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**Sept 21, 2006**

**James Frank Pizzo v. State of Florida  
SC05-1951**

PLEASE RISE.

HEAR YE, HEAR YE, HEAR YE.

THE KOURT OF FLORIDA IS NOW  
IN SESSION.

ALL WHO HAVE CAUSE TO PLEA,  
DRAW NEAR, GIVE ATTENTION,  
AND YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,  
THE GREAT STATE OF FLORIDA,  
AND THIS HONORABLE COURT.

>> MORNING.

>> MORNING.

>> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING, FRENTSDS,  
AND WELCOME TO THE FLORIDA  
SUPREME COURT THE ARGUMENTS  
FOR THURSDAY, SEPTEMBER  
21st.

OUR FIRST CASE ON THE  
CALENDAR IS PIZZO v. STATE  
OF FLORIDA, AND I WOULD  
PLEASE ASK ALL COUNSEL TO  
UNDERSTAND THAT THE COURT  
HAS THOROUGHLY STUDIED THESE  
CASES AND A AT TIMES WERE  
VERY INQUISITIVE AND TO USE  
YOUR TIME MOST JUDISHESLY SO  
THAT WHEN YOU WALK AWAY YOU  
FELT THAT YOU HAVE PRESENTED  
YOUR ARGUMENT SO WITH THAT  
PLEASE PROCEED.

>> GOOD MORNING, AND MAY IT  
PLEASE THE COURT, BEVERLY  
POHL REPRESENTING JAMES  
FRANK PIZZO IN THIS CASE.  
I WOULD LIKE TO START WITH A  
FEW AREAS WHERE THERE IS  
SOME AGREEMENT SO THAT WE  
DON'T HAVE TO SPEND TIME ON

THOSE THINGS.

EVERYONE AGREES THAT THERE IS A DOUBLE JEOPARDY VIOLATION WHEN SOMEONE IS CONVICTED OF ORGANIZED TO DEFRAUD AND GRAND THEFT THAT ARE BASED UPON THE SAME FACTUAL CIRCUMSTANCE.

THAT'S NOT IN DISPUTE.

EVERYONE ALSO AGREES THAT THE PROPER REMEDY FOR THAT IS THE VACATE THE LESSER OFFENSE.

SO THE QUESTION THAT THE COURT HAS ASKED IN ITS GRANT OF JURISDICTION IS HOW DOES ONE, HOW DOES A COURT DETERMINE WHAT IS THE LESSER OFFENSE.

>> BEFORE YOU GET TO THAT ISSUE, CAN YOU DISCUSS THE ISSUE OF CONFLICT BECAUSE IT'S FROM READING THE OPINION IN THIS CASE, THE COURT DIDN'T SAY ONE THING OR THE OTHER.

IT JUST LEFT IT TO THE TRIAL COURT TO DETERMINE WHICH WAS THE LESSER OFFENSE.

SO WHY DOES THAT CREATE CONFLICT WITH OTHER CASES?

>> IT CREATES A CONFLICT, JUSTICE CANTERO BECAUSE IT IS THE RESPONSIBILITY OF A COURT TO ISSUE OF LAWANE CRIMINAL OF APPEAL.

THIS IS AN ISSUE OF LAW.

IT DOESN'T REQUIRE FACTUAL DEVELOPMENT.

THERE THERE IS REALLY NO NEED TO REMAND IT AND THE ONLY THING THAT WOULD HAP FPB IT WERE REMANDICIDE THE TRIAL COURT'S DECISION ON THAT ISSUE OF LAW WOULD THEN BE SUBJECT TO ANOTHER APPEAL SO ULTIMATELY IT'S THE QUESTION OF THE DISTRICT COURT TO.

AND EVERY DECISION THAT CAME PRIOR TO THIS CASE HAD BEEN ONE IN WHICH THE DISTRICT COURT MADE SOME DECISION AND DIRECTED THE TRIAL COURT

WHICH OFFENSES TO VACATE  
HERE.

HERE THEY SAID WE CAN'T  
DECIDE AND THAT IN AND OF  
ITSELF IS A CONFLICT.

>> WELL, IF ON REMAND THE  
TRIAL COURT AGREES WITH THE  
OTHER DISTRICTS, THEN THERE  
IS NO CONFLICT, THE LAW IS  
UNIFORM THROUGHOUT THE  
STATE.

>> WELL THE CONFLICT  
JURISDICTION FOR THIS  
COURT'S CASES IS NOT  
CONFLICT BETWEEN THE SIXTH  
COURT DECISIONS AND THE  
DISTRICT COURT DECISIONS.  
IT'S THE CONFLICT BETWEEN  
DISTRICT COURT DECISIONS AND  
OTHER DISTRICT COURT  
DECISIONS FROM THE FOURTH  
AND OTHER DISTRICTS HAVE  
SAID GRAND THEFT IS THE  
LESSER OFFENSE AND MUST BE  
VACATED SO TO THE EXTENT THE  
SECOND DISTRICT DID THAT HERE,  
WE BELIEVE THAT THAT IS  
CONFLICT.

>> THE SECOND DISTRICT IN  
THIS CASE DID NOT VACATE THE  
GRAND THEFT BECAUSE THERE  
WERE MULTIPLE GRAND THEFTS  
ARE NOT HERE FROM THE  
OPINION WHY THE COURT DID  
NOT VACATE THE GRAND THEFT.

>> NOR, AM I.

JUSTICE KENS A.

THE SECOND DISTRICT DID NOT  
REALLY EXPLAIN WHY IT DIDN'T  
TAKE THAT ACTION IN THIS  
CASE OTHER THAN TO SAY THAT  
BECAUSE THERE ARE SIX COUNTS  
OF GRAND THEFT AND ONE COUNT  
OF ORGANIZED TO DEFRAUD,  
THEY DID NOT MAKE THE  
DETERMINATION BUT THAT IS  
NOT CONSISTENT WITH WHAT  
HAPPENED IN OTHER CASES EVEN  
IN THE WILLIAMSON CASE CITED  
IN OUR BRIEF FROM THE SECOND  
DISTRICT THERE HAD BEEN 57  
COUNTS OF GRAND THEFT, ONE  
ORGANIZED FRAUD, AND ALL 57  
COUNTS OF GRAND THEFT WERE

VACATED.

>> SO YOU JUST LOOK AT THE FACT THAT GRAND THEFT IS A THIRD DEGREE FELONY. AND ORGANIZED FRAUD, THE FIRST DEGREE FELONY? SO IS THAT ENOUGH TO SAY THAT THE GRAND THEFT ARE THE LESSER OFFENSES AND SO THE GRAND THEFT SHOULD BE VACATED?

>> I BELIEVE THAT THAT IS ALL ONE HAS TO DO IN THIS CASE.

IT MAY BHE MORE COMPLICATED IN OTHER FACTUAL SCENARIOS, BUT IN THIS CASE, IT'S KRITAL CLEAR THAT ONE OF THE OFFENSES HAS BEEN DESIGNATED BY THE LEGISLATURE AS A FIRST DEGREE FELONY AFIRST DEGREE FELONY CARRIES BY DEFINITION AMORE SERIOUS SENTENCE THAN DOES A SECOND OR THIRD DEGREE FELONY. ONE OF THE GRAND THEFTS IS A SECOND DEGREE FELONY AND THE OTHERS ARE THIRD DEGREE T. SHOULDN'T HAVE TO REALLY GO BEYOND THAT.

IT'S SO SELF-EVIDENT TO US THAT ORGANIZED FRAUD IS THE MORE SERIOUS OFFENSE.

>> WELL, IN FIRMS OF SERIOUS, ISN'T THAT IF THERE IS A CONFLICT ISSUE, THAT'S THE CONFLICT ISSUE WHICH IS DO YOU LOOK AT THE ELEMENTS OR THE SEVERITY OF THE PUNISH SNMENT AND ISN'T THE SORT OF THE INTENT BEHIND ALL OF THIS IS SOMEONE DOESN'T GET PUNISHED TWICE FOR WHAT IS ESSENTIALLY THE SAME OFFENSE.

BUT ON THE OTHER HAND, SHOULDN'T THEY BE PUNISHED THE MOST SEVERELY FOR WHATEVER THE OFFENSE IS? SO TELL ME WHY IT ISN'T APPROPRIATE TO LOOK AT WHATEVER THE GREATER PUNISHMENT IS, AND THEN VACATE WHATEVER OFFENSE HAS

THE LESSER PUNISHMENT.

>> I THINK, IT'S IMPORTANT TO LOOK AT WHY THIS COMPARISON IS BEING MADE. AND WHEN IT'S BEING MADE FOR DOUBLE JEOPARDY PURPOSES, DOUBLE JEOPARDY IS NOT ABOUT THE LENGTH OF PUNISHMENT. THE DOUBLE JEOPARDY IS ABOUT ELEMENTS.

THAT'S WHAT THE BLOCKBUSTER TESTS IS.

IT LOOKS AT THE ELEMENTS OF THE OFFENSE AND NOT THE PUNISHMENT AND I THINK --

>> WELL, THAT'S IN ORDER TO DETERMINE IF THERE'S A DOUBLE JEOPARDY OFFENSE VIOLATION BUT WHAT WE ARE TALKING ABOUT HERE IS WHAT IS THE REMEDY BECAUSE YOU JUST -- YOU STARTED YOUR ARGUMENT BY SAYING IF THERE -- EVERYONE AGREE THERE'S A DOUBLE JEOPARDY VIOLATION. SO TELL ME IN THIS SITUATION, WHAT WOULD BE THE PUNISHMENT OR WHAT IS FOR THE GRAND THEFT AND WHAT IS THE PUNISHMENT FOR THE RACKETEERING?

ARE THEY DIFFERENT PUNISHMENTS?

CAN WE FIGURE THAT OUT? AND IS THAT WHY THE SECOND DISTRICT REMANDED IT?

>> I THINK YOU MISSPOKE WHEN YOU SAID RACKETEERING, JUSTICE PARIENTE BECAUSE IT WOULD BE ORGANIZED SCHEME TO DEFRAUD WHICH IS WHAT WE ARE COMPARING.

WHAT ACTUALLY IS COMPOSED ON ALL THESE WAS FIVE YEARS ON EACH COUNT.

WHAT WAS POTENTIALLY AVAILABLE TO BE IMPOSED DIFFERED.

IT WOULD BE A 15-YEAR SENTENCE FOR SECOND-DEGREE FELONY AND FIVE-YEAR MAXM SENTENCE FOR THE THIRD-DEGREE GRAND THEFT.

>> WELL, YOU COULD -- YOU

COULD STACK THEM.

SO IF YOU ARE LOOKING AT ORGANIZE FRAUD 30 YEARS BUT IF YOU STACK THE THIRD FIVE DEGREE FELONIESES AND ONE SECOND DEGREE FELONY, WOULDN'T YOU BE LOOKING AT 40 YEARS?

>> WELL, THAT'S ONE OF THE STATE'S ARGUMENTS, BUT THERE IS REALLY NO PRECEDENT IN THE CONTEXT OF A DOUBLE JEOPARDY ANALYSIS TO LOOK AT A SERIES OF CONVICTIONS AS A UNIT.

EACH, EACH CONVICTION FOR THE, FOR THE OFFENSE OF GRAND THEFT HAS TO BE COMPARED TO THE GREATER OFFENSE OF ORGANIZED FRAUD AND YOU SIMPLY LOOK AT THE ELEMENTS OF EACH ONE.

AND EVEN IF YOU LOOKED AT ALL OF THE GRAND THEFT TOGETHER, ALL OF THOSE ELEMENTS FIT WITHIN THE ELEMENTS OF ORGANIZED FRAUD. SO UNDER OUR APPROACH WHICH WE BELIEVE IS THE RIGHT ONE TO LOOK AT THE ELEMENTS OF THE OFFENSE, NO MATTER HOW YOU LOOK AT IT, EITHER COLLECTIVELY OR INDIVIDUALLY, THE GRAND THEFT CANNOT STAND, AND TO FOLLOW --

>> WHEN YOU'RE SAYING ARE LESSER INCLUDED OFFENSES OF THE ORGANIZED FRAUD?

>> THEY'RE NOT LESSER INCLUDED OFFENSES THE WAY THAT TERM IS USUALLY UNDERSTOOD.

THEY ARE ACTUALLY DEEMED TO BE THE SAME OFFENSE UNDER THE EXCEPTIONS TO THE -- UNDER THE STATUTE -- THAT REPRESENTS THE BLOCKBUSTER TEST, 775021 STATUTE.

THEY'RE DEEMED TO BE THE SAME OFFENSE BECAUSE NEITHER OF THEM, OR LET ME PUTS IT THIS WAY.

IN ORDER TO BE DIFFERENT OFFENSES, EACH OF THEM HAS

TO HAVE AN ELEMENT THAT THE OTHER ONE LACKS.

THAT'S NOT --

>> ORGANIZED FRAUD CONTAINS ALL OF THE ELEMENTS OF THE GRAND THEFT, PLUS.

THEN ISN'T THAT -- ISN'T THAT A LESSER INCLUDED OFFENSE?

>> NO, BECAUSE THESE ARE TWO DISTINCT STATUTORY PROVISIONS, AND THE LANGUAGE THAT IS USED IS THAT THESE ARE DEEMED FOR DOUBLE JEOPARDY PURPOSES TO BE THE SAME OFFENSE AND THAT'S WHY THEY CANNOT CO-EXIST.

NOT QUITE THE SAME THING AS A LESSER INCLUDED OFFENSE. BECAUSE THE JURY WASN'T INSTRUCTED THAT EITHER THEY FIND ORGANIZED -- AGAIN, ORGANIZED FRAUD AND THEN NEXT ONE WOULD BE GRAND THEFT.

>> THAT'S CORRECT.

>> BECAUSE IF THEY HAD DONE THAT, THERE WOULDN'T HAVE BEEN --

>> THAT'S CORRECT.

>> IT WAS TWO SEPARATE JURY INSTRUCTIONS AND TWO SEPARATE CONVICTIONS.

>> THAT'S RIGHT.

>> BUT I'M STILL NOT SURE IN TERMS OF IF WE AGREE THERE'S A DOUBLE JEOPARDY VIOLATION, WHICH IS NOT IN DISPUTE EXPLAIN AGAIN, ARE YOU SAYING THAT HE ACTUALLY COULD RECEIVE A GREATER PUNISHMENT FOR THE CONVICTIONS FOR THE GRAND THEFT THAN FOR THE CONVICTIONESS FOR THE -- CONVICTIONS FOR THE ORGANIZED -- FOR THE FRAUD?

>> ONLY IN THE MOST HYPOTHETICAL SENSE BECAUSE IN THE REALITY SENSE HE COULD NOT.

HE RECEIVE AD15-YEAR SENTENCE OVERALL.

UPWARD DEPARTURE HON THE

RICO COUNT, AND, IF THERE WERE TO BE A REMAND AND A RESENTENCING, HE COULDN'T RECEIVE A SENTENCE IN EXCESS OF THAT 15 YEARS WITHOUT CONFLICTING WITH NORTH CAROLINA v. PIERCE. THAT WOULD BE A DUE PROCESS VIOLATION WERE THERE NOT SOME ADDITIONAL FACTS LEADING TO A LARGER SENTENCE

--

>> WELL, THAT'S BECAUSE HE'S ALREADY BEEN SENTENCED.

>> THAT'S RIGHT.

>> BUT IF THIS WERE A FRESH SENTENCING, LET'S ASSUME HYPOTHETICALLY THAT NO SENTENCING OCCURRED THIS JUDGE COULD'VE SENTENCED HIM TO 45 YEARS IF HE HAD STACKLOAD THE GRAND THEFTS?

>> NO, HE COULD NOT BECAUSE THIS WAS A SENTENCE UNDER THE PRE-1998 GUIDELINES SO THE JUDGE WAS CONSTRAINED BY THE GUIDELINE RANGE. THE GUIDELINE RECOMMENDATION WAS EIGHT YEARS.

THE RANGE WAS 6 TO TEN, AND HE DID EXCEED THAT, BUT THAT WAS IN CONFLICT WITH BLAKELY, AND THAT CERTAINLY WAS -- COULD NOT BE RETPEATED.

SO THE THEORY THAT THE STATE MIGHT BE ABLE TO GET THIS LONGER SENTENCE, I UNDERSTAND, BUT IT CANNOT REALLY HAPPEN IN THIS CASE.

>> BUT WHAT WOULD HAPPEN IN THE NEXT CASE?

I THINK THAT'S THE QUESTION.

>> WELL, IN THE NEXT CASE --

>> UNDER -- SOMEBODY IS CONVICTED TODAY FOR A CRIME THAT WAS COMMITTED IN 2005, WHAT WOULD THE SITUATION UNDER THE IDENTICAL FACTS --

>> I THINK THE CORRECT --

>> THE POTENTIAL SENTENCE IS CONCERNED?

>> I THINK THE CORRECT ANALYSIS WOULD STILL BE TO

VACATE THE GRAND THEFT  
BECAUSE EACH GRAND THEFT  
COUNT WOULD HAVE TO BE  
COMPARED TO THE ORGANIZED  
FRAUD, AND WHEN THE ELEMENTS  
OF THE GRAND THEFT ARE  
ASSUMED IN THE FRAUD, THAT  
COUNT CAN'T EXIST.

>> RIGHT, BUT MY QUESTION TO  
YOU IS, WHAT WOULD BE THE  
SENTENCE POTENTIAL?

>> IT WOULD BE --

>> PRO BONO SCENARIO.

>> IT WOULD BE WHATEVER THE  
POTENTIAL SENTENCE IS THERE  
THE ORGANIZED FRAUD IN THAT  
CASE.

IF IT WAS A SECOND DEGREE,  
THE POTENTIAL SENTENCE WOULD  
BE 15 YEARS.

>> SO YOU'RE SAYING UNDER  
THE PRESENT SITUATION YOU  
COULDN'T STACK THE GRAND  
THEFTS?

>> NO, BUT -- BECAUSE I  
DON'T THINK THE GRAND THEFTS  
COULD SURVIVE.

>> WELL, I -- LET'S ASSUME  
THAT THEY DID.

>> WELL, UNDER THE CRIMINAL  
PUNISHMENT CODE IT'S THE  
STATUTORY MAXIMUM.

SO I SUPPOSE IN THAT THEORY,  
ONE COULD DO THAT.

BUT IT DOESN'T MAKE GOOD  
DOUBLE JEOPARDY SENSE OR  
FALL WITHIN THE BLOCKBUSTER  
ANALYSIS TO DO THAT.

BLOCKBURGER.

SNOOL YEAH BUT REAR RR  
STILL.

THE QUESTION IS  
CONSTITUTIONALLY.

WHY AS THE REMEDY FOR A  
DOUBLE JEOPARDY VIOLATION  
DOES IT HAVE TO BE THAT YOU  
VACATE WHAT WOULD BE THE  
OFFENSE THAT'S ASSUMED  
WITHIN THE GREATER OFFENSE?  
AS LONG AS YOU VACATE ONE OF  
THE TWO THAT ARE THE DOUBLE  
JEOPARDY PROBLEM, AND  
SENTENCE ONLY FOR ONE OF THE  
TWO, THERE IS -- THERE IS NO

DOUBLE JEOPARDY VIOLATION.  
WOULD YOU -- DO YOU AGREE  
WITH THAT?

>> I DO AGREE WITH THAT.

>> SO THEN THEREFORE, WE ARE  
TALKING ABOUT REMEDY AND WHY  
WOULDN'T WE IN THIS DAY AND  
AGE KNOWING THAT THE  
LEGISLATURE WOULD RATHER  
SOMEONE RECEIVE THE GREATEST  
POSSIBLE PUNISHMENT, ALLOW  
THE TRIAL COURT TO DETERMINE  
WHICH OF THE TWO OFFENSES  
ALLOWS THE GREATEST POSSIBLE  
PUNISHMENT AS LONG AS THEY  
DON'T PUNISH FOR BOTH  
SEPARATE OFFENSES?

>> ONE THING, THIS COURT'S  
DECISION IN STATE v. BARTON  
SAYS THAT THE LESSER OFFENSE  
IS TO BE VACATED.

>> BUT YOU'VE JUST TOLD  
JUSTICE QUINCE THAT THIS IS  
NOT A LESSER OFFENSE --

>> IT'S NOT A LESSER  
INCLUDED OFFENSE AS THE WAY  
THAT THAT TERM IS DEFINED  
BUT IT IS A LESSER OFFENSE,  
IT'S A LESSER A DEGREE IF  
YOU LOOK AT THE OFFENSE OF  
GRAND THEFT JUST IN  
ISOLATION, THE OFFENSE OF  
GRAND THEFT CARRIES ONLY A  
FIVE-YEAR PENALTY.

THE OFFENSE OF ORGANIZED  
FRAUD IN THIS CASE, THE  
SECOND DEGREE FELONY,  
CARRIES A 15-YEAR SENTENCE.

>> BUT, THAT'S NOT HOW WE  
USE LESSER.

YOU MEAN LERS, AND I THINK  
THAT'S HOW QUINCE WAS USING,  
THERE ARE LESS OFFENSES OF  
GRAND THEFT THAN ORGANIZED  
FRAUD.

>> THAT'S CORRECT.

IF EVERY COURT UP UNTIL THIS  
ONE HAS GOTTEN IT WRONG, IT  
WOULD SURPRISE ME.

>> IT MAY BE JUST THAT THAT  
FACTUAL SCENARIO WASN'T  
THERE WHERE THERE WAS A  
POTENTIAL FOR A GREATER SENTANCE  
UNDER THE THEFT THAN THERE

WAS FOR THE ORGANIZED FRAUD.  
THERE'S NO THOUGHT -- I MEAN  
WE ARE TRYING TO LOOK AT  
WHAT IS THE PRINCIPLED RULE  
OF LAW THAT COMES OUT OF  
THIS, AND I THINK YOU'VE  
ALREADY SAID THERE WOULDN'T  
BE A CONSTITUTIONAL  
VIOLATION IF WE LOWED THE  
SECOND DISTRICT OPINION TO  
STAND.

>> THAT'S CORRECT.

BUT YOU'RE PRESUMING THAT  
CONSECUTIVE SENTENCING IS  
THE NORM, AND CONSECUTIVE  
SENTENCING IS THE EXCEPTION  
REALLY, NOT THE RULE.

A SENT SENSE PRESUMED TO BE  
CONCURRENT UNLESS FOR SOME  
REASON THE JUDGE FINDS A  
REASON TO IMPOSE CONSECUTIVE  
SENTENCES.

>> NO, I WASN'T PRESUMING  
THAT.

I WAS JUST PRESUMING THAT  
THE LEGISLATURE WOULD WANT  
THE PERSON, THE DEFENDANT TO  
BE -- TO RECEIVE THE MOST  
HARSH PUNISHMENT THAT THEY  
COULD RECEIVE UNDER THE  
LEGALLY VALID CONVICTIONS  
THAT WOULD STAND.

THAT'S WHAT I WAS PRESUMING.

>> I JUST THINKERATORS  
DOUBLE JEOPARDY MISTAKE TO  
ANALYZE THE GRAND THEFT  
COLLECTIVELY.

I BELIEVE THAT IT NEEDS TO  
BE DONE OFFENSE BY OFFENSE.  
AND AS I'VE SET FORTH IN THE  
BRIEF, ALL OF THE ELEMENTS  
OF EACH OFFENSE ARE ASSUMED  
SO EACH OF THOSE GRAND  
THEFTS NEED TO BE VACATED  
AND ONLY THE ORGANIZED FRAUD

--

>> LET ME ASK YOU THIS.  
AFTER BLAKELY v. WASHINGTON,  
A LOT OF TRIAL COURTS  
UNDERSTANDABLY SO ARE ASKING  
THE JURY TO DETERMINE MANY  
OF THESE FACTUAL ISSUES THAT  
ARE RELEVANT TO SENTENCE!!!ING  
SO THAT SOMETIMES NOW A

SOMETHING AS A LESSER INCLUDED OFFENSE ISN'T NECESSARILY LESSER ANYMORE DEPENDING ON THESE POST-CONVICTION AGGRAVATING FACTORS LIKE DID YOU CARRY A WEAPON, THINGS LIKE THAT, AND IT'S ALMOST LIKE A FAMILY TREE NOW THAT A COURT HAS TO GO THROUGH TO ASK THE JURY AND IT I'D ALSO LIKE US TO BE CONSISTENT IN DETERMINING IF WE'VE -- DEFENSE COUNCIL IS ASKING INSTRUCTIONS ON LESSER INCLUDED OFFENSES. SO, SHOULDN'T TRIAL COURTS NOW -- IT'S VERY COMPLICATED FOR TRIAL COURTS TO DETERMINE WHICH IS THE GREATER AND WHICH IS THE LESSER WHEN YOU TAKE INTO ACCOUNT ALL THESE SENTENCING FACTORS SO SHOULDN'T THE TRIAL COURTS BE ALLOWED IN THE DOUBLE JEOPARDY CONTEXT TO SEE, WELL, GIVEN THE FACTS OF THIS CASE, WHERE THERE WAS A GUN IN THE POSSESSION, WHICH IS GOING TO BE THE GREATER OF THE? AND WHICH IS GOING TO BE THE LESSER? OR DO WE SIMPLIFY IT EVEN IN THAT CONTEXT, IN INSTRUCTING ON A LESSER INCLUDED. AND DEFENSE COUNSEL ONLY GETS AN INSTRUCTION IF IT REALLY IS A LESSER INCLUDED REGARDLESS OF SENTANCING FACTORS?

>> I BELIEVE THAT'S THE STANDARDS CASE PENDING BEFORE THIS COURT, AND IT'S -- I THINK THE COURT CAN DISTINGUISH THE SITUATION OF WHAT IS DEFINED AS A LESSER INCLUDED OFFENSE FOR PURPOSES OF ARRANGING THE VERDICT FORM AND EXPLAINING IT TO THE JURY BECAUSE IN THAT CONTEXT, THE JURY IS TOLD THAT EACH OF THE SUBSEQUENT OFFENSES IS A

LESSER OFFENSE.

AND SO I UNDERSTAND THEM THAT MAYBE ONE HAS TO LOOK AT, AT THE COLLATERAL OR THE ENHANCEMENT SENTENCING FACTORS THAT MIGHT AFFECT THE REAL OUTCOME THERE.

I UNDERSTAND THAT ARGUMENT.

BUT THIS COURT ALTHOUGH IT CAN DEFINE WHAT IT WANTS A LESSER INCLUDED OFFENSE TO BE, CAN'T REALLY DEFINE WHAT DOUBLE JEOPARDY MEANS.

DOUBLE JEOPARDY IS ABOUT ELEMENTS.

STARTING WITH BLOCKBUSTER -- BLOCKBURGER, AND ALL OF THE CASES THAT HAVE COME.

BUT I WOULD DISTINGUISH THAT SITUATION WAS, WHICH HAS TO DO WITH A JURY PARDON QUESTION AND HOW THE VERDICT FORM SHOULD BE DESIGNED, WHICH, THERE'S SOME WIGGLE ROOM THERE, BUT FOR DOUBLE JEOPARDY IT'S ABOUT ELEMENTS.

>> I'M JUST CONCERNED THAT IT'S GOING TO GET EVEN MORE CONFUSING BECAUSE NOW NOT ONLY TRIAL COURTS HAVE TO DISTINGUISH BETWEEN SENTENCING FACTORS AND INSTRUCT THE JURIES AND WHAT ARE LESSER INCLUDED WELL, FOR PURPOSES OF INSTRUCTING THE JURY IT'S THIS BUT FOR PURPOSES OF DOUBLE JEPPIED, IT'S SOMETHING ELSE.

>>T WELL, THIS DECISION HERE, LET ME JUST POINT OUT, THE STATE AGREED WITH US AT SENTENCING, AT PAGE 2149 AT RECORD AT SENTENCING, THE STATE AGREE THAT GRAND THEFT SHOULD NOT BE INCLUDED IN THE SCORE SHEET AND THAT THERE SHOULD BE NO ADJUDICATION FOR THE GRAND THEFT.

THE TRIAL COURT AGREED AND DID NOT ORDERLY PRONOUNCE THE SENTFERENCE GRAND THEFT.

>> I'M ASKING YOU TO HELP US

WITH OUR JURIS PRUDENCE --  
JURIS PRUDENCE SO WE ARE NOT  
COMPLICATING TRIAL JUDGE'S  
LIVES AFTER BLAKELY.

>> I THINK THE TWO ANALYSES  
DO NOT HAVE TO BE THE SAME  
BECAUSE FOR ORG -- I MEAN  
FOR DOUBLE JEOPARDY,  
ELEMENTS ARE WHAT CONTROL.  
THE LEGISLATURE HAS SAID,  
WHICH OFFENSES ARE MORE  
SERIOUS THAN OTHERS.  
FIRST DEGREE, SECOND DEGREE,  
THIRD DEGREE.

>> MAYBE YOUR ANSWER TO  
JUSTICE CANTERO WOULD BE,  
MAYBE IT'S EASIER TO LOOK AT  
THE ELEMENTS AND LOOK AT ONE  
WITH LESSER ELEMENTS AND  
MAYBE THAN FIND OUT WHAT THE  
RANGE OF SENTENCES ARE?

>> I THINK ALSO THE  
DEFENDANT HAS A RIGHT AT THE  
BEGINNING OF THE A CASE WHEN  
HE'S CHARGED TO UNDERSTAND  
THE SERIOUSNESS AND THE  
COMPARATIVE SERIOUSNESS OF  
THE CHARGES THAT ARE PENDING  
AGAINST HIM OR HER.

AND WHAT WE ARE SAYING HERE  
IS THAT YOU CAN'T KNOW UNTIL  
THE END OF THE DAY WHEN THE  
HAS DECIDED WHICH SENTENCING  
ENHANCEMENTS IF RIGHT BE  
SEEKING WHEN ALL THESE  
COLLATERAL FACTORS ARE  
FACTORED IN, THAT'S WHEN  
YOU'RE GOING FIND OUT WHICH  
CHARGES ARE THE MOST  
SERIOUS?

IT CANNOT BE THAT  
COMPLICATED.

IT CANNOT BE THAT EVERY  
SCORE IS GOING TO HAVE TO BE  
RECOMPUTED IN VARIOUS  
DIFFERENT WAYS, PUT THIS ONE  
ON TOP, PUT THIS ONE ON TOP.  
IT CANNOT BE THAT  
COMPLICATED FOR DOUBLE  
JEOPARDY PURPOSES.

>> WHAT DO YOU THINK IS  
REALLY WRONG WITH THE WAY  
THE SECOND DISTRICT DID IT?  
THE SECOND DISTRICT SAID WE

ARE NOT GOING TO GO THROUGH THIS ANALYSIS.

WE'RE REMANDING THIS TO THE TRIAL JUDGE.

THE TRIAL JUDGE IS THE ONE WHO'S GOING TO HAVE TO REDO THE RESENTENCING SO LET THE TRIAL JUDGE DECIDE.

WHICH OF THESE IS THE LESSER OFFENSE AND GO ON.

>> WHAT IS WRONG WITH THAT APPROACH?

>> BECAUSE THIS IS A QUESTION OF LAW.

AND THAT IS WHY A DEFENDANT APPEALS TO THE DISTRICT COURT OF APPELLATE.

RESOLVE THESE QUESTIONS OF LAW.

REVERSE MY CONVICTIONS, RESOLVE THE JUDGMENT.

I DON'T UNDERSTAND WHY A DISTRICT COURT WOULD REFER QUESTIONS OF LAW TO THE LOWER COURT.

THAT'S WHAT I THINK IS WRONG HERE.

I BELIEVE --

>> YOU'RE ALMOST OUT BUT WE'LL GIVE YOU A COUPLE OF MINUTES.

>> THANK YOU.

>> YES, MA'AM?

>> MAY IT PLEASE THE COURT I'M ANNE WEANER AND I REPRESENT THE STATE.

WE STAND BEFORE YOU WITH THE SAME QUESTIONS FIRST JUSTICE CANTERO THE CONFLICT JURISDICTION THAT WE ARE BEFORE THIS COURT ON, THERE WOULD NOT APPEAR TO BE A CONFLICT JURISDICTION IN THIS CASE, AND I WOULD CONTINUE TO ARGUE THAT.

>> WOULD YOU TAKE ON THE VERY LAST COMMENTS OF YOUR OPPONENT HERE BECAUSE I'M HAVING GREAT DEAL OF DIFFICULTY WITH THE CONCEPT OF TAKING WHAT I PERCEIVE TO BE AN ISSUE OF LAW AND DECIDING THIS AND HAVING IT TURP INTO AN ISSUE OF FACT

BACK IN THE TRIAL COURT BY  
THIS SKEP OF FIGURING OUT --  
SEEM OF FIGGING OUT IF WE DO  
IT THIS WAY WE CAN FIND A  
MORE SEEIOUS SENTENCE BUT IF  
WE DO IT THIS WAY, IT WILL  
TURN OUT THAT WE'VE GOT MORE  
LEGAL CHAMELEONS IN OUR  
SYSTEM THAN JUST HOMESTEAD.  
SO, HELP ME BECAUSE THAT'S  
VERY APPEALING TO ME.  
THAT IS THAT THE COURTS, AND  
ESPECIALLY THE APPEALS  
COURTS HAVE AN OBLIGATION TO,  
TO TELL THE TRIAL COURTS  
WHAT THE LAW IS, AND CLARIFY  
THAT SO THAT EVERYBODY IS ON  
THE SAME PAGE, AND, AND,  
THAT THIS IS A CONCEPT WHICH  
SHOULD BE DECIDED AS A  
MATTER OF LAW, AND THEN  
WHATEVER THE, THE,  
CONSEQUENCES ARE, AFTER THAT,  
YOU KNOW, SO BE IT.  
NOT THE OTHER WAY AROUND.  
THAT --

>> YOUR HONOR.

>> FIGURING OUT WHAU THE  
GREATER -- THAT IF YOU LET  
US DO IT THIS WAY, WE  
ACTUALLY CAN PUNISH THE  
DEFENDANT MORE STRONGLY.

>> YOUR HONOR, IN THE REALM  
OF REALITY AS IT STANDS  
TODAY, IN SENTENCING, OUR  
LEGISLATURE HAS SEEN FIT TO  
INCREASE PENALTIES TO  
ENHANCEMENT.

WE HAVE SPECIAL ENHANCEMENTS  
WHICH ARE SOMETIMES  
DISCRETIONARY AND SOMETIMES  
ARE NOT.

THAT COME INTO PLAY BASED ON  
THE INDIVIDUAL THAT STANDS  
BEFORE THEM NOT SO MUCH AS  
THE CRIME THAT THEY ARE  
COMMITTING.

>> BUT ISN'T THAT THE TAIL  
WAGGING THE DOG THEN?  
IN OTHER WORDS, IF WE GO  
INTO ALL THOSE NUANCES OF  
SENTENCING, AND YOU KNOW, BY  
THE WAY, WE CAN ADD AN EXTRA  
FEW YEARS IF WE FIND THAT

THESE CIRCUMSTANCES OCCURRED  
OR OR WHATEVER AND WE'RE  
LETTING THAT DISTURB WHAT IS  
A TRADITION ISSUE OF LAW.

>> YOUR HONOR, WITH ALL DUE  
RESPECT, RIGHT NOW WITH THIS  
PARTICULAR CASE BEFORE THE  
COURT, AND THE PROBLEM WITH  
THIS PARTICULAR CASE BEFORE  
THE COURT IS IT IS A VERY  
SMALL NICHE KIND OF ISSUE  
WITH A DOUBLE JEOPARDY ISSUE  
WHERE THE LEGISLATURE CREATE  
AN UMBRELLA OFFENSE TO  
INCREASE THE PENALTIES ON A  
TRADITION -- ON GRAND THEFT.  
IN FACT, IT WAS REFERRED TO  
IN ONE OF THE OPINIONS I  
BELIEVE IT WAS CHERRY OUT OF  
THE SECOND ZIRKT AS  
AGGRAVATED THEFT WHAT THE  
LEGISLATURE INTENDED TO  
PUNISH SOMEBODY IMPOSE A  
GREATER PUNISHMENT FOR --  
>> FOR THE ORGANIZED FRAUD.  
>> FOR THE ORGINIZED FRAUD  
BASED ON THEIR REPEATED  
GRAND THEFT.

>> SO WHY IS IT -- IF THE  
LEGISLATURE INTENDED TO  
ORGANIZE FRAUD TO BE THE  
UMBRELLA SENTENCE, SO WHY  
ISN'T THAT THE GREATER  
OFFENSE?

>> BECAUSE IT DEPENDS -- YOU  
NEED ONLY TWO GRAND THEFTS  
TO SHOW THE PATTERN OF  
ACTIVITY FOR ORGANIZED  
FRAUD.

IN THIS CASE -- IT'S USUALLY  
CHARGED THIS WAY BUT IN THIS  
CASE WE HAVE SIX GRAND  
THEFTS AND DUE TO A MISTAKE  
OF FACT IN THE SECOND  
DISTRICT OPINION BUT IF WE  
GO ON THE SECOND DISTRICT  
ASSUMPTION THAT THEY WERE  
ALL THIRD DEGREE FELONIES,  
THE PRESWRUMTION WAS  
ANYTHING UNDER THE UMBRELLA  
WOULD BE LESSER BUT IN THIS  
CASE AND GOING FORWARD NOT  
UNDER THE 1994 GUIDELINES SO  
MUCH BUT, THEY ARE

THIRD-DEGREE FELONIES.  
EACH ONE HAS THE POTENTIAL  
PENALTY OF FIVE YEARS IN  
PRISON.

THE FIRST DEGREE FELONY --  
>> EVEN THOUGH THERE WAS A  
POTENTIAL FIVE YEARS FOR  
EACH ONE OF THOSE, UNDER THE  
GUIDELINES APPLICABLE TO  
THIS, HE WOULD NOT GET FIVE  
YEARS.

FOR EACH OF THEM.

>> NO, YOUR HONOR.

>> OKAY.

SO I'M -- I'M HAVING A HARD  
TIME WHEN YOU TALK ABOUT  
ABOUT UMBRELLA SENTENCE THAT  
THAT WOULDN'T REALLY ANSWER  
THE QUESTION IN THIS CASE.

>> IT WOULD NOT ANSWER THE  
QUESTION IN THIS CASE  
PRIMARILY BECAUSE THE, THE  
IDEAS IN THE WHOLE DOUBLE  
JEOPARDY SCHEME, YOUR HONOR,  
WITH ALL DUE RESPECT, IS  
THAT THE DEFENDANT STANDS  
BEFORE THE COURT AND IS NOT  
SUFFICIENT TO THE EVIDENCE  
ON EITHER COUNT STANDS  
BEFORE THE COURT CHARGED  
WITH TWO CRIMES THAT CAN'T  
STAND AT THE SAME TIME.  
WE NEED TO PUNISH FOR ONE.  
NOW, WHEN WE LOOK TO WHAT  
THE LESSER OFFENSE, THE IDEA  
WAS THAT THE LESSER OFFENSE  
WOULD HAVE THE LESSER  
PENALTY.

AND I THINK THERE WAS A  
PRESWRUMTION, AN ASSUMPTION  
THAT THE STATE WOULD ALWAYS  
SEEK THE GREATER -- TO, YOU  
KNOW, SENTENCE ON THE  
GREATER OFFENSE BECAUSE THAT  
WOULD IMPOSE THE GREATER  
PENALTY.

BUT IN THIS PARTICULAR CASE,  
THAT'S NOT TRUE.

>> BUT IF WE TAKE THIS CASE,  
WHEN WE SEND THIS BACK TO  
THE TRIAL JUDGE AND TELL THE  
TRIAL JUDGE THAT THE GRAND  
THEFT ARE THE GREATER  
OFFENSES, LET'S ASSUME THAT

THE TRIAL JUDGE DECIDED THAT,  
WHAT IS THE PENALTY THAT,  
THAT TRIAL JUDGE WOULD  
IMPOSE FOR THOSE GRAND  
THEFTS?

>> THE GRAND THEFT WOULD  
PROBABLY STAY AT THE  
FIVE-YEAR SENT SNONS SO WITH  
-IF WE WENT BACK AND THE  
TRIAL JUDGE DECIDED THAT  
THET ORGANIZEDS FRAUD IS THE  
GREATER OFFENSE, WHAT IS THE  
PENALTY THAT?

>> FIVE YEARS.

>> SO IN THIS CASE, IT  
REALLY -- IT DOESN'T MAKE  
ANY DIFFERENCE?

>> IT MAKES NO DIFFERENCE.

>> ONE OF THOSE -- SO  
THERE'S GOT TO BE SOME KIND  
OF ORGANIZED WAY TO DO THIS.  
TRIAL JUDGES JUST HAVE --  
WHETHER OR NOT ONE OR THE  
OTHER IS A GREATER OFFENSE  
IN TERMS OF -- BASED ON,  
OKAY, IF I TAKE THE FIVE  
OFFENSES, I CAN GIVE THEM  
THIS.

IF I TAKE THE ONE OFFENSE, I  
CAN GIVE HIM THIS S. THAT  
THE RIGHT WAY TO DECIDE  
THIS?

>> YOUR HONOR, WITH ALL DUE  
RESPECT, THERE'S NO REASON  
WHY THAT HAS TO BE THE  
SENTENCE.

WE JUST KNOW THAT ONE HAS TO  
BE VACATED.

WHY DOES IT HAVE TO BE THE  
LESSER?

WHY DOES IT HAVE TO BE THE  
GREATR?

>> WHY ISN'T THE ANSWER TO  
YOUR DILEMMA PROSECUTORIAL  
DISCRETION?

AND THAT IS THAT IF THE  
PROSECUTION KNOWS THEY'VE  
GOT A GOOD CASE TO PROVE A  
NUMBER OF THE GRAND THEFTS,  
AND THEY KNOW COMING IN THAT,  
BOY, THIS IS THE WAY WE CAN  
GET A GREATER PENALTY, AND  
GET THIS PERSON OFF THE  
STREETS OR WHATEVER, THAT,

THAT'S THE WAY WE'LL CHARGE THEM.

THAT IS, WE'RE GOING TO CHARGE THEM REALISTICALLY IN THE WAY THAT WE HAVING STUDIED, YOU KNOW, EACH OF THESE OFFENSES AND EVERYTHING, AND WHAT THE SENTENCING ELEMENTS OR CONSIDERATIONERIZE ARE, AND SO, IT CAN STILL ACCOMPLISH WHAT YOU'RE TALKING ABOUT BY USE OF PROSECUTORIAL DISCRETION, AND BOY, THE, YOU KNOW, THE DEFENDANT CAN'T COMPLAIN ABOUT THAT. THAT'S THE LAW ALLOWED THE

--

>> CLAIMANT EITHER WAY. WE HAVE SUFFICIENT EVIDENCE TO PROVE ANY OF THIS, BUT IN THE -- WHAT WE DID WAS CHARGE SIX INDIVIDUAL GRAND THEFTS BASED ON INDIVIDUAL VICTIMS.

WE THEN CHARGED THE PREDICATE ACT, THE SAME SIX, ON THE ORGANIZEDS FRAUD. WHEN WE -- IF WE HAD LOST ONE OF OUR GRAND THEFTS OR TWO OR THREE OF THE GRAND THEFTS, IF THE JURY WERE TO HAVE FOUND THAT FOUR OF THOSE GRAND THESTSS WERE INSUFFICIENT, BUT FOUND TWO WERE STILL SUFFICIENT, WE STILL THE ORGANIZED FRAUD, YOUR HONOR, WITH ALL DUE RESPECT.

>> NOW WE'RE TAKING ABOUT HAVING OUR CAKE BUT EATING IT TOO.

>> WELL, YOUR HONOR, IT'S STILL THE SAME OFFENSE.

>> NOT -- TO FOLLOW THE LAW.

>> SEPARATE ORGANIZED FRAUD.

>> NOT IF THIS IS AN ISSUE OF LAW.

>> MY CONCERN IS THAT ALTHOUGH I DON'T SEE THE CONSTITUTIONAL VIGS -- VIOLATION AND I THINK MS. PAUL CONCEDED THAT, SENTANTSING HAS BECOME

CLEARLY, I WAS TELLING JUSTICE CONTAROT TODAY, HE COMPARED IT TOO A FAMILY TREE, BUT A DYSFUNCTIONAL FAMILY TREE UNDER BLAMELY. BUT WHAT IS THE GUIDE THE TRIAL COURT IN WHICH OFFENSE IS VACATED.

HERE TO FOR WE HAVE HAD A SIMPLE THING FOR THE TRIAL COURTS TO FOLLOW.

JUST THIS NICHE OF SENTANTSING, WHICH IS YOU VACATE THE LESSER OFFENSE, WHICH IS THE ONE THAT HAS THE LESSER ELEMENTS, INWE START SAYING, WELL, THE TRIAL JUDGE IN THIS CASE COULD VACATE THE, YOU KNOW, ORGANIZED FRAUD IN OTHER ANOTHER CASE, THE THEFT, IT SEEMS TO ME THAT WE'RE GOING TO HAVE A DISPARITY JUST ON THIS ISSUE IN SENTENCING, THAT'S GOING TO BE VERY HARD FOR THE APPELLATE COURTS TO APPLY A STANDARD RULE OF LAW.

SO THAT'S NOW MY CONCERN IS THAT WE'RE NOT REALLY GOING TO HAVE AT LEAST, ON THIS THIS, A CONSISTENT RULE OF LAW, AND WE'RE GOING TO JUST END UP CREATING MORE CONFUSION ON THIS.

WHAT'S THERE ARE ANSWER TO THAT?

>> THE ANSWER IS, YOUR HONOR, THAT THERE IS NO NEED FOR THE APPELLATE COURTS TO DETERMINE THE LESSER OR GREATER IN THEIR RULING.

WHERE WE HAVE -- THERE'S NO SUFFICIENCY OF THE EVIDENCE. IT IS NOT A LESSER INCLUDED OFFENSE.

IN THOSE CASES IT WOULD BE AN OBVIOUS ONE BUT IN CASES SUCH AS THIS, WHY DOES THE APPELLATE COURT HAVE TO ENGAGE IN THIS AT ALL? BECAUSE THERE ARE TOO MANY FACTUAL ISSUES AND THE APPELLATE COURT'S ROLE IS

NOT ONE TO MAKE FACTS AND THAT'S WHERE WE'RE PUTTING THE APPELLATE COURT. WHY IS THE APPELLATE COURT GOING TO SIT ON ANY CASE AND DETERMINE WHICH ONE NEEDS TO BE VACATED?

92 BECAUSE WHAT MS. PAUL IS ADVOCATING FOR AND IF THERE'S A CONFLICT WHY THERE'S A CONFLICT IS BECAUSE BEFORE THIS IT WAS A PURE QUESTION OF LAW, WHICH IS YOU VACATE THE OFFENSE WHICH HAS THE LESSER ELEMENTS, WHICH IS THE, THE DOUBLE JEOPARDY VIOLATION. AND THAT'S THE END OF IT. THAT'S A PRETTY -- ONE THAT EXISTS WHICH DOESN'T EXIST VERY OFTEN UNDER BLOCKBURGER.

MOST OF THEM, THERE ARE DIFFERENT OFFENSES. YOU VACATE THE ONE THAT'S LESSER.

THAT'S TO ME A PRETTY SIMPLE RULE OF LAW AND WE ARE JUST GOING TO COMPLICATE THIS ONE AREA WELL THEY CAN PICK IT ONCE THEY FIGURING OUT WHAT THE SENTENCING POTENTIALERIZE FOR EACH ONE.

I -- SO THAT'S -- SO WE'RE NOT ASKING TRIAL -- WE'RE SAYING, SHOULDN'T THE APPELLATE COURT JUST KEEP THAT RULE OF LAW THAT'S EXISTED SAID UP UNTIL THIS TIME.

>> BUT IF WE'RE LOOKING TO THE LESSER, I GUESS THEN WE WOULD GO BACK, AND WE ARE STANDER HERE ON THE COAT TAILS OF SAUNDERS GOING FORWARD TRYING TO FIGURE OUT WHAT THE LESSER MEANS, DETERMINING THE ISSUE OF LESSER.

>> STANDARDS INCLUDE LESSER INCLUDED SO LET'S TRY TO STICK TO THAT THIS ONE SAYS THE LESSER, WE'RE TALKING ABOUT IS THE ONE THAT HAS

THE LESS ELEMENTS.  
DO YOU COMPARE AND ISN'T THE  
ISSUE THE CONFLICT ISSUE, DO  
YOU QUM PAIR FOR A LESSER  
FOR DOUBLE JEOPARDY,  
VIOLATION, DO YOU COMPARE  
THE ELEMENTS OR DO YOU  
COMPARE THE PUNISHMENTS?  
ISN'T THAT THE QUESTION WE  
HAVE TO DECIDE?

>> THE QUESTION S WHETHER WE  
DECIDE, I WOULD SAY WE GO TO  
THE PUNISHMENT, THE  
POTENTIAL --

>> BUT THAT'S -- ANDMIST  
POHL IS SAYING WE GO TO THE  
ELEMENTS SO WE HAVE A  
CRYSTAL CLEAR DICHOTOMY THE  
STATE IS SAYING LEAVING IT  
TO THE TRIAL COURTS TO SAY  
WHICH IS THE HARLING RGSER  
JUDGMENT AND MS. POHL IS  
SAYING KEEP IT SIMP AND  
COMPARE IT TO THE ELEMENTS.  
IS THAT IN THE NUTSHELL  
WHERE YOU DISAGREE WITH  
MS. POHL.

>> YES, YOUR HONOR.

>> WELL LET ME -- AS I READ  
YOUR BRIEFS, THE, THE  
ULTIMATE POSITION OF THE  
STATE IS THAT IN THIS  
SITUATION, THE DECISION  
REALLY SHOULD BE MADE BY THE  
STATE'S ATTORNEY.

>> YES, YOUR HONOR.

>> AS TO -- NOW I UNDERSTAND  
WHY THE STATE'S ATTORNEY  
WOULD CHARNEL ALL OF THESE  
AND GO FORWARD AND PROVE  
THEM.

BUT ONCE IT COMES BACK AND  
AS YOU HAVE CONCEDED THAT  
THE THERE WOULD BE A DOUBLE  
JEOPARDY VIOLATION TO ALLOW  
ALL OF THESE TO STANDS.  
THAT ISN'T THE STATE'S  
ATTORNEY STILL IN CHARGE OF  
WHICH ONES CAN GO FORWARD  
AND --

>> IF THIS HAD BEEN CAUGHT  
AT THE TRIAL LEVEL BEFORE  
SENTENCING, THERE WOULD'VE  
BEEN NO DOUBT THAT THE STATE

ATTORNEY'S OFFICE WOULD'VE BEEN THE BUDDY TO DECIDE AND IT IS THE STATE'S POSITION THAT IN RETURNING IT TO THAT POSITION BEFORE SENTENCING, WE SHOULD GO BACK TO THE STATE'S ATTORNEYS OFFICE AND ALLOW THEIR INPUT ON THIS BECAUSE IT IS A FACTUAL MATTER.

WE HAVE AN INDIVIDUAL THAT IS EMBLETHED IN EACH COMMUNITY THAT STANDS FOR THE VALUES OF EACH COMMUNITIES AND THEY'RE THE ONES THAT CHARGE THESE CRIMES AND THEY'RE THE ONES THAT KNOW IN SAESH CASES SUCH AS THIS ONE, RESTITUTION IS A MAIN CONCERN.

>> IN REALITY, IN ALMOST EVERY INSTANCE, THE STATE'S ATTORNEYS ARE STILL -- THE CAPTAIN OF THE SHIP. AND THIS TYPE OF SITUATION

--

>> YOUR HONOR, BECAUSE BACK TO THE TRIAL COURT, THE STATE'S ATTORNEY'S OFFICE WILL HAVE A SAY IN --

>> WELL, BUT, AS YOU JUST SAID, WHEN THE JURY COMES BACK,,

>> RIGHT.

>> THE STATE'S ATTORNEY CAN, CAN, CAN, DIRECT.

WHAT'S GOING TO TAPPEN AT THAT POINT.

>> YES, YOUR HONOR.

>> WELL, THEN THAT'S --, AND THEN THAT'S A MORE HONEST ANSWER TO THE WHAT WILL HAPPEN IN THE FUTURE, BUT WHAT YOU'VE BEEN SAYING IS LET THE TRIAL JUDGE DECIDE AND SO LET'S GET BACK TO WHERE WE ARE HERE, WHICH IS NOBODY'S SAYING THAT IN A NORMAL CASE YOU CAN'T DISMISS WHATEVER CHARGE YOU WANT TO DISMISS.

BUT IF IT GETS TO WHERE, WHERE THE JUDGE IS DECIDING

THE ISSUE, THE JUDGE OUGHT TO HAVE SOME CLEAR CUT GUIDELINES AND WHY NOT STICK TO THE COMPARISON OF THE ELEMENTS?

SO YOU STILL HAVE IN PROBABLY 99% OF THE SITUATIONS THIS -- YOU KNOW, THIS -- THE STATE ATTORNEY WILL HAVE THE ULTIMATE -- THE SAY.

>> YES, YOUR HONOR, ULTIMATELY, THE STATE'S ATTORNEY WILL MORE THAN LIKELY BECAUSE THESE DO GET CAUGHT PRIMARILY BEFORE THEY GO TO SENTENCING.

WHEN YOU GET THE DOUBLE JEOPARDY ISSUES AND THEY SHOULD -- THIS SHOULD HAVE BEEN CAUGHT BEFORE IT WENT TO SENTENCING BUT --

>> MS. POHL SAID, MAYBE I MISUNDERSTOOD HER ARGUMENT BUT I THOUGHT SHE SAID AT ONE POINT THAT THE STATE SAID THAT THESE GRAND THEFTS WERE THE ONES THAT DID NOT GET SENTENCED ON?

>> THE IDEA WAS THAT IT WAS -- IT WAS GOING TO RUN FIVE YEARS CONCURRENT ON THE ORGANIZED FRAUD -- IT WAS ALL GOING CONCURRENT WITH 15-YEAR SENTENCE ON RACKETEERING AND IT WENT -- WHEN WE GOT TO THAT POINT, THE STATE ATTORNEY'S OFFICE UNDER THE GUIDELINES WE KNEW WE HAD A FIVE-YEAR -- IT RAN FIVE YEARS CONCURRENT FOR ALL SEVEN OFFENSES.

IT -- IT WASN'T A -- THERE WAS NO -- THERE WASN'T GOING TO BE ANY CHANGE IN THE SENTENCING BASED ON THE GUIDELINES BECAUSE THIS WAS A SCORE SHEET -- I MEAN A GUIDELINES ISSUE.

BECAUSE OF THE BAIT OF THE OFFENSES.

BUT IN THE FUTURE THEY COULD RUN THESE CONCURRENTLY. CONSECUTIVELY, AND THIS --

IF YOU LOOK TO THAT, THEN WE HAD A 40-YEAR SENTENCE ON -- FIVE-SECOND DEGREE FELONIES, ONE -- I MEAN FIVE THIRD DEGREE FELONIES ONE SECOND DEGREE FELONY UNDER THE GRAND THEFT WHICH POSED A POTENTIAL PENALTY OF 40 YEARS VERSUS THE ONE --

>> BACK TO WHAT WE WERE JUST TALKING ABOUT, IF THAT WERE -- IF THE STATE THOUGHT THAT THEY WERE GOING TO GET CONSECUTIVE, THEN THEY WOULD -- AT THAT POINT.

>> YES, YOUR HONOR, AND IN THIS CASE, WE HAD THE RACKETEERING, THE RICO OFFENSE, THE JURY CAME BACK GUILTY ON THE RICO AND HE WAS SENTENCED UPWARD DEPARTURE ON THAT SO WHAT --

>> WHAT IS HIS SENTENCE?

>> 15 YEARS FOR THE RACKETEERING AND THE FIVE YEARS FOR -- WELL, THE MORTGAGE FRAUDS WERE REVERSED ON THE CABRERA ISSUE AND THE JURY INSTRUCTIONS AND THE CONSPIRACY WAS REVERSED. SO WHAT WE HAD WERE SIX PREDICATE ACTS OF MORTGAGE FRAUD AND SIX PREDICATE ACTS OF GRAND THEFT FOR THE ORGANIZED FRAD AND WHEN WE LOST THE MORTGAGE FRAUD WE HAD THE GRAND THEFT STILL VIABLE AT THAT TIME.

WE HAD A -- AFTER THE NOTICE OF APPEAL WAS FILED, THE TRIAL COURT DID ASSIGN, IF WHAT -- -- I'M -- I'M HAVING A DAY.

THE --

>> THAT'S ALL RIGHT WE ALL DO AT TIMES.

>> THE VICTIM WAS THERE.

>> EVERY NOW AND THEN YOUR BRAIN --

>> I'M JUST THINKING WHAT THE PUBLIC MUST THINKING TO LISTENING -- HOW COMP LJTED WE'VE MADE THING --

COMPLICATED WE'VE MADE THINGS.

SO HE'S GOT A 15 YEAR SENTENCE.

>> 15 YEARS.

>> BUT FIVE YEARS ON EVERYTHING, AND MORE ON THE RACKETEER FIGURE IT GOES -- >> THE RACKETEERING IS STILL -- IT HAS BEEN SENTENCED AND AFFIRMED AND WE HAVE -- WHAT WE'RE DOING IS GRAND THEFT FOR INDIVIDUAL VICTIMS AND ORGANIZED FRAUD WITH THE REMAINING FIVE -- I MEAN, WITH THE REMAINING SIX GRAND THEFTS.

>> DOES IT MAKE ANY DIFFERENCE IN THIS CASE AS CHARGED BY THE STATE THAT YOUR STATE COULDPUSC DONE IT DIFFERENT WAYS BUT AS FAR AS THE ORG UNDER FRAUD, THE UMBRELLA OFFENSE, THE PREDICATE OFFENSES LISTED UNDER THAT INCLUDED ALL THE MORTGAGE FRAUD AND ALL THE GRAND THEFT CHARGES.

>> YES, YOUR HONOR.

>> SO THE UMBRELLA WAS THAT -- THAT WAS BUILT BY THE STATE IN ITS INFORMATION INCLUDED ALL OF THESE OFFENSES?

>> YES, YOUR HONOR.

>> AND SO THE, THE FRAUDULENT SCHEME WAS WHATEVER THE JURY FOUND AS TO THOSE INDEPENDENT FRAUDS AND THOSE INDEPENDENT GRAND THEFTS.

>> RIGHT, AND THEY WERE NOT ASKED TO MAKE ANY INDIVIDUAL FINDINGS AS TO WHICH VICTIMS THEY WERE FINDING, YOU KNOW -- THEY WERE LISTED ALL THE PREDICATE ACTS SO WE HAVE ALL THE VICTIMS LISTED AND ONE OF OUR, OUR CONCERNS IN THIS PARTICULAR CASE, THE UNDERLYING FACTS IS MOST OF OUR VICTIMS WERE ELDERLY AND SOME OF THEM DIED DURING THE COURSE OF THIS.

AND WE DID NOT KNOW --  
UNFORTUNATELY, THEY WERE  
PRAYING ON ELDERLY VICTIMS.  
THIS WAS A HOME IMPROVEMENT  
THING WHERE THEY HAD  
TELEMARKETERS WHO WERE  
SPECIFICALLY TARGETING  
ELDERLY WIDOW AND WHEN WE  
WENT TO TRIAL WE DIDN'T KNOW  
WHICH ONE OF OUR VICTIMS  
WOULD ACTUALLY BE PRESENT  
FOR THIS AND WHEN WE WERE  
GOING FORWARD WITH IT, WE  
DIDN'T KNOW HOW MANY WOULD  
STILL BE ABLE TO TESTIFY AT  
TRIAL.

SO WE DID NOT KNOW WHICH  
COUNTS WE WOULD BE ABLE TO  
PROVE AT TRIAL.

IT WAS A VERY DIFFICULT, IT  
WAS A LONG CASE.

AND WE HAD, LIKE, LIKE I  
SAID, THE VICTIMS WERE OF  
VARIOUS DEGREES OF AGE AND  
INFIRMITY.

AND SOME OF THEM ARE NO  
LONGER WITH US.

SO WHEN WE LOOK TO THE  
COLLATERAL CONSEQUENCES OF  
REPAYING OUR VICTIMS, THAT  
WOULD'VE BEEN A  
DISCRETIONARY, YOU KNOW, ONE  
OF THE REASONS WE LOOK TO  
CHARGING THIS WAY WAS  
BECAUSE OF THE NUMBERS THAT  
WE HAD.

AND YOU HAD NO FURTHER  
QUESTIONS.

>> OKAY.

THANK YOU VERY MUCH.

MR. POHL, GOING TO GIVE YOU  
A COUPLE OF MINUTES.

YOU ARE BEYOND YOUR TIME,  
BUT, OUR ASSISTANCE, I THINK  
YOU LED YOU BEYOND SO LET ME  
GIVE YOU A COUPLE OF  
MINUTES.

>> THANK YOU.

I WOULD LIKE TO CLARIFY A  
COUPLE OF THINGS THAT WERE  
SAID, IN INFORMATION, COUNT  
16, WHICH IS ORGANIZED FRAUD  
COUNT DOES NOT LIST A SERIES  
OF PREDICATE AX.

IT'S JUST A SINGLE PARAGRAPH THAT TALKS ABOUT SCHEME TO DEFRAUD VARIOUS INDIVIDUALS AND TO OBTAIN PROPERTY FROM THEM SO IT DOESN'T HAVE ENUMMERATED PREDICATE ACTS. ALSO, AT SENTENCING, THE STATE DID ELECT TO KEEP THE ORGANIZED FRAUD AND TO NOT HAVE AN ADJUDICATION IMPOSED ON GRAND THEFT AND I WOULD REFER THE COURT TO VOLUME 12 OF THE RECORD 2849 WHERE THE PROSECUTOR SAID WE'VE TAKEN THAT DOUBLE JEOPARDY ISSUE INTO ACCOUNT, QUOTED QUOTE, WE TOOK THE GRAND THEFT CHARGES OUT OF THE SCORE SHEET, AND THAT WAS THE UNDERSTANDING, AT SENTANCING, THAT THE GRAND THEFT WOULD NOT BE PART OF THE SENTENCE OF THE PAGE.

>> SO THE -- DECIDED TO SENTENCE ON THOSE ANYWAY?

>> INI THINK THERE WAS JUST AN ERROR WHERE -- WHEN THE WRITTEN JUDGMENT WAS PREPARED BECAUSE THE ORAL PRONOUNCEMENT OF THE SENT TLNS WAS NO PRONOUNCEMENT OF SENTANTS ON THE GRAND THEFT.

>> AND SO REALLY THIS IS A VERY UNIQUE SITUATION. THAT WE'RE CONFRONTED WITH.

>> IT IS, AND THAT TAKES ME WHAT TO WHAT I WOULD JUST LIKE TO MAKE MY FINAL ARGUMENT AND THAT IS ONE CANNOT HAVE CONFIDENCE IN THE REMAINING CONVICTIONS IN THIS CASE.

THIS WAS A CASE THAT OVER 1,000 PAGES OF EXHIBITS WITH, I DON'T KNOW EXACTLY HOW LONG THE INFORMATION IS BUT IT MUST BE 20 PAEJS LONG WHICH THE JUDGE DID NOT EVEN READ THE RACKETEERING INSTRUCTION TO THE JURY. HE JUST HANDED HIM 4 PAGES OF SINGLE SPACED TEXT AND SAYS YOU CAN READ THAT. I CAN'T UNDERSTAND THE

RACKETEERING LAW.

>> BUT IS THE RACKETEERING  
ISSUE BEFORE THE COURT?  
WE'RE HERE ON THE ISSUES OF  
THE GRAND THEFT AND  
ORGANIZED FRAUD AND I DON'T  
SEE ANY ARGUMENT BEING MADE  
THAT THERE WAS SOMETHING  
WRONG WITH THE RACKETEERING.

>> I DIDN'T HAVE AN  
OPPORTUNITY BEFORE ALTHOUGH  
IT IS IN OUR BRIEF AND THE  
COURT ALLOWS D US TO BRIEF  
ISSUES AND IN THE  
JURISDICTIONAL BRIEF WE  
RAISED BOTH POINTS.  
INITIALLY WE HAD A VERY  
TECHNICAL ARGUMENT THAT THE  
RACKETEERING CANNOT SURVIVE  
WHILE AT THE MOMENT THE  
JUDGE -- OR THE COURT BELOW  
HAS REVERSED ALL ROST  
PREDICATE TACTS.

AND -- ALL OF THE  
PRECONNECT ACTS SO THAT WAS  
OUR TECHNICAL ARGUMENT.  
BUT IF YOU LOOK AT THIS, IT  
WAS THAT ONE OF THE MOST  
COMPLICATED SCENARIOS THAT  
THE COURT BELOW SAID AT  
LEAST WITH REGARD TO THE  
MORTGAGE FRAUD THAT THE JURY  
WAS HOPELESSLY -- WOULD'VE  
BEEN HOPELESSLY CONFUSED  
LISTENING TO THE  
INSTRUCTIONS AND I THINK  
THAT'S TRUE FOR VIRTUALLY  
EVERY OFFENSE THAT  
CONSPIRACY HAS BEEN REVERSED  
FOR NEW TRIAL, THE MORTGAGE  
FRAUD HAS BEEN REVERSED FOR  
A NEW TRIAL, AND I  
RESPECTFULLY SUGGEST THAT  
THE RACKETEERING SHOULD BE  
REVERSED.

>> AT TIMES OUR LAW IS QUITE  
COMPLICATED IS IT NOT?

>> THANK YOU I THINK YOU'VE  
EXHAUSTED YOUR TIME.

WE THANK BOTH OF YOU FOR  
YOUR ARGUMENTS THIS MORNING  
AND WE WILL TAKE THE CASE  
FOR CONSIDERATION.  
THANK YOU VERY MUCH.