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 THE MERITS

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

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

Florida Statutes

TABLE OF CITATIONS (continued)

INTRODUCTION

The Respondent, the **STATE OF FLORIDA,** was the prosecution in the trial court below. The Petitioner, **ROBERT J. ROQUE,** WAS THE Defendant in the trial court below. The Respondent shall refer to the parties in the posture as they appear in before this Court. The symbol "R" will be used to refer to portions of the original record on appeal. The symbol "p" will be used to designate pages of the Petitioner's Brief. All emphasis is supplied unless otherwise indicated.

QUESTIONS PRESENTED

WHETHER FLORIDA STATUTE SECTION 838.15 (SUPP. 1990) IS CONSTITUTIONAL, AS IT IS NEITHER VAGUE NOR SUSCEPTIBLE TO ARBITRARY APPLICATION?

STATEMENT OF THE CASE AND FACTS

On February 10, 1992, the Petitioner was charged in a 54 count Information. Counts 15 through 49 of the information charged the Petitioner with commercial bribe receiving, in violation of section 838.15, Florida Statutes (1990). (R. 1-110). Each count charges Petitioner with accepting 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 (hereinafter "Kelly"). The alleged incidents occurred between October 1, 1990, and June 30, 1991, during which time the Defendant was employed by Kelly as a credit manager.

In the scope of his employment duties as credit manager, the Petitioner worked with Mark Smith, an independent contractor, to find individuals or companies in need of financing or refinancing for them with funds from Kelly. As remuneration for his services in arranging these transactions, Kelly paid Smith a commission, the amount of which varied with each transaction. Each commission was known and approved by Kelly. The commercial paper generated by these transactions was either kept by Kelly or sold to other financial institutions at a profit.

Unbeknownst to Kelly, the Petitioner entered into an agreement with Smith whereby Smith was to pay the Petitioner a portion of the commission which he received from Kelly. Pursuant to this arrangement, the Petitioner received "kickbacks" from

Smith which amount ranged from 33 to 40 percent of Smith's commission from Kelly. This arrangement took place between October 1, 1990 through June 30, 1991. During this period, Smith voluntarily provided the Petitioner with kickbacks in the aforementioned portion of his commission. However, after July 1, 1991, Smith decided he no longer wanted to provide kickbacks to the Petitioner. After July 1, 1991, Smith announced that he would no longer conduct any further financing transactions with Kelly.

The Petitioner filed a Motion to Dismiss Counts 16 through 49 of the Information and Memorandum of Law. (R. 111-129). The State then filed a response to the motion and the Petitioner replied thereto. (R. 130-144). The Petitioner's motion to dismiss was argued before Judge Thomas S. Wilson, Jr. of the lower court on February 11, 1993. On April 19, 1993, Judge Wilson entered an Order granting the Petitioner's motion to dismiss the commercial bribe counts and finding that section 838.15(1), Florida Statutes (1990) is unconstitutionally vague and susceptible to arbitrary application. The State timely filed a Notice of Appeal. (R. 153). The Third District Court of Appeal ultimately reversed the trial court's Order granting the Petitioner's motion to dismiss.

SUMMARY OF THE ARGUMENT

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 (i.e. commercial bribe receiving), specifically enumerates the professions/legal relationships to which it applies and contains a scienter requirement. The fact that the statute refers to such related action as a violation of a statutory or common law duty does not render it vague or subject to arbitrary application, as its language clearly conveys a sufficiently definite warning. Moreover, the statute is not unconstitutional as applied to the Defendant. The Petitioner's actions in accepting commission kickbacks from Smith in itself caused direct harm to Kelly, Defendant's employer, by virtue of it constituting a breach of the fiduciary relationship.

ARGUMENT

FLORIDA STATUTE SECTION 838.15 (SUPP. 1990) IS CONSTITUTIONAL, AS IT IS NEITHER VAGUE NOR SUSCEPTIBLE TO ARBITRARY APPLICATION.

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. State v. Roque, 640 So.2d 97 (Fla. 3d DCA 1994). In its opinion, the Third District held, inter alia, that the statute is neither unconstitutionally vague nor susceptible of arbitrary application.

---

[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 Petitioner argues that the subject statute is unconstitutionally vague and susceptible to arbitrary application. In support of his argument, the Petitioner alleges 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) and Cuda v. State, 639 So.2d 22 (Fla. 1994). The Respondent maintains that the Third District's opinion in the instant action is correct and does not directly or expressly conflict with any of the aforementioned cases. Thus, the Petitioner's position is without merit.

The Petitioner's 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 standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair

notice of what constitutes forbidden conduct.[2] Brown v. State, 629 So. 2d 841, 842 (Fla. 1994). All doubts as to the validity of a statute are to be resolved in favor of its constitutionality. Hamilton v. State, 366 So. 2d 8 (Fla. 1979); Brown v. State, 358 So. 2d 16 (Fla. 1978). In Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So.2d 881, 884 (Fla. 1972), this Court stated: "To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited. Impossible standards are not required." Accord, State v. Lindsay, 284 So. 2d 377 (Fla. 1973). Where the language conveys a sufficiently definite warning to express the prescribed conduct when measured by common understanding and practices, no constitutional violation has occurred. See, Roth v. United States, 354 U.S. 476, 77 S.Ct. 143, 1 L.Ed.2d 1498 (1957); State v. Dye, 346 So. 2d 538 (Fla. 1977). Additionally, to survive a vagueness challenge, a statute must be specific enough that it is not susceptible to arbitrary application and discriminatory enforcement. See Brown, 629 So.2d at 842

---

[2] 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); and see Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984).

In support of his argument that the statute is facially unconstitutional, the Petitioner attacks the phrase "statutory or common law duty" and alleges that this phrase fails to adequately specify what conduct may lead to a violation of the statute. Specifically, the Petitioner complains that the statute fails to provide the following: whether the duty must be substantial or minor, that the violation of the purported duty must result in any harm to the principal employer, or organization, and 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. (P. 8-9).

The legislature could dispense entirely with intent as an element of a crime. State v. Bussey, 463 So. 2d 1141 (Fla. 1985). However, a simple reading of the subject statute establishes that this is a specific intent statute, as the State must prove that the act of accepting a benefit was done by the Petitioner with the intent to violate a statutory or common law duty. Thus, contrary to the Petitioner's assertion, the statute requires a knowing and intentional act. This requirement further dilutes the Petitioner's argument, as scienter makes a statute less likely to be vague. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 71 L.Ed.2d 362, 372, 102 S.Ct. 1186, reh den (US) 72 L.Ed.2d 476, 102 S.Ct. 2023 (1982).

The Petitioner's argument fails to acknowledge that the language of 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. In its opinion in the subject action, 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. 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."). The Court went on to cite the New York case of People v. Cilento, 138 N.E.2d 137, 140 (N.Y. 1956) which held that the 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.

The statute's finite list of 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.

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, 639 So.2d 22 (Fla. 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, contrary to the Petitioner's argument, the Third District's opinion in the case at bar does not expressly and directly conflict with

Locklin. For the same reason, the subject opinion 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.

Furthermore, contrary to the Petitioner's argument, there is no constitutional vagueness problem with the statute's use of "common law duty." Section 775.01, Fla. Stat., states, in pertinent part:

> The Common Law of England in relation to crimes ... shall be in full force in this State....

This Court rejected a vagueness attack on a statute's use of the term "common law" in State v. Egan, 287 So. 2d 1 (Fla. 1973). In Egan, the Court found that the use of the term "common law" by the Legislature was sufficiently clear and unambiguous, and allowed the courts to give effect to the plain meaning of the terms. Moreover, in Egan, as in the case at bar, the defendants asserted that the statute failed to give a person of ordinary intelligence fair notice of what constituted forbidden conduct. This Court also rejected that argument and refused to accept the premise that the statute was unconstitutional because it did not set forth in express language the common law made part of the law of this jurisdiction. Id. at p. 6.

Lastly, the statute's use of the word "bribe" further indicates the nature of the prohibited conduct. In it's opinion in the instant case, the Third District concluded its notice portion of the vagueness analysis as follows:

> 'Bribery is a well-known word, used widely and understood generally.' King v. State, 271 S.E.2d 630, 632 (Ga. 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.

Roque, 640 So.2d at 100. Consequently, the court found that the commercial bribe receiving statute adequately advises persons of common intelligence of what conduct is proscribed.

As to the second element of the vagueness analysis, the Third District correctly found that the commercial bribe receiving statute is not susceptible of arbitrary application so as to violate due process. However, in support of his position that the statute is subject to arbitrary application as applied to him, the Petitioner states that his alleged conduct in requiring a kickback from Smith resulted in no harm to Kelly, the employer, principal, or organization "to whom the defendant purportedly owed some undefined common law duty"... (p. 11-12). This argument fails based upon the Third District Court of

Appeal's holding in Phillips Chemical Co. v. Morgan, 440 So. 2d 1292 (Fla. 3d DCA 1983), rev. denied, 450 So. 2d 486 (Fla. 1984). The Petitioner conceded this point at oral argument before the Third District Court Of Appeal. Roque, 640 So.2d at 100.

Phillips Chemical was a civil case which involved an almost identical fact pattern as is at issue in the instant action. In Phillips Chemical, the Third District 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 defines the particular common law duty which the Petitioner is alleged to have breached in accepting the kickbacks, and which gave rise to the subject criminal charges.

The Respondent maintains that the Petitioner had an undeniable fiduciary duty to Kelly as his employer. Petitioner's act of exacting kickbacks from Smith was a breach of his duty to Kelly which in itself necessarily caused harm to Kelly.[3] To

[3] There are several scenarios under which it is obvious to see that the Petitioner's exacting and receiving kickbacks from Smith harmed Kelly. For one, in protest of the Petitioner's insistence that Smith provide him with a kickback from the commission which Kelly paid Smith, after July 1, 1991, Smith stopped all further financing transactions with Kelly. It is axiomatic that the Petitioner's actions in receiving kickbacks from Smith harmed Kelly, where Smith ceased from doing any further business with Kelly in order to avoid having to pay him any additional kickbacks. Kelly was also harmed each time the Petitioner accepted a kickback from Smith. Pursuant to Petitioner's arrangement with Smith, Smith only received a portion of the commission amount actually paid by Kelly, with the remainder going directly to the Petitioner in the form a kickback. It is conceivable that if the Petitioner did not engage in this scheme

allege otherwise would be disingenuous. Moreover, such an allegation is totally without legal support. As was stated in Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509 (1942), which was adopted and followed in Martin Co. v. Commercial Chemists, Inc., 213 So. 2d 477 (Fla. 4th DCA 1968), cert. denied, 225 So. 2d 523 (Fla. 1969):

> It is beside the point for either Turner [the employee] or Corbett [the payor] to say that Kinzbach [the employer] suffered no damages because it received full value for what it has paid and agreed to pay. A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you are without remedy. It would be a dangerous precedent for us to say that unless some affirmative loss can be shown the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired.

Accordingly, the statute is not vague in relation to the Petitioner and therefore is not unconstitutional as applied to him. A defendant whose conduct clearly falls within a statutory prohibition may not complain that the statute is too vague to provide notice to others, in situations not before the court. State v. Hamilton, 388 So.2d 561 (Fla. 1980); State v. Peters, 534 So. 2d 760 f.n. 10 (Fla. 3d DCA 1988). Thus, Petitioner has

---

of receiving kickbacks, the amount which the Petitioner received from Smith could ultimately become a reduction in the actual commission paid to Smith, thereby resulting in a savings to Kelly. Lastly, the Petitioner's actions in coercing Smith to provide kickbacks as well as actually receiving the kickbacks while in course of his duty as a Kelly employee, fiduciary, officer or manager necessarily tainted Kelly's reputation.

no standing to contest the constitutionality of the subject statute.

Secondly, the commercial bribe receiving statute is not susceptible to arbitrary application as it's title expressly states that it is limited to "commercial" transactions and the statute specifically enumerates the professions/legal relationships to which it applies. This clearly limits the realm in which the statute may be applied to that of private industry and commercial transactions. Thus, the Petitioner's reliance on the argument that the subject statute is "directly analogous" to portions of the official misconduct statutes which this Court held to be unconstitutionally vague and subject to arbitrary application in Jenkins and DeLeo is misplaced. The Respondent maintains that the the commercial bribery statute involved in the case sub judice is highly distinguishable from both Jenkins and DeLeo, which dealt with official misconduct on the part of public officials.

The portion of the official misconduct statuted involved in De Leo prohibited a public servant, with corrupt intent, from obtaining a benefit for himself or another or causing unlawful harm to another, by:

> knowingly violating, or causing another to violate any statute or lawfully adopted regulation or rule relating to his office.

Section 838.25(1)(c), Florida Statutes (1977). This Court declared the statute unconstitutional because it found it to be susceptible to arbitrary application. In its reasoning, the Court stated, in pertinent part, as follows:

> ...All that is necessary for intent to be corrupt is that it be 'done with knowledge that the act is wrongful and with improper motive.' 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.
>
> While some discretion is inherent in prosecutorial decision-making, it cannot be without bounds. 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.

The portion of the official misconduct statute involved in Jenkins prohibited a public servant, with corrupt intent, from obtaining a benefit for himself or another or from causing unlawful harm to another by:

> knowing refraining, or causing another to refrain from performing a duty imposed upon him by law...

Section 839.25(1)(a), Florida Statutes (1983). This Court held that subsection (1), like subsection (c) is unconstitutionally vague and subject to arbitrary application. The Court found that the statute impermissibly allows the imposition of criminal sanctions 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.

The act prohibited in the official misconduct statute was the violation of a legal duty. However, the statute failed to define or describe the legal duty sufficiently, resulting in the finding of unconstitutional vagueness. In contrast, in the statute involved in the instant case, Florida Statute 838.15, the prohibited act is specific, as it is **expressly directed to the act of solicitation or acceptance of a bribe,** and as such does not suffer from the "open-ended" and "arbitrary" application that so concerned the Supreme Court in De Leo and Jenkins.

Another distinction between the commercial bribery statute and the official misconduct statute is that the commercial bribery statute deals with persons engaged in arms length type relationships whereas the official misconduct statute deals with the issue of corruption of public servants. This political context from which the official misconduct statute must be construed was addressed in the De Leo and Jenkins opinion, as one of the Court's concerns was that the statute could be used to misuse the judicial process for political purposes.

The inapplicability of De Leo and Jenkins to a case such as the one at bar, where the statute is specific as to the conduct it proscribes, is further illustrated in State v. Riley, 381 So. 2d 1359 (Fla. 1980); Sandstrom v. Leader, 370 So. 2d 3 (Fla. 1979); and State v. Short, 483 So. 2d 10 (Fla. 2d DCA 1985), review denied 486 So. 2d 597 (Fla. 1986). In Short, the Court rejected a vagueness challenge to the portion of the Official Misconduct Statute, which remained after De Leo and Jenkins. The Court reasoned that this portion of the statute was constitutional since it specifically defined the prohibited conduct as the knowingly falsifying, or causing another to falsify an official record or official document, and no person of common intelligence needs to guess that the terms "official record" and "official document" include the writings involved in the case. Likewise, in the instant case, no person of common intelligence needs to guess that the term "common law duty", as contained in the commercial bribe statute, includes an employee's obligation to pay a full commission to the person entitled, rather than keeping a kickback. Thus, the subject statute is not vague and is, therefore, not facially unconstitutional.

In closing, 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. Moreover, 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

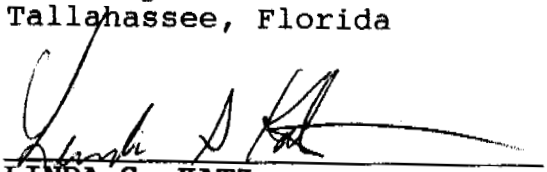
process for political purposes. Thus, contrary to the Petitioner's argument, the Third District's opinion is also not in direct or express conflict with Jenkins nor DeLeo.

CONCLUSION

Based upon the foregoing facts, authorities and reasoning, the Respondent maintains that the Third District Court Of Appeal's opinion was correct and does not expressly and directly conflict with any decision of this Court or of another District Court of Appeal. Accordingly, the Respondent respectfully requests that the Third District's opinion be affirmed by this Court.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON MERITS** was furnished by mail to **MARK KING LEBAN**, 2920 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-5302, on this 28th day of February, 1995.

LINDA S. KATZ
Assistant Attorney General

LSK/aa