ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Appellee,

v. 2 DCA Case No. 96-00129

JOHN HOLLIS FESSENDEN,

93,543

Respondent/Appellant.

_____/

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

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENTS

1. In compliance with the Administrative Order of the Supreme Court of Florida in re: Briefs filed in the Supreme Court of Florida issued July 13, 1998, Petitioner/Appellee State of Florida states that this brief has been prepared in Courier New Font (12 point).

2. The question certified in John Hollis Fessenden v. State of Florida, Second District Court of Appeal, Case No. 96-00129 is identical to the question certified in Charles Clinton Amos v. State of Florida, Case No. 96-1078, Florida Supreme Court Case No. 93,238:

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

Mr. Fessenden and Mr. Amos were co-defendants at trial below.

Petitioner/Appellee State of Florida therefore adopts the State's argument in the Brief of Petitioner on the Merits filed in State of Florida v. Charles Clinton Amos, Florida Supreme Court Case No. 93,238 attached hereto and incorporated by reference together with appendix with three exhibits.

STATEMENT OF THE CASE AND FACTS

Petitioner/Appellee State of Florida agrees that Respondent/Appellant's Statement of the Case and Facts is substantially correct for purposes of this appeal with the additions and clarifications set out in the Statement of the Case and Facts in Appellee State of Florida's Answer Brief.

SUMMARY OF THE ARGUMENT

Petitioner asserts that the time of the offense was not at application when the insurance company was committed to providing coverage, but at the end of the coverage year when the year's actual payroll figures and records were available and the final premium owed the insurance company for the year's coverage could be calculated with certainty.

The "estimated premium" was never stolen or alleged to be stolen; in fact the "estimated premium" was paid as consideration for insurance coverage.

The final premium derived by audit was a sum certain which was property subject to the theft statute.

In counts where no audits took place because the audit was prevented by Respondent's actions, Petitioner argues that Section 812.012 (9) (a) 3 (b) Fla. Stat. (1990) provides that if the value of the property cannot be ascertained, the trier of fact may find the value to be not less than a certain amount and if no such minimum value can be ascertained, the value is an amount less than $100.00. The no audit counts are sustainable at the very minimum as petit thefts.

CONCLUSION

Based on the foregoing facts, arguments and authorities, this Court should reverse the decision of the Second District Court of Appeal, as to the holding relating to the certified question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Suzanne Rossomondo, Esquire, Office of Statewide Prosecution, Florida Department of Legal Affairs, 4211 North Lois Avenue, Tampa, Florida 33614 and Assistant Public Defender Megan Olson, Office of the Public Defender, 14255 49th Street North, Clearwater, Florida 33762 on this 20th day of August, 1998.

Ann Pfeiffer Harris
OF COUNSEL FOR PETITIONER/APPELLEE