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

AMENDED REPLY BRIEF

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COMMENT ON THE STATE'S STATEMENT OF THE CASE AND FACTS

Although substantively we have no objection to the State's Statement of the Case and Facts, we note that it lacks any record references, and therefore violates Rule 9.210(b)(3), Fla.R.App.P. However, it appears that the entire statement of facts (everything at pp. 2-6 except the final two paragraphs) is an unattributed quotation—a *verbatim* copying of the facts as set forth in the District Court's opinion (omitting the footnotes). *See* Appendix to Initial Brief (slip op. at 2-6).

We also note that the penultimate paragraph contains an error, saying that "[t]he jury found James Frank Pizzo guilty of six counts of Mortgage Fraud. . . ." (Answer Brief, p. 6). Though they have now been reversed for new trial, he was actually convicted of five counts of mortgage fraud (Counts 1, 2, 3, 5, 6), not six. *See* R1-101-02 (Judgment); R1-50 (Verdict).

COMMENT ON THE STATE'S TABLE OF CONTENTS

"ISSUE II" and "ISSUE III" in the Table of Contents of the State's Answer Brief (p. ii) are apparently the result of a cut-and-paste from another case and a proofreading oversight. Those issues bear no relationship to this

case and are not the point headings in the body of the Answer Brief (pp. 22, 25).

COMMENT ON THE STATE'S "PRELIMINARY STATEMENT"

The State misstates one of the issues in this case, saying, incorrectly, that Pizzo "raises for the first time a ***sufficiency of the evidence claim*** as to the predicate acts for the Petitioner's conviction for Racketeering. . . ." (Answer Brief, p. 1) (emphasis supplied). Pizzo's Argument Point II(A) is not a sufficiency of the evidence claim. It is a ***legal*** argument: that a conviction for racketeering must be reversed as a matter of law when all the predicate act convictions have been reversed. And, contrary to the State's assertion, that argument is not raised here "for the first time." Pizzo presented the same issue to the District Court at the earliest possible time: in a Motion for Rehearing, arguing that the reversal of all the predicate act convictions required reversal of the racketeering conviction.

The State did not respond to the Motion for Rehearing in the District Court. Thus, none of the arguments made in the State's Answer Brief were made below.

ARGUMENT

I.

WHERE (1st-DEGREE FELONY) ORGANIZED FRAUD AND (2nd- AND 3rd-DEGREE FELONY) GRAND THEFT CONVICTIONS HAVE THE SAME ELEMENTS AND ARISE FROM THE SAME FACTS, THE DOUBLE JEOPARDY CLAUSE REQUIRES THAT THE LESSER GRAND THEFT CONVICTIONS BE VACATED

The State's argument is that, on remand after the reversal on double jeopardy grounds, the prosecutor, not the trial court, has the discretion to decide whether the organized scheme to defraud conviction or the grand theft convictions 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 . . . upon remand be allowed the discretion to determine which offense should be vacated.

Answer Brief, pp. 14-15.

> Upon remand to the trial court, the state attorney should have [the] opportunity to present argument as to which should be vacated or [be] 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.

Id. at 17.

Those unprecedented and legally unsupportable assertions must be rejected. All the decisions cited by the State (Answer Brief, p. 18) were

cases recognizing the state attorney's discretion at the ***pretrial*** stage; none involved post-appellate proceedings on remand, much less the double jeopardy issue presented in this case. Thus, they are inapposite.[1]

Article V, § 17, Florida Constitution, while affording the state attorney complete discretion in making the decision to charge and prosecute, *Valdes v. State*, 728 So. 2d 736, 738-739 (Fla. 1999), does not allow the prosecutor to intrude on the judiciary's exclusive power to vacate existing convictions that violate the Double Jeopardy Clause. *See generally Johnson v. State*, 460 So. 2d 954, 958 (Fla. 5th DCA 1984) (*en banc*) ("A violation of defendant's substantive constitutional double jeopardy rights . . . is per se harmful and ***judicially correctable*** without a showing of prejudice") (e.s.), *approved*, *State v. Johnson*, 483 So. 2d 420 (Fla. 1986). Indeed, consistent with centuries of law and the separation of powers principle embodied in article II, section 3 of the Florida Constitution, there is no Florida law

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[1] *Cleveland v. State*, 417 So. 2d 653 (Fla. 1982), held that a defendant's eligibility for a ***pretrial*** diversion program was a matter within the discretion of the state attorney. *State v. Bloom*, 497 So. 2d 653 (Fla. 1982), held that the trial court could not interfere with the state attorney's ***pretrial*** decision to proceed with a death penalty case. *Young v. State*, 699 So. 2d 624 (Fla. 1997), held that only the state attorney, not the court, could ***initiate*** habitual offender proceedings. And *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L.Ed.2d 547 (1985), affirmed the Ninth Circuit's reversal of the dismissal of an indictment. None of those cases arose in the procedural posture of this case.

example of a situation where the remedy to be afforded a criminal defendant after a successful appeal is at the election of the State. That is so because the appropriate appellate remedy is a question of law, not a question for executive branch discretion. *Cf. Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). We do not question the power of the State to *nolle pros* charges on remand after a successful appeal. But determining which charges remain viable after an appeal is a matter for the Court, not for the State.

Equally surprising is the State's vigorous attempt to counter Petitioner's argument that the lesser grand theft offenses must be vacated, leaving the organized scheme to defraud in place. One might expect the State to always advocate that the conviction for the more serious offense should remain. But the reason behind the State's position is its mistaken view that, should the six grand theft convictions survive a double jeopardy analysis, the State could then advocate for an increased, presumably consecutive, sentence. *See* Answer Brief, p. 21 (discussing "a ***more severe penalty*** the State could have sought [on remand] after proving the Petitioner was guilty of the six counts of Grand Theft") (emphasis supplied). But that analysis is flawed, as an increased sentence for the same offenses would

violate due process of law. *See Blackshear v. State*, 531 So. 2d 956 (Fla. 1988) (*citing North Carolina v. Pearce*, 395 U.S. 711, 725-26, 89 S. Ct. 2072, 2080-81, 23 L.Ed.2d 656 (1969)).[2]

* * *

The State has two theories about why the District Court did what it did. The first is "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." (Answer Brier, p. 11). But the decision below never mentioned the "identical, concurrent sentences" as part of its double jeopardy dilemma.[3]

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[2] We note that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), must also factor into the constitutionality of any resentencing scheme. Pizzo's 1995 Sentencing Guidelines scoresheet resulted in a 98.2 month sentence and a 73.65–122.75 month permitted range. R1-95–96; R12-2120. But, over objection, the trial court departed upward, imposing a 15-year sentence on the racketeering and conspiracy counts, and concurrent five-year sentences on the remaining counts. *See* R12-2188-2189; R1-101-02. The upward departure violated the Sixth Amendment under *Blakely v. Washington* (*see* Appendix to Init. Br., p. 12), so any resentencing scheme that exceeded the permissible Guideline sentence would have to satisfy the demands of both *Pearce* and *Blakely*.

[3] We note that although the written judgment of sentence does impose concurrent five-year sentences on the grand theft counts (R1-103), the oral pronouncement of sentence did not impose any sentence at all for the grand thefts (R12-2189), consistent with the State's representation that those counts were omitted from the scoresheet computation, in deference to double jeopardy concerns. R12-2149-50.

The State's second theory is that the "district court's decision clearly looked to the severity of the sentence that could have been imposed. . . ." *Id.* However, the decision below never mentioned the "severity of the sentence" that could have been imposed, so it is not so clear that the severity of the sentence was the stumbling block. The State assumes that the District Court was unable to determine whether organized scheme to defraud or grand theft was the lesser offense (even though organized scheme to defraud is a first-degree felony and the grand theft charges were five third-degree felonies and one second-degree felony), because the Court must have computed the maximum possible ***consecutive*** sentence from the six grand theft convictions, and compared that to the maximum possible sentence on the organized scheme to defraud conviction. Thus, treating the six grand thefts as one offense, the State writes, "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." (Answer Brief, p. 12). But the record does not support that theory either.[4]

[4] The District Court failed to recognize that the grand theft in Count 10 is a second-degree felony, not a third-degree felony. *See* § 812.014(2)(b), Fla. Stat. (1997). Thus, the State correctly points out that the maximum consecutive sentence for all the grand thefts would be 40 years, not 30 years.

First, there is no principled reason (and the State offers none) to treat the six grand theft sentences collectively, and to compare the potential length of six consecutive grand theft sentences to the statutory maximum sentence for organized scheme to defraud. And the decision below made no such calculation or finding. It merely states:

> 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 a [sic] grant judgment of acquittal on the lesser of the offenses.

Appendix to Initial Brief (slip op. at 12). The only clue provided by the District Court is that it compared the number of counts of grand theft to the single count of organized scheme to defraud. But as we have said in the Initial Brief, the number of counts is irrelevant; the grand thefts in this case (second- and third-degree felonies) are charges of a lesser degree than the organized fraud (a first-degree felony), and thus, consistent with every case that has confronted the same facts, it is the grand thefts that must be vacated. *See Williamson v. State*, 852 So. 2d 880 (Fla. 2d DCA 2003) (vacating 57

See Answer Brief, p. 13. But, as described herein, the possible consecutive sentence for multiple counts is irrelevant to the double jeopardy analysis.

counts of grand theft, which formed the basis of the charges for organized scheme to defraud, while upholding the scheme to defraud conviction); *Stav v. State*, 860 So. 2d 478 (Fla. 4th DCA 2003); *Cherry v. State*, 592 So. 2d 292 (Fla. 2d DCA 1991); *Donovan v. State*, 572 So. 2d 522, 526 (Fla. 5th DCA 1990).

While there is some support for the notion that the "lesser" of two offenses is determined by the maximum punishment that would be imposed for each one using all applicable sentencing provisions and enhancement statutes, we think the better view in the context of a double jeopardy violation based on two crimes that are "the same offense" under *Blockburger* is to simply examine the degree of the offenses. *Compare Gibbons v. State*, 540 So. 2d 144, 145 (Fla. 4th DCA 1989), where the Fourth District held that, under *State v. Barton*, 523 So. 2d 152 (Fla. 1988), "[t]he appropriate yardstick is the offense, not the punishment." [5] And also taking that "offense, not punishment" approach, in *Smith v. State*, 548 So. 2d 755 (Fla. 5th DCA 1989), the Fifth District logically found that possession of a firearm in the commission of a felony (a second-degree felony with a potential maximum sentence of fifteen years) was a greater offense than aggravated assault (a third-degree felony with a potential maximum sentence

[5] *Compare Sanders v. State*, 912 So. 2d 1286 (Fla. 2d DCA 2005), *rev. granted*, 919 So. 2d 436 (2006) (No. SC05-2115) (argued June 8, 2006).

of five years), even though a three-year minimum mandatory sentence applied to the aggravated assault charge and the Guideline sentence for the possession charge was "any nonstate prison sanction." The offense of the lesser degree was properly vacated, without regard to the sentencing consequences. *Id.* at 757; *accord, Bradley v. State*, 540 So. 2d 185, 187 (Fla. 5th DCA 1989) (considering convictions for first-degree felony burglary with a battery, and simple battery) ("[t]he offense carrying the greater potential punishment . . . is affirmed").

The Second District rejected the "degree" approach in examining whether an attempted false imprisonment was a lesser offense than the completed crime, in *Greene v. State*, 714 So. 2d 554 (Fla. 2d DCA 1998), instead focusing on the Sentencing Guidelines "offense level" of the two crimes, both of which were third-degree felonies Here, organized fraud is a Level 6, and the grand thefts are Level 3 and Level 4, with the exception of Count 10, which is a Level 6. So even under *Greene*, cited by the State, Pizzo's view that grand theft constitutes the lesser offense prevails, at least as to five of the six counts. Theoretically, under that approach, those five Level 3 and Level 4 counts would have to be vacated, and the court could vacate either of the two remaining Level 6 offenses, but presumably the first-degree felony organized fraud would still remain.

Taking yet a different approach, in *Bogan v. State*, 552 So. 2d 1171, 1172 (Fla. 3d DCA 1989), the Third District held that the "greater" offense "is the one which results in the greater *sentence* or *punishment* . . . rather than the crime which occupies a higher position on the merely theoretical ladder of seriousness." (emphasis in original). Thus, based on the scoresheet computations, looking at each alternative offense as the primary offense (aggravated assault and possession of a firearm in the commission of a felony), and factoring in the various sentencing considerations that result in the actual sentence to be imposed, the Third District (noting conflict with *Gibbons* and *Smith, supra*), found aggravated assault (a third-degree felony) to be a greater offense than the possession of a firearm charge (a second-degree felony). That minority view, requiring mathematical machinations, should be rejected by this Court, because it flies in the face of bgic and a simpler approach: a third-degree felony, with a statutory sentencing maximum of five years imprisonment, is plainly a lesser ***offense*** than a second-degree felony, with a statutory maximum of fifteen years, which is a lesser ***offense*** than a first-degree felony, with a statutory maximum of thirty years. *See* § 775.082(3)(a)(3), Fla. Stat. (1997) (Penalties for different degrees of offenses).

Neither the number of offenses nor the application of other factors affecting the sentence should matter when determining which is the lesser offense that must be vacated on double jeopardy grounds. That question should be answerable simply by looking at the statutes defining the crimes, just as the statutory elements, not the allegations or proof, govern the *Blockburger* double jeopardy analysis. *See* Initial Brief, p. 18 (*quoting* § 775.021(4)(a), Fla. Stat.). Thus, under this Court's decision in *State v. Barton*, 523 So. 2d 152 ("when . . . one of two convictions must fall, we hold that the conviction of the lesser crime should be set aside"), grand theft is the lesser crime that must be set aside when the defendant is also convicted of the greater crime of organized scheme to defraud.

For the foregoing reasons, the State's arguments should be rejected. Where first-degree organized fraud and second- and third-degree grand theft convictions arise from the same facts, the lesser grand thefts must be vacated.

II.

THE RACKETEERING CONVICTION SHOULD BE REVERSED FOR NEW TRIAL

As stated above (p. 2), this issue—whether the racketeering count must be reversed when all the predicate act convictions are reversed or vacated—was properly preserved in a Motion for Rehearing in the District

Court, and is not "procedurally barred" as the State argues. (*See* Answer Brief, p. 22).

The charged predicate acts for the racketeering count were mortgage fraud and grand theft, the same allegations contained in the substantive counts charging those offenses. *See* Initial Brief, p. 28. The State argues that, despite the reversal of all the mortgage fraud convictions, and even if we are correct that the grand theft convictions must also be vacated, thus leaving no extant convictions on the alleged incidents of racketeering conduct, the racketeering conviction can be sustained because those reversals were not based on insufficient evidence. (*See* Answer Brief, pp. 22-24). However, the State has no response to the cases cited in the Initial Brief (pp. 25-26) that undermine that argument, and offers not a single Florida case in which a substantive racketeering conviction was upheld absent convictions for two predicate acts.[6] Doing so here feels intuitively wrong, and in conflict with Section 895.03(3).

* * *

We do not argue that the racketeering conviction fails for insufficient evidence, forever barring a retrial. Instead, we argue that the racketeering

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[6] The State cites *Harvey v. State*, 617 So. 2d 1144 (Fla. 1st DCA 1993) for the proposition that "there is no need for the State to obtain convictions to prove the alleged predicate acts" (Answer Brief, p. 23), but we have already distinguished *Harvey*. *See* Initial Brief, pp. 26-27.

conviction should be reversed for a new trial. Either, as argued above, the reversal of all the predicate acts renders the racketeering count unsustainable, or (and this argument was made for the first time in this Court) (Initial Brief, pp. 29-32) the abbreviated and misleading jury instructions on the racketeering charge at the end of this lengthy and complex trial warrant reversal and a new trial. That remedy should result, whether one focuses on the fact that the entire charge was not given, or the fact that the instructions given contained confusing "and/or" conjunctions, or the fact that the instructions vacillated between "defendant" and "defendants" without rhyme or reason, or the fact that the District Court has already reversed so many of the underlying convictions in the consolidated cases for trial error, contributing to an overall lack of confidence that James Pizzo, Jr. had a fair trial or that the jury understood its charge on Count 18, even though it was likely "hopelessly confused" by other instructions in the case. *See* Appendix to Initial Brief (slip op. at 8).

Maybe the District Court's denial of Pizzo's Motion for Rehearing (which was unanswered and therefore unrebutted by the State), was an oversight, the District Court having considered and decided three consolidated, related but non-identical complex appeals, together presenting twenty issues, arising from an unusually lengthy charging document

(eighteen counts of criminal activity, with twenty-two predicate incidents, and four co-defendants), a lengthy trial, and an almost 5,000-page record on appeal, including over 1000 pages of exhibits. We cannot know the reason the Motion for Rehearing was summarily denied. But we can and do urge this Court to reverse and remand the racketeering conviction for a new trial along with the other reversed counts, a new trial hat does not suffer from the numerous and interrelated fundamental errors that infected the trial proceedings below and led to reversals on every other conviction in this case.

CONCLUSION

For the foregoing reasons, and those advanced in the Initial Brief, the decision below should be disapproved. First-degree organized fraud is a greater offense than second- and third-degree grand theft. Therefore, the Court should remand with instructions to vacate the grand theft convictions. In addition, the racketeering conviction should be reversed for new trial.

Respectfully submitted,

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I HEREBY CERTIFY that this Reply Brief complies with Rule 9.210(a)(2), Fla.R.App.P., as it is prepared in Microsoft Word 2002 in a 14-point Times New Roman font.

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