IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner/Cross-Respondent,	:	
vs.	:	Case No. 93,543
JOHN H. FESSENDEN,	:	
Respondent/Cross-Petitioner.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT/CROSS-PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The present appeal is before this Court based upon the Second District Court of Appeal's certified question as set forth by the Petitioner/Cross-Respondent. Mr. Fessenden and the co-defendant below, Mr. Amos, were tried jointly. On appeal the Second District, issued the opinion in Mr. Amos' case prior to the opinion in Mr. Fessenden's case. With the exception of two issues raised in Mr. Fessenden's case which were not raised In Mr. Amos' case, the issues on appeal were the same. In addition to the certified question posed in Mr. Amos' case, the court also addressed, and resolved against Mr. Amos, the issue of the statute of limitations and the amendment of the charging indictment through the issuance of an information.

The opinion issued in Mr. Fessenden's case reasserted the certified question, but did not address any of the other issues raised. These issues are the subject of the cross-appeal. Mr. Fessenden requests that this Court consider the additional issues if it reverses the District Court's decision.

For easier reading through the remainder of this brief, the Respondent/Cross-Petitioner will refer to himself as, Mr. Fessenden, and to the Petitioner/Cross-Respondent, as the State.

This brief has been prepared in Courier New Font (12 point).

STATEMENT OF THE CASE AND FACTS

Mr. Fessenden notes that the State relied on previously presented facts in its initial brief. Given the nature of the issues before the Court, particularly those presented in the cross-appeal, Mr. Fessenden sets forth the following facts.

The formal case against Mr. Fessenden, began on November 13, 1991, when the Statewide Prosecutor filed a fifteen count indictment charging Mr. Fessenden and Mr. Amos, with several counts of grand theft, organized fraud, and racketeering (R1-17). Mr. Fessenden was charged with nine offenses, occurring between January 16, 1986, and November 20, 1990 and ultimately convicted of first degree grand theft on counts 8 and 12, and second degree grand theft on counts 11, and 13 (R1-17,2349-2354).

On June 16, 1995, counsel for Mr. Fessenden filed several motions. One of them was a motion to sever defendants. The prosecution's written response stated that the men had been properly joined because they had been charged with both a RICO offense and organized fraud (R1922). Defense counsel also filed a motion to dismiss counts one, five, and eleven of the indictment as they contained time periods which were outside the statute of limitations for the charged offense (R1925,1928). The trial judge denied the motion to sever the defendants, but granted the motion to dismiss the counts as outside the statute of limitations, while permitting the State to amend the indictment (R1961-1962). In response to the ruling, the prosecutor on November 3, 1995, filed what she termed a"Re-file Information," and continuation of the

Tenth Statewide Grand Jury Indictment. The information shorten the time periods contained in six of the charged counts, but did not alter the charges in any other way (R2155-2177).

Defense counsel moved to dismiss the re-file information arguing that the statewide prosecutor had to return to the grand jury to issue another superseding indictment, and could not simply amend the indictment by filing an information (R2267-2287).

At trial, the theme of the State's case against Mr. Fessenden and Mr. Amos, was that they committed grand theft by depriving insurance companies of their right to worker's compensation premiums (TR129,220-221,295-294).

The evidence established that the company, Aanco Underwriters Inc., was formed and run by Charles Amos. The business wrote all types of insurance policies, including worker's compensation (TR126). Mr. Fessenden was employed by the company to produce new business and to handle the accounts he obtained.

Mr. Amos was shown to be a controlling and sometimes abusive employer (TR556-559,606,683,686,847). He obtained new clients for Aanco, by providing the businesses with lower worker's compensation cost, and by providing the service of having the insurance audits conducted at Aanco (TR211-212). His control over Aanco was so tight, that an ex-employee who had owned a third of the business, was never allowed access to the books or accounting records (TR684-685). Ex-employees testified that Mr. Amos instructed them regarding methods to reduce insurance premiums due, but none of them could recall Mr. Fessenden being present for these discussions

(TR687,690,698,717).

Mr. Fessenden did not mingle in the office, but kept to himself working on his own accounts. There was no indication during his employment with Aanco, that he was aware of the illegal activities (TR603,622). Mr. Amos's client's occasionally spoke with Mr. Fessenden about their cases when they could not get in touch with Mr. Amos, but neither he nor they ever discussed any improprieties (TR244). None of Mr. Fessenden's own clients could recall ever speaking of using any improper methods to decrease the cost of worker's compensation premiums (TR668,672).

Mr. Fessenden was convicted in counts of grand theft in counts Mr. Fessenden handled the accounts of the insured in counts 8, 12, 11, and 13. Evidence at trial showed that the payroll in those counts had been understated (TR663,666,676-678,909).

Handwriting analysis was performed on a multitude of documents, to link Mr. Fessenden or Mr. Amos to the items. Mr. Amos was's handwriting was found on some of the documents. Mr. Fessenden's handwriting was not identified on any of the documents. The most the State could show was that a portion of one document **may have** been in Mr. Fessenden's handwriting (TR794,797-800).

SUMMARY OF THE ARGUMENT

I. Answer Brief of Respondent:

The appeal presently before this Court should be dismissed, as the Second District Court of Appeal did not pass upon the issue contained in the certified question presented to this Court and thus their exists no basis for this Court to exercise jurisdiction over the case.

If jurisdiction is assumed, this Court should affirm the holding of the District Court that the State failed to show that the charged acts constituted theft. The District Court's conclusion that the difference between premiums estimated at the beginning of the policy period, and premiums calculated at the end of the period cannot provide a basis for a grand theft conviction is correct, as an estimated payment is always subject to revision.

The evidence also failed to establish that the thefts had occurred at the end of the coverage years for the insurance policies, as neither the insureds nor Mr. Fessenden ever obtained any money or insurance premiums which were the "property" of the insurance carriers.

II. Initial Brief of Cross-Petitioner:

If this Court reverses the District Court's decision on the above issue, it should exercise its discretion and consider the remaining issues raised before the District Court but not decided. State v. Smith, 573 So.2d 306 (Fla. 1990). Each of these issues

provide a basis for this Court to reverse the judgments entered by the Circuit Court. If this court elects not to review these issues, then it should remand the case to the District Court for their consideration.

This Court should reverse the convictions entered as Mr. Fessenden was tried pursuant to a "re-file Information" which was filed after the statute of limitations had expired. The refile information could not relate back to the previously filed indictment as there is no authority for amending an indictment through the filing of an information.

This court should also reverse the convictions on the basis that the circumstantial evidence introduced against Mr. Fessenden's was not inconsistent with a hypothesis of innocence, and thus was insufficient to support conviction.

Reversal of the convictions is also required because the denial of Mr. Fessenden's request for severance prevented him from obtaining a fair and impartial trial.

The failure of the State to introduce competent evidence of the amount of lost premiums, as well as the improper introduction of hearsay testimony also requires reversal of the convictions.

ARGUMENT

ISSUE I

IS THE OBTAINING OF A REDUCED INITIAL PREMIUM FOR WORKER'S COMPENSATION INSURANCE BY MISREPRESENTATIONS OF STATUTORILY REQUIRED FACTORS USED TO DETERMINE THAT PREMIUM, THEFT UNDER SECTION 812.014 FLORIDA STATUTES?

I. Jurisdiction:

This case is before the Court on the basis of the Second District Court of Appeal's certification of the above question as one of great public importance. Pursuant to Art. V, Section 3(b)(4), of the Florida Constitution, this Court has jurisdiction to review "...any decision of a district court of appeal that passes upon a question certified by it to be of great public importance..." (Emphasis added). Accordingly, had the District Court actually reached the question framed above, this court would have jurisdiction to review the decision. However, the District Court did not decide this issue, as the court itself recognized, there were no statutorily required factors for the calculation of worker's compensation insurance premiums at the time the offenses allegedly occurred.

Section 626.9541, Florida Statutes (Supp. 1986), which was in effect at the time of the commission of the offenses, did not contain any factors for the calculations of worker's compensation premiums. It was not until 1990, and the enactment of § 440.381, Fla. Stat. (Supp. 1990), that such factors were set forth.

Section 440.381, required that certain factors/information be supplied to the carrier when an application for insurance was presented. The section further provided that the filing of a misleading or factually incomplete application with the intention of reducing worker's compensation premiums constituted a third degree felony. As this section was not in effect at the time that the charged offenses occurred, it cannot be applied to the present case, as such an application would constitute an ex post facto violation. Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996);Heath v. State, 532 So. 2d 9 (Fla. 1st DCA 1988)7, cert. denied, ___ U. S. ___, 117 S. Ct. 1018, 136 L. Ed. 2d 894 (1997).

Mr. Fessenden is aware that this Court may rephrase a certified question, where the ultimate issue has been addressed below, but this point does not alter the fact that this Court's jurisdiction is based upon the lower court's having decided the central issued certified to the court. Strochak v. State, 707 So. 2d 727 (Fla. 1998); Revitz v. Baya, 355 So. 2d 1170 (Fla. 1978). In this case, the District Court did not reach the issue presented in its certified question, thus, this Court lacks jurisdiction to address the issue and must reject the petition for review of the issue presented.

II. Response to the Issue on the Merits:

If this Court accepts jurisdiction of this case, then it should affirm the District Court's decision on the merits, as the

acts allegedly committed by Mr. Fessenden did not constitute theft.

A. The District Court's Resolution of the Issue was Correct as "Estimated Premium" Cannot be the Subject of Theft.

In its analysis of the issues in this case, the District Court determined that the charged offense of theft of insurance premium was complete at the time that the insurance company issued or was committed to issuing the insurance policy based upon the "estimated premiums." The Court further concluded that an "estimated premium" was not "property" which could be the object of theft, as an "estimate" is merely an approximation or value judgment which is subject to revision. Amos v. State, 23 Fla. L. Weekly D1156,1157 (Fla. 2d DCA April 27, 1998).

In its brief to this Court, the State dismisses the District Court's decision as "arbitrary," (State's brief pg. 6), and proceeds to argue that the premium that was the object of theft was not the "estimated premium," as that was "paid," but rather the premium due at the end of the policy period. (State's brief pg. 8-9). In this argument, the State misconstrues the opinion of the District Court. The Court did not find that the prepaid estimated premium would be the object of the theft, but rather that the object of the theft would be the difference between the estimated premium and the actual premium due. What the Court did hold, was that the difference between the two amounts could not be the object of theft as the estimated premium was merely that, an estimate. As

the estimate was subject to revision, until the policy period was concluded, it was not specific or static property, cash, or premium which could be the subject of theft.

The Court correctly concluded that theft is not a continuing offense. State v. King, 282 So. 2d 162 (Fla. 1973); O'Malley v. Mounts, 590 So. 2d 437 (Fla. 4th DCA 1991). Accordingly, the charged thefts would have had to take place at the time the insurance policy was entered, and would have had to based upon the estimated premiums.

In its brief, the State takes issue with the District Court's conclusion that estimated premiums cannot be the subject of theft, asserting that if this were true, then it would not be possible to form worker's compensation contracts as consideration would be lacking. (State's Brief pg. 7). This assessment is incorrect for as noted above, the State, has misconstrued the District Court's reasoning. The Court did not state that estimates were valueless for every legal purpose, but only that one who is required to make an estimate cannot be prosecuted for theft if the amount ultimately determined to be due, is greater that the estimate provided.

Florida Statute 812.014 (1985) defines grand theft, in pertinent part, as follows:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) Appropriate the property to his or her own use or to the use of any person not

entitled to the use of the property.

As relevant to this case, ""Property" means anything of value, and includes:

> (b) Tangible or intangible personal property, including rights privileges, interests, and claims.

§ 812.012(3)(b), Fla. Stat. (1985). "Property of another" is defined as:

> ...property in which a person has an interest upon which another person is not privileged to infringe without consent, whether or not the other person also has an interest in the property.

§ 812.012(4), Fla. Stat. (1985).

The preceding definitions support the District Court's conclusion that the difference between the estimated and the correctly calculated premiums could not be the subject of theft at the beginning of the policy period. At this point of time, the insurance carriers did not have the required property interest in the premium variance for the difference between the two asserted premiums to constitute theft.

The State has not presented any cases holding that an understated, inaccurate, or incorrect "estimate" can support a conviction for theft. Instead, it has attached for this Court's perusal, a magazine article, discussing problems with the worker's compensation system, and the Fourteenth Statewide Grand Jury's Report on Worker's Compensation Fraud. Apparently, the State has attached these items, to convince this Court that affirmance of the District Court's decision in this case will only add to the

preexisting problems in the worker's compensation system. Neither the magazine article nor the Grand Jury's report are relevant to this case as they do not address the specific issues before the Court.

Mr. Fessenden notes that with the enactment of § 440.381, Fla. Stat. (Supp. 1990), recently recodified into § 440.105, Fla. Stat. (1997), steps have been taken to address the problem of misstatements and fraud made in worker's compensation applications and audits for the purpose of reducing the amount of premium to be paid, in making violations of the section punishable as third degree felonies. Those that make such misstatements are also subject to monetary penalty of paying ten times the difference between the estimated premium paid, and the actual premium owed. This section which directly addresses the type of activity alleged here, will not be affected by the District Court's decision in this case.

B. There was no Theft of Insurance Premiums at the Conclusion of the Policy Periods.

The State argues, that contrary to the District Court's conclusion, the charged thefts actually occurred at the end of the insurance policy periods regardless of whether an audit was or was not performed. The State has never argued that Mr. Fessenden or Mr. Amos personally obtained any property as a result of the

alleged theft, but rather has maintained that the insureds obtained the benefit of the reduced premiums, and thus had the remaining uncollected premiums amounts due, available to them for other purposes.

This argument fails, however, as claimed loss of revenues or premiums, does not constitute conversion, as it does not comprise the appropriation of any identifiable property. Belford v. Trucking Co. v. Zagar, 243 So. 2d 646 (Fla. 4th DCA 1970), rev. denied 494 So. 2d 1151 (Fla. 1986). Accordingly, the appropriation of possible future profits or revenues does comprise the offense of grand theft. In applying for worker's compensation insurance companies first provide an **estimate** of what they believe the applicable payroll to be covered will be. The amount of insurance provided as well as the cost to the insured is based upon that estimate. Changes in the amount owed are only made if an audit is conducted, which indicates a difference between the estimate and the year end totals. Here, the payrolls were allegedly understated to gain insurance coverage at a lesser cost. The mere reduction of payroll, cannot be said to give rise to the offense of theft, for the reduced payroll inherently reduced the amount of assumed coverage. If there had been evidence of several worker's compensation claims, then there would be an argument that a theft had occurred because the insurance companies would have been compensating individuals they had not covered. However, there was no evidence that any claims had been made with the insurance companies, thus, no loss of revenues was shown. The most that was

demonstrated was the future possible loss of revenues, and this prospective loss was simply insufficient to constitute grand theft.

The State attempts to analogize the instant case with the offense of retail theft, occurring when the price of merchandise is altered prior to making payment at the cash register. The problem with this analogy and the similar one presented in Brown v. State, 414 So. 2d 15 (Fla. 5th DCA 1982), where the Appellant's actions of receiving credit for store merchandise he had not purchased was deemed to constitute theft, is that in each instances the stores had a specific property interest in the merchandise taken or the credit obtained through the use of the merchandise. In the present case, no such interest in the understated premium balance existed.

The claimed loss of revenues was the subject at issue in Warren v. State, 635 So. 2d 122 (Fla. 1st DCA 1994). There, the Appellant had been in charge of selling advertising for a television station. To increase sales, he contacted some businesses and offered to allow them to advertise, for a period, on the channel without cost. He did not tell his employers of the offer, and when they found out, he was charged with grand theft.

On appeal, the court reversed the conviction. In so doing, the court noted that the information tracked the grand theft statute, charging the defendant with appropriating currency to his use or the use of another. The court found that no evidence was presented at trial to support the assertion. The assistant attorney general argued, among other alternatives, that the conviction should be upheld on the basis, that the defendant had

diminished his employer's revenues. The court rejected this argument stating that any possible revenues never became the property of the television station.

As in Warren, Mr. Fessenden was charged with knowingly and unlawfully obtaining or using insurance premiums and/or cash and appropriating it to his use or the use of another. The theft was supposedly of revenues due the victim. Here, again as in Warren, the State failed to prove the allegations. There was never any offer of proof or even assertion, that Mr. Fessenden profited personally from the revenues. The State also failed to show that the insurance companies suffered a loss of revenues. The revenues never became the "property" of the companies and thus no loss can be claimed. Additionally, there was no evidence of theft, because no one from any of the insurance companies, specifically Cigna or Atena Insurance, testified about lost premiums. There was evidence that there was a difference between the payrolls stated in the applications or in the one audit, but there was no evidence that the insurers had not received compensation for this difference.[1] Thus, the State failed to put forth any evidence that a taking of property had occurred.

The State argues that the insurance carriers were entitled to the specific sum calculated at the end of the insurance policy periods. In instances where no audit was performed, the State suggests the offenses may be sustained as petit thefts, and in

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[1] It most assuredly was assumed that no compensation was received because of the fact that criminal charges were brought, but such assumptions are a far cry from evidence of guilt.

instances where audits were performed, sustained as grand thefts.

The State's assertions on this point overlook the fact that the insurance carriers never had an interest in or entitlement to the specific premiums at issue, as defined under § 812.014 in order for the lack of their payment to constitute theft. It may well be true that the insurance carriers could recover, any alleged losses through civil proceedings, but the criminal forum is not the place for the resolution of this issue.

Regardless of whether the charged offenses are deemed to have been committed at the beginning or at the conclusion of the insurance policy periods, the District Court's assessment that grand theft did not occur was correct and should be affirmed.

ISSUE II

THE CONVICTIONS IN THIS CASE CANNOT STAND AS THE STATEWIDE PROSECUTOR WAS IMPROPERLY ALLOWED TO "AMEND" THE INDICTMENT THROUGH THE FILING OF A "RE-FILE" INFORMATION, THUS THE CONVICTIONS MUST BE REVERSED BY THIS COURT.[2]

Mr. Fessenden and Mr. Amos were originally indicted on November 13, 1991. A superseding indictment which added new grand theft counts was filed on May 13, 1992. On October 20, 1995, Mr. Fessenden and Mr. Amos moved to have the trial court dismiss those counts of the indictment which were outside the applicable statute of limitations period. The trial court granted the motion, but allowed the State leave to amend the indictment. On November 3, 1995, the statewide prosecutor filed a "Re-file Information," containing the language that it was a continuation of the previously commenced prosecution. The "Re-file Information," narrowed the time periods of the dismissed counts so that they would fall within the appropriate time periods. Over defense counsel's strenuous objections, the trial judge allowed the prosecution to go forward relying on the refiled-information.

In Amos, supra., the Second District Court of Appeal relied on the cases of State v. Nuckolls, 677 So. 2d 12 (Fla. 5th DCA) 7, rev. denied, 686 So. 2d 582 (Fla. 1996), and Distefano v. Langston, 274 So. 2d 533 (Fla. 1973), in concluding that the "Re-file

[2] If this court decides not to consider the issues presented in the cross-appeal, Mr. Fessenden requests that the case be remanded to the District Court for their consideration.

Information" did not constitute an abandonment of the previous indictment, and that the narrowing of the time periods of the affected counts was not a substantive change. Accordingly, the court determined that the "Re-file Information was a continuation of the preceding indictment. Id.

The cases of Nuckolls, and Distefano, are distinguishable from the present case. In each of those cases, the original informations remained in effect until the new or amended informations were filed. Thus, through the "linking" language present in Distafano, or the "narrowed" time period in Nuckolls, the statute of limitations period was deemed to relate back to the original timely filed informations.

The distinguishing fact here, is that the counts at issue were dismissed, and the indictment nolle prossed prior to the refiling of the "continued" information. Once the State abandoned the indictment, it had no authority to recommence the prosecution through the refile information.

Prosecutions in Florida are commenced when either an indictment or an information is filed. Art. I, Sec. 15(a), Fla. Const.; § 775.15(5), Fla. Stat. (1985). In electing to obtain a grand jury indictment against a defendant, a prosecutor chooses to implement the fact finding powers of the judicial system. Inherent in the issuance of an indictment are the limited means for its alteration once a "true bill" has been received. For, unlike informations, indictments may not be amended to charge different, similar or new offenses. An alteration of the indictment may only

be achieved through the act of reconvening the grand jury and the issuance of a new indictment. Smith v. State, 424 So.2d 726, 729 (Fla.1983), cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); Akins v. State, 691 So. 2d 587 (Fla. 1st DCA 1997).

In recent years, courts have permitted the **ministerial** amendments of indictments without requiring that the grand jury be reconvened. Amendments which have deleted allegations from the indictment or narrowed the time frame of the commission of the alleged offenses have been permitted. See, Huene v. State, 570 so. 2d 1031(Fla. 1st DCA 1990), rev. denied, 581 So.2d 1308 (Fla.1991); Pearson v. State, 603 So. 2d 676 (Fla. 3d DCA 1992), rev'd in part, 616 So. 2d 49 (Fla. 1993). The aforementioned cases indicate that in certain limited cases where the amendment of the indictment is deemed ministerial, a prosecutor may amend an indictment without returning to the grand jury. Here however, the amendment of the indictment in this case was not merely ministerial, and even if an amendment to the superseding indictment would have been permissible, the statewide prosecutor chose not to do this. Instead, she abandoned the indictment and filed what was termed a "Re-file Information."

By filing the information, the prosecutor violated the strict requirement of separation of powers between the branches of government. B. H. v. State, 645 So. 2d 987 (Fla. 1994), cert. denied ___ U.S. ___, 115 S.Ct. 2559, 132 L.Ed.2d 812 (1995). The Florida Supreme Court has recognized, that the "exercise by a

member of one branch of any powers appertaining to either of the other branches of government," is forbidden by the Constitution. Id. at 992, quoting, Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978).

The Grand Jury as an arm of the judiciary, receives its authority to issue an indictment through the judicial branch of the government. A statewide prosecutor, as a member of the executive branch, may not amend, supersede, or circumvent the grand jury's action of issuing an indictment by abandoning it through the filing of an information; for such an action would violate the separation of powers required by the Constitution.

The information in this case was neither an amendment of nor a continuation of the prior indictment, consequently, it did not relate back to the original filing date of the initial indictment. "Clearly a prosecution timely commenced by the filing of an information within the limitations period, but then abandoned, is no basis for a restored prosecution after the period has run. McClure, infra. at 244, note 6. As a general rule, if the state nolle prosses a charge, it cannot refile the same charge in a new information after the statute of limitations has expired. Geiger v. State, 532 So. 2d 1298 (Fla. 2d DCA 1988); State v. Garcia, 245 So. 2d 293 (Fla. 3d DCA 1971). Accordingly, an abandoned, withdrawn or dismissed indictment may not be continued through an information absent an express statutory provision expressing such intent. State ex. rel. Florida Petroleum Marketers Ass'n, Inc. v. McClure, 330 So. 2d 239 (Fla. 1st DCA 1976).

Florida Statute 775.15(5)(c)(1985), does provide for a three month extension of the statute of limitations, after the statutory period has expired, to permit the refiling of an indictment or information which was originally filed within the prescribed period, but was "dismissed or set aside because of a defect in its content or form." Interestingly, this provision is inapplicable to theft offenses, as they fall under the § 812.035(10), Fla. Stat. (1985) which specifies a five year statute of limitations period in such cases, and does not contain a similar restorative provision. State v. Guthrie, 567 So. 2d 544 (Fla. 2d DCA 1990).

The "Re-file Information" filed on November 3, 1995, was neither an amendment or continuation of the preceding indictment. As it charged Mr. Fessenden with the commission of offenses occurring more than five year prior to the above date, Mr. Fessenden's motion to dismiss all of the charges should have been granted.

ISSUE III

THE CIRCUMSTANTIAL EVIDENCE PRESENTED DURING MR. FESSENDEN'S TRIAL WAS INSUFFICIENT TO ESTABLISH THAT HE COMMITTED THE CHARGED OFFENSES OF GRAND THEFT, ACCORDINGLY, THE CONVICTIONS SHOULD BE REVERSED BY THIS COURT.

The evidence of Mr. Fessenden's commission of the offenses of grand theft was circumstantial. Thus, to prevail against Mr. Fessenden's motion for judgment of acquittal, the state had the burden of introducing evidence from which the jury could have excluded every reasonable hypothesis except that of guilt. Jaramillo v. State, 417 So. 2d 257 (Fla. 1982); State v. Powell, 636 So. 2d 138 (Fla. 1st DCA 1994); Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994). Accordingly, the state must present **substantial competent** evidence which is inconsistent with the defendant's theory of events. State v. Law, 559 So. 2d 187, 189 (Fla.1989). Where the state fails to meet this burden, the trial court should grant the defendant's motion for judgment of acquittal, as the evidence was insufficient to support the charge or any lesser-included offenses. Id.

This Court has stated that where the only proof of a defendant's guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Law, at 188. In applying these standards to this case,

it is apparent that the circumstantial evidence of grand theft presented by the State was insufficient to overcome Mr. Fessenden's motion for judgment of acquittal.

The question of an individual's intent is illusive, and often may only be shown through circumstantial evidence. Consequently, Florida courts are frequently called upon to resolve the question of the sufficiency of the circumstantial evidence regarding a defendant's criminal intent. In this often confusing arena, it does appear clear that where the evidence presented at trial is equally suspectable to competing hypothesis of guilt and innocence, a conviction for the charged offenses cannot be sustained. Grover, infra.

In Grover v. State, 581 So. 2d 1379 (Fla. 4th DCA 1991), the Appellant had sold opportunities to buy or lease soda vending machines including contracts for locations and service for the machines. Eventually the business ran into difficulty supplying the numbers of requested machines. Complaints were filed and the Appellant was charged with multiple counts of grand theft and consumer fraud. The question for resolution by the court was whether the Appellant's actions were indicative of the criminal intent to steal or defraud, or simply indicated an attempt to keep a floundering business afloat.

The Appellate Court determined that neither the State's nor the Appellant's argument regarding the facts were per se unreasonable and the State's evidence could possibly even have been said to possess a strong inference of guilt. In resolving the

question, and in reversing the conviction, the court aptly stated:

> The ultimate question devolves here then as to whether a jury may be permitted to consider a single set of circumstances, which are at once susceptible of opposing reasonable hypotheses on the issue of guilt or innocence in a criminal case, and return a verdict of guilty based on their view of the more reasonable of the two. Clearly not, since it is the tendency to establish one fact to the exclusion of contrary facts which gives circumstantial evidence the force of proof in the first place; and when circumstances are reasonably susceptible of two conflicting inferences they are probative of neither. There simply would be no "proof."

Id. at 1381. See Also, Crawford v. State, 453 So. 2d 1139 (Fla. 2d DCA 1984)(facts that appellant did not have all of the items necessary to fix victim's roof, and that he said he would return her money but failed to do so, was insufficient circumstantial evidence of theft, as no intent was shown where he had commenced contract prior to termination by the victim); Stramaglia v. State, 603 So. 2d 536 (Fla. 4th DCA 1992)(circumstantial evidence that appellant who was working for excavation company failed to pay the subcontractors the balances owed them; avoided them and told them that he did not have the money, while telling the county they had been paid, was insufficient to establish felonious intent and the broken promises made by the Appellant did not demonstrate criminal intent)

The circumstantial evidence presented against Mr. Fessenden is quite similar to the circumstantial evidence presented against the Appellant in Rager v. State, 587 So. 2d 1366 (Fla. 2d DCA 1991). Mr. Rager had been convicted of one count of racketeering,

twenty-seven counts of securities fraud and twenty-seven counts of grand theft. The charges arose from the illegal act of commingling funds in a "sweep account." The appellate court reversed the convictions finding that the evidence presented below had been insufficient to support the denial of the defendant's motion for judgement of acquittal.

The events of the case began in 1982 when Mr. Rager was hired by Loyd Lawrence to sell securities. In 1984, Lawrence Properties Group was formed with Lawrence as its 95% owner and president, and Rager acquired a 50% interest and became president of Lawrence, Rager and Company. Lawrence formed several other limited partnerships not involving Rager. Rager never had any ownership interest in Lawrence Properties Group or any other related companies which remained exclusively in Lawrence's control. In 1986, Lawrence, informally named Rager president of Lawrence Properties Group. Lawrence alone maintained control of the company. Rager was never made signatory to bank accounts and had no authority to obtain release of bank records. Lawrence, the comptroller and bookkeeper, maintained exclusive control over all bank accounts.

The comptroller and bookkeeper responded only to directions given by Lawrence. Rager approached Lawrence about possible financial problems within several of the partnerships, but Lawrence dismissed the issue. When Rager discovered that checks for a certain fund were not being deposited into the appropriate escrow account. He stopped the involved partnership program. Being

unable to gain accurate information regarding the partnership's financial condition, Rager hired an additional bookkeeper, and public accountant. He then borrowed money from his wife to make the payroll. He also notified the National Association of Securities Dealers, and the limited partners of the situation. He was completely cooperative during the subsequent investigation of the case.

In reversing Rager's convictions, the appellate court stated that the evidence presented had been wholly circumstantial, and minimal at that. Lawrence had clearly been in complete control of the company and all actions had been directed by him. For Rager to be convicted, the state had to show that he had aided and abetted Lawrence in the commission of the offenses and had the specific intent to participate in the crime. The circumstantial evidence was simply insufficient to meet this burden.

Given the factual complexities of cases of this nature, the inadequate circumstantial evidence presented against Rager, was quite similar to the inadequate circumstantial evidence presented against Mr. Fessenden. Through reams of paperwork and an abundance of testimony, the State attempted to show that Mr. Fessenden knowingly and intentionally participated in the thefts of premiums from the various insurance companies. Despite these attempts, the effort failed, and the motion for judgment of acquittal regarding the grand theft offenses should have been granted.

Beginning with the opening statement the State stressed the fact that Mr. Fessenden had become the president of Aanco, thus

implying that with the title came knowledge and intent, a fact that they were never able to establish either through direct evidence, of which there was none, or through circumstantial evidence. To the contrary, the evidence presented through all of the State's numerous witnesses was that Mr. Amos was in complete control of Aanco. It was not until he was shot, and unable to run the company in 1990, the last few months of the time period charged in the ongoing offenses that Mr. Fessenden was named president (TR845). There was never any evidence introduced that showed that with the title of "President" of Aanco came the power to control the company. To the contrary, prior employees testified that even when they were vice-presidents of the company or had partial ownership interest in it, they did not have access to the books or Aanco accounts. Mr. Amos was the one who, in his megalomaniacal fashion, maintained control of the business.

Substantial evidence was presented that showed Mr. Amos had intentionally deprived the insurance companies of premiums, but none of the evidence established Mr. Fessenden's participation in the activities. Key state witnesses, each confirmed Mr. Amos' control over and involvement in the schemes, but in contrast each of the witnesses specifically stated that Mr. Fessenden remained to himself in the business and there was no indication that he was aware of Mr. Amos's activities (TR604,619,622). Although handwriting analysis was performed on numerous documents, the State was unable to establish that Mr. Fessenden had signed any of them (TR794,797-800).

The State relied heavily on auditing procedures to show that Mr. Fessenden knew of the activities occurring at Aanco, but the evidence simply was insufficient to establish that fact. Various auditors testified that conducting the audits at the agent's office occurred occasionally, while at least one auditor stated that her company would not conduct audits in that fashion, and that handling audits in such a fashion made them difficult to complete. However, none of the auditors testified that there was anything unlawful or improper in the procedure. Supposedly, conducting the audits at their office deterred or inhibited the taking of audits, but even if this fact is true, it does not mean that Mr. Fessenden was aware of Mr. Amos' activities. All the evidence showed was that it was the policy at Aanco, a policy instituted by Mr. Amos, to have the audits conducted at the office rather than the insured's business. The practice does not impute intent or knowledge to Mr. Fessenden.

In reviewing the denial of a motion for judgment of acquittal, the evidence must be considered in the light most favorable to the state. Spinkellink v. State, 313 So.2d 666, 670 (Fla.1975), cert. denied, 428 U. S. 911, 96 S. Ct. 3227, 49 L. Ed. 2d 1221 (1976). Even give the benefit of this illumination, the State's evidence in the present case failed to shed any light on the State's theory that Mr. Fessenden had knowingly and intentionally participated in the theft from any of the insurance companies who were designated as victims in this case.

The evidence presented by the State was not inconsistent with the hypothesis of innocence presented by Mr. Fessenden. That he

was merely an employee of Aanco, albeit a temporary president, placed in that position only through Mr. Amos' demise. The evidence of his actions while employed by the business was not inconsistent with the actions of an innocent employee simply acting in accordance with business policy, while being wholly unaware of any criminal activity. To convict Mr. Fessenden of the charged offenses of grand theft, the State was required to prove that Mr. Fessenden knowingly and intentionally participated in the thefts, not that he was merely an employee, of a megalomaniacal employer who engaged in criminal activities. As there was a complete lack of evidence as to the elements of knowledge and intent the motion for judgment of acquittal should have been granted, for "[t]he cloak of liberty and freedom is far too precious a garment to be trampled in the dust of mere inference compounded." Harrison v. State, 104 So.2d 391, 395 (Fla. 1st DCA 1958).

ISSUE IV

IN DENYING THE REQUEST FOR SEVERANCE OF THE CO-DEFENDANTS, THE TRIAL JUDGE DENIED MR. FESSENDEN HIS FUNDAMENTAL RIGHT TO THE FAIR AND UNBIASED RESOLUTION OF THE CHARGES AGAINST HIM; CONSEQUENTLY, THIS COURT SHOULD ORDER THAT A NEW TRIAL BE HELD.

Mr. Fessenden moved for severance from Mr. Amos both prior to and during his trial. The motion was not based upon antagonism or hostility between the defendants, but rather upon the complexity of the charges themselves and the great likelihood that the jury would be unable to separate the facts as they applied to each defendant. The trial judge abused his discretion in denying the motion, as a defendant has a fundamental right to the fair and unbiased resolution of each of the criminal charges against him. This right is ensured through Florida Rule of Criminal Procedure 3.152(b) which provides for the severance of defendants where necessary to ensure a fair determination of guilt or innocence of the defendants.

It is well recognized that requests for severance should be granted liberally if a defendant is likely to be prejudiced by refusal of the request, and that concerns of practicality and efficiency should not outweigh a defendant's right to a fair trial. Sosa v. State, 639 So. 2d 173 (Fla. 3d DCA 1994); State v. Vazquez, 419 So. 2d 1088, 1091 (Fla.1982); Fotopoulos v. State, 608 So. 2d 784 (1992)7, cert. denied 113 S.Ct. 2377, 508 U.S. 924, 124 L.Ed.2d 282 (1992). The purpose of the severance rule is to,

> ... assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence.
>
> The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants...

Bryant v. State, 565 So. 2d 1298, 1301-1302 (Fla. 1990).

In the present case, the information charged seventeen counts of grand theft, and one count each of racketeering and organized fraud. Mr. Fessenden was charged either individually or with Mr. Amos in eight counts, including racketeering and organized fraud. Mr. Amos was charged with thirteen counts, including racketeering and organized fraud. The jury convicted Mr. Fessenden of four counts of grand theft, and organized fraud. One count of grand theft had previously been nol prossed by the State. Mr. Amos was convicted as charged. The judge subsequently dismissed the organized fraud count in both cases.

At first blush, one may look at the outcome of Mr. Fessenden's case and conclude that no error arose from the denial of his motion for severance. However, this preliminary deduction would be wrong. There was a voluminous amount of evidence presented in this case. The nature of the evidence presented, and the manner in which it was manipulated obscured the lines between the two co-defendants.

This meshing of Mr. Fessenden and Mr. Amos, into one, thwarted the jury's ability to evaluate the acts of each man independently, depriving Mr. Fessenden of his fundamental right to a fair trial. The merging of the two men can also be seen in the State's initial brief to this Court. The brief refers solely to Mr. Amos, and his actions, there is no reference to Mr. Fessenden other than his name in the styling on the title page.

Over 50 witnesses testified, and approximately 191 exhibits were introduce into evidence. The striking thing about the evidence was that all most all of it implicated Mr. Amos, but there was almost no mention of Mr. Fessenden. The two had been charged together because of the allegations of racketeering and organized fraud. In her closing argument, the prosecutor repeatedly used the term the "Aanco Way" in an effort to combine all of the charges and to show the two defendants acted as one, in a common pattern of practice.

The evidence presented regarding Mr. Amos' character and method of running Aanco was damning. Witnesses testified in depth regarding his tyrannical control of the office, and his abusive nature toward his family and employees. Two ex-employees said that they knew of Mr. Amos's illegal activities at Aanco, although both said that they did not have any knowledge regarding Mr. Fessenden's involvement in the acts. Regardless of the disclaimers about Mr. Fessenden, the overall implication from the myriad testimony was that any employee that worked at Aanco would fall under Mr. Amos's scrutiny and temperamental control, and would have to be involved

in the thefts.

The fact that Mr. Fessenden was not convicted of all of the charges against him does not diminish the confusion or prejudice that was present in the case, but rather is illustrative of its existence. The evidence of Mr. Fessenden's participation in the offenses was circumstantial and minimal at best. The acquittal on three of the eight counts demonstrates how weak the case against him was. Had he not been tried with Mr. Amos, the chances are great that he would have been acquitted on all counts, for independent of the aura of culpability surrounding Mr. Amos, there was no evidence of Mr. Fessenden's guilt. Utilizing, the plethora of evidence against Mr. Amos, the State swept all of the evidence and charges encompassing both men into one neat package -- the "Aanco Way." In so doing, the facts and issues in the case became so commingled and so prejudicial, that the jury most certainly could not separate them. Thus, they were unable to make a clear determination of Mr. Fessenden's guilt or innocence on all charges.

"Due process consists of more than the procedural rules we use to safeguard a fair trial... due process requires that a defendant be given a fair trial in the substantive sense." Kritzman v. State, 520 So. 2d 568, 570 (Fla. 1988). Mr. Fessenden's due process rights were violated when he was compelled to proceed to trial with Mr. Amos. This error requires that a new separate trial be held in this case.

ISSUE V

THE EVIDENCE PRESENTED IN THE TRIAL COURT WAS INSUFFICIENT TO ESTABLISH THE AMOUNT TAKEN OR THAT GRAND THEFT OCCURRED.

Assuming that there was a loss of premiums by the insurance companies, the State failed to adequately establish the extent of that loss. The amount of underpaid premium due, was calculated through an application of a rule contained in the NCCI manual, which reflects regulations and rules relating to worker's compensation under § 440.381, Fla. Stat. (Supp. 1990). The use of this method was insufficient to establish the loss beyond a reasonable doubt which was required to support the conviction for grand theft.

In an attempt to establish the losses suffered by the insurance companies, the State called one witness, Brent Jenkins, as an expert in worker's compensation. The alleged victims of the charges were never called to testify during the trial. Mr. Jenkins, explained in length, the factors assessed when arriving at an estimated premium. (TR923-926). However, after describing the general calculation process, he then admitted that he had not utilized all of the required factors when calculating the premiums supposedly lost by the insurance companies (TR995). In calculating the lost premiums, the "NCCI" rule required him to classify all employees at their highest possible level, where no audits had been performed, he multiplied this factor by the experience modification factor, and then adjusted by the premium discount. In this

fashion, he derived the difference between the payroll reported to the insurance companies and the state, and the premiums owed on this difference (TR934-935).

The utilization of the NCCI manual to establish the amount of the lost premiums in this case was improper. The application of the rule contained in the manual may be perfectly appropriate in cases involving insurance regulatory proceedings, or in resolving premium disputes between employers and carriers, but reliance upon the "rule" to establish the amount of the theft was in appropriate in a criminal case where each element of the offense must be established beyond a reasonable doubt.

The "rule," which was never specifically described, resulted in a speculative assessment of the amount of the loss. Mr. Jenkins could have used the evidence collected by the state to accurately derive a specific loss amount for each count, but he did not do so. Instead, he employed a general formula to develop an unsubstantiated amount of loss. Although this procedure was clearly more expedient that developing specific calculations, it failed to establish the amount of loss beyond a reasonable doubt.

Even if the use of the NCCI "rule," was proper, the State still failed to establish the amount of the monetary loss. The State introduced exhibit 279 which showed the premiums calculations utilizing both the highest and lowest classification levels. The purpose of the exhibit was to establish the maximum possible loss, and minimum possible loss to the companies. In this fashion, the State hoped to show that even under the lowest calculation, the

offense of grand theft had been established (TR953). This proof failed; however, as Mr. Jenkins failed to take into consideration several factors when arriving at the loss figures. First, he failed to consider the fact that some of the understated payroll may have been the result of overtime deductions, which correctly should have been exempt from inclusion in the payroll. Second, he failed to consider the payment of officer's salaries which would also have been exempt, as well as the Aanco's commission for the sale of the insurance which would have been deducted from the premium (TR995). Because Mr. Jenkins failed to include these factors in the calculation of the premiums, all of his assessments as to loss were inflated, and cannot properly be relied upon to establish the grand theft amounts.

To establish the offense of grand theft, the state must be able to show that the value of the property taken was at least three hundred dollars. Second degree grand theft arises where the value of the property taken is at least twenty thousand dollars but under one hundred thousand dollars, and first degree grand theft occurs when the value of the property is one hundred thousand dollars or more. § 812.014 (2)(a)1, (2)(b), (2)(c), Fla. Stat. (1985). On occasion, the value of property may be so apparent that a jury may make a finding of minimum value even though the state failed to show the value of the property. Randolph v. State, 608 So.2d 573 (Fla. 5th DCA 1992). However, a jury should never be allowed to speculate regarding the value of the stolen property. Id.; Kellar v. State, 640 So. 2d 127 (Fla. 1st DCA 1994). If

adequate proof of value is not contained in the record, the issue should not be submitted to the jury. Id.

Here the calculations of lost premiums were flawed. The inaccuracy of the calculation process rendered the end results inconclusive as to the amount of underpaid premium. The only fact that is clear is that all of the premium amounts were inflated due to the inaccuracies. Given the inherent complexities in the computation of insurance premiums, the amount of the loss was not something that was self-evident or easily discerned by the jury. Only by relying on the flawed computations of loss could the jury reach a determination as to the amount of the under paid premiums. The reliance on the inaccurate figures is tantamount to resolving the issue through the prohibited act of speculation. As the State failed to accurately set forth the amount of lost premiums, the evidence was insufficient to support the charges of grand theft.

ISSUE VI

THE TRIAL JUDGE ERRED IN PERMITTING, OVER A HEARSAY OBJECTION, THE INTRODUCTION OF DOCUMENTS WHERE THE CUSTODIAN OF THE RECORDS DID NOT TESTIFY AND ESTABLISH THEIR AUTHENTICITY.

A plethora of documents, relied upon by the State in calculating the amount of unpaid premiums was admitted at trial over defense counsel's objection that no custodian had been called to testify prior to their admission (TR900-903).

Florida Statute 90.803(6)(1985), provides for the introduction of business records into evidence where it is established, that the records were compiled in the **regular course of business where evidence of such business practices is established by a records custodian or other qualified witness.** In compliance with this section, Florida courts have consistently required that testimony be introduced establishing the above predicate before the documents themselves or evidence contained therein may be introduced into evidence. Phillips v. State, 621 So. 2d 734 (Fla. 3d DCA 1993); Hogan v. State, 583 so. 2d 426 (Fla. 1st DCA 1991).

In introducing the documents, the State never attempted to comply with section 90.803(6). Instead, the seized documents were simply introduced, without eliciting testimony from any witness regarding their authenticity.

The improper admission of this hearsay evidence was clearly prejudicial and far from harmless, as the documents were utilized

by Mr. Jenkins, to establish the amount of the theft or loss.[3] The prosecutor also relied on the documents in her closing argument to support her theory that some of the businesses' payroll records had been altered. The error created by the prosecutor's reliance on the improperly admitted documents to support crucial elements of the charged offenses was not harmless and requires that the case be reversed and remanded for a new trial.

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[3] State v. Diquilio, 491 So. 2d 1129 (Fla. 1986).

CONCLUSION

In light of the foregoing argument, issues and authorities, This Court should decline jurisdiction in this case. If jurisdiction is accepted, this Court should affirm the holding of the District Court discharging Mr. Fessenden for the offenses of grand theft. If this Court reverses the District Court's decision on this issue, the convictions should be reversed on the basis of the issues presented in the cross-appeal. If this Court declines to review these issues, the case should be remanded to the District Court for their consideration.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ann P. Howe, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 18 day of September, 1998.

Respectfully submitted,

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