OA 4-7-95

IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,182

THIRD DISTRICT CASE NO. 93-981

ROBERT J. ROQUE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION TO INVOKE DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

LAW OFFICES OF MARK KING LEBAN, P.A.
2920 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-5302
(305) 374-5500
Fla. Bar No. 0147920

and

ARTURO ALVAREZ, ESQUIRE
2151 S.W. LeJeune Road
Suite 310
Coral Gables, Florida 33134

BY: MARK KING LEBAN
Counsel for Petitioner

TOPICAL INDEX TO BRIEF

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS[1]

The petitioner, Robert Roque (hereinafter defendant), was charged by information with, inter alia, thirty-five counts of "commercial bribe receiving," in violation of section 838.15, Florida Statutes (Supp. 1990).[2] (R.56-110). Each of the thirty-five counts of the information alleged as follows:

> And the aforesaid Assistant State Attorney, under oath, further information makes that ROBERT JOSEPH ROQUE between October 1, 1990, and June 30, 1991, in the County and State aforesaid, did unlawfully and feloniously solicit, accept or agree to accept a benefit, to wit: CASH, good and lawful money of the United States of America, with the intent to violate a statutory or common law duty to which that person is subject, to wit: As an

---

[1]All emphasis is added unless otherwise noted.

[2]The statute provides:

> **838.15. Commercial bribe receiving**
>
> (1) A person commits the crime of commercial bribe receiving if the person solicits, accepts, or agrees to accept a benefit with intent to violate a statutory or common law duty to which that person is subject as:
>
> (a) An agent or employee of another;
>
> (b) A trustee, guardian, or other fiduciary;
>
> (c) A lawyer, physician, accountant, appraiser, or other professional adviser;
>
> (d) An officer, director, partner, manager, or other participant in the direction of the affairs of an organization; or
>
> (e) An arbitrator or other purportedly disinterested adjudicator or referee.
>
> (2) Commercial bribe receiving is a third degree felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

> agent and/or employee and/or fiduciary and/or accountant and/or professional andvisor [sic] and/or other participant in the direction of the affairs of KELLY TRACTOR COMPANY, in violation of s. 838.15 Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

The defendant moved to dismiss the commercial bribery counts on the grounds that section 838.15, Florida Statutes (Supp. 1990), is unconstitutionally vague and susceptible to arbitrary application. (R.111-29). The Circuit Court granted the motion and declared the statute unconstitutional. (R.145-52).[3] In the trial court's order of dismissal, the court made the following findings:

> The Court finds that the defendant did not serve as Smith's employee, and that during the period of time alleged in the information, KELLY obtained exactly what it bargained for through its financing and refinancing of loans with Mr. Smith. KELLY suffered no harm during the period of time charged in the information, but rather profited through its transactions with Smith in the normal course of business, profits which KELLY would not have received were it not for the defendant's bringing Smith to KELLY in the first instance. (R.147-8).

The State thereafter timely appealed the order of dismissal and the Third District subsequently issued its decision reversing the Circuit Court's order of dismissal and expressly declaring section 838.15, constitutional. State v. Roque, 640 So.2d 97 (Fla. 3d DCA 1994).[4]

The defendant was a credit manager for Kelly Tractor Company.

---

[3]The Circuit Court's ORDER GRANTING DEFENDANT'S MOTION TO DISMISS is attached hereto as an Appendix to this brief.

[4]The Third District's decision is also attached as an Appendix to this brief.

As part of his job, he extended credit to entities seeking to finance or refinance construction equipment. In locating suitable entities to which to extend credit, the defendant worked with a Mr. Smith, who helped locate suitable candidates. For each suitable candidate that Mr. Smith brought in, he was paid a commission by Kelly Tractor. The State alleged that the defendant entered into an unauthorized side agreement with Mr. Smith, under which Mr. Smith paid the defendant between 33 and 40 percent of each commission as a "kickback." State v. Roque, supra at 98. The dates alleged in the information, set forth above, were between October 1, 1990, and June 30, 1991, during which the commission arrangement between the defendant and Smith was in operation. It was not until after July 1, 1991, that Smith decided to terminate his arrangement and thus, his dealings with both defendant and Kelly Tractor.[5] (R.146-7).

QUESTION PRESENTED

WHETHER FLORIDA'S COMMERCIAL BRIBE RECEIVING STATUTE, SECTION 838.15(1), FLORIDA STATUTES (SUPP. 1990), IS UNCONSTITUTIONALLY VAGUE AND SUSCEPTIBLE TO ARBITRARY APPLICATION.

---

[5]As the Circuit Court's ORDER found: "During the period alleged, Smith, to whom the defendant owed no fiduciary duty, voluntarily paid the defendant this portion from his commission;***The Court finds that the defendant did not serve as Smith's employee, and that during the period of time alleged in the information, KELLY obtained exactly what it bargained for through its financing and refinancing of loans with Mr. Smith. KELLY suffered no harm during the period of time charged in the information, but rather profited through its transactions with Smith in the normal course of business. . .". (R.147-8).

SUMMARY OF THE ARGUMENT

Section 838.15(1), Florida Statutes (Supp. 1990), is unconstitutionally vague and susceptible to arbitrary application. The statute prohibits an agent or employee of another, or a manager in the affairs of an organization, from accepting a thing of benefit "with intent to violate a statutory or common law duty" to which the person in his or her capacity is subject. It totally fails to define the nature of the "statutory or common law duty" to which the person is subject, requires no harm to the employer or other fiduciary, and contains no scienter requirement. Similar statutes have been repeatedly condemned on vagueness and susceptibility-to-arbitrary-application grounds by this Court. Locklin v. Pridgeon, 158 Fla. 737, 30 So.2d 102 (1947); State v. DeLeo, 356 So.2d 306 (Fla. 1978); State v. Jenkins, 469 So.2d 733 (Fla. 1985); Cuda v. State, 639 So.2d 22 (Fla. 1994). An individual must guess at his peril what specific acts might violate a "statutory or common law duty," and is subjected to a severe criminal penalty even if his or her act does not constitute a violation of the criminal law, was committed with no corrupt intent, and resulted in no measurable harm to his or her fiduciary.

The statute here at issue is indistinguishable from others making it criminal for a "public servant" to obtain a benefit for himself and violating "any statute or lawfully adopted regulation or rule relating to his office," State v. DeLeo, supra, or "refrain[ing] from performing a duty imposed upon him by law. . .", State v. Jenkins, supra, or for an agent or employee of the state or federal government acting under color of such authority doing

"any act. . .not authorized by law," Locklin v. Pridgeon, supra, or a private person managing the funds of an aged person "by the improper or illegal use" of such funds "for profit." Cuda v. State, supra. Yet, this Court, in each of these cases, struck the analogous statutes there at issue on the identical grounds utilized by the trial judge in the case at bar, namely, vagueness and susceptibility to arbitrary application.

The Third District's distinctions between the statute here at issue and those stricken by this Court are ephemeral. Further, the Third District's reliance upon Rodriguez v. State, 365 So.2d 157 (Fla. 1978), is at once misplaced and serves to demonstrate, by Rodriguez's contrast to the case at bar, the unconstitutionality of the commercial bribe receiving statute. Since the statute is vague and susceptible to arbitrary application, this Court must declare it constitutionally invalid and quash the decision of the Third District.

ARGUMENT

FLORIDA'S COMMERCIAL BRIBE RECEIVING STATUTE, SECTION 838.15(1), FLORIDA STATUTES (SUPP. 1990), IS UNCONSTITUTIONALLY VAGUE AND SUSCEPTIBLE TO ARBITRARY APPLICATION.

The defendant submits that section 838.15(1), Florida Statutes (Supp. 1990), purporting to criminalize commercial bribe receiving, is unconstitutionally vague and susceptible to arbitrary application. The statute here at issue, in regulating private misconduct, is analogous to statutes regulating "official misconduct" which have been repeatedly stricken for the vices of vagueness and arbitrary application. It is also analogous to statutes, similarly stricken by this Court, purporting to criminalize an employee's acts "not authorized by law," or purporting to criminalize acts of a manager for "improper or illegal use" of the assets of another. Moreover, it does not define nor require any corrupt intent to injure or harm the purported victim of the offense.

It is long established Florida law that "a penal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Brock v. Hardie, 114 Fla. 670, 678-9, 154 So. 690, 694 (1934). Stated differently, "an assault on the constitutionality of a penal statute vel non must necessarily succeed if the language does not convey sufficiently definite warnings of the proscribed conduct when measured by common understanding and practice. . .". D'Alemberte v. Anderson, 349

So.2d 164, 166 (Fla. 1977). Moreover, "when construing a penal statute against an attack of vagueness, where there is doubt, the doubt should be resolved in favor of the citizen and against the state, [since] criminal statutes are to be strictly construed according to the letter thereof." State v. Wershow, 343 So.2d 605, 608 (Fla. 1977). Although a court has a duty to uphold a law, this Court has recognized that the duty to uphold the constitution is greater than the duty to uphold a law. Delmonico v. State, 155 So.2d 369, 371 (Fla. 1963); Powell v. State, 345 So.2d 724 (Fla. 1977).

Consistent with this Court's pronouncements, the United States Supreme Court has repeatedly condemned statutes for vagueness and susceptibility to arbitrary application. Grayned v. City of Rockford, 408 U.S. 104, 108-9, 92 S.Ct. 2294 (1972)("[A]n enactment is void for vagueness if its prohibitions are not clearly defined.***If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."); Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855 (1983)("a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). Indeed, the Kolender Court observed that "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement.'" 461 U.S. at 358, quoting Smith v. Goguen, 415 U.S. 566, 574 (1974). And, with particular

significance to the case at bar, the Kolender Court warned of the danger that "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." Id.

Thus, the void-for-vagueness doctrine requires the legislature to define criminal offenses with sufficient clarity so that two objectives are met: (1) ordinary people can understand what conduct the statute prohibits; and (2) law enforcement officials (including prosecutors) are not encouraged to arbitrarily enforce the statute. Kolender v. Lawson, supra; Wyche v. State, 619 So.2d 231 (Fla. 1993).

Measured by these standards, the commercial bribe receiving statute here at issue must fall. As stated, the statute purports to prohibit private conduct, consisting of accepting a benefit with intent to violate "a statutory or common law duty" to which the person is subject as an agent or employee of another, or as a manager or other participant in the direction of the affairs of an organization.[6] The statute fails to provide whether the duty must be substantial or minor, and the statute fails to provide that the violation of the purported duty must result in any harm to the principal, employer, or organization. Moreover, the statute fails

---

[6]The only conceivable relationships that could apply to the defendant in the case at bar are those set forth in §838.15(1)(a), "[a]n agent or employee of another," or (d) "[a]n officer, director, partner, manager, or other participant in the direction of the affairs of an organization. . .". The defendant does not dispute that he was an employee of Kelly, and that he was Kelly's credit manager.

to provide that the accused must have any unlawful, corrupt, or willful intent in accepting "a benefit," and fails to attribute any corrupt or unlawful intent even in that portion of the statute prohibiting the violation of a "statutory or common law duty."[7]

The defendant submits that this statute, prohibiting private misconduct, is directly analogous to previous Florida statutes purporting to prohibit "official misconduct" which have been repeatedly condemned by this Court.

In State v. DeLeo, 356 So.2d 306 (Fla. 1978), this Court struck as unconstitutionally vague and susceptible to arbitrary application section 839.25(1)(c), Florida Statutes (1977), the "Official Misconduct" statute, which provided as follows:

> 839.25. Official Misconduct--
>
> (1) "Official Misconduct" means the commission of one of the following acts by a public servant, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another:
>
> * * *
>
> (c) Knowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his office.

In condemning this statute as unconstitutionally vague, this Court held that "Official Misconduct" under this subsection "is

---

[7]As set forth above, the statute provides that "[a] person commits the crime of commercial bribe receiving if the person. . .accepts. . .a benefit with intent to violate a statutory or common law duty. . .". There is thus no intent requirement at all with regard to the acceptance of the benefit, and the only intent requirement with regard to violation of a statutory or common law duty is that the defendant have "intent" to do so, not that he have willful, unlawful, or corrupt intent to violate the purported duty.

keyed into the violation of any. . .rule or regulation. . .whether they contain criminal penalties themselves or not, and no matter how minor or trivial." In addition, this Court observed that "public servant," while not defined in the Official Misconduct statute itself, was defined in a related chapter "as any. . .agent or governmental employee. . .". 356 So.2d at 308. Thus, this Court observed that "an appointed employee could be charged with official misconduct, a felony of the third degree. . .for violating a minor agency rule applicable to him, which might carry no penalty of its own." Id. Of course, the identical defects apply to the "commercial bribe receiving" statute under attack in the case at bar. A violation of §838.15(1) is keyed into the violation of any "common law duty," whether such a violation contains any criminal penalties itself or not, and no matter how egregious or insignificant. In DeLeo, a "public servant" was defined as any agent or (governmental) employee, precisely as §838.15 defines the subject person under the commercial bribe receiving statute here. Thus, under our statute, the office manager of a small concern that accepts a $5.00 pen from the office supply company salesman, with the intent, as the person in charge of purchasing office supplies, to purchase pencils (or rubber bands) in the future only from that supplier, is guilty of a third degree felony.[8]

The DeLeo Court also held that the statutory element contained in the "Official Misconduct" statute of "corrupt intent" did not

---

[8]The absurdity of this and many other examples will not be belabored, nor expanded upon. Even in this example, the employer has been "harmed," unlike Kelly in the case at bar.

save the statute from arbitrary application since "corrupt intent" was defined elsewhere in Chapter 839 as "'done with knowledge that the act is wrongful and with improper motive.'" 356 So.2d at 308, quoting §839.25(2), Fla.Stat. (1977). This Court held that this standard "is too vague to give men of common intelligence sufficient warning of what is corrupt and outlawed, therefore, by the statute. The 'corruption' element, as defined, does nothing to cure the statute's susceptibility to arbitrary application." Id. [footnote omitted]. Of course, in the case at bar, there is no "corrupt intent" element at all contained within the statute.[9] If the statute in DeLeo was unconstitutionally vague and susceptible to arbitrary application, then a fortiori the commercial bribe receiving statute at issue in the case at bar is similarly defective.

The DeLeo Court concluded that the statute there at issue also was unconstitutional "because of its 'catch-all' nature." Id. That identical defect plagues the commercial bribe receiving statute. The susceptibility to arbitrary application of the statute is demonstrated in this very case. The defendant's alleged conduct in requiring a "kickback" or commission from Mr. Smith resulted in no harm to Kelly, the employer, principal, or organization to whom the defendant purportedly owed some undefined common law duty, during the period of time alleged in the

---

[9]While lack of an intent requirement does not doom the statute, "[c]riminal statutes that reduce or eliminate traditional scienter. . .should receive greater scrutiny. . .". State v. Smith, 638 So.2d 509, 512 (Fla. 1994), Kogan, J., concurring in result.

information. Moreover, the statute appears to require no such harm.[10] The trial court, in its order striking the statute expressly found:

> The Court finds that the defendant did not serve as Smith's employee, and that during the period of time alleged in the information, KELLY obtained exactly what it bargained for through its financing and refinancing of loans with Mr. Smith. KELLY suffered no harm during the period of time charged in the information, but rather profited through its transactions with Smith in the normal course of business, profits which KELLY would not have received were it not for the defendant's bringing Smith to KELLY in the first instance. (R.147-8).

Again, in State v. Jenkins, 469 So.2d 733 (Fla. 1985), affirming, 454 So.2d 79 (Fla. 1st DCA 1984), this Court struck as unconstitutionally vague yet another subsection of the same Official Misconduct statute that was at issue seven years earlier in DeLeo, supra. In Jenkins, the defendant was charged with violating section 839.25(1)(a), Florida Statutes (1983), which provided in pertinent part that Official Misconduct consisted of an act of a public servant in obtaining a benefit for himself by "[k]nowingly refraining. . .from performing a duty imposed upon him by law. . .". It is submitted that this portion of the Official Misconduct statute is even more directly analogous to the commercial bribe receiving statute at issue in the instant case than was the subsection at issue in DeLeo. The First District, affirming the trial judge's order striking the statute, observed

---

[10]The condemned statute in DeLeo, at least, did have an alternative requirement, in addition to "obtain[ing] a benefit for himself," of "caus[ing] the unlawful harm to another." §839.25(1), Fla.Stat. (1977).

that "the duties addressed in (a) may be those imposed by any source of law, not merely the statutes and rules of (c), found to be overly broad in DeLeo." 454 So.2d at 80. Of course, in the case at bar, the "statutory or common law duty" whose violation is prohibited may also be imposed by any source of law, a standard even more nebulous than that found wanting in DeLeo with regard to the prohibition of the violation of "any. . .regulation or rule relating to [one's] office."

Affirming the First District's striking of the statute in Jenkins, this Court agreed that subsection (a) suffered "the same vulnerability to arbitrary application and [found] that it impermissibly allows the imposition of criminal penalties for the failure to perform duties imposed by statutes, rules, or regulations that may themselves impose either a lesser penalty or no penalty at all." 469 So.2d at 734. Thus, the Court held that the statute was "unconstitutionally vague and susceptible to arbitrary application." Id. It is submitted that the commercial bribe receiving statute's prohibition of a violation of "a statutory or common law duty" is precisely as vague and susceptible to arbitrary application as was the statute condemned by this Court in Jenkins.

The defendant further submits that the "common law duty" element of the commercial bribe receiving statute cannot survive constitutional scrutiny. In Sullivan v. Leatherman, 48 So.2d 836 (Fla. 1950), the Sheriff of Dade County was indicted for "neglect of duty" a common law offense. Against the defendant's assertion of failure to charge a crime known to the laws of Florida, the

State urged that the offense could be sustained under the theory that the indictment charged an offense of the "common law misdemeanor of failing or neglecting to perform a duty imposed on him by law. . .[and] conduct on the part of the Sheriff involving corruption or the abuse of any power entrusted to him for the benefit of the public" stated an offense. Thus, the State relied upon the Sheriff's violation of "this invoice of duties. . .". 48 So.2d at 838. In striking the indictment for failure to charge an offense, this Court held:

> [I]f the State relies on an indictment charging official misconduct. . .whether common law or statutory, the offense must be charged in direct and specific terms and that it was willfully or corruptly done or omitted.***So it necessarily follows that when one is relying on a common law indictment. . ., it must meet constitutional and statutory requirements. The charge must be made in such positive and direct terms as will put the defendant on notice of what he is charged with and enable him to prepare his defense. 48 So.2d at 838.

In the case at bar, as previously observed, §838.15(1) does not require any such corrupt intent, nor does the information even allege such an intent. Pursuant to Sullivan, the trial court here correctly struck the statute.

The statute here at issue, in prohibiting one from accepting a benefit with intent to "violate a statutory or common law duty," is directly analogous to the exploitation of the elderly statute stricken by this Court in Cuda v. State, 639 So.2d 22 (Fla. 1994), which sought to criminalize "the improper or illegal use or management of the funds. . .of [an] aged person or disabled adult for profit. . .". Section 415.111(5), Florida Statutes (1991). In

Cuda, the trial court struck the statute finding that the prohibition of "improper or illegal" mismanagement of funds or assets of an aged person created constitutional vagueness problems. While agreeing that the term "improper" was constitutionally vague, the Fifth District nevertheless upheld the statute, construing the word "illegal" to mean that "the perpetrator must be found to have violated another criminal statute but not necessarily charged with a violation of that statute." State v. Cuda, 622 So.2d 502, 506 (Fla. 5th DCA 1993). Disagreeing, this Court held that the exploitation of the elderly statute "contains no clear explanation of the proscribed conduct [and] no explicit definition of terms. . .". 639 So.2d at 25. The Court analogized the statute to an earlier statute containing the phrase "not authorized by law" which the Court had previously stricken on vagueness grounds. Locklin v. Pridgeon, 158 Fla. 737, 30 So.2d 102 (1947).

In Locklin, this Court found that the phrase "not authorized by law" was "too vague, indefinite and uncertain to constitute notice of the crime or crimes or unlawful acts which it purports to prohibit" and "prescribes no ascertainable standard of guilt." Locklin, supra at 103. The Locklin statute made it unlawful for any officer, agent or employee of the federal government or the State of Florida to commit any act under color of authority of their position which was "not authorized by law." Id. As the Cuda Court observed, in Locklin, the Court "held that the act was unconstitutionally vague because it required every government employee and officer 'to determine at his peril what specific acts

are authorized by law and what are not authorized by law.'" Cuda, supra at 23, quoting Locklin, 30 So.2d at 105.

The defendant submits that both Cuda and Locklin are directly analogous to the commercial bribe receiving statute in the case at bar. Essentially, all three statutes prohibit unspecified acts which are "not authorized by law," Locklin, which are "illegal," Cuda, or which "violate a statutory or common law duty," Roque. In Locklin, this Court condemned the statute there at issue[11] In language equally applicable to the statute here at issue:

> The infirmity in the statute is that it is too vague, indefinite and uncertain to constitute notice of the crime or crimes or unlawful acts which it purports to prohibit. The statute prescribes no ascertainable standard of guilt. Under the provisions of this Act an officer or employee is just as amenable to prosecution for an act done in good faith, when that act is not specifically authorized by law, as he would be for the commission of an act done with evil intent and wilfully done in violation of law. So the determination of a standard of guilt is left to be supplied by courts or juries.
>
> * * *
>
> By the terms of this act every officer, agent or employee. . .is required to determine at his peril what specific acts are authorized by law and what are not authorized by law. Honest and intelligent men may reasonably have contrary views as to whether or not a specific act of an officer is or is not authorized by law and, therefore, the violation or non-violation of this statute may reasonably depend upon which view the court or a jury may agree with.

---

[11]Section 839.22, Florida Statutes (Supp. 1946), provided in pertinent part that "it shall be unlawful for any person to commit any act under color of authority of an officer, agent or employee of the United States government [or] State of Florida. . .when such act is not authorized by law. . .".

> It seems to us that nothing could be more indefinite and uncertain than what is attempted as a penal statute in the instant case. 30 So.2d at 103, 105.

Similarly, in the case at bar, any agent, employee, trustee, guardian, or other fiduciary enumerated in the commercial bribe receiving statute must guess what acts are authorized or not authorized by the "common law duty" attendant to the particular fiduciary relationship in which the employee finds himself or herself. Moreover, the statute's prohibition against violation of any "statutory" duty does not require that the statute at issue be a criminal statute as opposed to the myriad duties imposed by civil statutes. In this respect, the statute here at issue is even more open-ended than those condemned by this Court in Locklin and in Cuda.

It is significant that this Court in Cuda rejected the Fifth District's construction of the exploitation of the elderly statute wherein the Fifth District opined that "the perpetrator must be found to have violated another criminal statute but not necessarily [be] charged with a violation of that statute." 622 So.2d at 506.[12] This Court held that "there are no other statutes in this instant case to lend meaning to the vague language employed in section 415.111(5)." 639 So.2d at 24.[13]

---

[12]Similarly, in the case at bar, the Third District construed "statutory or common law duty" to mean "legal duties" of an employee, manager, or other fiduciary. 640 So.2d at 99.

[13]Certainly a statute prohibiting "illegal use. . .of the funds. . .of [an] aged person. . .for profit. . .", lends itself to speculation that such "other statutes" as the laws against theft, §812.014, Fla.Stat., dealing in stolen property, §812.019, Fla.Stat., fraudulent practices, §817.03, Fla.Stat., or illegal use

The Third District's purported distinctions between the statute here at issue and those involved in the above-cited cases are ephemeral. First, the Third District stated that the "'common law or statutory duties' involved are only those which apply to the professions or legal relationships specifically enumerated in" the statute. 640 So.2d at 99. For instance, the Third District believed that "a lawyer understands the legal duties of a lawyer. . ., and a manager understands the legal duties of a manager." Id. However, the statute stricken by this Court in Locklin expressly enumerated the very specific relationship of "an officer, agent or employee of the United States government, State of Florida, or any political subdivision thereof. . .". 30 So.2d at 103. The statute involved in Cuda expressly enumerated a guardian of an "aged person or disabled adult" and one who "manage[s]. . .the funds, assets," of such person. 639 So.2d at 23 n.1. And the statutes stricken in DeLeo and Jenkins expressly specified "public servants." It is submitted that the government

---

of credit cards, §832.05, Fla.Stat., give meaning to the term "illegal" employed in the statute. Yet, this Court refused to permit such speculation to save the exploitation of the elderly statute from the vagueness attack. Even if these, or other, constitutionally valid criminal statutes do "lend meaning" to the vague and general language of the commercial bribe receiving statute here at issue, proof of a statutory violation of any other applicable criminal statute renders §838.15(1) meaningless; the statute has no field of operation which is different from these or other untarnished criminal statutes. A reviewing court should avoid a construction which renders a law meaningless or void. See St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950). A court should also give effect to a more specific statute rather than to a general (and here, vague) statute covering the same and other subjects in general terms. See Adams v. Culver, 111 So.2d 665 (Fla. 1959). The more specific statutes in the case at bar are these, and other, criminal statutes vaguely referenced by §838.15(1), Fla.Stat.

employee in Locklin, the public servants in Jenkins and DeLeo, and the manager or guardian of the aged in Cuda are no more or less "aware of the duties which are commensurate with that station" than a person in one of the professional or legal relationships set forth in section 838.15(1), Florida Statutes (Supp. 1990).

Second, the Third District looked to the use of the word "bribe" in the statute, and rejected the Circuit Court's finding of vagueness based upon the rationale that "[i]ndividuals of common intelligence know what a 'bribe' is." 640 So.2d at 100. In so holding, the Third District clearly ignored the fact that the statute stricken by this Court in Cuda on the identical grounds utilized by the Circuit Court below, provided "[p]enalties relating to abuse, neglect, or exploitation of aged person or disabled adult."[14] And, of course, the statutes condemned by this Court on vagueness and susceptibility-to-arbitrary-application grounds in DeLeo and Jenkins were titled "Official misconduct." Thus, resort to the title of the statute does nothing to cure the inherent vagueness within its body.

Next, the Third District finds the statute not susceptible to arbitrary application, again, because of "the finite list of professions/legal relationships to which the statute applies," holding that prosecutorial discretion is thus limited by applying the statue only to those enumerated positions. 640 So.2d at 100.

---

[14]Since the Third District found it useful to resort to Webster's definition of "bribe," the defendant observes that the definition of "exploit" is "to make unethical use of for one's own advantage or profit; to turn selfishly or unfairly to one's own account." Webster's New Universal Dictionary of the English Language Unabridged, 646 (1977).

As previously observed, however, the "relationships" involved in each of the above cases discussed in this brief were also expressly enumerated by the respective statutes. Yet this Court found, for instance, in Locklin, that notwithstanding the fact that the statute was specifically directed to an agent or employee of the state or federal government, "the determination of a standard of guilt is left to be supplied by courts or juries." 30 So.2d at 103. And in DeLeo, even though a "public servant" was expressly defined in Chapter 838 as "any public officer, agent or governmental employee, whether elected or appointed," this Court still held that the keying of the prohibited conduct into "violation of any statute, rule or regulation, pertaining to the office of the accused, whether they contain criminal penalties themselves or not, and no matter how minor or trivial," rendered the statute "susceptible to arbitrary application because of its 'catch-all' nature." 356 So.2d at 308.

In addition, the Third District found no arbitrary application problems with the commercial bribe receiving statute because the modifier "commercial" was deemed by the court to "limit[] the realm in which the statute may be applied to that of private industry and commercial transactions." 640 So.2d at 100. However, the statute in Cuda v. State, supra, was expressly aimed at the purely private relationship between an aged person\disabled adult and one who acted as a guardian or manager of his or her funds. For this same reason, the Third District's further rationale that "the commercial bribe receiving statute applies primarily to private, commercial actors, and not public, political officials " 640 So.2d at 100,

renders its decision in manifest opposition to this Court's Cuda decision.

Finally, the Third District's decision here expressly misapplies this Court's decision in State v. Rodriguez, 365 So.2d 157 (Fla. 1978), where this Court in a 4-3 decision, narrowly upheld a statute which prohibited a person from knowingly using or trafficking in food stamps "in any manner not authorized by law. . .". Id. at 158. Rejecting a vagueness attack, this Court reviewed the entire scheme of state and federal statutory and regulatory provisions attendant to the Food Stamp Program, and held that "because of the peculiar nature of the food stamp program, because it is a federal program, and because Chapter 409 gives notice that it is a federal program with federal regulations, we can conclude that the Legislature, by the use of the language 'not authorized by law,' means not authorized by state and federal food stamp law." Id. at 159. Clearly, the Third District in the case at bar, misapplied Rodriguez to the extent that it applied the complex web of federal and state statutory and regulatory law pertinent to the Food Stamp Program to the commercial bribe receiving statute.

Here, as in Locklin v. Pridgeon, supra, no closely related statutory and regulatory scheme can be read in pari materia with the statute to save it from its inherent vagueness and susceptibility to arbitrary application. Section 838.15(1), Florida Statutes (Supp. 1990), contains no such "backdrop" or direction to assist a person in determining what acts in violation of his or her common law or statutory "duty" to an employer will

subject himself or herself to prosecution. While the Rodriguez Court found that that statute pertained to state and federal food stamp laws, section 838.15(1) contains no such limitation or guidance. Does the "duty" pertain to laws for which the defendant might incur criminal or civil liability or both? Does an "unethical" act by an employee, but one that produces no measurable harm whatsoever to his or her boss, become criminally punishable? Will the trivial violation of an agency regulation subject the agent to a violation of this statute? One can only speculate the number of situations that violate a duty or obligation to a superior that could subject a citizen to conviction of a third degree felony under section 838.15(1).

Justice Sundberg, in a provocative opinion in which he dissented from the Rodriguez majority, illustrated this problem particularly well with respect to the case at bar when he stated:

> Although I cannot be absolutely sure of it, I believe that a majority of the Court today has potentially sanctioned an enactment by the Legislature which would make unlawful as a discrete crime "the doing of any and all acts in any manner not authorized by law." It could appropriately be entitled the "Omnibus Prevention of Unlawful Conduct Act." Of course, conduct not authorized by law is not limited to criminal conduct but includes any act in contravention of the common law or statute, civil or criminal. To my mind, there is little difference between my hypothetical "Omnibus Prevention of Unlawful Conduct Act" and the provision here under consideration. This statute does nothing more than to state that it shall be unlawful to act in any manner not authorized by law and then provides a criminal sanction. 365 So.2d at 1761 (Sundberg, J., dissenting).

While the purpose of the commercial bribe receiving statute is

laudable, the defendant submits that this Court should reverse the Third District and affirm the trial court's order striking the statute as unconstitutionally vague and susceptible to arbitrary application. We close with State v. Llopis, 257 So.2d 17, 18 (Fla. 1971), where this Court said:

> While we acknowledge a special sympathy for legislation of this nature, which is intended to safeguard the public and insure honesty and integrity in government, our sympathy cannot be allowed to impair our judgment. This statute is vague beyond redemption.

CONCLUSION

This Court has a duty to insure that statutes imposing severe criminal penalties upon the citizenry of this state clearly apprise the citizens of what conduct is proscribed, and are not susceptible to arbitrary application by prosecutors, courts, and juries. Based upon the citation of authority and argument contained herein, the defendant respectfully requests this Court to quash the decision of the District Court of Appeal of Florida, Third District, and remand this cause with directions that the Third District affirm the order of dismissal entered by the Circuit Court below.

Respectfully submitted,

LAW OFFICES OF MARK KING LEBAN, P.A.
200 South Biscayne Boulevard
Suite 2920
Miami, Florida 33131-5302
(305) 374-5500
Fla. Bar No. 147920

and

ARTURO ALVAREZ, ESQUIRE
2151 S.W. LeJeune Road
Suite 310
Coral Gables, Florida 33134

BY: Mark King Leban
MARK KING LEBAN
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Linda Katz, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 921N, Miami, Florida 33128, this 1st day of February, 1995.

Mark King Leban

IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,182

THIRD DISTRICT CASE NO. 93-981

ROBERT J. ROQUE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION TO INVOKE DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX TO PETITIONER'S INITIAL BRIEF ON THE MERITS

Circuit Court'S Order of Dismissal (R.145-152)

State v. Roque, 640 So.2d 97 (Fla. 3d DCA 1994)

DFP

92-3576

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

MCN #
CASE NO. 91-0206

(Judge Wilson)

Case # 92-3576

STATE OF FLORIDA,)
Plaintiff,)
vs.)
ROBERT J. ROQUE,)
Defendant.)
_____)

E. HARPER

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS 16 THROUGH 49 OF THE INFORMATION

THIS CAUSE, having come before the Court on defendant's MOTION TO DISMISS COUNTS 16 THROUGH 49 OF THE INFORMATION, predicated upon an attack on the constitutional validity of section 838.15, Florida Statutes (1990), and the Court having considered the memoranda of law and legal argument submitted by the parties, and being otherwise fully advised in the premises, hereby makes the following findings of fact and conclusions of law:

The defendant is charged in a multi-count information with, inter alia, 35 counts of "commercial bribe receiving," in violation

RECORDED
JUN 25 1993
Clerk of Circuit & County Courts

[OFF_REC BK]
15960 PG 2629 145

of section 838.15, Florida Statutes (1990).[1] Each of the 35 counts charges, in identical language, that between October 1, 1990, and June 30, 1991, the defendant accepted cash with the intent to violate a statutory or common law duty, as an agent or employee or participant in the direction of the affairs of KELLY TRACTOR COMPANY. The factual scenario set forth in the State's probable cause affidavit and investigative summary is that during the period of time alleged in the information, the defendant was employed as the credit manager for KELLY. As the credit manager for KELLY, the defendant, and one Mark Smith, an independent contractor, sought out individuals or companies in need of financing or refinancing of construction equipment and provided the needed financing for them

---

[1]The statute provides:

> **838.15. Commercial bribe receiving**
>
> (1) A person commits the crime of commercial bribe receiving if the person solicits, accepts, or agrees to accept a benefit with intent to violate a statutory or common law duty to which that person is subject as:
>
> (a) An agent or employee of another;
>
> (b) A trustee, guardian, or other fiduciary;
>
> (c) A lawyer, physician, accountant, appraiser, or other professional adviser;
>
> (d) An officer, director, partner, manager, or other participant in the direction of the affairs of an organization; or
>
> (e) An arbitrator or other purportedly disinterested adjudicator or referee.
>
> (2) Commercial bribe receiving is a third degree felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

with funds from KELLY. For his services in locating customers and helping to arrange the transactions, Mr. Smith would be paid a commission by KELLY that varied according to each transaction. The payment and amount of said commissions was always known and approved by KELLY. The commercial paper generated by these transactions would then either be kept by KELLY or sold to other financial institutions at a profit.

Unbeknownst to KELLY, the defendant, during the period alleged in the information (October 1, 1990 through June 30, 1991), entered into an arms-length arrangement with Mark Smith for Smith to pay the defendant a portion of Smith's commission (paid directly from KELLY to Smith) ranging from 33 to 40 percent of Smith's commission. In other words, the defendant received a "kickback" from Smith, out of Smith's commission from KELLY. During the period alleged, Smith, to whom the defendant owed no fiduciary duty, voluntarily paid the defendant this portion from his commission; however, after July 1, 1991, Smith decided that he would no longer pay the defendant from his commission and after that point, announced that he would no longer conduct further financing transactions with KELLY.

The Court finds that the defendant did not serve as Smith's employee, and that during the period of time alleged in the information, KELLY obtained exactly what it bargained for through its financing and refinancing of loans with Mr. Smith. KELLY suffered no harm during the period of time charged in the information, but rather profited through its transactions with

Smith in the normal course of business, profits which KELLY would not have received were it not for the defendant's bringing Smith to KELLY in the first instance.

The defendant asserts that section 838.15 is unconstitutional, facially and as applied, since its "common law duty" element is vague and susceptible to arbitrary application, the statute neither requires nor defines any corrupt intent to injure or harm the purported victim of the offense (here KELLY), and the statute improperly injects long abrogated common law elements into Florida's bribery law. The State argues that the statute is not vague but rather is directed toward a specific prohibited act, that of soliciting or accepting a bribe, is not open-ended and subject to arbitrary application, and that, although not specifically stated, the statute implies a knowledge requirement.

The Court finds that the commercial bribe receiving statute here at issue suffers the same defects as the official misconduct statutes stricken by the Florida Supreme Court in State v. DeLeo, 356 So.2d 306 (Fla. 1978), and State v. Jenkins, 569 So.2d 733 (Fla. 1985), affirming, 455 So.2d 79 (Fla. 1st DCA 1984). The statute in DeLeo, section 839.25(1)(c), Florida Statutes (1977), prohibited an official (defined as an agent or employee) from, with corrupt intent, obtaining a benefit for himself or causing unlawful harm to another, by violating any regulation, statute, or rule relating to his office. The statute in Jenkins, section 839.25(1)(a), Florida Statutes (1983), prohibited a public official from obtaining a benefit for himself in return for

"[k]nowingly refraining. . .from performing a duty imposed upon him by law. . .". [Emphasis added]. The Florida Supreme Court struck both statutes finding that the prohibited acts were "keyed into the violation of any. . .rule or regulation. . .whether they contain criminal penalties themselves or not, and no matter how minor or trivial." DeLeo, supra at 308. The Supreme Court found that an "employee could be charged with official misconduct, a felony of the third degree and punishable by up to five years in prison or a fine up to $5,000, for violating a minor agency rule applicable to him, which might carry no penalty of its own." Id. [Footnotes omitted]. Further, the Supreme Court in DeLeo held that the statutory element of "corrupt intent" did not save the statute from arbitrary application notwithstanding the fact that "corrupt intent" was defined elsewhere in Chapter 839 since that definition did "nothing to cure the statute's susceptibility to arbitrary application." Id.[2] The Supreme Court in DeLeo held that the statute was "simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute, as a crime, the most insignificant of transgressions or, at worst, to misuse the judicial process for political purposes. We find it susceptible to arbitrary application because of its 'catch-all' nature." Id. [Footnote omitted].

Similarly, in Jenkins, the Supreme Court affirmed the First

---

[2]The Court observes that the statute here at issue, §838.15(1), Fla.Stat. (1990), contains no "corrupt intent" element at all.

District's decision finding that "the duties addressed in (a) may be those imposed by any source of law, not merely the statutes and rules of (c), found to be overly broad in DeLeo." 454 So.2d at 80. This Court finds that this analysis is directly applicable to the "common law duty" element of the commercial bribe receiving statute in the case at bar. The "statutory or common law duty" whose violation is prohibited may be imposed by any source of law, a standard even more nebulous than that found deficient in DeLeo and Jenkins with regard to the prohibition of the violation of "any regulation or rule relating to [one's] office."

Contrary to the State's argument, the Court finds no material distinction between the DeLeo-Jenkins statutes and the commercial bribe receiving statute in the case at bar. Both statutes prohibited receiving a bribe in exchange for refraining from performing a duty imposed by law; in both cases, the violation of the "duties" may be trivial, carry no penalty of its own, the duty itself may be imposed by any source of law, and enforcement of the respective statutes is "susceptible to arbitrary application." Jenkins, 469 So.2d at 734.

The statute's susceptibility to arbitrary application is best illustrated by the case at bar where the defendant owes no duty under the statute to the independent contractor, Mark Smith, and where KELLY, the entity to whom the defendant purportedly did owe a duty as an employee or agent, suffered no harm whatsoever arising out of the defendant's receiving of "kickbacks" from Smith, during the period alleged in the information. The vagueness of the

statute is demonstrated by the State's assertion that the defendant, as a person of common intelligence, need not have guessed that the term common law duty "includes an employee's [defendant's] obligation to pay a full commission to the person entitled [Smith], rather than keeping a kickback." (State's RESPONSE at page 4; emphasis added). Clearly, the defendant was not Smith's employee, owed no common law duty to Smith under the statute, and thus the statute cannot be constitutionally applied to the defendant.

Moreover, the Court finds that the statute's failure to require any corrupt intent adds to its susceptibility to arbitrary application. State v. DeLeo, supra at 308. It simply will not do for the statute to "imply" a scienter requirement.

Finally, although the term "common law" in a criminal statute does not render the statute unconstitutionally vague, State v. Egan, 287 So.2d 1, 6 (Fla. 1973), the commercial bribe receiving statute's resurrection of a "common law duty" as an essential element of the commercial bribe receiving offense is unconstitutional since "[w]e no longer look to the common law for the crime of bribery. . .". Coleman v. State ex rel. Mitchell, 132 Fla. 845, 182 So. 627, 629 (1938). Even if a common law offense may properly be charged, "it must meet constitutional and statutory requirements." Sullivan v. Leatherman, 48 So.2d 836, 838 (Fla. 1950). "[W]hether common law or statutory, the offense must be charged in direct and specific terms and that it was willfully or corruptly done or omitted." Id. The Court finds that the

commercial bribe receiving statute here under attack fails to meet this constitutional requirement. Accordingly, it is hereby

ORDERED and ADJUDGED that section 838.15(1), Florida Statutes (1990), is unconstitutionally vague and susceptible to arbitrary application, and the defendant's motion to dismiss counts 16 through 49 of the information is GRANTED.

DONE this 19 day of April, 1993, at Miami, Dade County, Florida.

CIRCUIT JUDGE
JUDGE THOMAS S. (TAM) WILSON, JR.

Copies provided to:

Arturo Alvarez, Esquire
Mark King Leban, Esquire
Howard Pohl, Assistant State Attorney

1

Brenda ANGUISH, Appellant,

v.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DISTRICT 11: DADE UNIT 55583, Appellee.

No. 94-230.

District Court of Appeal of Florida, Third District.

July 12, 1994.

On appeal from order of the Department of Health and Rehabilitative Services, Office of Public Assistance Appeal Hearings, which dismissed appellant's administrative appeal as being premature, the Third District Court of Appeal held that administrative proceeding was premature, since Department had not made final decision as to whether to request reimbursement by appellant of alleged Aid to Families with Dependent Children (AFDC) overpayment.

Affirmed.

Administrative Law and Procedure ⇐704

Social Security and Public Welfare ⇐194.19

Administrative appeal was premature where Department of Health and Rehabilitative Services had made no final decision as to whether to request reimbursement by appellant of alleged Aid to Families with Dependent Children (AFDC) overpayment; if Department decided to refer matter to Benefits Recovery Program, then recipient of alleged overpayment would have right to administrative hearing. Fla. Admin. Code Ann. 10C-1.900, 10-2.042 to 10-2.044.

Brenda Anguish, in pro. per.

Janet K. Shepherd, Hialeah, for appellee.

Before HUBBART, BASKIN and COPE, JJ.

PER CURIAM.

Brenda Anguish appeals an order dismissing her administrative appeal as being premature. The Department of Health and Rehabilitative Services states that at this time, it has made no final decision whether to request reimbursement by Ms. Anguish of an alleged Aid to Families with Dependent Children ("AFDC") overpayment. If the Department decides to refer the matter to the Benefits Recovery Program, then Ms. Anguish will have a right to an administrative hearing. Fla.Admin.Code R. 10C-1.900, 10-2.042-10.2.044. Accordingly, this court agrees with the administrative hearing officer that the administrative proceeding is premature. This affirmance of the administrative hearing officer's order is without prejudice to Ms. Anguish's right to be heard if the Department proceeds with a referral to the Benefit Recovery Program.

Affirmed under Florida Rule of Appellate Procedure 9.315(a).

2

The STATE of Florida, Appellant,

v.

Robert J. ROQUE, Appellee.

No. 93-981.

District Court of Appeal of Florida, Third District.

July 12, 1994.

Defendant moved to dismiss 35 counts of commercial bribe receiving. The Circuit Court, Dade County, Thomas S. Wilson, Jr., J., granted motion, and state appealed. The District Court of Appeal, Levy, J., held that commercial bribe receiving statute was not unconstitutionally vague, facially or as applied.

Reversed.

1. Criminal Law ⇐13.1(1)

To survive vagueness challenge, statute must be specific enough that it is not susceptible to arbitrary and discriminatory enforcement. West's F.S.A. Const. Art. 1, § 9; U.S.C.A. Const.Amend. 14.

2. Bribery ⇐2

Statute defining crime of commercial bribe receiving as soliciting, accepting, or agreeing to accept benefit with intent to violate "common law or statutory duty" is not unconstitutionally vague on its face, notwithstanding contention that it does not adequately advise person of common intelligence of what conduct was prohibited; phrase "common law or statutory duty" was clarified by enumeration to profession or legal relationships to which statute applied, and use of common word "bribe" further indicates nature of prohibited conduct. West's F.S.A. § 838.15; West's F.S.A. Const. Art. 1, § 9; U.S.C.A. Const.Amend. 14.

3. Bribery ⇐2

Statute defining crime of commercial bribe receiving, unlike official misconduct statutes previously stricken for vagueness, is not unconstitutionally vague on its face, notwithstanding contention that it is susceptible of arbitrary enforcement; finite list of professions and legal relationships to which statute applies limits prosecutorial discretion, and modifier "commercial," along with enumerated positions, clearly limits realm in which statute may be applied to that of private industry and commercial transactions. West's F.S.A. § 838.15; West's F.S.A. Const. Art. 1, § 9; U.S.C.A. Const.Amend. 14.

4. Bribery ⇐2

Statute defining crime of commercial bribe receiving as soliciting, accepting, or agreeing to accept benefit with intent to violate "common law or statutory duty" was not unconstitutionally vague as applied to defendant, who, as credit manager for construction equipment company, was allegedly paid "kickbacks" out of commissions paid to person who brought in suitable candidates for credit; prior civil case held, based on almost identical fact pattern, that such kickbacks were in blatant disregard of fiduciary duties owed employer, thus giving defendant notice that his conduct fell within statutory prohibition. West's F.S.A. § 838.15; West's F.S.A. Const. Art. 1, § 9; U.S.C.A. Const.Amend. 14.

Robert A. Butterworth, Atty. Gen., and Linda S. Katz, Asst. Atty. Gen., for appellant.

Mark King Leban, Miami, Arturo Alvarez, Coral Gables, for appellee.

Before SCHWARTZ, C.J., and NESBITT and LEVY, JJ.

LEVY, Judge.

The State appeals a trial court order which declared the commercial bribe receiving statute, Florida Statutes Section 838.15 (Supp. 1990), unconstitutionally vague. We reverse.

The State filed an information against Robert J. Roque, the defendant, which alleged the following facts: The defendant was the credit manager for Kelly Tractor Company. As part of his job, the defendant extended credit to entities seeking to finance or refinance construction equipment. In locating suitable entities to which to extend credit, the defendant worked with a Mr. Smith, who helped locate suitable candidates. For each suitable candidate that Mr. Smith brought in, he was paid a commission by Kelly Tractor. The State alleged that the defendant entered into an unauthorized side agreement with Mr. Smith, under which Mr. Smith paid the defendant between 33 and 40 percent of each commission as a "kickback."

The information charged the defendant with 35 counts of "commercial bribe receiving", in violation of Florida Statutes Section 838.15 (Supp.1990), which states:

> (1) A person commits the crime of commercial bribe receiving if the person solicits, accepts, or agrees to accept a benefit with intent to violate a statutory or common law duty to which that person is subject as:
>
> (a) An agent or employee of another;
>
> (b) A trustee, guardian, or other fiduciary;
>
> (c) A lawyer, physician, accountant, appraiser, or other professional adviser;

(d) An officer, director, partner, manager, or other participant in the direction of the affairs of an organization; or

(e) An arbitrator or other purportedly disinterested adjudicator or referee.

(2) Commercial bribe receiving is a third degree felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The defendant moved to dismiss the commercial bribery counts, and the trial court granted the motion, finding that Section 838.15 was unconstitutionally vague and susceptible to arbitrary application. The gist of the trial court's opinion was the conclusion that "the commercial bribe receiving statute here at issue suffers the same defects as the official misconduct statutes stricken by the Florida Supreme Court in *State v. DeLeo*, 356 So.2d 306 (Fla.1978), and *State v. Jenkins*, [4]69 So.2d 733 (Fla.1985)." It is from this order that the State appeals. *See* Fla. R.App.P. 9.140(c)(1)(A). This case presents us with the issue of whether Florida's commercial bribe receiving statute is unconstitutionally vague.

[1] "The vagueness doctrine was developed to insure compliance with the due process clauses of the state and federal constitutions which require that a law be declared void if it is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Rawlins*, 623 So.2d 598, 600 (Fla. 5th DCA 1993); *see Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources*, 453 So.2d 1351, 1353 (Fla.1984); *State v. Hoyt*, 609 So.2d 744, 747 (Fla. 1st DCA 1992); *see also State v. Wershow*, 343 So.2d 605, 608 (Fla.1977) (vagueness doctrine enforces the due process clauses of Article I, Section 9 of the Florida Constitution, and Amendment 14 of the U.S. Constitution); *Bertens v. Stewart*, 453 So.2d 92, 93 (Fla. 2d DCA 1984) (same). "The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct." *Brown v. State*, 629 So.2d 841, 842 (Fla.1994); *see State v. Hagan*, 387 So.2d 943, 945 (Fla.1980); *Richards v. State*, 608 So.2d 917, 920 n. 1 (Fla. 3d DCA 1992) (collecting cases), *rev'd*, 638 So.2d 44 (Fla. 1994). Additionally, to survive a vagueness challenge, a statute must be specific enough that it is not susceptible to arbitrary and discriminatory enforcement. *See Brown*, 629 So.2d at 842; *Pallas v. State*, 636 So.2d 1358 (Fla. 3d DCA 1994); *State, Dep't of Health and Rehabilitative Servs. v. Cox*, 627 So.2d 1210, 1214 (Fla. 2d DCA 1993), *rev. granted*, 637 So.2d 234 (Fla.1994); *see also State v. Moo Young*, 566 So.2d 1380, 1381 (Fla. 1st DCA 1990) (applying vagueness analysis as a two-part test); *State v. Deese*, 495 So.2d 286, 287–88 (Fla. 2d DCA 1986) (same).

[2] In arguing that the statute is facially unconstitutional due to vagueness, the defendant focuses in on the phrase "statutory or common law duty." The defendant contends that this phrase does not adequately specify what conduct may lead to a violation of the statute. In making this argument, however, the defendant fails to consider that the "common law or statutory duties" involved are only those which apply to the professions or legal relationships specifically enumerated in subparts (1)(a) through (1)(e) of the statute. A person who fits into one or more of these categories is certainly aware of the duties which are commensurate with that station. In other words, a lawyer understands the legal duties of a lawyer, a trustee understands the legal duties of a trustee, and a manager understands the legal duties of a manager. Thus, when read in its entirety, the statute is not unconstitutionally vague because "the party to whom the law applies has fair notice of what is prohibited...." *Southeastern Fisheries*, 453 So.2d at 1353–54; *see State v. Hamilton*, 388 So.2d 561, 562 (Fla.1980) ("[A] defendant whose conduct clearly falls within the statutory prohibition may not complain of the absence of notice."); *see also People v. Cilento*, 2 N.Y.2d 55, 156 N.Y.S.2d 673, 678, 138 N.E.2d 137, 140 (1956) (statute making it a crime for a union representative to take a bribe is not vague because "any person in the capacity of labor representative could not but clearly understand that a bribe taken to influence *any* of his duties is in violation of the section." (empha-

sis in original)).[1]

The use of the word "bribe" in the statute itself further indicates the nature of the prohibited conduct. "Bribery is a well-known word, used widely and understood generally." *King v. State*, 246 Ga. 386, 271 S.E.2d 630, 632 (1980). "Bribe" is defined as "a price, reward, gift, or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct...." Webster's Third New International Dictionary 275 (1986). It is this common usage of the word "bribe", and not a technical, legal usage, that the Legislature employed in labeling the crime. Individuals of common intelligence know what a "bribe" is. Consequently, we find that the statute adequately advises persons of common intelligence of what conduct is proscribed.

[3] Turning to the second element of the vagueness analysis—arbitrariness—we do not find this statute to be susceptible of arbitrary application so as to violate due process. First, the finite list of professions/legal relationships to which this statute applies limits prosecutorial discretion by applying the statute only to those enumerated positions. Second, the modifier "commercial" in the title "commercial bribe receiving", along with the enumerated positions, clearly limits the realm in which the statute may be applied to that of private industry and commercial transactions.

These important observations distinguish the commercial bribe receiving statute from the official misconduct statute at issue in *DeLeo* and *Jenkins*. In both of those cases, the Supreme Court used identical language in condemning the official misconduct statute's individual subsections due to the potential for arbitrary application:

> The crime defined by the statute, knowing violations of any statute, rule or regulation for an improper motive, is simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute, as a crime, the most insignificant of transgressions or, at worst, to misuse the judicial process for political purposes. We find it susceptible to arbitrary application because of its 'catch-all' nature.

Jenkins, 469 So.2d at 734 (footnotes omitted) (quoting *DeLeo*, 356 So.2d at 308). Unlike the official misconduct statute, the commercial bribe receiving statute applies primarily to private, commercial actors, and not public, political officials. The absence of this public, political element, which was crucial to the decisions in *Jenkins* and *DeLeo*, removes the potential for arbitrariness and political misuse from this statute. For these reasons, we conclude that the statute is not subject to arbitrary application, and the trial court erred in finding Section 838.15 facially unconstitutional.

[4] In this appeal, the defendant has also contended that Section 838.15 is unconstitutional as applied to him. However, the defendant conceded at oral argument that his "as applied" argument fails based upon this Court's holding in *Phillips Chemical Co. v. Morgan*, 440 So.2d 1292 (Fla. 3d DCA 1983), *rev. denied*, 450 So.2d 486 (Fla.1984). In *Phillips Chemical*, which was a civil suit based upon an almost identical fact pattern as is at issue in this case, we held that such kickbacks "were in blatant disregard of the most elemental fiduciary duties owed an employer not to deal in his business for the agent's own benefit." *Phillips Chemical*, 440 So.2d at 1294. This holding in *Phillips Chemical* represents an unequivocal statement of the particular common law duty which the defendant is alleged to have breached in accepting the kickbacks, and which gives rise to the criminal charges herein.

Accordingly, the order dismissing the 35 counts of commercial bribe receiving is re-

1. Our reasoning is similar to that employed by the Supreme Court in *Cuda v. State*, 639 So.2d 22 (Fla.1994). In *Cuda*, the Supreme Court compared *State v. Rodriquez*, 365 So.2d 157 (Fla. 1978), to *Locklin v. Pridgeon*, 158 Fla. 737, 30 So.2d 102 (1947), and concluded that Section 415.111(5) was unconstitutional because it was more like the statute struck down in *Locklin* than the statute upheld in *Rodriquez*. 639 So.2d at 24. However, because the enumerated professions/legal relationships in our statute provide a "backdrop" for the statutory and common law duties referred to in the statute, we find our case to be more akin to *Rodriquez* than to *Locklin*.

versed, and this case is remanded for further proceedings consistent herewith.

Reversed and remanded.

Zoila PUIG, Appellant,

v.

PASTEUR HEALTH PLAN, INC., Appellee.

No. 93-2213.

District Court of Appeal of Florida, Third District.

July 12, 1994.

Member of health maintenance organization (HMO) sued HMO to obtain benefits for surgery. Following member's voluntary dismissal of suit, the Circuit Court, Dade County, S. Peter Capua, J., awarded attorney's fees to HMO. Member appealed. The District Court of Appeal, Cope, J., held that: (1) HMO was not "prevailing party" entitled to attorney's fees under HMO statute, and (2) HMO was not entitled to attorney's fees under rule providing for assessment of cost award in action which was voluntarily dismissed.

Reversed.

1. Pretrial Procedure ⇐516

Health maintenance organization (HMO) was not "prevailing party" entitled under HMO statute to attorney's fees in action to obtain benefits which was filed and then voluntarily dismissed by HMO member; no adjudication on merits by trial court occurred. West's F.S.A. § 641.28.

See publication Words and Phrases for other judicial constructions and definitions.

2. Pretrial Procedure ⇐516

In action against health maintenance organization (HMO) which HMO member filed and then voluntarily dismissed, HMO was not entitled to attorney's fees under rule providing for assessment of cost award in action which was voluntarily dismissed; HMO statute did not define costs as including attorney's fees. West's F.S.A. § 641.28; West's F.S.A. RCP Rule 1.420(d).

Lionel Barnet, Miami, for appellant.

Stabinski & Funt, Lawrence & Daniels and Adam H. Lawrence, Miami, for appellee.

Before BARKDULL, NESBITT and COPE, JJ.

On Motion for Rehearing

COPE, Judge.

On consideration of appellee's motion for rehearing we withdraw the opinion dated February 22, 1994, and substitute the following opinion in its stead:

Zoila Puig appeals a final judgment awarding attorney's fees to appellee Pasteur Health Plan, Inc. We reverse.

Puig is a member of Pasteur Health Plan, Inc., a health maintenance organization ("HMO" or "Pasteur"). Puig underwent surgery. The HMO disputed its obligation to pay. The HMO agreed to pay approximately 30 percent of the $10,816 bill, but refused to pay the remainder.

The Pasteur Health Plan contract provides in part:

> 14.1 Submission of Grievance. Any Member who has a grievance against Health Plan for any matter arising out of this Agreement or Covered Services rendered hereunder may submit a written statement of the grievance to Health Plan....
>
> ....
>
> 14.4 Appeal of Decision. If the Member is dissatisfied with the decision of the Grievance Committee, the Member may request reconsideration by the Committee and may request a personal appearance before the Committee.... In addition, a Member may appeal a decision of the