IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,920

STATE OF FLORIDA,

Petitioner/Appellant/Cross-Appellee,

vs.

MARK MARKS, P.A., et al.,

Respondents/Appellees/Cross-Appellants.

AMENDED ANSWER BRIEF OF MARK MARKS

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PRELIMINARY STATEMENT

Mark Marks files this answer brief, in which Gary Marks, Carl Borgan, Irene Raddatz a/k/a Irene Porter, Noreen Roberts and Denise Beloff join and adopt. This case involves three State appeals from three orders rendered in Broward County Circuit Court. Two of the appeals, involving the circuit court's dismissal of all counts involving third party liability cases, were consolidated before briefs were submitted (fourth district case nos. 93-3259 and 93-3308). The majority of the record on appeal is contained in the record in case no. 93-3259. Therefore, this brief utilizes the designation "R" for the record in case no. 93-3259. The designation "2R" refers to the record in case no. 93-3308. The designation "SR" refers to the supplemental record filed by the clerk. The designation "T" refers to the transcripts filed by appellee Marks as a supplement to the record.

The third appeal in fourth district case no. 94-0339, involving the dismissal of counts charging exclusions or omissions in an uninsured motorist case, was briefed separately, but consolidated after oral argument. The record in fourth district case no. 94-0339 is referred to in this brief as "3R". All emphasis in this answer brief has been supplied by counsel unless otherwise noted.

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STATEMENT OF THE CASE AND FACTS[1]

INTRODUCTION

This is a case which should never have been brought in the first place. Admittedly based on "shades of gray",[2] this felony RICO prosecution rests primarily on the State's theory that a lawyer's failure to include unfavorable medical reports in initial presuit negotiation letters to third party liability and uninsured motorist carriers may, in some, as yet undefined, circumstances (determined in hindsight on a case-by-case basis by a criminal court jury), constitute a fraudulently "incomplete" claim in violation of Florida's insurance fraud statute, section **817.234** (1)(a).

PARTIES

Defendants, Mark Marks, P.A. (the "law firm"), Marvin Mark Marks a/k/a Mark Marks ("Mark Marks"), Carl Borgan, Irene Raddatz a/k/a Irene Porter ("Irene Porter"), Noreen Roberts, Denise Beloff and Ronald J. Centrone, M.D. ("Dr. Centrone") were charged in a multi-count Information in trial court case no. **90-6433**, originally filed December 21, 1989, and amended twice (R. 1-98). The dismissed charges which are the subject of this appeal involve seven individual clients of the law firm. The same acts alleged as insurance fraud as to each individual client also form the bases for grand theft counts (T. 110-111; R. **115, 117,** 1922). **In** turn,

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[1] To correct inaccuracies and omissions of facts material to this appeal, defendants provide this statement of the case and facts. Fla. R. **App.** P. 9.210(c).

[2] See Brief of Petitioner on the Merits at **p.** 43.

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the individual insurance fraud and grand theft counts form the bases for the predicate acts of a RICO charge.[3] Another **11** count information was filed October 29, 1993, circuit court case no. 93-501, in which defendants Mark Marks, P.A., Mark Marks, Gary Marks, and Ronald J. Centrone, M.D. are charged (2R. 1-7).[4] This information alleges individual counts of insurance fraud and grand theft, but contains no RICO count.

THE CHARGES

The information in case no. 90-6433 was first filed on December 21, 1989 and initially charged twelve defendants (a law firm, three of its lawyers and three office personnel; and a medical center consisting of two corporations, two of its doctors, and its administrator). (R. 1-28). The original Information did not contain the charges which are now the focus of the State's case. There were no counts charging a violation of Florida's

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[3] The law firm is charged in 9 of the dismissed counts: 18, 19, 29, 30, 31, 32, 33, 34, and 35, and corresponding predicate acts of the RICO count, P, Q, AA, BB, CC, DD, EE, FF, and GG. (R. 91, 94-97, 76, 78-81). Mark Marks is charged in the same 9 counts and in count 15 and count 23, and corresponding predicate acts M and V. (R. 90, 93, 75, 78). Gary Marks is charged in counts 18, 29, 30, 31, 32, 33, 34 and 35 and corresponding predicate acts P, AA, BB, CC, DD, EE, FF an GG. (R. 91, 94-97, 78-81). Carl Borgan is charged in count 15, and corresponding predicate act M. (R. 90, 75). Irene Porter is charged in counts 29 through 33 and corresponding predicate acts AA through EE. (R. 94-96, 78-81). Noreen Roberts and Denise Beloff were not named in any of the individual counts which were dismissed or in the RICO count, but were named, along with all defendants, in count 2 charging RICO conspiracy and count 3 charging a scheme to defraud by the conduct alleged in the dismissed counts. (R. 83-84).

[4] Mark Marks and the law firm are charged in all counts. Gary Marks is charged in counts 4, 6, 8, 9, 10, and **11.** Dr. Centrone is charged in counts 1 and 2.

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insurance fraud statute, §817.234, by omissions during presuit settlement negotiations. (R. 1-28). On February 28, 1990, four of the medical center defendants, Dr. Gelety, Ginger Gelety, and the two medical corporations, announced ready for trial. The State also announced ready, assuring the court that it was ready to try the case that day. The law firm was waiting for a Statement of Particulars it had requested. Trial for the four defendants who announced ready was set for March 12, 1990. But, when it came time to try the case, the State advised the court that it had not subpoenaed any witnesses and made it clear that the State had no intention of trying the case. In *Re* Broward *County State Attorney's Office,* 577 so. 2d 967, 969 (Fla. 4th DCA 1991). Instead, the State advised the court that it intended to amend the Information and later provide a Statement of Particulars. The four defendants who were ready for trial demanded a speedy trial and the State moved for a continuance until April 9th. Circuit Court Judge Patti Englander Henning, who was presiding over the case at the time, was dismayed by the State's blatantly false representations that it was ready to try the case when it hadn't subpoenaed a single witness and, when the State couldn't come up with any reasonable explanation, fined the State Attorney's office for contempt of court. Judge Henning noted:

> The allegations and the issues in this case strike to the very heart of what this system is all about. And I am at a loss for words at this time to understand how the State could so frivolously take its responsibilities in these actions.

Broward County State Attorney's Office, 577 So. 2d at 969. The

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Fourth District concluded that the conduct of the three individual prosecutors involved was criminally contemptuous, but held that Judge Henning's order was too broad because it encompassed the entire State Attorney's Office. ***Id.***

Several days later, on March 30, 1990, the State filed an amended information, adding the charges of omissions in presuit settlement negotiations which have long plagued the trial and appellate court, resulting in the holding that the statute is unconstitutional as applied. (R. 29-69).[5] Judge Henning was the first trial court judge to consider the constitutional issues. After hearing argument back in 1990, Judge Henning invited the State to drop the charges based on "incomplete" submissions and get on to the prosecution of the broad based false and fraudulent conduct the Information purported to allege. (T. 240-241). The State declined to do so, conceding that these counts could not stand on an allegation of falsity:

> MR. DAMSKI: I could go into a lot of areas, and we're forced - we can't go along with deletions. As I go through the counts with the exception of one possible count where I might be able to take that word [incomplete] out of the information it would still have to remain in virtually all of the others for our purposes. (T. 242).

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[5] When the April 9th trial date for the four defendants who demanded a speedy trial approached, the State voluntarily dropped the charges against defendants Dr. Gelety and Ginger Gelety and agreed to accept a conditional plea from the two medical corporations. The medical corporations had a pending motion to dismiss the charges to which they entered the conditional plea on the ground that the conduct charged was perfectly legal. The court agreed and dismissed the charges. (R. 467-476). The dismissal was affirmed on appeal. State ***v. Marks,*** 596 So. 2d 1074 (Fla. 4th DCA 1992) .

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Before Judge Henning could rule on the constitutionality of the statute, she was transferred to the civil division. The case has since been assigned and reassigned to various trial court judges, four in all. The State places great emphasis on the order of the third trial court, retired Judge John Ferris, concerning the constitutionality of the statute. However, the State neglects to include the fact that this order was the tainted product of secret ex parte communications between Judge Ferris and State prosecutors (R. 1535, 1717). Judge Ferris was subsequently disqualified from the case. ***See Marks*** v. Ferris, 4th DCA Case Nos. 93-867 and 93-1112.

As the years went by, numerous charges were dismissed upon findings that the conduct charged simply did not constitute a crime.[6] The State appealed each and every one of the dismissals and each and every dismissal was affirmed on appeal. Additionally,

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[6] For example, the State had charged that the medical corporations and doctors committed "grand theft" by collecting the balance of their regular and customary fees, not paid by worker's compensation, from the patient's third party tort recovery and that the law firm committed the same crime by deducting this money from the client's settlement. (R. 469). However, prior to the charges being filed, another Broward Circuit Court Judge, in a declaratory judgment action filed by a different doctor, had ruled that these payments were perfectly appropriate and legal. (R. 471). Additionally, the worker's compensation statutes specifically provide that payments can legally be received from liable third parties (R. 469); the legislative history of the statute states that the legislature intended health care providers to receive such payment from third-party tort recoveries (R. 470); and the Attorney General's Office, in a companion RICO case alleging the identical violation, conceded the payments were lawful. (R. 475). Accordingly, Judge Henning dismissed these charges. (R. 467-476). The State appealed and this court affirmed the dismissal. ***State v. Marks, 596 So.*** 2d 1074 (Fla. 4th DCA 1992). Other charges which were dismissed upon sworn motions to dismiss are discussed later in this brief.

as the defense demonstrated that the State's fraud charges were meritless, either factually or as a matter of law, the State voluntarily dropped numerous charges.' The Information was again amended in August of 1992, deleting the charges which were dropped. (R. 70-98). The remaining charges which were dismissed by Circuit Court Judge Andrews and which are the subject of this appeal are set forth below.'

A. **Neomia Williams - "Incomplete" Information. (Counts 20, 21, and Predicate Acts "R" and "S" of Count 1).**

Mark Marks and the law firm were charged with failing to

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[7] For example, The State had charged the law firm and Mark Marks with committing "theft of interest from clients' settlement recoveries which the State alleged was earned when the clients' settlement drafts were deposited into the firm's trust account to be cleared and disbursed. (R. 56). After comprehensive discovery, motions to dismiss, and memoranda of law demonstrating there was no theft of interest, the State voluntarily dropped those charges when it filed its third (amended) information. (R. 70-98).

Additionally, in a count strikingly similar to the "incomplete" insurance fraud prosecution, the State alleged that the law firm and Mark Marks committed "theft" by submitting a hospital bill to a tort feasor, Jackson Memorial Hospital, without disclosing that some of the charges had been paid by Medicaid. (R. 19, 135-158). The Firm filed a sworn motion to dismiss and memorandum of law demonstrating that the law firm would have breached its obligation to the client had it not presented the full bill because the client was statutorily obligated to pay Medicaid back from any recovery and the common law collateral source rule in effect at the time provided for recovery of the full bill. (R. 135-158). Other charges which were voluntarily dropped are discussed later in this brief.

[8] The underlying facts are properly considered in considering the constitutionality of the statute as applied. *See In Re Fuller, 255 So.* 2d 1 (Fla. 1971); State v. *Globe Communications Corporation,* 622 So. 2d 1066, 1070 (Fla. 4th DCA 1993), *aff'd 648 so.* 2d 110 (Fla. 1994).

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voluntarily provide an expert radiology opinion' to Allstate Insurance Company in a presuit offer to settle their client, Neomia Williams', $10,000 uninsured motorist claim. (R. 92; 1195-1197). Gary Marks was also charged in these counts with theft, but not insurance fraud, by virtue of his status at the law firm.[10] (R. 92; T. 105-106, 109-111). Neomia Williams was not charged with any crime, nor has there been any allegation that she in any way falsified, fabricated, or exaggerated her injuries. There are also no charges or allegations that the medical reports and bills provided to Allstate with the presuit letter were false. Rather, the charges were based solely on an allegation of "excluding" the expert's report. (R. 92).

The excluded report was Dr. Robert Kagan's interpretation of a low back MRI scan as showing no evidence of disc herniation. (R. 443). Marks' presuit letter made no claim of low back disc herniation. (R. 413, 445-448). More importantly, whether there

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[9] The law firm filed an affidavit of the expert radiologist, Dr. Robert Kagan, in which he testified that Mark Marks, P.A. retained him as an expert witness for the purpose of rendering an expert opinion on Neomia Williams' low back MRI scan. The State filed a traverse in which it disagreed with Dr. Kagan's testimony that he was retained as an expert. However, the State did not identify the facts upon which it relies in denying the testimony. (SR. 73-77).

[10] It is the State's position that Gary Marks can be held criminally responsible for theft, without committing the allegedly fraudulent act, by reason of his position at the firm. The State's theory is that in July of 1987, an arbitrarily chosen date (T. 105), Gary Marks became a "principal" because he took on more responsibility and management functions at the law firm. Therefore, according to the State, he is guilty of theft if someone else committed insurance fraud and the case settled after that date. (T. 105-106, 109-111).

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was a low back disc herniation was totally irrelevant to Allstate in paying Ms. Williams' claim. Allstate settled the claim without even considering Ms. Williams' low back injury because Ms. Williams had a serious knee injury which Allstate concedes was alone worth the $10,000 policy limits. (R. 407, 1186-1187). Additionally, long before the law firm's presuit letter, Allstate had already determined that the claim's value exceeded the uninsured motorist policy limits. This determination was made 11 months before the presuit letter and without any input from Marks. (R. 404-405, 414-415).[11]

These counts had also initially charged that medical reports by Dr. I. Soovere and Dr. Farriss D. Kimbell, were fraudulently excluded. (R. 58). These reports were in fact favorable to Ms. Williams' claim. (R. 408,411,439,441). Earlier in the case, the firm filed a separate sworn motion to dismiss the portion of the counts alleging exclusion of these favorable reports (R. 401-465) and when the State filed its third (amended) information it voluntarily dropped these charges. (R. 76-77).

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[11] The State nevertheless contends that Marks violated §817.234(1) by failing to include Dr. Kagan's expert opinion with the presuit letter. The State's theory is that even though no claim was made for disc herniation, because another test by Dr. Genovese showed "lumbar radiculopathy" (an indication of a neurological problem) the MRI showing no disc herniation (a neurological problem) had to be disclosed. (T. 358-360, 376). However, Dr. Genovese's reports indicate that his diagnosis was not in any way dependent on the results of an MRI scan, but would remain the same regardless of the MRI results: "She has a need to review the NMR as these, if positive, may indicate where the pinched nerve is, if it is negative, she will need further testing to evaluation the location of the pinched nerve I've diagnosed." (R. 434).

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B. Annette Wardimon - "Incomplete" Information and "forged and false" report of Dr. Cohen (Counts 18, 19 and Predicate Acts "P" and "Q" of Count 1).

These counts charge Mark Marks and the law firm with grand theft and insurance fraud for presenting a demand letter to Fireman's Fund Insurance Company on behalf of Annette Hardimon which excluded a medical report of Roscoe M. Thorne, M.D. "which materially lessened the severity of Annette Hardimon's injuries"; and for presenting a "forged and false" medical report of Bernard J. Cohen D.C. (R. 91). Gary Marks was also charged in these counts with grand theft, but not insurance fraud.

Dr. Roscoe M. Thorne, whose report was allegedly excluded, was a worker's compensation doctor who treated Annette Hardimon for a separate and distinct earlier worker's compensation accident (not the accident for which the presuit offer to settle was made). Dr. Thorne's report stated that the doctor suspected malingering. This information was public record in the worker's compensation file and the insurance company through its own independent investigation had already received this information long before the firm's presuit letter. (R. 813, 851). The insurance company declined to enter into any settlement negotiations, suit was filed, and the defendant received the report through discovery requests. (R. 816, 878-881). After the charges were filed, it was learned that the insurance company failed to disclose a witness statement and an independent medical auditor's report to the plaintiff. (R. 244-245, 248). When these items were subpoenaed in the criminal proceedings, the insurance company and its lawyer filed motions for protective order

asserting the work product and attorney-client privileges. (R. 1119-1126). The trial court granted the motions and issued a protective order. (R. 1127-1128).

The allegations that a "forged and false" report of Dr. Bernard J. Cohen was presented were based on ex parte investigative interviews with the doctor. An insurance investigator asked Dr. Cohen whether he was ever asked to "change" Hardimon's medical report. Dr. Cohen responded that he did not remember and the investigator asked the doctor to check his records. (R. 1219). A month later Dr. Cohen returned to the State Attorney's office with his file. It contained the allegedly "forged and false" report. However, Dr. Cohen, a physician in his seventies, concluded that the report was not his because the subheadings in the report were in a different order than that which he usually used. (R. 1220).

After the charges were filed, the State's key witness, Laurence Leavy, a lawyer formerly employed by Marks who handled Ms. Hardimon's worker's compensation claim, testified that he had put together a draft of the report for the doctor to follow if the doctor agreed with it and that the doctor told Leavy in a phone conversation that he had reviewed and did agree with the proposed report. (R. 490-491, 1220-1221). Laurence Leavy's proposed report merely contained more complete and accurate information than the doctor's earlier report. It was a compilation of Dr. Cohen's earlier report and his physician's notes, plus the observations and opinions of other doctors' reports in Dr. Cohen's file. (R. 1224-1228).

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Dr. Cohen's medical transcriber testified that she typed the report from an audio tape of Dr. Cohen supplied by Dr. Cohen. After typing the report in final form, the transcriber sent it to Dr. Cohen's office where the doctor's signature stamp was affixed. (R. 1222-1223). Leavy testified that Dr. Cohen confirmed that he had "signed" the report (R. 490-491, 1220-1221) and Dr. Cohen acknowledged in deposition that the report is more accurate and more complete than his earlier report and that the facts contained in the report are true and correct. (R. 1228).[12] After Leavy's testimony, Assistant State Attorney Fred Damski expressly disavowed that the report was in any way forged. (R. 165-173). The firm filed a motion to strike the allegation of forgery, the State agreed to an order striking the allegation, and the allegation was stricken. (R. 165-173, 249, 332).[13]

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[12] At a later deposition, taken while Dr. Cohen was under investigation for sexual battery on one of the firm's clients, Dr. Cohen gave contradictory testimony. (R. 1705).

[13] In a similar (subsequently dropped) charge, the original information had also alleged that the law firm and several defendants presented "a false medical report purportedly prepared by Dwight C. Reynolds, M.D., P.A. dated April 2nd, 1986 on behalf of Jessie Wilcher, which report omitted the material facts that Mr. Wilcher had denied any complaints for the first 72 hours after his accident and denied any pain or numbness in his arms or legs." (R. 39-40). This allegedly "false" report was, in fact, true and accurate. Not only did Mr. Wilcher have complaints of neck and right arm pain immediately after the accident, but he was treated by the same doctor, Dr. Reynolds, at the emergency room right after the accident. These facts were fully available to the State prior to the filing of the charges. (R. 174-208). In a brief ex parte investigative statement, Dr. Reynolds had stated that the report was in his file, but he wasn't sure he had generated the report. (R. 175, 205-208). After the charges were filed, the law firm filed a sworn motion to dismiss (R. 174-208) and the State voluntarily dropped this charge.

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C. Williamena Nelams - "Incomplete" Information (Counts 34, 35 and Predicate Acts "FF" and "GG").

Mark Marks and the law firm are charged with theft and insurance fraud for presenting a demand letter and medical report and bills to First Southern Insurance Company on behalf of Williamena Nelams which excluded medical reports which reflected Dr. Joseph Gelety's opinion of an MRI Scan. (R. 96-97; R. 686-687). Six experts have interpreted the MRI scan. Four (Dr. Centrone, Dr. Robert Kagan, Dr. Howard Wilkov, and the State's own witness, Dr. Arnold Lang[14]) opined disc herniation which did not affect the lumbar spinal canal. The defendant's expert, Dr. Thomas Tuft, who is routinely retained by insurance companies to interpret medical records and MRI films (T. 23-30; R. 260) disagreed, opining no disc herniation. The sixth, allegedly fraudulently excluded, opinion of Dr. Gelety stated that there was "no evidence of disc herniation into the lumbar spinal canal." (R. 250-331). Dr. Gelety's opinion is not inconsistent with the opinions of Drs. Centrone, Kagan, Wilkov, and Lang, It does not state that there was no disc herniation, it states that there was "no evidence of disc herniation into the lumbar spinal canal." (R. 250-331, 753).

The Information had also initially charged Marks with insurance fraud in a separately dismissed count alleging that Dr.

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[14] After the law firm filed a motion demonstrating that the majority of the experts opined disc herniation, the State had the MRI scan reviewed by neurosurgeon Dr. Arnold Lang, a State witness and former associate of Dr. Gelety and Dr. Centrone. Dr. Lang opined that Dr. Centrone was correct, that there was a "definite irregularity" of the disc which the doctor described as a "bulge or herniation" (R. 753).

Centrone's opinion that the MRI scan showed disc herniation was false and fraudulent. (R. 67). This count was dismissed upon Dr. Centrone's sworn motion to dismiss (R. 686-688) and the dismissal was affirmed by the Fourth District. State ***v. Centrone, 589 So.*** 2d 913 (Fla. 4th DCA 1991).

D. **Phillip** Gammage (Count 23 and Predicate Act **"U").**

The State charged Mark Marks under section 817.234(3) with assisting, conspiring with or urging Phillip Gammage to make a false and fraudulent insurance claim in violation of section 817.234(1), "in that [Mark Marks] urged Phillip Gammage to undergo unnecessary surgical procedures". (R. 93). Phillip Gammage never had any surgery, much less any "unnecessary" surgery. Moreover, Gammage unequivocally testified at a deposition attended to by the State Attorney's Office and the Department of Legal Affairs that Mark Marks never urged him to have any surgery (R. 763-764, 802-804), that he was truly and legitimate injured, that he was never asked to and did not fake or exaggerate any pain or injury, and that he was never urged to commit any type of insurance fraud. (R. 762-764, 755-804).[15]

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[15] The charge was based on a brief ex-parte convoluted statement taken by a State investigator prior to the case being filed. The original information had also alleged that Mark Marks urged two of Phillip Gammages' relatives to make false claims, ***i.e.***, that Barbara Gammage was urged to make a false claim by telling a doctor her neck hurt, and Robert Gammage was also urged to undergo "unnecessary" surgery. (R. 21-22). After Barbara and Robert Gammage were deposed and denied these allegations (R. 756), the State voluntarily dropped the charges related to Barbara and Robert Gammage when it filed an amended information. (R. 39; R. 756). However, Phillip Gammage had not yet been deposed at that time. (R. 756).

E. Sharon Mills (Count 22 and Predicate Act "T").

Mark Marks was charged with a violation of section 817.234(3) for allegedly conspiring with or urging Sharon Mills to make a false and fraudulent insurance claim in violation of section 817.234(1)(a), "in that said [Mark Marks] urged Sharon Mills to exaggerate her pain and suffering during medical examinations." (R. 93). After the charges were filed, a comprehensive deposition was taken from Ms. Mills. She was questioned in detail about every visit she made to every doctor and testified that every complaint and every symptom she related was true and correct and she never exaggerated any pain and suffering. (R. 1708).

F. Sam Montgomery (Counts 29 - 33 and Predicate Acts "AA" - "EE").

These counts charge theft and insurance fraud under s. 817.234(1) against Mark Marks, Gary Marks, Irene Porter, and Dr. Centrone for allegedly preparing and presenting "a medical report purportedly prepared by Ronald J. Centrone, M.D., dated September 21, 1987 on behalf of Samuel Montgomery, which report was dictated by [Mark Marks] and prepared by [Irene Porter] on Dr. Centrone's stationery". (R. 94-96). Dr. Centrone says that his office did not prepare the report but that the contents of the report are true and accurate. (R. 1709).

G. **Howard Drinks (Count 15 and Predicate Act "M").**

This count alleges that Mark Marks and Carl Borgan committed insurance fraud in violation of s. 817.234(3) for allegedly assisting, conspiring with or urging Howard Drinks to make a false and fraudulent insurance claim in violation **of** s. 817.234(1)(a),

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"in that [they] urged Howard Drinks to testify falsely during the course of a deposition on October 6th, A.D. 1988, taken by attorneys for Nationwide Insurance Company." Allegedly false testimony by Howard Drinks during this deposition in his tort case against Nationwide's insured (Nationwide was not a party) forms the bases of an additional 10 perjury counts (counts 4 through 13 and predicate acts "B" through "K") and a theft count (count 14 and predicate act "L") (R. 85-90, 72-75). Only the insurance fraud count was dismissed. (R. 1981-1982). The charges are based on the testimony of Howard Drinks and his wife, whose credibility has been called into question for many reasons including the fact that Drinks' own lawyer (retained after he discharged the Marks firm) testified that in his opinion Drinks lost his personal injury case because of his untruthfulness at trial. Mrs. Drinks replied that the case was lost because the attorney drugged her husband during trial. (R. 1700-1702).

H. **Case No. 93-501CF.**

This case, filed October 29, 1993, has not enjoyed as much factual development an discovery as the original information. Only defendants Mark Marks, Gary Marks, Mark Marks, P.A., and Ronald J. Centrone, M.D., are charged in this case. (2R. 1-7). Judge Andrews dismissed all counts involving third party liability cases (counts 1, 2, **3, 5, 7, 8,** 9, 10 and 11). (2R. 29-30). These counts allege theft and insurance fraud in violation of s. 817.234(1) for nondisclosure of medical information in connection with a presuit letter regarding Damon Wyche (2R. 1-2), presentation of medical

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reports which omitted any mention of an intervening accident (2R. 6), and a "false" oral statement to an adjuster concerning a purported conversation with an eyewitness. (2R. 7).

DECISION UNDER REVIEW

Circuit Court Judge Robert Lance Andrews held that Fla. Stat. 817.234(1) does not apply to third party liability cases and dismissed all charges, in both informations, involving third party cases. (R. 1962-1982; 2R. 29-30). These orders were the subject of the State's appeal in Fourth District case numbers 93-3259 and 93-3308. In a later order, Judge Andrews held that the statute is unconstitutionally vague as applied to omissions by attorneys engaged in the representation of their clients, and dismissed the counts charging an omission on an uninsured motorist claim in case no. 90-6433. (3R. 246-257). This order was the subject of the State's appeal in Fourth District case no. 94-0339. All appeals were consolidated by the Fourth District after oral argument. The Fourth District agreed in its decision that "section 817.234(1) is unconstitutionally vague in its application to attorneys in the representation of their clients, as it does not provide adequate notice when omissions will result in an 'incomplete' claim under the statute." State v. ***Mark Marks, P.A., 654 So.*** 2d 1184, 1190 (Fla. 4th DCA 1995). However, the Fourth District disagreed with the trial court's conclusion that the insurance fraud statute is inapplicable to third party liability cases. Id. at 1190-1193, and held that it was error to dismiss the grand theft charges or to dismiss any charges based on a third party case not solely

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dependent on the allegation of incompleteness. ***Id.*** at 1187. Accordingly, the Fourth District reversed and remanded the trial court's orders of dismissal with directions to reinstate all of the counts and predicate acts except those which are totally and exclusively dependent upon alleged incomplete statements tendered by the attorneys in representation of their clients. ***Id.***

Upon the State's motion for rehearing/certification, the Fourth District certified to this Court the following question of great public importance: "Whether Section 817.234(1), Florida Statutes (1987), is unconstitutionally vague as applied to attorneys in representation of their clients since it does not provide adequate notice of when an omission will result in an 'incomplete' claim under the statute." ***Id.*** at 1194. The State filed a Notice to Invoke Discretionary Jurisdiction/Notice of Appeal, contending that the Fourth District erred in holding the statute unconstitutional as applied. The defendants cross-appeal the Fourth District's holding that the statute is applicable to third party liability cases, its reversal of the dismissal of the counts charging insurance fraud not involving "incompleteness", and the dismissal of the theft counts.[16]

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[16] Defendants also filed a Cross-Notice to Invoke Discretionary Jurisdiction. This court has both mandatory appellate jurisdiction and discretionary jurisdiction over all issues in the case. The decision is appealable as of right as a decision of the district court declaring invalid a state statute, pursuant to Fla. R. App. P. 9.030 (a)(1)(A)(ii). ***See L.M. Duncan & Sons, Inc. v. City of Clearwater, 478 So.*** 2d 816 (Fla. 1985) (decision of district court holding statute unconstitutional as applied); ***Universal Engineering Corp.*** v. Perez, 451 So. 2d 463 (Fla. 1984) (same); ***Simmons v. Division of Pari-Mutuel,*** Etc., 412 So. 2d 357 (Fla. 1982) (Supreme Court had appeal jurisdiction over decision of district court

SUMMARY OF THE ARGUMENT

The Fourth District correctly held that s. 817.234 is unconstitutionally vague as applied to omissions by attorneys in the representation of their clients. The statute contains no definition of "incomplete" and there is no discernible standard of disclosure to be found in the statute, or in any other body of law, which would put an attorney engaged in the adversarial process of presuit settlement negotiations on notice of what act the statute prohibits. The mental state element of the statute does not save the statute because it does not make definite which acts are proscribed. Additionally, the statute conflicts with an attorney's duties of confidentiality, the rules of civil procedure, and the work product doctrine, constituting an unconstitutional encroachment on the judiciary.

However, the Fourth District erred in concluding that the insurance fraud statute applies to third party liability cases, and therefore, in reversing the dismissal of the insurance fraud charges not involving exclusions or omissions. In reaching its conclusion, the Fourth District recognized an ambiguity in the statute, yet construed it broadly in violation of the fundamental rule of strict construction for criminal statutes. Moreover, the composition, language and legislative history of the statute demonstrate that it was not intended to include third party

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holding a portion of a statute unconstitutional, but rejecting other grounds argued by appellant). Additionally, the court having discretionary jurisdiction on the basis of the certified question, it has jurisdiction over all issues. *Feller v. State, 637 So.* 2d 911 (Fla. 1994).

liability cases. Alternatively, the statute is an unconstitutional violation of equal protection because it imposes criminal penalties only upon claimants, but not upon insurance companies, and if it is interpreted to apply to third parties and their attorneys, unconstitutionally discriminates between attorneys who are penalized for conspiring with third parties, and doctors and hospitals who are not. The Fourth District further erred in reversing the dismissal of the theft counts.

LEGAL ARGUMENT

I. FLORIDASTATUTE 8817.234 IS UNCONSTITUTIONALLYVAGUE WHEN APPLIED TO OMISSIONS BY ATTORNEYS IN THE REPRESENTATION OF THEIR CLIENTS

The Fourth District correctly held that Fla. Stat. §817.234(1) is unconstitutionally vague when applied to omissions by attorneys in the adversarial context **of** settlement negotiations of their clients' cases. The State contends that omissions or exclusions may constitute a fraudulently incomplete insurance claim under s. 817.234(1) in some, as yet undefined, circumstances, determined on a case-by-case basis. The insurance fraud statute provides at subsection (1):

> **817.234 False and fraudulent insurance claims. --**
>
> **W** (a) Any person who, with the intent to injure, defraud, or deceive any insurance company, including, but not limited to, any statutorily created underwriting association or pool of insurers or any motor vehicle, life, disability, credit life, credit, casualty, surety, workers' compensation, title, premium finance, reinsurance, fraternal benefit, or home or automobile warranty company:
>
> 1. Presents or causes to be presented **any written or oral statement** as part of, or in support of, a claim for payment or other benefit pursuant to an insurance

> policy, knowing that such statement **contains any false, incomplete, or misleading information concerning** any fact or thing material to such claim;
>
> is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084
>
> (b) All claims forms shall contain a statement in a form approved by the Department of Insurance that clearly states in substance the following: "Any person who knowingly and with intent to injure, defraud, or deceive any insurance company files a statement of claim containing any false, incomplete, or misleading information is guilty of a felony of the third degree."

§817.234(1), Fla. Stat. (1987). The term "statement" is defined in the statute in broad and opened ended-language:

> (6) For the purposes of this section, "statement" **includes, but is not limited to,** any notice, statement, proof of loss, bill of lading, invoice, account, estimate of property damages, bill of services, diagnosis, prescription, hospital or doctor records, X ray, test result, or other evidence of loss, injury, or expense.

However, the statute contains no definition of the term "incomplete" and is simply too broad and open-ended to provide any ascertainable standard of guilt for nondisclosure when applied to presuit settlement negotiations of personal injury tort claims. There is simply no discernible standard of disclosure to be found in the statute, or in any other body of law, which would put attorneys in this adversarial context on notice of when an omission will result in a fraudulently "incomplete" statement under the statute.

Indeed, this prosecution is <u>wholly unprecedented</u>, presenting a case of first impression not only in Florida, but across the nation. There have been no reported decisions found anywhere in the nation where an attorney **was** prosecuted for insurance fraud for presenting "incomplete" information to an insurance company in

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presuit settlement negotiations of personal injury tort claims.

The adversarial system for settlement negotiations of personal injury tort claims is firmly entrenched in the jurisprudence of this State and in the usual, customary and accepted practice of personal injury law. As both the trial court and the Fourth District correctly stated: "Attorneys are expected to zealously represent their client's interest. In an adversary system such as ours the contending parties presume that evidence is marshaled competitively." State ***v. Mark Marks, P.A., 654 So.*** 2d 1184, 1187 (Fla. 4th DCA 1995).

The only body of law in Florida to address the issue of nondisclosure in our adversary system holds that there is not now, and never has been, a duty to voluntarily disclose unfavorable information in settlement negotiations. ***See Wilkinson v. Golden,*** 630 So. 2d 1238 (Fla. 2d DCA 1994); ***Smiles v. Young,*** 271 So. 2d 798 (Fla. 3d DCA), ***cert. den.*** 279 So. 2d 305 (Fla. 1973). In ***Wilkinson v. Golden,*** a medical malpractice claimant omitted material facts when she answered the defendant's presuit request for information relating to her medical history. After suit was filed, the defendant moved to dismiss the plaintiff's complaint as a sanction for nondisclosure. The trial court found that the omission was intentional and dismissed the complaint. Chapter 766 creates a presuit screening period for medical malpractice claims and creates a duty of informal presuit discovery. The information which must be disclosed and when it must be disclosed is specifically identified and set forth in the form of specific rules in the

statute. See §766.106(7). However, the presuit discovery obligation is not triggered until the plaintiff files a notice of intent to initiate litigation and no notice of intent had been filed when the plaintiff made the omission. Consequently, the Second District reversed, stating:

> Nowhere within the statutes or rules do we find any requirement that a claimant furnish information prior to the notice of intent. **Nor would we expect to find such a requirement. Parties have always been free to exchange information in settlement negotiations but [are] not required to do so until initiation of litigation.** The statutory scheme in chapter 766, requiring informal discovery prior to filing a malpractice action, is an ***exception,*** but not one that would allow access to a potential claimant's medical and financial records without a precipitating event. We conclude that the precipitating event is the notice of intent to initiate litigation. *630* So. 2d at 1238.

Similarly, in *Smiles v. Young, 271* So. 2d 798, the Third District found that there was no duty to voluntarily provide unfavorable medical reports during settlement negotiations with one's opponent. In *Smiles,* a lawyer for the defendant in a litigated personal injury case negotiated a settlement of the plaintiff's claim without disclosing a medical report. The physician who examined the plaintiff pursuant to the defendant's request under the rules of civil procedure found that the plaintiff had a more serious injury than the other doctors' reports revealed. The plaintiff never served a proper discovery request for the information and so the defendant "withheld" that information and settled the case. The plaintiff sought to set aside the settlement agreement, claiming fraud:

> [Plaintiffs] urge that there is a species of "fraud" or

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> "misconduct" to be found in the fact that the defendants knew that Mrs. McCutcheon had sustained the serious injury in question, the fractured odontoid process, and, perhaps more importantly, knew that Mrs. McCutcheon and her lawyers were not aware of this serious injury when they effected a settlement very favorable to the defendants. 277 So. 2d at 803.

The Third District flatly rejected the claim, explaining that to hold that this conduct was fraudulent, would have the effect of imposing a disclosure duty upon adversaries, contrary to the adversary system for the determination of truth:

> We think that the dicta in the Minnesota case, as interpreted by appellees, **would have the result of imposing upon trial attorneys a duty** to advise a plaintiff represented by competent counsel of every fact within a defendant's knowledge which might be material to the plaintiff. **Such a holding would be contrary to the adversary system for the determination of truth.** *Id.*[17]

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[17] Similarly in ***USM Corp. v. SPS Technologies, Inc., 694*** F. 2d 505 (7th Cir. 1982), cert. den., 462 U.S. 1107 (1983) the federal court held that a lawyer did not commit a fraud by negotiating a settlement without producing a damaging document to his opponent:

> Fraud is just a name for the misrepresentations and omissions that legislators or judges want to punish; the concrete question we have to answer is whether the kind of conduct that SPS's counsel engaged in should be punished -- and by denying finality to consent decrees, a heavy sanction. We are unwilling to judge the conduct of SPS's counsel by the standards that would be appropriate if he had been responding to a request from his client or from someone else to whom he owed fiduciary obligations, **His relationship with USM's counsel was adversary rather than fiduciary.** The American system of justice has been built on the premise that truth, at least the sort of truth that is relevant to legal rights and remedies, is likeliest to emerge from a vigorously competitive contest between opposing counsel. In any competitive contest -- even war -- there are constraints on the adversaries. In litigation one of these is that the **adversaries may not resort to fraud; but that as we have said is a conclusion rather than a standard. It wouldbepsychologicallyunrealistic, given the adversary setting, to call a failure to go out of one's way to produce damaging documents a "fraud"** on opposing counsel and so, perhaps, on the court. Id. at 509.

Additionally, as the Fourth District noted, there are numerous statutes, rules, and case law, which provide that medical reports and opinions are privileged and confidential and need not be disclosed to one's adversary presuit. Florida Statute § 455.241(2) provides for the confidentiality of medical records." In the absence of the consent of the patient, or a properly issued subpoena, there are only three presuit exceptions for the disclosure of medical records enumerated in the statute: (1) records may be furnished to the person who obtained or furnished medical treatment for the patient; (2) records may be furnished to the Department of Professional Regulation pursuant to its authority to regulate doctors; and (3) records may be furnished in a worker's compensation case upon request of the employer or its insurance carrier, however, the use of the records by the employer/carrier is confidential and such records are not discoverable in any civil or criminal suit. Case law holds that this statute creates a privilege and that the statutory privilege is not abrogated by a presuit insurance claim, or even by filing suit. See *Adelman Steel v.* Winter, 610 So. 2d 494 (Fla. 1st DCA 1992) (statute creates a privilege of confidentiality in medical information); *Pic N' Save* v. *Singleton,* 551 *so.* 2d 1244 (Fla. 1st DCA 1989) (presuit insurance claim does not abrogate statutory privilege of confidentiality in medical information); *Franklin* v. Nationwide

[18] The State's position that §455.241(1) does not apply when a patient's attorney has obtained medical records from the doctor is meritless. Confidential matters retain their confidentiality when their disclosure is itself a privileged communication. Fla. Stat. §90.507.

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Mutual Fire Insurance Company, ***566 So.*** 2d 529 (Fla. 1st DCA 1990), ***rev. dismissed*** 574 So. 2d 142 Fla. 1990) (medical records privilege not waived by filing suit).

Fla. R. Civ. P. 1.360 likewise demonstrates that the medical privilege is not waived and that there is no obligation to disclose medical reports presuit. The rule provides for disclosure of medical reports only when the claimant has undergone a mandatory medical examination pursuant to the rule and has requested and obtained a report of the examination. The medical reports required to be disclosed are specifically delineated and the obligation is not triggered until a request by the opposing party. ***Id.*** Additionally, Fla. Stat. §395.3025, relating to hospital records, is worded substantially similar to the medical records statute, and has been construed as creating a statutory privilege of confidentiality in hospital records. ***State v. Wenger, 560 So.*** 2d 347 (Fla. 5th DCA 1990).

Medical reports of doctors prepared in anticipation of litigation are also protected from disclosure by the work product doctrine, even after litigation. ***See Surf Drugs,*** Inc. v. Vexmette, 236 So. 2d 108, 112 (Fla. 1970) (written summaries of witness' knowledge of the case prepared in anticipation of litigation is protected work product); ***Hickman v.*** Taylor, ***329*** U.S. 495, 67 S.Ct. ***385,*** 91 L.Ed. 451 (1947) (same); ***Avis-Rent-A-Car System, Inc. v. Smith, 548*** So. 2d 1193 (Fla. 4th DCA 1989) (statement obtained from treating doctor is work product and not discoverable). Similarly, expert medical opinions of doctors not expected to be called at

trial are privileged and not discoverable. Fla. R. Civ. P. 1.280(4); ***Morgan v. Tracy, 604 So.*** 2d 15 (Fla. 4th DCA 1992) (report of expert radiologist initially disclosed, but later withdrawn from witness list is protected work product).[19]

Moreover, the relationship between attorney and client is confidential and attorneys have a duty to maintain the confidentiality of client information. See 90.502, Fla. Stat. (attorney-client privilege); Rule 4-1.6, "Rules of Professional Conduct," ***Rules Regulating the Florida Bar*** (attorney's duty of confidentiality); Official Comment to Rule 4-1.6 ("The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information related to the representation, whatever its source. "); *Buntrock* ***v. Buntrock,*** 419 So. 2d 402, 403 (Fla. 4th DCA 1982) (the rule of confidentiality "protection is broader than the evidentiary attorney-client privilege, and applies even though the same information is discoverable from other sources").

The Official Commentary to the ethical Rule of Confidentiality makes clear that disclosure during settlement negotiations with the client's adversary is authorized only when the disclosure will be favorable to the client:

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[19] ***See also Wackenhut Corp. v. Crantz-Heisz Enterprises, Inc.,*** 451 so. 2d 900 (Fla. 2d DCA 1984); ***Myron v. Doctors General Ltd.,*** 573 So. 2d 34 (Fla. 4th DCA 1990); *Ruiz* ***v. Brea, 489 So.*** 2d 1136 (Fla. 3d DCA 1986). The State has taken the position below that the opinion of a treating physician cannot constitute privileged opinion work product. This is plainly incorrect. The fact that a doctor treated the patient does not necessarily mean he cannot be a litigant's expert witness. ***See Wilson v. Health Trust, Inc., 640*** So. 2d 93 (Fla. 4th DCA 1994).

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> A lawyer is impliedly authorized to make disclosures about a client **when appropriate in carrying out the representation,** except to the extent that the client's instructions or special circumstances limit that authority. In litigation, **for example,** a lawyer **may** disclose information by admitting a fact that cannot properly be disputed **or in negotiation by making a disclosure that facilitates a satisfactory conclusion.** *Id.*

Consistent with these rules and statutes, and the long established standards for the practice of personal injury law, the Florida Bar, in required Continuing Legal Education courses, cited by both the trial court and the Fourth District below, teach attorneys not to disclose unfavorable information to their clients' adversaries in presuit settlement negotiations (R. **714-714, 717-719, 735-737).** State *v. Mark Marks, P.A., 654 So.* 2d at 1187-1188, n. 3.

Illustrative of the advocate's duty to emphasize the strengths of his client's cause, a lecturer at a Florida Bar Continuing Legal Education Seminar offered this example. His client was injured in an accident, but a year after the accident her treating orthopedist said she had a "zero" impairment rating. The lecturer acknowledged that this fact would be critical to the insurance company's evaluation, but explained that there was no duty to disclose it, and therefore no crime in omitting that report from his settlement brochure. (R. 718-719). Similarly, treatises on personal injury practice, such as the *Florida Practice Guide: Personal Injury, co-*authored by United States District Court Judge William M. Hoeveler, encourages lawyers to make selective disclosure of medical information during presuit negotiations and **states that** medical

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records remain confidential presuit. (R. *746). **State v. Mark Marks, P.A., 654 So.* 2d at 1188, n. 3.

After considering the various statutes, rules of procedure, and professional regulations by which an attorney must gauge his conduct in this adversarial context and the usual and customary practice of providing less than complete disclosure, the Fourth District correctly concluded:

> In an adversarial context, an attorney would rightfully be confused as to what conduct would subject him or her to punishment for filing an "incomplete" claim under Florida's insurance fraud statute. ***654 So.*** 2d 1188.

The State does not dispute the propriety of omitting confidential or privileged information or of making selective disclosure of favorable medical information. In fact, the State concedes that the statutory language defining the prohibited act is so broad and open-ended as to render the statute unconstitutionally vague for failure to give due notice. (R. 2509, 2523, 2531). However, the State contends that the vagueness problem is cured by the mental state element of the statute. According to the State, the words "intent to injure, defraud or deceive" are sufficient to create a discernible standard by which attorneys may gauge their conduct because attorneys are prohibited from committing fraud. The Fourth District properly rejected this patently circular reasoning explaining the obvious, that no fraud for nondisclosure can exist in the absence of a duty to disclose and that there is no duty to disclose in the absence of a right to know:

> Another troublesome aspect of applying criminal sanctions for fraud against an attorney in an adversarial position for filing an "incomplete" claim is the absence

> of a duty to disclose the information. The trial court found, and the state concurs on appeal, that the insurance fraud statute does not create a duty of full disclosure. A fraud is committed for the failure to disclose material information only when there is a duty to disclose such; and such duty arises when one party has information that the other party has a right to know because of a fiduciary or other relation of trust or confidence between them. *Chiarella v. United States, 445* U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980). Cases cited by the state to demonstrate that civil fraud causes of action may exist absent a duty to disclose are not relevant to the instant case. These cases involve contractual disputes, and do not support a finding of fraud when an attorney does not disclose material information to his adversary. *See, e.g., Ramel v. Chasebrook Constr. Co.,* 135 So.2d 876 (Fla. 2d DCA 1961).

654 So. 2d 1189. There is no such relationship between adversaries which would give rise to a right to know and thus a duty to disclose. *See Wilkinson v. Golden, 630 So.* 2d 1238; *Smiles v. Young, 271 So.* 2d *798; USM Corp. v. SPS Technologist, Inc., 794* F.2d 505.

Notwithstanding the lack of any duty to disclose, the State insists that § 817.234 provides fair notice of when "incomplete" disclosure will subject an attorney representing tort claimants to prosecution because "intent to injure, defraud or deceive", as applied to dealings with insurance companies, connotes an attempt to obtain more than the attorney's client is entitled to. This argument is likewise without merit. The State itself concedes that the amount of damages a tort claimant is entitled to is not fixed, but is an issue which must ultimately be determined by the jury in the client's tort case. (T. 395). As Circuit Judge Andrews correctly held in his January 24, 1994 order, in the absence of a jury determination and a final judgment, the amount of damages to

which the claimant is entitled to is entirely speculative:

> The State draws a fine line distinction between strengthening your position and committing fraud which relies on the insured's entitlement to the fair amount of what the injury is worth. According to the State, an attorney who in good faith represents his client to get everything to which she is entitled does not violate the insurance fraud statute. However, once that attorney attempts to mislead the insurance company and obtain more than the amount the insured is entitled to, then the that attorney is guilty of fraudulent conduct.
>
> This distinction is problematic due to the speculative nature of the determination of the amount to which the insured is entitled. The worth of a specific injury is determined either by the settlement process or by a jury. In the process of negotiating a settlement, the insurance company attempts to offer the least amount possible while the insured seeks the greatest amount possible and the parties maneuver and manipulate to arrive at a settlement figure. In a trial, the insurance company claims the insured had little or no injury while the insured maintains the contrary both parties attempting to sway a jury that has great leeway in fixing an award. (3R. 254-256).

Indeed, every trial lawyer and insurance adjuster knows that what amount the client may be ultimately awarded by a jury is affected by an array of indeterminate factors such as the luck of the draw in the selection of a jury pool, the county in which the case is tried, the ability and skill of the particular trial attorneys involved, and the myriad of individual idiosyncracies which affect a jury's evaluation of intangibles such as pain and suffering, loss of the capacity for the enjoyment of life, mental anguish, etc. The list goes on and on. Indeed, there is often little rhyme or reason to explain the drastically different outcomes in jury verdicts between one case and the next, although they involve similar injuries. Similarly, what amount the parties will agree to settle for in the absence of a jury determination, is itself

indeterminate and affected by a myriad of factors: the costs of litigation, the amount of coverage involved, the motivation of the negotiating parties, the personalities of the negotiators, etc.

A criminal prosecution cannot rest on the basis of such a speculative standard which is inherently incapable of determination and leaves to the jury the definition of the criminal offense. ***State v. Buchanan, 191 so.*** 2d 33 (Fla. 1966). In ***State v. Buchanan,*** an attorney was prosecuted under a statute which made it unlawful to accept compensation for the placement of a child for adoption, but did not prohibit payment of "reasonable" charges or fees for legal services. As in the instant case, there were no appropriate common law guidelines and no familiar practice or workable standard to guide attorneys confronted with the statute. This Court held that the statute was unconstitutionally vague, in words which are particularly appropriate in the instant case:

> Violation of the present statutory section! a felony, can result in imprisonment in the state prison for not less than one year nor more than five, or a fine of not less than $1,0000 nor more than $5,000, or both. One jury and judge, applying the statute, could find as unreasonable a given fee, while another jury and judge under identical circumstances could conclude that a larger fee was proper. This could be especially true as to the range of fees found reasonable in the so-called higher and lower income and cost living areas of the state. An attorney searching earnestly for precedents in an effort to keep to what is safe, could not possibly know but could only speculate as to why one lawyer was adjudged a felon and the conduct of another deemed not violative, when the fee charged by the latter was perhaps considerably in excess of the one charged by the former under a seemingly parallel situation. As apt today as when pronounced is the observation of the court in ***United States*** v. Reese, 1876, 92 U.S. 214, 23 L.Ed. 563, "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could

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be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government."

We simply say that the statutory section in question is too vague and indeterminate to establish for guidance of attorneys an ascertainable standard of guilt. Accordingly, we find that section 72.40(2)(a), Florida Statutes, F.S.A., is void, in that attorneys prosecuted and convicted under it will be deprived of their organic right of due process of law. 191 so. 2d at 37.

Moreover, as the Fourth District correctly noted, intent is an after the fact determination and in the instant case does nothing to define the act which is proscribed:

As far as can be ascertained, the state can not specifically identify when an omission of information by an attorney in an adversarial context is fraudulent, other than to say that an omission is fraudulent when there is an intent to defraud. Such circular reasoning cannot withstand appellees' vagueness challenge. The state's interpretation of the statute could lead to arbitrary enforcement. Intent, in so many instances, boils down to a factual finding based on inferences from evidence. The state admits that cases involving "incomplete" claims, specifically those involving omitted medical records would have to be determined on a case **by** case basis. It also maintains that if a case lacks materiality or intent "a prosecution cannot succeed." However, an unsuccessful prosecution will result after charges are brought and evidence is presented to a jury. Intent is an "after-the-fact" determination. Rou, **366** So.2d at 386. An adjudication of not guilty may clear an attorney's name, but "it cannot undo the harm inflicted upon him and his career by such a charge." Id.

* * *

In sum, section 817.234(1) is unconstitutionally vague in its application to attorneys in the representation of their clients, as it does not provide adequate notice when omissions will result in an "incomplete" claim under the statute. Given the various statutes, rules, regulations, and customs involving disclosure of information **by** an attorney to adversaries, the statute forces attorneys to act at their peril when dealing with insurance companies prior to a trial. The specific intent element does not save the statute since it does not make definite which acts are proscribed. **654 So.** 2d at 1190.

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11. FLA. STAT. 8817.234 UNCONSTITUTIONALLY ENCROACHES ON THE JUDICIARY

As demonstrated above, when the statute is applied to adversaries, it conflicts with an attorneys duties of confidentiality, the discovery provisions of the rules of civil procedure, and the work product doctrine. Because these matters fall within the exclusive jurisdiction of the judiciary, the statute constitutes an unconstitutional encroachment. *See In re: The Florida Bar, 316 So.* 2d *45* (Fla. 1975); *The Florida Bar v. Massfellar,* 170 So. 2d 834, 838 (Fla. 1964); Art. V, s. 3, s. 15 *Florida Constitution* (1968); Johnson v. State, 308 So. 2d 127 (Fla. 1st DCA 1975), *aff'd* 346 So. 2d 66 (Fla. 1977).

III. ARGUMENT ON CROSS-APPEAL

A. FLA. STAT. 8817.234 MUST BE STRICTLY CONSTRUED AS EXCLUDING THIRD PARTY LIABILITY CASES

The Fourth District erred in construing section 817.234 as encompassing third party liability cases.[20] The basic disagreement between the Circuit Court and the Fourth District on this issue is in the determination of what constitutes a "claim" within the meaning of s. 817.234. The heading of the statute uses the words

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[20] A construction which limits the statute to first party insurance claims supports the dismissal of the uninsured motorist count because, although the claimant is the policy holder in an uninsured motorist claim, an uninsured motorist claim does not constitute a first party insurance claim. *Allstate Insurance* Company *v. Boynton*, 486 So. 2d 552, 557 (Fla. 1986) ("... **UM coverage is a limited form of third party coverage** inuring to the limited benefit of the tortfeasor to provide a source of financial responsibility if the policyholder is entitled under the law to recover from the tortfeasor. It is not first **party coverage** even though the policy holder pays for it . . .").

"insurance claim" and the body of the statute uses the language "claim for payment or other benefit pursuant to an insurance policy." The Circuit Court construed the statute narrowly as encompassing only first party insurance claims, by reference to the language and composition of the statute as a whole. The Fourth District recognized an ambiguity in the meaning of the statute, stating that "[s]ection 817.234 does not define the term 'claim'," yet construed the statute broadly as encompassing third party liability cases. The Fourth District relied on the generic sense of the words "claim" and "claimant" and the fact that "insurance companies negotiate with third parties and their attorneys". ***State v. Mark Marks, P.A., 654 So.*** 2d at 1191, 1193.

With all respect to the Fourth District, the Circuit Court's construction of the statute is the sounder of the two. Moreover, in reaching its conclusion, the Fourth District departed from the most fundamental rule for the construction of criminal statutes mandated by this Court, the State and Federal Constitutions, and the legislative branch of the State of Florida: that criminal statutes must be strictly construed. "When the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat .; ***Perkins v.*** State, 576 So. 2d 1310 (Fla. 1991).

Section 817.234 contains five subsections related to the making of a false and fraudulent insurance claim. The substantive crime is defined in subsection (1) of the statute. Subsections (2) through (4) penalize physicians, attorneys, and hospitals for

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assisting, conspiring or urging fraudulent violations of the statute. Subsection (6) defines the term "statement".[21] These provisions must be read as a whole, with reference to each other and the title of the act, to determine the statute's meaning. *See* ***Foley v. State,*** 50 So. 2d 179 (Fla. 1951); State v. Webb, 398 So. 2d 820 (Fla. 1981). Read as a whole, the statute provides:

> **817.234 False and fraudulent insurance claims. --**
>
> (1)(a) Any person who, with the intent to injure, defraud, or deceive any insurance company, including, but not limited to, any statutorily created underwriting association or pool of insurers or any motor vehicle, life, disability, credit life, credit, casualty, surety, workers' compensation, title, premium finance, reinsurance, fraternal benefit, or home or automobile warranty company:
>
> 1. Presents or causes to be presented any written or oral statement **as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy,** knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim; or
>
> 2. Prepares or makes any written or oral statement that is intended to be presented to any insurance company in connection with, or in support of, **any claim for payment or other benefit pursuant to an insurance policy,** knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084
>
> (b) All **claims forms** shall contain a statement in a form approved by the Department of Insurance that clearly states in substance the following: "Any person who knowingly and with intent to injure, defraud, or deceive any insurance company files **a statement of claim** containing any false, incomplete, or misleading information is guilty of a felony of the third degree."

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[21] Subsection (5) provides a civil remedy to insurance companies upon a criminal adjudication of guilt.

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> (2) Any physician licensed under chapter 458, osteopath licensed under chapter 459, chiropractor licensed under chapter 460, or other practitioner licensed under the laws of this state who knowingly and willfully assists conspires with, or urges **any insured** party to fraudulently violate any of the provisions of this section or part XI of chapter 627, or any person who, due to such assistance, conspiracy, or urging by said physician, osteopath, chiropractor, or practitioner, knowingly and willfully benefits from the proceeds derived from the use of such fraud, is guilty of **a** felony of the third degree, punishable as provided in **s. 775.092, s. 775.083,** or s. 775.084. . . .
>
> (3) Any attorney who knowingly and willfully assists, conspired with, or urges **any claimant** to fraudulently violate any of the provisions of this section or part XI of chapter 627, or any person who, due to such assistance, conspiracy, or urging on such attorney's part, knowingly and willfully benefits from the proceeds derived from the use of such fraud, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (4) No person or government until licensed under chapter 395 to maintain or operate a hospital, and no administrator or employee of any such hospital, shall knowingly and willfully allow the use of the facilities of said hospital **by an insured party** in a scheme or conspiracy to fraudulently violate any of the provisions of this section or part XI of chapter 627. Any hospital administrator or employee who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775,082, s. 775.083, or s. 775.084. . . . §817.234, Florida Statutes (1987).

To begin with, the heading of the statute clearly manifests the legislature's intent that the statute encompass only "insurance claims, " not any claim in the generic sense of the word. Moreover, as the Circuit Court correctly stated, subsection (1) of the statute which defines the substantive offense, is composed of two parts, part (a) and part (b), "which must be read with reference to each other to glean the proper meaning of the provision as a whole. By framing these parts within the same subsection instead of making

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them separate provisions, the legislature manifested an intent for these parts to be read in harmony with one another, not in isolation." (R. 1967). Part (a) of subsection (1) begins the provision by referring to statements presented "as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy." Part (b) completes the provision by stating that "[a]ll claims forms shall contain a statement in a form approved by the Department of Insurance that clearly states in substance the following: 'Any person who knowingly and with intent to injure, defraud, or deceive any insurance company files a statement of claim containing any false, incomplete, or misleading information is guilty of a felony of the third degree."

The Circuit Court correctly concluded, that this provision, strictly construed, cannot encompass claims for tort damages against insured tortfeasors because claim forms exist only for first party coverage. They facilitate the administrative process of paying claims for identifiable policy benefits. Tort plaintiffs seeking to recover damages for personal injuries do not file insurance claims, claim forms, or statements of claim with liability insurers. Thus, by including part (b) within the subsection defining the substantive offense, the legislature manifested an intent to restrict the statute to first-party claims and to exclude third party liability cases.

The language used in the remaining subsections reinforces this construction. The statute prohibits doctors, hospitals and attorneys from assisting, conspiring or urging a fraudulent

violation of the statute. Subsections (2) and (4), applicable to doctors and hospitals, respectively, are restricted to assisting, conspiring, or urging an **"insured party"** to fraudulently violate the statute, further demonstrating the statute's restriction to first party insurance claims.[22] While subsection (3), applicable to attorneys, employs the word "claimant," it must refer to a first party claimant for two reasons. First, subsection (3) penalizes an attorney's conduct in assisting, urging, or conspiring with the claimant to fraudulently violate any of the provisions of "this section", *i.e., s.* 817.234. The only provision applicable to claimants is subsection (1), which, as demonstrated above, is restricted to first party insurance claims. Second, subsection (3) applicable to attorneys, seeks to penalize the same type of conduct punishable in subsections (2) and (4), applicable to physicians and hospitals *(i.e.,* urging, assisting, or conspiring). The Circuit Court correctly stated that interpreting the word "claimant" in subsection (3) to mean anything other than a first party claimant would result in a framework in which only an attorney would be subject to punishment when conspiring with a tort plaintiff to fraudulently violate the statute, but doctors and hospitals who participated in the very same conspiracy could not be prosecuted. (R. 1968). There is simply no reasonable basis for making this

[22] The restriction to first party insurance coverage is obvious by the use of the words "insured party" in these subsections because the only "insured party" who would utilize services of a doctor or hospital is a first-party claimant. In third party liability cases the "insured party" is the tortfeasor who caused the injury.

distinction and it is illogical to conclude that the legislature intended this result. Moreover, such a distinction would violate equal protection. See *State* v. *Blackburn*, 104 So. 2d 19 (Fla. 1958) ; *Seaboard Air Line Ry.* v. *Simon,* 47 So. 1001 (Fla. 1908).

The Circuit Court and the Fourth District also disagree on whether the legislature's inclusion of the predecessor to Florida's current nonjoinder statute in the same enactment should be considered in determining legislative intent. See Ch. 77-468, Laws of Florida, §39.[23] The Circuit Court found the inclusion of the nonjoinder statute as dispositive of the legislature's intent to exclude third party liability cases from the insurance fraud statute. As the Circuit Court correctly noted, there is a distinction between making an insurance claim for payment pursuant

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[23] **"768.063 Nonjoinder of liability insurers**
(1) No liability insurer shall be joined **as** a party defendant **in an action to determine the insured's liability;** however, each insurer, which does or may provide **liability insurance coverage to pay all or a portion of a judgment which might be entered in the action,** shall file a statement of a corporate officer setting forth the following information regarding each known policy of insurance:
(a) The name of the insurer.
(b) The name of each insured.
(c) The limits of liability coverage.
(d) A statement of any policy or coverage defense which said insurer reasonably believes is available to said insurer at the time of filing the statement.
(2) The statement required under subsection (1) shall be amended immediately upon discovery of facts calling for an amendment.
(3) If the statement or amendment indicates that a policy or coverage defense has been or will be asserted, then the insurer may be joined as a party.
(4) After the rendition of a verdict, or a final judgment by the court if the case is tried without a jury, **the insurer may be joined as a party and judgment may be entered by the court based on the statement required by this section.**
(5) The rules of discovery shall be available to discover the existence and policy provisions of liability insurance coverage." Ch. 77-468, *Laws of Florida,* §39.

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to the insurance policy, and pursuing an action for tort damages against an insured tortfeasor pursuant to the common law. This distinction is recognized by Florida's nonjoinder statute in both the 1977 version and the version in effect at the time of the acts charged in this case. §627.7262(2), Fla. Stat. (1989).[24] Both nonjoinder statutes prohibit a tort plaintiff from bringing any action against the tortfeasor's liability insurer, unless and until there is a verdict or judgment against the tortfeasor which determines the plaintiff's right to recover damages and the amount of damages. Section 627.7262(2) refers to the plaintiff's claim against a tortfeasor insured under the terms of a liability insurance policy, not as an "insurance claim" or a "claim for payment or other benefit pursuant to an insurance policy," but as a "cause of action which is covered by such policy":

> (2) No person who is not an insured under the terms of a liability insurance policy shall have any interest in such policy, either as a third-party beneficiary or otherwise, **prior to first obtaining a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.**

§ 627.7262, Fla. Stat. (1989).[25] The 1977 predecessor to the

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[24] The information alleges that the insurance fraud violations occurred on dates within the time frame of June 15, 1985 through March 10, 1989. (R. 90-97). Sec. 627.7262(2), Fla. Stat. (1989) was enacted in 1982. Ch. ***82-243,*** §542, ***Laws of Florida.***

[25] §627.7262(2) was amended, effective October 1, 1990 (Ch. 90-119, ***Laws of Florida,*** §55), after the acts charged here, as follows:

> (2) Notwithstanding subsection (1), anyinsurerwho pays any taxable costs or attorney's fees which would be recoverable by the insured but for the fact that such costs or fees were paid by the insurer shall **be** considered a party for the purpose of recovering such fees or costs. No person who is not an insured under the

nonjoinder statute refers to a third party liability case in similar terms, i.e., as "an action to determine the insured's liability." Ch. ***77-468, Laws of Florida,*** §39. The nonjoinder statute is properly considered in the construction of the insurance fraud statute. ***See Lee v. Gaddy, 183 So.*** 4, 6 (Fla. 1938) (statute imposing licensing tax on "every person engaged in the practice of any profession" strictly construed as inapplicable to pharmacists where statute relating to the board of pharmacy made "no reference to the 'profession' of the pharmacist but referr[ed] to the 'business of compounding or dispensing drugs": "While holding that pharmacy is a profession, we think that the bill of complaint in this case shows that the pharmacists who were the complainants are not practicing the profession of pharmacy within the purview of the statute") .

In rejecting the Circuit Court's reasoning, the Fourth District recognized the susceptibility of the insurance fraud statute to differing constructions, yet adopted the broadest construction by using the general sense of the word "claim", stating:

> Section 817.234 does not define the term "claim." The trial court seems to hold that section 817.234(1) defines a claim as "a claim for payment or other benefit

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terms of a liability insurance policy shall have any interest in such policy, either as a third-party beneficiary or otherwise, prior to first obtaining a settlement or verdict ~~judgment~~ against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy. Ch. 90-119, ***Laws of Florida,*** §38.

The nonjoinder statute was subsequently renumbered as 5627.4136 by Ch. 92-318, ***Laws of Florida,*** §37.

> pursuant to an insurance policy." Using a term to define itself is circular. Also the nonjoinder statute allows a suit to be filed against an insured, or an interest to be obtained in a policy, after a settlement or verdict has been reached. Implicit in reaching a settlement, which could occur in a pretrial setting, is negotiations between the insurer and the injured third party -- and his or her attorney. Some kind of demand or claim for compensation must be made prior to setting the wheels of negotiation into motion.

The Fourth District's broad construction is in error for several reasons. To begin with, it fails to take into account the heading of the statute which uses the words "insurance claim" and fails to construe the statute as a whole and with reference to all of its parts, which demonstrate its limitation to first party coverage. See Foley *v.* State, 50 So. 2d 179, 184 (Fla. 1951) ("... if the phraseology of the act is ambiguous or is susceptible to more than one interpretation, it is the court's duty to glean the legislative intent from a consideration of the act as a whole, 'the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of law already in existence bearing on the subject'"); ***State v. Webb, 398 So.*** 2d 820, 824-825 (Fla. 1981) ("In determining legislative intent, we must give due weight and effect to the title of [the statute1 which was placed at the beginning of the section by the legislature itself. The title is more than an index to what the section is about or has reference to; it is a direct statement by the legislature of its intent") .[26] Furthermore, the nonjoinder

[26] ***See also State v. Tom of Davie, 127 So.*** 2d 671, 673 (Fla. 1961) ("As so aptly expressed by Judge Learned Hand 'words are chameleons, which reflect the color of their ***environment'"); Dunham*** v. ***State, 192 so.*** 324 (Fla. 1939) (words "any other person with

statute, in effect at the time of the acts charged in this case, as well as the 1977 predecessor, did not allow an interest to be obtained in a liability insurance policy after settlement. The exception for post-settlement actions was not made until 1990. See Ch. 90-119, ***Laws of Florida,*** §38, set forth in note 23, *supra*.

Most importantly, the Fourth District's construction violates the most fundamental rule of construction for criminal statutes: When the language is susceptible of differing constructions, it shall be construed most favorably to the accused." §775.021(1), Fla. Stat. As this Court stated in ***Perkins v. State, 576 So.*** 2d 1312 (Fla. 1991), strict construction is mandated by fundamental constitutional principles:

> One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.
>
> Indeed, our system of jurisprudence is founded on a belief that everyone must be given sufficient notice of those matter that may result in a deprivation of life, liberty, or property. For this reason,
>
> > [a]l penal statute must be written in language sufficiently definite, when measured by common understanding and practice, to apprise ordinary persons of common intelligence of what conduct will render them liable to be prosecuted for its violation.

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whom any property which may be the subject of larceny is entrusted or deposited by another" when read with reference to language of statute as a whole, were held inapplicable to accused where there was no relationship of bailor and bailee).

Elsewhere, we have said that

> [s]tatutes criminal in character must be strictly construed. In its application to penal and criminal statutes, the due process requirement of definiteness is of especial importance.
>
> Thus, to the extent that definiteness is lacking, a statute must be construed in the manner most favorable to the accused.

1312-1313. (citations and footnotes omitted); See *also State v. Camp* 596 So. 2d 1055, *1056* (Fla. 1992) ("...it is a well-established canon of construction that words in a penal statute must be strictly construed. Where words are susceptible of more than one meaning, they must be construed most favorably to the accused") (citations omitted).

This principle of strict construction for penal statutes has been demonstrated by decisions of this Court, narrowly construing words which, like the Fourth District's construction of the word "claim", could be given broader meanings. In *Earnest v. State,* 351 So. 2d 957 (Fla. 1977), a defendant was sentenced under a statute prescribing a three year minimum term of imprisonment for any person convicted of robbery "who had in his possession" a firearm. The defendant did not have personal possession of the firearm, but the district court affirmed the sentence on the basis of vicarious possession. Because of an ambiguity in the word "possession", this court reversed, stating:

> Petitioner's challenge to her sentence is predicated on an asserted ambiguity in the phrase "in his possession". She suggests that the phrase may or may not include vicarious possession, and argues that for this precise reason we are obliged to construe the statute strictly -- to exclude vicarious possession -- in favor of the accused. She basically relies on Section

775.021(1), Florida **Statutes** (1975), and on ***State v. Wershow,*** **343** So.2d 605 (Fla. 1977). In ***Wershow we*** reiterated the principle expressed in ***Ex*** Parte Amos, 93 Fla. **5, 112 So. 289 (1927):**

> "The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; **nothing that is not clearly and intelligently described in its very words, as well as manifeetly intended by the Legislature, is to be considered as included within its terms . . ..'"**
>
> **We** agree that the term "possession" does not clearly encompass vicarious possession, and we agree that petitioner is entitled to the benefit of the doubt.

357. so. 2d 958-959.

This Court has similarly construed ordinances and statutes imposing licensing taxes upon broad classes of persons and professions, narrowly as excluding persons who would otherwise fall within the general sense of the words, due to their penal nature. See **State** v. Nelson, 20 So. 2d 394 (Fla. 1945) (city ordinance requiring a license for "every person, firm or corporation engaged in or managing the business as an Insurance Adjuster or Adjusters" was held to exclude an insurance adjuster whose business was limited to adjusting claims of his employer); *Lambert* ***v.*** *Mullan,* 83 So. 2d 601 (Fla. 1955) (statute imposing occupational license tax upon "every person engaged in the practice of any profession", was held to exclude registered nurses despite the facts that other statutes referred to registered ***nurses*** as persons engaged in the practice of "professional" nursing and that registered nurses refer to themselves as "professional" nurses); Lee v. *Gaddy*, 183 So. 4 (Fla. 1938) (the practice of pharmacy, although a profession within

the general sense of the word, was held excluded from statute imposing license tax on "every person engaged in the practice of any profession").

Both the Circuit Court and the District Court also looked to decision of other states in construing Florida's insurance fraud statute. The Circuit Court cited *People v. Learman*, 121 N.Y.S.2d 388 (N.Y. A.D. 4 Dept. 1953), which made the distinction between a tort claim and a claim "for the payment of a loss upon a contract of insurance" within the meaning of New York's insurance fraud statute:

> **The claim which Melchoirre was endeavoring to establish was not a claim for a loss upon any contract of insurance. It was a claim in tort for damages against Pellicci** arising out of his supposed liability on account of the non-existent accident. The fact that Pellicci was insured and that the insurance company stood in his shoes and was to be the intended victim does not render Melchoirre's claim a "loss upon a contract of insurance." **These words as used in section 1202 relate as we view it to a situation when an insured or someone having a right to be paid for a loss under the terms of a policy makes a claim against the insurance company based upon the contract of insurance.** Id. at 391. (R. 1981).

The District Court relied on California decisions, which declined to follow *Learman* and applied the California insurance fraud statute to third party liability cases, finding the reasoning that "insurance companies negotiate with third parties and their attorneys" persuasive. 654 So.2d at 1193. The District Court also cited an Oklahoma case which rejected the notion that Oklahoma's insurance fraud statute would apply only in situations where there is privity of contract between the accused and the insurance company. 654 So. 2d at 1192, n. 7. However, Florida's insurance

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fraud statute is substantially different than the California and Oklahoma statutes involved in those decisions, and is unique in its language and composition, as discussed above. Moreover, the California and Oklahoma statutes did not include a provision related to the submission of "incomplete" information or a provision related to claims forms. It is only in the context of a first party insurance claim that the inclusion of these provisions makes any sense. In contrast to a third party liability case, there is both a contractual relationship which may give rise to a duty to disclose, and a contractually defined amount of payment to which the claimant is entitled. Unlike third party cases, it is possible to make a fraudulent omission or concealment of information in a first party insurance claim, e.g., in the completion of a claim form which gives adequate notice that there is a duty to disclose specific information.[27]

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[27] The Circuit Court also concluded that the term "any person" should be construed as "any insured". One of the cases cited by the Circuit Court in support of its conclusion was ***Cardenas v.*** Miami-Dade *Yellow* ***Cab*** Co., 538 So. 2d 491 (Fla. 3d DCA), rev. ***dismissed, 549*** So. 2d 1013 (Fla. ***1989).*** (R. ***1972).*** In ***Cardenas,*** the Third District construed the words "any person" as "any insured party who is harmed by his insurer's bad faith refusal to settle" for the purposes of Fla. Stat. 624.155, providing civil remedies for an insurers bad faith failure to settle. ***Id.*** at 496. This Court recently disagreed with ***Cardenas,*** finding that by the use of the words "any person" the "legislature evidenced its desire that all persons be allowed to bring civil suit when they have been damaged by enumerated acts of the insurer." ***Auto-Owners Ins. Co. v. Conquest,*** 20 Fla. L. Weekly S313 (Fla. July 6, 1995).

The civil remedy statute is substantially different than the insurance fraud statute, in which the legislature manifested an intent to include only first-party insurance claims. Moreover, the insurance fraud statute is a criminal statute, which must be strictly construed. In any event, even if the insurance fraud statute is construed to apply to persons other than the insured, the statute's language and composition demonstrate its restriction

B. FLA. STAT. §817.234 IS VIOLATIVE OF EQUAL PROTECTION

Fla. Stat. §817.234 violates the Equal Protection clauses of the Florida and United States Constitutions by making arbitrary and discriminatory classifications between parties who are similarly situated with respect to insurance claims. Subsections (1) through (4), applicable to claimants, physicians, attorneys, and hospitals all provide that a violation constitutes a third degree felony. Subsection (7) of the statute purports to make the statute applicable to insurance companies, but imposes no criminal penalty:

> The provisions of this section shall also apply as to any insurer or adjusting firm or its agents or representatives who, with intent, injure, defraud, or deceive any claimant with regard to any claim. The claimant shall have the right to recover the damages provided in this section.[28]

Imposing a criminal penalty on insurance claimants, but not on insurance companies who commit fraud bears absolutely no relationship with the purpose of the statute -- to prevent fraud by both insurance claimants and insurance companies. The statute is thus unconstitutional under the Equal Protection clause. See State *v. Lee, 356* So. 2d 276, 279 (Fla. 1978); State v. *Blackburn, 104 So.* 2d *19* (Fla. *1958); Seaboard Air Line Ry. v.* Simon, 47 So. 1001

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to insurance claims for first-party coverage.

[28] Moreover, the State concedes that the statute cannot be constitutionally applied to prosecute insurance companies because the provisions subsection (7) purports to apply to insurers do not even address the conduct of insurers. (R. 2518-2521). Furthermore, if the insurance fraud statute creates a duty of disclosure for third party tort cases, as the State contends, it must also create a duty of disclosure for insurers, who are similarly situated.

(1908).

Additionally, if the statute is held applicable to third-party liability cases, it unconstitutionally discriminates between attorneys who are penalized for conspiring with third-parties and doctors and hospitals who are not. There is no rational basis to support this classification and it, too, violates equal protection. *Id.*

C. **THE FOURTH DISTRICT ERRED IN REINSTATING THE THEFT COUNTS**

There are only three theft counts in case no. 90-6433, counts 18, 29, and 30 (and corresponding predicate acts "P", "AA" and "BB") (R. 91, 94, 76-79), and one, count 11, in case no. 93-501 (2R. 7); involving allegations of affirmative misconduct, as opposed to omissions. When the trial court dismissed these counts, the State never moved to set the dismissal aside and therefore waived any right to challenge their dismissal on appeal. See Sparta *State Bank v. Pape,* 477 So. 2d 3 (Fla. 5th DCA 1985); *Dober v. Worrell,* 401 So. 2d 1322 (Fla. 1981); *Mariani v. Schleman, 94 so.* 2d 829 (Fla. 1957). Therefore, the Fourth District erred in reinstating these counts.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative, and affirm in part and reverse in part the District Court's decision. All insurance fraud counts and theft counts, whether or not based on exclusions or omissions, should stand dismissed, for the reasons set forth on cross-appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Answer Brief of Mark Marks was served by U.S. mail this 22nd day of September, 1995 to those on the attached service list.

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