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SEP 16 1994

CLERK, SUPREME COURT

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Chief Deputy Clerk



IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,182

ROBERT J. ROQUE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

LINDA S. KATZ
Assistant Attorney General
Florida Bar No. 0672378
Department of Legal Affairs
Office of Attorney General
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

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INTRODUCTION

The Respondent, the **STATE OF FLORIDA**, shall refer to the parties in the posture as they appear in before this Court. The symbol "A" will be used to refer to portions of the appendix attached to the Petitioner's brief. The symbol "p" will be used to designate pages of the Petitioner's Brief. All emphasis is supplied unless otherwise indicated.

QUESTIONS PRESENTED

WHETHER THIS COURT SHOULD INVOKE ITS DISCRETIONARY JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION, WHERE THE THIRD DISTRICT COURT OF APPEAL CORRECTLY DECLARED FLORIDA STATUTE SECTION 838.15 CONSTITUTIONAL? (REPHRASED).

WHETHER THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH ANY DECISIONS OF THE FLORIDA SUPREME COURT? (REPHRASED).

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's rendition of the case and facts, as set forth in his initial brief, as a substantially accurate account of the proceedings below. Any additional facts which the Respondent seeks to include are contained in the argument portion of the brief.

SUMMARY OF THE ARGUMENT

The Respondent acknowledges this Court's discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution, by virtue of the opinion rendered in the instant case by the Third District Court of Appeal which expressly declared Florida's commercial bribe receiving statute, Section 838.15 constitutional. However, as the Respondent maintains that the appellate court was correct in its opinion, there is no need for this Court to exercise its discretion to review the lower court's opinion.

The instant case does not expressly and directly conflict with any other decisions of this Court or of any other district court of appeal. The commercial bribe receiving statute is neither vague nor susceptible of arbitrary application. It is expressly limited to commercial transactions, clearly states what act is prohibited and specifically enumerates professions/legal relationships to which it applies.

ARGUMENT

THIS COURT SHOULD NOT INVOKE ITS DISCRETIONARY JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION, WHERE THE THIRD DISTRICT COURT OF APPEAL CORRECTLY DECLARED FLORIDA STATUTE SECTION 838.15 CONSTITUTIONAL.

The Respondent acknowledges this Court's discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution, by virtue of the opinion rendered in the instant case by the Third District Court of Appeal which expressly declared Florida's commercial bribe receiving statute, Section 838.15 constitutional. However, as set forth in the argument portion directed to the Petitioner's allegation of conflict with other Supreme Court opinions, the Respondent maintains that the appellate court was correct in its opinion. Accordingly, there is no need for this Court to exercise its discretion to review the lower court's opinion.

THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISIONS OF THE FLORIDA SUPREME COURT.

The trial court dismissed 35 counts of commercial bribe receiving charged against the Petitioner pursuant to Florida Statutes Section 838.15 (Supp. 1990) and declared the statute

unconstitutionally vague.¹ On appeal, the Third District Court of Appeal reversed. In its opinion, the third district held that the statute is neither unconstitutionally vague nor susceptible of arbitrary application.

The Petitioner now argues that the appellate court's decision is in conflict with several decisions of this Court dealing with similar statutes, to wit: 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, 19 Fla. L. Weekly S346 (Fla. June 30, 1994) and State v. Rodriguez, 365 So. 2d 157 (Fla. 1978). The Respondent maintains that the third district's opinion in the instant action does not directly or expressly conflict with any of the aforementioned cases.

¹ Florida Statute Section 838.15 (Supp. 1990) provides as follows:

(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 allegation of vagueness is based upon a portion of subsection (1) of the commercial bribe receiving statute which states that:

A person commits the crime of commercial bribe receiving if the person solicits, accepts, or agrees to accept a benefit with the intent to violate a statutory or common law duty to which that person is subject ...

The Petitioner alleges that the statute fails to define the nature of the "statutory or common law duty" to which the person is subject. P. 5).

The Petitioner's argument fails to acknowledge that the statute limits and defines the common law or statutory duties involved to those which apply to the professions and legal relationships specifically enumerated in subparts (1)(a) through (e) of the statute. The third district held that "[a] person who fits into one or more of these categories is certainly aware of the duties which are commensurate with that station." Accordingly, the court concluded that, 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.

As set forth in the third district's reasoning, the enumerated professions/legal relationships set forth in the commercial bribe receiving statute provide a "backdrop" for the statutory and common law duties referred to in the statute. Similarly, in State v. Rodriguez, 365 So. 2d 157 (Fla. 1978),

this Court upheld a statute containing language that prohibited acts "not authorized by law." The Court found that the statute, which involved food stamp fraud, was so inextricably linked to federal law that the use of the language "not authorized by law" means not authorized by state and federal food stamp law. Just as the federal law served as a backdrop in Rodriguez, providing requisite notice to make the statute constitutional, the enumerated professions/legal relationships in the subject statute provides notice as to whom the law applies. Thus, the third district did not expressly and directly misapply Rodriguez, nor is its opinion in any way in conflict with it.

The very reasoning which makes the instant case analogous to Rodriguez makes it distinguishable from Locklin v. Pridgeon, 158 Fla. 737, 30 So. 2d 102 (1947), which involved a statute which 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 is "not authorized by law." See Cuda v. State, 19 Fla. L. Weekly S346 (Fla. June 30, 1994). In Locklin, this Court held that the statute's use of "not authorized by law" was unconstitutionally vague because it required every government employee and officer to determine at his peril what specific acts are and are not authorized by law.

The commercial bribe statute is distinguishable from Locklin because the enumerated professions/legal relationships provide

notice. Moreover, the commercial bribe receiving act does not prohibit "any" act which is not authorized by law. Instead, it expressly prohibits commercial bribe receiving. Thus, the third district's opinion does not expressly and directly conflict with Locklin. For the same reason, it does not conflict with Cuda, in which this Court held that the statute at issue was unconstitutionally vague because, inter alia, it contained no clear explanation of the proscribed conduct.

Lastly, the instant statute is highly distinguishable from both State v. Jenkins and State v. DeLeo, which dealt with official misconduct on the part of public officials. The limitation of the commercial bribe receiving statute to commercial transactions, along with the enumerated positions, clearly distinguish the instant opinion from Jenkins and DeLeo. The political undertones present in Jenkins and DeLeo factored strongly into the opinions, as the Court was concerned that the statute could be used to misuse the judicial process for political purposes. Thus, the third district's opinion is also not in direct or express conflict with Jenkins and DeLeo.

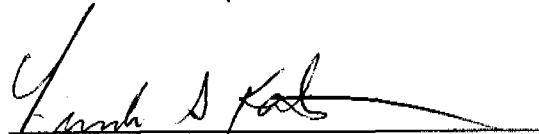
CONCLUSION

Although this Court has discretionary jurisdiction by virtue of the lower court's opinion declaring the subject statute constitutional, as indicated by the foregoing facts, authorities and reasoning, the lower court's decision was correct and does

not expressly and directly conflict with any decision of this Court or of another District Court of Appeal. Thus, the Respondent respectfully requests that this Court does not invoke its jurisdiction for the purpose of reviewing the lower court's opinion. Accordingly, the subject petition should be denied.

Respectfully submitted,

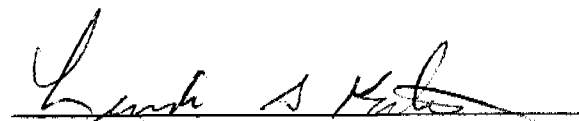
ROBERT A. BUTTERWORTH
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LINDA S. KATZ
Assistant Attorney General
Florida Bar No. 0672378
Department of Legal Affairs
Office of Attorney General
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Miami, Florida 33101
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to MARK KING LEBAN, 2920 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-5302, on this 13th day of September, 1994.



LINDA S. KATZ
Assistant Attorney General

LSK/aa