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TEXTS, LIES, AND IDENTITY THEFT: PROSECUTING COMPLEX FINANCIAL FRAUD WITH MINNESOTA’S RACKETEERING STATUTE

Thomas G. Sinas†

I. INTRODUCTION ................................................................. 1643
II. OVERVIEW OF THE MORTGAGE PLANNERS CASE ........... 1644
III. THE OFFENSE OF RACKETEERING AND ITS APPLICATION TO THE MORTGAGE PLANNERS CASE ........................................... 1652
IV. STRAIGHT—BUT NOT NECESSARILY STRAIGHTFORWARD—GUITYPLEAS .......................................................... 1655
V. INTO THE ABYSS: MARITAL PRIVILEGE AND CONFLICT OF LAWS ................................................................. 1660
VI. RANKING AND UPWARD DEPARTURES: KEEPING THE APPLES AWAY FROM THE ORANGES ...................................... 1664
VII. CONCLUSION ....................................................................... 1670

I. INTRODUCTION

In early 2010, this author was fortunate to be presented with a special opportunity: the chance to join the state’s premier prosecution office on a special assignment to prosecute mortgage loan and real estate fraud. It was both a personally gratifying and

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timely assignment. The United States was in the throes of the Great Recession—a financial crisis that, in the words of former Harvard Law School Professor Elizabeth Warren, “began one lousy mortgage at a time.”¹ Criminal prosecutors around the country were pursuing cases against individuals in the mortgage lending business whose actions helped bring about the economic implosion. And locally, the Hennepin County Attorney’s Office was in the midst of a series of successful criminal prosecutions of Twin Cities mortgage brokers, realtors, and closing agents.²

Much of the activity in mortgage fraud prosecutions, both nationally and locally, centered on loans from the subprime lending boom. Loan products that have now become infamous—“stated income,” “low doc,” and “no doc” loans—made credit too easy and attracted swarms of criminal activity. But as the Great Recession took hold, the subprime lending market evaporated, property values plummeted, and communities became awash in foreclosed homes. Criminal prosecutors working in 2010 still had a large backlog of cases from the real estate boom years. But many, including this author, wondered, would criminals adapt to the new market environment, or would mortgage fraud disappear like subprime loans? At the Hennepin County Attorney’s Office, that question was answered when prosecutors were presented with a case known as “Mortgage Planners.”

II. OVERVIEW OF THE MORTGAGE PLANNERS CASE

The Mortgage Planners case was a criminal prosecution involving two primary defendants, a husband and wife from Hudson, Wisconsin, named James Ober and Wendy Ober (a.k.a. Wendy Spinks).³ The case was named after the St. Paul-based mortgage brokerage firm that the Obers owned and operated, Mortgage Planners, Inc.

The evidence presented demonstrated that the Obers had

³ The defendants’ case numbers are Hennepin County District Court File Nos. 27-CR-11-18122 and 27-CR-11-18119.
devised a mortgage fraud scheme unlike any seen in Minnesota. The criminal complaint summarized the scheme as follows:

Complainant’s investigation reveals that from approximately June 2009 through August 2010, Defendants and their co-conspirators participated in a complex scheme to fraudulently obtain millions of dollars of mortgage loan proceeds for the purchase of distressed residential properties throughout the Twin Cities metropolitan area. Defendants’ scheme used “straw buyers” to purchase the distressed properties using mortgage loans guaranteed by the Federal Housing Administration (“FHA”) that Defendants originated through their mortgage brokerage, Mortgage Planners, Inc. In order to qualify the straw buyers for the federally-insured loans, Defendants devised a sophisticated scheme involving phony employers, bogus bank statements and paystubs, forged college transcripts, counterfeit court documents, and staged down payment gift funds. Defendants then illicitly profited from the scheme by recording against the properties sham junior mortgages that were payable to their business entities or associates. Defendants used the sham mortgages so that, upon the sale of the property, they could collect substantial kickbacks of loan proceeds through supposed “payoffs” of their sham mortgages.4

The complaint then went on to explain the intricate details of the defendants’ alleged crime. First, the complaint explained how the distressed real estate market created a crime of opportunity:

Defendants’ fraud scheme exploited a number of factors unique to the current depressed real estate market. First, Defendants targeted distressed homes that were in foreclosure. Second, Defendants’ scheme focused on a certain subset of distressed homes—foreclosed properties that had been sold at sheriff’s foreclosure sales for a fraction of the total debt owed by the homeowner. This allowed Defendants to take advantage of a technical provision of Minnesota real estate law. In Minnesota, a home is sold at a sheriff’s foreclosure sale to the highest bidder, which is typically the foreclosing lender (also known as the mortgagee). The sheriff’s sale price effectively replaces the existing mortgage on the home.

Then, through a process known as redemption, a homeowner can reclaim the property by paying the sheriff’s sale price within approximately six months of the sheriff’s sale.

Traditionally, lenders’ bids at sheriffs’ sales were equal or close to the total debt owed by the homeowner. Following the recent real estate market crash, however, many lenders have bid only a fraction of the total debt owed. In many cases, low bids by lenders have the effect of creating equity in the home—equity that equals the difference between the home’s market value and the sheriff’s sale price. For example, suppose (1) a homeowner has a $200,000 mortgage on his home that goes into foreclosure; (2) the market value of the home at the time of the foreclosure is $150,000; and (3) the lender bids only $50,000 at the sheriff’s sale. If the homeowner pays the $50,000 sheriff’s sale price (plus interest and fees) within the redemption period, the homeowner will own the home (worth $150,000) free of the previous mortgage. Thus, the lender’s low bid would have the effect of creating $100,000 worth of equity. As discussed below, Defendants not only targeted foreclosed properties with low sheriff’s sale prices but also devised a scheme to direct as personal payments to themselves nearly all of the equity created by those low sheriff’s sale prices.

The third factor of the depressed real estate market that Defendants exploited was homeowners’ ignorance of the foreclosure process. That is, many homeowners were (and still are) unaware that they could redeem their homes by paying the sheriff’s sale price. Rather, homeowners reasonably believed that they were required to pay off the entire debt owed in order to keep their homes. In fact, until recently, Minnesota law perpetuated this misunderstanding by mandating disclosures to homeowners in foreclosure that erroneously stated that homeowners could redeem by paying off the total debt owed (as opposed to the sheriff’s sale price).

The final aspect of the real estate market that Defendants used to further their fraud scheme was the widespread availability of FHA-insured mortgage loans. Following the recent collapse of subprime lending, [the United States Department of Housing and Urban Development] increased the availability of FHA-insured mortgage loans in an effort to help stabilize the mortgage
market. An FHA-insured mortgage loan is funded by a bank or mortgage company but the risk of default is insured by the federal government. FHA-insured loans are also unique in that they permit eligible borrowers to purchase a home with as little as a 3.5% down payment that can be in the form of a gift from the borrower’s family. Unlike subprime loans, many of which required little or no documentation of a borrower’s creditworthiness, FHA-insured loans are subject to strict underwriting requirements and require a substantial amount of documentation in order to satisfy those requirements.\footnote{Id. at 3.}

Second, the complaint explained how the defendants used loan origination fraud (i.e., fraud in obtaining mortgage loans) as the engine to power their scheme.\footnote{Id. at 4–6.} That is, the money that the Obers stole came from loan proceeds that were used to purchase homes. “In order to facilitate the sales, [the d]efendants used a group of ‘straw buyers.’”\footnote{Id. at 4.} As the complaint described, “The straw buyers were individuals in whose names the homes were purchased but who could not, in reality, qualify for the loans for which they applied and largely did not intend to occupy or otherwise be responsible for the homes.”\footnote{Id.} The complaint also explained how the defendants recruited and often paid individuals to act as the buyers.\footnote{Id. at 5.} In many instances, after a home was purchased in a straw buyer’s name, the defendants then operated the home as a rental.\footnote{Id. at 4.}

The complaint then described the defendants’ “vast facade of lies” that was used to trick lenders into believing that the individuals applying for loans were qualified borrowers.\footnote{Id.} That facade included the creation of fictional employers and the submission to lenders of loan applications and other documents falsely stating that the borrowers worked for these employers.\footnote{Id.} The names of the fictional employers included supposed health care companies like “Bio Medical Solutions,” restaurants such as “Franconello Italian Restaurant,” and construction firms like

\begin{itemize}
\item \textit{Id.} at 3.
\item \textit{Id.} at 4–6.
\item \textit{Id.} at 4.
\item \textit{Id.}
\item \textit{Id.} at 5.
\item \textit{Id.}
\item \textit{Id.} at 5.
\item \textit{Id.}
\end{itemize}
“Heartland Paving.” The complaint described how the defendants listed bogus physical addresses for these employers and maintained separate telephone numbers for each employer. Those phone numbers were then all routed to one “phone tree” that the defendants answered to falsely verify the borrowers’ employment.

In addition, the complaint described how the defendants created a host of forged documents in order to bolster the lies in the borrowers’ loan applications. The defendants submitted to lenders bogus paystubs and bank account statements that purported to show that the borrowers earned the income stated on their loan applications. In addition, the defendants’ scheme involved the use of forged college transcripts, including transcripts from local institutions like the University of Minnesota. The transcripts were used “to falsely explain the difference between the borrowers’ previous income and their new false income from their fictitious employment.”

Furthermore, and perhaps most shockingly, the defendants’ scheme used counterfeit divorce decrees that purported to be issued by Minnesota district courts. As the complaint described, “The counterfeit decrees were used to ‘divorce’ borrowers from their existing mortgage debt. That is, the decrees included provisions that purportedly transferred the borrowers’ homes and all associated mortgage debt from the borrower to the borrower’s ex-spouse.” Some of the counterfeit divorce decrees used the names and signatures of actual Minnesota district court judges, whereas others used fictitious judges. Additionally, the complaint described the down-payment fraud component, noting first that “federal law permits borrowers obtaining FHA-insured loans to put as little as a 3.5% down payment and allows borrowers to use money gifted to them from family members for this purpose.”

The defendants fraudulently misrepresented the source of the

13. Id.
14. Id.
15. Id. at 4–5.
16. Id. at 5.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id. at 5–6.
down payment funds. “That is, Defendants represented to lenders that the gifted down payment funds were from various relatives of the borrowers . . . [who, i]n reality, . . . had no relation to the borrowers.”24 A review of bank records demonstrated that the supposed gift funds actually came from accounts controlled by the defendants and their co-conspirators.25

Third, the complaint described how the defendants used junior mortgages as vehicles for collecting illicit profits:

Defendants used a sophisticated scheme of junior mortgages to direct kickbacks of loan proceeds to themselves. This aspect of the fraud scheme involved the creation of second (and sometimes third) mortgages that were purportedly entered into between the sellers of the properties and various entities or associates of the Defendants. These junior mortgages shared similar characteristics. First, the junior mortgages were supposedly dated before the properties went into foreclosure but were not recorded against the properties until after the sheriff’s foreclosure sale. Second, the mortgage amounts were very large and roughly represented the total amount of equity in the home that had been created by the low sheriff’s sale price. Third, the mortgages were shams. That is, a review of the mortgagee’s bank records reveals that the mortgagees (i.e., the entities or associates of the Defendants) never lent money to the homeowners.

Defendants used the junior mortgages to disguise payments to themselves. As is customary at a real estate closing, the seller’s proceeds (which come from the buyer’s financing) are used to pay off the seller’s existing mortgage debt. Thus, Defendants would time the closings to occur after their sham mortgages were recorded but before the end of the redemption period. That way, the seller’s proceeds (which came from loans that Defendants fraudulently obtained in straw buyers’ names) paid off the existing sheriff’s sale price as well as the sham junior mortgages. When the sellers’ proceeds were not enough to pay the amounts supposedly owed on the sham junior mortgages, the mortgagees controlled by Defendants would send letters to the closing agent agreeing to “short” payoffs. Thus, Defendants used the sham junior

24. Id. at 6.
25. Id.
mortgages to cash out for themselves at the time of closing nearly all of the equity in the home.

The sham junior mortgages also acted as a failsafe way for the Defendants to acquire the properties for themselves if the transaction did not close. Under Minnesota law, if the homeowner does not redeem, a junior creditor can redeem a foreclosed property by paying off the senior mortgages. Thus, if Defendants were not able to structure a purchase using a straw buyer and fraudulently-obtained loan proceeds, Defendants’ sham junior mortgages gave them the ability to acquire properties with existing equity by simply paying off the sheriff’s sale price.

For the nine transactions described in this Complaint, the total amount of kickbacks paid to Defendants by way of the sham junior mortgages was over $840,000. In all but one case, the kickback for each transaction was between $63,000 and $157,000.26

Finally, although the complaint focused on the details of nine different transactions, it explained that the defendants’ scheme was much larger. Specifically, “an internal review by [a lender-victim] indicated that it issued a total of nearly $10 million in FHA-insured mortgage loans in transactions brokered by Defendants for the purchase of approximately 65 properties in Minnesota. A vast majority of those transactions have indicia of loan origination fraud . . . .”27

As the above details describe, the majority of the transactions in the defendants’ fraud scheme involved the use of straw buyers. Yet after the initial complaint was filed, evidence developed showing that the defendants’ crime involved more than willing buyers, but also the use of stolen identities. Specifically, in the months after the initial filing, law enforcement received information regarding a transaction concerning the stolen identity of a woman named “R.V.” and the purchase of a North Minneapolis home in her name. That information led to an additional amendment of the complaint that described the theft of R.V.’s identity and over $125,000 in mortgage loan financing that was used to purchase, in her name, a property located on Morgan Avenue North in Minneapolis.28

26. Id.
27. Id. at 2.
28. Second Amended Complaint at 21–23, State v. Ober, Nos. 27-CR-11-
As the amendment described, R.V. "previously resided in New Hope, Minnesota, with her husband and child before returning to [her native] El Salvador in March 2010."\textsuperscript{29} R.V.’s husband told law enforcement that he learned of his wife’s stolen identity in the spring of 2011 after receiving in the mail a disconnection notice regarding utilities for the Morgan Avenue North property.\textsuperscript{30} R.V. never lived on Morgan Avenue North, and she never purchased nor authorized anyone to purchase that home or any home in her name.\textsuperscript{31} Nevertheless, according to county property records and mortgage loan documents, the property was sold to R.V. in June 2010, three months after she had left the United States.\textsuperscript{32}

The sellers of the property “stated that they had no knowledge of any sale to R.V.”\textsuperscript{33} Rather the sellers believed that they had deeded the property in March or April of 2010, while the property was in foreclosure, to an employee of Mortgage Planners in exchange for approximately $1000.\textsuperscript{34} The property had been sold at a sheriff’s foreclosure sale, and the amount necessary to recover it from the bank was a fraction of the property’s value.

The sale of the property to R.V. was financed using an FHA-insured loan.\textsuperscript{36} A review of the loan documents showed that the information provided to the lender came from the defendants.\textsuperscript{37} The documents provided to the lender included fraudulent documents similar to those used in other transactions. They included phony paystubs from a fake employer for whom R.V. never worked, a letter from a supposed gift donor who had no relationship with R.V., and a counterfeit divorce decree from Hennepin County District Court that purported to terminate the marriage of R.V. and her husband.\textsuperscript{38} In addition, evidence seized from a search of the Obers’ Wisconsin home showed their direct involvement in the theft of R.V.’s identity. Specifically, on June 4, 2010, just before the loan was funded, but months after R.V. left the country, Wendy Ober sent James Ober the following text

\begin{quote}
29. Id. at 21.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id. at 22.
38. Id.
\end{quote}
message: “Set up that other phone for [R.V.] and i will use that to talk to the lender back and forth, have peter set it up for me under her address in new hope.”

In addition, documents seized at the Obers’ home included a U.S. Postal Service form that changed R.V.’s address to the Obers’ home as well as statements for credit cards in R.V.’s name listing the Obers’ home as the billing address.

At closing, approximately $31,500 of the sellers’ proceeds were disbursed to the Hennepin County Sheriff to redeem the property from foreclosure. Yet an additional almost $91,000 was paid to one of the Obers’ entities, “Eagle River Financial,” to pay off a second mortgage.

The second mortgage in favor of Eagle River was purportedly signed by the sellers in October 2009 but not recorded until March of 2010—approximately three months after the property had been sold at a sheriff’s foreclosure sale. The sellers, however, stated that they never gave Eagle River Financial a second mortgage on the property and that they were unaware that money had been disbursed to that entity. In short, the defendants made approximately $91,000 by structuring the sale of a home from sellers who had no knowledge of what was actually occurring to a woman who did not live in the country.

III. THE OFFENSE OF RACKETEERING AND ITS APPLICATION TO THE MORTGAGE PLANNERS CASE

In 1989, the Minnesota legislature enacted the Racketeering Influenced and Corrupt Organizations Act. The statute, often referred to as “RICO” or simply “racketeering,” was modeled after its federal counterpart.

To laypersons and many practitioners, racketeering conjures images of Mafia-style organized crime. And in its first decades, Minnesota’s racketeering statute was successfully used in prosecutions involving “traditional” organized crime such as

39. Id. (errors in original).
40. Id.
41. Id.
42. Id.
43. Id. at 22–23.
44. Id. at 23.
45. See generally MINN. STAT. §§ 609.901–.912 (2012).
as narcotics trafficking and extortion. Yet despite these associations, the Minnesota Supreme Court has stated that “our statute is not limited to drug ‘kingpins’ or major crime syndicates.” This, of course, makes sense because the statute does not limit application to a certain persona of defendant.

Rather, the essence of the offense of racketeering lies within its two key elements: an “enterprise” and a “pattern of criminal activity.” Although the statute sets forth three different modes of racketeering, all three reference the statute’s definitions of an enterprise and a pattern of criminal activity.

An enterprise is a “sole proprietorship, partnership, corporation, trust, or other legal entity, or a union, governmental entity, association, or group of persons, associated in fact although not a legal entity, and includes illicit as well as legitimate enterprises.” Simply put, an enterprise under the racketeering statute is either a formal organization or an informal group of associated persons. Furthermore, a pattern of criminal activity includes three or more “criminal acts” that share the following characteristics:

1. were committed within ten years of the commencement of the criminal proceeding;
2. are neither isolated incidents, nor so closely related and connected in point of time or circumstance of commission as to constitute a single criminal offense; and
3. were either: (i) related to one another through a common scheme or plan or a shared criminal purpose or (ii) committed, solicited, requested, importuned, or intentionally aided by persons acting with the mental

47. See, e.g., State v. Kujak, 639 N.W.2d 878 (Minn. 2002).
48. See, e.g., State v. Huynh, 519 N.W.2d 191 (Minn. 1994).
49. Id. at 195.
50. § 609.903, subdiv. 1.
51. See id.
52. Id. § 609.902, subdiv. 3. In Huynh, 519 N.W.2d at 196, the Minnesota Supreme Court held that the following three characteristics should be added to the definition of an enterprise:

1. a common purpose among the individuals associated with the enterprise; where (2) the organization is ongoing and continuing, with its members functioning under some sort of decision making arrangement or structure; and where (3) the activities of the organization extend beyond the commission of the underlying criminal acts either to coordinate the underlying criminal acts into a pattern of criminal activity or to engage in other activities.
culpability required for the commission of the criminal acts and associated with or in an enterprise involved in those activities. 53

The criminal acts (sometimes referred to as “predicate offenses”) that can comprise a pattern of criminal activity are extensive and varied. They include violent crimes such as murder, manslaughter, assault, robbery, and kidnapping. 54 They also include crimes against justice like coercion, bribery, perjury, and witness tampering. 55 And finally, criminal acts under the racketeering statute include economic crimes like concealing criminal proceeds, theft by swindle, and identity theft. 56 In this respect, racketeering is the zenith of Minnesota’s Criminal Code. Because of the wide range of crimes within the statutory definition of criminal acts comprising a pattern criminal activity, racketeering brings under one offense crimes that are otherwise unrelated. That is, so long as the criminal acts were committed by the defendant through his relationship with an enterprise, evidence of all such criminal acts falls within the ambit of racketeering. Practitioners and judges thus sometimes describe racketeering as an offense with its own joinder provision. 57

In addition to encompassing a wide variety of criminal conduct, the racketeering statute is a flexible tool because of the volume of criminal conduct it can include. Although the definition of a pattern of criminal activity requires a minimum of three criminal acts, the statute does not cap the number of crimes that can be considered within one offense. This makes racketeering an especially useful tool for prosecuting defendants who engage in prolific criminal behavior. For example, absent the racketeering statute, a defendant who commits fifty acts of coercion might be charged in fifty separate cases or with fifty separate counts. The racketeering statute gives the prosecutor the option of charging all of the conduct under one overarching charge of racketeering.

The evidence presented regarding defendants James and Wendy Ober showed that their alleged crime was well suited for racketeering. First, the evidence demonstrated that all of their

53. § 609.902, subdiv. 6.
54. Id. § 609.902, subdiv. 4.
55. Id.
56. Id.
57. For more on joinder of offenses in Minnesota, see MINN. R. CRIM. P. 17.03.
criminal acts were committed through their business, Mortgage Planners, Inc. That business was a Minnesota corporation and therefore an "enterprise" under the racketeering statute. Second, the quantity and variety of the Obers' crimes were a match for the statute's definition of a pattern of criminal activity. The evidence presented showed not only that the Obers carried out scores of fraudulent transactions, but also that the underlying criminal acts included concealing criminal proceeds, theft by swindle, and identity theft. As such, the Obers were charged with one count of racketeering in violation of Minnesota Statutes section 609.903, subdivision 1(1). That is, they were charged to have been "employed by or associated with an enterprise, to wit, Mortgage Planners, Inc., and intentionally conducted or participated in the affairs of the enterprise by participating in a pattern of criminal activity, namely, theft by swindle, identity theft, and concealing criminal proceeds." Simply stated, this offense required proof of three basic elements: (1) the existence of an enterprise, (2) the defendants' association with that enterprise, and (3) a pattern of criminal activity.

IV. STRAIGHT—BUT NOT NECESSARILY STRAIGHTFORWARD—GUilty PLEAS

As any practitioner or judge will attest, nearly all cases settle. In the few that do not, settlement is usually forced out of reach because of the parties' divergent views on the defendant's culpability. It is the rarer case, however, where settlement fails even though the parties agree that the defendant is guilty. But this was one such case.

As the complaint demonstrated, the evidence in support of the State's case was substantial and detailed. It should come as no surprise then that the defendants never asserted a claim of innocence. Nevertheless, the parties were unable to reach a settlement. Efforts at plea bargains were unsuccessful because the parties had vastly different views of the appropriate sanction for the defendants' crime. As the State declared in various filings, it believed this to be the most egregious mortgage fraud case ever prosecuted by the Hennepin County Attorney's Office and thus

60. See, e.g., State's Notice of Intent to Seek an Upward Sentencing
demanded a commensurate sentence. Suffice to say that James and Wendy Ober did not agree with the State’s assessment of their conduct.

Because the parties could not reach a plea bargain, the defendants elected to enter what is known as a “straight plea.” Simply put, a straight plea means that a criminal defendant enters a guilty plea to all counts with which he is charged without any agreement or promises from the court or the State. In most criminal cases, the mechanics of a straight plea are relatively straightforward. That is, the defendant, after waiving his constitutional rights, enters a factual basis establishing that he did, in fact, commit each element of every offense charged. The trial court then determines an appropriate sentence under the Minnesota Sentencing Guidelines.

Yet as this case demonstrated, the offense of racketeering and straight pleas are strange bedfellows. The problem lies first in the nature of the offense of racketeering. As discussed above, one commits racketeering when one engages in a pattern of criminal activity that consists of at least three criminal acts that can run the gambit from assault to perjury. In other words, one associated with an enterprise can commit racketeering by inflicting one hundred brutal beatings or telling three lies in a deposition about those beatings. And in a pure statutory sense, a factual basis in which a defendant admits to either the beatings or the lies would suffice for purposes of a guilty plea to the offense of racketeering.

In this case, the alleged pattern of criminal activity did not stretch from assaults to perjury. It did, however, include allegations of both theft by swindle and identity theft. In addition, the criminal complaint alleged that James and Wendy Ober committed dozens of fraudulent transactions. Yet in their guilty pleas, James and Wendy Ober offered much narrower views of their crime. Most significantly, both defendants refused to admit at their guilty


62. See MINN. R. CRIM. P. 15.

63. See §§ 609.902–.903.

64. See § 609.52, subdiv. 2(4).

65. See id. § 609.527, subdiv. 2.
plea that they committed identity theft involving R.V. Rather, the Obers presented factual bases that acknowledged a pattern of criminal activity consisting of only theft by swindle. In addition, the Obers initially offered factual bases that discussed only the minimum three transactions. This presented a vexing question: In a case where the State alleges racketeering through an extensive and varied pattern of criminal acts, could the defendants enter guilty pleas simply by confessing to three of the least severe acts? And, if so, how should the case proceed from that point?

The problem presented by this question was not simply theoretical. Rather, it presented serious practical considerations for sentencing. To fully appreciate why this is so, one needs some basic background on the Minnesota Sentencing Guidelines and how racketeering is treated under the Guidelines. At the risk of oversimplification, and understanding that the Guidelines have been and will be subject of much authorship, the heart of the Guidelines is the Sentencing Grid. That Grid has two axes, one for the severity level of the defendant’s crime, and the other for the defendant’s criminal history score. The intersection of the two axes marks the presumptive sentence for a particular offense.

The offense of racketeering, however, is what is known as an “unranked” offense. That is, the Guidelines assign no severity level to racketeering, thus giving the crime no presumptive sentence. This, of course, makes sense when one considers the varied criminal acts that can comprise a pattern of criminal activity. To use the example again, racketeering committed through a pattern of assaults is, and should be, treated differently that racketeering done through multiple acts of perjury. The Guidelines’ unranked treatment of racketeering thus recognizes the unique and flexible nature of the offense. But in doing so, the Guidelines offer the trial court little guidance on how to assign a severity level to the offense. The Guidelines simply direct judges to “exercise their discretion by assigning an appropriate severity level for that offense and specify on the record the reasons a particular

67. See Transcript of Proceedings, supra note 66.
69. See id.
70. See id. § 5.
level was assigned.” 71 Thankfully, the Minnesota Supreme Court has set forth a framework for how a trial court should go about exercising that discretion. In State v. Kenard, the court held that, when assigning a severity level to an unranked offense such as racketeering, trial courts should consider the following four factors: (1) the gravity of the specific conduct underlying the unranked offense, (2) the severity level assigned to any ranked offense whose elements are similar to the unranked offense, (3) the conduct of and severity level assigned to other offenders for the same unranked offense, and (4) the severity level assigned to other offenders who engaged in similar conduct. 72

Minnesota trial courts routinely make so-called Kenard findings when sentencing unranked offenses, so the need to do so was not unique to the case against James and Wendy Ober. What was unique, however, was the posture of the case in light of the defendants’ straight pleas. The Kenard factors necessarily require the trial court to make a series of factual findings. Most notably, the first Kenard factor requires the trial court to consider the “gravity of the specific conduct underlying the unranked offense.” 73

In most cases, sentencing of an unranked offense occurs after a trial during which a lengthy record is developed concerning the defendant’s crime. Thus, the trial court has plenty to reference when assessing the gravity of the defendant’s crime. But in this case, James and Wendy Ober’s straight pleas stunted the record. There had been no trial. Thus, if the defendants’ convictions were to be based on their guilty pleas alone, the court would have little record on which to rely for assessing the gravity of their crime. And what little record existed consisted of only the defendants’ versions of their conduct.

In addition, James and Wendy Ober’s refusal to admit at their guilty pleas to identity theft involving R.V. presented another obstacle in sentencing their crime. This is because of the relationship between the offense of racketeering and the criminal acts that comprise the underlying pattern of criminal activity. In the words of the Minnesota Court of Appeals, “Ranking racketeering at a higher level than the predicate offenses on which that charge is based has been upheld by this court.” 74

71. See id. § 2.A.
72. 606 N.W.2d 440, 443 (Minn. 2000).
73. Id.
words, the severity level of the criminal acts that comprise the pattern of criminal activity generally sets the “floor” for the ranking of the racketeering offense. This concept flows directly from the second Kenard factor that requires that the court consider the severity level of similar ranked offenses.  

In this case, the dispute over the identity theft of R.V. had potential consequences for the defendants’ sentence. That was because theft by swindle over $35,000 is a level-VI offense, whereas identity theft over $35,000 is a level-VIII offense. Thus, the ranking floor was potentially two severity levels higher or lower, depending on whether the facts supported the State’s or the defendants’ view of the transaction involving R.V.

As a result of these unresolved issues, it was apparent that the case could not proceed directly to sentencing after the defendants’ guilty pleas. Rather, the trial court would have to conduct a series of evidentiary hearings to resolve the outstanding factual issues pertaining to the racketeering offense. As it turns out, additional hearings were already required because of yet another unresolved issue separate and apart from the racketeering offense: the existence of facts supporting an upward sentencing departure.

Before the defendants’ guilty pleas, the prosecution filed its Notice of Intent to Seek an Upward Sentencing Departure on the following grounds: (1) that the crime charged was a major economic offense,  (2) that defendants used the identities of others—including those of Minnesota district court judges—to commit their crime, (3) that defendants committed their crime as part of a group of three or more persons who actively participated in the crime, and (4) that defendants preyed on vulnerable individuals who were losing their homes and who were ignorant of the foreclosure process.

In Blakely v. Washington, the United States Supreme Court held...
that a criminal defendant has a right to demand that the State prove to a jury the existence of facts supporting an upward departure beyond a reasonable doubt.\textsuperscript{81} James and Wendy Ober both waived their jury-trial \textit{Blakely} rights.\textsuperscript{82} They did not, however, admit at their guilty pleas to the existence of facts supporting an upward sentencing departure.\textsuperscript{83} As such, the defendants put the State to its burden of proof regarding upward departure factors. Thus began a series of evidentiary hearings, referred to in short as “\textit{Kenard/Blakely}” hearings, which resulted in the presentation of more evidence and testimony than is typically offered in many trials.

V. INTO THE ABYSS: MARITAL PRIVILEGE AND CONFLICT OF LAWS

The intricate details of the evidence presented at the \textit{Kenard/Blakely} hearings are beyond the scope of this article. Suffice to say that the State presented evidence and testimony to support the facts set forth in the complaint, with an eye toward how that evidence applied to the issues of offense ranking and aggravating sentencing factors. The trial court heard testimony from witnesses across the factual spectrum of the case, including co-conspirators, borrowers who bought homes with loans brokered through Mortgage Planners, distressed homeowner-sellers, mortgage lending experts, and individuals whose identities had been unlawfully used. In addition to testimony, the trial court received nearly one hundred exhibits that included loan files, bank records, and evidence obtained via search warrant.

Yet of all the evidence in the case, none sparked more dispute than a series of text messages between James and Wendy Ober. Those text messages were obtained when law enforcement executed a search warrant of the Obers’ Wisconsin home, which resulted in the seizure of both physical and digital evidence.\textsuperscript{84} One such piece of digital evidence were text messages on James Ober’s cell phone—including text messages between him and his wife. One of those text messages was referenced in the criminal complaint as direct evidence in support of the State’s claim that the Obers stole R.V.’s identity. This text, which Wendy Ober sent to

\begin{thebibliography}{99}
\item[81.] 542 U.S. 296, 301–05 (2004).
\item[82.] Transcript of Proceedings, \textit{supra} note 66, at 8.
\item[83.] \textit{Id.}
\item[84.] Second Amended Complaint, \textit{supra} note 28, at 4–5.
\end{thebibliography}
James Ober in the weeks before the loan in R.V.’s name was funded, read: “Set up that other phone for [R.V.] and i will use that to talk to the lender back and forth, have peter set it up for me under her address in new hope.”85 This text was significant because the evidence showed that someone posing as R.V. did, in fact, talk with the mortgage lender that provided the loan issued in her name.

In their pretrial motions, both James and Wendy Ober sought to exclude all text messages between them on the grounds that the messages were privileged marital communications. They relied on Minnesota Statutes section 595.02 that provides:

A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage.86

This statute affords married couples in Minnesota two kinds of marital privilege: the testimonial privilege and the communications privilege. The testimonial privilege “prevent[s] a spouse from testifying against the other during the marriage.”87 The communications privilege “prevent[s] a spouse from testifying at any time concerning confidential interspousal communications made during the marriage.”88

Minnesota courts have held that the marital privilege is absolute and, unlike other states, have refused to recognize any exceptions to the privilege.89 Yet as is often true in the Upper Midwest, things are different on the other side of the St. Croix River. That is, Wisconsin law recognizes an exception to its statutory marital privilege. As the Court of Appeals of Wisconsin held, “The marital privilege statute does not apply to communications between spouses who conspire to act as agents for each other in an unlawful transaction.”90

While that may be true, did it mean anything for this case? True, James and Wendy Ober were Wisconsin residents. But this was a Minnesota state prosecution, vened in Hennepin County,

85.  Id. at 22 (errors in original).
86.  Minn. Stat. § 595.02, subdiv. 1(a) (2010).
87.  State v. Palubicki, 700 N.W.2d 476, 483 (Minn. 2005).
88.  Id. (citing State v. Gianakos, 644 N.W.2d 409, 415 (Minn. 2002)).
89.  See Gianakos, 644 N.W.2d at 409.
where all of the alleged crimes occurred in Minnesota. And wasn’t this conflict of laws issue something that only matters to law students and civil litigators? Turns out, the answer was a resounding “no.” And the reason for that answer came from the Minnesota Supreme Court in the 2004 case of State v. Heaney.91

*Heaney* was a watershed decision concerning conflicts of law in criminal cases. The facts arose out of a fatal, alcohol-related car accident in Houston County, Minnesota.92 Following the accident, the driver-defendant was transported to a hospital in La Crosse, Wisconsin, where doctors obtained a blood sample showing a blood-alcohol level of 0.144.93 Law enforcement later sought and obtained a subpoena from a Wisconsin court for the defendant’s medical records.94 The defendant was then charged in Minnesota with criminal vehicular operation resulting in death.95

At an omnibus hearing, the defendant sought to exclude the blood-alcohol evidence on the grounds that it was obtained in violation of Minnesota’s physician-patient privilege statute.96 Like the marital communications privilege, Minnesota’s physician-patient privilege is absolute and includes blood samples taken by treating physicians.97 Wisconsin’s physician-patient statute, on the other hand, has exceptions for evidence in homicide trials as well as circumstances surrounding alcohol intoxication.98 As such, there was a direct conflict of laws between the two states’ privileges.

The Minnesota Supreme Court therefore needed to set forth a test for resolving conflicting evidentiary privileges in criminal cases. The court first noted that conflicts of law tests used in civil cases, such as *lex fori* (i.e., the law the forum), *lex loci* (i.e., the law of place of the seminal event), or its own “better rule of law” analysis were ill-suited to criminal cases.99 So following the lead of other states, the court adopted the test from the Restatement (Second) of the Conflict of Laws.100 That test set forth two prongs:

1. Evidence that is not privileged under the local law of

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91. 689 N.W.2d 168 (Minn. 2004).
92. *Id.* at 170.
93. *Id.* at 171.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 173.
98. *Id.*
99. *Id.* at 174–75.
100. *Id.* at 175–76.
the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.101

The question presented under either prong, of course, is what state has “the most significant relationship with the communication.” The court adopted the Restatement’s definition: “The state of ‘most significant relationship with the communication’ will be the state where the communication took place, unless there is a prior relationship between the parties.”102 Furthermore, “[i]f there is a prior relationship between the parties, the state where the relationship is centered has the most significant relationship, unless the state where the communication took place has ‘substantial contacts’ with the parties and the transaction.”103

Applying the Restatement test to the facts of Heaney, the court held that Wisconsin law applied and that the evidence was thus admissible.104 Specifically, the court found that the communication at issue occurred in the Wisconsin hospital where the blood sample was taken and that there was no prior relationship between the defendant and the hospital.105 As such, the court reversed the court of appeals and remanded for trial.106

Heaney had direct application to the prosecution of James and Wendy Ober. But unlike in Heaney, the conflict of laws regarding marital privilege could not be resolved by simply looking at where the communications (i.e., the text messages) took place. The reason why was because James and Wendy Ober were married—meaning that there was “a prior relationship” between them. As such, the issue became where their marital relationship was
“centered.” To that end, at the omnibus hearing that occurred before the defendants’ guilty pleas, the State presented testimony concerning the Obers’ marital relationship. The evidence showed that the Obers had lived in Wisconsin as a married couple for years, that they owned a home together in Wisconsin, and that, at one point in time, Wendy Ober initiated a divorce proceeding in a Wisconsin state court.

So the State argued that the Obers’ marital relationship—the relationship that was the subject of the privilege that they sought to invoke—was centered in Wisconsin and that the trial court should apply Wisconsin marital privilege law. The trial court agreed. It noted that Heaney controlled the issue of marital privilege. And citing the evidence presented at the omnibus hearing, it held that the Obers’ marital relationship was centered in Wisconsin. It thus ruled that Wisconsin law applied and refused to exclude the text messages between the defendants.

VI. RANKING AND UPWARD DEPARTURES: KEEPING THE APPLES AWAY FROM THE ORANGES

At the conclusion of the hearings, the trial court had two tasks to complete. The first was to assign a severity-level ranking to the defendants’ racketeering offense. The second was to determine whether the State had proven the existence of facts supporting an upward sentencing departure. Completing these tasks—and doing so the right way—required a careful and measured approach.

A threshold question was whether a trial court was, in fact, permitted to impose an aggravated sentence with an unranked offense. Or was there a constitutional problem with a court first exercising its discretion to assign a severity-level ranking and then again exercising its discretion to depart from the presumptive sentence for that ranking? Like so much jurisprudential drama, the answer to this question was in a footnote. In Kenard, the Minnesota Supreme Court said, “Once the sentencing court has determined the severity level by considering the conduct underlying proof of the elements of the offense, it is not

107.  Id. at 175.
109.  Id.
110.  Id.
111.  Id.
prohibited, in appropriate cases, from considering whether there are also aggravating or mitigating circumstances that would justify departure.\footnote{112}

Although the \textit{Kenard} court held that unrated offenses and upward departures can coexist, it did not give trial courts guidance on how to manage that coexistence. Subsequent appellate decisions, however, did issue warnings against double-counting a defendant’s conduct. That is, the Minnesota Court of Appeals stated that “the same conduct or circumstance may not be used both to assign a severity level and to support an upward departure as an aggravating factor.”\footnote{113}

So, in essence, the trial court in this case needed to separate into two silos evidence used to determine the ranking of the Obers’ offense and evidence pertaining to aggravating factors. This turned out to be relatively easy to do with respect to most of the \textit{Kenard} analysis. That is because at least two of the factors—the conduct of and severity level assigned to other offenders for the same unrated offense and the severity level assigned to other offenders who engaged in similar conduct\footnote{114}—call for comparisons to other cases.

A more delicate dance arose between the first \textit{Kenard} factor—the gravity of the specific conduct underlying the Obers’ offense—and the fact that the State was seeking an upward departure on the grounds that the crime was a major economic offense. Under Minnesota law, a crime is a major economic offense when it has at least two of the following characteristics:

(i) the offense involved multiple victims or multiple incidents per victim;
(ii) the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes;
(iii) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;
(iv) the offender used the offender’s position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships;

\footnote{112} \textit{State v. Kenard,} 606 N.W.2d 440, 443 n.3 (Minn. 2000).
\footnote{114} \textit{Kenard,} 606 N.W.2d at 443.
or

(v) the offender had been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions.

Early in the case, the State indicated its intent to seek an upward departure on major-economic-offense grounds based on subparts (i), (ii), (iii), and (iv) of section 244.10, subdivision 5a(a)(4). Yet as the sentencing phase unfolded, there appeared to be no meaningful way to separate the evidence relating to subparts (i) and (iii) from evidence related to the first Kenard factor. That is, as the State acknowledged in its memorandum of law, “because of the incredible depth and breadth of Defendants’ fraud scheme . . . there is no practical way to evaluate the gravity of Defendants’ conduct without looking at the sophistication and planning that went into their scheme as well as the number of incidents of mortgage fraud committed by each Defendant.” The trial court agreed. So in its initial order regarding ranking of the defendants’ offense, the court was careful to limit the scope of evidence it evaluated. As the court stated:

[F]or purposes of evaluating the gravity of Defendants’ conduct, the Court will look at the following: the scope of their fraud; the sophistication used to accomplish it, both in terms of originating mortgage loans and the means of directing kickbacks; the market environment in which Defendants’ perpetuated their fraud; and Defendants’ roles in the corrupt enterprise that was [Mortgage Planners].

This analysis, however, did not prevent the State from seeking an aggravated sentence on major-economic-offense grounds. That is because the State reserved its right to seek an upward departure based on the remaining two subparts of section 244.10, subdivision 5a(a)(4) (i.e., that the offense involved a monetary loss substantially greater than the minimum loss specified in statute and

115. MINN. STAT. § 244.10, subdiv. 5a(a)(4) (2010).
116. See State’s Notice of Intent to Seek an Upward Sentencing Departure, supra note 60.
that the defendants used their position or status to facilitate the offense).  

On August 9, 2012, the trial court completed its first task by issuing an order ranking the defendants’ racketeering offense. The court first observed the seriousness of the offense: “Racketeering is regarded as one of the most serious criminal offenses in Minnesota. It is an economic crime placed alongside some of the most violent crimes . . . .” The court then analyzed each of the Kenard factors as they pertained to this case.

In evaluating the gravity of the Obers’ crime (i.e., the first Kenard factor), the court called it “unique and extraordinary.” It noted that the evidence presented showed that James and Wendy Ober each originated over thirty-five fraudulent mortgage loans, totaling over five million dollars in theft. The court also described how the Obers “deftly” adapted to the post-subprime mortgage lending environment in order to commit their crime. And it listed the tools that they used to make that adaptation: fake employers, fabricated paystubs, forged bank statements, and forged college transcripts. The court specifically quoted the testimony of a senior mortgage lending expert who stated, “In this particular case, almost every single document within the loan file was found to be fraudulent or altered in some manner.” The court also described the junior mortgages that the defendants used to collect their kickbacks as a scheme that required “a perversion of insider knowledge.”

In examining the second Kenard factor (i.e., the severity level assigned to a ranked offense with similar elements), the court settled the outstanding factual dispute regarding the identity theft of R.V. The court found that the State had proven beyond a reasonable doubt that James and Wendy Ober were criminally liable for the theft of R.V.’s identity in connection with the purchase of the North Minneapolis home. In doing so, the court

119.  § 244.10, subdiv. 5a(a) (4) (ii), 5a(a) (4) (iv).
120.  Order and Memorandum of Law, supra note 118.
121.  Id. at 3.
122.  Id. at 7.
123.  Id.
124.  Id. at 9.
125.  Id.
126.  Id.
127.  Id. at 11.
128.  Id. at 13–17.
cited to various pieces of evidence and testimony, including the
text messages between the Obers. 129 The court also described the
defendants’ attempt to refute the State’s proof as “simply not
credible.” 130

Finally, in examining the third and fourth Kenard factors, the
trial court noted that it had ample precedent from other mortgage-
fraud racketeering cases prosecuted in Minnesota on which to
rely. 131 In all of those cases, the trial courts ranked the defendants’
racketeering offense at severity level IX or X. 132 Although
acknowledging that precedent supported the argument, the court
declined the State’s request to rank the offense at a level X. 133
Instead, the court elected to rank the Obers’ offense at a level IX. 134
The court, however, added the following caveat in the conclusion
of its order:

This is not to excuse any of the conduct by either
Defendant in this case. The evidence has demonstrated
to this court that Defendants committed a menacing and
widespread scheme that knew few boundaries.
Defendants used a considerable array of tools at their
disposal to defraud lenders, rob distressed homeowners of
the equity in their homes, and steal the identity of an
innocent person. 135

Under the court’s level-IX ranking, the presumptive sentence
for both James and Wendy Ober (each of whom had zero criminal
history points) was between 74 and 103 months imprisonment. 136
That presumption, however, did not determine the ultimate
sentence. The court still had to complete its second and final task
of deciding whether the record established the existence of facts
supporting an upward (or, as the defendants requested, a
downward) departure. The court completed this final task on
September 13, 2012, when it held a sentencing hearing and issued
its sentencing order. 137

In its sentencing order, the court found that the State had

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129.  Id. at 14–16.
130.  Id. at 17.
131.  Id. at 18.
132.  Id.
133.  Id. at 22.
134.  Id.
135.  Id.
proven beyond a reasonable doubt four separate bases for an upward sentencing departure. First, the court found that both James and Wendy Ober committed their crime as part of a group of three or more people who actively participated in the crime.\textsuperscript{138}

Second, the court found that the defendants used the identities of others without authorization to commit their crime.\textsuperscript{139} This finding was not to be confused with the court’s earlier finding that the Obers committed identity theft involving victim R.V. Rather, this finding related to the use of counterfeit divorcees in the defendants’ fraud scheme. As described above, the Obers used those decrees to make it appear as though the borrower in whose name a house was purchased (who, in reality, already owned another home) was debt free by way of a (fictitious) divorce in which the nonborrowing spouse received the home and its associated debt. The court found that this aspect of the Obers’ crime used the identities of the real attorneys, judges, and court staff, whose names and signatures were on the counterfeit decrees.

Third, the trial court found that the defendants’ crime was a major economic offense.\textsuperscript{140} This finding was based first on the court’s conclusions that the underlying criminal acts involved a monetary loss substantially greater than the minimum loss set forth by statute.\textsuperscript{141} In other words, the court concluded that many of the transactions in the case involved losses greater than the $35,000 statutory amount of the predicate offense of theft by swindle. The court also concluded that the defendants used their positions and status to facilitate the offense, citing the Obers’ abuse of trust of both the lenders with whom they did business and the individual borrowers who were conned into participating in the scheme.\textsuperscript{142}

Finally, the court found a fourth basis upon which to justify an upward departure. As the court described it, the Obers’ crime “targeted a vulnerable group of individuals who were losing their homes and who were largely ignorant of the foreclosure process.”\textsuperscript{143} This basis focused on another group of victims in the case—the distressed homeowners who sold their homes without knowing that

\textsuperscript{138.} Id. at 5–7; see MINN. STAT. § 244.10, subdiv. 5a(10) (2010).

\textsuperscript{139.} Order and Memorandum of Law, supra note 118, at 7–8; see § 244.10, subdiv. 5a(12).

\textsuperscript{140.} Order and Memorandum of Law, supra note 118, at 10–15; see § 244.10, subdiv. 5a(4).

\textsuperscript{141.} Order and Memorandum of Law, supra note 118, at 10–12.

\textsuperscript{142.} Id. at 12–15.

\textsuperscript{143.} Id. at 15.
the defendants’ scheme robbed them of substantial equity. After then concluding that the defendants failed to show the existence of any substantial grounds that excused or mitigated their culpability, the trial court pronounced its sentence: 120 months imprisonment, approximately $500,000 in restitution, and a $50,000 fine.

VII. CONCLUSION

The evidence in the case against James and Wendy Ober might best be summed up in the annals of alternative music: “good news for people who love bad news.” That is, the defendants’ crime showed that the Great Recession did not eradicate mortgage and real estate fraud and that complex financial crime is still alive and well in Minnesota. But the prosecution of the case did have some genuinely good news. It demonstrated that, although criminals will continue to adapt to a changing world, Minnesota’s racketeering statute is an equally nimble and effective foil to bring them to justice.

144. Id. at 16–20.
145. Id. at 2–3.
146. MODEST MOUSE, GOOD NEWS FOR PEOPLE WHO LOVE BAD NEWS (Sony Music Entertainment, Inc. 2004).