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.

CROSS-REPLY BRIEF OF MARVIN MARK MARKS

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PRELIMINARY STATEMENT

The designation "R" refers to the record in Fourth District Case No. 93-3259 and the designation "T" refers to the transcripts filed by appellee Marvin Mark Marks as a supplement to the record. All emphasis in this brief has been supplied by counsel unless otherwise noted.

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STATEMENT OF THE CASE AND FACTS

The State protests the inclusion of the facts underlying the charges in this case as irrelevant because there has been no factual adjudication. Marks agrees that an adjudication of the underlying facts was not made and was not necessary to the district court's holding that the insurance fraud statute is unconstitutionally vague in its application to attorneys. However, the underlying facts are relevant to the extent that they illustrate in concrete terms the statute's susceptibility to wholly arbitrary application and the inability of the State itself to define or agree on what act the statute prohibits.

While the State tells this Court that in cases of conflicting evaluations, nondisclosure of unfavorable evaluations is not fraudulent and does not constitute a violation of the statute,[1] the assistant attorney general and lead prosecutor who argued the constitutional issues in the trial court said just the opposite:

> THE COURT: Well, do you think that they have to hand in a report that says someone is only two percent disabled when five reports say he is 45 percent disabled?
>
> [A.A.G.] THORNTON: Absolutely. If it's not privileged and it's relevant and material to the claim.
>
> * * *
>
> THE COURT: What if it's one of four doctors' reports where one finds a two percent and the others 45?
>
> [A.S.A.] DAMSKI: If those are treating physicians where there is no question about privilege I think that it's incomplete and fraudulent to exclude those.

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[1] See Brief of Petitioner on the Merits, at p. 30.

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(1990 hearing before Circuit Judge Henning)(T. 212, 225). Thus, the lead prosecutor charged Marks with failing to disclose Dr. Gelety's opinion on Williamena Nelams' MRI scan (which the State contends negates a finding of disc herniation), when four other doctors, including the State's own witness, opined the scan did show disc herniation.[2] Under the State's current position, this conduct is perfectly legitimate and does not constitute a violation of the insurance fraud statute. Yet, Marks stands charged.

Similarly, the State tells this Court that the statute presents no conflict with an attorney's ethical duties and training because nondisclosure of unfavorable medical information as advocated by Florida Bar Continuing Education materials does not constitute a violation.[3] Yet, the lead prosecutor told the trial

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[2] *See* Amended Answer Brief of Mark Marks, at p. 12 (R. 251-252, *753).*

[3] See Brief of Petitioner on the Merits at page 26:

> The principal reason for the lower Court's conclusion that the statute does not adequately notify attorneys that they are subject to the prohibition against fraudulent submissions of incomplete claims is that attorneys who represent claimants against insurance companies, by virtue of various aspects of their professional training, education, ethical canons, and discovery rules, are effectively trained that it is permissible for them to refrain from disclosing unfavorable materials to insurers. The State does not dispute the propriety of nondisclosure in the situations referred to by the lower Court. The State does not assert that nondisclosure in those situations is going to fall within the ambit of section 817.234's penal proscriptions. The critical failure of both the lower Court and the trial court, is the failure to recognize the significance of the statutory element of the intent to defraud. Very simply, the acts referred to in the lower Court's opinion are acts which permit nondisclosure by attorneys because they are typically acts in which

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court just the opposite. In fact, the prosecutor used the Florida Bar teachings as prime examples of what the statute prohibits:

> MR. DAMSKI: Judge, I'm telling you what the statute that I think is clear on its face and certainly in the light --
>
> THE COURT: Then what does incomplete mean to you?
>
> MR. DAMSKI: I will use the example of the Florida Bar and the skeletons in the closet. If it is something that is not privileged or otherwise excludable and clearly hurts your case factually, medically, whatever the case may be, and you omit it intending to keep it from the insurance company when you make that claim, I think it's incomplete. You're doing it with fraudulent intent at that point.

(T. 224). Thus, **Marks** stands charged with such conduct as excluding information which was public record and had already been received by the insurance company long before Marks' presuit negotiation letter;[4] and excluding an expert radiologist's interpretation of a low back MRI scan as showing no disc herniation on a $10,000 uninsured motorist claim, although no claim of disc herniation was made and the radiologist's report was totally irrelevant to the insurance company in paying the claim.[5]

The fact that the State disputes whether the radiologist's report and opinion were privileged work product further demonstrates the vagueness of the statute and its conflict with the work product: doctrine and the rules of civil procedure. Attorneys have a duty to protect privileged materials and to assert

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there is no intent to defraud the insurer.

[4] See Amended Answer Brief of Mark Marks at p. 9 (R. 813, 851).

[5] See Amended Answer Brief of Mark Marks at p. 8 (**R. 407-408, 1183-1187).**

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privileges prior to disclosure.[6] The determination of whether a particular document is in fact privileged work product is ultimately decided by the court. If the court decides the document is not privileged, the attorney may seek review in an appellate court.[7] Upon an adverse ruling, the attorney merely has to produce the document. Here, if the attorney guesses wrong or if a State prosecutor disagrees on the issue of privilege, he is subjected to a criminal prosecution and imprisonment.

The wholly arbitrary application of the statute is also demonstrated by the fact that the State initially charged violations for nondisclosure of medical reports which were in fact favorable to the client's claim of injury.[8]

ARGUMENTS ON CROSS-APPEAL

A. FLA. STAT. § 817.234 MUST BE STRICTLY CONSTRUED AS EXCLUDING THIRD PARTY LIABILITY CASES.

The State initially asserts that this Court need not reach the issue of whether the insurance fraud statute applies to third party liability cases because it contends the case is before this Court pursuant to a limited certified question. This assertion is without merit. To begin with, the State itself invoked the

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[6] See, e.g., Rule 4-1.6, Rules of Professional Conduct, Rules Regulating the Florida Bar.

[7] See, e.g., Rule 4-1.6(d), Rules of Professional Conduct, Rules Regulating the Florida Bar (an attorney who is required by a tribunal to reveal client information may first exhaust all appellate remedies); Segal v. Roberts, 380 So. 2d 1049, 1051 (Fla. 4th DCA 1979), cert. den., 388 So. 2d 1117 (Fla. 1980) (certiorari review for orders compelling production of documents asserted to be privileged).

[8] See Amended Answer Brief of Mark Marks at p. 8.

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appellate jurisdiction of this Court pursuant to Fla. R. App. P. 9.030(a)(1)(A)(ii) (decisions of district courts of appeal declaring invalid a state statute) in its "Notice to Invoke Discretionary Jurisdiction/Notice of Appeal". (App. 1). Defendants also invoked this Court's appellate jurisdiction in their Notice of Cross-Appeal. (App. 4-5). Review of district court decisions which declare state statutes invalid is mandatory and extends to all issues in the case. See Simmons v. Division of Pari-Mutuel, Etc., 412 So. 2d 357 (Fla. 1982); Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982).[9]

On the merits, the State argues that the district court's conclusion that the insurance fraud statute applies to third party liability cases is supported by the language, purpose, and legislative history of the statute. The State relies on general rules of statutory construction, Florida cases construing civil statutes, and decisions from other states construing insurance fraud statutes which do not share the Florida statute's unique language and composition.

Conspicuously absent from the State's analysis, however, is any effort to address the impact of the most fundamental and mandatory rule of construction for criminal statutes: that criminal statues must be strictly construed. When the language is susceptible of differing constructions, it shall be construed most

[9] The mandatory appellate jurisdiction of the Supreme Court includes decisions of district courts which hold statutes unconstitutional as applied. L.M. Duncan & Sons v. City of Clearwater, 478 So. 2d 816 (Fla. 1985); Universal Engineering Corp. v. Perez, 451 So. 2d 463 (Fla. 1984).

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favorably to the accused." § 775.021(1). Significantly, the State does not dispute that the district court recognized an ambiguity in the meaning of the statute in that the statute does not define the word "claim." Nonetheless, the State urges a broad construction. This construction violates the fundamental rule of strict construction and must therefore be rejected.

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

The State's position that the insurance fraud statute does not violate equal protection is based on alternative arguments: either the insurance fraud statute does impose criminal penalties on insurers, or, the statute's failure to equally impose criminal penalties on insurers does not violate equal protection. Both arguments fail.

The State argues that criminal penalties are equally imposed on insurance companies because it contends that subsection (7) incorporates the penalty provisions of the previous subsections by stating that the "provisions of this section apply to any insurer ..."[10] This argument is without merit. There is nothing in the language of subsection (7) which purports to incorporate the criminal penalty provisions of the prior subsections. Subsection (7) merely states that claimants have the right to recover damages:

> 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

[10] See pp. 10-11 of the State's October 11, 1995 "Reply Brief of Petitioner (As to Respondent Mark Marks, P.A.)", which the State incorporates into its reply brief to Mark Marks.

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claimant shall have the right to recover the damages provided in this section.

The damages provided in s. 817.234 are set forth in subsection (5). Subsection (5) contains no criminal penalty. In contrast, criminal penalties are explicitly imposed in subsections (1) through (4) applicable to claimants, attorneys, physicians, and hospitals.

The State's second argument, that the insurance fraud statute does not violate equal protection by failing to impose criminal penalties on insurers who commit fraud against claimants, ignores the obvious purpose of the insurance fraud statute -- to prevent fraud by both sides to an insurance claim. This purpose is evident from the fact that the legislature included subsection (7) in the statute. The State erroneously contends that the purpose of the insurance fraud statute was to reduce insurance premiums. In reaching this conclusion, the State relies on statements contained in the Senate Staff Analysis and Economic Statement of the Commerce Committee for the Committee Substitute for Senate Bill 1181. These statements discuss the tort limitations, not the insurance fraud provisions, of the bill" and are thus inapplicable.

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11 "Testimony before the Senate Commerce Committee indicates that the tort limitations contained in this bill would reduce verdict amounts with a corresponding reduction in insurance premiums. Since PIP is the only required coverage, drivers could save on their premiums by reducing their coverage. This bill would allow deductibles in PIP up to 4/5 of the mandated coverage. The bill would institute a rate cap until 1/1/78. The total dollar amount of any saving is not quantifiable at this time." (R. 1961).

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The State also relies on LeBlanc v. State, 382 So. 2d 299 (Fla. 1980) in which this Court upheld a statute authorizing a warrantless arrest, under certain conditions, if officers have reason to believe that one has committed a battery upon his or her spouse. The court rejected the defendant's argument that his arrest was invalid on equal protection grounds because the statute singled out spouses, but did not apply to all parties who might be involved with or affected by domestic violence, stating:

> There is no suggestion that this statute fails to address the problem of domestic violence or that members within the affected spousal class are treated differently. We reject appellant's contention that the statute must apply to all parties who might be involved with or affected by domestic violence. It is not a requirement of equal protection that every statutory classification be all-inclusive. Rather, the statute must merely apply equally to the members of the statutory class and bear a reasonable relation to some legitimate state interest.

382 So. 2d at 300 (citations omitted). The Le Blanc case is distinguishable. In Le Blanc the statute applied equally to all members in the affected spousal class which the statute created by subjecting all of them to a warrantless arrest. In contrast, the insurance fraud statute does not apply equally to the members of the statutory class of participants which the insurance fraud statute creates (i.e. claimants, attorneys, physicians, and hospitals who commit fraud against insurance companies and insurers who commit fraud against claimants), as it subjects only some of them to criminal penalties. Moreover, as discussed below, there is

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no rational basis for this discriminatory treatment and it bears no relationship to the purpose of the insurance fraud statute.

The State also argues that the insurance fraud statute need not apply equally to insurance companies because insurance companies are regulated by the State and a fraudulent act by an insurer could result in the loss of its license to conduct business in the State. This argument is totally without merit. The conduct of attorneys, physicians, and operators of hospitals are similarly regulated by appropriate licensing authorities and they all bear the same risk of losing their licenses. In fact, the insurance fraud statute itself provides that in addition to criminal penalties, if "a physician, osteopath, chiropractor, or practitioner is adjudicated guilty of a violation of this section", the "appropriate licensing authority shall hold an administrative hearing to consider the imposition of administrative sanctions as provided by law". § 817.234(2). It also provides that in addition to criminal penalties, operators of hospitals are subject to sanctions which include the revocation of their licenses. § 817.234(5). Attorneys who commit fraud are likewise subject to disciplinary proceedings and risk the loss of their license to practice law, under the jurisdiction of the Supreme Court. Thus, the State's urged distinction is nonexistent.

In sum, the insurance fraud statute violates equal protection because all participants in insurance claims are similarly situated with respect to the duties imposed by the insurance fraud statute, *i.e.* to refrain from committing fraud against each other. There is

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no rational basis for imposing criminal penalties only upon claimants, attorneys, physicians, and hospitals, but not upon insurance companies. See Seaboard Air Line Rv. v. Simon, 47 So. 1001 (Fla. 1908)(statute imposing an interest penalty of 25% per annum for failing to pay claims for goods lost in transit within 90 days after the filing of a claim violated equal protection because it applied only to railroads, and not other common carriers who were similarly situated with respect to the subject of the regulation, ***i.e.*** the payment for goods lost in transport).

Additionally, the insurance fraud statute's discriminatory treatment of claimants, attorneys, physicians, and hospitals bears no relationship with the purpose of the statute to prevent fraud by both sides to an insurance claim. See State v. Lee, 356 So. 2d 276 (Fla. 1978)("Good Driver Incentive Fund" which discriminated between drivers with no traffic convictions and drivers with as few as a single conviction violated the Equal Protection Clause because it did not bear a fair and substantial relation to legislative objective of encouraging the safe operation of automobiles and discouraging the abuse of driving privileges); State v. Blackburn, 104 so. 2d 19 (Fla. 1958)(statute forbidding the display of signs within 15 feet of right-of-way by gasoline dealers, but not dealers of other products and services, violated equal protection as it bore no reasonable relationship to the basic purpose of the statute -- to avoid the danger of distracting the attention of drivers).

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CONCLUSION

For the foregoing reasons, and for the reasons stated in Marks' Amended Answer Brief, this Court should affirm in part and reverse in part the District Court's decision. All insurance fraud counts, whether or not based on exclusions or omissions, should stand dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Cross-Reply Brief of Marvin Mark Marks was served **by** U.S. mail this 16th day of November, 1995 to those on the attached service list.

By: _____
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Pages

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT

CASE NOS. 93-3259
93-3308
94-0339

THE STATE OF FLORIDA,

Appellant,

vs.

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

Appellees.
_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION/NOTICE OF APPEAL

NOTICE IS GIVEN that THE STATE OF FLORIDA, Appellant/Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered May 24, 1995. The decision passes on a question certified to be of great public importance.

THE STATE OF FLORIDA, alternatively invokes the mandatory appellate jurisdiction of the Supreme Court, pursuant to Rule 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure, and appeals to the Supreme Court of Florida, the decision this Court rendered May 24, '1995. The same decision which forms the basis for the exercise of discretionary jurisdiction also invokes the mandatory appellate jurisdiction of the Supreme Court as the rendered decision of the District Court of Appeal expressly

APP. 1

declares invalid a state statute.

Respectfully submitted,

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APP. 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice to Invoke Discretionary Jurisdiction/Notice of Appeal was furnished by mail to H. DOHN WILLIAMS, JR., Esq., The 110 Tower - Suite 1710, P.O. Box 1722, New River Station, Ft. Lauderdale, FL 33302; ARCHIBALD THOMAS, III, Esq., Suite 1640, Gulf Life Tower, 1301 Gulf Life Drive, Jacksonville, FL 32207; EDWARD SHOHAT, Esq., Courthouse Center - Suite 1730, 175 N.W. 1st Avenue, Miami, FL 33128; EDWARD R. CARHART, Esq., 2151 S. LeJeune Road, Suite 202, Coral' Gables, FL 33134; RONALD GURALNIK, Esq., One Biscayne Tower, Suite 1928, Two South Biscayne Blvd., Miami, FL 33131; NEAL SONNET, Esq., One Biscayne Tower, Two South Biscayne Blvd., Suite 2600, Miami, FL 33131; MARK HICKS, Esq., Hicks, Anderson & Blum, P.A., New World Tower, Suite 2402, 100 North Biscayne Blvd., Miami, FL 33132; J. DAVID BOGENSCHUTZ, Esq., 600 S. Andrews Avenue, Suite 500, Fort Lauderdale, Florida 33301; RONALD I. STRAUSS, Esq., 3370 Mary Street, Coconut Grove, FL 33133 on this 14th day of June, 1995.

RICHARD L. POLIN
Assistant Attorney General

APP. 3

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH
DISTRICT

STATE OF FLORIDA,

Plaintiff/Appellant,
Cross-Appellee,

v.

MARK MARKS, P.A., MARVIN MARK MARKS a/k/a Mark Marks, GARY MARKS, CARL BORGAN, IRENE RADDATZ a/k/a Irene Porter, NOREEN ROBERTS, DENISE BELOFF,

Defendants/Appellees/
Cross-Appellants,

and

RONALD J. CENTRONE,

Defendant/Appellee.

Case Nos. 93-3259
and 94-0339

L.T. Case No. 90-6433 CF10

STATE OF FLORIDA,

Plaintiff/Appellant,
Cross-Appellee,

v.

MARK MARKS, P.A., MARVIN MARK MARKS a/k/a Mark Marks, GARY MARKS,

Defendants/Appellees,
Cross-Appellants,

and

RONALD J. CENTRONE,

Defendant/Appellee.

Case No. 93-3308

L.T. Case No. 93-501 CF10

NOTICE OF CROSS-APPEAL

NOTICE IS GIVEN that MARK MARKS, P.A., MARVIN MARK MARKS a/k/a Mark Marks, GARY MARKS, CARL BORGAN, IRENE RADDATZ a/k/a Irene Porter, NOREEN ROBERTS, and DENISE BELOFF, Defendants/Cross-Appellants, appeal to the Florida Supreme Court, the decision of

this court rendered May 24, 1995. The nature of the decision is a final decision *expressly* declaring invalid a state statute and affirming in part and reversing in part the trial court's dismissal of multiple counts and predicate acts of the informations.

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APP. 5

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BY: _____
MARK HICKS

APP. 6