IN THE
SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Appellant,	)	
v.	)	**Case No: SC06-157**
	)	
JOHN ANTHONY RUBIO,	)	
SONIA BONILLA GUZMAN,	)	
ANAMARIA BONILLA MENDEZ,	)	
ILIANA MARTIN-FERNANDEZ,	)	
and GUSTAVO ADOLFO FERNANDEZ,	)	
	)	
Appellees.	)	
_____	)	

INITIAL BRIEF OF APPELLANT, STATE OF FLORIDA

On Appeal From The District Court of Appeal,
Fifth District of Florida

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STATEMENT OF THE CASE AND FACTS

This is an appeal of a decision of the Fifth District Court of Appeal declaring section 409.920(2)(a), Florida Statutes, prohibiting the making of false Medicaid claims, unconstitutional under the Supremacy Clause of the United States Constitution. App. 1.[1]

Although the decision upheld the constitutionality of section 817.505(1), Florida Statutes, which prohibits split-fee arrangements in return for referring patients, it ruled the State could not charge multiple violations of this statute. It also ruled that violations of section 817.505(1) do not constitute racketeering activity as defined in Florida's RICO statute, section 895.02, or white collar crime as defined in section 775.0844.

The Fifth District's decision thus affirmed the trial court's dismissal of 127 counts of the 130-count information and rendered useless the remaining three counts, as all predicate acts supporting these counts were dismissed.

Background Facts

In October 2003, the State of Florida, through the Office

[1] This Court has under review the question of whether section 409.920(2)(e), Florida Statutes, is unconstitutional under the Supremacy Clause. See State v. Harden, Case No. SC04-613 (argued April 5, 2005). Section 409.920(2)(e) prohibits, inter alia, kickbacks for patient referrals.

of the Statewide Prosecutor, filed a 130-count information against Sonia Bonilla Guzman and Anamaria Bonilla Mendez, who are dentists, and three co-defendants, John Anthony Rubio, Iliana Martin-Fernandez, and Gustavo Adolfo-Fernandez. R1: 64-200. From the information, the probable cause affidavit, R1: 57-62, and representations of defense counsel, R1: 9-10 and R3: 452-53, the Fifth District gleaned the following background facts:

> Guzman and Mendez are dentists who operated a dental office in Miami. According to the state, they were recruited to come to Orlando to provide dental services to Medicaid-eligible children. Rubio and Gustavo Fernandez solicited these children primarily from public housing areas and transported them to and from the clinic. The dentists billed Medicaid and split the fees with Rubio. Five Medicaid recipients were examined by a pediatric dentist who found no evidence to support the claims submitted on their behalf.
>
> According to the defendants, the fee arrangement was actually between their corporations – Bonilla Professional Services operated by the dentists and Dental Management, Inc., a dental practice management company owned by Rubio. Rubio's company markets for the dental practice, handles the business aspects of the dental practice and lets the dentists do the clinical work. In return for getting a turnkey dental office and marketing, Rubio's company is paid between 42% and 43% of the compensation received by the dentists for their services. The defendants consider this to be a legitimate dental practice management fee.

Slip Op. at 5-6.[2]

The Information

Counts 1, 2, and 130 of the information charged defendants with violations of RICO, RICO conspiracy, and the White Collar Crime Victim Protection Act, respectively sections 895.03(3), and 895.03(4), and 775.0844, Florida Statutes. R1: 64-200, et seq.

Counts 3-55 and Predicate Incidents 1-53 of Counts 1, 2, and 130 alleged the defendants knowingly made or caused to be made false statements to the Agency of Health Care Administration ("AHCA") in violation of section 409.920(2)(a), Florida Statutes.[3] The information charged that AHCA was

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[2] While this case was in the trial court the State entered a nolle prosequi as to defendant Iliana Fernandez. R2: 389.

[3] Section 409.920(2)(a), Florida Statutes, makes it unlawful to

> [k]nowingly make, cause to be made, or aid and abet in the making of any false statement or false representation of a material fact, by commission or omission, in any claim submitted to the agency or its fiscal agent for payment.

At all times relevant to this case (1999-2003) section 409.920(1)(d), Florida Statutes, defined "knowingly" as follows:

> (1)(d) "Knowingly" means done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result.

billed for Medicaid dental services that were not performed, only partially performed, or not performed correctly, and for radiation services administered by unlicensed or otherwise unqualified persons. R1: 64-200 et seq. More specifically, the defendants submitted claims for services supposedly rendered on 22 separate days when, according to the probable cause affidavit, surveillance established there was no activity at the dental clinic. R1: 61 (probable cause affidavit) and R1: 84-89 (Predicate Incidents 32-53). The radiation administered by defendant Rubio occurred on 25 different days. R1: 77-83 (Predicate Incidents 7-31).

Counts 56-129 and Predicate Incidents 54-127 of Counts 1, 2, and 130 alleged that the defendants violated the Patient Brokering statute, section 817.505(1)(b) and (c), Florida Statutes, by engaging in an illegal split-fee arrangement.[4]

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[4] Section 817.505, Florida Statutes, provides:

> 817.05 Patient brokering prohibited; exceptions; penalties. –
>
> (1) It is unlawful for any person, including any health care provider or health care facility, to:
>
> * * * *
>
> (b) Solicit or receive any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any

The information alleged that defendant Rubio referred or provided patients to the two dentists, Guzman and Mendez, in return for a percentage of the resulting fees. R1: 64-200 et seq. The probable cause affidavit asserted that of the $715,378.55, defendants Guzman and Mendez received in Medicaid payments from July 2001 through October 2002, they paid defendant Rubio or his management company $359,203.65. R1: 61.

The Fifth District's Decision

Although the Fifth District reversed the trial court's unexplained ruling that section 817.505(1) was unconstitutional, it otherwise affirmed that court's judgment.

In ruling that section 409.920(2)(a) was preempted by the Supremacy Clause, the Fifth District relied exclusively on the decision of the Third District in State v. Harden, 873 So. 2d 352 (Fla. 3d DCA 2004). The Fifth District held that section

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> form whatsoever, in return for referring patients or patronage to a health care provider or health care facility; or
> (c) Aid, abet, advise or otherwise participate in the conduct prohibited under paragraph (a) or paragraph (b).
>
> * * * *
>
> (4) Any person . . . who violates any provision of this section commits a felony of the third degree, punishable as provided by § 775.092, § 775.038, or § 775.084.
>
> ****

490.920(2)(a) and 490.920(1)(d) were preempted by the higher mens rea requirement of 42 U.S.C. § 1320a-7b(a)(1), which provides for purposes of federal prosecution that a false statement be made "knowingly and willfully."

The Fifth District rejected the Third District's more recent decision in State v. Wolland, 902 So. 2d 278 (Fla. 3d DCA 2005), which construed section 409.920(2)(a) and held that "it is implicit in the filing of a false claim that the claimant intends to defraud the government, and hence unnecessary to charge willfulness separately." Id. at 284 (citation omitted). The Fifth District found section 409.920(2)(a) preempted because it "allows convictions for conduct that may be improper but was inadvertent. That is precisely the opposite of what Congress intended." Slip Op. at 10. The court made no finding that defendants were charged with negligent or inadvertent conduct and did not explain how repeated incidents of billing for services that were not performed and repeated incidents of billing for radiation services performed by an unqualified and unlicensed individual (defendant Rubio) could possibly constitute negligent or inadvertent conduct. In fact, defendants have not asserted in these proceedings that their conduct was negligent or

inadvertent.[5]

The decision further held that defendants could not be charged with 73 counts (Counts 56-129) of engaging in split-fee arrangements in violation of 817.505(1)(b) and (c), based on the alleged referral of patients on different dates in exchange for splitting the fees paid by AHCA. Although, as the State had pointed out in the motion hearing, R1: 19, 42-44, there was no evidence before the trial court of the nature of defendants' agreement, i.e., whether there was one agreement or a succession of agreements, the Fifth District assumed there was essentially one agreement and held that under the rule of lenity the statute should be construed to apply to the "arrangement as a whole" and not to "each time the defendants 'arranged' to refer patients and submitted requests for payment. . . ." Slip Op. at 22.

With respect to the RICO charges (Counts 1 and 2), the Fifth District held that the language of section 895.02(1)(a)29. which refers to "Chapter 817, relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes" was not a reference to the title of that chapter, but only to those sections of Chapter 817 that

[5] Although not applicable to this case, section 409.920(1)(d), Florida Statutes, defining "knowingly," was amended in 2004 to include the word "willfully." See ch. 2004-344, section 8, Laws of Florida (2004).

required proof of fraud. The court declined to read section 817.505 to include any element of fraud. Slip. Op. at 24.

The court reached a similar conclusion under section 775.0844, the "White Collar Crime Victim Protection Act," with respect to Count 130. That statute defines white collar crime to include:

> (3)(a) The commission of, or a conspiracy to commit, any felony offense specified in:
>
> 4. Chapter 817, relating to fraudulent practices.

§ 775.0844(3)(a)4., Fla. Stat. Based on the same reasoning it applied to the RICO counts, the court held that patient brokering as prohibited by section 817.505 does not constitute white collar crime because it does not require proof of fraudulent conduct.

Accordingly, the Fifth District affirmed the dismissal of Counts 56-129 as multiplicitous and the striking of Counts 1, 2, and 130 as not relating to fraud.

STANDARD OF REVIEW

The standard of review governing decisions of law is de novo. Execu-Tech Bus. Sys. v. New Oji Paper Co., 752 So. 2d 582 (Fla. 2000); Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000).

Whether a statute is facially unconstitutional is a pure question of law, and therefore subject to de novo review. City of Miami v. McGrath, 824 So. 2d 143, 146 (Fla. 2002). A statute comes before the court clothed with a presumption of constitutionality. Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879, 881 (Fla. 1983). All doubts as to constitutionality are to be resolved in favor of the statute. See State v. Yocum, 186 So. 448, 451 (Fla. 1939); see also Capital City Country Club v. Tucker, 613 So. 2d 448, 452 (Fla. 1993) (courts must interpret statutes in such a manner as to uphold their constitutionality if it is reasonably possible to do so); Knight and Wall Co. v. Bryant, 178 So. 2d 5 (Fla. 1965) (an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt).

SUMMARY OF ARGUMENT

I. Section 409.920(2)(a), Florida Statutes, read in conjunction with section 409.920(1)(d), Florida Statutes (1999-2003), is not preempted by the higher mens rea standard of 42 U.S.C. § 1320a-7b(a)(1) because **i)** Congress intended

that the states enforce their own Medicaid laws; **ii)** defendants were not charged with negligent or inadvertent conduct, and therefore lack standing to assert preemption on that basis, **iii)** state law is preempted only to the extent of actual conflict; and **iv)** the "should be aware" language of section 409.920(1)(d) is consistent with the "willful ignorance" doctrine, application of which furthers Congress's intent to combat fraud.

II. The information was not multiplicitous in charging defendants with engaging in split-fee arrangements on 37 separate occasions in violation of section 817.505(1)(b) and (c), Florida Statutes. On each of these occasions defendant Rubio referred Medicaid-eligible patients to defendant Guzman, who then submitted claims to AHCA and split the fee with Rubio. "Engaging in any split-fee arrangement" means not just having an agreement, as the lower court said, but engaging in the consequent acts of patient referral, submission of claims, and splitting the fee.

The "a/any" test has no application to section 817.505(1) because the statute is not ambiguous. "Any" simply means "all"--all split fee arrangements are prohibited.

III. A violation of section 817.505(1) is a predicate act because section 895.02(1)(a)29. refers to "fraudulent

practices” and “fraud generally,” and patient brokering is a collusive, dishonest and fraudulent practice. In creating section 817.505, the legislature addressed what it thought to be “fraudulent health care practices associated with pay-for-patient schemes.” The lower court erred in rejecting a plain meaning reading of section 895.02(1)(a)29. in favor of a speculative construction that actually adds words to the statute.

IV. A violation of section 817.505(1) constitutes a White Collar Crime pursuant to section 775.0844(3)(a)4. which refers to “Chapter 817, relating to fraudulent practices.” Again, the lower court failed to understand that patient brokering is a fraudulent practice, and failed to give section 775.0844(3)(a)4. a plain meaning construction. Moreover, the conduct proscribed by section 817.505(1) clearly falls under the catch-all provisions of section 775.0844(3).

ARGUMENT

I. SECTION 409.920(2)(a), FLORIDA STATUTES, READ IN CONJUNCTION WITH SECTION 409.920(1)(d), FLORIDA STATUTES (2003), IS NOT PREEMPTED BY FEDERAL LAW.

This issue is virtually identical to the preemption issue presented in State v. Harden, Case No. SC04-613, and will likely turn on the Court's reasoning in that case. In fact, defendants' brief in the Fifth District did not even discuss preemption law but merely urged that court to follow the Third District's decision in State v. Harden, 873 So. 2d 352 (Fla. 3d DCA 2004), and reject that same court's decision in State v. Wolland, 902 So. 2d 278 (Fla. 3d DCA 2005), which upheld section 409.920(2)(a), against a preemption challenge. The Fifth District erred in relying on Harden and finding section 409.920(2)(a) preempted.

The argument on this first issue is substantially the same as that presented in the State's Harden brief, except that I.A.2.c., infra, shows that the language of section 409.920(1)(d) is consistent with the "willful ignorance" doctrine, application of which furthers Congress's objectives.

A. Federal Preemption Principles Generally

Preemption analysis begins with the "basic assumption that Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746 (1981). This presumption

applies with all the more force to joint or coordinate state and federal programs, such as Medicaid,[6] that pursue common purposes. Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S. 644, 666 (2003) ("The presumption against federal preemption of a state statute designed to foster public health . . . has special force when it appears . . . that the two governments are pursuing common purposes") (citations omitted); New York State Dep't of Social Services v. Dublino, 413 U.S. 405, 421 (1973) ("Where coordinate state and federal efforts exist within a complementary framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one").[7]

When Congress legislates in a field traditionally occupied by the states, the states' police powers will not be presumed to have been superceded "unless that is the clear and

[6] Medicaid is a cooperative state-federal program in which each participating state designs and implements its own Medicaid program subject to certain strictures established by federal law. See 42 U.S.C. § 1396a (prescribing general requirements of state Medicaid plan). See also Harris v. McRae, 448 U.S. 297, 309 (1980) (referring to Medicaid program as a "system of cooperative federalism").

[7] See also Pharmaceutical Research and Mfrs. of America v. Concannon, 249 F.3d 66, 75 (1st Cir. 2001) (quoting Dublino); Wash. Dep't of Soc. & Health Servs. v. Bowen, 815 F.2d 549, 557 (9th Cir. 1987) (relying on Dublino and holding that because the Medicaid program consists of coordinated state and federal efforts that exist within a complementary framework, agency regulations do not preempt state community property law).

manifest purpose of Congress." California v. ARC America Corp., 490 U.S. 93, 101 (1989). Such a clear and manifest purpose or intent is not expressed in the Medicaid law. On the contrary, as a condition of participation in the Medicaid program Congress requires the states to maintain fraud and abuse control units to prosecute violations of "state laws regarding any and all aspects of fraud. . . ." 42 U.S.C. § 1396b(q) (emphasis added).

The Supreme Court has recognized three discrete categories of preemption under the Supremacy Clause: (1) express preemption, where a federal statute contains "explicit preemptive language"; (2) field preemption, in which the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it"; and (3) implied conflict preemption, in which "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." Gade v. National Solid Wastes Mgmt., 505 U.S. 88, 98 (1992) (quotations and citations omitted). Express and field preemption are inapplicable in this case. See Pharmaceutical Research and Mfrs. of America

v. Meadows, 304 F.3d 1197, 1206 (11th Cir. 2002) (because "Medicaid is a cooperative state-federal program, in which each participating state designs and implements its own Medicaid program subject to certain strictures established by federal law," only implied conflict preemption applies). Although the Fifth District seemed to recognize that only implied conflict preemption could apply to this case, the court erred in its analysis.

B. Implied Conflict Preemption

Implied conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." Gade, 505 U.S. at 98. The Fifth District's decision did not discuss whether compliance with both federal and state regulations is a physical impossibility, but it is clear that that argument, if made, fails.

1. Compliance with both federal and state regulations is not a physical impossibility.

Compliance with section 409.920(2)(a), Florida Statutes, unquestionably encompasses compliance with 42 U.S.C. § 1320a-7b. Appellees have never contended otherwise. To comply with both statutes, appellees need only refrain from knowingly

making or causing to be made false statements or false representations of material fact. Physical impossibility cannot form the basis for implied conflict preemption in this case. Compare Cox v. Shalala, 112 F.3d 151, 154 (4th Cir. 1997) (holding that North Carolina's Wrongful Death Act conflicted with the Medicare Act to the extent that it capped the amount of money that Medicare could recover for medical expenses it paid in connection with the provision of medical services to a Medicare beneficiary who died as a result of malpractice. The Medicare statute entitled the program to complete compensation and therefore presented an actual conflict with state law.); Congress of Cal. Seniors v. Catholic Healthcare West, 104 Cal. Rptr.2d 665, 667 (Cal. Ct. App. 2001) (holding that extensive and complex federal law governing cost reporting by hospitals precluded a claim that hospital's including certain anti-union expenses in annual Medicare cost reports constituted an unfair business practice under state law).

2. Section 409.920(2)(a) does not stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.

Section 409.920(2)(a) furthers the purpose and objectives of Medicaid by criminalizing conduct that undermines the Medicaid program. The federal Medicaid statutes expressly

authorize the states to work to prevent Medicaid fraud and to enforce their own laws regarding fraud.

a. The purpose and objectives of Congress

The primary purpose of Medicaid is to enable each state, "as far as practicable under the conditions in such state," to provide medical services to those "whose income and resources are insufficient to meet the costs of necessary medical services," and to provide such medical services with minimal losses to fraud and abuse. 42 U.S.C. § 1396 (2000). Congress manifested no intent to displace the states' enforcement of their own laws or limit the states' concept of fraud to that embodied in federal law or regulations. In fact, Congress intended for the states to take primary enforcement responsibility for preventing and prosecuting Medicaid fraud and to do so in accordance with their own state laws addressing fraud. A required element of any state plan seeking federal assistance is a Medicaid fraud and abuse control unit. 42 U.S.C. § 1396a(61). The function prescribed for such a unit is "the investigation and prosecution of violations of all applicable state laws regarding any and all aspects of fraud in connection with (A) any aspect of the provision of medical assistance and the activities of providers of such assistance under the State plan under this

title. . . .” 42 U.S.C. § 1396b(q)(3) (emphasis added). Congress would not have authorized Medicaid fraud units under 42 U.S.C. § 1396b(q) to prosecute “violations of all applicable state laws regarding any and all aspects of fraud,” laws bound to differ not only among the states but also with federal law, had it intended preemption. To this end, Congress actually subsidizes state Medicaid fraud control offices established pursuant to 42 U.S.C. § 1396b(q).

The plain language of the federal Medicaid statute demonstrates that enforcement of state fraud law does not stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. Under 42 U.S.C. § 1320a-7(a) anyone convicted of a Medicaid “program-related crime” is barred from participating in the program. Section 1320a-(7)(i) defines a program-related crime as “a judgment of conviction . . . entered against an individual or entity by a Federal, State, or local court. . . .” (Emphasis added).

Legislative history offers further insight into the purpose and objectives of the Medicaid statutes. In 1972, Congress enacted the Medicare/Medicaid Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b)(2). In making criminal “such practices as the soliciting, offering or accepting of kickbacks or bribes, including the rebating of a portion of a

fee or charge for a patient referral, involving providers of health care services," Congress recognized these provisions "would be in addition to and not in lieu of any other penalty provisions in state or federal law." H.R. Rept. No. 92-231, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Cong. and Admin. News 5094 (emphasis added).

Congress added a "safe harbor" provision in 1977 which shielded from prosecution "any amount paid by an employer to an employee (who has a bona fide relationship with such employer) for employment in the provision of covered items or services." 42 U.S.C. § 1320a-7b(b)(3)(B). During hearings on the safe harbor regulation, 42 CFR § 1001.952, the federal Department of Health and Human Services clarified that the federal law and the proposed regulation did not preempt state enforcement laws:

> Comment: Two commentators requested that the OIG clarify the relationship between the statute and various State laws.
>
> Response: Issues of state law are completely independent of the federal anti-kickback statute and these regulations. There is no federal preemption provision under the statute. Thus, conduct that is lawful under the federal anti-kickback statute or this regulation may still be illegal under State law. Conversely, conduct that is lawful under State law may still be illegal under the federal anti-kickback statute.

56 Fed. Reg. 35952, 35957 (July 29, 1991)(emphasis added). The legislative history of this related provision demonstrates Congress's understanding that conduct that is lawful under the federal Medicaid statutes may still be illegal under state law. The fact that Florida's Medicaid fraud laws may be more stringent than federal laws no more commands a preemption finding than would the fact that state law might provide a more stringent penalty than a corresponding federal law.

b. The flawed preemption rationale

In ruling that section 409.920(2)a) stands as an obstacle to the accomplishment of Medicaid's purposes and objectives, the Fifth District asserted only that:

> Congress has mandated a knowing and willful standard for Medicaid fraud violations. Prosecuting health care providers in Florida for mere negligence in filing claims may cause providers to simply refuse to treat Medicaid patients.

Slip Op. at 11. The "should be aware" language of section 409.920(1)(d), said the Court, allowed for prosecution of merely negligent conduct.

This reasoning cannot justify the Fifth District's preemption finding. Appellees have never claimed, nor did the lower courts find, that they were being prosecuted for "mere negligence in filing claims." The Fifth District's facial invalidation of section 409.920(2)(a) thus fails for two

salient reasons: First, as a matter of general law, a person may not challenge that portion of a criminal statute that does not affect him. State v. Hogan, 387 So. 2d 943 (Fla. 1980). Second, in preemption cases state law is displaced only to the extent of actual conflict with federal law. Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996). "The rule [is] that a federal court should not extend its invalidation of a state statute further than necessary to dispose of the case before it." Id. at 476 (quoting Brockett v. Spokane Arcades Inc., 472 U.S. 491, 502 (1985)). The existence of a hypothetical or potential conflict is insufficient to warrant preemption of a state statute. Pharmaceutical Research and Mfrs. v. Concannon, 249 F.3d 66, 77 (1st Cir. 2001) (citing United States v. Salerno, 481 U.S. 739, 745 (1987), and Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982)).

The Fifth District had no basis for considering the application of section 409.920(2)(a) to hypothetically negligent or inadvertent conduct and no basis for concluding that prosecution of such conduct might deter medical or dental physicians from providing Medicaid services. Indeed, as shown infra, some non-negligent conduct would be criminally culpable under the "should be aware" language of this statute. In any

case, Congress has authorized the states to enforce their own laws on Medicaid fraud. If the State of Florida begins to prosecute "mere negligence" in filing claims, and if such prosecutions deter providers from serving Medicaid patients, it is the responsibility of the Florida Legislature to address that problem.

c. Section 409.920(2)(a) may be construed in harmony with federal law.

It is the duty of a court to uphold a statute by giving it a constitutional construction whenever possible. Capital City Country Club v. Tucker, 613 So. 2d 448, 452 (Fla. 1993); Richardson v. Richardson, 766 So. 2d 1036, 1041-42 (Fla. 2000). The Third District did this in its decision in State v. Wolland, 902 So. 2d 278 (Fla. 3d DCA 2005), upholding section 409.920(2)(a) against the same preemption challenge asserted here. The Wolland court interpreted the "willful" language in federal law to apply only to conduct prohibited by the anti-kickback provision. Id. at 284 n. 8. It rejected the preemption argument, stating:

> By its terms, subsection 409.920(2)(a) proscribes presentation of a claim with knowledge that the claim is false and thereby precludes prosecution for unintended violations. Interpreting "knowingly" as implicitly including willful behavior does no more than give a fair construction to the term as used in subsection 409.920(2)(a).

Id. at 285. Thus, the Wolland court interpreted section 409.920(2)(a) as being consistent with the legislature's amendment to section 409.920(1)(d) in chapter 2004-344, section 8, Laws of Florida. Id. [8]

The Fifth District rejected Wolland only because it believed that under the "should be aware" language of section 409.920(1)(d) the State could obtain a conviction "for conduct that may be improper but was inadvertent." Slip Op. at 10. Here, the court failed to give section 409.920(1)(d) its constitutional due. The "should be aware" language of that section is perfectly consistent with "willful ignorance." As the Fifth District itself has held, the "willful ignorance" or "willful blindness" doctrine "holds that one may not deliberately close his or her eyes to what would otherwise be obvious to them." Hale v. State, 838 So. 2d 1185, 1187 (Fla. 5th DCA 2003). Under this doctrine, "a defendant can be found guilty of 'knowingly' making a false statement when he signs a document without reading it, if by doing so he acted with reckless disregard of whether the statements were true or with a conscious purpose to avoid learning the truth." Id.

By the same token, a person who submits a Medicaid claim

[8] The Wolland decision points out that health care fraud costs taxpayers nearly $100 billion a year. 902 So. 2d at 286 n. 11 (citing Cone, Health Care Fraud, 40 AM.CRIM.L.REV. 713, 715 (2003).

with deliberate disregard for the truth of its representations violates the "should be aware" language of section 409.920(1)(d). The federal government has prosecuted false Medicaid claims on precisely this basis. United States v. Nazon, 940 F.2d 255, 258-60 (7th Cir. 1991). In Nazon the court held that the evidence justified a conscious avoidance instruction where a physician deliberately avoided familiarizing himself with the rules, conditions, and law controlling his Medicaid claim submissions. The jury instruction approved by the Seventh Circuit stated in part that:

> You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted "knowingly". . . .

Id. at 258.

The "should be aware" language of section 409.920(1)(d) is certainly susceptible to this interpretation and application, and this Court is empowered to so construe it. Richardson, 766 So. 2d at 1041-42. This construction, assuming its necessity, is consistent with the federal government's enforcement of Medicaid law. Prosecuting persons

who put themselves in the position of deliberately not knowing what they should know would not frustrate Congress's intent. This being so, sections 409.920(2)(a) and 409.920(1)(d) in no way stand as an obstacle to the accomplishment of federal purposes and objectives--to prevent fraudulent claims--and therefore are not preempted by the federal Medicaid fraud statutes. Accordingly, this Court should reverse the Fifth District's decision declaring section 409.920(2)(a) unconstitutional under the Supremacy Clause.

II. THE ALLEGED VIOLATIONS OF SECTION 817.505(1)(b) AND (c), FLORIDA STATUTES, DID NOT CHARGE A SINGLE OFFENSE IN MORE THAN ONE COUNT.

The information, in Counts 56-129, charged defendants with engaging in split-fee arrangements on at least 37 different occasions in violation of section 817.505(1)(b) and (c), Florida Statutes.[9] As the Fifth District observed,

[9] Section 817.505(1)(a)-(c) provides:

> (1) It is unlawful for any person, including any health care provider or health care facility, to:
>
> (a) Offer or pay any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, to induce the referral of patients or patronage from a health care provider or health care facility;
>
> (b) Solicit or receive any commission, bonus, rebate, kickback, or bribe, directly

"multiplicity" occurs when "the state charges a single offense in more than one count, an action which raises double jeopardy concerns." Slip Op. at 21 (citations omitted).

Section 817.505(1)(b) applies to an "arrangement" to split fees in return for referring patients to a health care provider. Slip Op. at 21. The Fifth District interpreted the word "arrangement" to mean simply an agreement, and then in the complete absence of evidence decided that there had been only one agreement. Considering the statute, it discerned "no intent by the legislature to criminalize each and every act done pursuant to the agreement." Slip Op. at 22.

The Fifth District's ruling is flawed for several reasons. First, defendants produced no evidence of any agreement at the motion hearing.[10] Whether defendants had one

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> or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for referring patients or patronage to a health care provider or health care facility. . .
>
> (c) Aid, abet, advise, or otherwise participate in the conduct prohibited under paragraph (a) or paragraph (b). (emphasis added).

[10] Defendants' counsel told the trial court that Rubio's management company received 42-43% of the Medicaid fees, which was the "lease payment" for a turnkey dental office. R1: 9-10. Counsel did not say whether any purported lease or management agreement was in writing and produced no written agreement of any kind. Accordingly, there was no evidence before the trial court as to whether the defendants had agreed

agreement or many is a fact inquiry that must focus "on the specific conduct of the defendant[s]." United States v. Krizek, 111 F. 3d 934, 938 (11th Cir. 1997) (so stating with respect to submission of false Medicaid and Medicare claims). The trial court here did not conduct an evidentiary hearing and had no basis for concluding there was only one agreement.

The second and more serious error is the court's assumption that "arrangement" and "agreement" are synonymous. They are not. The word "arrangement" means, inter alia, a "provision or plan made in preparation for an undertaking." American Heritage Dictionary (2d ed. 1985). What the statute prohibits is to "engage in any split-fee arrangement, in any form whatsoever, in return for referring patients. . . ." To engage in this arrangement involves not just making an agreement but participating in a plan involving i) referring patients, ii) providing treatment (or not), iii) filing Medicaid claims, and iv) splitting the payment. A violation of the statute occurs every time patients are referred, claims submitted, and the fee split. The form of the arrangement could include a single patient, if that is all that was involved, or, as here, a number at a time. Each occasion is an "arrangement." Focusing on the specific conduct of

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to split Medicaid fees once, or on many occasions as alleged. The State pointed out the absence of evidence. R1: 19, 42-44.

defendants and the form of their action, that is exactly what the State charged in this case -– that defendants engaged in such an arrangement on 37 separate occasions.

The State's reading of the patient brokering statute is consistent with analogous case law on false claims. In Krizek, the Eleventh Circuit held that a claim was made every time defendants submitted a Medicaid reimbursement form and did not depend on the number of different services for which the form sought payment. 111 F. 3d at 939-940. The Eleventh Circuit relied on United States v. Bornstein, 423 U.S. 303, 307 (1976), another False Claims Act case. In Bornstein the Supreme Court held that three false claims were made based on a subcontractor's three separate shipments of falsely labeled electron tubes, rejecting the contention that 35 claims were made based on the contractor's 35 invoices. 111 F. 3d at 939.

The Fifth District further erred in concluding that the mere use of the word "any" in "any split fee arrangement" automatically created an ambiguity that required application of the rule of lenity. This Court rejected such reflexive analysis in Bautista v. State, 863 So. 2d 1180 (Fla. 2003).

As Bautista makes clear, the a/any test is not a simple syntactical rule to be applied in lieu of a common sense construction of a statute, and use of the word "any" does not

automatically render a statute ambiguous. Id. at 1187-88. "The a/any test should not be applied to create an ambiguity where none exists and then to reach a result contrary to clear legislative intent." Id. at 1188. Bautista thus emphasized that a court's duty is to give effect to legislative intent, and a court discerns that intent by considering "the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment. . . ." Id. at 1185 (citation omitted). Repeatedly in Bautista this Court said that the plain language of a statute must be given a common sense reading.

The indisputable intent of section 817.505(1)(b), as explained, is to punish those who perpetrate fraudulent claims by arranging to split fees and doing so. Furthermore, the use of the word "any" in this subsection creates no ambiguity. The use of "any" simply emphasizes that all split fee arrangements are prohibited. A person may not lawfully "engage in any split-fee arrangement, in any form whatsoever. . . ." § 817.505(1)(b), Fla. Stat.

The history of section 817.505 supports the above interpretation. The current version of the statute provides that anyone who violates any provision of section 817.505 commits a felony of the third degree. § 817.505(4), Fla.

Stat. (2004). Notably, section 817.505, as originally passed by the legislature in 1996, provided for different penalties depending on the number of violations incurred. The statute originally differentiated between first offenses and second or subsequent offenses, stating:

> (4) Any person, including an officer, partner, agent, attorney, or other representative of a firm, joint venture, partnership, business trust, syndicate, corporation, or other business entity, who violates any provision of this section commits:
>
> (a) A misdemeanor of the first degree *for a* first violation, punishable as provided in s. 775.082 or by a fine not to exceed $ 5,000, or both.
>
> (b) A felony of the third degree for a second or subsequent violation, punishable as provided in s. 775.082 or by a fine not to exceed $ 10,000, or both.

§ 817.505, Fla. Stat. (1997) (emphasis added). Thus, section 817.505 as originally enacted distinguished between a first violation and a second or subsequent violation of the statute.

The penalty provision of section 817.505 was amended during the 1999 legislative session as part of a bill aimed at reducing insurance fraud. See Ch. 99-204, § 7, Laws of Florida. The 1999 amendments enhanced the penalties under the statute to make all violations of the statute, even first violations, third-degree felonies. The amendments were not

intended to limit the unit of prosecution, but were instead intended to strengthen the penalties provided for under the statute.[11] The original language of section 817.505 and the legislative intent of the 1999 amendments clearly demonstrate that each act in violation of section 817.505 can and should be prosecuted as a separate crime. If the Fifth District's construction of section 817.505(1)(b) were correct, defendants, under the 1996 version of that statute, could have defrauded the State of hundreds of thousands of dollars based on innumerable referrals and split fees, and have committed only a single misdemeanor. That is not a reasonable interpretation of the statute.

The legislative intent is clear in this case. The statute is not ambiguous, the a/any test does not apply, and the State may charge a violation for every arrangement in which patients are referred in return for a split fee.

III. VIOLATIONS OF SECTIONS 817.505 QUALIFY AS PREDICATE ACTS PURSUANT TO SECTION 895.02(1)(a) 29., FLORIDA STATUTES.

Counts 1 and 2 of the information charged defendants with racketeering and conspiracy to commit racketeering in

[11] In fact, the House Committee on Judiciary Analysis noted as one of the effects of the 1999 amendments, "the criminal penalty for first offenses of 'patient brokering' provisions would be increased." Fla. H.R. Comm. on Judiciary Analysis, CS/HB 1743 (1999) Staff Analysis (April 16, 1999).

violation of the Florida RICO Act, Chapter 895, Florida Statutes. The Act defines racketeering as follows:

> (1) "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another to commit:
>
> (a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes:
>
> * * * *
>
> 29. Chapter 817, relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes.

§ 895.02(1)(a)29., Fla. Stat. (emphasis added). The "relating to . . ." clause following the reference to chapter 817 is a verbatim recitation of the title and first two parts of chapter 817. When the racketeering statute was enacted in 1977 as section 943.461, Florida Statutes (1977), chapter 817 contained only these two parts.

The Fifth District held that violation of section 817.505 could not be a predicate act because that section does not relate to fraud. This was so, the court reasoned, because the "relating to . . ." language in section 895.02(1)(a)29. does not refer to the entire content of parts I and II of chapter 817, but only to those sections that require proof of the elements of fraud. Slip Op. at 24-25. This holding misreads

the plain language of section 895.02(1)(a)1.-29. and ignores the generality of the terms "fraudulent practices" and "fraud generally."

A. Patient Brokering is a Fraudulent Practice.

Section 895.02(1)(a)29. references "Chapter 817, relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes." The legislature specifically directed that the patient brokering statute be created as section 817.505 in part I of chapter 817. Chapter 817 is entitled "Fraudulent Practices." Section 817.505 is located in part I of chapter 817, entitled "False Pretenses and Frauds, Generally." If the 1996 legislature did not believe patient brokering was a fraudulent practice and intend for the statute to constitute a predicate offense under the RICO statute, it would not have specifically provided for its creation as section 817.505, within the specifically named subpart of chapter 817. See chap. 96-152, § 1, Laws of Florida (1996). Moreover, the legislative history of this act confirms that the legislature was concerned with what it viewed as fraudulent health care practices associated with pay-for-patient schemes. See R4:630-635 and R4:637-639 (Senate Staff Analysis).

Subsequent legislative history demonstrates that the

statute was intended to curb insurance fraud. Amendments to the penalty provisions of section 817.505 were made in 1999 in House Bill 1743, which the House Committee on Judiciary Analysis titled as "Relating To: Insurance Fraud." Fla. H.R. Comm. On Judiciary Analysis, CS/HB 1743 (1999) Staff Analysis (April 16, 1999). As such, violations of section 817.505 are consistent with other statutory violations constituting predicate acts under the RICO statute. The Fourth District's reliance on the parenthetical language to limit the scope of predicate offenses runs contrary to legislative intent.

Further, the very term "fraudulent practices," the title of chapter 817, is generic. A "fraudulent act" is "one which involves bad faith, a breach of honesty, a want of integrity, or moral turpitude." Black's Law Dictionary (6th ed. 1990).[12] Patient brokering, a major factor in Medicaid false claims, is all of these. Section 817.505(1) proscribes a collusive and dishonest practice aimed at, among other things, obtaining state and federal Medicaid money. In fact, under a similar statute, section 409.920(2)(e), Florida Statutes, soliciting, offering, paying, or receiving a kickback for referral of a

[12] As otherwise stated, "[c]onduct comprehended within the term 'fraud' assumes many shapes, disguises, and subterfuges, and it has been said that there can be no all-embracing definition of the term, but that each case must be considered upon its own peculiar facts." 27 Fla. Jur. 2d, § 1, Fraud and Deceit (footnoted omitted).

Medicaid patient is a species of Medicaid fraud. The same is true under federal law.[13] Therefore, even if the "relating to fraudulent practices . . ." language is read restrictively, the Fifth District erred in holding that patient brokering does not involve fraud.

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[13] United States v. Liss, 265 F.3d 1220, 1224 (11th Cir. 2001) ("CCL and its employees developed a scheme to defraud Medicare by paying doctors to refer their Medicare patients to CCL in return for kickbacks from CCL"); United States v. Adam, 70 F.3d 776, 781 (5th Cir. 1995); United States ex rel. Pogue v. American Healthcorp, Inc., 977 F. Supp. 1329 (M.D. Tenn. 1997). Fraud against the government has been described in this manner:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.

United States v. Conover, 772 F.2d 765, 770 (11th Cir. 1985) (quoting Hammerschmidt v. United States, 265 U.S. 182,18 (1924)).

B. The Fifth District Ignored the Plain Meaning of Section 895.02(1)(a).

When the language of a statute is clear and unambiguous, there is no need to resort to rules of construction; the statute must be given its plain and obvious meaning. Clines v. State, 912 So. 2d 550, 556 (Fla. 2005). A plain meaning reading of section 895.02(1)(a)1.-29. confirms that the "relating to . . ." language is included to facilitate the identification of each provision listed. This purpose is evident because the "relating to" language follows references to even the most specific statutory provisions. For example, section 895.02(1)(a)2. identifies "[s]ection 403.727(3)(b), relating to environmental control," and section 895.02(1)(a)26. identifies "[s]ection 810.02(2)(c), relating to specified burglary of a dwelling or structure." Given the pinpoint specificity of these statutory references, the words that follow are either identifiers or they are surplusage. Words in a statute should not be construed to be surplusage or meaningless. Hechtman v. Nation Title Ins. of New York, 840 So. 2d 993, 996 (Fla. 2003); State v. Goode, 830 So. 2d 817, 824 (Fla. 2002). Therefore, it cannot reasonably be argued that any "relating to. . ." clause was intended to restrict or limit the acts that may constitute predicate offenses rather than identify the section, part or chapter referenced.

The Fifth District's interpretation effectively adds words to the statute. Reading a restrictive intent into language that merely reiterates a chapter title and subparts elevates speculation over plain meaning. Had the legislature intended to restrict the predicate acts to those involving proof of the elements of fraud, it could easily have said so or referred only to specific statutes or statutory subsections rather than the entirety of parts I and II. It did not. Section 895.02(1)(a)1.-29. contains references to 24 different chapters of the Florida Statutes. Courts may now be faced with the peculiar and unprecedented task of deciding which particular statutory sections or subsections appropriately "relate" to the chapter title or chapter parts.

The Fifth District relied on two terse decisions from the Fourth District. In State v. Gusow, 724 So. 2d 135 (Fla. 4th DCA 1998), the Fourth District held that the statutorily defined predicate of crimes chargeable by indictment or information under "Chapter 687, relating to interest and usurious practices" meant that only those crimes in chapter 687 relating to interest and usurious practices fit within the definition of racketeering activity.[14] Judge Polen concurred specially in Gusow, noting that the panel was bound by the

[14] The title of chapter 687 is "Interest and Usury; Lending Practices."

court's decision in State v. Kessler, 626 So.2d 251 (Fla. 4th DCA 1993), but further noting that if he were writing on a clean slate, he would have ruled otherwise, in reliance on United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982).

In Kessler, the Fourth District, without explanation, affirmed a trial court ruling that a conviction for lewdness and assignation under section 796.07, Florida Statutes (1989), could not constitute a predicate act under the RICO statute. The RICO statute referenced violations of "Section 796.01, s. 796.03, s. 796.04, s. 796.05, or s. 796.07, relating to prostitution" as constituting predicate acts. The court held that convictions of section 796.07 for lewdness or assignation could not be predicate acts because of the phrase "relating to prostitution" in section 895.02(1)(a)(16), Florida Statutes (1989). The court reached this conclusion notwithstanding the fact that "assignation" was defined as "the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement." § 796.07(1)(c), Fla. Stat. (1989) (emphasis added).

In Kopituk, the decision referenced by Judge Polen's Gusow concurrence, the Eleventh Circuit rejected the proposition that parenthetical language contained within specific definitions of racketeering activity in 18 U.S.C. §

1961(1)(C), was intended to limit the predicate acts chargeable under the federal RICO Act. The federal RICO statute provided in part: "(1) 'Racketeering activity' means . . . (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations). . . ." Kopituk, 690 F.2d at 1328, n.36. The court rejected the notion that the parenthetical language further restricted the scope of racketeering activity:

> We agree with the government's contention, however, that the parenthetical language following the reference to Section 186 was included as a means to facilitate identification of 29 U.S.C. § 186 and was not intended to limit the definition of racketeering activity only to Taft-Hartley charges involving "restrictions on payments and loans to labor organizations."

Id. (emphasis added).

Like section 895.02(1)(a)1.-29., 42 U.S.C. § 1961(1)(A)-(C) is replete with parenthetical identifiers. The substantive Florida RICO statute is patterned after its federal counterpart. Therefore, Florida courts may look to federal RICO decisions as persuasive authority. See Gross v. State, 765 So. 2d 39, 42 (Fla. 2000); State v. Whiddon, 384 So. 2d 1269, 1271 (Fla. 1980). Given the plain language of section 895.02(1)(a) and the Eleventh Circuit's decision in

Kopituk, the Fourth District's holdings in Gusow and Kessler should not be extended by this Court.[15]

IV. VIOLATIONS OF SECTION 817.505 CONSTITUTE WHITE COLLAR CRIME PURSUANT TO SECTION 775.0844(3)(a), FLORIDA STATUTES.

Section 775.0844 includes in the definition of white collar crime all offenses included in chapter 817. With one exception, the "relating to . . . " clauses in section 775.0844 recite verbatim the titles of each of the included chapters. The "relating to" clauses were not, as the lower courts held, intended to further restrict the definition of white collar crime. Moreover, a violation of section 817.505 would also fall within the catch-all provisions of section 775.0844, a point the Fifth District failed to even address.

A. Section 775.0844 Expressly Includes in the Definition of White Collar Crime Any Felony Offense in Chapter 817.

Section 775.0844(3), provides in pertinent part:

> (3) As used in this section, "white collar crime" means:

[15] Provisions of chapter 817 that may not satisfy the "fraudulent practices" requirement have formed the basis for RICO convictions in at least one other case. See e.g. State v. Sobieck, 701 So. 2d 96 (Fla. 3d DCA 1997) (RICO charges based on violations of section 817.36, Resale of tickets of common carriers, places of amusement, etc.).

> (a) The commission of, or a conspiracy to commit, any felony offense specified in:
>
> * * * *
>
> 4. Chapter 817, relating to fraudulent practices.
>
> * * * *
>
> (b) A felony offense that is committed with intent to defraud or that involves a conspiracy to defraud.
>
> (c) A felony offense that is committed with intent to temporarily or permanently deprive a person of his or her property or that involves a conspiracy to temporarily or permanently deprive a person of his or her property.
>
> (d) A felony offense that involves or results in the commission of fraud or deceit upon a person or that involves a conspiracy to commit fraud or deceit upon a person.

The statute references eleven chapters. With the exception of a reference to chapter 832, the "relating to . . ." clauses recite verbatim the titles of each of the chapters cited.[16] Section 775.0844 merely restates the title of chapter 817, "Fraudulent Practices." There is no indication in the statute or legislative history that the legislature intended the

recitation of chapter titles to limit the crimes chargeable under section 775.0844. Section 775.0844 defines white collar crime as "any felony offense specified in" the listed chapters. As with the RICO statute, the legislature could have clearly and easily limited the scope of the definition by referring to specific statutes or parts of chapters had it so desired. Again, however, the Fifth District rejected a plain meaning reading in favor of a speculative interpretation that adds words to the statute. It also continued to ignore the fact that patient brokering is a fraudulent practice.

B. Section 817.505 Falls Under the Catch-all Provisions of Section 775.0844

In addition to being specifically included as predicate acts pursuant to section 775.0844(3), the acts criminalized by section 817.505 would fall within the catch-all provisions of section 775.0844. These provisions make clear that the legislature did not intend a restrictive application of the statute. Section 775.0844(3)(b) and (d) include in the definition of White Collar Crime fraudulent acts or conspiracies to commit fraud. The acts encompassed in section

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[16] The "issuance of worthless checks and drafts" language in the chapter 832 "relating to" clause appears to be the Legislature's preferred shorthand title for chapter 832. This title is referred to three times in the Florida Statutes. See §§ 772.102(1)(a)25., 775.0844(3)(a)7., and 895.02(1)(a)33., Florida Statutes. The actual title of chapter 832,

817.505 and charged in this case result in the commission of fraud or deceit upon the State and involve a conspiracy to commit fraud or deceit upon the State. Thus, the acts criminalized by section 817.505 and charged in the information are, at the very least, includable in the definition of White Collar Crime felony offenses pursuant to section 775.0844(3)(b) and (d). Accordingly, the Fifth District erred in affirming the striking of the patient brokering incidents from Counts 1, 2, and 130.

"violations involving checks and drafts," is never referred to in the Florida Statutes outside of chapter 832.

CONCLUSION

For the foregoing reasons, except for the ruling that section 817.505(1) is constitutional, the decision of the Fifth District should be reversed and this case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by **U.S. Mail,** postage prepaid, to ROBERT TARG, Esquire, 7600 Red Road, Suite 200, South Miami, Florida 33143, counsel for John Rubio; JOSE M. QUINON, Esquire, 1401 Brickell Ave., Suite 1000, Miami, Florida 33131, counsel for Sonia Bonilla Guzman; ANTHONY C. VITALE, Esquire, 799 Brickell Plaza, Suite 700, Miami, Florida 33131, counsel for Anamaria Bonilla Mendez; G. RICHARD STRAFER, Esquire, 2400 South Dixie Hwy., Suite 200, Miami, Florida 33133, counsel for Gustavo Adolfo Fernandez; and JUAN D. GONZALEZ, Esquire, 6547 Coral Way, Miami, Florida 33155-1843, counsel for Gustavo Adolfo Fernandez; this ___ day of February, 2006.

_____
LOUIS F. HUBENER
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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I certify that this computer-generated brief is prepared in Courier New 12-point font and complies with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure.

_____
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