Full Appeal Brief Filed in Case of Rabbi Osher Eisemann

A deeper look at the alleged injustices outlined in the appeal

BY RABBI CHAIM SEREBROWSKI

Within weeks of the April 29 hearing at which Rabbi Osher Eisemann was sentenced to two years of probation and 60 days in jail, both the prosecutors and the defense filed notices of appeal, with the prosecutors challenging the leniency of a probation sentence and the defense seeking to overturn the convictions on the two remaining counts. This past Monday, Rabbi Eisemann's lawyers submitted the completed appeal brief, a 65-page document arguing that the charges for which Rabbi Eisemann was convicted should be vacated on a number of grounds.

During the February trial, the state alleged that Rabbi Eisemann stole almost a million dollars of public funds. He was charged with five counts: corruption of public resources, theft by unlawful taking, financial facilitation of criminal activity (money laundering), misapplication of entrusted property, and misconduct by a corporate official. The SCHI Foundation, an independent fundraising arm of SCHI, was also charged with the first four counts. Following a three-week trial, the Foundation was acquitted on all counts, and Rabbi Eisemann was acquitted on counts 1, 2, and 4 – the counts pertaining to the theft of public funds – and convicted on counts 3 and 5. The state had claimed that Rabbi Eisemann had committed count 3 – money laundering – by taking a $200,000 loan from the school and then allegedly writing off a debt to the Foundation when he returned the money 12 days later. Count 5 – misconduct by a corporate official – is that a corporation was used to commit another crime. Count 5 hinged on the conviction of another count, which in this case was count 3.

When categorizing the evidence that led to the conviction, Superior Court Judge Ben Bucca noted that the evidence supporting the two convictions was "rather slim," and that in "a nine, ten-day trial," the evidence supporting the convictions "consisted of about maybe ten lines in the transcript… about maybe 30 seconds to a minute of evidence." The judge also said that the prosecution "arguably could have been equally and responsibly handled as an administrative matter." He then sentenced Rabbi Eisemann to one year of probation for each of the two counts, including, as a condition to the probation, a 30-day jail term for each count. The state had requested a 12-year prison term.

The appeal portrays how an innocent man was targeted and persecuted, without an investigation, and charged with crimes that were never committed. It shows how an elaborate string of injustices had to be aligned in order for the prosecution to wrangle a guilty conviction on an undoubtedly irreproachable individual. It accentuates just how ridiculous the charges were, and how the prosecutors knew that Rabbi Eisemann was completely innocent when they misled the jury and eked out a conviction. It highlights how the entire case against Rabbi Eisemann from the very start was a mere fishing expedition that could just have well been carried out against any other guiltless citizen.

Therefore, the appeal presses for the two convictions to be vacated and that the indictment be dismissed with prejudice, meaning that the case should be closed and that the state should not be able to prosecute any further based on the indictment.

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The brief categorizes eight distinct arguments as to why the appellate court should do so, alleging gross injustices in the process, spanning from the execution of the search warrants until the post-trial motion for acquittal.

The Search Warrants Were Unlawfully Broad

The earliest issue noted in the appeal is in the nature of the search warrants. By law, a search warrant must delineate specifically what can be seized, and should state in regard to which subjects or criminal activity documents can be searched. In the case of Rabbi Eisemann, the warrants were extremely broad, effectively giving license for officials to take a truckload of mostly unrelated documents and records, which they did. They carted off a truckload of boxes, including field trip approval forms, student bus assignments, and even a video of former Governor Jon Corzine's visit to SCHI.

As per legal precedent, the New Jersey Supreme Court has suppressed evidence seized under similarly broad search warrants. Judge Benjamin Bucca chose to allow the evidence to be presented, and that is one aspect that this appeal seeks to overturn.

The State Lied to the Grand Jury to Secure an Indictment – Twice

Before the state was able to issue indictments, it had to garner the approval of a grand jury. The state presented evidence to a grand jury twice, before each of the two indictments, each time selling a narrative that it later contradicted during the actual trial.

During his presentation to the first grand jury, the state's lead detective on the case, Thomas Page, testified that he was certain that all alleged transactions that Rabbi Eisemann made were conducted with public funds, as there were no private funds in the account. He also referenced "the account," implying that there were no other school accounts, and therefore, if there were no private funds in this account, it must have been public funds that were used, as there were no other accounts. On this basis, the grand jury voted to indict.

After the initial indictment, Rabbi Eisemann hired a forensic accounting team to sort through all the transactions in all the school accounts. The accountants found that there had been sufficient private money to cover all the allegedly criminal transactions, even in the very account that Detective Page referenced. The accounting team subsequently met numerous times with the state, showing them all their documentation and dispelling their lie that no private funds were available. The forensic accountants later presented the same findings during the trial, and the prosecutors didn't even attempt to offer a rebuttal.

Months later, however, during a second grand jury hearing, Detective Page doubled down on his narrative that the transactions were criminal, saying that there was a mere "fraction" of private dollars in "the" account - again, not letting them in on the fact that other accounts existed in which private funds may be found - and that the transactions all must have been made with public funds. This was an outright lie, and despite numerous meeting between the prosecutors and the accountants, they refused to back down.

During the trial, Detective Page retracted his stance and testified that he, in fact, had no idea how many private dollars were in the school account:

Defense: So, again then tell me, how many - how much private money was deposited into [the account] that you reviewed eight hours a day for two years?

Page: I can't give you a specific answer.

Defense: So, you do not know. Is that your answer?

Page: Yeah, that's - correct.

Defense: And you testified on direct, did you not, that I "know the bank accounts," right?

Page: Yes.

Defense: But you don't really know the bank accounts; do you?

Page: In terms of?

Defense: In terms of what went in - in private dollars. You really have no idea.

Page: In private dollars, no.

Defense: You have no idea, right?

Page: Yeah.

Page also testified, during the trial, that had there been enough private dollars in the accounts, there would have been no crime. Despite that, he didn't investigate how much of the money was private money, and yet he had no problem testifying before the grand jury that there were definitely insufficient private dollars to cover the transactions.

In a climactic end to defense attorney Lee Vartan's cross examination on Detective Page, which took place on the second day of the trial, this point was accentuated in a simple exchange.

Defense: So, you and the State indicted - you went before the grand jury so an indictment would be returned so [Rabbi Eisemann] would sit here charged with five felonies, and you did nothing to look at the private dollars in any of these [school] accounts?

Page: That's correct.

Defense: Even though if there were sufficient private dollars, there was no crime by your admission?

Page: That's correct.

Defense: Nothing further.

The appeal argues that because the state deliberately misled the grand juries, and prosecutors knew that Rabbi Eisemann was completely innocent when they secured the indictments, the indictments must therefore be dismissed.

The Indictment and Jury Charge Were Inconsistent

Another point argued is that the indictment and the resulting jury instructions were inconsistent when they considered the same $200,000 public money in some counts, but allowed it to be considered private money in another count.

In counts 2 and 4, Rabbi Eisemann was charged with theft by unlawful taking and misapplication of entrusted property on nearly $1

million for public funds, including $200,000 of a specific transaction. In count 3, Rabbi Eisemann was charged with money laundering the same $200,000, but instead of calling it public funds, the indictment called it public money or private money. This is inherently troubling, as how can someone be charged for two potentially contradictory crimes on the same money? Additionally, the state did not mention anywhere during the grand jury testimony anything about the theft or laundering of private funds, and in fact, the only testimony offered during trial about private funds is that they are unrestricted and can be used freely.

It shows how an elaborate string of injustices had to be aligned in order for the prosecution to wrangle a guilty conviction on an undoubtedly irreproachable individual.

Defense: And private money is without restriction, correct?

Page: That's correct.

Defense: Private money can be spent however the school or Mr. Eisemann or I deem, right? No restrictions.

Page: Yes.

And later:

Defense: Detective, you would agree with me, correct, that if there were sufficient private dollars to cover the transactions that the state has called criminal, then there would be no theft of public dollars?

Page: We would not be here.

Defense: Would not be no crime?

Page: Right.

Another outcome of the inconstant indictment is that it led to jury confusion, as was apparent from a question posed by the jury during deliberations.

Even more troubling is that in the initial version of the jury charge – the document containing instructions for the jury – the $200,000 was labeled as public funds. These instructions were released just two days before the defense started presenting their case, and they relied on it when they brought witnesses to prove that no public money was stolen. It was only after the defense rested their case – mere hours before the closing remarks – that Judge Bucca reversed his decision on how to word the jury charge and instead wrote that the crime could have been committed with both public and private money. Had the defense known this, they would have presented proof that transactions using private money were not criminal. However, since the jury charge stated that the crime was done with public money, the defense presented arguments solely addressing the notion that public money was the alleged crime and did not present available testimony that would have disproven any criminal activity in regard to private money.

In legal precedent, courts have dismissed counts in "defective" indictments or reversed convictions pertaining to "mutually exclusive" charges. Thus, the appeal alleges that Judge Bucca should have tossed count 3 or, at the very minimum, he should have narrowed count 3 to only cover public funds. Courts have also tossed convictions in which variations between the proposed and final jury instructions were substantial enough to impede on the lawyer's ability to properly argue the case.

The Jury Instructions Were Wrong

Another basis for appeal is because the jury charge was faulty.

According to New Jersey law, money laundering must constitute two actions, illegally obtaining property and then using it to facilitate criminal activity or conceal it. This means that merely facilitating criminal activity or concealing it is not sufficient to be charged with money laundering. Another, predicate crime must also have been committed, in which the money was illegally obtained.

In the indictment, count 3 listed the other counts in the indictment as predicate crimes. This was not reflected, however, in the jury charge that the judge prepared. The jury charge stated that the jury can find Rabbi Eisemann guilty of money laundering if they found that the $200,000 was derived from *any* criminal activity. Had the predicate crime been limited to crime listed in the indictment, there would have been no way for the jury to convict Rabbi Eisemann on count 3, as they acquitted him on the other counts.

The New Jersey Supreme Court has previously ruled that when a crime depends on a predicate crime, and the indictment lists what that predicate crime is, the jury can only find the person guilty if they convict them of that predicate crime. In this case, against defense attorney Lee Vartan's objection, Judge Bucca approved the language that would allow the jury to convict Rabbi Eisemann even though they acquitted him on the predicate crimes listed in the indictment.

There Was No Theft

Also listed as a basis for appeal is that the money laundering hinges on theft, but the transaction that the state alleges as being theft does not constitute any theft at all, but rather a loan.

According to the law, theft means depriving a person of property permanently or for long enough that it loses value, or taking something with the intention of giving it back only upon receiving payment, or disposing of someone's property in a manner that it would be unlikely for the person (or in this case, the school) to ever recover it.

The $200,000 that the state alleges as the predicate "theft" for the money laundering was removed from the school and returned 12 days later, and was recorded as a loan in the school's QuickBooks. This transaction does not even remotely fit the law's depiction of theft, and legal precedent is clear that a loan made and fully repaid in 12 days does not amount to permanent deprivation.

Because of this gross misrepresentation, Rabbi Eisemann was able to be convicted without ever having committed a crime.

The Jury Was Charged With Interpreting the Law

The $200,000 could only have been theft if the law prohibits loaning money from a school account. However, even loans made with indisputably-public funds are the subject of debate, and three trial witnesses offered two opinions on how to interpret the intricate education laws that pertain to government funding.

On the one hand, the prosecutors presented a Department of Education employee who testified that government restricted funds cannot be loaned, and any unauthorized loan would be illegal. Rebutting her claims were two witnesses, one a state witness and the other a defense witness, with each of them testifying that loans were allowed even with government restricted public funds.

Judge Bucca gave the jury a copy of the Department of Education regulations and asked them to determine which testimony was correct. That, however, is not the job of the jury. The jury is supposed to be informed of the law and then determine if the defendant violated it.

Remarkably, Judge Bucca expressed doubt when he decided to ignore the objection of Attorney Vartan and allow the jury to decide on the law.

"I don't know if I'm right," he said. "And ultimately, maybe a higher authority than myself, the Appellate Division, will have to make a determination as to whether I'm right or not."

In addition, legal precedent says that if the law is "so uncertain that it was presented to the jury as a matter of disputed fact, that degree of uncertainty shows that the law does not give a person of ordinary intelligence fair warning what conduct is proscribed."

There Was No Testimony Regarding Private Money

By finding Rabbi Eisemann innocent on stealing public funds but guilty on count 3, the conviction must have been hinged on the theft of private dollars (count three, despite it being inconsistent with the other counts, charged for money laundering public or private money). However, there were no witnesses brought at trial to support a conviction on private dollars, and to the contrary, the only witness to discuss private dollars – the state's lead detective – actually testified that private dollars were unrestricted and could have been used however Rabbi Eisemann decided. Even Judge Bucca supported this notion during the trial:

Lee Vartan: …there's one person who seems to agree with me in all of this, and that happens to be Tom Page, their lead detective. Tom Page testified unequivocally that if private dollars were used, then there was no crime. He said that multiple times. Private dollars were used. There was no crime.

Judge Bucca: I think everyone agrees with that. From the evidence and how I have been educated on this issue.

The judge, however, made an about face during the post-trial motion to toss the convictions based on this rationale, and he said that "the only reasonable inference that can be made is that once the funds were deposited into the school's bank account, they became the property of the school." This, however, is pure speculation and in direct contradiction to the state's witness, who testified that private funds are unrestricted, even if they would be in a school bank account.

According to this, Rabbi Eisemann was found guilty of a crime that was not written in any law book!

In the past, other courts have tossed cases based on such inferences.

There Was No Evidence that it Was Rabbi Eisemann Who Made the Transaction

The supposed money laundering took place when Rabbi Eisemann allegedly wrote off a $200,000 loan to the Foundation in QuickBooks after returning the original loan to the school. The state, however, did not offer any evidence that it was Rabbi Eisemann who made that change in QuickBooks, nor did it prove that Rabbi Eisemann even had login credentials for the program or that he directed someone to do it for him. In fact, a state witness testified that Rabbi Eisemann was not a bookkeeper. The state only said that Rabbi Eisemann was included on the articles of incorporation for the Foundation and, as a result, the jury could infer that any write-off was done by him or at his direction.

Aside from having to rely on this inference, in order to convict him the state would have to rely on the accuracy of the QuickBooks logs. However, witnesses from both the state and the defense testified that the QuickBooks logs were inaccurate, and, in fact, undisputed testimony by the forensic accountant asserted that not only did Rabbi Eisemann not owe the Foundation money, but the Foundation owed money to Rabbi Eisemann. The state investigator who interpreted the QuickBooks records for the jury, however, did so assuming they were accurate, even though he neither created the records nor was qualified as an expert.

The defense filed a motion to preclude the testimony of the state investigator as inadmissible lay opinion, in accordance with a previous legal ruling that stated that "accountants brought in after the transactions occur to perform an audit, review, or forensic examination may not offer lay opinions based on their review." Judge Bucca denied the motion and allowed the state investigator to testify. It was that investigator's "about maybe ten lines in the transcript… about maybe 30 seconds to a minute of testimony" that, according to the trial court, was the "rather slim" evidence on which Rabbi Eisemann was convicted.

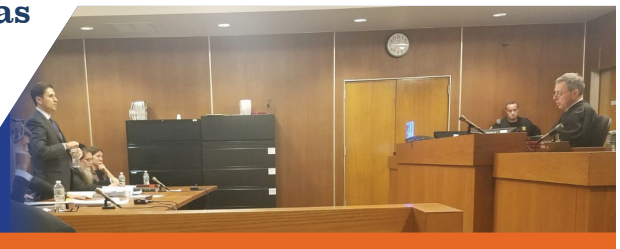
Pending Briefs

The above eight reasons are outlined in the 65-page appeal brief that was submitted this week. Next month, prosecutors will issue a rebuttal, followed by a final defense brief due in September. After the final brief is submitted, oral arguments generally take place before a three-judge panel.

Regardless of the decision of the Appellate Division, the case can still be brought up to the state's highest court, the New Jersey Supreme Court.

The appeal process costs hundreds of thousands of dollars. Donations toward legal fees can be called in, 24 hours a day, to 732.813.1212. Online donations can be made at pidyonshvuyim.com. Checks payable to CZR can be mailed to 307 Dewey Avenue, Lakewood, NJ 08701.

The Eisemann family asked that the Yated express their hakoras hatov to everyone for standing with them throughout this ordeal, and for never stopping to daven and accrue zechusim on their behalf. They also request that people continue to have in mind Osher ben Chana Frumet in their tefillos.,



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