§ 40.50 Previous prosecution; enterprise corruption.

1. The following definitions are applicable to this section:

(a) A criminal act or offense is "specifically included" when a count of an accusatory instrument charging a person with enterprise corruption alleges a pattern of criminal activity and the act or offense is alleged to be a criminal act within such pattern.

(b) A criminal act is "a part of" a pattern of criminal activity alleged in a count of enterprise corruption when it is committed prior to commencement of the criminal action in which enterprise corruption is charged and was committed in furtherance of the same common scheme or plan or with intent to participate in or further the affairs of the same criminal enterprise to which the crimes specifically included in the pattern are connected.

(c) A person "is prosecuted" for an offense when he is prosecuted for it within the meaning of section 40.30 of this article or when an indictment or a count of an indictment charging that offense is dismissed pursuant to section 210.20 of this chapter without authorization to submit the charge to the same or another grand jury, or the indictment or the count of the indictment charging that offense is dismissed following the granting of a motion to suppress pursuant to article 710 of this chapter, unless an appeal from the order granting the motion to dismiss or suppress is pending.

(d) An offense was "not prosecutable" in an accusatory instrument in which a person was charged with enterprise corruption when there was no geographical jurisdiction of that offense in the county where the accusatory instrument was filed, or when the offense was prosecutable in the county and was not barred from prosecution by section 40.20 or 40.40 of this article or by any other provision of law but the prosecutor filing the accusatory instrument was not empowered by law to prosecute the offense.

2. A person who has been previously prosecuted for an offense may not be subsequently prosecuted for enterprise corruption based upon a pattern of criminal activity in which that prior offense, or another offense based upon the same act or criminal transaction, is specifically included unless:

(a) he was convicted of that prior offense; and

(b) the subsequent pattern of criminal activity in which he participated includes at least one criminal act for which he was not previously prosecuted, which was a felony, and which occurred after that prior conviction.

3. A person who has been previously prosecuted for enterprise corruption may not be subsequently prosecuted for an offense specifically included in the pattern of criminal activity upon which it was based, or another offense based upon the same act or criminal transaction, unless the offense is a class A felony and was not prosecutable in the accusatory instrument in which the person was charged with enterprise corruption.

4. A person may not be separately prosecuted for enterprise corruption and for an offense specifically included in the pattern of criminal activity upon which it is based or another offense based upon the same act or transaction, unless the offense is a class A felony and is not prosecutable in the accusatory instrument in which the person is charged with enterprise corruption.

5. A person who has been previously prosecuted for enterprise corruption may not be subsequently prosecuted for an offense which, while not specifically included in the pattern of criminal activity on which the prior charge of enterprise corruption was based, was nonetheless a part of that pattern, unless the offense was a class A or B felony and either the offense was not prosecutable in the accusatory instrument in which the person was charged with enterprise corruption or the people show, by clear and convincing evidence, that the prosecutor did not possess evidence legally sufficient to support a conviction of that offense at the time of the earlier prosecution and evidence of that offense was not presented as part of the case in chief in the earlier prosecution.

6. A person who has been previously prosecuted for enterprise corruption may not be subsequently prosecuted for enterprise corruption based upon a pattern of criminal activity that specifically includes a

criminal act that was also specifically included in the pattern upon which the prior charge of enterprise corruption was based.

7. A person may not be separately prosecuted for enterprise corruption in two accusatory instruments based upon a pattern of criminal activity, alleged in either instrument, that specifically includes a criminal act that is also specifically included in the pattern upon which the other charge of enterprise corruption is based.

8. When a person is charged in an accusatory instrument with both one or more counts of enterprise corruption and with another offense or offenses specifically included in or otherwise a part of the pattern or patterns of criminal activity upon which the charge or charges of enterprise corruption is or are based, and the court orders that any of the counts be tried separately pursuant to subdivision one of section 200.40 of this chapter, this section shall not apply and subsequent prosecution of the remaining counts or offenses shall not be barred.

9. A person who has been previously prosecuted for racketeering pursuant to federal law, or any comparable offense pursuant to the law of another state may not be subsequently prosecuted for enterprise corruption based upon a pattern of criminal activity that specifically includes a criminal act that was also specifically included in the pattern of racketeering activity upon which the prior charge of racketeering was based provided, however, that this section shall not be construed to prohibit the subsequent prosecution of any other offense specifically included in or otherwise a part of a pattern of racketeering activity alleged in any such prior prosecution for racketeering or other comparable offense.