IN THE SUPREME COURT OF FLORIDA

JAMES FRANK PIZZO,
A/K/A JAMES PIZZO, JR.,

Petitioner,

v.

Case No. SC05-1951
Lower Tribunal No. 2D03-4913

STATE OF FLORIDA,

Respondent.
______________________________/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT
STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. KRAUSS
BUREAU CHIEF-
ASSISTANT ATTORNEY GENERAL
TAMPA CRIMINAL APPEALS
Florida Bar No. 0238538

ANNE SHEER WEINER
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0015199
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7900
Facsimile: (813) 281-5500

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT........ 11

ISSUE I 11

UPON REVERSAL ON DOUBLE JEOPARDY GROUNDS, THE APPELLATE COURT IS NOT REQUIRED TO DETERMINE WHICH OFFENSE IS THE "LESSER OFFENSE" TO BE VACATED AFTER REMAND TO THE TRIAL COURT. (as restated by Respondent).

ISSUE II 22

PETITIONER'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL WAS NOT VIOLATED, PURSUANT TO BOOKER AND BLAKELY. (as restated by Respondent).

ISSUE III 25

SECTION 90.404(2)(b)(1) DOES NOT VIOLATE THE EX POST FACTO CLAUSE. (As restated by Respondent).

CONCLUSION........ 29

CERTIFICATE OF SERVICE 30

CERTIFICATE OF FONT COMPLIANCE 30

TABLE OF AUTHORITIES

Cases

Archer v. State,
673 So. 2d 17 (Fla.), cert. denied, 519 U.S. 876, 136 L. Ed. 2d 134 (1996) 25

Armstrong v. State,
642 So. 2d 730 (Fla. 1994), cert. denied, 514 U.S. 1085, 131 L. Ed. 2d 726 (1995) 25

Brown v. State,
124 So. 2d 481 (Fla. 1960) 26

Burks v. United States,
437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) 23

Cleveland v. State,
417 So. 2d 653 (Fla. 1982) 17

Greene v. State,
714 So. 2d 554 (Fla. 2d DCA 1998) 12

Griffin v. State,
866 So. 2d 1 (Fla. 2003), cert. denied 543 U.S. 962, 160 L. Ed. 2d 328, 125 S. Ct. 413 (2004) 28

Harvey v. State,
617 So. 2d 1144 (Fla. 1st DCA 1993) 23

Morris v. Mathews,
475 U.S. 237, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986) 24

Reed v. State,
837 So. 2d 366 (Fla. 2002) 26

Savona v. Prudential Ins. Co. of America,
648 So. 2d 705 (Fla. 1995) 22, 25

Sochor v. State,
619 So. 2d 285 (Fla.), cert. denied, 510 U.S. 1025, 126 L. Ed. 2d 596 (1993) 25

State v. Bloom,
497 So. 2d 2 (Fla. 1986) 17

State v. Delva,
575 So. 2d 643 (Fla. 1991) 26

State v. Florida,
894 So. 2d 941 (Fla. 2005) 18

Wayte v. United States,
470 U.S. 598, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985) 18

Young v. State,
699 So. 2d 624 (Fla. 1997) 18

Other Authorities

Article V, section 17, Florida Constitution 17, 18

PRELIMINARY STATEMENT

The instant case is before this Court on conflict jurisdiction from the Second District Court of Appeal. This Court provisionally accepted conflict jurisdiction on the limited issue:

> WHETHER THE ELEMENTS OF THE RESPECTIVE OFFENSES, OF THE SEVERITY OF SENTENCE RESULTING FROM CONVICTION, CONTROLS THE DETERMINATION OF WHICH IS A LESSER OR GREATER OFFENSE WHEN CONVICTIONS FROM BOTH CHARGES WOULD CONSTITUTE DOUBLE JEOPARDY?

Petitioner's Initial Brief raises three Issues. Issue I of the Initial Brief encompasses the issue this Court determined as conflict, Issue II(A) raises for the first time a sufficiency of the evidence claim as to the predicate acts for the Petitioner's conviction for Racketeering, and Issue II(B) raises a jury instruction error for the first time on appeal. Hall v. State, 752 So. 2d 575, 578 n. 2 (Fla. 2000)("Once we have conflict jurisdiction, we have jurisdiction to decide all issues necessary to a full and final resolution.").

STATEMENT OF THE CASE AND FACTS

Mr. Pizzo started East Coast Exteriors, Inc., in 1997 in Vero Beach. East Coast Exteriors sold windows, soffits, fascia, and siding through telemarketing followed by direct sales to homeowners. The only officer and director of the new company was Mr. Pizzo's mother, Edwina, but her role was strictly nominal. Mr. Pizzo was the owner of the company and the ultimate decision-maker. Mr. Pizzo's wife, Rozlyn, worked as the office manager. Mr. Pizzo's father, James, supervised East Coast Exterior's work crews.

Eventually, Mr. Pizzo opened another East Coast Exteriors office in Manatee County, and customer complaints led to the charges in this case. The State charged Mr. Pizzo; his wife, Rozlyn; his father, James; and his mother, Edwina, with mortgage fraud, grand theft, organized fraud, conspiracy to commit racketeering, and racketeering. n1 The fraud charges were based on misrepresentations that the windows being sold were "Reynolds" windows when they were actually Caradon Better Bilt windows distributed by Reynolds Building Products; misrepresentations regarding East Coast Exteriors' history and capacity to do the work; and misrepresentations and omissions that resulted in liens and mortgages being recorded against customers' properties without their knowledge. The grand theft

charges, which were only filed against Mr. Pizzo, were based on the fact that customers were sold the lesser-quality Caradon Better Bilt windows at a price they were quoted for "Reynolds" windows.

The evidence at trial established that East Coast Exteriors' telemarketers used scripts dictated by Mr. Pizzo in which they asserted that they represented "Reynolds." The telemarketers continued to make this misrepresentation even after a Reynolds Building Products branch manager asked Mr. Pizzo to have his staff refrain from using the name "Reynolds" in any capacity in their telemarketing and followed up with a "cease and desist" letter.

The sales representatives were all trained by Mr. Pizzo. They advised customers that East Coast Exteriors was a "very large company," in business "from 12 to over 20 years," having done "thousands of projects" without complaints. Sales representatives told customers that they did not work on commission, though they did. They represented that the crew workers were salaried employees of East Coast Exteriors, trained by Reynolds, when in fact that was not true.

The sales representatives' primary tool was known colloquially as the "pitch book." The pitch book contained pictures of Reynolds products with the Reynolds Aluminum logo.

It also contained what an agent of the Reynolds Metal Company called a "doctored letter" stating that East Coast Exteriors was the "exclusive authorized dealer for Reynolds Aluminum Vinyl Tuf building products, as well as a Reynolds Better-Bilt window distributor for Southeast Florida." The pitch book also contained a "doctored letter" regarding an award that was never given to East Coast Exteriors.

The Reynolds Metal Company agent concluded that Mr. Pizzo knew he was buying Caradon Better Bilt windows from Reynolds Building Products. However, Mr. Pizzo trained East Coast Exteriors' telemarketers and sales representatives to represent the windows as "Reynolds Better Bilt," and the pitch book contained a "warranty" for Better Bilt windows that contained the Reynolds logo.

East Coast Exteriors' sales representatives also offered various financing options to their customers who could not pay cash. In-house financing was available as was a retail mortgage through American General Finance or a consolidation loan through a mortgage broker. Sales representatives routinely convinced customers to obtain financing by calling Mr. Pizzo to obtain a quote for a low interest rate which the customer never received. n2 If a customer signed a retail mortgage or consolidation loan agreement, the lender acquired the right to record "UCC-1s,"

which imposed a lien against the property to which the fixture attached until the loan was satisfied.

The sales representatives took various financing forms, including the UCC-1s and certificates of completion, to the customers' homes and obtained signatures at the time the contracts were signed. Mr. Pizzo trained the sales representatives not to discuss the UCC-1s, and customers were not told that they would be used to impose a lien on their homes. Some were told that the UCC-1 was for "state taxes." The sales representatives were able to obtain some customers' signatures on the UCC-1s without their knowledge because the sales representatives were trained by Mr. Pizzo to present the forms in a bundle. The sales representatives convinced the customers to sign certificates of completion before the work was started by misrepresenting that it would speed up their financing. The sales representatives were not trained to inform the customers of their legal right to rescind the contract within seventy-two hours, and although required by law, this legal right was not mentioned in the forms provided to the customers. In their efforts to obtain customers' signatures without their knowledge of the purpose of the forms, the sales representatives did not obtain proper witness and notary

signatures. Those signatures were provided after the forms were returned to the office.

American General required a copy of the sales contract, a loan application, and a certificate of completion signed by the customer prior to loan processing and the filing of a UCC-1. Mr. Pizzo's sales procedure allowed East Coast Exteriors to provide American General or the mortgage broker all of the paperwork required for the filing of a UCC-1. Thus, liens were imposed against customers' property before they became aware of their true interest rate and before the work was complete. Because the customers signed certificates of completion before the work was even started, many of them had liens imposed, even though they were not satisfied with the work.

The jury found James Frank Pizzo guilty of six counts of Mortgage Fraud in violation of Section 817.54, Florida Statutes (Counts 1, 2, 3, 5, 6); six counts of Grand Theft in violation of Section 812.014(2)(b)and(c), (Counts 8, 10, 12, 13, 14, 15); one count of Organized Fraud in violation of Section 817.034(4)(a)(1), (Count 16); one count of Conspiracy of Commit Racketeering in violation of Section 895.03(4)(Count 17); and Racketeering in violation of Section 895.03(3) (Count 18).

On direct appeal, the Second District Court of Appeal affirmed the conviction for Racketeering without opinion. The

appellate court reversed and remanded for a new trial both of the convictions for Mortgage Fraud and Conspiracy to commit Racketeering after finding the jury instructions for those offenses were fundamentally erroneous. Pizzo v. State, 916 So. 2d 828 (Fla. 2d DCA 2005). The appellate court also reversed the convictions for both Organized Fraud and Grand Theft based on a violation of double jeopardy and ordered the trial court to "grant a judgment of acquittal" on the lesser of the two charges.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal was unable to determine which is actually the "lesser" of the offenses. The Petitioner was found guilty of six counts of Grand Theft and one count of Organized Fraud. The Petitioner was sentenced to five years in prison for each of the offenses, without regard to the degree of the offenses, and the trial court ran all the sentences concurrent to each other. In light of the identical, concurrent sentences imposed by the trial court for all the offenses, the district court remanded the case to the trial court with the direction to vacate the "lesser" offense.

The district court's decision clearly looks to the severity of the sentence resulting in conviction when it noted in its opinion, "in this case there are six counts of grand theft, a third degree felony, and one count of organized fraud, a first degree felony. Therefore, we are unable to determine which is actually the "lesser" of the offenses." Under the calculation of severity of sentences that could be imposed, the district court found the Petitioner could have been sentenced to thirty (30) years for either of the offenses. However, this was based on a mistake of fact, when the Petitioner was actually convicted of five counts of third degree grand theft, one count of second degree grand theft, and one count of organized fraud, a first

degree felony. The Petitioner could have been sentenced to five years imprisonment for each of the third degree felonies, fifteen years for the second degree felony, and thirty years for the first degree felony. Under the 'severity of the sentence that could be imposed upon conviction method', the district court should have found the organized fraud conviction to be the "lesser offense", as the Petitioner could have been sentenced to thirty years and the Petitioner could have been sentenced to forty years upon conviction for the six counts of grand theft.

The district court in the instant case believed it was faced with a situation where the severity of the sentence that could be imposed method did not result in a "lesser offense". In a situation where an appellate court is unable determine which is the "lesser offense" based on its calculation of the severity of the sentence alone, the appellate court is not required to make a determination of the "lesser offense" to be vacated upon remand. The determination of which is the "lesser offense" should be left to the discretion of the state attorney who brought the charges.

The State was not required to obtain convictions for each of the predicate acts for the offense of Racketeering. The reversal of any or all of the convictions for the predicate acts

would not be a sufficient basis to find the evidence insufficient to sustain the conviction.

The failure to make a contemporaneous objection to the jury instruction waives the issue for appellate review. The jury instruction was not fundamental error where the instruction could not read in a manner suggesting the jury could find the Petitioner guilty solely on the determination that the Petitioner's wife's conduct met an element of the offense. The use of the word "defendants" did not diminish the State's burden of proof. Under the plain meaning, the plural actually increased the burden.

ARGUMENT

ISSUE I

UPON REVERSAL ON DOUBLE JEOPARDY GROUNDS, THE APPELLATE COURT IS NOT REQUIRED TO DETERMINE WHICH OFFENSE IS THE "LESSER OFFENSE" TO BE VACATED AFTER REMAND TO THE TRIAL COURT. (as restated by Respondent).

This Court accepted jurisdiction of this case as it appeared to presented conflict on this issue of whether the elements of offenses or the severity of the sentences resulting from the conviction controlled the determination of which is the lesser or greater offense when a double jeopardy violation occurs. The Second District Court of Appeal stated it was unable to determine which was actually the "lesser" of the offenses where the Petitioner was found guilty of six counts of Grand Theft and one count of Organized Fraud. The Petitioner was sentenced to five years in prison for each of the offenses without regard to the degree of the offenses and the trial court ran all the sentences concurrent to each other. In light of the identical, concurrent sentences imposed by the trial court for all the offenses, the district court stated it was unable to determine which was the "lesser offense" to be vacated upon remand.

The district court's decision clearly looked to the severity of the sentence that could have been imposed upon

conviction when it noted in its opinion, "in this case there are six counts of grand theft, a third degree felony, and one count of organized fraud, a first degree felony. Therefore, we are unable to determine which is actually the "lesser" of the offenses." Under the calculation of severity of sentences that could be imposed pursuant to statute, the district court found the Petitioner could have been sentenced to thirty (30) years for either of the offenses. The Second District Court of Appeal had previously held that the term "lesser" is usually determined by comparing the potential punishments for the offenses rather than their descriptive "degrees." Greene v. State, 714 So. 2d 554, 557 (Fla. 2d DCA 1998). The holding in the underlying cases in consistent with their prior ruling.

However, this was based on a mistake of fact on the part of the district court, as the Petitioner was actually convicted of five counts of third degree grand theft, one count of second degree grand theft, and one count of organized fraud, a first degree felony. If the district court looked to the possible statutorily permissible sentences to determine which is the "lesser sentence", the Organized Fraud charge would carry a possible sentence of thirty years, the second degree felony would carry a possible sentence of fifteen years, and each of the third degree felonies would carry a possible sentence of

five years each. The thirty year possible sentence for Organized Fraud would have the "greater" sentence standing alone, but the six counts of Grand Theft would carry a possible combined total sentence of forty years if the sentences were run concurrently. The district court could have determined the Organized Fraud conviction was the "lesser offense" to be vacated upon remand.

In the realm of double jeopardy based on multiple convictions, there is no sufficiency of the evidence question presented as to either offense; "greater" or "lesser". A jury returned guilty verdicts for all the offenses as charged. The appellate courts may possess the authority to determine the "lesser offense" based simply of either the length of the sentence imposed or the degree of the offense, but is an appellate court <u>required</u> to make this determination? May an appellate court remand the case to the trial court and direct that the conviction and sentence of the "lesser" offense must be vacated because of the violation of double jeopardy without determining which is the "lesser"? The Respondent would urge this Court to find the appellate court was not required to designate the "lesser offense" to be vacated upon remand.

The definition of the term "lesser offense" is not a static definition which can be readily or conclusively determined on

the face of every appellate record. A defendant convicted of an offense which is a second degree felony may a receive a sentence longer than for a first degree felony. A defendant may be convicted of a lesser degree offense and receive the same sentence that could be imposed for the higher degree offense. Sentencing enhancements play a significant role in the actual sentence a defendant may receive. If there is an applicable enhancement based on the victim, such as the victim's age or if the victim was a law enforcement officer, the appellate court need also look to the enhancement in determining which offense is the "lesser". The appellate court must also look to the nature of the offense and determine if there is a statutory enhancement for the use of a weapon. The potential sentence for enumerated offenses can increase based on the date the defendant was last released from prison. It could be argued that the imposition of restitution made a sentence more severe.

It is not inconceivable that an appellate court would be unable to determine the "lesser offense" on the record on review. The appellate court should remand the case for the determination on which charge should be vacated. The state attorney should be allowed to decide which offense should be vacated in situations where the appellate court can not determine the "lesser offense". The state attorney should

consider these factors when deciding what offenses to charge and upon remand be allowed the discretion to determine which offense should be vacated.

In the instant case, Petitioner was convicted of one count of organized fraud and six counts of grand theft based on the operation of a family owned home improvement business. On direct appeal to the Second District Court of Appeal, the appellate court reversed these convictions on double jeopardy grounds and remanded the case to the trial court directing a judgment of acquittal be granted as to the lesser of the two charges. Petitioner asserts the Second District Court of Appeal erred in not determining and designating the six counts of grand theft as the "lesser offense" to be vacated upon remand. Although the Petitioner cites to numerous cases in which the appellate courts did designate the "lesser offense" to be vacated upon remand, this does not support the Petitioner's contention that the Second District's decision not to make this designation is in conflict with the earlier decisions.

The State conceded the double jeopardy violation upon direct appeal, as the Information (Count 16) charged the Petitioner with Organized Fraud alleging the Petitioner "engaged in a systematic, on-going course of conduct with the intent to defraud" between August 1, 1998 and April 13, 2001. (R364-69).

The Information alleged each of the predicate acts and victims by date and name. (R364-69). The predicate acts and victims were the same as listed in the individual counts charging Mortgage Fraud and Grand Theft and all the acts fell within the time frame alleged for the Organized Fraud. The evidence presented at the Petitioner's trial supported the allegations contained in the Information and the jury found the Petitioner guilty on each of the six counts of Grand Theft and the on count of Organized Fraud. The acknowledgement of double jeopardy under these facts was proper.

Clearly, based on the fact the six counts of Grand Theft were lower degree offenses[1] than the one count of Organized Fraud, upon the finding of double jeopardy it might be assumed by a defendant that the lower degree offenses would be vacated upon remand and, therefore, expect the appellate court to direct the lower degree or "lesser" offenses vacated. However, the Petitioner's argument before this Court asserts this is mandated and simply relies on prior appellate decisions in which the appellate courts have designated the lower degree offense as authority for this proposition without any citation to statute or rule.

---

[1] The Respondent would also point out that five of the Grand Theft counts are third degree felonies, but one count (Count 10) is a second degree felony. (R101).

The standard of review for a pure question of law is de novo. State v. Florida, 894 So. 2d 941, 945 (Fla. 2005). The issue before this Court is whether, in the context of a double jeopardy violation, an appellate court is required to designate which offense should to be vacated upon remand.

In the instant case, the appellate court found the Petitioner's convictions and sentences for both Organized Fraud and Grand Theft violated double jeopardy principles where the Petitioner was being punished twice for the same criminal conduct. The appellate court ordered the case remanded to the trial court and the "lesser offense" be vacated. Upon remand to the trial court, the state attorney should have opportunity to present argument as to which should be vacated or given the opportunity to exercise its discretion to file a nolle prosequi on either offense pursuant to Article V, section 17, of the Florida Constitution. An appellate court should not interfere with the state attorney's decision whether and how to prosecute a case upon remand. Although there may be an assumption that the state attorney would seek the greater offense based on the original charging document, this should not preclude the state attorney from being given the opportunity to argue which of the offenses should be vacated or to file a nolle prosequi as to the either offense to cure the double jeopardy violation.

Article V, section 17, of the Florida Constitution specifically provides that state attorneys are the prosecuting officers of all trials in each circuit. This Court has long held that as the prosecuting officer, the state attorney has "complete discretion" in the decision to charge and prosecute a crime. See Cleveland v. State, 417 So. 2d 653, 654 (Fla. 1982). The judiciary cannot interfere with this "discretionary executive function." State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986). The state attorneys also possess complete discretion with regard to decisions on whether to seek enhanced punishments after conviction. See Young v. State, 699 So. 2d 624, 627 (Fla. 1997). A judicial limit to this discretion arises where constitutional constraints are implicated. Wayte v. United States, 470 U.S. 598, 608, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985).

In the instant case, the Petitioner was sentenced to five years prison on each of the counts of Grand Theft and sentenced to five years prison for the one count of Organized Fraud. These sentences all run concurrently. The Second District Court of Appeal had good reason for stating it was "unable to determine which is actually the "lesser" of the offenses. Where there was no difference in the punishments for the five third degree felonies, the one second degree felony, and the one

first degree felony, there really wasn't a "lesser" offense. Under these facts, the decision not to designate the "lesser offense" was not error.

The Petitioner's argument that each count of Grand Theft must be regarded as a separate indictment to be compared individually with the elements of the Organized Fraud and each count must be vacated individually if the elements are contained within the offense of Organized Fraud is without merit. The offense of Organized Fraud is an 'umbrella' offense which can not exist without proof of a "scheme to defraud" based on the conduct alleged in the multiple counts of Grand Theft. The State's evidence necessary to prove each count of Grand Theft was also evidence necessary to prove "a systematic, ongoing course of conduct with intent to defraud one or more persons, or with intent to obtain property from one or more persons by false or fraudulent pretenses, representations, or promises or willful misrepresentations of a future act."

The double jeopardy implications in the instant case derive from the fact that each of the individual acts done by the Petitioner to warrant prosecution for each six Grand Theft offenses were subsumed by the offense of Organized Fraud. Much like a snowball can not exist without individual snowflakes, Organized Fraud can not be established without evidence of

individual criminal offenses illustrating an ongoing course of conduct. This demonstrates why the Petitioner's idea of looking at each Grand Theft as a separate indictment would not result in reversal on double jeopardy grounds. If the State only presented evidence the Petitioner committed one Grand Theft then there was no Organized Fraud because one act is not an ongoing course of conduct. Under the Petitioner's theory, each conviction standing separately would remain separate convictions for Grand Theft and the Organized Fraud conviction would be vacated for insufficient evidence.

The Petitioner in the instant case was convicted of all the offenses charged after the State presented the multiple victims who were convinced to purchase home improvements based on false representations. The State's evidence showed the products installed on their homes were not the products promised and the Petitioner was able to obtain some customers' signatures on the UCC-1s without their knowledge resulting in liens against the victims' homes. The State sought restitution in the underlying case for both the victims of the Mortgage Fraud and the Grand Theft convictions. The restitution order was a nullity as it was entered after the Petitioner filed his notice of appeal. The Mortgage Fraud convictions were reversed on appeal based on jury instruction errors. If this Court were to find the Grand

Theft charges were the “lesser offenses” to be vacated upon remand, the State could not seek restitution for the victims of the Organized Fraud or the Mortgage Fraud. The Petitioner could use the “greater offense” of Organized Fraud as a shield against a more severe penalty the State could have sought after proving the Petitioner was guilty of the six counts of Grand Theft.

In light of the facts presented, the opinion of the Second District Court of Appeals in not in conflict prior decisions of this Court or other district courts. There is no requirement that an appellate court designate the “lesser offense” to be vacated upon remand on a violation of double jeopardy.

ISSUE II(A)

PETITIONER'S CONVICTION FOR RACKETEERING WAS PROPERLY UPHELD WHERE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE THE PREDICATE ACTS. (as restated by Respondent).

As an initial note, this issue was never raised by the Petitioner in the direct appeal and should be deemed procedurally barred. Additionally, this Court should not consider this issue where this Court did not accept jurisdiction on this issue and it is not dispositive of the case. This Court's authority to consider issues other than those upon which jurisdiction is based is discretionary and is exercised only when these other issues have been properly briefed and argued and are dispositive of the case. See Savona v. Prudential Ins. Co. of America, 648 So. 2d 705, 707 (Fla. 1995).

As an initial premise to this argument, the Petitioner would ask this Court to find that the Petitioner was acquitted of all of the offenses charged by the State and convictions for the predicate acts were necessary to sustain the Racketeering conviction. This premise is clearly false in light of the Petitioner's first issue. Additionally, even if the six convictions for Grand Theft were vacated upon remand, this does not nullify the evidence presented at trial. The Petitioner was found guilty of each charged Grand Theft and, even if the offenses are subsumed into the offense of Organized Fraud, the

evidence was sufficient to find the Petitioner guilty of Racketeering. The Petitioner was found guilty of six counts of Grand Theft. Additionally, the Petitioner's convictions for Mortgage Fraud were reversed for a procedural error, not on a challenge based on the sufficiency of the evidence. As there is no need for the State to obtain convictions to prove the alleged predicate acts, the jury's verdict of guilt inherently found the State presented sufficient evidence to prove Racketeering. See Harvey v. State, 617 So. 2d 1144 (Fla. 1st DCA 1993).

The State produced sufficient evidence to show the Petitioner and his family operated their home improvement business as a continuous unit with the purpose of selling replacement windows and home improvements that were not of the quality purported and obtain documents which allowed the Petitioner to file UCC liens against the victims' homes without their knowledge or consent.

"Reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. . . . Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect." Burks v. United States, 437 U.S. 1, 18, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978); See also, Morris v.

Mathews, 475 U.S. 237, 245, 106 S.Ct. 1032, 1037, 89 L.Ed.2d 187 (1986) (jury which found defendant guilty of greater offense of aggravated murder did not acquit of lesser charge but, a fortiori, found defendant guilty of the lesser offense of murder as well). The conviction for Organized Fraud presumes the sufficiency of the evidence to prove the commission of the requisite number of lesser offenses of Grand Theft or Mortgage Fraud to sustain the greater offense.

ISSUE II(B)

THE JURY INSTRUCTION FOR RACKETEERING WAS PROPER AND COMPLETE. (As restated by Respondent).

As an initial note, this issue was never raised by the Petitioner in the direct appeal and should be deemed procedurally barred. Additionally, this Court should not consider this issue where this Court did not accept jurisdiction on this issue and it is not dispositive of the case. This Court's authority to consider issues other than those upon which jurisdiction is based is discretionary and is exercised only when these other issues have been properly briefed and argued and are dispositive of the case. See Savona v. Prudential Ins. Co. of America, 648 So. 2d 705, 707 (Fla. 1995).

This Court has consistently held that jury instructions are subject to the contemporaneous objection rule. See Archer v. State, 673 So. 2d 17 (Fla.), cert. denied, 519 U.S. 876, 136 L. Ed. 2d 134 (1996); Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied, 514 U.S. 1085, 131 L. Ed. 2d 726 (1995). Absent an objection at trial, the complained-of instruction may be raised on appeal only if fundamental error has occurred. See Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 510 U.S. 1025, 126 L. Ed. 2d 596 (1993). It is undisputed that the Petitioner did not make a contemporaneous objection to the jury

instruction for the offense of Racketeering. Although the Petitioner concedes this error is unpreserved, the Petitioner would ask this Court to find fundamental error based on the use of term “and/or” between the Petitioner’s name and his wife’s name in the introduction to the instruction. The instruction did not use the term “and/or” in the body of the instruction which outlined the predicate offenses the State had to prove. The jury instruction can not be read in a manner suggesting the jury could find the Petitioner guilty solely on the determination that the Petitioner’s wife’s conduct met an element of the offense. This issue has not been properly preserved for appellate review.

Fundamental error is error which "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." <u>State v. Delva</u>, 575 So. 2d 643, 644-45 (Fla. 1991)(quoting <u>Brown v. State</u>, 124 So. 2d 481, 484 (Fla. 1960)). "Thus, for error to meet this standard, it must follow that the error prejudiced the defendant. Therefore, all fundamental error is harmful error." <u>Reed v. State</u>, 837 So. 2d 366, 370 (Fla. 2002). Fundamental error occurs when "the omission is pertinent or material to what the jury must consider in order to convict." <u>Id</u>. at 370. (internal citations omitted). The jury instruction

given was not fundamental error and not properly preserved for review.

The jury instructions given for the offense of Racketeering was proper and complete. The use of the term "and/or" in the first paragraph was an introduction to the instruction. This portion of the jury instruction was setting forth the elements of the offense of Racketeering, not the predicate acts the State needed to prove. Under the jury instructions as read, neither the Petitioner nor his wife could have been convicted solely on the actions of the other. In fact, the use of the plural "defendants" in the predicate offenses of Mortgage Fraud increased the State's burden of proof.

The Petitioner did not contest the fact he ran a home improvement business with his family. The evidence that he was the manager of the business, put together the pitch book, trained the telemarketers, and trained the sales people. The Petitioner spoke with the salespeople in helping them close the deals with the victims. The undisputed evidence showed that his wife, Rozlyn Pizzo, also worked at the business in the office, she took care of the financing paperwork, and mailed out the warranties after the replacement windows were installed.

The instructions presented as error were sufficient for the jury to find the Petitioner guilty of Racketeering as the use of

the plural "defendants" only served to increase the State's burden of proof for the predicate acts of Mortgage Fraud. The jury had to find both the Petitioner and his wife acted with the intent to defraud each of the victims. As to the predicate acts of Grand Theft, the instructions do not have any plurals and the Petitioner was the only defendant charged with Grand Theft. However, the Petitioner fails to consider that the jury which found him guilty also found him guilty of the same six counts of Grand Theft separately. As the Petitioner, is not challenging the jury instructions as given for the separate offenses of Grand Theft as improper and the evidence showed the jury found him guilty of all counts under those jury instructions, the Petitioner's conviction should be affirmed.

"Where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail." Griffin v. State, 866 So. 2d 1, 14 (Fla. 2003), cert. denied 543 U.S. 962, 160 L. Ed. 2d 328, 125 S. Ct. 413 (2004).

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court affirm the opinion of the Second District Court of Appeal.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

____

ROBERT J. KRAUSS
CHIEF, ASSISTANT ATTORNEY GENERAL
BUREAU CHIEF, TAMPA CRIMINAL APPEALS
Florida Bar No. 0238538

____

ANNE SHEER WEINER
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0015199
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7900
Facsimile: (813) 281-5500

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Regular Mail to Bruce Rogow, Esquire, Broward Financial Centre, Suite 1930, 500 East Broward Boulevard, Fort Lauderdale, Florida 33394, and Beverly A. Pohl, Esquire, P.O. Box 14010, Fort Lauderdale, Florida 33302, this 11th day of May, 2006.

____
COUNSEL FOR RESPONDENT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

____
COUNSEL FOR RESPONDENT