorandum, and Appendix consisting exhibits (Docket Ref. 71, 72, 73) provided the evidence.

There is of course the element of continuity plus relationship, and the threat of the conduct of the enterprise continuing into the future. See Collins' First Amended Complaint. In light of the time span covered by the allegations, and the ongoing nature of the enterprise, it in itself projects into the indefinite future:

> "It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas v. U.S. 118 S.Ct. 469 (1997).*

A pleading of immunity is indefensible under the circumstances because of the allegations of the violations of clearly established constitutional or statutory provisions, namely RICO.

ISSUE 7 RESTATED

DEFENDANTS WHO MOVED FOR SUMMARY JUDGMENT FAILED TO MAKE A SHOWING UPON COLLINS' SUMMARY JUDGMENT EVIDENCE

In the case at bar, the defendants in essence told the Court that they were all good men or women, "just doing their job", somewhere in or around a courthouse, and were therefore entitled to absolute immunity no matter what Collins alleged about them, and immediately moved for summary judgment and the District Court trial judge denied Collins all discovery.

For the Court to let the defendants get by with such pleadings is surely holding them entitled to a "lowered" standard. Such a lowered standard would, of course, be harmonious with this Circuit's "heightened" standard against plaintiffs, i.e. the relative "barrier" created against plaintiffs by the "heightened" standards imposed upon him in the first place.

As for the defendants' motions for summary judgment, it is elementary that Collins presented a significant "small stack" (90+ exhibits) of evidence, which he designated as representative of his "big stack" showing his cause, that a" reduction" of at least the "small stack" would be necessary to show that there was nothing in there to show any "genuine issues of material facts". The burden of this "reduction" falls initially on the defendants, to show that at least Collins' "small stack" was insufficient.

> "Summary judgment is appropriate where the moving party establishes that "there is no genuine issue of material fact and that [it] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The **moving party** must show that, if the evidentiary material of record were **reduced** to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden of proof. *Celotex v. Catrett, 477 U.S. 317, 327 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).*
>
> "Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, **show** that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986) (quoting Fed.R. Civ.P. 56c; Little v. Liquid Air Corp.k, 37 F.3d 1069, 1075 (5th Cir.1994)). Aubrey v. School Board of Lafayette Parish, 95-30987-cv0.htm (5th Cir. Aug. 22, 1996).*

The defendants could have done a "reduction" in one of two ways, one being with discovery, and the other being without discovery:

With discovery, which is not the case at bar, the defendants could have attempted to show that which they "discovered", i.e. what "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any "show" under the law, *i.e.* that there was no "genuine issue of material fact". Colloquially, the defendants would have shown that there was nothing in Collins' "small stack", and nothing in Collins "large stack", and that Collins may not even have a "large stack" at all, because they had "discovered" such.

Collins would have "discovered" just the opposite and shown the trial court his version of the truth, as opposed to the defendants version.

Such a showing, after adequate discovery, may not require a hearing at all, for the defendants would be merely showing under the law, exactly what Collins discovered evidence showed - that there is no "genuine issue of material fact", so that the District Court trial judge, as a matter of law, could have found that there was indeed no "genuine issue of material fact", and grant summary judgment. That scenario is not the case at bar.

In the case at bar, without any discovery, the defendants could have fulfilled their burden by showing Collins' "small stack" of evidence directly to the judge at some sort of hearing, and claimed that it raised no "genuine issue of material fact". Collins, would have claimed that his "small stack", with proper inferences, proved his allegations, and referred to his "big stack", which may include the testimony of his witnesses, which he is not required to depose and certainly not required to bring to hear their testimony at this hearing. That would be a full trial, not only on paper, but in fact, and before the judge, not the jury as Collins requested!

All inferences were to be drawn in favor of Collins at this stage, and the District Court trial judge was not to weigh the evidence himself, nor make inferences thereon. The District Court trial judge should have looked at Collins'

"small stack" in light of Collins' allegations. The defendants could not honestly represented to the Court that Collins would have no other "big stack".

By not allowing Collins discovery, the District Court trial judge "reduced" all evidence and everything else by simply "finding" there was nothing to Collins' allegations. The trial court judge denying all discovery shut off the "reduction" of the evidence. That is why the evidentiary material is before this Appeals Court in such "loose" form. The District Court was the proper place to do the "reduction".

In sum, the defendants who moved for summary judgment failed to make a showing upon Collins' summary judgment evidence. There never was a hearing in Collins' RICO cause!

ISSUE 8 RESTATED

THE DISTRICT COURT TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT, WHEN CONSIDERING THAT "THE ISSUE OF MATERIAL FACT", THE ONLY ISSUE OF FACT AT THAT POINT, WAS THE QUESTION FOR A JURY, "DID ANY OF THE DEFENDANTS VIOLATE RICO?"

Substantive law, i.e. RICO, tells District Court trial judges which facts are material. Case law tells the District Court trial judge that he is to view the summary judgment evidence in the same manner as the jury, i.e. upon largely or wholly circumstantial evidence in the case of RICO:

> "As to materiality, the **substantive law will identify** which facts are **material**. Only disputes over facts that might affect the outcome of the suit

under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant will not be counted." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242(1986)*

"Thus, in ruling on a motion for summary judgment, the judge **must view the evidence** presented **through the prism** of the **substantive evidentiary burden**. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some [477 U.S. 242, 255] benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242(1986)*

"In prosecution under this chapter, jury is entitled to **infer existence** of enterprise **on basis of largely or wholly circumstantial evidence**." *U.S. v. Elliott, C.A.Ga 1978, 571 F.2d 880, rehearing denied 575 F.2d 300, certiorari denied 99 S.Ct. 349,439 U.S. 953, 59 L.Ed.2d 344.*

Summary judgment case law also tells District Court trial judges, that unlike the jury, he is not allowed to draw inferences[1] like a jury is allowed to. Case law also tells him that whether an issue needs to go to a jury turns on whether it presents a proper jury question[2]. RICO violation is a jury question. Case law also tells the judge that he, unlike the jury, is not entitled to draw inferences from any of the documentary evidence[3] in front of him either. Case law also tells him that summary judgment on affidavits is inappropriate[4] when state of mind is involved,

as it surely is in RICO.

[1] "Credibility determinations, the weighing of the evidence, and the **drawing of legitimate inferences** from the facts **are jury function**, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Adickes, 398 U.S., at 158-159. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242(1986)

[2] "Again, in *Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)*, the Court emphasized that the availability of summary judgment turned on whether a **proper jury question** was **presented**. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury ... to infer from the circumstances" that there had been a meeting of the minds. *Id., at 158-159. Anderson v. Liberty Lobby, Inc., 477 U.S. 242(1986)*

[3] "Cases may be posed dealing with evidence that is essentially documentary, rather that testimonial; but the Court has held in a related context involving Federal Rule of Civil Procedure 52(a) that inferences from documentary evidence are as much the prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 270 (1986)*, Justice Rehnquist, dissenting

[4] "And summary judgment on **affidavits** and the like is even more **inappropriate** when the central, and perhaps only, inquiry is the official's **state of mind**. See C. Wright, Law of Federal Courts 493 (3d ed. 1976) (It "is not feasible to resolve on motion for summary judgment cases involving state of mind"); *Subin v. Goldsmith*, 224 F.2d 753 (CA2 1955). *Butz v. Economou, 438 U.S. 478, 527 (1978)*, Justice Rehnquist, etc. concurring in part and dissenting in part.

Case law also tells the District Court trial judge that Collins really does not have to present anything yet, because he has not had an opportunity for discovery. Besides that, Collins need only present evidence from which a jury might return a verdict in his favor. And if Collins does so, as he did, there is a genuine issue of fact that requires a trial:

> "The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, *Cities Service, 391 U.S., at 290,* held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering "any significant probative evidence tending to support the complaint." As we have recently said, "discredited testimony *[477 U.S. 242, 257]* is not [normally] considered as sufficient basis for drawing a contrary conclusion.' *Bose Corp. v. Consumers Union of United States, Inc, 466 U.S. 485, 512 (1984).* Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, **as long as the plaintiff has had a full opportunity to conduct discovery**. We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury **might** return a **verdict in his favor**. If he does so, there is a **genuine issue of fact** that **requires a trial**." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)

In summary, Collins presented his "small stack" of evidence, i.e. his affidavit and his exhibits. The District Court trial judge is not even allowed to "weigh" it, or draw any inferences upon it. The defendants have presented no more than mere affidavits. The District Court trial judge allowed no discovery. Not one

defendant inquired into the "caliber" or "quantity" of Collins' possible future testimony or the witnesses he might bring to the jury, or with what "clarity" or "particularity" Collins might speak to the jury.

At that stage of the proceedings, the District Court trial judge can not possibly "find" that Collins could not show "The RICO Violations" to a jury. A grant of summary judgment, as is the case at bar, is at least, outright abuse of discretion!

> "In sum, we conclude that the determination of whether a given factual dispute requires submission to a Jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)

In sum, the District Court Trial Judge erred in granting summary judgment, when considering that "the issue of material fact", the only issue of fact at that point, was the question for a jury, "Did any of the defendants violate RICO?"

ISSUE 9 RESTATED

THE PARTICIPATION OF PUBLIC OFFICIALS IN AN ALLEGED SCHEME TO DEFRAUD COLLINS OF THE INTANGIBLE RIGHT OF HONEST SERVICES VIOLATES RICO

Among the violations Collins alleged against the public official defendants is their participation in and by a "scheme to defraud of the intangible right of honest service." The Fifth Circuit, as recent as September 8, 1999, in *Brown v.*

Nationsbank Corporation, reveals the law pertaining to RICO and the "intangible rights":

> "The Racketeering and Corrupt Organizations Act ("RICO) imposes criminal and civil liability upon those who engage in "a pattern of racketeering activity" defined as "any act or threat involving" specified state-law crimes, acts indictable under various specified federal statutes, and other federal offenses. See 18 U.S.C. § 1961(1). Section 1964(c) allows a private party who has been sustained damages from a RICO violation, to recover those damages. See 18 U.S.C. § 1964(c). Appellants' complaint alleges that the Government and private defendants' racketeering activities included mail and wire fraud, which are included among the enumerated acts for a RICO claim. See 18 U.S.C. § 1961(1)." *Brown vs. Nationsbank, 5th Cir. Sept 8, 1999.*
>
> "In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court held that the mail fraud statute did not prohibit schemes that defrauded people of their intangible rights to an honest and impartial government. Following McNally, Congress enacted 18 U.S.C. § 1346,(2) which, in one sentence provided that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services". **In 1997, the Fifth Circuit, sitting en banc, held that, by enacting § 1346, Congress intended to protect the intangible right of honest services from wire fraud schemes by state actors. See** *States United v. Brumley, 116 F.3d 728, 733 (5th Cir. 1997)("fraud statutes cover the deprivation of intangible rights.")* However, prior to the en banc resolution of *Brumley*, we cannot say that such rights were clearly established by the enactment of § 1346." *Brown vs. Nationsbank, 5th Cir. Sept. 8, 1999.*
>
> "This means that if the official does all that is required under state law, alleging that the services were not otherwise done "honestly" does not charge a violation of the mail fraud statute. The statute contemplates that there must first be a breach of a state-owed duty." *United States v. Brumley, 116 F.3d 728, 733 (5th Cir. 1997)*
>
> "Stated another way, "honest services" contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interest of the employer - - or

that he consciously contemplated or intended such actions." *United States v. Brumley, 116 F.3d 728, 733 (5th Cir. 1997)*

"Finally, the statute proscribes an actual scheme or artifice to defraud. There is nothing in the informing principles of federalism or legislative history to suggest that the scheme or artifice to defraud elements are drawn from state law. Rather, they are familiar terms of federal criminal law generating and drawing their sustenance from federal common law. These wholly federal elements, read with the jurisdictional elements of mail usage and coupled with the draw upon state law for the definition of service, allow the statute to serve federal interests without supplanting rights of core state governance." *United States v. Brumley, 116 F.3d 728, 733 (5th Cir. 1997).*

Collins clearly alleged which statutes the defendants violated, and provided factual allegations upon which a jury could indeed find that the defendants knowingly and intentionally did not provide honest service. First Amended Complaint. (Docket Ref. 78)

A public official's participation in a "scheme to defraud Collins of the intangible right of honest service" violates RICO as a matter of law.

ISSUE 10 RESTATED

A PRIOR NON-RICO CAUSE CANNOT PROVIDE RES JUDICATA TO THESE RICO DEFENDANTS

In its *res judicata* analysis (page 10 of "Order") the District Court trial judge correctly quoted the law, but wrongly quoted the facts. The law the District Court trial judge quoted:

"A subsequent suit is barred by the doctrine of res judicata if: (1) the parties are identical in both suits; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior judgment was final on the merits;

and (4) the cases involve the same cause of action. Travelers ins. Co v. St Jude Hospital, 37 F 3d 193, 195 (5th Cir. 1994)" "Order", (Docket Ref. 95, Record Excerpt 3, page 10)

"The critical issue is not the relief requested or the theory asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts. The rule is that res judicata bars all claims there were or could have been advanced in support of the cause of action on the occasion of its former adjudication, ... not merely those that were adjudicated. Id (internal citations omitted). "Order", (Docket Ref. 95, Record Excerpt 3, page 10)

Collins fully accepts what the District Court trial judge quoted to be law. Collins accepts the District Court trial judge's findings that criteria 1 through 3 may be satisfied. However, the District Court trial judge went on to quote:

"A review of the pleadings in both cases establishes that both suits against Parrish are based on the same nucleus of operative facts. In both suits, Collins complains of Parrish's involvement in the alleged unlawful search and seizure of his residence on July 17, 1995. Finally, since both suits stem from the alleged misconduct of Parrish, the claims made against Parrish in this suit could have been brought in the earlier suit. Hence, Collins' claims against Parrish in the present suit are barred by res judicata." "Order", (Docket Ref. 95, Record Excerpt 3, page 10)

First, Collins' RICO Complaint is not about Parrish's *"misconduct"*, but about Parrish violating the law, namely RICO.

Second, Collins RICO Complaint does not complain about Parrish's *"involvement in the allegedly unlawful search and seizure of his residence on July 17, 1995"*, but of Parrish knowingly and illicitly participating in the affairs of the RICO "enterprise".

Third, Collins could not have brought a Civil RICO cause of action against Parrish right in the middle of a Civil Rights complaint. The operative facts are entirely different in RICO and Civil Rights:

> "In addition, we have recognized that claims that were not actually litigated are not barred unless they "could and should" have been brought in the earlier suit." *In the Matter of Super Van Inc. v. City of San Antonia,* 5th 95-50799, quoting *Matter of Howe,* 913 F. 2d 1138, 1143-44 (5th Cir. 1990)

The District Court trial judge correctly quoted *Travelers v. St. Jude*, but case law shows exactly why St. Jude was not protected by *res judicata* because of its secondary liability as a general partner, like the liability of each of the defendants, under RICO, as agents of each other. The Fifth Circuit Court even found that St. Jude's "presence in the prior" Partnership Litigation was immaterial in determining whether this action (the SJH Litigation) is barred.

In sum, the District Court Trial Judge got the facts wrong (the "nucleus of operative facts"). A prior non-Rico cause cannot provide res judicata to these Rico defendants.

ISSUE 11 RESTATED

THE DISTRICT COURT TRIAL JUDGE'S ORDER CLEARLY SHOWS HE SELECTED THE DEFENDANTS' VERSIONS OF THE FACTS, DREW INFERENCES MOST FAVORABLE TO THE DEFENDANTS THEREON, AND TOTALLY IGNORED EVERY ALLEGATION COLLINS MADE AND ALL EVIDENCE COLLINS BROUGHT OF "THE RICO VIOLATIONS"

Collins uses the "Order" itself (Docket Ref. 95, Record Excerpt 3) to show that there is no absence of a "genuine issue of material fact" in this Cause, which of course should have precluded summary judgment.

For clarity, no further case law will be cited in the corrections. All applicable case law has already been cited in the above issues.

Court Error 01: *"This is a civil rights suit ... ... for alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C § 1961." ("Order", page 1 line 1)*

Correction: This is a civil RICO suit, not a civil rights suit.

Court Error 02: *"This lawsuit apparently had its beginning in 1995 when Collins and defendant Scott were involved in a divorce. ." ("Order", page 2 line 6)*

Correction: This lawsuit did not "*apparently have its beginning in 1995 when Collins and defendant Scott were involved in a divorce. .*" Nowhere in Collins' complaint did Collins make any such statement. The "divorce", which defendant Scott swears she paid defendant Cluck $20,000 for, was only one part of the defendants' scheme which Collins foiled.

Court Error 03: *"Collins cites no facts from which it may be inferred that Judge Wallace joined a conspiracy, etc," ("Order" page 6 line 14)*

Correction: Collins does cite facts and brought lots of evidence. This is an inference that the judge is not even allowed to make.

Court Error 04: *"Collins cites no authority allowing claims against judges for these acts. ("Order page 7 line 1)*

Correction: Collins cites 18 U.S.C. § 1964(c), "Civil Rico", the cause of action under which he is bringing this claim.

Court Error 05: *"Collins' claims against Judge Gohmert stem from Gohmert granting the defendant's motion for summary judgment" ("Order" page 5 line 3)*

Correction: This is an inference that the judge is not even allowed to make. Collins' claims stem from Gohmert's participation with the other defendants.

Court Error 06: *"Dixon is absolutely immune from Collins claims that she failed to investigate and to initiate criminal prosecution. ("Order page 7 line 12)*

Correction: Dixon is of course immune upon such claim, but not for her participation with the other Rico defendants, as Collins claims. Collins alleges inaction to further the enterprise.

Court Error 07: *"Collins sues Truman Price ..... on the basis that ..... Price refused to ..... " ("Order" page 7 line 15). "Additionally, a government official is entitled to qualified immunity from damages claims unless his conduct violates a "clearly established federal statute ... " ("Order page 7 line 20)*

Correction: Collins sues Price for participating with the other defendants in a scheme violative of 18 U.S.C. § 1962.

Court Error 08: *"... ... the plaintiff must further show that the officials conduct was objectively unreasonable. ("Order page 8 line 1)*

Correction: Surely this District Court trial judge does not believes that after a jury looked at all of the acts of so many public officials/law enforcement officers and others in this case they would not ask themselves – Why would any public officials/law enforcement officer ignore such report of a break-in of a private home and theft of personal property unless those officials had been having some communications with each other. Defendant Price is just another public official doing what the "enterprise" needed him to do in order to accomplish its goal. Defendant Price did for the enterprise <u>what the enterprise needed at that time</u> - <u>inaction</u> by law enforcement officials. Had defendant Price or any of the public officials defendants investigated Collins' report of the break in of his home and theft of it's contents, done what they took an oath to do, this case would not be in this Appeals Court today.

It is scary to read that this District Court trial judge believes that participation in a pattern of racketeering is objectively reasonable. ("Order" page 8, line 6)

Court Error 09: *"On the record before the court, plaintiff has not presented <u>evidence</u> which establishes that Price's acts were objectively unreasonable or a violated of Collins' rights. ("Order" page 8 line 3)*

Correction: Collins pleading, brief, affidavit, & exhibits showed <u>evidence</u>.

Court Error 10: *"However, examination of the allegations against Davis in light of the above factors leads to the conclusion that Davis' acts were judicial acts. ("Order page 9 line 3). ... ... From the evidence and pleadings before the court, the court can not find that Davis' acts were objectively unreasonable. ("Order" page 9 line 9)*

Correction: The judge is not to examine the weight of the evidence or make conclusions. A jury can and is entitled to find whether or not Davis' acts were objectively unreasonable. Participating in a scheme to defraud Collins of honest service is not objectively reasonable.

Court Error 11: *"Apart from his own assertions, Collins presents no facts from which it may be inferred that Davis joined a conspiracy . . ." ("Order page 9 line 11)*

Correction: The judge is not allowed to infer that no inferences can be made upon Collins' summary judgment evidence.

Court Error 12: *Collins' claims against Parrish stem from an alleged illegal search and seizure Parrish took part in at Collins residence on July 17, 1995. ("Order" page 9 line 16)*

Correction: This is an erroneous inference that the judge is not even allowed to make. Collins evidence shows that Parrish, in concert with others, broke into Collins' home, not once, but twice!

Court Error 13: *The allegations made by Collins against Parrish in that suit are virtually identical to the allegations in the present suit. ("Order page 10 line 3)*

Correction: The operative facts in this RICO cause are entirely different, i.e. the "pattern of racketeering", etc.

Court Error 14: *A review of the pleadings in both cases establishes that both suits against Parrish are based on the same nucleus of operative facts. ("Order" page 10 line 19)*

Correction: Civil Rico has different operative facts

Court Error 15: *"... ... both suits stem from the same alleged misconduct of Parrish ... ..." ("Order" page 10 line 19)*

Correction: Civil Rico stems from illicit conduct, not misconduct

Court Error 16: *Parrish has established that after satisfying himself that Jenna Scott owned the property that was searched, he allowed Scott to go into the residence and remove items which she could show belonged to her. ("Order" page 11 line 10)*

Correction: Collins version of the facts are diametrically opposite, *i.e.* that Parish broke into his home, not once, but twice! Collins is the one who claims Parrish broke in and was illegally "searching" for and seizing the property.

Court Error 17: *"Moreover... ... Collins' claims against Conner are barred by res judicata because Collins is seeking to litigate in the present suit issues that were previously litigated in the state court suit, the alleged wrongdoing by Conner". ("Order" page 14 line 19)*

Correction: A prior non-RICO cause cannot provide res judicata to this RICO suit. See issue 10.

Court Error 18: *"Pending before the court are motions for summary judgment filed by ... . Also pending are motions to dismiss filed by ... ...". ("Order" page 3 line 1)*

Correction: Also pending is a one year old motion (4/26/99, Docket Ref. 21, and others) for a *Schultea* determination for entitlement to absolute immunity, a one year old motion for severe sanctions (5/3/99, Docket Ref. 32) for having brought this suit, the issue of denial of all discovery by "Order" (8/11/99,Docket Ref. 86, until further notice by the Court), and the absence of any hearing, of any type, prior to this "Order" finding all of this. See Docket Sheet with 95+ entries)

Court Error 19: *"The court need only rely [for summary judgment] on the portions of the submitted documents to which the non-moving party directs the court. ("Order" page 4 line 6)*

Correction: Plaintiff Collins submitted brief, affidavit with 95 exhibits, and himself. Be it remembered that there was no discovery, and of course no admissions on the part of Collins on file. There also was no hearing to make a showing by the defendants upon this. (See Issue 7)

Court Error 20: *"More troubling is that an attorney would sign on to a case that is based largely on mere assertion and conjecture) ("Order", footnote 4, page 9)*

Correction: Be it remembered that Collins' cause was brought pro se, and at the time of this "Order" had been before the court for eleven (11) months, without the court ever making a "finding" as to the defendants' entitlement to absolute immunity from Collins' suit! (See 95+ entries on Docket Sheet)

Court Error 21: *"Roxie Cluck is an attorney who represented Jenna Scott in the divorce proceeding in Van Zandt Count district Court. ("Order" page 15 line 3)*

Correction: The Court makes no findings about her, other than that she was an attorney for Jenna Scott. Collins brought evidence that she was the local kingpin in getting him tied up with a fraudulent "divorce" proceeding! Cluck represented Collins before she turned on Collins. (First Amended Complaint, etc. and evidence)

Court Error 21: *"Here, plaintiff suggests no "series" of racketeering acts with the level of continuity required for a RICO violation" ("Order" page 17 line 7). "Plaintiff has simply taken three separate lawsuits ... ...sought to weave those into a pattern of racketeering activity. ... ... Additionally, the summary judgment evidence does not establish ... ..."a series of related predicates extending over a substantial period of time". ... ... Nor does the evidence demonstrate the "threat of continued racketeering activity" by the defendants. ("Order", footnote 8 page 17)*

Collins does far more than "suggest" with his allegations and his evidence. Furthermore, there has been no showing (no discovery, admission, answers, hearing) that Collins' evidence does not show exactly what the trial judge says does not exist. (Issue 7). Of course the law does not allow the trial judge to make the finding above. And of course he cannot make a finding as to the "threat of continued racketeering activity" by the "pattern of racketeering activity" he was not allowed to infer to exist or not exist. That is why this cause is now before this Honorable Appeals Court with a 2300 page Record on Appeal, no admissions, no

answers to interrogatories, no depositions, no hearings, and no more than this "Order", other than the entire record, to go on.

Collins of course alleges that such "pattern of racketeering activity" has been going on upon him starting somewhere in 1991, and continuing to this day, and by its very nature extending into the indefinite future.

As for the Court even considering disputed issues, as referred to above, in its summary judgment decision, when Collins had clearly alleged violations of clearly established laws, i.e. RICO, the matter is summed up best in the words of this Fifth Circuit itself:

> "The lower court erred when it focused too closely on the fact that reasonable suspicion is a question of law. This is obviously true, but even though the district court will determine at trial as a matter of law whether reasonable suspicion existed, the district court cannot draw conclusions of law from disputed facts at the summary judgment phase. This principle was set forth in Johnston v. City of Houston, 14 F.3d at 1056, which squarely controls this case. There, we rejected the defendant's claim to summary judgment on the qualified immunity issue because **"[d]ivergent versions of what happened had been offered** by Appellants and Johnston." Id. At 1058. We held that, because "a genuine dispute as to the material and operative facts of this case exists, ... **[s]ummary judgment is inappropriate unless** plaintiff's version of the violations **does not implicate clearly established law**." Id. At 1061. See also Hart v. O'Brien, 127 F.3d 424, 432 (5th Cir. 1997) ("[W]e will not consider disputed facts in determining whether the officers had, or reasonably believed that they had, probable cause to search Hart's home or to arrest her.") Mangieri v. Clifton, 29 F.3d 1012, 1016 n.6 (5th Cir. 1994); Lampkin v. City of Nacogdoches, 7 F.3d 430, 435 (5th Cir. 1993) *Goodson v. City of Corpus Christi, No. 98-41084 (5th Cir. 1999?)*

In sum, Plaintiff's version of the divergent versions of what happened clearly implicated clearly established law, i.e. 18 U.S.C. § 1961 et seq., and specifically so under the Fifth Circuit's ruling upon "honest service" under *Brumley*.

The District Court trial judge's Order clearly shows he selected the defendants' versions of the facts, drew inferences most favorable to the defendants thereon, and totally ignored every allegation Collins made and all evidence Collins brought of "The Rico Violations."

CONCLUSION

Endless hours could be meaninglessly spent scrutinizing what the defendants and District Court did or did not do related to the merits of this case.

The number of co-conspirator defendants, the fact that all except two are lawyers or public officials, the continuing scheme against Collins, and the nine year activities stretching from the El Paso area to east Texas, have made this case very complex and convoluted.

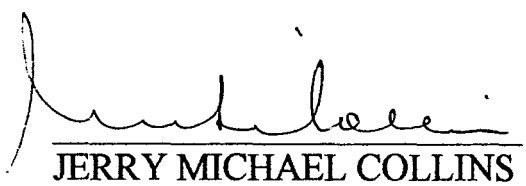
Couple all of that with the fact that all discovery Collins has sought in various suits, since 1995, has been denied by a court. Couple that with the fact that no lawyer in the underlying cases would represent Collins. This not only futher complicated everything, but it promoted and protected the very racketeering activities Collins is complaining about in his lawsuit.

Having been a juror in over a hundred trials and having provided demonstrative evidence for others, Collins knows discovery in this case would have produced enough evidence for any jury to find that the defendants clearly violated the law.

The District Court trial judge in this case erred when he followed suit of all other lower court judges and continued to deny Collins discovery.

Collins painfully understands the difficulties of obtaining any relief through the legal system, since it is rogue public officials within the legal system itself who were and continue to be out to "stop Collins" as Collins pleading shows.

Oral discussion of the facts and the applicable precedent would benefit the Court. Collins petitions the Fifth Circuit to hear his oral argument, and to remand the case to the Northern District of Texas, Dallas Division, to be processed according to the law, and to be heard upon the relief he is seeking. Plaintiff is entitled to a showing by opposing counsel upon the Appeal Issues.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument, and accompanying computer disc ("WORD") has been served upon all counsel of record via Certified Mail, Return Receipt Requested on this the 6th day of June, 2000.

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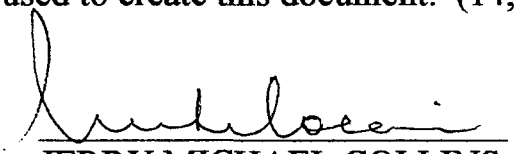
This certificate is made pursuant to Rule 32(a) (7) (C) (I) FRCP. The number of words in this entire document including headings, footnotes, and quotations, but excluding table of contents, table of citations, statement with respect to oral argument, certificate of counsel, and certificate of interested persons is _13,029__ words based on the word count of this document made with the text editor ("Microsoft Word 97 SR-1") used to create this document. (14,000 permissible)



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