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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Appellee,

v. Case No. 93,543

JOHN HOLLIS FESSENDEN,

Respondent/Appellant.

_____/

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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OTHER AUTHORITIES:

PRELIMINARY STATEMENT

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).

SUMMARY OF THE ARGUMENT

The Florida Supreme Court has jurisdiction to review the certified question and, in accordance with frequent past practice, may in its discretion re-state or re-frame the question, and review it.

The thefts took place at the end of the policy periods. In Brown v. State, 414 So. 2d 15 (Fla. 5th DCA) the court held that property was "anything of value" including intangible personal property including right, privileges, interests and claims" and included credit as a proper subject of the theft statute. Once the insurance company committed to issuance of a policy of workers' compensation insurance to Mr. Amos' and Mr. Fessenden's clients, it acquired a right, interest or claim to an honestly calculated premium. This premium was therefore subject to the theft statute under Section 812.014.

The Second District Court of Appeals opinion on the statute of limitations issue rests on sound legal underpinnings. Petitioner/Appellee respectfully asks this Court to affirm its ruling.

Should the Florida Supreme Court rule in Petitioner's favor on the certified question and the statute of limitations issue, the Court in its discretion, should remand Issues III, IV, V and VI to the Second District Court of Appeal for its consideration

because the Second District Court of Appeal's opinion did not reach these four issues or alternately affirm as to these issues.

ISSUE I

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

(As stated by Appellant)

I. Jurisdiction:

The Florida Supreme Court has jurisdiction to review the certified question.

The Second District Court of Appeal framed the certified question as follows:

> 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?
>
> (Emphasis supplied)

The post 1990 Section 440.381(1) Fla. Stat. provides in pertinent part:

> 440.381 Application for coverage; reporting payment; payroll audit procedures; penalties.- (1) Applications by an employer to a carrier for coverage required by s. 440.38 must be made on a form proscribed by the Department of Insurance. The Department of Insurance shall adopt rules for applications for coverage required by s. 440.38. The rules must provide that an application include information on the employer, the type of business, past and prospective payroll, estimated revenue, previous workers' compensation experience, employee classification, employee names, and any other information necessary to enable a carrier to accurately underwrite the applicant

....

(emphasis supplied)

The effect of the 1990 Worker's Compensation law codified factors which were already being currently used to determine a company's workers' compensation premium.

In his Initial Brief, Statement of the Case and Facts Mr. Fessenden relies upon the expert testimony of Gregory Jenkins, administrator of the Workers' Compensation Form and Rate filing section of the Department of Insurance, to establish an explanation of premium calculation under pre-1990 law. Mr. Jenkins testified that the procedures he described were mandated by the Basic Manual for Workers Compensation and Employers Liability Insurance, Florida Edition published by the National Council on Compensation Insurance, Inc. ("NCCI"), (T920-929) and described factors that are the same as those codified in Section 440.381(1).[1]

Since Mr. Fessenden's actions are not covered by the post-1990 law, the Second District Court's certified question which refers to "statutorily-required factors" clearly intends consideration of the factors in current use at the time of Mr. Fessenden's actions. In his Statement of the Case and Facts below, Mr.

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[1]"Rates and procedures for calculating Florida's workers' compensation insurance premiums are developed by the Department of Insurance, acting in conjunction with the National Council on Compensation Insurance (NCCI), a body organized by and acting on behalf of the insurance carriers." Slip Op., at 2.

Fessenden accepts as true Mr. Jenkins' description of the factors to be considered in calculating the insurance premium. (Initial Brief Fessenden, p. 10-11)

Respondent's position, that the Second District Court of Appeal did not "pass on"[2] a question certified by it to be of great public importance, is without merit. Respondent may be "legally accurate" in noting that at the time of Mr. Fessenden's offense no "statutorily required factors" existed; however, his argument ignores the substance of the Second District Court of Appeal's question as to whether misrepresentation of factors used in calculating the premium under the NCCI Basic Manual constitutes theft under Section 812.14 Florida Statutes.

This Court frequently re-frames questions certified by courts of appeal. See: Riley v. State, 511 So. 2d 282 (Fla. 1987), reversed on other grounds, 488 U.S. 445, 109 S. Ct 693, 102 L. Ed 2d 835 (1989); Time Insurance Co., Inc v. Harvey Burger, 712 So. 2d 389 (Fla. 1998); Strochak v. Federal Ins. Co., 707 So. 2d 727 (Fla. 1998).

Re-statement of the certified question is wholly appropriate. Petitioner State of Florida requests that this honorable Court

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[2]Article V, Section 3(b) of the Florida Constitution provides, inter alia that "the Supreme Court. . . .4) may review any decision of a district court of appeal that passes upon a question certified to be of great public importance." See also Fla. R. App. P. 9.030(a)(2)(A)(v).

exercise its discretion in re-stating and then reviewing the certified question.

II. Issue I on the merits

A. NO THEFTS TOOK PLACE WHEN THE PREMIUM ESTIMATES WERE MADE.

Petitioner's stated position is that the trial court erred in holding that the time of the criminal offense if any was when the insurance company "issued or was committed to issue a policy at a stated premium." (Slip. Op. at 11.) Petitioner re-asserts this position treated at more length in Petitioner's Initial Brief on the Merits.

B. THE THEFTS TOOK PLACE AT THE END OF THE POLICY PERIODS.

The "refile information" continuing the original prosecution alleged that John Hollis Fessenden "did unlawfully and knowingly obtain or use, or endeavor to obtain or use . . . the property of (named insurance company) to wit: insurance premium and/or cash, good and lawful currency of the United States. . ." and that he intended to deprive that insurance company of its use.

Respondent takes a very narrow and literal view of the elements of theft set out in the statute, concluding that the property must be tangible and the taking a physical act of control. The use of the language 'obtain or endeavor to obtain' indicates that theft is not restricted solely to the tangible, to physical property capable of being carried away.

In Brown v. State, 414 So. 2d 15 (Fla. 5th DCA 1982) the Fifth District Court of Appeal held that 'property' as being "anything of value," including "intangible personal property, including rights, privileges, interests and claims" and included credit as proper subject to the theft statute. Once it committed to issuance of the policy of workers' compensation insurance to Mr. Fessenden's clients, it acquired a right to an honestly calculated premium which could be determined at the end of the coverage year. The Brown case indicates that the statute contemplates coverage of "intangible personal property, including rights...interests and claims." Id. Put simply, the insurance company had a right, interest or claim to an honestly calculated premium which was property subject to the theft statute under Section 812.014.

Petitioner/Appellee respectfully requests this honorable Court to reverse the Second District Court of Appeal opinion holding that Mr. Fessenden's actions, even if taken as proven, did not constitute theft under Section 812.014.

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.

(As stated by Appellant)

When the Florida Supreme Court has jurisdiction on the basis of certified questions, it has jurisdiction over all issues in the criminal case. Feller v. State, 637 So. 2d 911 (Fla. 1994). Once the Supreme Court accepts jurisdiction over a cause to resolve a legal issue in conflict, it may, in its discretion, consider other issues properly raised and argued before the Supreme Court. Savoie v. State, 422 So. 2d 308 (Fla. 1982)

The Second District Court of Appeal considered the statute of limitations issue, raised by Respondent/Appellee in its Initial Brief, Issue I to which Petitioner/Respondent responded in its Answer Brief below, Issue I. In its opinion rendered 27 April 1998, the Second District Court of Appeal ruled in the State's favor. (Slip Op. at 4-5) The district court of appeal's opinion rests on sound legal underpinnings.

Petitioner/Appellee State of Florida therefore republishes its position argued below, as set forth in its Answer Brief, Issue I (p. 5-18), and adds the following argument.

The Second District Court of Appeal did not err in ruling that the statute of limitations did not bar the "Re-file Information in continuation of the Superseding Indictment." It is clear from the appellate record that the Original and Superseding indictments were never abandoned by the State. Amendments to charges in counts 1,5 and 11 narrow the time frame of the offenses which is not a substantive change from the original charging documents. Each charging document names the same defendants and enumerates the same charges. The "Re-File Information" continues the original prosecution rather than initiating a new and independent prosecution. The use of the linking language in the "Re-File Information" to the original charging documents establishes a continuation of the original and superseding indictments.

State v. Ex rel. Florida Petroleum Marketers Assoc., Inc. v. McClure, 330 So. 2d. 239 (Fla. 1976) cited by Respondent is distinguishable. In McClure the superseding indictment was abandoned, whereas in the instant case, the original Indictment and Superseding Indictment were never abandoned by the State.

Respondent/Appellant misreads the cases, DiStefano v. Langston, 274 So. 2d. 533 (Fla. 1973) and State v. Nuckolls, 677 So. 2d. 12 (Fla. 5th DCA 1996) in an attempt to distinguish them from the facts of the instant case. In the Nuckolls case, the court held where an amended information shortened the alleged time period of a conspiracy and was filed after the end of the limitations period,

while the information it was amending and continuing remained in effect, it related back to the beginning of the limitations period. The Nuckolls case is exactly on point to the instant case. In the instant case, the trial court on Appellant's motion to dismiss gave the State leave to amend four counts of the Superseding Indictment to bring them within the statute of limitations but the Superseding Indictment itself was not nolle prosequi and was replaced by the Re-File Information in continuation of the original charging documents. The Original and Superseding Indictments from which counts 1, 5 and 11 were excised (at least as to their original form) remained in force and the changes were memorialized in the new Re-File Information which used the necessary linking language (authorized by this honorable Court in DiStefano) to the original and Superseding Indictments. The State then was entitled to the benefit of a relation back to the beginning of the limitation period.

The Second District Court of Appeal did not err in ruling that prosecution under the "Re-File Information" was not barred by the statute of limitations.

Petitioner/Appellee respectfully requests this honorable Court to affirm the Second District Court of Appeal's opinion in regard to the statute of limitations issue.

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.

(As stated by Appellant)

Petitioner/Appellee State of Florida republishes Issue III of its Answer Brief in the Second District Court of Appeal, John Hollis Fessenden v. State, Case No. 96-04893 in response to Respondent's Issue III expressed above. For the convenience of the Court, Issue III of the State's Answer Brief is attached hereto and incorporated by reference as Exhibit I in Petitioner/Appellee's Appendix.

Should this honorable Court reverse On Issue I and affirm on Issue II, Petitioner/Appellee State of Florida requests the court to remand Issue III to the Second District Court of Appeal, because it did not reach Issue III in its opinion, or alternately to affirm Mr. Fessenden's conviction.

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.

(As stated by Appellant)

Petitioner/Appellee State of Florida republishes Issue II of its Answer Brief in the Second District Court of Appeal, John Hollis Fessenden, v. State, Case No. 96-04893 in response to Respondent's Issue IV expressed above. For the convenience of the Court, Issue II of the State's Answer Brief is attached hereto and incorporated by reference as Exhibit II in Petitioner/Appellee's Appendix.

Petitioner notes, on the merits, that the fact that Mr. Fessenden was acquitted of three of the eight counts with which he was charged demonstrates that the jurors were in fact paying close attention to the evidence and had the actions of Mr. Fessenden clearly separated in their minds from the actions of his co-defendant Charles Clinton Amos.

Should this honorable Court reverse on Issue I and affirm on Issue II, Petitioner/Appellee requests this Court to remand Issue IV to the Second District Court of Appeal because it did not reach

Issue IV in its opinion, or alternately to affirm the trial court's denial of Mr. Fessenden's motion for severance.

ISSUE V

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

(As stated by Appellant)

Petitioner/Appellee State of Florida republishes Issue III of its Answer Brief in the Second District Court of Appeal, John Hollis Fessenden v. State, Case No. 96-04893 in response to Respondent's Issue V expressed above. For the convenience of the Court, Issue III of the State's Answer Brief has already been attached hereto and is now incorporated by reference as Exhibit I in Petitioner/Appellee's Appendix.

Should this honorable Court reverse on Issue I and affirm on Issue II, Petitioner/Appellee State of Florida requests this Court to remand Issue III to the Second District Court of Appeal, because it did not reach Issue V in its opinion, or alternately to affirm Mr. Fessenden's conviction.

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.

(As stated by Appellant)

Petitioner/Appellee State of Florida republishes Issue IV of its Answer Brief in the Second District Court of Appeal, John Hollis Fessenden v. State, Case No. 96-04893 in response to Respondent's Issue VI expressed above. For the convenience of the Court, Issue IV of the State's Answer Brief is attached hereto and incorporated by reference as Exhibit II in Petitioner/Appellee's Appendix.

Should this honorable Court reverse on Issue I and affirm Issue II, Petitioner/Appellee requests the Court to remand Issue VI to the Second District Court of Appeal, because it did not reach Issue VI in its opinion, or alternately to affirm Mr. Fessenden's conviction.

CONCLUSION

Based on the foregoing facts, arguments and authorities, this Court should reverse on the theft issue and affirm on the statute of limitations issue.

Respectfully submitted,

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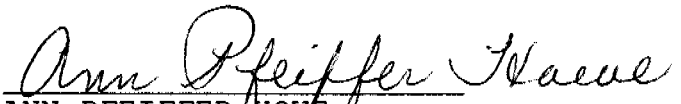

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CERTIFICATE OF SERVICE

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 2 day of October 1998.

Ann Pfeffer Howe
OF COUNSEL FOR PETITIONER/APPELLEE

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Cross-Respondent

v.

CASE. NO. 93,543

JOHN HOLLIS FESSENDEN,

Respondent/Cross-Petitioner.

_____/

STATE OF FLORIDA'S APPENDIX

Exhibit I	Issue III of State of Florida's Answer Brief in the Second District Court of Appeal, John Hollis Fessenden v. State, Case No. 96-04893
Exhibit II	Issue II of State of Florida's Answer Brief in the Second District Court of Appeal, John Hollis Fessenden v. State, Case No. 96-04893
Exhibit III	Issue IV of State of Florida's Answer Brief in the Second District Court of Appeal, John Hollis Fessenden v. State, Case No. 96-04893

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

JOHN HOLLIS. FESSENDEN,

Appellant,

v. **CASE NO. 96-04893**

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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ISSUE II

WHETHER THE TRIAL JUDGE ERRED WHEN HE FAILED TO GRANT MR. FESSENDEN'S MOTION FOR SEVERANCE.

(as stated by Appellant)

The present appellate record is inadequate to review the merits of Appellant's Issue II as to whether error occurred when the trial court denied Appellant's Motion for Severance. Without an adequate record, Appellant is unable to demonstrate error.

Mr. Fessenden's appellate counsel states in her Statement of the Case and Facts that a transcript of the hearing on the motion to sever is not in the appellate record. Appellee notes that the prosecution's written response to the Motion to Sever is also not in the appellate record, although counsel describes its contents and cites incorrectly to its presence at R1922 which is Appellant's Motion to Sever.

Your undersigned counsel well appreciates the difficulty of wrestling with the 27 volume appellate record of the magnitude of Mr. Amos' and Mr. Fessenden's trial, pre-trial hearings and rulings and the associated civil RICO proceedings which to date spans the course of more than six years, having been initiated with the Indictment issued November 11, 1991, in a case on which a number of different

court reporters worked (See Initial Brief of Appellant, Statement of the Case and Facts, page 3, footnote 2 re difficulties of obtaining transcript of hearing on Motion to Sever).

Fla. R. App. P. 9.200 (e) provides:

> Duties of the Appellant or Petitioner. The burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or appellant....

Appellant's counsel has not exhausted her means for creating a record adequate for review. Since the efforts she described proved futile, a further step would have been asking for assistance from the Court Administrator to have the Official Court Reporter request logs from the court reporters in an effort to determine who covered the hearing and have the notes transcribed.

Should that in turn have proved futile, counsel has recourse to Fla. R. App. P.9.200 (a)(4) which provides:

> If no report of the proceedings has been made or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee who may serve objections or proposed amendments to it within ten days of service. Thereafter the statement and any objections or proposed amendments shall be submitted to the lower tribunal for settlement and approval. As settled

and approved, the statement shall be included by the clerk of the lower tribunal in the record.

The burden is on the Appellant to demonstrate error and in the absence of a record on appeal, a judgment that is not fundamentally erroneous must be affirmed. Southeast Bank, N.A. v. David A. Steves, P.A., 552 So. 2d. 292 (Fla. 2d DCA 1989) If the record is not sufficient, the court will affirm the judgment under review. Morgan v. Pake, 611 So. 2d. 1315 (Fla. 1st DCA 1993). In Applegate v. Barnett Bank of Tallahassee, 377 So. 2d. 1150 (Fla. 1979, the Florida Supreme Court affirmed the order of the trial court because it was unable to decide the factual issue in the absence of a record.

Appellee State of Florida respectfully submits that in the absence of an adequate appellate record, the conviction and sentence of Appellant John Hollis Fessenden should be affirmed as to matters raised in Issue II.

ISSUE III

WHETHER THE TRIAL JUDGE ERRED IN DENYING MR. FESSENDEN'S MOTION FOR JUDGMENT OF ACQUITTAL FOR THE CHARGES OF GRAND THEFT.

(as stated by Appellant)

Section 812.014 (1) Fla. Stat. provides that:

> A person commits theft if he knowingly obtains or uses or endeavors to obtain or 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 therefrom.
> (b) Appropriate the property to his own use or to the use of any person not entitled thereto. (Emphasis supplied)

The State's evidence established the two requisite elements of grand theft beyond a reasonable doubt.

In each theft count, the insurance company provided Worker's Compensation coverage for the insured's business. Appellant John Hollis Fessenden obtained or endeavored to obtain for his client's use the cash value of that portion of the premium due the insurance company as calculated as the cash difference between the true premium and the dishonestly calculated premium. Alternately stated, the insured had available for its use and benefit, through the unlawful actions of Appellant John Hollis Fessenden, the difference between the honestly calculated

premium and the dishonestly calculated premium just as certainly as if the equivalent sum had been deposited in the insured's bank account for use of the business. The underpayment by the difference between the two amounts constitutes the deprivation of a benefit to the insurance company and an appropriation to the use of the insured client of a money benefit to which he is not entitled, as a result of retaining the difference between the correct amount of the premium and the fraudulently reduced amount of the premium.

Obtaining this benefit for his client businesses enabled Appellant to obtain all other insurance business of his Workers' Compensation client businesses. This tactic increased his volume of business and brought him other types of insurance business that generated higher commissions than the Workers' Compensation.

The Statewide Prosecutor pleaded with specificity in Count 8 that Mr. Amos and Mr. Fessenden,

> "...did unlawfully and knowingly obtain or use, or endeavor to obtain or use by fraud, willful misrepresentation of a future act, false promises, false pretenses or deception, the property of Aetna Casualty and Surety Company, to wit: insurance premium and/or cash, good and lawful currency of the United States, and of a value of one hundred thousand dollars ($100,000) or more with the intent to either temporarily or permanently deprive Aetna Casualty and Surety Company of a right to said property or a benefit therefrom, or to appropriate said property to their own use or to the use of any person not

> entitled thereto, in connection with a workers' compensation insurance policy provided to Seminole Machine and Welding, Inc. For the period November 4, 1988 through November 4, 1989 contrary to Section 812.014 Florida Statutes...."[5]

In each case, the business client, acting through Appellants, contracted with its particular insurance company for workers compensation insurance, based on an estimated payroll for the upcoming year, and for which the company established a estimated premium due. The fluid nature of incoming revenues to the client company during the coverage year necessitated a later final determination of the premium based on actual figures at the end of the coverage year, either through audit of actual figures or using the NCCI Manual for calculating a premium where an audit did not take place. Part of the "fraud, willful misrepresentation of a future act, false pretenses or deceptions" was the policy of AANCO Insurance to avoid an audit at the end of the coverage year at the client's place of business. When the audit could not be altogether avoided, clients were instructed to direct the auditors to the AANCO Insurance Company office where summaries of figures, now

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[5]Mr. Fessenden was also found guilty of count 11 (Cigna policy to Tri-County Roofing for August 1, 1986 through August 1, 1987); Count 12 (Cigna policy to Tri-County Roofing for August 1, 1987 through August 1, 1988); Count 13 (Cigna policy for Tri-County Roofing for August 1, 1988 through August 1, 1989) The Organized Fraud count 9 was later dismissed and is not at issue here.

falsified, would be supplied to the auditors, rather than their being able to examine the actual records of the client businesses.

Warren v. State, 635 So. 2d. 122 (Fla. 1st DCA 1994), cited by Appellant, is distinguishable from the instant case, because in Warren the State failed to plead with sufficient specificity to identify the property the defendant endeavored to obtain from another.[5] In the instant case it is clear what property Appellant is alleged to have taken.

Appellant's argument that because there was no evidence of claims against the insurance company during the coverage year, there was no loss to the company and therefore no theft, is without merit. This argument ignores the prospective and anticipatory nature of workers compensation insurance. In return for a premium based upon a true statement of payroll and properly classified employees, the insurance carrier contracts to be financially liable for injuries to the described workers in the upcoming year. The premium is consideration for the potential exposure of the insurance company, not for the actual claims, and whether there is evidence of actual claims under a particular policy is irrelevant.

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[5]In Warren, the information referred to a theft of currency, but there was no evidence that the defendant received any money or other consideration from the businesses or any extra remuneration from employer and it was unclear what property the defendant was alleged to have taken.

Appellant challenges the trial court's failure to grant judgment of acquittal on counts involving coverage provided by Cigna Companies to client Tri-County Roofing for the periods August 1, 1986 through August 1, 1987; August 1, 1987 through August 1, 1988; and August 1, 1988 through August 1, 1989 respectively and coverage provided by Aetna Casualty to Seminole Machine and Welding for the period November 4, 1988 through November 4, 1989.

The circumstantial evidence in the instant case, when taken from the view of the State as prevailing party, is sufficient substantial competent evidence to support the conclusion that Appellant John Hollis Fessenden was guilty as charged in Counts 8, 12 and 13 and guilty of Count 11 on which he was convicted of a lesser second degree felony.

Appellant maintains that his co-defendant Charles Amos was "in complete control" of AANCO. More correctly stated, the evidence shows that Charles Amos was in complete control of the policy of AANCO, a policy that involved telling potential clients that AANCO could save them appreciable amounts of money on their workers compensation insurance, although such insurance is highly regulated a calculation of premiums admits of little flexibility on the part of an honest broker as to the "deal" he is able to offer a client. The testimony shows that clients were instructed by either Amos or Fessenden or by both that at year end, insurance

auditors should be referred to AANCO as the place where the audit would take place, rather than at the insured's place of business, where original records were kept. (T309) In fact it was Mr. Amos' policy to avoid audits as much as possible or failing that to do the audit at his office, using summaries of figures with significantly lowered payroll figures and altered classifications to give to the auditor rather allowing him to examine the original documents and ledgers. Significantly lower premiums were generated by the tactics of under-reporting payroll even though the UCT-6s which each client filed with the State of Florida showed much higher payroll(in the case of Seminole Machine and Welding); of reclassifying workers in a high-risk (and therefore more costly) class to a lower risk (and cheaper) class; and filing false change of ownership forms which reduced the company's experience modification rating, achieving a lower premium. Mr. Amos was prepared to summarily rid himself of employees who questioned or became uncomfortable with such tactics. (T610, 611, T687, T457-458, T846-849)

The evidence shows that Appellant Fessenden, an officer of the company and a long time employee at AANCO, "kept all to himself and worked on his own accounts" according to testimony. (T601) The evidence amply demonstrates however that Appellant did act in accordance with Charles Amos' scheme for

offering significant savings on workers compensation premiums to his clients and employed the same tactics as did Amos.

As to Tri-County Roofing, the evidence shows that Appellant Fessenden did in fact solicit the business of Tri-County Roofing with the explanation that dealing with AANCO would save them time (audits handled by AANCO) and significant money. (T664, 675) As Nancy Lee of Tri-County Roofing testified, she mailed Appellant copies of UCT-6s, the quarterly reports of payroll which she had filed with the State of Florida, which were intended to be used when Fessenden supplied figures to the auditor at year's end. (T664,665) However the payroll figures submitted by Fessenden on the application were significantly lower than the UCT-6s submitted to the State. One year the actual payroll was $350,000.00 and what was listed by Appellant as payroll was $255,000.00. Co-owner Arnold Lee, her stepson of Nancy Lee testified that for the policy year 1986-1987, Appellant Fessenden under-reported the payroll on the application by more than $300,000.00 (T666, 676) and for the policy year 1988-1989 he understated the payroll by approximately $95,000.00. (T677)

In addition, Exhibit 141 came into evidence showing a change of ownership form for Tri-County purportedly signed by "Clyde A. Lee" (Arnold). He denied that the signature was his. (T678) The change of ownership form (Exhibit 142)

represented that he owned 15% of the company, his father owned 15% and his brother in law Forrest Cooper owned 70%. In actuality his brother in law had no interest in the business. The false change of ownership form had the effect of changing the experience modification factor to a lower one, thereby reducing the premium owed.

Dawn Miller, part owner with her two sisters and brother of Seminole Machine and Welding testified that she dealt with both Charles Amos on her company account and with Amos' associate Jack after Amos was shot by his son. (T276) Her brother Dean Miller testified that he dealt with Jack Fessenden on the telephone on his company's account. (T413) Ms. Miller testified that the payroll figures supplied to Appellant for the audit matched the figures reported to the Florida Department of Labor (T266) ($608,443.00). No audit was able to take place and the premium was based on the payroll figures reported on the application as $149, 968. (T274-276).

Dean Miller, her brother, testified that a change of ownership form was submitted to the insurance company bearing what purported to be his signature. As with Tri-County Roofing, there had been no change in ownership of Seminole Machine and Welding and Dean Miller had not signed the form. (415-418) As with

Tri-County Roofing, such a claim of change of ownership had the effect of reducing the company's experience modification factor and reducing the premium due.

Mr. Terry Miller, of the Florida Department of Labor, Division of Unemployment Compensation testified as records custodian to the UCT-6s actually filed by Tri-County Roofing and Seminole Machine and Welding, with the State of Florida. All of the UCT-6s showed far higher numbers of reported payroll in the UCT-6s than payroll reported on the accounts to the auditors (Seminole) or on the application (Tri-County) (Exhibits 91 and 94 (a) at T784-785 and Exhibits 146 -150 at T785-787)

There was sufficient substantial competent evidence on which the jury could base its conclusion that Appellant Jack Fessenden fully participated in the scheme of Charles Amos to fraudulently reduce the premium owed to insurance companies for coverage of Seminole Machine and Welding and Tri-County Roofing. He instructed clients to refer all auditors to the AANCO office for audits, a tactic which either enabled him to submit false figures to the auditor as in Seminole Machine and Welding or, as in the case of Tri-County Roofing, avoid the audit altogether. The evidence clearly shows that he filed false change of ownership forms and otherwise endeavored to artificially and fraudulently reduce the premiums due to the insurance

companies by Seminole Machine and Welding for the year 1988-1989 and Tri-County Roofing for the years 1986-1987; 1987-1988 and 1988-1989.

The State adequately established the amount of loss suffered by the insurance companies.

The State presented the testimony of Brent Jenkins, Worker's Compensation Administrator for the Florida Department of Insurance over the Form and Rate Filing Section who testified as to the amounts of lost premium which were suffered by specified insurance companies through the criminal acts of Appellant John Hollis Fessenden.

A. AT MOST WHAT WAS CREATED WAS AN ISSUE OF FACT, NOT LAW, TO BE CONSIDERED BY THE JURY SITTING AS TRIER OF FACT.

Appellant's counsel cross-examined Mr. Jenkins in an attempt to impeach the reliability and credibility of his calculations.

It is the province of the court to determine questions of law and that of the jury to resolve conflicts as to facts. Lee v. State, 153 So. 2d 351 (Fla. 1st DCA 1963, cert. denied 377 U.S. 999, 84 S. Ct. 1924, 12 L. Ed. 2d 1049 (1963). Appellant presented no testimony in conflict with Mr. Jenkins' valuations but cross-examined vigorously. Where the facts are not conceded, and the testimony is conflicting, it is for the jury to determine them under appropriate instructions.

Padgett v. State, 82 So. 2d 372 (Fla. 1955). The resolution of conflicting evidence is a function for the jury and not the appellate courts, McGee v. State, 294 So. 2d 674 (Fla. 1st DCA 1974), and if reasonable men might justifiably make different inferences or deductions or reach different conclusions from the evidence, the matter must be submitted to the jury. Barwick v. State, 660 So. 2d 685 (Fla. 1995).

As to credibility and weight of the evidence, once competent substantial evidence has been submitted on each element of a crime, it is for the jury to evaluate the credibility of witnesses, Hitchcock v. State, 413 So. 2d 741 (Fla. 1982) cert denied, 459 U.S. 960, 103 S. Ct. 274, 74 L. Ed. 2d (1982) and the weight or probative value of the evidence. Mills v. State, 476 So. 2d 172 (Fla. 1974) The jury must decide the probative force of the evidence, reconcile its contradictions and to give such weight to the testimony of each witness as in their judgment the conditions warrant. Barnes v. State, 93 So. 2d 863 (Fla. 1957).

It is the jury's right, specifically, to judge the credibility of expert witnesses and to accept or reject expert testimony. State v. McMahon, 485 So. 2d 884 (Fla. 2DCA 1986) review denied 492 So. 2d. 1333 (1986).

The appellate record demonstrates that the jury heard the expert testimony of Brent Jenkins, as to valuation of the losses suffered by insurance companies as the result of Mr. Amos' and Appellant Fessenden's acts, weighed Appellant's testimony

and credibility and concluded that Mr. Fessenden was guilty of Counts 8, 12 and 13. It is an indication of the jury's close attention to the testimony that Mr. Fessenden was convicted of a lesser included charge on Count 11 rather than the count as charged.

B. THE VALUATION METHOD USED BY THE STATE'S EXPERT WITNESS ACCURATELY REFLECTED THE ECONOMIC LOSS BY INSURANCE COMPANIES.

The State's expert witness Brent Jenkins testified that in regard to the summary calculation of lost premiums due to insurers only seven of the twenty calculations of lost premiums involved instances where the insurer was prevented from doing an audit at the end of the policy year. These "no-audit" counts included the Tri-County Roofing counts with which Mr. Fessenden was charged. Of the remaining counts where audits took place, Mr. Jenkins testified that the figures appearing on his summaries as "Payroll reported to Auditor" contained corrections for overtime and officer payroll exclusions. Count 8 involving Seminole Machine and Welding was one of these accounts.

It is a fundamental equitable principle that no one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or found any claim upon his own iniquity or profit from his own crime. Appellant here seeks an advantage from the fact that he obstructed the efforts of insurance company auditors to perform year

end audits which they had a contractual right to perform as part of supplying Appellant's clients with Workers' Compensation coverage. When he was unable to completely obstruct the audits, he supplied false figures in the form of summaries which resulted in much lower premiums to insurance companies than those honestly due. Now when certain calculations are unable to be made as a direct result of Appellant's efforts to prevent audits, Appellant complains that the State's expert witness did not calculate deductions from overtime and officer salary when the lack of that information was a direct result of his avoidance of audits. Appellant thus seeks to take advantage of his own wrong and profit by his own crime.

In Scott v. Sites, 41 So. 2d 444, 445 (Fla. 1949) the Florida Supreme Court held:

> "It is the general rule that when one purchases property and causes the title to be taken in another for the purpose of thwarting his creditors, a court of equity will not aid him in extricating himself from the situation he has created. In such circumstance he becomes the victim of his own fraudulent devices and cannot enter a chancery court with clean hands. * * * Tenny v. Hilton Corporation, 140 Fla. 521, 192 So. 180, * * *"

Avoiding audits was an integral tool of the continuing fraud and pattern of racketeering activity in the case at bar. Appellant should not be able to raise, as a defense to the State's valuation of lost premiums, in the "no-audit" counts involving

Tri-County Roofing, the unavailability of information on which to base a more accurate calculation of lost premium, when the unavailability of information was a calculated and direct consequence of his own fraud.

C. THE STATE'S USE OF NCCI MANUAL RULES TO DETERMINE THE VALUE OF THE LOSS TO INSURANCE COMPANIES WAS NOT ERROR; POLICY TERMS PROVIDE FOR USE OF THE RULES AND THEREFORE APPELLANT AND THE INSURED BUSINESSES HAVE CONSENTED TO THEIR USE IN DETERMINING PREMIUMS.

Chapter 440 provides that "The Department of Insurance shall adopt rules for applications for coverage required by Section 440.38." Being a creature wholly created by statute, the Workers' Compensation Law delegates to appropriate officials and agencies the promulgation of rules to govern operation of the statute.

The National Council on Compensation Insurance is a voluntary non-profit, unincorporated association of insurance companies which writes workmen's compensation insurance and is licensed in Florida as a rating organization pursuant to applicable law. Among the functions of the National Council are the formulation of uniform calculations and policy forms and the collection and analysis of loss and expense experience with respect to workmen's compensation insurance. The terms of workmen's compensation policies provide that the premium for a policy will be determined by Manuals of Rules, Classifications, Rates and Rating Plans of the

National Council on Compensation Insurance. (R. 958, 982) All members of the National Council have authorized the Insurance Commissioner to accept filings made on their behalf pursuant to requirements of law and the constitution of the National Council. Liberty Mutual Insurance Co. v. Larson, 169 So. 2d 866 (Fla. 1st DCA 1964).[6]

The terms of the Workers' Compensation insurance policy control the determination of the premium due by the insured to the insurance company. Nationwide Mutual Insurance Company v. Soules, 397 So. 2d 775 (Fla. 1st DCA 1981). The Manual of the National Council on Compensation Insurance is incorporated by reference to the policies provided through Appellant to the insureds and are properly employed for use in determining the correct premium due to the

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[6]The constitutional provision vesting legislative power (Art. III, Section 1, Fla. Const., requires that only the Legislature shall establish the legislative policies and standards of the state. However the Legislature may delegate to authorized officials and agencies the authority to promulgate subordinate rules within prescribed limits and to determine facts to which the established policies of the Legislature are to apply. In Florida Welding and Erection Service, Inc. V. American Mut. Ins. Co. Of Boston, 285 So. 2d 386 (Fla. 1973) the Florida Supreme Court held that Section 627.091 Fla. Stat. (delegation for filing with the Insurance Commissioner the company's manuals of classifications, rules and rates) when read in conjunction with Section 627.072 Fla. Stat. is not an improper delegation of legislative power because through Section 627.072, the necessary guidelines and standards to be followed in establishing rates and rating plans have been provided by the Legislature.

insurer and losses suffered by the insurers through the racketeering activity of Appellant. By acceptance of the contract for Workers' Compensation insurance, the insured businesses agree to be governed by the manual for purposes of calculation of premiums.

Appellant has waived, by virtue of the terms of the workers' compensation insurance policies issued to businesses, any objection to the application of the NCCI Manual rules and procedures in the determination of the economic loss suffered by the defrauded insurance companies.

Even using the NCCI Manual rule, the State continued to have the burden of proving beyond a reasonable doubt that Appellant intended to violate the theft statute. Businesses were instructed to refer the insurance company auditors to Appellant at his AANCO Underwriters' Association office, where audits were either altogether avoided by unavailability of source documents or an "audit" took place based on fraudulently altered figures supplied by Appellant. The exhibits of insurers' documents make frequent contemporaneous note of difficulties encountered by auditors in accessing documents necessary for an accurate audit and being fobbed off

by Appellants' "summaries". (Exhibit 120 R.1182; Exhibit 119 R.1181; Exhibit 117 R. 1180; Exhibit 122 R.1183)[7]

The use of the Manual rule to charge businesses the highest rate applicable to a particular company when audit records establishing the correct classification were unavailable, was done with the consent of the business, both implied and express.

The use of the NCCI Manual rule went only to a stipulated means to measure the loss to insurers and its use in calculating lost premiums to insurers was not error.

Appellee State of Florida requests this Court to affirm Appellant John Hollis Fessenden's convictions and sentences.

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[7]As has been demonstrated in some instances Appellant submitted a forged change of ownership when no true change existed, so the experience modification rating would revert to a lower number, thereby reducing the premium. (See Seminole Machine and Welding T. 415-418 and Tri-County Roofing T.677-679)

ISSUE IV

WHETHER THE TRIAL JUDGE ERRED IN PERMITTING, OVER A HEARSAY OBJECTION, THE INTRODUCTION OF DOCUMENTS THROUGH INVESTIGATOR VIZANDIOU'S TESTIMONY.

(as stated by Appellant)

Section 90.803 (6) Fla. Stat. provides:

> "The provision of Section 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> ***
>
> Records of Regularly Conducted Business Activity.
>
> (A) A memorandum, report, record or data compilation in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association,

profession, occupation and calling of every kind, whether or not conducted for profit."

Appellant complains of the admission of certain AANCO business records which were transferred to Larry Brown, successor owner of AANCO Underwriters, on the basis that the State failed to meet the requirements of Section 90.803 (6) Florida Statutes, because Larry Brown did not testify as records custodian.[8]

Appellee State of Florida asserts that the Statewide Prosecutor substantially satisfied the provisions of Section 90.802 (6) Fla. Stat. by establishing circumstances that show trustworthiness of the records offered into evidence. Essentially most hearsay exceptions are allowed based on factors of special reliability. The trial court admitted into evidence the Settlement Stipulation between Arkansas Financial Development Corporation, ARKO Underwriters, Inc., Insurance Premium Finance

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[8]The challenged exhibits were Exhibits 30, 31, 32 (a-c), (relating to Gulf Steel audit memo and Outten Joist payroll breakdown, quarterly tax report federal tax summary, tax summary) Exhibits 34-45 (being CNA Insurance Co. letter, memo, payroll breakdown Gulf Steel, Outten Joist tax summary, Outten Joist quarterly federal tax returns), Exhibits 54 - 56 (being Florida Plating payroll summary 196, Florida Plating quarterly tax report, payroll breakdown by class Florida Plating), Exhibits 128-132 (being Southern Roofing payroll breakdown, audit report, payroll summary), Exhibits 151 - 159 (being application and payroll Tri-County Roofing, quarterly reports quarterly wage reports), Exhibits 161 - 163 (being quarterly wage reports Tri-County Roofing) (R. 961-976, R.979 - 981). Only Exhibits 151-159 and 161-163 relating to Tri-County Roofing affect Appellant John Fessenden.

Corporation, AANCO Underwriters Inc., Larry D. Brown and the State of Florida which was executed by the State and Larry D. Brown. The Stipulation provided, among other terms, for turning over to the State of Florida all AANCO documents kept in the course of business operation in consideration of use immunity granted to Larry D. Brown and the named entities.[9] Investigator Kevin Jackson of Florida Department of Legal Affairs, who was at time of trial, in the position of current records custodian, testified that the documents offered into evidence were obtained from Mr. Larry Brown, successor owner of AANCO pursuant to a Settlement Stipulation. The Settlement Stipulation by its terms and by signature of Larry Brown in effect attested to the authenticity of the business records he held on behalf of AANCO Underwriters.[10]

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[9]In return for turning over AANCO's business documents which came into Mr. Brown's possession when AANCO was transferred to him, and in return for his testimony, the State agreed to release RICO liens on certain properties of AANCO and provide Larry Brown with use immunity. The Settlement Stipulation fully set forth the terms, conditions and understandings of the parties.

[10]Appellant John Fessenden has not included the Settlement Stipulation in his appellate record; however, it is included in the *connecting* appellate record of Mr. Fessenden's co-defendant Charles Clinton Amos. See, Charles Clinton Amos v. State of Florida, Fla. 2d DCA No. 96-01078 (submitted following oral argument Oct. 29, 1997)

In addition, examination of the State's exhibits show them to be of a character of records kept by AANCO Underwriters in the course of providing Worker's Compensation Insurance for clients enumerated in counts of the "Re-File Information and Continuation...", specifically, audit memos, payroll breakdowns, quarterly tax reports, federal tax forms, correspondence, payroll summaries, change of ownership forms (ERM-14s) and policy applications. Various state witnesses testified during the course of the trial as to the creation of these documents in the course of business operations. (Barrett, Gulf Steel T.118; Miller, Seminole Machine and Welding T. 263-276; Hoskins, Southern Roofing T.292-292)

The Settlement Stipulation constitutes an acknowledgment and authentication of the documents by successor owner of AANCO, Larry Brown, who represented the documents as business records acquired by him as successor owner of AANCO Underwriters. Mr. Kevin Jackson testified to taking possession of the documents in the chain of custody. Insurance investigator Andrew Vizandiou testified to the examination of the documents as part of his investigation of AANCO. Thus the documents clearly exhibit strong indicia of trustworthiness. Appellee State of Florida asserts that the trial court did not commit reversible error in admitting the documents into evidence.

Where discretion is lodged in the trial court with regard to a particular matter, as it is in matters relating to admission of evidence, the exercise of that discretion will not be reviewed by the appellate court except to determine whether the discretion has been abused. Huff v. State, 569 So. 2d 1247 (Fla. 1990); Molina v. State, 520 So. 2d 320 (Fla. 2d DCA 1988).

Discretion, in the context of what constitutes an abuse of discretion for purposes of review, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court; if reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. An inquiry by the appellate court into whether the trial court abused its discretion necessarily turns on the specific facts presented in each case. Booker v. State, 514 So. 2d 1079 (Fla. 1987) Appellant has failed to demonstrate that the trial court abused its discretion in the case at bar.

Appellee State of Florida submits that error if any in admitting the challenged records was harmless under the principle enunciated in State v. DeGuilio, 491 So. 2d 1129 (Fla. 1986) in view of evidence of the chain of custody and indicia of trustworthiness demonstrated by the State. The State adequately established the

chain of custody and the representations of successive owner of AANCO Underwriters, Larry Brown, that the records he was turning over to the State were ones that came into his possession through his purchase of AANCO Underwriters, gave sufficient indicia of trustworthiness to justify the trial court in allowing their admission into evidence. At no time did defense counsel allege that the submitted documents were not authentic.

Arguably Exhibits 151-159 and 161-163 (relating only to Tri-County) were cumulative evidence because the trial court received testimony from Nancy Lee, her husband Clyde and stepson Arnold of Tri-County Roofing as to the contents of the documents, which were quarterly reports filed with the State of Florida, change of ownership form for Tri-Countyand application for coverage. The quarterly tax reports in the Amos appellate record relate only to the year 1988-1989, to the best of Appellee's understanding. None of the challenged documents related to Seminole Machine and Welding.[11]

Appellant has failed to carry his burden of demonstrating that the trial court abused its discretion in admitting the challenged documents into evidence.

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[11]The exhibits have not been included in the Fessenden appellate record, but consulting the Amos appellate record where they were included, answers the question as to what these evidence exhibits were.

This honorable Court should affirm as to matters raised in Issue IV.