

IN THE SUPREME COURT  
OF FLORIDA

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**CASE NO. SC05-1951**

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**JAMES FRANK PIZZO,**

Petitioner,

vs.

**STATE OF FLORIDA,**

Respondent.

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

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**PETITIONER'S BRIEF ON JURISDICTION**

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## **STATEMENT OF THE CASE AND FACTS**

### **A. PROCEDURAL HISTORY**

Petitioner James Frank (“Jimmy”) Pizzo, along with his mother, father, and wife, all co-defendants, was charged in an 18-count Amended Information filed by the Office of the Statewide Prosecutor in the Twelfth Judicial Circuit in and for Sarasota County. The charges grew out of allegations that the family’s home improvement business, East Coast Exteriors, Inc., had engaged in fraudulent business practices.

After a jury trial before the Honorable Peter A. Dubensky, Pizzo was found guilty of six counts of mortgage fraud, in violation of § 817.54, Florida Statutes; six counts of grand theft, in violation of § 812.014(2)(b) and (c), one count of organized fraud, in violation of § 817.034(4)(a)(1), one count of conspiracy to commit racketeering, in violation of § 895.03(4), and racketeering, in violation of § 895.03(3). He was sentenced under the pre-October 1998 sentencing guidelines to an upward departure sentence of fifteen years imprisonment, and is incarcerated at Columbia Correctional Institution.

On appeal, the Second District reversed all of Jimmy Pizzo’s convictions except the racketeering charge, and noted that the upward departure sentence was error under *Blakely v. Washington*, 542 U.S. 296,

124 S. Ct. 2531 (2004). (**Appendix**, pp. 1-14).<sup>1</sup> The convictions for mortgage fraud and conspiracy to commit racketeering were reversed for new trial due to erroneous jury instructions. The dual convictions for grand theft and organized fraud were reversed on double jeopardy grounds, with instructions that “[o]n remand, the trial court must grant a judgment of acquittal on the lesser of the grand theft or organized fraud charges.” (**Appendix**, p. 13).<sup>2</sup> A timely motion for rehearing was denied without comment. (**Appendix**, p. 15).

## **B. THE FACTS**

East Coast Exteriors, Inc. was started in 1997 in Vero Beach, and later also conducted business in Manatee County. Using telemarketing followed by direct sales to homeowners, East Coast Exteriors sold windows, soffits, fascia, and siding. Jimmy Pizzo was the owner of the company and the ultimate decision-maker. His wife was the office manager; his father

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<sup>1</sup> Pizzo’s wife and father were also convicted, and their appeals were decided in conjunction with this case. *See Appendix*, pp. 2-3, n. 1. Most, but not all, of the counts of conviction were reversed for new trial; Rozlyn’s mortgage fraud convictions were reversed for insufficient evidence. *See Rozlyn Pizzo v. State*, 910 So. 2d 287 (Fla. 2d DCA 2005); *James Pizzo, Sr. v. State*, 910 So. 2d 286 (Fla. 2d DCA 2005). Jimmy’s mother, Edwina Pizzo, was convicted but was granted a post-verdict judgment of acquittal.

<sup>2</sup> Those directions to the lower court form the basis for one aspect of this petition for discretionary review. *See Point II, infra*, p. 8.

supervised work crews; and his mother's role was "nominal" as a corporate officer. (**Appendix** p. 2).

Manatee County customers complained that East Coast Exteriors salespeople made misrepresentations about the company and its products, and several also complained that liens and mortgages against their property had been recorded without their knowledge. For example, customers were told that they were purchasing "Reynolds" windows, when they were actually sold another brand. It was established at trial that the company had not been in business for the "12 to over 20 years" that was told to the customers, and that the salespeople were paid on commission, although they represented to customers that they were salaried. (**Appendix**, pp. 2-3). The primary sales tool used by the sales force was a "pitch book," which contained pictures of Reynolds products, false documents, "doctored" letters, and a fabricated award, all designed to bolster the company's false claims.

The company arranged financing for its customers who could not pay cash. In conjunction with the financing, certificates of completion were improperly signed in advance of the work; customers were promised one interest rate and charged a higher rate; and they were misinformed about the significance of certain documents. Some financing options resulted in the

imposition of liens being placed on the property, without the customers' knowledge.

This petition seeks review of (1) the RICO conviction, the only remaining count of conviction, and (2) the district court's remand directions regarding the reversed organized scheme to defraud and grand theft charges.

### **SUMMARY OF ARGUMENT**

I. The decision below, upholding Petitioner's conviction for racketeering under section 895.03(3), Florida Statutes, despite the reversal of *all* predicate act convictions, expressly and directly conflicts with decisions of this Court and of another district court, which have held that proof of two incidents of racketeering conduct 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 (Fla. 3d DCA 1990).

Here, the mortgage fraud charges, which were alleged to be incidents of racketeering conduct supporting the racketeering charge, have been reversed for a new trial. The grand theft charges, the other alleged incidents of racketeering conduct, have been reversed on double jeopardy grounds, and as shown in Point II, must be vacated. Thus, *there are no extant convictions for incidents of racketeering conduct*, and therefore the RICO



conviction must also be reversed for a new trial in conjunction with the new trial on the mortgage fraud counts. This Court has jurisdiction under article V, section 3(b)(3), Florida Constitution, and should exercise it and quash the decision below because it seriously misapplies the law under the RICO statute.

II. The district court's refusal to direct the trial court to vacate the grand theft convictions, despite the fact that established double jeopardy jurisprudence requires that result where grand theft and organized fraud convictions grow out of common factual allegations, is in express and direct conflict with other district courts of appeal. *See Donovan v. State*, 572 So. 2d 522 (Fla. 5<sup>th</sup> DCA 1990); *Stav. v. State*, 860 So. 2d 478 (Fla. 4<sup>th</sup> DCA 2003). Thus, this Court has jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution. The Court should grant review, and quash the decision below.

## ARGUMENT

### I.

#### **THE DECISION AFFIRMING THE RICO CONVICTION, DESPITE NO EXTANT PREDICATE ACT CONVICTIONS, IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND ANOTHER DISTRICT COURT OF APPEAL**

The district court did not discuss the RICO conviction, other than to say “We affirm Mr. Pizzo’s conviction for racketeering.” (**Appendix**, p. 2). But because that conviction now stands alone -- all of Mr. Pizzo’s other convictions having been reversed for new trial -- controlling decisions of this Court compel the conclusion that the RICO conviction cannot stand at all. It must be reversed for a new trial, along with the new trial on the reversed mortgage fraud charges.<sup>3</sup>

That legal conclusion flows inexorably from the RICO statute, which requires a “pattern of racketeering activity” (§ 895.03(3), Fla. Stat. (1997)) defined as “*engaging in at least two incidents of racketeering conduct . . .*” §895.02(4), Fla. Stat. (1997). This Court has stated that “[t]he pertinent Florida RICO statutes *require* that the defendant engage in at least two incidents of racketeering conduct within five years of each other.” *Lugo v.*

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<sup>3</sup> The charged predicate acts were the mortgage fraud and grand theft charges. As described in Point II, *infra*, p. 8, the grand theft charges will not be subject to a new trial, but must be dismissed on double jeopardy grounds. See **Appendix**, p. 2.

*State*, 845 So. 2d 74 94, n. 38 (Fla. 2003) (emphasis supplied). Since Jimmy Pizzo no longer stands convicted of any incidents of racketeering conduct, the district court's decision upholding the RICO conviction, despite the fact that its foundation has been undone, is in express and direct conflict with this Court's *Lugo* decision. Thus, jurisdiction to review the decision below rests upon article V, section 3(b)(3), Florida Constitution.

Similarly, the decision below is in express and direct conflict with a decision of another district court of appeal, *Watts v. State*, 558 So. 2d 142 (Fla. 3d DCA 1990), because *Watts* (properly) reversed a RICO conviction because the two predicate act convictions grew out of the same incident, and thus did not satisfy the "two incidents of racketeering conduct" statutory requirement. Article V, section 3(b)(3), Florida Constitution, again provides jurisdiction for this Court to grant review, where express and direct conflict exists with a decision of another district court of appeal.

This Court should grant review and quash the decision below, because it conflicts with decisions that apply the unambiguous requirements of the RICO statute, and is therefore in clear derogation of the legislative requirements for a RICO conviction.

## II.

### **THE DISTRICT COURT’S FAILURE TO DIRECT THAT THE GRAND THEFT CONVICTIONS BE VACATED ON DOUBLE JEOPARDY GROUNDS IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL**

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**, p. 11). The problem, and the conflict creating jurisdiction in this Court, is the fact that the district court did not direct the trial court to vacate the grand theft convictions, which are of a lesser degree than the organized fraud conviction, as other district courts routinely do. *See Donovan v. State*, 572 So. 2d 522, 526 (Fla. 5<sup>th</sup> DCA 1990) (“we conclude that the appellant's convictions for organized fraud, forgery, and uttering false instruments were proper, but that he could not lawfully also be convicted of theft. In keeping with the usual practice, we reverse the lesser offenses and affirm the greater offense (organized fraud)”); *Stav v. State*, 860 So. 2d 478 (Fla. 4<sup>th</sup> DCA 2003) (“Stav was convicted of organized scheme to defraud and grand theft . . . Stav contends that the constitutional protection against double jeopardy was violated by convicting and sentencing him for the two crimes in question. . . . We find error . . . as the two crimes share common elements and the State concedes the violation. As

a result, the grand theft conviction and sentence is reversed and remanded for discharge.”)<sup>4</sup>

The district court recognized that its treatment of the organized scheme to defraud and grand theft convictions was out of the ordinary:

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**, p. 12. That analysis plainly conflicts with *Donovan*, *Stav*, *Cherry*, and *Williamson*, all of which properly found that the grand theft offenses are lesser in degree than organized fraud, and thus required to be vacated because the elements of grand theft are subsumed in the organized fraud charges. The district court’s suggestion that multiple counts of grand theft might be considered collectively instead of individually in the double jeopardy analysis has no basis in the law. *Each* of the grand theft charges

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<sup>4</sup> We realize it is not relevant to the question of this Court’s jurisdiction, but even the Second District has, in other cases, required that the grand theft convictions be vacated in this circumstance. *See Williamson v. State*, 852 So. 2d 880 (Fla. 2d DCA 2003); *Cherry v. State*, 592 So. 2d 292, 294-95 (Fla. 2d DCA 1991).

was subsumed in the organized fraud charge; thus each of the grand theft convictions must be vacated.

The express and direct conflict on this issue provides jurisdiction for this Court's discretionary review, pursuant to article V, section 3(b)(3), Florida Constitution. The Court *should* grant review on this point, because the trial court in this case, and future trial courts within the Second District, should not be misled in their analysis of the double jeopardy issue presented by jury verdicts of conviction on both organized scheme to defraud and grand theft charges arising out of common allegations of facts.<sup>5</sup>

### **CONCLUSION**

For the foregoing reasons, the Court should accept jurisdiction over both of the legal points on which conflict is asserted, and order briefing on the merits.

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<sup>5</sup> The significance to James Frank Pizzo is that the grand theft charges were alleged to be incidents of racketeering conduct supporting the racketeering charge. If the now-reversed grand theft convictions are vacated, as they should be, it further bolsters the argument in Point I that the racketeering charge cannot be sustained because no predicate act convictions presently exist, and that a new trial is required on the racketeering charge, at which the only proper alleged incidents of racketeering will be the mortgage fraud charges.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following counsel, by U.S. Mail this \_\_\_\_ day of November, 2005:

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Brief is typed in Time New Roman 14 point font and complies with the type style and font requirements of Rule 9.210, Fla.R.App.P.

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