IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC05-1951

JAMES FRANK PIZZO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On discretionary conflict review of a decision
of the Second District Court of Appeal

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE

This case is here on express and direct conflict review of a decision of the Second District Court of Appeal. *See* **Appendix A** (*Pizzo v. State*, 916 So. 2d 828 (Fla. 2d DCA 2005). The Court has provisionally accepted jurisdiction and indicated that oral argument will be set by separate order. *See* March 8, 2006 Order.

Petitioner James Frank Pizzo ("Jimmy") was tried by jury and convicted in the Twelfth Judicial Circuit in and for Sarasota County. The trial was before the Honorable Peter A. Dubensky, upon an 18-count First Amended Information filed by the Office of the Statewide Prosecutor, alleging numerous fraudulent practices of Pizzo's family-owned home improvement business, East Coast Exteriors, Inc.. R3-358-377.

East Coast Exteriors sold windows, soffits, fascia, and siding, through telemarketing followed by direct sales to homeowners. The fraud charges were based on misrepresentations that the windows being sold were "Reynolds" windows (they were Caradon "Better Built" windows, distributed by Reynolds Building Products); misrepresentations made regarding the company's history and capacity to do the work; and misrepresentations made about, and failures to disclose, finance charges and

UCC-1 forms and mortgages that were recorded against the homeowners' properties. *See* **Appendix A**, pp. 2-3.

The State also prosecuted and convicted Rozlyn Pizzo (Jimmy's wife), James Pizzo, Jr. (Jimmy's father), and Edwina Pizzo (Jimmy's mother), for their role in the operation of the family business.[1] Their cases are not part of this appeal.[2]

None of the defendants testified at trial. Jimmy Pizzo, "the owner of the company and the ultimate decision-maker" (*id.*), was found guilty of five counts of mortgage fraud in violation of § 817.54, Florida Statutes (Counts 1, 2, 3, 5, 6); six counts of grand theft in violation of § 812.014(2)(b) and(c) (Counts 8, 10, 12, 13, 14, 15); one count of organized fraud in violation of § 817.034(4)(a)(1) (Count 16); one count of conspiracy to commit racketeering in violation of § 895.03(4) (Count 17); and racketeering in

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[1] Because of the similarity of names, throughout the trial James Frank Pizzo was referred to as "Jimmy" or "Jr.," while the elder Pizzo, who actually was a "Jr.," was referred to as "Sr." Where necessary for clarity, Senior and Junior will be used here to distinguish between father (Sr.) and son (Jr.).

[2] *See Rozlyn Pizzo v. State*, 910 So. 2d 287 (Fla. 2d DCA 2005) (affirming conviction for organized fraud, reversing convictions for mortgage fraud, racketeering, and conspiracy to commit racketeering); *James Pizzo, Jr. v.* State, 910 So. 2d 286 (Fla. 2d DCA 2005) (affirming conviction for organized fraud, reversing conviction for conspiracy to commit racketeering). Edwina Pizzo was found guilty of organized fraud, but her conviction was set aside by the trial court. R12-2182.

violation of § 895.03(3) (Count 18). *See* R1-101-102. He was sentenced under the pre-October 1998 sentencing guidelines to an upward departure sentence of fifteen years imprisonment (R1-103-107), and is incarcerated at Columbia Correctional Institution.

Pizzo appealed the jury verdict and Amended Judgment of Conviction and Sentence to the Second District Court of Appeal. That court reversed all of his convictions except the racketeering conviction. The mortgage fraud convictions were reversed and remanded for a new trial due to the erroneous oral delivery of the jury instructions. (**Appendix A**, pp. 7-10). The conspiracy to commit racketeering conviction was reversed because the jury instruction itself was flawed. *Id.* at 10-11. The convictions for organized fraud and grand theft were reversed on double jeopardy grounds (the State conceded error), leading to the primary issue in this case on which the Court has ordered merit briefing.

The Second District questioned whether the *number* of grand theft counts (six), when compared to the single organized fraud count, was relevant to which of the reversed convictions had to be vacated on double jeopardy grounds:

> Ordinarily, we would reverse the lesser of the offenses and affirm the greater. *See Cherry*, 592 So. 2d at 295; *Donovan*, 572 So. 2d at 526. However, 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. Accordingly, we reverse Mr. Pizzo's grand theft and organized fraud convictions and remand for the trial court to grant a judgment of acquittal on the lesser of the offenses.

Appendix A, p. 12.

Pizzo sought rehearing in the District Court, which was denied, then sought discretionary review in this Court, arguing that precedent requires that each of the six grand theft convictions be vacated, and that the decision in this case conflicts with decisions from other districts. In addition, Pizzo also sought review of the affirmance of the racketeering conviction, contending that it must be set aside since all the predicate act convictions (for mortgage fraud and grand theft) have been reversed. This Court's March 8, 2006 Order permitted merits briefing on both issues.

STATEMENT OF THE FACTS

In 1997, in Vero Beach, James Frank Pizzo started a home improvement business, East Coast Exteriors, Inc. R4-600; R13-140. He had previous experience in the industry. R16-495-496, 567. The only officer and director of the new company was Jimmy's mother, Edwina Pizzo (R4-615-17, 619), but her role was strictly nominal. Jimmy was "owner of the company" (R20-1282), in charge of the business, and the ultimate decision maker: "Jimmy Pizzo was running the operations, making the decisions, final decisions, if you will." R17-847; *see also* R16-554, 578-79, 634; R17-755.

East Coast Exteriors later opened another office in Manatee County (R13-99), and customer complaints about the work and the attendant financing arrangements and liens on homeowners' property in the Sarasota area led to the charges in this case.

In January 1998, Jimmy Pizzo entered into an arrangement with Jerry Linkous, a West Palm Beach general contractor (R16-491), whereby Linkous would receive $400 per month and East Coast Exteriors could use his license to obtain permits. R5-797-802; R16-499-501, 554, 558. As the "qualifier" for the company, Linkous was to review the construction work, which he understood to be exterior work, primarily screen enclosures, fascia,

aluminum siding, and general home improvement. R16-493-95. They did not discuss replacement windows, which Linkous was wary of from a liability standpoint, because it involved going inside customers' homes. *Id.* at 497 ("my understanding, was totally exterior"). Some months into their arrangement, Linkous learned that Florida law required a disclosure to customers regarding the right to make a claim through the Construction Industry Licensing Board Fund if the value of labor and materials exceeded $2500 and they are unhappy with a contractor's work. R16-508-512; R5-846. He provided Jimmy with the statutory language, which was to be added to the sales contracts as an "Attachment A," although Linkous never saw any East Coast contracts containing the statutory language R16-510-12. Consistently, customers and salespeople testified that this disclosure was not made. *See e.g.*, R16-612; R23-1838-39.

Although the written agreement with Linkous did not limit the geographic area in which East Coast Exteriors could utilize his State license to obtain permits, or the type of work that could be done, Linkous was "shocked" to learn that work was being done on the west coast. R16-507-08, 541-42. He had not checked any of that work, because he was unaware of those projects. *Id.* at 516-17.

Rozlyn did office work in the Vero Beach office (R21-1320, 1324), and was considered by office employees to be a supervisor, along with Jimmy. R19-1055. Jimmy's father, James "Sr.," was in charge of the work crews on both sides of the state. R21-1332, 1373-74. Mark Baugh, district manager and head salesman on the west coast, pled *nolo contendere* to reduced charges and testified for the State. R20-1277; R22-1557-1568.[3]

East Coast Exteriors generated business through telemarketing. The telemarketers used scripts dictated by Jimmy; no deviations were allowed. R19-1118, 1122-23; R7-1233 ("Hi m/m_____. This is _____ and I'm calling on behalf of Reynolds Products. The reason for my call is that Reynolds is introducing a new double-paned, thermo-insulated custom window. . . ."); R7-1235. Jimmy instructed the callers to say they represented Reynolds (R20-1157, 1165, 1174-75, 1184), which became a theme of the case, because the windows provided to East Coast Exteriors by Reynolds Building Products, and thus to East Coast's customers, were not Reynolds windows, but rather were Caradon Better Built Windows.[4]

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[3] Baugh cooperated in return for a recommendation from the State for a withhold of adjudication and sentence of probation. *Id.*, 1562-64.

[4] "Better-Bilt Aluminum" manufactures aluminum windows for distribution by other distributors, such as Reynolds Building Products, Home Depot, and Lowes. R15-363-64. Although the correct spelling is "Better Bilt" (R4-656), the transcript contains the usual spelling of "built,"

Reynolds had never manufactured an aluminum window such as those sold by East Coast Exteriors. R15-362-363.

Telemarketing calls were placed to names listed in a Hill and Donnelly directory for the Sarasota area, which is a resource routinely used in the telemarketing industry. The directory lists names by street, and indicates the degree of financial affluence by location. R19-1129. In addition, East Coast Exteriors' former telemarketing manager, Carolyn Stalvey, said that Jimmy provided "White Sheets," lists of names of elderly and widowed women, for the telemarketers to contact. *Id.* at 1124-1128; R7-1237-39.[5] Once "leads" were generated, *i.e.*, people who indicated an interest in the products, those names were forwarded to the salespeople.

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not the trade spelling. We use the usual spelling except where quoting from trade materials. The "Reynolds" company evolved as follows. First there was Reynolds Metals Company, with a construction products division that was sold to Amerimark, and which became Reynolds Building Products, a distributor of various manufacturers' products (R15-339-41) in late 1996 or early 1997. That company was later acquired by Owens Corning and merged with Mirandex, but retained the name Reynolds Building Products. By March 1997, a directive was issued to Reynolds Building Products to discontinue use of the Reynolds "St. George slaying the dragon" logo. R17-702-03. In July, a new Reynolds Building Products logo was required for all marketing. R5-841-44; R15-342. Those efforts were not 100% successful, and some Reynolds Building Products trucks continued to display the Reynolds logo during the time they were delivering product to East Coast Exteriors. R17-707, 736.

[5] There was no evidence presented that any of the named victims in this case were contacted *via* the White Sheets. One salesperson testified

Several salespeople assisted Mark Baugh on the west coast of Florida. Their sales techniques were similar, because they were all trained by Jimmy Pizzo. R17-755-56 (Blakney); R20-1294 (Baugh); R18-912 (Chagaruly); R20-1195 (Lewandoski); R16-578, 584, 634 (Miller). The salespeople were trained to present themselves as "managers." R20-1296; R17-761; R18-914. 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. R16-577, 581-82. Salesman William Miller (who did not sell to any of the customers named as victims in the Information), misrepresented to customers that he was "the nephew of the owner and that I was in the area because the salesman's vehicle had broken down and he was unable to make it. . . ." R16-583. Salespeople told customers they did not work on commission, though they did. R16-586, R17-761; R18-947; R20-1283-84, 1294. They represented that the crew workers were salaried employees of East Coast Exteriors, trained by Reynolds, when in fact that was not true. R18-916-917; R20-1283, 1287.

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that "deep in my heart" she believed that all her customers needed the products they purchased (R20-1263), and that her customers were significantly younger, and were "sharp," "coherent," and had "no mental deficiencies." *Id*. at 1259, 1264, 1266.

The sales staff's primary tool was known colloquially as the "pitch book." R4-630-687 (State's Exhibit 8); R16-573-78 (it was used "on literally every sales call;" they received "daily classes" in using the pitch book). "[T]he book was basically a sales tool to – that was to allow the people in the home to become at ease with the product and the company and certainly the name recognition of Reynolds Aluminum Corporation." R16-574-75. The book was replete with pictures of Reynolds products, with the familiar Reynolds Aluminum logo, contained pictures of windows and exterior work, and contained an October 4, 1997 letter from Chris Fuertsch, of the Reynolds Metal Company Orlando Service Center, stating that East Coast Exteriors, Inc. was the "exclusive authorized dealer for Reynolds Aluminum Vinyl Tuf building products, as well as a Reynolds Better-Bilt window distributor for Southeast Florida." R4-634; R5-876.[6]

Fuertsch testified that the letter in the pitch book was a "doctored letter from one that I wrote to a company called Better Homes Exteriors back in the mid '80s," that he did not create, and it was "not my signature." R17-654-656. In fact, Reynolds never made Better Built windows – they were made by Caradon and distributed by Reynolds Building Products (R15-

[6] The document at R4-634 is dated "October 4, 1997," while the document at R5-876 is dated "October 4, 1987." They are otherwise identical.

343-44) – and East Coast was not an "exclusive" agent for Reynolds products. *Id.* at 652-55, 658.

Fuertsch concluded that Jimmy Pizzo knew what he was buying from Reynolds Building Products (R17-687-695) and that the entire pitch book "appeared to be a presentation book that was used by a company that Mr. Pizzo had worked for prior to East Coast Exteriors. Better Homes Exteriors was that company. The information in that book goes back to that era, which was early to mid '80s." R17-657.

Fuertsch concluded that other documents in the pitch book were doctored as well. An "April 5 1997" Vinyl Siding Institute press release announcing that East Coast Exteriors, Inc. had been "named a winner in the 1997 Awards of Distinction competition," for "outstanding workmanship in the application of vinyl siding products" (R4-637; R5-894), was dated prior to the April 24, 1997 incorporation of East Coast Exteriors, Inc. R4-600; R17-681. Fuertsch did not know if an October 12, 1997 Vinyl Siding Institute letter to James Pizzo (R4-635; R5-896) was authentic, but inferred it was not, stating that "[we] had a customer in south Florida, Better Homes Exteriors, who won a VSI award a couple years prior to this." R17-683.

The pitch book also contained a purported warranty for Better-Bilt windows, containing the Reynolds logo. R4-572, 672; R13-108. However,

an original warranty, obtained from the distributor, did not contain that logo, but instead bore the official logo for Caradon Better Bilt Windows. R4-574; R13-109. FDLE Special Agent Charles Leonard testified that the warranty in the pitch book was a "forgery." R13-109.

A Reynolds Building Products branch manager, Jack Grissom, once overheard an East Coast Exteriors telemarketer say he was with "Reynolds Metal Company." R15-347-48. Grissom asked Jimmy 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 on April 14, 1999:

> During my visit with your company on March 10th, I observed your telephone sales personnel representing themselves as being "with Reynolds Building Products". It has been brought to my attention that your field sales personnel are in possession of business cards implying they are employees of Reynolds Building Products. I have also been advised that the BetterBuilt aluminum windows we supply you are being portrayed as a "Reynolds manufactured window."
>
> While we recognize the value of associating the "Reynolds" brand name as part of your sales efforts, there is a limit as to how far you can go.
>
> ***All personnel of your company must be made aware that they cannot represent themselves as employees of Reynolds Building Products, either verbally or in writing. They should also be made aware that they cannot represent any product not***

produced by the Norandex/ Reynolds Distribution Co. as a "Reynolds manufactured" product.

* * *

R5-814; R15-349-50 (emphasis in original). Grissom, like Fuertsch, reviewed the various documents in the pitch book, and concluded it contained "old, out-of-date" Reynolds Metal Company literature (R15-353) and that the improper use of the Reynolds logo and the depiction of obsolete products, was not "an appropriate sales tool for Reynolds Building Products supplies." *Id.*, 355-362. "No way, shape, or form was any customer allowed to represent themselves as being a part of Reynolds whatever." *Id.* 386.

The East Coast Exteriors salespeople also offered various financing options to their customers who could not pay cash. In-house financing was available, a retail mortgage, often through American General Finance (R17-838-39), or a larger consolidation loan, offered through Peter Green, a mortgage broker. R22-1541-43. The latter two methods gave the lender the right to record "UCC-1's," which imposed a lien against the property until the loans were satisfied. American General required a copy of the sales contract, a loan application, a Certificate of Completion signed by the customer, and then the loan would be processed and the UCC-1 would be filed. R17-839-40.

The salesmen took various financing forms, including the UCC-1's and Certificate of Completion to the customers' homes, and obtained signatures at the time the contracts were signed. R21-1321. Jimmy Pizzo trained the salespeople in how to fill out the financing paperwork (R21-1324), instructed the salespeople not to discuss the UCC-1's, and customers were not told that they would be used to impose a lien on their homes. R21-1358-59.[7] Some were told that the UCC-1 was for "state taxes." *Id.* at 1360, 1386.

Neither Rozlyn Pizzo nor James Pizzo "Sr." sold product to East Coast Exteriors customers named in the First Amended Information. Appellant James Frank Pizzo routinely participated in the sales process by telephone, when the salespeople would call him for the "phone close" of the transaction. R16-584-85. There was no evidence, however, that he did so for any of the customers involved the mortgage fraud convictions, Counts 1, 2, 3, 5, and 6.

[7] The financing contract, however, advised the customers in several places that a security interest would be placed on the home. R14-286-289

SUMMARY OF ARGUMENT

1. As the State conceded and the District Court properly found, the Double Jeopardy Clause forbids convictions for both grand theft and organized scheme to defraud where the underlying conduct is the same, because all the elements of grand theft are found in the elements of organized scheme to defraud. *See* § 775.021(4)(a), Fla. Stat. (codifying the *Blockburger* "same elements" test). The District Court's unwillingness to then vacate the grand theft convictions, because there were multiple counts of grand theft, was a misapplication of double jeopardy principles, and conflicts with clear precedent from other districts and from the Second District itself. *See Stav v. State*, 860 So. 2d 478 (Fla. 4th DCA 2003); *Donovan v. State*, 572 So. 2d 522 (Fla. 5th DCA 1990); *Cherry v. State*, 592 So. 2d 292 (Fla. 2d DCA 1991). The decision below lacks analysis and legal support and should be disapproved.

Every court that has considered the question, including this Court, has concluded that where double jeopardy precludes dual convictions, the proper remedy is to vacate the convictions for the lesser offense. *See generally State v. Barton*, 523 So. 2d 152, 153 n. 3 (Fla. 1988) ("In cases involving convictions of both the greater and lesser included offenses, it is the lesser rather than the greater sentence which is vacated"). Thus, the lesser grand

theft convictions (second and third-degree felonies) must be vacated on remand without regard to how many counts of grand theft exist, and only the organized scheme to defraud conviction (a first-degree felony) should remain. *See Williamson v. State*, 852 So. 2d 880 (Fla. 2d DCA 2003) (vacating 57 counts of grand theft, which formed the basis of the charges for organized scheme to defraud, while upholding the scheme to defraud conviction).

That result is dictated by an analysis of the elements of each of the two offenses, and by the fact that all the elements of ***each*** of the grand thefts are subsumed by the elements of the organized fraud. The double jeopardy analysis has to be performed for ***each*** grand theft conviction because "[e]ach count in an indictment is regarded as if it was a separate indictment." *Dunn v. United States*, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356 (1932); *Bell v. State*, 437 So. 2d 1057, 1060 (Fla. 1983) (*citing Dunn*). Thus, the trial court should be instructed on remand to vacate the six grand theft convictions.

2. James Frank Pizzo's racketeering conviction, in violation of Section 895.03(3), Fla. Stat., must be reversed, because all the predicate act convictions have been reversed. Proof of "two incidents of racketeering conduct" within five years of each other (*i.e.*, a pattern of racketeering activity) (§ 895.02(4)) is a requirement for a RICO conviction under Florida

law. *See Lugo v. State*, 845 So. 2d 74, 94 n. 38 (Fla. 2003); *Watts v. State*, 558 So. 2d 142, 144 (Fla. 3d DCA 1990) (reversing RICO conviction, because "the 'two incidents' requirement under the Florida RICO statute was not satisfied . . . .").

Here, the mortgage fraud convictions, which were alleged to be incidents of racketeering conduct supporting the racketeering charge, have been reversed for a new trial. The grand theft convictions, the other charged incidents of racketeering conduct, have been reversed, and as argued, *supra*, must be vacated on double jeopardy grounds. Thus, there are ***no*** extant convictions for incidents of racketeering conduct, and therefore the RICO conviction must also be reversed. It is elementary that a substantive racketeering conviction cannot stand, absent the predicate acts foundation of two incidents of racketeering conduct. The Second District's decision violates that principle.

In addition, unpreserved but fundamental error occurred in the jury instructions on the racketeering count (Count 18). The use of the conjunctive "and/or," improperly combining instructions on two defendants, constitutes fundamental error, requiring reversal. *See* **Appendix A**, p. 10–11 (reversing conspiracy convictions because of the use of "and/or" in jury instructions) (citing cases).

ARGUMENT

I.

THE REMEDY FOR THE DOUBLE JEOPARDY VIOLATION IS TO VACATE THE GRAND THEFT CONVICTIONS

The application of double jeopardy principles is a question of law entitled to *de novo* review. *See State v. Florida*, 894 So. 2d 941, 944–945 (Fla. 2005); *Saddler v. State*, 921 So. 2d 777 (Fla. 1st DCA 2006).

Pizzo argued, the State conceded, and the District Court agreed that "[c]onvictions for both organized fraud and grand theft that are based on common allegations violate the constitutional prohibition against double jeopardy." **Appendix A**, p. 11. That is so because, under the *Blockburger* test, as codified in Section 775.021(4)(a), Florida Statutes ("[f]or the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial"), organized fraud and grand theft are the same offense.[8] As can be seen from the statutory language that follows, they do not ***each*** have an element that the ***other*** lacks.

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[8] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932), stated the test that is still used today:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct

Organized scheme to defraud, in violation of Section 817.034(4)(a)1, Florida Statutes, charged in Count 16 of the First Amended Information (R3-364), is a first degree felony, defined as follows:

> (4) OFFENSES. --
>
> (a) Any person who engages in a scheme to defraud and obtains property thereby is guilty of organized fraud, punishable as follows:
>
> 1. If the amount of property obtained has an aggregate value of $50,000 or more, the violator is guilty of a felony of the first degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Defining the terms used aids in determining the elements of the offense. "Scheme to defraud" is defined in Section 817.034(3)(d) as "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." "Obtain" is defined in Section 817.034(3)(b) as to "temporarily or permanently deprive any person of the right to property or a benefit therefrom, or to appropriate the property to

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> statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Id. at 304, 52 S. Ct. at 182.

one's own use or to the use of any other person not entitled thereto." And "property" is defined broadly in Section 817.034(3)(c) as "anything of value . . . ." Thus, the elements of organized fraud are

> (1) Engaging in or furthering a systematic, ongoing course of conduct (2) with (a) intent to defraud, or (b) intent to obtain property by false or fraudulent pretenses, representations, or promises, or willful misrepresentations of a future act, (3) resulting in temporary or permanently depriving any person of the right to property or a benefit therefrom, or appropriating the property to one's own use or to the use of another person not entitled thereto.

Donovan v. State, 572 So. 2d 522, 526 (Fla. 5th DCA 1990).

In comparison, grand theft, in violation of Section 812.014, as charged in Counts 8, 10, 12, 13, 14, and 15 (R3-361-363), is defined first as theft, as follows:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Subsection (2) defines various degrees of grand theft, depending upon the value of the property. *Donovan* also culled the elements of that offense from the statutory language:

> (1) knowingly (2) obtaining or using, or endeavoring to obtain or use, property of another (3) with intent to deprive the person of a right to the property or a benefit therefrom, or to appropriate the property to one's own use or to the use of any person not entitled thereto.

572 So. 2d at 526.

As can be seen from the above, "[t]he elements of theft are all included in the elements of organized fraud even though identical terminology is not used in the two statutes. One cannot be convicted of both organized fraud and theft for the same act without a double jeopardy violation." *Id.; accord Cherry v. State*, 592 So. 2d 292 (Fla. 2d DCA 1991). The District Court here agreed. *See* **Appendix A**, p. 11 ("Convictions for both organized fraud and grand theft that are based on common allegations violate the constitutional prohibition against double jeopardy").

However, the District Court departed from well-established precedent when it failed to mandate that the grand theft convictions be vacated. *Compare*, *Donovan*, 572 So. 2d at 526 ("In keeping with the usual practice, we reverse the lesser offenses and affirm the greater offense (organized fraud). *See e.g.*, *State v. Barton*, 523 So. 2d 152 (Fla. 1988); *Bell v. State*,

437 So. 2d 1057 (Fla. 1983) . . . .") (additional citations omitted); *Cherry v. State*, 592 So. 2d at 295 ("We vacate the lesser offenses of grand theft . . . ."); *Stav v. State*, 860 So. 2d 478 (Fla. 4th DCA 2003) ("the two crimes share common elements . . . . As a result, the grand theft conviction and sentence is reversed and remanded for discharge").

Only one case, *Saddler v. State*, 921 So. 2d 777 (Fla. 1st DCA 2006), has ever vacated the organized scheme to defraud conviction and left the grand theft convictions standing. Saddler was convicted of three counts of grand theft, and one count of organized scheme to defraud, based on the same conduct as the three grand thefts. Finding that double jeopardy barred conviction on both the grand thefts and the organized scheme to defraud, the court reversed the organized scheme to defraud count and directed that a judgment of acquittal be entered. *Id.* at 778. The difference, however, was that, unlike this case, ***all the convictions in Saddler were third-degree felonies***.

Instead of following settled law requiring that the grand theft convictions be vacated, the District Court in this case struggled with the fact that there were multiple counts of grand theft:

> Ordinarily, we would reversed the lesser of the offenses and affirm the greater. . . However, 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***. Accordingly, we reverse Mr. Pizzo's grand theft and organized fraud convictions and remand for the trial court to a [sic] grant judgment of acquittal on the lesser of the offenses.

Appendix A, p. 12 (citations omitted) (emphasis supplied). That was error; the number of grand theft convictions was irrelevant. Plainly, the first-degree felony (organized scheme to defraud) was a greater offense than each of the second and third-degree felonies (the grand thefts), and the lesser counts were required to be vacated. *See Williamson v. State*, 852 So. 2d 880 (Fla. 2d DCA 2003) (vacating ***57 counts*** of grand theft, which formed the basis of the charges for organized scheme to defraud, while upholding the scheme to defraud conviction).

This result is logical if one remembers the long-standing rule that "***[e]ach count in an indictment is regarded as if it was a separate indictment***." *Dunn v. United States*, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356 (1932) (Holmes, J.) (*citing Latham v. The Queen*, 5 Best & Smith, 635, 642, 643; *Selvester v. United States*, 170 U.S. 262, 18 S. Ct. 580, 42 L. Ed. 1029 (1898)) (emphasis supplied). Therefore, the double jeopardy consequences of each grand theft conviction must be considered separately.

The Court must look at the first grand theft conviction (Count 8), see if its elements are contained within the greater offense, organized scheme to

defraud (Count 16), and because the answer is yes, the lesser offense, grand theft (Count 8), must be vacated. Then, the Court must look at the second grand theft conviction (Count 10), see if its elements are contained within the greater offense, organized scheme to defraud (Count 16), and because the answer is yes, the lesser offense, grand theft (Count 10), must be vacated. The analysis is the same for Counts 12, 13, 14, and 15.

The District Court inexplicably took another route ("we are unable to determine which is actually the 'lesser of the offenses'") for which there was no law and no logic. Each grand theft conviction was a lesser offense, and had to be vacated to avoid a double jeopardy violation. Thus, the decision below should be disapproved.

II.

THE RACKETEERING CONVICTION (COUNT 18) MUST BE REVERSED

A. THE REVERSAL OF ALL PREDICATE ACT CONVICTIONS REQUIRES REVERSAL OF THE RACKETEERING COUNT

The construction of the Florida RICO statute is a question of law entitled to *de novo* review. *See Matos v. State*, 899 So. 2d 403, 408 (Fla. 4th DCA 2005) (*citing State v. Burris,* 875 So. 2d 408 (Fla. 2004)).

The decision below reversed *all* of Jimmy Pizzo's convictions, except Count 18, the substantive racketeering count. § 895.03(3), Fla. Stat. There was no analysis; the District Court merely noted that: "We affirm Mr. Pizzo's conviction for racketeering." **Appendix** A, pp. 2, 13. Pizzo filed a motion for rehearing in the District Court, arguing that the reversal of all predicate acts required reversal of the racketeering conviction. That motion for rehearing was denied without comment.

No other Florida case has upheld a RICO conviction where ***all*** the predicate acts constituting the required "pattern of racketeering activity" (*i.e.*, the "at least two incidents of racketeering conduct" required by § 895.02(4), Fla. Stat.) have been reversed. Nor have we found federal decisions upholding RICO convictions when ***all*** the predicate acts have been reversed.[9] To the contrary, *United States v. Walgren*, 885 F.2d 1417 (9th Cir. 1989), observed that "[i]f convictions for all of the predicate offenses underlying a RICO count are vacated, then conviction for the RICO count also must be vacated." *Id.* at 1424 (*citing United States v. Truglio*, 731 F.2d 1123, 1132 (4th Cir. 1984) (reversing substantive RICO conviction where

[9] Federal RICO cases are persuasive authority when construing the Florida RICO statute. *See Mese v. State*, 824 So. 2d 908, 912 (Fla. 3d DCA 2002) ("Given the fact that the Florida RICO statute is patterned after the federal RICO statute, Florida courts look to federal courts for guidance in construing RICO provisions.") (footnote omitted).

predicate acts were reversed for insufficient evidence)); *cf. Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 411, 123 S. Ct. 1057, 1069, 154 L. Ed. 2d 991 (2003) ("Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed.") (a civil case). Under those authorities, reversal of Jimmy Pizzo's racketeering conviction, now that all his predicate act convictions have been reversed, is required.

We acknowledge that in *Harvey v. State*, 617 So. 2d 1144 (Fla. 1st DCA 1993), the First District made the following statement:

> The definition of "racketeering activity" in subsection 895.02(1), Florida Statutes (1987), does not require the state to obtain convictions for the alleged predicate incidents. It merely requires proof of "[a]ny crime which is chargeable by indictment or information" under the specific provisions of the Florida Statutes enumerated therein. § 895.02(1)(a), Fla. Stat. (1987).

Id. at 1148. But *Harvey* does not stand for the proposition that a substantive RICO conviction can survive without proof of ***any*** incidents of racketeering conduct. In *Harvey*, there were three counts: conspiracy to commit racketeering with predicate incidents labeled A through G (in Count 1), and

two separate counts of grand theft.[10] One of the grand theft counts resulted in a not guilty verdict, and on the other the jury could not reach a verdict. *Id.* at 1147. The First District upheld the RICO conviction, because the A though G incidents alleged in Count 1 were ***not the same*** as the incidents charged in Counts 2 and 3:

> The guilty verdict on the racketeering offense (count I) and the not guilty verdict and hung jury on the grand theft counts alleged in counts II and III are not necessarily inconsistent because the predicate incidents in paragraphs A-G supporting the racketeering count allege a time period for committing grand theft that is different from the time period alleged in the separate grand theft counts in counts II and III.

Harvey, 617 So. 2d at 1148. In contrast, in this case the incidents of racketeering conduct that are alleged in Count 18 of the First Amended Information are ***identical*** to the charges in the counts that were reversed (Counts 1, 2, 3, 5, 6) (mortgage fraud), and (Counts 8, 10, 12, 13, 14, 15) (grand theft). The table on the following page, analyzing the First Amended Information (R3-358), illustrates that point:

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[10] The *Harvey* opinion does not mention conspiracy, but does state that Section 895.03(4) was the operative statute (617 So. 2d at 1144), and that subsection is the conspiracy provision.

A	B		C	D
Ct. 1	Mortgage fraud; 8/17/98 – 3/10/99; re John and Mary Maxwell		Ct. 18 Pred A	Mortgage fraud; 8/17/98-3/10/99; re John and Mary Maxwell
Ct. 2	Mortgage fraud; 10/1/98; re Mark Christiansen		Ct. 18 Pred B	Mortgage fraud; 10/1/98; re Mark Christiansen;
Ct. 3	Mortgage fraud; 10/12/98-6/23/2000, re Adela Naeher		Ct. 18 Pred C	Mortgage fraud; 10/12/98-6/23/2000; re Adela Naeher;
Ct. 5	Mortgage fraud; 12/2/98-2/10/99; re Paul / Linda Porter		Ct. 18 Pred E	Mortgage fraud; 12/2/98-2/10/99; re Paul / Linda Porter
Ct. 6	Mortgage fraud; 12/7/98-2/10/99; re Shirley Behrens		Ct. 18 Pred F	Mortgage fraud; 12/7/98-2/10/99; re Shirley Behrens
Ct. 8	Grand theft; 9/21/98-2/2/99; re Joseph and Lura Poulin		Ct. 18 Pred G	Grand theft; 9/21/98-2/2/99; re Joseph and Lura Poulin
Ct. 10	Grand theft; 10/12/98-6/23/2000; re Adela Naeher		Ct. 18 Pred C	Grand theft; 10/12/98-6/23/2000; re Adela Naeher
Ct. 12	Grand theft; 12/2/98-3/10/99; re Paul / Linda Porter		Ct. 18 Pred E	Grand theft; 12/2/98-3/10/99; re Paul / Linda Porter
Ct. 13	Grand theft; 12/7/98-3/10/99; re Shirley Behrens		Ct. 18 Pred F	Grand theft; 12/7/98-3/10/99; re Shirley Behrens
Ct. 14	Grand theft; 12/29/98-3/7/99; re Pamela Cedar		Ct. 18 Pred J	Grand theft; 12/29/98 – 3/7/99; re Pamela Cedar
Ct. 15	Grand theft; 11/16/99-7/10/99; re John Kennett		Ct. 18 Pred K	Grand theft; 11/16/99-7/10/99; re John Kennett

Here, unlike *Harvey*, all the alleged incidents of racketeering conduct in Column C are identical to the substantive offenses in Column A, and all the Column A offenses have been reversed. Thus, the racketeering offense (Count 18), must also be reversed.

B. FUNDAMENTAL ERROR IN THE JURY INSTRUCTIONS ON COUNT 18 REQUIRES A NEW TRIAL

Reversal on the ground of an unpreserved jury instruction issue is required if the error meets the stringent fundamental error standard. In *Reed v. State*, 837 So. 2d 366 (Fla. 2002), this Court restated the rule:

> To justify not imposing the contemporaneous objection rule, "the error must reach 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." In other words, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict."

Id. at 369-370 (internal citations omitted). The Second District has concluded that the improper use of "and/or" in a jury instruction has such potential to confuse a jury that it satisfies the fundamental error test. *See* **Appendix A**, p. 10 ("it is fundamental error for the trial court to include the conjunction and/or between codefendants' names if it allows for a conviction of one codefendant based solely on a determination that the other

codefendant's conduct met an element of the offense") (citing cases). *See also Davis v. State*, 922 So. 2d 279 (Fla. 1st DCA 2006) (same); *Dorsett v. McRay*, 901 So. 2d 225 (Fla. 3d DCA 2005) (vacating convictions in postconviction proceeding, due to improper "and/or" instructions).

The oral instruction on Count 18 was incomplete. *Compare* R29-2574-2575 (oral instruction), with R3-501-504 (written instructions) (**Appendix B**) (both oral and written instructions).[11] But even looking at the incomplete instruction that was delivered, and the written instructions that were provided to the jury, reveals errors analogous to those found to require reversal of the conspiracy charge. In the oral instruction, the conjunctive "and/or" was used: "Before you can find the defendant, James Frank Pizzo, also known as James Pizzo, Jr., ***and/or*** Rozlyn Pizzo guilty of racketeering . . . the State must prove the following . . . ." R29-2574-75 (emphasis supplied). Paragraphs 1, 2, and 3, which followed, used the plural "defendants," without distinguishing the need to prove conduct by each of

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[11] Assuming that was error under Rule 3.390(b), Fla.R.Crim.P., which provides that "[e]very charge to a jury shall be orally delivered . . . ," we realize that the error was unpreserved (if not invited by defense counsel, who acquiesced in the trial court's suggestion not to read the predicate acts). *See* R28-2374-2375. The jury did receive a copy of the written instructions. R29-2560 ("Fortunately, I do not have to read every word on all of these pages to you. But you will get to take all of the pages back with you when you deliberate. By law I am required to read them to you. You're welcome to read along with me as I do.").

the defendants.

In the written instructions, the "and/or" was also used, but the instructions alternated between "defendant" (singular) and "defendants" (plural), within each of the mortgage fraud predicates, without explanation. And in the predicates labeled "GRAND THEFT," there was no instruction as to the value of the property, and therefore no explanation of how the conduct satisfied the requirements for grand theft.

In sum, while trial counsel did not make these arguments below, the racketeering instruction was delivered in a manner that was as hopelessly unilluminating to the jury as were the instructions on the other charges, all of which resulted in reversal. On such a serious charge after such a lengthy and complex case, the court-initiated deviation from the mandatory oral delivery requirement of Rule 3.390(b) should not have even been presented to trial counsel as an option. But even if counsel waived for Pizzo any argument about the failure of the court to orally deliver the entire racketeering instruction, the substantive problems with the written instructions, in the context of this case where every other conviction was reversed, provide a fundamental error basis to simply reverse the racketeering conviction for new trial, along with the other counts that were reversed for new trial by the District Court. If this case were being considered for the first time on

appeal, it would be a good candidate for total reversal under the "cumulative error" doctrine, which recognizes that sometimes cumulative errors result in the denial of a fair trial. *See Penalver v. State*, ___ So. 2d ___, 31 Fla. L. Weekly S90, 2006 WL 240418 *15 (Fla. Feb. 2, 2006). Here it has already been determined that numerous jury instruction errors were sufficiently prejudicial to require a new trial. The errors infecting the charge on the racketeering count, while not preserved, ought to result in the same relief. A new trial on Count 18 should be granted.

CONCLUSION

For the foregoing reasons, the decision below should be disapproved and the Court should remand with instructions that the grand theft convictions be vacated on double jeopardy grounds. In addition, the racketeering conviction should be reversed, either (a) for a new trial, if the Court concludes the jury instructions constituted fundamental error, or (b) because all of the convictions for the predicate acts have been reversed or vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished to the following counsel, by U.S. Mail this _____ day of April, 2006:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with Rule 9.210, Fla.R.App.P., as it is prepared in Times New Roman, 14-point font.

_____

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APPENDIX

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