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 REPLY BRIEF ON THE MERITS

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ARGUMENT

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

The State's reliance upon the totally distinguishable decision in State v. Rodriguez, 365 So.2d 157 (Fla. 1978), and its attempts to distinguish the decisions upon which the defendant relies,[1] has already been addressed in the defendant's Initial Brief, and those arguments will not be repeated herein.

As did the Third District below, the State here argues that "the enumerated professions/legal relationships in the subject statute provides notice as to whom the law applies." As observed in the defendant's Initial Brief, however, the statute stricken by this Court in Locklin also expressly enumerated a very precise relationship, "an officer, agent or employee of the United States Government, State of Florida, or any political subdivision thereof. . .", 30 So.2d at 103, yet this Court invalidated the statute on vagueness grounds. Similarly, the statute condemned in Cuda explicitly "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. And the statutes stricken in DeLeo and Jenkins expressly specified the status of those affected by the statute as "public servants." It is clearly not the enumeration of the specific relationship between the actor and the entity sought

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[1] 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), affirming, 454 So.2d 79 (Fla. 1st DCA 1984); Cuda v. State, 639 So.2d 22 (Fla. 1994).

to be protected that serves to delimit the reach of a particular statute, but rather the specificity of the actor's prohibited conduct that saves an enactment from unconstitutional vagueness. And see defendant's Initial Brief (hereinafter IB) at 18-19.

Next, the State argues that the commercial bribe receiving statute "does not prohibit 'any' act which is not authorized by law," and is thus distinguishable from Locklin. SB11. To the contrary, the statute here at issue does indeed prohibit violating "a statutory or common law duty" and the fact that the statute uses the article "a" instead of "any" before the words "statutory or common law duty" is no distinction. Indeed, the prohibition against violating "a statutory or common law duty" is what makes the statute at issue so vague and susceptible to arbitrary application: are the statutes which the defendant must not violate criminal or civil, are they regulatory or administrative? Must they be substantial or only trivial violations? Is the common law duty a moral obligation, or one that merely comports with proper etiquette?

The State, as did the Third District, relies upon the title of the statute here at issue, and argues that the title "commercial bribe receiving" "indicates the nature of the prohibited conduct." SB13. The defendant has previously addressed this argument. See IB19. Again, the titles of the statutes invalidated by this Court in such cases as Cuda ("penalties relating to abuse, neglect, or exploitation of aged person or disabled adult"), and Jenkins and DeLeo ("official misconduct") did not save those statutes, and nor

can the title of the statute involved here similarly correct the inherent vagueness within its body.

The State addresses much of its argument to the proposition that the statute here at issue is not unconstitutional "as applied" to the defendant. See SB13-15. So that it is clear, the defendant asserts that he is challenging the statute on its face. The arguments in the defendant's Initial Brief about the specific facts in this case (the defendant's requiring a "kickback" from Mr. Smith resulted in no harm to the defendant's employer, Kelly), are included simply to demonstrate the susceptibility to arbitrary application of this statute, a susceptibility which arises from the inherent facial vagueness. For precisely the same reasons that led this Court to condemn the statutes in DeLeo and Jenkins, the statute here at issue is facially unconstitutional. See IB9-13.[2]

Thus, the State's reliance upon the rule that "[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," SB15, is misplaced. First, the defendant submits that his conduct in the case at bar does not clearly fall within the statutory prohibition since that

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[2]At SB14, the State's assertion that the defendant "conceded this point [an as applied argument] at oral argument before the Third District Court of Appeal" is misleading: what the defendant conceded was the "as applied" argument might fall based on the civil tort doctrine set forth in Phillips Chemical Company v. Morgan, 440 So.2d 1292 (Fla. 3d DCA 1983), rev. denied, 450 So.2d 486 (Fla. 1984). Cases such as Phillips and Martin Company v. Commercial Chemists, Inc., 213 So.2d 477 (Fla. 4th DCA 1968), cert. denied, 225 So.2d 523 (Fla. 1969), deal with civil remedies for breach of a duty; conduct that may give rise to such a civil remedy is not necessarily analogous to conduct that may be criminally proscribed.

prohibition is hopelessly vague; second, "the vice of constitutional invalidity must inhere in the very terms of the title or body of the act," Crandon v. Hazlett, 157 Fla. 574, 26 So.2d 638, 643 (1946), and the particular "facts from which the criminal charges arise in a particular case are irrelevant to a determination of the facial constitutional validity of the statute under which the defendant is charged." Sims v. State, 510 So.2d 1045, 1046 (Fla. 1st DCA 1987); see also Department of Revenue v. Florida Home Builders, 564 So.2d 173 (Fla. 1st DCA), rev. denied, 576 So.2d 286 (Fla. 1990). Here, since the defendant is challenging the facial constitutional validity of the statute, the fact that his particular conduct might fall within some construction of the statutory prohibition (a point not conceded by the defendant) is totally irrelevant.

Although, as discussed above, the State's "as applied" argument is not pertinent to the defendant's facial constitutional attack here, we address it briefly. These arguments are largely contained in footnote 3, at page 15 of the State's brief. There, the State reviews "several scenarios" by which the defendant's conduct could be deemed to have "harmed Kelly." The State points out that after July 1, 1991, Mr. Smith stopped all further financing transactions with Kelly, and thus, the defendant's actions in requiring the payments from Smith harmed Kelly; since Smith ceased "doing any further business with Kelly in order to avoid having to pay [defendant] any additional kickbacks," Smith was harmed. In response, the defendant notes that the information in this case sets forth the dates of the defendant's purportedly

criminal conduct as October 1, 1990 to June 30, 1991; clearly, any "harm" to Kelly after the dates alleged in the information is irrelevant. As the trial court, in striking the statute, observed:

> 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).

Next, the State argues that Kelly was harmed each time Mr. Smith paid a kickback to the defendant since "[i]t is conceivable that if the [defendant] did not engage in this scheme of receiving kickbacks, the amount which the [defendant] received from Smith could ultimately become a reduction in the actual commission paid to Smith, thereby resulting in a savings to Kelly." SB14-15 n.3. Clearly, the State's scenario relies on pure conjecture (and a totally unlikely one at that). Moreover, this convoluted argument falls of its own weight. First, it is based upon strained speculation. Surely a criminal prosecution cannot be predicated upon some "conceivable" harm that may enure to a purported victim in the "future." Second, it has been held that it is "improper to arbitrarily permit a substantive inclusion. . . into the reach of a Florida statute" by proscribing what may in the future be made criminal by some "subsequently enacted. . . provision of law or other conceivable thing or subject. . .". State v. Camil, 279 So.2d 832, 834 (Fla. 1973)(legislature cannot through general

enactment statute reach a particular item embraced in a subsequently enacted regulation or law).

The State's tortured argument is similar to that rejected in Warren v. State, 635 So.2d 122 (Fla. 1st DCA 1994), where a theft conviction was reversed; there was no evidence that the employer-victim suffered any out-of-pocket losses of money whatsoever. In reversing Mr. Warren's grand theft conviction, the First District addressed the State's arguments, reminiscent of those made in the case at bar, as follows:

> On appeal, the assistant attorney general suggested a range of possible subjects of theft, arguing that the conviction should be upheld on the basis, inter alia, of appellant's having diminished his employer's revenues. But the proof did not establish lost revenues, as opposed to increased expenses, and any such "currency" never became the property of the supposed victim of the theft. 635 So.2d at 124.

The parallels between Warren and the case at bar are self-evident. In both cases, the purported employer-victim suffered no loss whatsoever. Any monies going to defendant Roque from Smith "never became the property of the supposed victim. . .". Id. at 124. The State's struggle to find "harm" to Kelly in the case at bar must meet with the same fate that befell the State's similar struggle in Warren. It is significant that the basis for the reversal in Warren was that the very prosecution violated the defendant's constitutional right to "'be informed of the nature and cause of the accusation against him,'" 635 So.2d at 122, quoting Article I, Section 16, Florida Constitution. It is this same defect which

plagues the prosecution in the case at bar predicated upon the infirm commercial bribe receiving statute.

Next, the State attempts to distinguish this Court's Jenkins and DeLeo decisions, and argues that the statute in those cases prohibited a public servant from obtaining a benefit for himself by violating "any statute or lawfully adopted regulation or rule relating to his office." Section 839.25(1)(c), Florida Statutes (1977). The State also notes that the statute condemned in Jenkins prohibited a public servant from obtaining a benefit for himself by "refraining, or causing another to refrain from performing a duty imposed upon him by law. . .". Section 839.25(1)(a), Florida Statutes (1983). Apparently, it is the State's argument that these stricken statutes are sufficiently distinguishable from the statute involved in the case at bar such that the decisions in Deleo and Jenkins are inapposite here. The State argues at SB18 that the instant statute, section 838.15(1), Florida Statutes (Supp. 1990) is "expressly directed to the act of solicitation or acceptance of a bribe. . .". The defendant is unable to discern any material distinction. The statutes stricken by this Court in DeLeo and Jenkins also expressly prohibited "obtaining a benefit" which is no different from accepting a bribe. For the reasons set forth in more detail in the defendant's Initial Brief, the defendant submits that this Court's decisions in Deleo and in Jenkins compel the same result here. See IB9-13.

The State also, as did the Third District, seeks to distinguish the instant statute from the statutes involved in DeLeo and in Jenkins on the basis that the latter statutes dealt with a

"political context" unlike the instant statute. Of course, no such "political context" was involved whatsoever in the statute invalidated by this Court in Cuda v. State, 639 So.2d 22 (Fla. 1994), yet this Court applied the identical rationale that it had earlier employed in Jenkins and in Deleo, to invalidate the exploitation of the elderly statute there involved. The Cuda statute was directed to entirely private conduct between a guardian or manager of the assets of an aged or disabled person.

Finally, the State's reliance upon such cases as State v. Short, 483 So.2d 10 (Fla. 2d DCA 1985), rev. denied, 486 So.2d 597 (Fla. 1986); State v. Riley, 381 So.2d 1359 (Fla. 1980), and Sandstrom v. Leader, 370 So.2d 3 (Fla. 1979), is misplaced. See SB19. In Short, relying on Riley, the Second District upheld the surviving portion of the "Official Misconduct" statute, §839.25(1)(b), Fla.Stat., which prohibited a public servant form obtaining, with corrupt intent, any benefit in exchange for "[k]nowingly falsifying, or causing another to falsify, any official record or official document. . .". The specificity of the prohibited conduct set forth in this surviving subsection of the official misconduct statute is self-evident. There is simply no comparison between such offense-specific conduct on the one hand and the prohibition from obtaining a benefit with intent to violate any "common law duty" on the other hand.

The State's reliance upon Sandstrom v. Leader, 370 So.2d 3 (Fla. 1979), is also misplaced. There, the statute under attack, §400.17(2)(a), Fla.Stat. (1977), prohibited receiving a bribe, with corrupt intent, in exchange for the furnishing of items or services

to a nursing home patient. This is a far cry from the nebulous commercial bribe receiving statute here under attack. The Leader Court's distinction between that case and its earlier DeLeo decision is, contrary to the State's purported distinction, quite illuminating. After exposing the "open-ended" nature of the official misconduct statute stricken in DeLeo, the Leader Court observed:

> In contrast, the statute before us is not "open-ended." Section 400.17(2)(a) delineates the proscribed conduct with sufficient specificity. Subsection (1)(b) narrowly defines the term "bribe" to include only that consideration which is corruptly intended to influence the performance of duties related to furnishing items or services to a nursing home patient. Through application of the key phrase, corrupt intent to influence the performance of these designated duties, persons of ordinary intelligence may reasonably determine what conduct is unlawful under section 400.17(2)(a). 370 So.2d at 6 [Last emphasis by this Court].

In sharp contrast to the "designated duties" specifically set forth by the statute in Leader, the statute in the case at bar makes only vague reference to "a statutory or common law duty to which [a] person is subject. . .". If anything, Leader, by its contrast to the case at bar, serves to demonstrate the unconstitutionality of the commercial bribe receiving statute here at issue.

Next, the State argues that "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." SB19. Perhaps no better statement could serve to elucidate the vagueness in the

statute here at issue. The information charges that the defendant accepted a benefit with intent to violate a statutory or common law duty to which the defendant is subject as "an agent and/or employee. . .or other participant in the direction of the affairs of Kelly Tractor Company. . .". (R.70). As the facts set forth in the State's own factual recitation make clear, "Smith voluntarily provided the [defendant]" with the payments from his commission from Kelly. SB4. Clearly, the defendant obtained money, not from Kelly Tractor Company, but from Mark Smith, the independent contractor. The defendant is charged with violating his common law duty with respect to Kelly, not Mark Smith. The defendant did not serve as Smith's employee, and owed no fiduciary duty under the statute to Smith. Thus, to argue that the defendant knew he had an "obligation to pay a full commission to the person entitled, rather than keeping a kickback. . .", SB11, demonstrates better than the defendant could ever demonstrate the vagueness of the statute under which he is charged.

Try as it might, the State simply cannot distinguish the statute here under attack from those repeatedly stricken by this Court in the decisions cited above. The commercial bribe receiving statute, apart from its open-ended vagueness and susceptibility to arbitrary application, is totally unnecessary to protect employers, managers, principals and those other classes of individuals or organizations set forth in the statute. Numerous criminal statutes, safe from constitutional attack, exist to protect these individuals and organizations. See IB17-18 n.13. As this Court recognized in State v. Llopis, 257 So.2d 17, 18 (Fla. 1971), the

Court's sympathy for a legislative goal to ensure honesty and integrity in business dealings "cannot be allowed to impair our judgment. This statute is vague beyond redemption."

CONCLUSION

Based upon the above and foregoing argument and citation of authority, as well as that contained in the defendant's Initial Brief, the defendant respectfully requests this Court to quash the decision of the District Court of Appeal of Florida, Third District, and to remand this cause with directions that the Third District affirm the order of dismissal entered by the Circuit Court below.

Respectfully submitted,

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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 27th day of March, 1995.